



# **Annual European Report on the Free Movement of Workers in Europe in 2010-2011**

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The European network on free movement of workers within the European Union coordinated by the University of Nijmegen's under the European Commission's supervision:

- keeps track of legislation on free movement of workers and how it is applied;
- monitors how national courts interpret EU laws;
- raises awareness of the importance of free movement of workers as a fundamental right.

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## EXECUTIVE SUMMARY

2010-2011 saw a number of important legal developments as regards the fulfillment of the EU's obligations to ensure the free movement of workers across the whole of the EU. The most important legal development over the period was the ultimate end of the transitional arrangements for workers with nationalities of Member States which joined the EU on 1 May 2004.<sup>1</sup> This took place on 1 May 2011. While there were only three Member States which continued to apply transitional arrangements for nationals of EU8 states after 1 May 2009, the legal importance is immense. The consolidation of free movement of workers is a core legal requirement of the Treaty on the Functioning of the European Union. Nationals of Bulgaria and Romania are still subject to transitional arrangements. The end of the second phase on 31 December 2011, sadly, saw nine Member States applying the exceptional two year extension of the transitional arrangements to workers from these two states and one Member State, after having lifted the transitional arrangements for workers from both Member States, made use of safeguard clause foreseen in the Accession Treaty and was authorized by the Commission, on the basis of the information and data provided, to reintroduce temporarily restrictions for nationals of only one of the EU 2 countries.

The intensification of economic turmoil in some large Member States had an impact on movement of workers. While unemployment rates across the Member States varied dramatically, EU nationals sought work in substantial numbers outside their countries of nationality. Clarification by the Court of Justice of the European Union of a number of rights of workers, particularly as regards the treatment of their children<sup>2</sup> required a number of Member States to amend their legislation to reflect the correct position. This was generally undertaken over the reporting period. A very limited number of Member States which had not yet brought their national legislation into conformity with the CJEU's 2008 judgment on the admission of family members<sup>3</sup> did so over this reporting period.

A matter of substantial importance for free movement of workers is the ability of workers to enjoy the benefit of their professional and other qualifications in their work. This reporting period witnessed substantial improvements in national implementation of EU qualification recognition requirements. Similarly, a number of Member States made real progress in amending their national legislation to open up jobs in the public service for nationals of other Member

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<sup>1</sup> Except Cyprus and Malta for whose nationals no transitional arrangements were ever applicable.

<sup>2</sup> C-480/08 *Teixeira*; and C-310/08 *Ibrahim*.

<sup>3</sup> C-127/08 *Metock*.

States. This followed substantial efforts on the part of the Commission over the past two years to achieve progress in this area. Problems do continue in some Member States.

Less encouraging, as regards legal developments, have been the following:

- Continuing administrative problems regarding family reunification for EU workers with third country national family members in a number of Member States;
- Issues regarding equal treatment in professional sports, including some egregious breaches of the prohibition on discrimination;
- A lack of clarity for EU workers in a number of Member States regarding venues of legal redress where they have claims of nationality discrimination.

## GENERAL INTRODUCTION

### 1. Consequences of the economic situation

The economic and financial crisis in 2010 and 2011 has clearly affected the free movement of workers although the effects vary considerably between the Member States. The wide differences in unemployment rates, ranging between 4-5% in some Member States and 17-20% in others, illustrate the positive function free movement of workers may have in reducing unemployment both at the individual and the macro-economic level. Notwithstanding the economic situation, large numbers of workers from the EU-12 are employed in the EU-15: e.g. Polish workers in Germany, the UK and the Netherlands and Romanian workers in Italy and Spain. In the UK and the Netherlands many Polish workers who were and are employed in short term jobs have decided to stay. The number of Polish nationals with registered residence in the Netherlands increased from 32,000 in 2007 to 91,000 in January 2011. The number of Polish workers registered with the Dutch social security agency, however, is twice as high. In the UK, the Polish born population increased from 75,000 in 2003 to 532,000 in December 2010, though the registered immigration from Poland to the UK decreased from 96,000 in 2007 to 39,000 in 2009. The large majority of Romanian workers in Spain chose not to return, but to remain in the host-country for the time being.

The economic situation and the debate on the euro have supported anti-immigrant and anti-European sentiments. In several Member States populist or nationalist parties gained considerable influence on their government's migration policy. In these Member States free movement of persons is increasingly perceived in terms of a potential threat to public security or a burden on the social security system. In some Member States the anti-immigrant sentiments focused on nationals of other Member States, e.g. Polish workers in the Netherlands and Roma from Romania in Denmark, France and Italy. In our previous report we mentioned that politicians in some Member States used the economic crisis as a justification for demands to roll back free movement with the EU-12. In 2011 one Member State openly campaigned for the introduction of a series of amendments to Directive 2004/38/EC that would severely restrict free movement of workers in the whole of the EU. In other Member States, for instance Austria, the Czech Republic and Greece, free movement of workers was not an issue of public debate in 2010-2011.

In several Member States (e.g. Denmark, Lithuania, Poland and the UK) nationals, upon return after employment in another Member State, are confronted with obstacles such as the habitual residence test in the UK regarding their rights to social benefits, fiscal regime, recognition of periods of employment abroad or residence rights of their third-country national family members.

## 2. Transposition and application of Directive 2004/38/EC

The Commission's activities in monitoring the implementation of Directive 2004/38/EC or the informal part of the infringement procedure clearly has a positive impact on the implementation of the Directive in many Member States. In Bulgaria, Cyprus, Denmark, France, Italy, Latvia, Romania, Slovakia and Slovenia the national legislation was amended in order to improve the implementation. In Poland the judgments in *Ibrahim* and *Teixeira* resulted in an amendment of national immigration law concerning the position of children of ex-workers from other Member States. The *Metock* judgment of the Court of Justice has been implemented during 2010-2011 in the Czech Republic, Finland, France, Italy, Sweden and the UK.

In Denmark, France, Italy and the UK a general policy measure introducing mandatory expulsion of non-nationals after a criminal conviction or a prison sentence, also affected EU workers. Interventions by MP's, the Ombudsman or national courts were necessary before these Member States recognized that such policies could not be applied to EU-citizens. Other Member States are considering the possibility of more restrictive policies regarding expulsion of unemployed EU-workers once they rely on social benefits.

The Bulgarian legislation on exit bans presents a barrier to free movement of Bulgarian nationals intending to work in another Member State. That legislation and its implementation is subject of two reference pending before the Court of Justice.<sup>4</sup>

## 3. Equal treatment

In several Member States the general legislation on equal treatment is an important instrument in ensuring equal treatment of EU workers (e.g. in Estonia, Finland, Italy and the Netherlands). In Romania the right to equal treatment of nationals of other Member States was explicitly codified in the national immigration law in 2011. Specific examples of unequal treatment are mentioned: new residence requirements for access to social housing in Italy,

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<sup>4</sup> Case C-434/10 (*Aladzhov*) and case C-430/10 (*Gaydarov*), both decided on 17 November 2011.

exclusion from social housing in municipal rules in Portugal, higher bus fares for non-nationals in Malta, exclusion from certain benefits in Austria and Latvia, and lower payment of posted workers from other EU Member States in Finland.

Improvements in the legislation on the recognition of diplomas and qualifications are reported with regard to Bulgaria, Cyprus, Greece and Latvia.

New legislation opening access to certain jobs in the public service entered into force in France, Lithuania and Luxemburg. Legal or practical barriers for access to those jobs are reported in Bulgaria and Estonia. Language requirements remain an important barrier. The report on Luxemburg mentions that advertisements for certain public services jobs are only published in the Luxemburg language, rather than in the other official languages, German and French.

Remaining problems regarding the position of job seekers are mentioned in the reports on Bulgaria, Finland, Germany, Ireland, Latvia, Lithuania and the UK. In the Netherlands third-country national family members experience problems accessing the labour market during the often prolonged debate on the recognition of their residence right. Moreover, the case law of the Court of Justice that part-time workers are entitled to free movement is not correctly implemented in that Member State.

The issue of equal treatment in professional sports remains a problem in several Member States. The use of quota or high fees for transfers is mentioned in nine national reports: Bulgaria, Finland, France, Ireland, Latvia, Lithuania, Malta, Poland and Spain.

The nationality requirement for captains and first officers on board of Greek and Spanish ships has (in general) been abolished, but in Spain for some type of ships the nationality requirement still exists

#### **4. Reverse discrimination**

Reports on nine Member States (Austria, Belgium, Bulgaria, Cyprus, Denmark, France, Ireland, Italy, Lithuania and Spain) mention the issue of reverse discrimination: the treatment of workers from other Member States with regard to family reunification or on other issues is more favourably than the treatment of national workers who did not use their right to free movement. Quite contradictory developments are reported. According to the Austrian Constitutional Court reverse discrimination is a justified differentiation. In Belgium a private Bill introducing reverse discrimination has been adopted in 2011 with support from all major political parties and the Cypriot Supreme Court legitimated reverse discrimination. Equal treatment of family members of Italian

nationals and EU migrants is provided for in Italy. In Spain, the High Court annulled a provision in a Royal Decree that would have introduced reverse discrimination of Spanish nationals.

The Court of Justice has repeatedly held that family reunification of nationals who have not used free movement rights falls outside the scope of EU law. Nevertheless, the existence of national law allowing reverse discrimination continues to affect the application of free movement provision in a number of Member States. In these Member States exercising free movement rights by nationals is disqualified in certain cases and qualified as circumvention of national rules or abuse of EU law. In these Member States politicians are exerting political pressure to introduce new restrictions in Directive 2004/38/EC. Moreover, as reverse discrimination affects EU-citizens of immigrant origin far more often than other EU-citizens. This raises questions as to its effect on the integration of the first category EU-citizens in their Member State of nationality as well as its compatibility with the ECHR, the principle of equal treatment and the prohibition of racial discrimination.

## 5. Transitional measures

The end of the transitional measures restricting free movement of EU-8 workers in Austria and Germany on 1 May 2011, apparently, did not result in a large increase of EU-8 workers migrating to those Member States. Slovenia feared the opposite; an exodus of a large number of qualified Slovenian workers seeking better paid jobs across the border in Austria. In several EU-15 Member States the economic situation is used as a justification to prolong the transitional measures concerning workers from Bulgaria and Romania until the end of the transitional period, i.e. December 2013. In the reports on the Member States that do not apply transitional measures to EU-2 workers few, if any, problems related to migration from those Member States are mentioned.<sup>5</sup> In some of the Member States that still apply transitional measures, problems are reported: a more restrictive registration scheme in the UK and a more restrictive practice regarding the issuing of work permits notwithstanding the standstill clause in the Accession Treaties in the Netherlands.

## 6. Positive developments

In some Member States (e.g. Denmark and Netherlands) it was decided to offer language or integration courses to immigrants from other Member States. It appears that large numbers of Union citizens are participating in those voluntary (rather than mandatory) integration measures.

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<sup>5</sup> Except for expulsions of Romanian citizens of Roma origin in Denmark.

The growing awareness among national courts of the relevance of EU law on free movement is reflected in the growing number of references to the Court of Justice, although the number of references by national courts in their decisions to relevant CJEU judgments remains low. Between 1 January 2010 and 1 July 2011, 24 preliminary references were made to the Court of Justice of the EU by the national courts of Member States requesting it to clarify the right to free movement of workers, Directive 2004/38/EC, social security of migrant workers, EU-citizenship or discrimination on grounds of nationality. On 26 July 2011 the EFTA Court, answering preliminary questions of a court in Liechtenstein, handed down its first judgment interpreting the rules on the right of permanent residence in Directive 2004/38/EC in the *Clauder* case (E-4/11).

The entry into force of the EU Visa Code appears to have improved the position of third-country national family members applying for a short-stay visa at EU embassies.

In Denmark, Greece and Sweden the national Ombudsman plays an important and visible role in enforcing the rights of EU workers and in combating unequal treatment of EU workers and their family members. The office of the Greek Ombudsman has a special section entrusted with this task.

In Cyprus the Equality Authority in 2010 performed a similar function with regard to Union citizens working in the hotel industry.

## CHAPTER I THE WORKER: ENTRY, RESIDENCE, DEPARTURE AND REMEDIES

### INTRODUCTION

The focus of this chapter is on the transposition in the 27 EU Member States of provisions of the EU Citizens Directive (hereafter 'the Directive')<sup>6</sup> concerning EU workers and the specific situation of EU job-seekers in Member States with reference to the pertinent provisions of the Directive. The chapter also highlights a number of issues of concern relating to continuing delays in issuing residence documents in some Member States; the refusal of entry to and expulsion of EU citizens, particularly those coming from the EU-2 and EU-8; and shortcomings in the application of procedural safeguards and remedies. Finally, the situation of the free movement of EU workers of Roma origin is examined from the perspective of both EU destination and origin Member States.

#### 1.1. Transposition of provisions specific for workers

On the whole, the assessment of the transposition of these provisions in most of the EU Member States does not differ significantly from the assessment provided in the 2008-2009 and 2009-2010 reports, although in some Member States (*Bulgaria, Denmark, France, Italy, Latvia, Poland, Slovakia,*<sup>7</sup> *Slovenia, Romania*) the reporting period has seen the introduction of amendments to correct earlier discrepancies, and these are highlighted below. There remains a concern, however, that transposition is not always undertaken by express legal guarantees. For example, a communication presented in October 2010 by two senators to the Senate in *France* refers to the European Commission's request that inclusion of rules in circulars, which are by their nature precarious and not well known by the persons concerned, cannot be sufficient.

These amendments have also resulted in changes to the informal ranking of Member States, discussed in previous reports, which may be categorized as follows: (1) detailed and comprehensive, where careful attention has been given to each provision in the implementing legislation or regulations,

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<sup>6</sup> European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158/77; OJ 2004 L 229/35 (Corrigendum).

<sup>7</sup> In Slovakia, a new law implementing the Directive is pending.

or where transposition has been essentially verbatim (*Cyprus, Denmark, Estonia, Finland, Greece, Luxembourg, Portugal*); (2) generally complete, with the exception of one or two gaps or relatively minor inaccuracies (*Austria, Belgium, Czech Republic, France, Germany, Hungary, Ireland, Italy, Latvia, Malta, Netherlands, Poland, Romania, Sweden*); (3) partial or incomplete, where more gaps or serious deficiencies in transposition have been highlighted (*Bulgaria, Lithuania, Slovakia, Slovenia, United Kingdom*); and (4) where transposition of these specific provisions is largely absent (*Spain*). It needs to be underlined, however, that verbatim transposition does not guarantee that there will not be problems in practical application and this is evident from the concerns expressed by the Commission with regard to the transposition of the Directive in *Cyprus*, which are also discussed in that country's report.

A few Member States have in place some more favourable rules relating to these provisions. As mentioned in previous reports, in *Belgium*, EU workers and family members acquire the right to permanent residence after three years (which is also the period of residence required to apply for Belgian nationality) rather than the five years stipulated in the Directive (Article 16), although the period of five years is still required for students. The rapporteurs, however, note that this favourable position may change in the future as there are proposals before Parliament to revert to a minimum period of five years of residence to apply for Belgian nationality. If one of these proposals is accepted, it would probably mean that the qualifying period for permanent residence will also eventually be changed to five years, although the draft law adopted by Parliament in May 2011 does not modify the three-year period. In *Italy*, with regard to the transposition of Article 7(3)(c) of the Directive, the worker in involuntary unemployment, after completing a fixed-term employment contract of less than one year or after having become involuntary unemployed during the first twelve months, retains the status of worker for one year rather than the minimum six months specified in the Directive. In *Latvia*, in relation to Article 7(3)(c), the new implementing regulations are also now more favourable than the requirements of the Directive because the unemployment does not have to occur involuntarily and no completion of a fixed term contract is necessary.

### **Article 7(1)(a) – right of residence for more than three months of workers or self-employed persons**

This provision appears to have been transposed correctly in most EU Member States, i.e., *Austria, Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Sweden*, and the *United Kingdom*.

A concern is raised by the rapporteur in Poland that new legislation on evidence of people, which entered into force on 1 August 2011 and which obliges all foreigners – including EU citizens and members of their families – to register their place of residence not later than 30 days from arrival, may be incompatible with EU law.

As previously observed, in Spain, this provision has not been accurately transposed in the Royal Decree 240/2007 (as amended) implementing the Directive, which merely stipulates that 'citizens of the EU or of the EEA have the right to residence in Spain for a period longer than three months', without any specific reference to workers or self-employed persons.

In *Latvia*, amendments introduced in 2011 now stipulate that EU citizens need to register after three months from the date of arrival rather than after 90 days, which was considered an incorrect transposition of Article 7(1)(a) of the Directive because this period was usually shorter in duration.

#### **Article 7(3)(a)-(d) – retention of status of the worker or self-employed person by EU citizens who are no longer in employment**

Correct transposition of Article 7(3)(a)-(d) seems to be in place in *Austria, Belgium, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Sweden*, and the *United Kingdom*. No transposition of these provisions has taken place in *Lithuania* and *Spain*, with the result that the status of EU workers and self-employed persons after the termination of the employment relationship remains unclear. In *Lithuania*, however, according to the Migration Department of the Ministry of Interior, such persons would retain the status of worker or self-employed person even if this is not explicitly provided for in the legislation.

In *Ireland, Italy* and *Slovenia*, these provisions have been transposed in a way that does not expressly maintain the status of worker or self-employed person but rather the right to remain. In *Bulgaria*, as also underlined in the 2008-2009 and 2009-2010 reports, the transposition of Article 7(3)(d) continues to be incorrect because in the case of a EU citizen becoming involuntarily unemployed, the national law expressly stipulates that vocational training shall not be related to the previous employment. In *Slovakia*, the inaccuracy in the transposition of Article 7(3)(a), discussed in previous reports, is still in place but will be removed when the new foreigners' legislation enters into force at the beginning of 2012. In *Ireland*, there are also ambiguities in the wording of the regulations transposing Articles 7(3)(c) and (d).

### **Article 8(3), first indent – administrative formalities relating to the residence of EU workers and self-employed persons**

This provision has been transposed correctly in *Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Luxembourg, Netherlands, Poland, Portugal, Spain, Romania* and *Sweden*. In the *United Kingdom*, as described in the 2009-2010 report, new procedures were introduced in June 2009 to address the lengthy delays in the issuing of residence certificates, which, as discussed in the final section in this chapter, are continuing, although not to the same extent as before. In *Spain*, EU citizens are obliged to register before the end of the three-month period from the time of their arrival and to pay the relevant fee, although no further administrative formalities are mentioned.

As observed in previous reports, the administrative formalities in relation to residence of EU citizens for a period longer than three months continue to be overly onerous in a number of Member States, whereas there are discrepancies in others. While in *Lithuania* the national legislation does not provide for additional documents and thus appears to comply with Article 8(3), the documents to be provided have to be translated into the Lithuanian language, which may serve as a practical obstacle to obtaining the residence certificate. In *Malta*, as noted in previous reports, a licence has first to be issued for employment, and although the law expressly stipulates that such a licence should not be withheld, this may nonetheless constitute an administrative impediment to free movement of workers. While there is no requirement to register with the authorities in the *Czech Republic*, if the EU citizen intends to stay in the country for more than three months and requests a residence certificate, a number of the documents required to obtain the certificate, namely a document confirming guaranteed accommodation and photographs, are not in compliance with Directive 2004/38/EC. In *Slovakia*, where registration for EU citizens is also optional, a document certifying provision of accommodation is still required, although this has been removed in the amending draft legislation. In addition to the continuing delays in issuing residence documents in the *United Kingdom*, a study undertaken by a group of practitioners on behalf of the Immigration Law Practitioners' Association (ILPA) revealed that a number of unnecessary questions and documents are being requested for EEA/EU residence applications – particularly to family members – that go beyond the requirements stipulated in the Directive. In *Cyprus* there were burdensome administrative formalities, which appeared to be inconsistent with Article 8(3), first indent. The policy of the Cypriot authorities to require EU workers to possess a certain level of income in order for the right of residence for more than three months to be recognized to them was not in conformity with Directive's provisions and finally the government agreed that they should not be requested to present proof of sufficient resources and issued a circular to this effect. This position has also been affirmed by the Cypriot Equality body. In *Hungary*, there continues to be a min-

imum monthly income requirement, which must exceed the lawful monthly minimal pension per capita in the family, amounting to approximately EUR 105, so that the EU citizen concerned is not deemed to become an unreasonable burden on the social assistance system.

With regard to the need to provide proof of the sufficiency of the employment income, it is noteworthy that in *Finland* under the legislation transposing the Directive the authorities are expressly prohibited from requesting the applicant to submit any other documents, certificates or other means of proof than those mentioned. In *Italy*, the discretion of municipal authorities to check the sanitary conditions of the applicant's accommodation before agreeing to residence registration request, which was reported in 2009-2010, was successfully challenged by a group of EU citizens and third-country nationals before the administrative tribunal of first instance. The requirement in *Slovenia* that both the worker and self-employed person hold a valid work permit has now been removed, although transposition of Article 8(3), first indent is imprecise because the three conditions in that provision are listed cumulatively in the new legislation rather than as alternatives.

In *Latvia*, the introduction of amended implementing regulations means that EU citizens and their family members are no longer required to provide excessive personal data when registering their residence, although the rapporteur questions the continuing need to provide information on one's marital status. In *Poland*, as observed in the 2009-2010 report, the questionnaire that has to be completed in order to register residence requests information (e.g. names of parents, height, special marks, colour of eyes) that is not required under the Directive.

#### **Articles 14(4)(a)-(b) – prohibition on expulsion of EU citizens or their family members if they are workers or self-employed persons, or job-seekers**

Articles 14(4)(a)-(b) appear to have been correctly transposed in *Austria, Belgium, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Greece, Italy, Latvia, Luxembourg, Netherlands, Portugal, Romania, and Sweden*.

There are no specific national provisions in the laws of *Bulgaria, Germany, Hungary, Ireland, Lithuania, Malta, Poland, Slovakia, Slovenia, Spain* and the *United Kingdom* transposing Articles 14(4)(a) and (b), although the rapporteur for *Germany* observes that Article 14(4) is taken account in administrative practice, while in *Lithuania* EU citizens can only be expelled if they lose their right of residence. In *Ireland*, as observed in the 2009-2010 report, a possible difficulty arises in relation to residence for up to three months, which in the regulations implementing the Directive is made conditional upon the person in question not becoming an unreasonable burden on the social welfare system, and no specific derogations are foreseen for workers, self-

employed persons, or job-seekers. However, this difficulty does not arise in respect of workers or self-employed persons enjoying the right of residence for more than three months because there is no such condition. Given the lack of transposition in *Slovakia*, the rapporteur observes that EU/EEA and family members in the situation encompassed by these provisions and not possessing permanent residence might be expelled in breach of the Directive. However, the draft amending foreigners' legislation appears to be in conformity with Articles 14(4)(a) and (b), although the position of family members of EU/EEA citizens in this situation continues to be unclear. In the *United Kingdom*, the rapporteurs discuss a pilot project, operated by the UK Border Agency in conjunction with local police forces, which is aimed at removing EU nationals who have been in the country for more than three months and are not self-sufficient (i.e. not working or self-employed). However, given the manner of the project's implementation and that it appears to be more of a policy response to alleviating street homelessness, its compatibility with Article 14(b) is questioned, particularly as there does not seem to be any regard to proportionality or significant attempt to ascertain the specific circumstances of the individuals concerned and whether they can be assisted to become economically active without removal.

#### **Article 17 – right of permanent residence for persons and their family members who are no longer in employment**

Article 17 has been fully transposed in *Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovenia, Sweden* and the *United Kingdom*.

As described in previous reports, transposition of Article 17 is very weak in *Slovakia*, although the draft amendments to the foreigners' legislation will fully transpose Article 17. While Article 17 provisions have been transposed in *Lithuania*, as observed above in relation to Article 8(3), first indent, all supporting documents have to be translated into the Lithuanian language. In *Estonia*, the national legislation does not contain any rules relating to Article 17(4)(c), while, in *Malta*, Article 17(2) has not been transposed literally, which in the rapporteur's view may be interpreted as incorrect transposition. In *Greece*, the conditions as to length of residence and employment do not apply if the spouse of the worker or self-employed person possesses Greek nationality or has lost Greek nationality by marriage to that worker or self-employed person.

While the transposition of Article 17 in *Ireland* is generally correct, as noted in previous reports, two small discrepancies have been identified in the implementing regulations in relation to Article 17(1)(c) and Article 17(3). In *Spain*, all the provisions in Article 17 have been transposed but for Article 17(1)(a). Article 17 has been accurately transposed in the *United Kingdom*,

but in this regard the rapporteurs also refer to the continued restrictive interpretation of the right to permanent residence of nationals from the EU-8 and EU-2 in respect of residence completed before the date of the implementation of the Directive.<sup>8</sup>

Finally, the national provisions in *Bulgaria*, which stipulated that EU citizens and their family members were only entitled to permanent residence if they had resided continuously in the country for five years and fulfilled any of the requirements in Article 17 of the Directive, have now been corrected by amending legislation.

### **Article 24(2) – derogations from equal treatment regarding entitlement to social assistance during the first three months of residence and study grants prior to the acquisition of the right of permanent residence**

*Cyprus, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Lithuania, Malta, Poland, Portugal* and the *United Kingdom* have transposed the derogations in Article 24(2), but there are no explicit national provisions transposing this provision in *Austria, Belgium, Bulgaria, Hungary, Romania, Slovakia, Slovenia, and Spain*. The degree of transposition in *Luxembourg* is less clear. The Article 24(2) derogations are not transposed in the *Netherlands* by the foreigners' legislation, but by separate provisions in the Work and Social Assistance Act and the Study Grants Decree. The latter entitles EU/EEA/Swiss students to reimbursement of enrolment fees only. With regard to *Austria*, the rapporteur observes that transposition would need to be undertaken by the *Länder* (social assistance) and the federal parliament (study grants), but there do not appear to be any specific provisions in place to this effect. However, the Administrative Court ruled in a judgment in April 2011 that the authorities are not obliged to grant social assistance to EU citizens within the first three months of their stay or to job-seekers.

In *Romania*, there have been no changes to the previously stated position that, as a general rule, EU citizens are entitled under the Government Emergency Ordinance No. 102/2005 to the same State social protection measures as Romanian citizens. Similarly, in *Spain*, Royal Decree 240/2007 contains a general equal treatment clause applicable to EU citizens, including third-country national family members. As observed in the 2009-2010 report, in *Estonia*, the derogations in Article 24(2) do not appear to be strictly applied as all persons who have a right to stay (on either a permanent or 'fixed' basis) also have the right to social assistance, study loans and vocational training. In *Finland*, workers, self-employed persons, and persons who retain this status, as well as members of their families, are entitled to social assistance on their entry into the country. They are also entitled to mainte-

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<sup>8</sup> The UK Border Agency requires evidence for every month over the full five-year period of residence that EU-8 and EU-2 nationals were exercising a treaty right. For example, such evidence may include monthly wage slips over the full five-year period, evidence of continuing residence in the United Kingdom, etc.

nance grants for studies. While the regulations transposing Article 24(2) in *Ireland* preclude access to maintenance grants for students (including those undertaking vocational training) prior to acquisition of the right of permanent residence, it would appear that in practice permanent residence is not required to receive such a grant. In the *United Kingdom*, universities grant study loans on evidence of three years residence as established in the Court of Justice's judgment in C-209/03, *Bidar*.

Despite the introduction of amended implementing regulations, transposition of Article 24(2) in *Latvia* remains incorrect because only EU citizens and their family members holding permanent residence and who have registered their place of residence in a municipality may access social assistance and social services. Moreover, amendments to the Education Law adopted in March 2010 meant that only EU citizens and not their third-country national family members have a right to education on the basis of equality with nationals. On the other hand, in *Italy*, the legislative decree transposing this provision makes it clear that workers are entitled, even during the first three months of their residence, to those social benefits which are automatically connected to their employment or otherwise provided by the law. As noted in the 2009-2010 report, in *Sweden*, in principle, for periods of stay of up to three months, persons (irrespective of their nationality) who are not resident in the local municipality are only entitled to acute social assistance in emergency situations.

## 1.2. Situation of jobseekers

As noted in the 2008-2009 and 2009-2010 reports, there are two broad categories of national rules applicable to job-seekers coming from other EU Member States: (1) where the rules explicitly recognize their existence to varying degrees; and (2) where there are no specific rules concerning their status, with the exception, in some instances, of an express prohibition on their expulsion in accordance with Article 14(4)(b) of the Directive. Recital 9 in the Directive – which refers to the more favourable treatment of this group recognized by the case-law of the European Court of Justice – has not been explicitly referred to in the transposing rules in any Member State, although its application is implicit in some.

### Member States in which the position is unclear

The specific situation of job-seekers in a number of Member States is unclear and has been overlooked in the transposing national provisions. In *Estonia*, there are no special rules applying to this group, and while there appears to be no contradiction between the national rules and the Directive, the rapporteur recognizes that their situation needs to be clarified under the legislation, particularly in relation to the right of residence. In *Greece*, there are no

other explanatory memoranda or administrative guidelines concerning the right of residence of job-seekers. Nor is their situation formally regulated in the *Czech Republic* and *Lithuania*, even though there were 145 EU citizens registered as job-seekers in *Lithuania* during 2010, according to information from the national Labour Exchange Office. In *Bulgaria*, the law implementing the Directive makes no reference to the right of EU citizens who are registered job-seekers to stay in the country for longer than three months, or to Article 14(4)(b) (see above) or to Case C-292/89, *Antonissen*, although the national provisions explicitly refer to discontinuance of the right to residence if the person concerned no longer meets the requirements of Articles 7(1)(a)-(c). In *Ireland*, the position of job-seekers who enter the country continues to be unclear, with the exception of a regulation explicitly denying them assistance under the social welfare legislation and operational guidelines issued by the Department of Social and Family Affairs requiring the authorities to take 'special care ... to ensure that all EU nationals have genuinely come to Ireland with the intention of seeking employment'. In practice, however, there is nothing precluding 'genuine' EU job-seekers from entering and residing in the country because there is no requirement for them to prove their status to the immigration authorities (i.e. no obligation to register and no entitlement to social assistance). In *Italy*, it continues to be unclear whether EU job-seekers should be treated as workers or non-workers (and therefore whether they are required to possess 'sufficient economic resources'), and the implementing rules do not devote any specific attention to the registration of the residence of job-seekers. Nevertheless, they are protected from expulsion, in accordance with Article 14(4), if they can prove that they have been registered with an employment centre for less than six months or if they are available to work in a new job. In *Spain* (in keeping with the general non-transposition of the specific provisions relating to workers above), the treatment of EU job-seekers is not regulated. In practice, however, this implies that EU job-seekers have the right to stay and look for work under the same conditions as Spanish nationals.

### Residence registration requirements

Residence registration requirements for job-seekers differ. In some Member States (*Estonia, France, Greece, Hungary, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovenia, Spain*), the general rules on residence also apply to job-seekers, either expressly or implicitly, and they need to register their residence if they are going to stay longer than three months in the territory, while in other Member States (*Austria, Belgium, Czech Republic, Malta, Slovakia, Sweden, United Kingdom*) there is no such requirement. However, the draft amending foreigners' legislation in *Slovakia* will introduce the obligation of EU job-seekers to register their residence. In *Belgium*, EU job-seekers can obtain a registration certificate as soon as they arrive in the country. This is a provisional document issued by the local administration confirming their job-seeker status. In *Cyprus*, all job-seekers, including EU citizens, are required

to register with the district job-seeking and social security offices. As observed in the 2008-2009 and 2009-2010 reports, in *Austria*, the rule that all EU citizens, including job-seekers, first have to report their presence in the territory within three days of arrival is still in place, which does not appear to comply with the requirement of 'a reasonable and non-discriminatory period of time' in Article 5(5) of the Directive and the judgment of the Court of Justice in C-265/88, *Messner*, although the rapporteur notes that EU citizens are permitted more time if they are reporting their presence for the first time. In *Hungary*, EU job-seekers need to supply as proof a document that they are seeking work and that there is a probability of entering into gainful employment. In order to retain their right of residence as job-seekers, EU nationals are required to verify compliance with the conditions of residence by a certificate issued by the employment centre. In *Portugal*, EU job-seekers staying longer than three months are required to register their residence within 30 days after the period of three months from the date of entry into the national territory and, in addition to showing a passport or valid identity card, to make a declaration that they have sufficient resources for themselves and their family members as well as sickness insurance (provided this is also required of Portuguese citizens in the Member State of their nationality). They must also declare expressly that they are seeking their first job.

### **Registration with employment agencies and access to employment services**

It is usually necessary in a number of Member States for job-seekers to register with the national or local employment agencies so that they can access their services (*Austria, Bulgaria, , Cyprus, Czech Republic, Estonia, Finland, Germany, Hungary, Latvia, Malta, Poland, Sweden*). But even when there is no formal requirement to register and job-seekers have the right to start work before registration has been completed, non-registration may create practical problems for job-seekers in some Member States. For example, in *Belgium*, it has been reported that employers and administrations are reluctant to engage with EU job-seekers as long as the registration procedure has not been completed. In *Finland*, the quality of access depends on the services offered by employment offices. Information services are provided to everyone without the need to register, while certain employment services require registration as a job-seeker. Moreover, labour market training is conditional on having a home municipality in Finland, which EU citizens obtain once they have registered their residence. It is not possible to register residence on the basis of job-seeking alone with the result that job-seekers who do not meet the pre-conditions for registering their right of residence (i.e. as an economically inactive person) will not obtain a home municipality and will therefore not be able to gain access to the employment services provided to residents. Another practical consequence of non-registration is that job-seekers are likely to find it more difficult to obtain a Finnish identity number, which is needed to access a number of basic services, such as opening a bank account with some banks, lending books from public libraries, and to obtain

consumption credits, etc. While in theory it should be possible to reside and seek employment in *Latvia* without possession of a registration certificate/card and to register officially as unemployed or a job-seeker with the State Employment Agency, in practice, the Agency requires notice of the award of a Latvian personal code and official registered place of residence, which is issued by the Office for Citizenship and Migration Affairs, and which is impossible to obtain without a registration certificate/card. In *Lithuania*, the situation also appears to be restrictive because employment support (i.e. counselling, mediation, active measures, etc.) is only provided to nationals and lawfully resident foreigners, which probably means that EU job-seekers would be excluded from access because they are unlikely to be considered as resident.

### **Right of residence of up to six months or more**

In *Denmark*, *Latvia*, *Malta* and *Sweden*, the national rules explicitly provide EU job-seekers with a right of residence for at least up to six months without the need to obtain a residence certificate, and, in *Romania*, the law has now changed and an express right of residence is recognized to EU job-seekers for a period of up to six months from the date of entry without any additional conditions. In *Denmark*, *Sweden* and the *United Kingdom*, it is also clear that EU job-seekers may stay longer and not be removed from the country if they can demonstrate that they are continuing to seek employment and have a genuine chance of obtaining it, although in the *United Kingdom* the official instructions expect the job-seeker in such circumstances to be exercising his or her rights as a self-sufficient person.

While job-seekers are required to register their residence after a period of three months in *Estonia*, *Greece*, *Hungary*, the *Netherlands* and *Portugal*, there is also in principle no time limit on their stay so long as they can prove they are looking for work and have a real prospect of obtaining it. A similar situation appears to exist in *Luxembourg*, where the *Antonissen* case is cited in the legislative history of the implementing law, and in *Cyprus*, where the rapporteurs observe that the practices seem to be in line with the criteria in that judgment. In *France*, the Circular of 10 September 2010 on the conditions concerning the exercise of the right of residence by EU, EEA and Swiss nationals also explicitly applies *Antonissen* stating that EU citizens may seek work for up to six months and also beyond this period if they can demonstrate that they continue to look for work and have a genuine chance of finding it. Such proof, for example, may be possession of a qualification in demand on the labour market or the promise of a job within a given time period.

In the *Czech Republic*, the rapporteur notes that the legislation does not contain any possibility to terminate the stay of EU citizens if they are unable to find work after a certain period of time, and so it would appear that they

would be allowed to seek employment without any time restrictions. In *Finland*, job-seekers may reside for a reasonable period of time beyond three months without the need to register their residence provided they continuously look for work and have real chances of obtaining it. However, what is a 'reasonable period of time' is not defined. Similarly, in *Germany*, while there are no specific provisions in the applicable law on an EU citizen's length of stay without formalities, the Administrative Guidelines on the Implementation of the Freedom of Movement Act cite *Antonissen* and stipulate that EU job-seekers have a right of residence as long as there is a reasonable expectation of finding employment, which is assumed if job-seekers, due to their qualifications and the situation on the labour market, will probably be successful in securing employment. There is no 'reasonable expectation', however, if the EU citizen does not pursue a serious intention to find a job.

### Access to benefits

This question was not raised in all of the reports, but, as noted by a number of country rapporteurs, job-seekers can normally transfer unemployment benefit from their EU Member State of origin if they register their job-seeking status with the employment services (*Czech Republic, Hungary, Ireland, Latvia, United Kingdom*). On 4 June 2009, the Court of Justice of the European Union handed down its judgment in the case [C-22/08](#) and *C-23/08 Vatsouras and Koupatantze*. This is a particularly important judgment for work seekers and access to benefits as the CJEU held that benefits which are intended to integrate a person into the labour market cannot be considered 'social assistance'. The consequence is that the derogation contained in Article 24(2) Directive 2004/38 as regards job seeking periods is not applicable. In some Member States (*Austria, Belgium, Ireland*), they may, in principle, request social welfare/assistance payments or Jobseeker's Allowance (in *Ireland*), provided they meet certain conditions. However, such payments are not automatically granted and accessing them puts job-seekers at risk of becoming a burden on the social assistance system of the Member State concerned. Similarly, in *Cyprus*, job-seekers wishing to access allowances need first register at the district job-seeking bureau and then at the social security office, although the rapporteurs note that there has been no case law on the question whether the type of social assistance in Cases *C-258/04 Ioannides* and *C-138/02, Collins* would be permitted. In *Estonia*, as noted above, there are no special rules foreseen for job-seekers from other EU Member States and clarification is necessary regarding their right of residence. This is especially important in this context because all persons with a 'right to stay' are entitled to access social assistance. In *Denmark*, however, first-time EU job-seekers are expressly excluded from social assistance or starting assistance, namely cash benefits, with the exception of the costs related to return to their home country. The rapporteurs observe that these rules appear to be in accordance with Articles 14 and 27 of the Directive, although they may be questioned in the light of recent Court of Justice case law. In *Portugal*, job-seekers

do not enjoy entitlement to non-contributory benefits. It might still be possible for them to access allowances applicable under a 2003 law on social income for insertion, although the rapporteurs note that the specific law containing provisions on allowances for young people seeking their first employment has been repealed.

In *Ireland* (as noted above) and in the *United Kingdom*, EU job-seekers are explicitly denied access to social assistance under the social welfare legislation, and in *Poland* a job-seeker who does not fulfil the criteria for receiving unemployment benefit is not entitled to receive any financial benefits and can only receive non-financial means of support. The rapporteur for *Lithuania* observes that given their unregulated situation, this group of persons is likely to experience difficulties in accessing social security benefits, particularly if they have not been contributing to such benefits or are not permanent residents.

### 1.3. Other issues of concern

Delays concerning the issue of residence certificates and residence cards for EU citizens and their family members continue to be serious problem in *Cyprus* and the *United Kingdom*, and thus impede the enjoyment of free movement rights in those Member States. In the *United Kingdom*, improvements have been reported but residence applications still take four months to be processed despite the introduction of new procedures.

With regard to refusal of entry and expulsion of EU citizens, as was also observed in the previous reports, concerns persist in a number of Member States that nationals of the EU-12, and especially of the EU-2, are being treated less favourably in this regard. This section focuses on the more general concerns raised in this respect, while Section 4 below discusses *inter alia* expulsion as it pertains to EU workers of Roma origin.

In *Finland*, as noted in the 2009-2010 report, some discrepancies continue to exist in the transposition of the Directive in respect of the procedural safeguards relating to the expulsion of EU citizens and their family members. Such safeguards are considerably stronger in the case of those who have registered their residence or obtained a residence card than in the case of those who did not, irrespective of the length of time they have *de facto* resided the country. The former are considered for removal by way of deportation and the criteria in Article 28(1) of the Directive are applied to them but not to the latter who are considered under a different procedure applicable to refusal of entry. Moreover, a person excluded from Finland on grounds of public order or public security may be prevented from re-entering regardless of how long ago the exclusion decision was taken and without any obligation to re-examine the personal circumstances of the individual concerned in order to

assess whether she or he continues to pose a real and serious risk to the fundamental interests of society. In the *Czech Republic*, only the disproportionate impact on family and private life is taken into account when deciding on the expulsion of EU citizens, which falls short of the more extensive list of grounds in Article 28(1) of the Directive. Furthermore, as noted in previous reports, the application of the notion of 'public policy' is problematic because it has been transposed as an abstract legal concept, although the case pending before the extended bench of judges of the Supreme Administrative Court where it is hoped that this matter will be clarified has not yet been ruled upon. Article 28(1) of the Directive has also – against the advice of the Council of State – not been transposed in the *Netherlands*, with the result that the less specific provision weighing up personal interests in the general administrative rules is applied in this context. Ambiguities regarding the transposition of the provisions in the Directive relating to entry and procedural safeguards are also noted by the rapporteur in *Malta*. In the former instance, the possibility in Article 5(4) of the Directive for EU citizens to bring their travel documents to the authorities within a reasonable period of time in the case that they do not have them is not found in the national legislation. In the latter instance, no unequivocal transposition of the pertinent provisions of the Directive can be detected even though such safeguards are normally respected by the courts.

As documented in previous reports, the inclusion in *Hungary* of HIV infection as a disease endangering public health is problematic from the standpoint of EU and international law. The rapporteur notes that human rights organizations have been critical of the reference to HIV/AIDS in public law since the mid-1990s. In *Lithuania*, there continue to be no special provisions in the foreigners' legislation regulating the departure of EU citizens, with the exception of the application of different timelines. Similarly, detention of EU nationals may be a problematic issue because no specific rules have been established with the result that they could be detained under the same conditions or on the basis of the same grounds as foreigners generally. However, according to the Migration Department of the Ministry of the Interior, no EU/EEA nationals were detained in 2010 in connection with illegal entry, although it is not possible to ascertain whether third-country national family members have been detained because such persons would only be included in the statistics on the basis of nationality rather than family status. The application of the stricter criteria of the 'gliding scale' in the *Netherlands*, introduced for the expulsion of non-nationals who have been convicted of serious offences or are habitual offenders, is continuing and this scale has been tightened further. In February 2010, the Dutch Parliament passed a motion to withdraw the residence of non-nationals who have received three convictions in the first two years of their stay in the country. The rapporteurs observe that in many instances the administrative decisions declaring the 'undesirability' of non-nationals is not in conformity with Court of Justice case law and particularly with the requirement that the personal conduct of the

person in question should be taken into account. Moreover, in such cases, the continued residence of the non-national constitutes a criminal offence. However, they also refer to a recent internal instruction which requests the police to contact immediately the Immigration and Naturalization Service (IND) when arresting EU citizens so that the IND can re-consider the decision on undesirability in line with EU criteria.

In *Bulgaria*, judicial practice relating to exit bans imposed on Bulgarian citizens and their conformity with the Directive has become even more significant in 2010 and the first half of 2011. For example, the Sofia City Administrative Court requested the Court of Justice for a preliminary ruling in May 2011 asking whether it was in conformity with the Directive for a national regulation to envisage the imposition of an exit ban on the ground of debt owed to a private legal person above a certain threshold. Exit bans are now also the subject of two other requests for preliminary rulings to the Court of Justice (C-434/10, *Aladzhov* and C-430/10, *Gaydarov*).

In the *United Kingdom*, as referred to in previous reports, the regulations applicable to free movement of EU/EEA citizens afford wide powers to the authorities to refuse entry to, expel and detain EU/EEA citizens. The grounds on which an Immigration Officer may have reason to believe that an EU/EEA national should be excluded are not set out and there remains a large degree of discretion in this area. For example, an Immigration Officer may detain EU/EEA nationals 'if there are reasonable grounds for suspecting that a person is someone who may be removed from the UK'.

As observed in the 2009-2010 report, in *Denmark*, when deciding cases regarding expulsion of EU citizens, it appears that the courts act in conformity with EU law by conducting a concrete and individual assessment of each case and the level of the threat to society constituted by the defendant, although the rapporteurs argued that they apply a low threshold concerning the latter. In March 2011, the Supreme Court issued four principled rulings determining the threshold for administrative expulsion of EU citizens applying the case law on judicial expulsions. The result of these judgments are that a crime committed by EU citizens in a professional manner (e.g. organized or systematic crime, crimes committed by persons with previous criminal convictions, etc.) – based on a concrete, individual assessment of the circumstances of the case – is assumed to lead to expulsion when the person in question has no real attachment to Denmark and/or has just entered Denmark prior to committing the crime. On the other hand, crime consisting of isolated incidents and with limited adverse impact (e.g. violating domestic peace by staying overnight on another person's property or illegal handling of lost property) – without the presence of aggravating circumstances – is not considered to meet the threshold for expulsion of EU citizens under the Directive. In July 2011, amendments to the Aliens law entered into force requiring that non-nationals who committed any crime resulting in imprison-

ment had to be expelled unless such expulsion would for certain be contrary to Denmark's international obligations, including EU free movement rules. In *France*, a new law was adopted on 16 June 2011 concerning immigration, integration and nationality, and includes a provision obliging EU citizens or members of their family to leave French territory if no right of residence can be justified or if their stay constitutes an 'abuse of rights'. This concept essentially defines three situations: (1) absence of conditions for staying beyond three months in respect of the ability to maintain oneself on the territory; (2) abuse of the right of residence with the essential goal of benefiting from the social assistance system; or (3) where the personal conduct of the individual concerned constitutes a real, actual and sufficiently serious threat to the fundamental interests of French society. In *Spain*, there have been a number of court judgments during the reporting period confirming or annulling expulsion decisions taken by the authorities against EU citizens. With regard to the latter, it is noteworthy that these included expulsion decisions issued in respect of Bulgarian and Romanian nationals for not possessing the necessary documentation (i.e. residence and work permits).

With regard to the question of remedies, as observed in previous reports, the limited jurisdiction in *Belgium* of the Council for Aliens Disputes (CCE – *Conseil du Contentieux des étrangers*) in respect of the residence of EU citizens and their family members, which raises questions about the compatibility of the Belgian legislation with Article 31 of the Directive, has been accepted by the Constitutional Court and since re-confirmed by the case law of the CCE. The rapporteurs urge the Belgian authorities to agree to a request for a preliminary ruling from the Court of Justice on this issue and add that this position may also now fall foul of the right to an effective remedy in Article 13 of the European Convention on Human Rights (ECHR) in the light of the judgment of the European Court of Human Rights of 21 January 2011 in *M.S.S. v. Belgium*. In the *Netherlands*, the administrative courts in cases on the recognition and termination of the residence rights of EU workers tend to restrict the judicial review to a review of the situation at the time of the last administrative decision rather than at the time of the hearing by the court as required by the Court of Justice in Cases C-482/01 and C-493/01, *Orfanopoulos and Oliveri* and which the rapporteurs contend is not in conformity with Article 31 of the Directive.

#### **I.4. Free movement of Roma workers**

Two general trends can be identified with regard to EU Roma workers: (1) EU nationals of Roma origin are making use of EU free movement provisions to escape poverty, marginalization and discrimination in their Member State of origin, and have sought jobs in the formal labour markets of EU destination countries; and (2) Despite reports of better treatment in some instances, EU Roma workers experience considerable problems regarding access to the

labour market in the latter because of generally lower levels of education and skills, discrimination and a greater tendency to expulsion on grounds relating to public order and being a burden on the social assistance system of the host Member State. Moreover, the transitional provisions that continue to be in place in some Member States in respect of EU-2 nationals (*Belgium*) appear to be exacerbating this situation.

With regard to the first trend, it is specifically reported that a combination of poor housing and living conditions, insufficient salaries to maintain families, limited access to education and health care, high levels of unemployment, discrimination, marginalization and social exclusion are widespread in a number of EU-8 Member States (*Bulgaria, Czech Republic, Hungary, Latvia, Lithuania, Poland*), although there have also been a number of positive initiatives taken to assist the Roma community, which are discussed below. Discrimination against the Roma community has been the subject of cases before the European Court of Human Rights (e.g. *D.H. and others v. Czech Republic*) and also documented by the United Nations Special Rapporteur on modern forms of racism and xenophobia. Therefore, it is not surprising that free movement to other Member States is seen as an opportunity for EU nationals of Roma origin, particularly less-skilled persons, to escape poverty and discrimination at home. In *Latvia*, for example, the rapporteur observes that persons of Roma origin claim that they feel free from discrimination in other Member States, especially in Ireland and the United Kingdom, with the result that an estimated 10,000 (out of 15,000) Latvian Roma have made use of their free movement rights.

As for the second trend, it should be emphasized at the outset, that it is difficult to obtain a full picture of the situation of EU Roma workers in a number of destination Member States because of the absence of relevant official statistics. For example, it is reported that there were 4,112 nationals from Romania in the *Czech Republic* in January 2010 as compared to 4,437 in January 2011, and 4,520 in March 2011. Some of these Romanian nationals may be assumed to be of Roma origin, although the significance of these figures is questionable given that there is no obligation under Czech law on EU citizens to register their residence after three months. In *Germany*, in reply to a request from the Parliament for information on expulsion measures against Roma, the Federal Government reported that the Federal Register on Aliens does not record administrative measures on the basis of ethnic affiliation, which would be considered discriminatory under the law. Moreover, there are no figures available on the assisted voluntary return of EU citizens. While in principle this programme only applies to third-country nationals, it is possible for local and regional authorities to assist the voluntary return of EU citizens, although no official information is available on this practice. In *Ireland*, there are no official statistics relating to the number of EU workers of Roma origin, although the Roma Support Group estimated that there were between 2,500 and 3,000 Roma in the country, with the majority from Roma-

nia and smaller numbers from the Czech Republic and Slovakia. In *Italy*, there are an estimated 170,000 Roma of which 50 per cent are Italian nationals, although the general public perception is that Roma are foreigners. In *Lithuania*, statistics of workers based on nationality are not collected at all, with the result that it is impossible to ascertain whether workers coming to the country are of Roma origin. In *Poland*, it is estimated that there are about 30,000 persons of Roma origin living in the territory.

Nonetheless, it is clear that EU workers of Roma origin face difficulties in demonstrating their quality as workers and that they are economically active or have sufficient resources for themselves and their families (*Belgium*), thus avoiding becoming a burden on the social assistance of the host Member State. Problems with accommodation (including refusals by local administrations to permit Roma to access land for their vehicles and caravans), school attendance, access to vocational training, health and social care are also reported in *Belgium*. In *Finland*, initiatives taken in the past couple of years to prohibit camping in areas not designed for this or begging in public places have been criticized as being discriminatory for targeting the Roma ethnic group. In *Ireland*, Roma frequently fall foul of the criminal law and are charged with theft, begging and casual trading offences, and in this regard the rapporteur observes that a member of the Roma community was the first person to be successfully prosecuted under a new anti-begging law. Poor housing conditions, difficulties in finding employment due to a low level of professional qualifications – although reliable data on the rate of employment among Roma are absent – and discrimination are among the social problems reported in *Italy*. EU citizens of Roma origin can also face difficulties in accessing health care because they often do not register their residence. In *Sweden*, EU Roma job-seekers experience discrimination in the labour market and also have difficulties in accessing employment because of a low level of education. As a result, they resort to other means to earn a living, such as begging. They are also likely to have worse living conditions compared with other groups in society. The issue of Bulgarian and Romanian nationals of Roma origin attracted considerable media attention in *Luxembourg* in connection with a parliamentary question on the application of EU law to a group of Roma who requested to stay on a camping ground. In the *United Kingdom*, nationals of Roma origin face difficulties in accessing work as well as social assistance while looking for work. Moreover, given that they are essentially seeking employment in low-skilled sectors, they have been particularly hard hit by the economic crisis. EU-8 nationals who are not subject to transitional arrangements are usually dependant on temporary employment agencies for low-skilled jobs, which means that the work is often of a precarious nature. Moreover, they are generally not eligible for housing and social assistance. On the other hand, despite incidences of xenophobic violence and discrimination, evidence from two detailed research reports on EU Roma workers in 2009 indicated a more positive picture of Roma integration in the United Kingdom in comparison to other Member States.

Facilitated expulsion of Roma contrary to the strict EU free movement rules and human rights law is also widely reported. The rapporteur for *Germany* observes that many of the EU citizens deported come from Bulgaria and Romania and so it should be assumed that ethnic Roma are among them, although it is not possible to verify how many given the absence of data referred to above. In *Italy*, Roma are more likely to be subject to collective expulsion or 'cut-and-paste' individual expulsion decisions, to expulsion decisions based on lack of resources, or to receive financial incentives to voluntarily return to their countries of origin. In June 2011, the Parliamentary Ombudsman in *Sweden* criticized the police authority in Stockholm for expelling a number of persons of Roma origin to Romania in 2010, on the basis that they had been begging and were unable to provide for themselves. In the view of the Ombudsman, these expulsions were contrary to Swedish and EU law.

Interestingly, however, no such removals have been reported in *Belgium*, while in *Spain* no obvious limitations have been put into place in respect of the free movement of EU Roma workers (Note: this information was provided before re-imposition of transitional arrangements on EU workers from Romania). In *Finland*, the rapporteur also observes that the authorities are well aware of the rights of Bulgarian and Romanian nationals as EU citizens and that no large-scale expulsions have taken place. In *France*, the controversial circular of 5 August 2010 instructing prefects and the police to clear illicit camps with priority to be given to Roma camps, and discussed at length in the 2009-2010 report, was annulled and replaced with the circular of 13 September. The former circular was also annulled by the Conseil d'Etat in April 2011 on the basis that it had come into force prior to its annulment in September 2010. However, the Conseil d'Etat has not seen it necessary to annul the circular of 13 September because it calls for the removal of all illegal encampments irrespective of the origin of their occupants. Disputes have also arisen in respect of procedural questions relating to the clearing of the camps where the prefect has decided to go ahead with the action without consulting the mayor of the locality. There have also been several judgments of the administrative tribunal in Lille invalidating the prefect's decision to remove EU citizens of Roma origin to the border (*reconduite à la frontière*) on the basis of the illegal occupation of property. In *Denmark*, the four rulings of the Supreme Court, discussed in Section 3 above, which applied the case law on judicial expulsion to the administrative expulsion of EU citizens resulted in the subsequent annulment of the controversial expulsion of 14 persons of Roma origin in July 2010 for the offence of violating domestic peace and illegal camping. In *Ireland*, while deportation figures are not made available to the public, it has been observed that the deportation of Roma has been successfully challenged on a number of occasions on three main grounds: (1) procedural grounds; (2) insufficient evidence that the person concerned is a 'genuine, present and sufficiently serious threat affecting one of the fun-

damental interests of society' as per Article 27(2) of the Directive; and (3) humanitarian grounds. On the other hand, figures on voluntary return are available, and in 2010, 302 Romanian nationals were voluntarily repatriated to Romania, and 73 in January and February 2011 alone. While these data are not broken down on the basis of ethnicity, anecdotal evidence suggests that the majority of Romanian nationals repatriated voluntarily are members of the Roma community.

It is troubling to learn, however, that such expulsions have not necessarily given rise to critical reaction in EU Member States of origin which appears to reflect the existence of inherent discriminatory attitudes to this ethnic minority group. For example, in *Bulgaria*, there has been no public debate of note and the media has focused more on the money the returnees have received from the expelling authorities rather than on the nature of the expulsions. However, the voluntary return and expulsion of persons of Roma origin to *Romania* is noted as a concern by the rapporteur, although he contends that this should be seen in the wider context of discrimination and the need for effective European programmes for the integration of the Roma minority.

A number of positive initiatives in respect of the Roma community are also reported. For example, in *Belgium*, the Walloon region encouraged the establishment of a Mediation Centre for Traveller People and Roma, which offers facilities for accommodation when Roma arrive in the locality and organizes meetings between Roma, municipal authorities and the local population in order to harmonize and exchange good practices. In *Germany*, there are specific programmes, under which members of the Roma minority, irrespective of their nationality, are entitled to social assistance to facilitate their access to the labour market. In *Ireland*, the Department of Justice, Equality and Law Reform is in the early stages of producing an integration strategy for the Roma community in the country as requested by the European Commission under the Europe 2020 Strategy. In *Italy*, the rapporteur draws attention to a successful discrimination challenge on the ground of ethnic origin against the Municipality of Milan which suspended a grant of social housing to a group of Roma families because of a public statement criticizing the grant by the Ministry of the Interior. The rapporteur for *Poland* refers to a number of integration initiatives for the Roma, such as the Governmental Programme for the Roma Community 2004-2013, which gives priority to education but also includes activities such as combating unemployment, guaranteeing security, supporting culture and disseminating knowledge about the Roma community in Poland. In *Spain*, the government has approved a Plan of Action for the development of the Roma population 2010-2012, which will benefit approximately 700,000 persons of the Roma ethnic group resident in Spain. It is noted that Spain contains the second largest population of Roma in the EU-27 after Romania.

In some Member States, the rapporteurs observe that there are no EU workers of Roma origin in the country (*Malta*) or that their presence does not give rise to any specific issue of concern (*Cyprus, Portugal, Slovenia*), or to any attention in the media or academic literature (*Austria, Greece*). In *Estonia*, a group of Roma, who were sent from Helsinki to Romania and travelled through Estonia, attracted some attention in 2010, although they did not stay in the country for longer than three months. The issue of Roma workers leaving or entering the country has not given rise to any debate in *Slovakia*, although the rapporteur cites the Annual Report on the activities of the Office of the Plenipotentiary for Roma Communities, which refers to person of Roma origin leaving to work abroad, especially to the United Kingdom and the Czech Republic.



## CHAPTER II MEMBERS OF A WORKER'S FAMILY

### II.1. The definition of family members and the issue of reverse discrimination

#### II.1.1 Definition of family member

The overall position is that the implementation of the definition of family member by the Member States is correct. The problems reported mainly concern the correct reading of the concept 'partner in a durable relationship duly attested' and the evidence that should be accepted by Member States as proof of such a relationship. Following a notification of the Commission, the Cypriot government has proposed a Bill that should ensure compliance with Directive 2004/38/EC for direct descendants. On 18 July 2011 the competent authorities were instructed to set aside implementing legislation and give direct effect to Article 8(3) of Directive 2004/38/EC.<sup>9</sup>

As reported in the 2009-2010 European report, two years cohabitation appears to be the common denominator which is set aside if a child has been born out of the relationship. In *Denmark*, however, residence as a cohabitating partner is subject to the requirements that the principal person is 18 years of age or older and the availability of sufficient resources to support the partner. As reported in the 2009-2010 European report, the Netherlands is an exception as it requires a shared household during six months.

From the information provided in the national reports (registered) partners benefit from the rights in Directive 2004/38/EC in *Austria, Cyprus, the Czech Republic, Denmark, Finland, Lithuania, the Netherlands, Portugal, Romania and Spain*. In *Ireland, Malta, Slovakia and Sweden* registered partners do not qualify as beneficiaries of Directive 2004/38/EC. Partners in a durable relationship duly attested are, however, covered in Malta, albeit subject to public policy and Sweden, albeit it subject to the obligation to be a member of the EU citizen's household. Neither registered partners, nor partners in a durable relationship duly attested benefit from Directive 2004/38/EC in *Bulgaria, Estonia, Greece, Lithuania, and Poland*. Though *de facto* partnerships are gaining recognition, the *Bulgarian* Family Code still does not provide for (certified) factual partnerships and, therefore, they are not equated in law to marital relationships. In *Lithuania* an amendment to the definition of family member is on the table that, if adopted, will include the partner who has a

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<sup>9</sup> Circular File No. 15/2006/III of 18 July 2011.

lasting relationship duly attested with an EU-citizen as one of the beneficiaries of Directive 2004/38/EC. Though an announcement was made by the *Polish* left party that it intends to introduce an Act on Registered Partnerships, the chances of success are not rated very high by the Polish rapporteur as elections are due for the autumn and there is no majority in Parliament.

The *Czech*, *Maltese* and *Polish* rapporteurs explicitly mention that same sex relationships are not recognized by their Member State. Though *Cyprus* recognizes same sex partners, they do not benefit in full of free movement rights (infra sections 5 and 6). The position of same sex-partners in *Cyprus* has attracted the attention of the Commission (infra). In *France* same sex-partners are admitted under Article 3(2) of Directive 2004/38/EC, which requires close scrutiny, like any other de facto relationship. In *Poland*, nationals are prevented from entering into same sex relations abroad through the working of the Act on Civil Acts of 29 September 1986, stating that applicants who want to enter into a marital relationship or a registered partnership abroad need to obtain a certificate from the Polish authorities. Though at odds with Article 71 of the Polish Act on Civil Status, that does not authorize the authorities to check when and with whom the relationship is entered into, this certificate is denied if a same sex relationship is envisaged. This practice has attracted the attention of the Polish Ombudsman,<sup>10</sup> EU Commissioner Viviane Reding<sup>11</sup> and the Petition Committee of the European Parliament. Information provided by the Polish Ministry of Internal Affairs and Administration reveals that work is underway to amend the specimen of the certificate deleting the obligation to provide information on the future partner. The envisaged amendment is in line with a ruling of the Gdansk Administrative Court that ruled that a certificate must be issued on application without further statements of the reasons why a certificate has been requested.<sup>12</sup>

The *Slovenian* Aliens Act changed the definition of family members in 2011. Unmarried children are not mentioned any more, but only descendants are mentioned. Registered partners benefit from the rights mentioned under Directive 2004/38/EC

## Case law

The *Hungarian* courts,<sup>13</sup> confronted with an appeal against a deportation order, had to adjudicate on the question whether the OIN's refusal to issue a registration card to a third-country national partner who had cohabitated in Hungary from 2004-2008, but had presented no proof in terms of a registration in the Aliens police administration. The Capital Court accepted the OIN's

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<sup>10</sup> Intervention of the Polish Ombudsman Irena Lipowicz of 15 March 2011, No. RPO-660930/10/MO.

<sup>11</sup> Newspaper Rzeczpospolita, 2 February 2011.

<sup>12</sup> Judgment of 6 August 2008, III SA/Gd 229/08.

<sup>13</sup> EBH 2010/2196. Supreme Court Decisions, 2010/1.

argument, that partnership by definition means the existence of a common, registered and documented address and place of residence during the preceding year. The evaluation of other evidence submitted by the couple, that court found, is part of the margin of appreciation accorded to the OIN. The Supreme Court confirmed the Capital Court's findings, arguing that a common household and cohabitation is one component of the equation and documented address registration – the statutory, connecting requirement – the other. The obligation to provide documents evidencing a shared address is found in line with the obligation in Article 3(2) of Directive 2004/38/EC to assess the personal circumstances.

A ruling establishing that neither Article 2, nor Article 3 of Legislative Decree 2007, No. 30 can be interpreted as including a sister as a beneficiary of EU free movement rules, unless the additional conditions in the latter provision are fulfilled, was handed down by the *Italian* Supreme Court in December 2010. In the same judgment it held that the obligation to 'facilitate entry and residence' in Article 3(2) of Directive 2004/38/EC, as implemented by Article 3 of Legislative Decree 2007, could include the issuing of a residence permit on other grounds than family reunification.<sup>14</sup> The search for a definition has attracted the attention of legal scholars.<sup>15</sup>

The *Dutch* courts have handed down decisions regarding both the definition of durable relationship and the evidence submitted to substantiate the claim of a durable relationship. The case law reveals that the District Courts are divided in their opinion regarding the question whether the reading of the notion of 'durable relationship' in B10/1.7 of the *Vreemdelingen-circulaire* is correct.<sup>16</sup> The position of the courts regarding the evidence that can be submitted to establish the existence of a durable relationship is mixed. Though the policy rules explicitly require registration at the same address in the *Gemeentelijke Basisadministratie* [municipal population registration], there are decisions where the courts have accepted other evidence as proof of the durable nature of the relationship (e.g. photographs, written statements by third parties).<sup>17</sup>

<sup>14</sup> Italian Supreme Court, 17 December 2010, No. 25 661.

<sup>15</sup> E. Bergamini, *La famiglia quale oggetto di tutela nel diritto dell'Unione europea e nella giurisprudenza della Corte di giustizia*, *Diritto pubblico comparato ed europeo* (2010) p. 457-471; G. Rossolillo, *Rapporti di famiglia e diritto dell'Unione europea: profili problematici del rapporto tra dimensione nazionale e dimensione transazionale della famiglia*, *Famiglia e diritto* (2010) p. 733-741; and A. Adinolfi, *Il diritto alla vita familiare nella giurisprudenza della Corte di giustizia dell'Unione europea*, *Rivista di diritto internazionale* (2011) p. 5-32.

<sup>16</sup> Rechtbank 's-Gravenhage z.p. Utrecht, 23 April 2010, Awb 09/25347 BEPTDN, LJN: BM1997 (correct reading), cons. 2.11, Rechtbank 's-Gravenhage z.p. Arnhem, 19 August 2010, Awb 09/41938, LJN: BN6033, JV 2010/415 (too restrictive reading of a European notion), cons. 20, Rechtbank 's-Gravenhage, 7 December 2010, Awb 10/16324 (beroep)/Awb 10/16325 (voorlopig voorziening), LJN: BO7910, cons. 14 (too restrictive reading) and Rechtbank 's-Gravenhage, 26 January 2011, Awb 10/11716 VISUM, LJN: BP3126 (national concept, not European), cons. 4.1.

<sup>17</sup> Rechtbank 's-Gravenhage z.p. Arnhem, 19 August 2010, Awb 09/41938, LJN: BN6033, JV 2010/415, cons. 21-27, Rechtbank 's-Gravenhage, 26 January 2011, Awb 10/11716 VISUM, LJN: BP3126, cons. 7 (note that the court refers to the Commission Guidelines in its decision) and Rechtbank 's-Gravenhage, 7 December 2010, Awb 10/16324 (beroep)/Awb 10/16325 (voorlopig voorziening), LJN: BO7910, cons. 12-16. See, however: Rechtbank 's-Gravenhage z.p. Rotterdam, 4 March 2010, 09/29746, LJN: BL7188, where the District Court

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In a landmark decision, the *Spanish* Supreme Court, finding a justification in Article 13 of Directive 2004/38/EC that does not include legal separation as a qualifying condition for a right of residence under that provision, ruled that the requirement of 'legal separation' in Article 2(a), (c) and (d) and Article 9(1), (4) and (4)(a) of Royal Decree 240/3007 may not be applied.<sup>18</sup> The same court also held that the reference to a single registration system for registered partners as a qualifying condition for recognition as a family member within the meaning of Article 2(2)(b) Directive 2004/38/EC cannot be upheld in the light of the wording of the aforementioned provision. As dual registration is possible in that Member State, this decision will have far-reaching consequences.<sup>19</sup>

### **Miscellaneous**

The following points concerning the personal scope of Directive 2004/38/EC are taken from the *Bulgarian, Czech, French, Latvian, Maltese, Dutch, Slovakian* and *British* reports.

In *Bulgaria*, the direct descending and direct ascending family members of the partner, as defined in Article 2(2)(b) of Directive 2004/38/EC, are not included as beneficiaries of EU free movement rules in the national law implementing Article 2(2)(c) respectively (d) of Directive 2004/38/EC.

In the *Czech Republic* it is only possible to register a partnership if one of the partners has Czech nationality. Partnerships registered in other Member States are recognized.

Clarification of the *Chen* ruling means that in *France* reliance on that decision is only successful if the parent takes full responsibility of the child, has sufficient financial means and social security coverage to ensure that the child does not become a burden on the French State. The parent is issued a 'visitor' residence permit and needs prior authorisation to take up paid employment.

Admission of partners in a durable relation, duly attested is subject to public policy in *Malta*. The Maltese rapporteur questions whether this is permitted under EU law. She finds a justification in 1) the omission to define the concept in Directive 2004/38/EC that permits the host-Member State to undertake an extensive examination of all relevant personal circumstances and 2) the CJEU's reading of public policy in the *Van Duyn* case, i.e. that public policy 'must in any event presuppose the existence, in addition to the perturbation

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Rotterdam ruled that as no GBA-statement had been submitted, consideration of WBV 2009/1 was not necessary, cons. 4.3 and *Rechtbank 's-Gravenhage z.p. Utrecht*, 23 April 2010, Awb 09/25347 BEPTDN, LJN: BM1997, cons. 2.12-2.15.

<sup>18</sup> Spanish Supreme Court, Decision of 1 June 2010.

<sup>19</sup> Spanish Supreme Court, Decision of 1 June 2010.

of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to one of the fundamental interests of society.'<sup>20</sup> She feels, however, that it is too early to draw conclusions regarding the compatibility of the Maltese rules with EU free movement rules as, to date, there are no cases addressing the issue of admission of partners in the light of European rules.

The *Slovakian* Draft Foreigners Act in its current wording will put an end to the prevailing uncertainties as it includes registered partners as family members.

The *United Kingdom* Home Office's guidance's on the *Baumbast* case<sup>21</sup> does not recognize the right of a child to remain for education in accordance with Article 12 Regulation 1612/68 as explained by the CJEU in *Ibrahim*.<sup>22</sup> It does not acknowledge that the right to remain for education crystallizes when the child installs him or herself as a family member of an EU worker and continues even if the worker subsequently ceases work. The Upper Tribunal recently found that, for the purposes of the right of permanent residence, time runs from the time education begins while seeking employment was insufficient to engage Article 12 of Regulation (EEC) No. 1612/68.<sup>23</sup> In relation to retained rights after divorce, the Home Office still insists that for the one year period that the couple have been in the United Kingdom, that they show that they have cohabited although at Tribunal level, immigration judges appear to be accepting that the couple do not have to have cohabited but need purely to have been officially married. The Home Office is also extremely strict on requiring the applicant to show that the EEA national was exercising free movement rights on the date of the divorce. This is proving extremely difficult. The Home Office is not willing to use its powers to check national insurance or tax records to aid the applicant given the capacity constraints that they have and their understanding of the burden of proof. In the United Kingdom, fiancés and proposed civil partners of EEA nationals, although not granted a right in the Citizens' Directive, are able to apply to entry clearance posts under the Immigration Rules and are granted the same rights as United Kingdom nationals or people with permanent residence in the United Kingdom.

### **Position of Family Members listed in Article 3(2)**

As reported in previous European reports the family member listed in Article 3(2) of Directive 2004/38/EC are to be treated as beneficiaries of the rights in Directive 2004/38/EC in *Bulgaria, the Czech Republic, Finland and the Neth-*

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<sup>20</sup> ECJ case 41/74, *Yvonne van Duyn v Home Office* [1974] ECR 1337.

<sup>21</sup> ECJ Case C-413/99, *Baumbast, R and Secretary of State for the Home Department* [2002] ECR I-7091.

<sup>22</sup> ECJ Case-C-310/08, *London Borough of Harrow v Ibrahim* [2010] ECR I-1065.

<sup>23</sup> *MDB and others v SSHD* [2010] UKUT 161 (IAC).

erlands. The obscure legal situation as reported in the 2009-2010 report for the Netherlands persists. In Spain the family members listed in this provision are admitted in accordance with the general immigration rules, which do, however, oblige the national authorities to facilitate family reunification.<sup>24</sup>

In Cyprus there is an administrative practice which seems to be in contradiction with provisions of Article 3(2) of Directive 2004/38/EC. Cypriot authorities consider that requesting a Schengen visa is compatible with the aforementioned provision that, in very broad terms, obliges Member States to facilitate the admission of Article 3(2) family members. Invoking a circular issued by the Archive of Population on 18 July 2011, the Cypriot authorities argue that where there is no visa, they facilitate entry, if permitted under Article 35 of Regulation 810/2009. The Cypriot rapporteur notes that if the aforementioned circular reflects the position of the Cypriot authorities the circular reflects the authorities established practice, it is questionable whether EU law, in particular the Treaty on the Functioning of the EU, Regulation (EEC) No. 1612/68 and Directive 2004/38/EC is being complied with. Cypriot practice in particular affects lesbians/ gays, bisexuals and transsexual persons exercising free movement rights. The Cypriot Equality Body that has had dealt with complaints concerning the non-existence of a right to marry or register for same sex partners, urged for the recognition of same sex relations on 31 March 2010.

In its guidance to caseworkers, the United Kingdom government has maintained its position that the right of admission under Article 3(2) of Directive 2004/38/EC is discretionary. Although the UK courts have found that other family members, applying under Article 3(2) of Directive 2004/38/EC, are covered by the finding in *Metock* and prior lawful residence within the EEA may not be required, the UK government does not accept this. Clarification by the CJEU is due, as the Upper Tribunal (Immigration and Asylum Chamber) has made a reference to the CJEU requesting it to clarify the meaning of Article 3(2) Directive 2004/38/EC, amongst others, whether that provision has direct effect, what should be understood by 'to facilitate entry' and dependency and whether reliance on that provision is subject to the requirement of residence in the same Member States as the EU-citizen, prior to entering the host-Member State.<sup>25</sup>

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<sup>24</sup> Nineteenth Additional Provision of Royal Decree 2392/2004

<sup>25</sup> United Kingdom Upper Tribunal (Immigration and Asylum Chamber), *MR and others (EEA extended family members) Bangladesh* [2010] UKUT 449 (IAC), case C-83/11, *Secretary of State for the Home Department v Muhammad Sazzadur Rahman, Fazly Rabby Islam, Mohibullah Rahman*, 22 February 2011, OJ EU 2011, C 145/9.

## II.1.2 Reverse discrimination, including return situations

### **Reverse Discrimination**

In previous reports it was noted that reverse discrimination is not an issue in *Belgium, Hungary, Italy* and *Luxembourg* as the national implementing measures adopted by these Member States extended the rights in Directive 2004/38/EC to the nationals of those Member States (assimilation principle). The picture for 2010-2011 remains pretty much the same, though the following points merit attention.

A new law on family reunification adopted by the *Belgium* Parliament on 26 May 2011, however, though formally leaving the assimilation principle intact, in practice has reduced it to a formal declaration as it has amended the conditions for family reunification when requested by Belgium nationals. Applications for family reunion made by Belgium nationals will be decided on in accordance with the rules which apply to applications made by third-country nationals (expected to enter into force late June 2011). This amendment was adopted notwithstanding the Council of State's view, expressed in April 2011, that Article 20 TFEU, post-*Ruiz Zambrano*, must be read as precluding national measures that have the effect of depriving citizens of the genuine enjoyment of the substance of the rights conferred on them by virtue of their status as citizens of the Union.

Though *Poland* has not chosen for assimilation, its Act on Aliens facilitates admission and residence of family members of EU citizens, amongst which family members of Polish nationals. Thus Article 53 a of that Act provides a temporary right of residence to family members of a Polish national and EU citizen alike, without defining the nature of the ties and Article 64 entitles the spouse of a Polish national to a residence permit after three years of marriage and subject to the condition that the spouse has resided in Poland continuously for two years on the basis of a residence permit for a fixed period or is a minor child of a Polish citizen and the parent has parental authority over that child.

Notwithstanding the Ministerial Committee for the Employment of Aliens decision on 28 July 2009 that EU free movement rules can be relied on by family members of *Cypriots*, reverse discrimination exists in practice. Courts persistently ignore this decision, subjecting family members of *Cypriots* to a more stringent regime than the family members of Union citizens. According to the Cyprus Equality Authority Report,<sup>26</sup> the position of the immigration authorities there is 'contradictory and defensive'. The courts decisions are di-

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26 Έκθεση Επιτρόπου Διοικήσεως αναφορικά με την εφαρμογή στην Κύπρο του κοινοτικού κεκτημένου στα θέματα της οικογενειακής επανένωσης και τη δυσμενή μεταχείριση Κυπρίων πολιτών και των μελών των οικογενειών τους που είναι υπήκοοι τρίτων χωρών, Α/Π 1623, Α/Π 1064, dated 06.05.2009, p. 1.

vided on this matter and the Ombudsman has had to deal with numerous complaints.<sup>27</sup>

The *Ruiz Zambrano* case<sup>28</sup> that was only handed down in March 2011 has found its way into the national courts of various Member States and new preliminary rulings, made by an Austrian,<sup>29</sup> and two Finish courts,<sup>30</sup> requesting the CJEU to clarify its decision in *Ruiz Zambrano* and its follow up *McCarthy*,<sup>31</sup> are pending. In January 2011 the German *Verwaltungsgericht* Baden-Württemberg referred questions regarding the position of a third-country national parent with custody over a EU citizen minor who is exercising free movement rights under Directive 2004/38/EC.<sup>32</sup> Though strictly speaking not a 'follow-up' to the *Ruiz Zambrano* case, the similarities between this case and *Ruiz Zambrano* justify the conclusion that the Court of Justice's answer to these questions will build on its findings in the latter case. The reactions of the Member States and the national case law building on *Ruiz Zambrano* are covered in the 2011 Follow-up of Case law of the Court of Justice of the EU, § 6 and Annex 5.

### Return situations

Reliance on EU free movement rules by nationals vis-à-vis their Member State of nationality is also an issue in so-called return situations. From the information provided it appears that, in general, the Member States apply the CJEU rulings in the *Surinder Singh* line of cases. The following information on return situations is taken from the *Lithuanian* and *Dutch* reports.

2011 witnessed a clarification of the documents that are required as evidence that free movement rights have been exercised by a Lithuanian national returning to *Lithuania* and claiming an EU-right of residence for his/her family members. Article 100(2) of the new Lithuanian immigration law entitles third-country national family members of returning Lithuanian nationals to an EU-temporary residence card if they accompany the returning Lithuanian national.

<sup>27</sup> See for instance the section entitled 'iii. Το δικαίωμα εισόδου και παραμονής πολίτη τρίτης χώρας που είναι σύζυγος ή σύντροφος Κύπριου ή Ευρωπαϊού πολίτη', of the *Ombudsman's Annual Report of 2007*, [http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/2316716CE693858D882574FA0077E4E6/\\$file/%CE%95%CF%84%CE%AE%CF%83%CE%B9%CE%B1%20%CE%88%CE%BA%CE%B8%CE%B5%CF%83%CE%B7-2007.pdf?OpenElement](http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/2316716CE693858D882574FA0077E4E6/$file/%CE%95%CF%84%CE%AE%CF%83%CE%B9%CE%B1%20%CE%88%CE%BA%CE%B8%CE%B5%CF%83%CE%B7-2007.pdf?OpenElement) (accessed 29 September 2009).

<sup>28</sup> EU CJ case C-34/09, *Ruiz Zambrano*, 8 March 2011, n.y.r.

<sup>29</sup> Austrian *Verwaltungsgerichtshof*, lodged on 25 May 2011, Case C-256/11 *Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduiké and Dragica Stevic v Bundesminister für Inneres* (Grand Chamber), Hearing 27 September 2011, OJ EU 2011, C 219/11.

<sup>30</sup> Finnish *Korkein hallinto-oikeus*, lodged on 7 July 2011 joined cases C-356/11 and C-357/11, *O., S. and Maahanmuuttovirasto and Maahanmuuttovirasto and L.*, OJ EU 2011, C 269/36. By order of 8 September 2011, n.y.r. the CJEU joined these cases and decided to subject them to the accelerated procedure.

<sup>31</sup> CJEU case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, 5 May 2011, n.y.r..

<sup>32</sup> Case C-40/11, *Yoshikazu Iida v City of Ulm*, OJ EU 2011, C 145/4.

In the Netherlands the policy rules on returning Dutch nationals were re-written and reorganized to accommodate for the CJEU's ruling in the *Eind* case.<sup>33</sup> Special attention is given to the point made by the Court of Justice in that decision that a Dutch national returning to the Netherlands after exercising free movement rights can rely on EU law to safeguard a right of residence for family members even if upon his/her return to the Netherlands the Dutch national relies on social benefits (B10/5.3.2.1). The policy rules now cover an explicit reference to the restricted territorial scope of Directive 2004/38/EC ('in a Member State other than the Member State of which the EU citizen is a national'), the position of service providers, as defined by the Court of Justice in the *Carpenter* case,<sup>34</sup> and the position of Dutch nationals who have acquired Dutch citizenship after they have exercised free movement rights as defined by the Court of Justice in the *Scholz* case (family reunification has to be completed before naturalization).<sup>35</sup>

## Case law

New case law on the position of own nationals under EU free movement rules is found in the *Cypriot, German, Irish, Dutch and Spanish* reports. Though only a few, the first cases in which the *Ruiz Zambrano* decision is relied on have been reported. This case law is discussed in the European Report, Follow-up of Case Law of the Court of Justice, 2011. The cases pending before the ECtHR against *Bulgaria* (see European report 2009-2010) in which Bulgarian nationals have contested the practice of reverse discrimination in the light of Articles 14 and 8 of the ECHR are still pending.

The uncertainty regarding the position of family members of Cypriots was not put to an end by the *Cypriot* courts. In two cases, featuring the same parties, reverse discrimination was first acknowledged as in compliance with EU free movement rules<sup>36</sup> then as at odds with the general principle of equality, with no reference to the earlier cases, or the *Metock* ruling.<sup>37</sup> In April 2011, with no reference to the aforementioned cases, the presiding judge acknowledged the existence of reverse discrimination as it followed from the wording of the definition of citizen of the Union in section 2 of Law 7(I)/2007, namely: 'every citizen who has citizenship of a Member State of the EU, other than the Republic'.<sup>38</sup> Reverse discrimination not only concerns the so-called 'purely internal situations', but also Cypriots returning to their country of nationality after having exercised free movement rights with their family members.

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<sup>33</sup> ECJ case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v RNG Eind* [2007] ECR I-10719.

<sup>34</sup> ECJ case C-60/00, *Mary Carpenter* [2002] ECR I-6279.

<sup>35</sup> ECJ case C-419/92, *Scholz* [1994] ECR I-505.

<sup>36</sup> *Svetlana Shalaeva v Republic of Cyprus*, No. 45/2007, 27 April 2010.

<sup>37</sup> *Republic of Cyprus v Svetlana Shalaeva*, No. 72/2008, 22 December 2010.

<sup>38</sup> As per judge Nicolaides, in *Abdulkader Majed v Republic of Cyprus* No. 1099/2009, 7 February 2011.

In Germany the courts<sup>39</sup> have ruled that reverse discrimination does not violate equal treatment as required under the German Constitution, nor fundamental rights or Article 7(2) of the Family Reunification Directive. Before the CJEU had handed down its ruling in *McCarthy*, the Bavarian Administrative Court had ruled that dual nationals who are born in Germany and have never exercised free movement rights derive no rights from EU-law if they apply for family reunification with a third-country national.<sup>40</sup> The German report also covers a number of cases which address the position of German nationals who have moved to Denmark where they have married a third-country national for whom they then apply for residence permission in Germany relying on Directive 2004/38/EC (the so-called Denmark cases). The administrative courts, adjudicating in first instance, have ruled that free movement rights have been exercised and that, as a consequence, German immigration rules, amongst which the obligation to have obtained a basic knowledge of the German language, cannot be required. The German Federal Administrative Court has also acknowledged that in the so-called Denmark cases free movement rights have been exercised, but found that the *effet utile* of those rights is not affected if Directive 2004/38/EC could not be relied on upon return as what is required is a 'certain intensity of the movement within the EU', which is lacking in these cases.<sup>41</sup>

The *Irish* rapporteur mentions a number of cases involving third-country national family members of *Irish* citizens that reveal that the 'principle' of 'reverse discrimination' continues to apply. In November 2009, the High Court refused an Irish family leave to challenge the Government's decision to deny a Chinese relative permission to live with them in Ireland, in circumstances where an EU-citizen having the nationality of another Member State would have been entitled to family reunion. In March 2010, the Irish wife of a deported Nigerian asylum seeker argued that this situation was unfair where, had she possessed the nationality of another Member State, she would have been entitled to avail of the ruling in the *Metock* case. There is no publicly available information on the status or outcome of this claim.

In 2010, the Judicial Division of the *Dutch* Council of State handed down three decisions on the rights of family members of Dutch citizens. In two decisions the highest Dutch Court in migration cases ruled that reliance on Directive 2004/38/EC by third-country national family members of Dutch nationals is only possible if they were resident in the host-Member State at the time that

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<sup>39</sup> Bavarian Administrative Appeal Court, judgment of 3 March 2010, 10 ZB 09.2023, DÖV 2010, 619 and Federal Administrative Court, judgment of 30 March 2010, 1 C 8/09.

<sup>40</sup> Bavarian Administrative Court, decision of 19 February 2010, 10 ZB 09.2584.

<sup>41</sup> German Federal Administrative Court, judgment of 11 January 2011, 1 C 23/09, para. 13, with reference to ECJ, Case C-212/06, *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683. Two months earlier the same court had resolved a so-called Denmark case relying on the *Aufenthaltsverordnung* (Residence Regulation), German Federal Administrative Court, judgment of 16 November 2010, 1 C 17/09.

the Dutch citizen him/herself was resident in that Member State as a beneficiary of Directive 2004/38/EC.<sup>42</sup> In one of the cases it is explicitly mentioned that the *Metock* case<sup>43</sup> does not apply as that case concerns the position of family members in the host-Member State, not the Member State of which the EU-citizen is a national.<sup>44</sup> In the third case, the Council of State established that Article 3(1) Directive 2004/38/EC has been correctly implemented in Dutch law.<sup>45</sup> The origins of this case are a Dutch SIS-report and entry ban, which operates as an obstacle for a third-country national family member of a Dutch citizen to exercise free movement rights in another Member State. The cases share that the court found no violation of Directive 2004/38/EC.<sup>46</sup>

On 1 June 2010 the *Spanish* Supreme Court handed down a landmark decision on the position of a Spanish national's family members. According to that court, Article 3 of Directive 2004/38/EC does not justify the exclusion of Spaniards from the personal scope of that Directive. Spanish nationals now benefit from Directive 2004/38/EC when they return to Spain after having exercised free movement rights in a host-Member State.

### **Miscellaneous**

The following points are taken from the *Cypriot, Danish, Finish, Hungarian and Italian* reports.

Following a complaint of the Commission, the *Cypriot* government drafted a Bill that will amend Law 7(I)/2007 so that it will include Cypriot nationals returning to their home-Member State after exercising free movement rights.

Internal guidelines now allow *Danish* students and Danes with sufficient means of subsistence to be accompanied by their spouses when they return to Denmark.<sup>47</sup> Previously, the pursuit of an economic activity in the host-Member State was required for Danes to benefit from EU free movement rules on their return to Denmark.

In *Finland*, Government Bill 77/2009 reads that family ties with Finish nationals are only recognized for the purpose of Directive 2004/38/EC if the re-

<sup>42</sup> ABRvS, 7 September 2010, 201000977/1/V1, LJN: BN6685, (confirming: President Rechtbank 's-Gravenhage, z.p. Amsterdam, 7 January 2010, AWB 08/34633, LJN: BK9765, JV 2010/113), JV 2010/437, commentary: H. Oosterom-Staples and *idem*, 201000085/1/V1, LJN: BN6683, (confirming: Rechtbank 's-Gravenhage, z.p. Amsterdam, 4 December 2009, Awb 09/17913, LJN: BL8962, JV 2010/2002), JV 2010/438.

<sup>43</sup> CJEU case C-127/08, *Blaise Baheten Metock a.o. v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.

<sup>44</sup> ABRvS, 7 September 2010, 201000085/1/V1, LJN: BN6683, JV 2010/438, cons. 2.1.4.

<sup>45</sup> ABRvS, 9 November 2010, 201003131/1/V1, JV 2011/9, with commentary H. Oosterom-Staples.

<sup>46</sup> Examples of cases where Directive 2004/38/EC is considered applicable as residence rights have been accorded by other Member States are: Rechtbank 's-Gravenhage zp Haarlem, 11 November 2010, Awb 10/10677, LJN: BO)5261 and Rechtbank 's-Gravenhage, 2 December 2010, Awb 10/16378, LJN: BP2652.

<sup>47</sup> Internal guidelines on the processing of applications for family reunification under the EU rules where the principal person is a Danish citizen, Danish Immigration Service, Family Reunification Information No. 5/10, 1 July 2010, para. 4.1.4.

relationship existed or started at the time that the Finish national was exercising free movement rights. The narrower definition of family member in Finish law dictates who can be admitted as a family member of Finish national with no intra-EU link who are thus treated in the same manner as EU-citizens who do not satisfy the preconditions for free movement rights (e.g sufficient resources). Finish nationals, however, do not have to satisfy an income-requirement according to section 50 of the Finnish Aliens Act and there is an obligation to issue a residence permit if conditions are satisfied. Though the Bill explicitly excludes reliance on EU free movement rules by Finish nationals where family ties did not exist at the moment of return to Finland, it does not detail when there is an intra-EU link.

Through the introduction of a one-year threshold before arrival in Art 1(1) of the *Hungarian FreeA* in December 2010 for family members of Hungarian nationals who are admitted for reasons of health, age or because they depend on financial support of or have lived under the same roof with the Hungarian national who actually cared for them, the *FreeA* has introduced differential treatment between EU-citizens and Hungarian nationals.

Circular letter No. 5493 of 23 August 2010 written by the *Italian* Ministry of Interior provides a list of documents that have to be produced by non-nationals as evidence of their marital relationship with an Italian or EU-citizen if the marriage was concluded outside Italy. The fact that Italian nationals have to provide a marriage certificate issued by an Italian civil registrar where the spouse of an EU-citizen from the other Member States may submit either a registration certificate issued by an Italian or foreign civil registrar, might appear as discriminatory. It is, however, explained by the fact that for Italians, even if they are not in the country, the civil status records are updated and kept, whereas registrations concerning foreigners are only made when residents of Italy.

## II.2. Entry and residence rights

Like in previous years the information provided on the implementation of entry, including visa obligations, and residence conditions, including the issuing of registration certificates to family members who themselves are EU citizens and residence permits to third-country national family members, reveals that the rules in Directive 2004/38/EC on entry and residence are, as a rule, respected and complied with by the Member States.

The Cypriot government has taken steps to bring its administrative practice in line with EU-law (*infra*).

2010-2011 witnessed amendments to the legislation in: *Bulgaria* (Articles 16 and 17 of the Citizens Directive are now implemented correctly in the LERD,

a permanent residence card is to be issued within one month after the application is made<sup>48</sup> and the introduction of a legal redress procedure against a refusal to issue a short-stay visa<sup>49</sup>); *Finland* (abolition of prior lawful residence<sup>50</sup> and amendment of the provision implementing Article 7 of the Citizens Directive<sup>51</sup>); *France* (clarification that the rights accorded to family members are derived from the EU citizen's rights under Directive 2004/38/EC, obligation to verify the EU-citizen's right of residence before family members are granted residence rights and an obligation to check systematically all options for residence after the relationship with an EU-citizen has ended before refusing residence permission to former family members<sup>52</sup>); *Hungary* (Article 7 Directive 2004/38/EC<sup>53</sup> and five years residence in Article 16 can include periods of paid employment in another EEA State<sup>54</sup>); *Ireland* (abolition of short-stay visa obligation for holders of a 'Residence card of a family member of a Union citizen' ex Article 10 of Directive 2004/38/EC<sup>55</sup>); *Italy* (proof of the condition of family members<sup>56</sup>); *Latvia*;<sup>57</sup> *Lithuania* (e.g. clarification of documents to establish that the Lithuanian national has exercised free movement rights<sup>58</sup> and a proposal to include biometric identifiers in residence permits issued to third-country national family members is pending<sup>59</sup>), *the Netherlands* (new fee for residence permits 43 Euros<sup>60</sup>); *Poland* (abolition fee registration documents following adoption of the Act on identity cards that are issued to Polish citizens free of charge,<sup>61</sup> right of residence for children of EU-citizen<sup>62</sup> and reasonable time, i.e. 72 hours, to have documents delivered when seeking permission to enter<sup>63</sup>); *Slovenia* (short-stay entry visa required from third-country national family members who envisage family reunion,<sup>64</sup> temporary residence permits are required by third-country national family members and remain valid upon the EU-citizen's death if the family member has sufficient financial resources and a health insurance or pursues

<sup>48</sup> State Gazette No. 9, January 2011.

<sup>49</sup> Ordinance on the Conditions and Order for Issuance of Visas and Determination of the Visa Regime, State Gazette No.18, 5 March 2010.

<sup>50</sup> Section 153(3) of the Aliens Act, Government Bill amending the Aliens Act (HE 77/2009 vp), amended by Act 432/2010.

<sup>51</sup> Section 158a of the Aliens Act, amended by Act 432/2010.

<sup>52</sup> Circulaire No. NOR/IMIM/1000/116/C du 10 septembre 2010 relative aux conditions d'exercice du droit de séjour des ressortissants de l'Union européenne, des autres Etats parties à l'Espace économique européen (EEE) et de la Confédération suisse, ainsi que des membres de leur famille, texte non paru au Journal Officiel.

<sup>53</sup> Conditions were tightened on 24 December 2010.

<sup>54</sup> Article 18(2a) of the FreeA.

<sup>55</sup> Immigration Act 2004 (Visas) Order 2011, 25 April 2011.

<sup>56</sup> Article 3, para. 2 lit. b, Article 9, para. 5, lit. b, Article 10, para. 3, lit b, Legislative Decree No. 30 of 2007.

<sup>57</sup> Regulation No. 243, OG No. 58, 13 April 2011.

<sup>58</sup> Article 101(2) Aliens Law.

<sup>59</sup> Article 97(2) Draft new law.

<sup>60</sup> Article I B Regeling van de Minister voor Immigratie en Asiel van 22 December 2010, No. 5678736/10, houdende wijziging van het Voorschrift Vreemdelingen 2000 (honderdeneerste wijziging), *Staatscourant* 30 December 2010, No. 20991, amending Article 3.34h Vreemdelingenbesluit.

<sup>61</sup> Act of 6 August 2010, on identity cards, Journal of Laws of 2010, no. 167, item 1131. Residence permits are issued free of charge since 21 May 2011.

<sup>62</sup> Article 19a Act on Entry, implementing the EU CJ's ruling in *Teixeira and Ibrahim*.

<sup>63</sup> Article 11 a of the Act on entry (entry into force: 21 May 2011).

<sup>64</sup> Article 127/3 of the Aliens Act.

an economic activity,<sup>65</sup> new provision establishing that the residence permit remains valid where the child is in education (codification *Baumbast, Ibrahim and Teixeira*<sup>66</sup>), Sweden (new residence permit card that satisfies the conditions in Regulation (EC) No. 380/2008).<sup>67</sup>

In *Slovakia* the Draft Foreigners Act is running through the legislative process. This Act, when adopted, will introduce the following amendments: family members will no longer be subject to health requirements and social security,<sup>68</sup> the family relationship of family members who themselves are EU-citizens will be considered, introduction of an obligation to register for a residence permit, the right to a permanent residence permit for third-country national family members along the lines of Article 17(4) Directive 2004/38/EC.

### **Case law**

Case law on entry and residence is taken from the *Belgium, Bulgarian, French, German, Italian, Luxembourg, Dutch, Spanish* and *Swedish* reports.

The *Belgian* report details four court decisions concerning entry and residence rights. On 4 November 2010 the Constitutional Court ordered that the failure to provide for a period for examination of an application for family reunification with a Belgian national made abroad, the expiry of which gives the applicant a right of residence in Belgium, amounted to a violation of the principle of equality and non-discrimination as Article 12bis of the Aliens law does establish a right of residence for family members of non-EU citizens if their application has not been processed in nine months.<sup>69</sup> On 28 May 2010 the CCE ruled that according to the CJEU's decision in the *MRAX* case, the withdrawal of a residence permit issued to the spouse of a Belgian national must take place within two years after the application for that document and not the issuing of it, as follows from the parliamentary drafting history.<sup>70</sup> Applying Article 5(4) of the Citizens Directive, the same court cancelled a removal decision adopted against the Spanish Moroccan husband of a Dutch citizen who allegedly had not established his status as an EU-citizen though he had presented a valid passport and a declaration of theft of this residence permit.<sup>71</sup> A decision to refuse a short-stay visa to the Guinean spouse of a Dutch national was overruled by the CCE applying Articles 5 and 6 of Directive 2004/38/EC that only require the family member of an EU-

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<sup>65</sup> Articles 127/8 and 129/1 of the Aliens Act.

<sup>66</sup> Article 129/2 of the Aliens Act.

<sup>67</sup> Paragraphs 8a and 8b of the Aliens' Act, Government proposition 2010/11:123 Biometriskä kännetecken i uppehållstillståndskort, referring to Council Regulation (EC) No 380/2008 amending Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third-country nationals.

<sup>68</sup> Article 45b(1) of the Foreigners Act.

<sup>69</sup> Constitutional Court, 4 November 2010, Judgment No. 128/2010.

<sup>70</sup> CCE, 28 May 2010, Judgment No. 44.247, R.D.E., 2010, p. 174.

<sup>71</sup> CCE, 2 October 2010, Judgement No. 49.027, R.D.E., 2010, p. 376.

citizen to establish his/her relationship with an EU-citizen and, therefore, does not allow a Member State to refuse a short-stay visa because the purpose of travel is residence in Belgium.<sup>72</sup> In this case, the applicant had relied on the 2009 Commission guidelines.

In 2010 the *Bulgarian* courts ruled on the first cases concerning a short stay visa brought before those courts by third-country national family members of Bulgarian citizens. Though the refusals were repealed, the applicants were not issued a visa by the Bulgarian Ministry of Foreign Affairs that simply issued new refusals, this time stating the reasons. Fresh proceedings have been instigated against these new refusals.

The *French Conseil d'Etat* upheld a decision regarding the refusal of a long stay visa as the applicant did not qualify as dependant family member in the ascending line as there was no evidence that the Spanish son, resident in France, made regular payments to his parent and it was established that he had insufficient financial means to take care of his parent.<sup>73</sup>

The *German* Federal Administrative Court overruled a decision of the Administrative Appeal Court of Baden-Württemberg establishing that the general rule of competence in § 11 of the Freedom of Movement Act bars recourse to the Residence Act thus ruling out the possibility of using § 71 of the Residence Act as a legislative basis for decisions regarding the loss or non-existence of the right to free movement.<sup>74</sup> The Bavarian Administrative Appeal Court has ruled that a third-country national family member had lost his right of residence as the EU-citizen from whom the right of residence was derived had left Germany and taken up permanent residence in Greece, the country of nationality of the EU-citizen.<sup>75</sup>

The *Italian* Regional Administrative Tribunal of Campania upheld a decision to refuse a maternity benefit to an Ukrainian in possession of a residence card establishing her position as a family member of an EU-citizen in that Member State, arguing that as she did not have permanent residence in Italy, as required by Italian law, there was no genuine link between the applicant and that Member State.<sup>76</sup>

The *Luxembourg* Ombudsman ordered the Minister to re-examine a refusal to issue a short-stay visa to a third-country national ascendant family member of an EU-citizen in the light of the 2009 Commission Guidelines, arguing that according to point 2.2.1 there is an obligation to issue a short-stay

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<sup>72</sup> CCE, 20 September 2010, Judgement No. 48.259.

<sup>73</sup> CE, réf., 2 February 2010, No. 334549, Zammouri.

<sup>74</sup> Federal Administrative Court, Judgment of 28 June 2011, 1 C 18.10.

<sup>75</sup> Bavarian Administrative Appeal Court, 16 April 2010, 10 ZP 09.1051.

<sup>76</sup> Regional Administrative Tribunal, Campania, Chamber III, Judgment of 28 January 2010, No. 458, K.N. c. Comune di Napoli.

visa to a family member upon presentation of a valid passport and evidence of family ties. Evidence of financial means may not be required. In line with the findings of the Ombudsman, the Passport, Visa and Legislation Office issued the short-stay entry visa. The *Tribunal Administratieve* upheld a decision in which the residence permit was revoked for lack of sufficient financial means/unreasonable burden on the host-Member State's financial means, arguing that though social benefits were no longer enjoyed and work was being sought actively following the withdrawal of residence permission, past reliance on social benefits during a period of 25 months out of 30 months residence under circumstances can justify a terminate of residence permission.<sup>77</sup> The same court upheld a decision to terminate residence rights for reasons of public order arguing that the applicant had reoffended the Drugs and Narcotics Legislation and following his release from prison after serving a prison sentence had resumed drugs dealing. This outweighed the fact that the applicant had always worked in Luxembourg, returned to his former employer after completing the prison sentence and the presence of family ties.<sup>78</sup>

New issues considered by the *Dutch* Council of State are: the determination of the moment when lawful residence in accordance with Directive 2004/38/EC commenced (cannot be deduced from the date on which a residence permit was issued due to its declaratory nature);<sup>79</sup> reliance on Article 27(2) of Directive 2004/38/EC by the third-country national family member of a German national resident in Germany to contest the Dutch entry ban (*ongewenstverklaring*) and subsequent SIS-report (not possible, because the third-country national family member had not 'accompanied' or 'joined' the EU-citizen in the Netherlands and no obligation for Dutch authorities to consult German authorities ex Article 25(2) SIA until the entry ban is irreversible);<sup>80</sup> obligation to report presence in the Netherlands in accordance with Articles 21 and 22 of the Schengen Implementing Agreement and Article 21(d) Schengen Borders Code if a third-country national family member does not accompany or join the EU-citizen to the Netherlands;<sup>81</sup> and if family members of EU-citizens have expressed their intention to leave the Netherlands and move to a different Member State immigration detention ex Article 59(3) *Vreemdelingenwet* is not permitted.<sup>82</sup> Decisions handed down by the District Courts concern: prior to establishing the rights of family members,

<sup>77</sup> Tribunal administrative, 26 January 2011, No. 26951.

<sup>78</sup> Tribunal administrative, 7 February 2011, No. 27033.

<sup>79</sup> ABRvS 21 February 2011, 201003057/1/V2, LJN: BP5947, cons. 2.3.1-2.1.3.

<sup>80</sup> ABRvS 6 December 2010, 200907934, LJN BO7026, *JV* 2011/49 (reverses: Rechtbank 's-Gravenhage z.p. 's-Hertogenbosch, 14 September 2009, Awb 08/34755, LJN: BJ8526). See also: Rechtbank 's-Gravenhage, 12 July 2010, Awb 10/15305, LJN: BN3110, cons. 5, where the District Court ruled that the mere fact that the residence permit issued by the Spanish authorities was still valid obliged the Dutch authorities to apply Directive 2004/38/EC to the facts of the case before issuing an entry ban (*ongewenstverklaring*).

<sup>81</sup> ABRvS 26 May 2010, 200908732/1/V3, LJN: BM6096, *JV* 2010/276, cons. 2.4.1.

<sup>82</sup> ABRvS 18 January 2011, 201009741/1/V3, LJN: BP1919, *ibidem*, 6 May 2010, 201001849/1/V3, LJN: BM5535, *JV* 2010/249 (reverses the decision of Rechtbank 's-Gravenhage z.p. Roermond, 12 February 2010, Awb 10/3898), *ibidem*, 12 May 2010, 201002955/1/V3, LJN: BM5538, *JV* 2010/252 (reverses the decision of Rechtbank 's-Gravenhage z.p. Dordrecht, 19 March 2010, Awb 10/6692, *JV* 2010/174)

the position of the EU-citizen must be assessed;<sup>83</sup> third-country national family members derive a right of to move within the European Union from Article 6(2) of Directive 2004/38/EC which they are exercising if they are travelling in the European Union for the purpose of joining their EU-citizen family member in another Member State, in this case Hungary;<sup>84</sup> there is an assumption that an applicant for a short-stay visa who claims to have a durable relationship with an EU-citizen intends to stay in the Netherlands permanently and therefore the short-stay visa could be refused (prior to reaching this conclusion it had been established that the definition of durable relation had not been satisfied);<sup>85</sup> and the Visa Code and Directive 2004/38/EC apply to all applications for visa other than return visa and long-stay visa, the so-called *machtiging tot voorlopig verblijf*.<sup>86</sup>

The Spanish Constitutional Court annulled Article 9.2, § 2 of Royal Decree 240/2007 that it considered 'a restrictive interpretation of Directive 2004/38/EC and a limited transposition of rights'. The effect of this annulment is that family member may continue their residence in Spain under Royal Decree 240/2007 (European immigration regime) in the event of the decease of a beneficiary of Directive 2004/38/EC. This right is, however, subject to the condition that the family member resided in Spain in his capacity as a family member prior to the death of the EU-citizen/EEA-national/Swiss national and has notified the Spanish authorities of the death.

In 2010 the Swedish Migration Court of Appeal ruled on two cases concerning the right of residence and the calculation of the period of stay to qualify for a right of residence.<sup>87</sup>

### **Miscellaneous**

The comments, *infra*, are taken from the *Cypriot, Czech, Danish, French, Hungarian, Latvian, Lithuanian, Maltese, Polish and Slovakian* reports.

In relation to Cyprus there was a number of complaints concerning the issuing of residence permits, decisions to terminate residence rights, the documents required for a residence certificate, sanctions for non-compliance with the registration obligation, the right to permanent residence and the right to continue residence according to Article 17 of Directive 2004/38/EC. the majority of cases appear to be bad administrative practices . The complaints concerning residence permits had been made by spouses, who, in

<sup>83</sup> Rechtbank 's-Gravenhage z.p Utrecht, 5 August 2010, Awb 09/16306 BEPTDN, LJN: BN3363.

<sup>84</sup> Rechtbank 's-Gravenhage z.p. Haarlem, 12 August 2011, Awb 10/27668, LJN: BO4516, JV 2011/30, cons. 2.10-2.11.

<sup>85</sup> Rechtbank 's-Gravenhage 26 January 2011, Awb 10/11716 VISUM, LJN: BP3126, cons. 12.

<sup>86</sup> Rechtbank 's-Gravenhage z.p. Amsterdam, 12 April 2011, Awb 10/41326, cons. 4-4.6.

<sup>87</sup> Case MIG 2010:8 and Case MIG 2010:14.

their capacity as a third-country national family member, should have been granted a residence card along the lines of Articles 10(1) and 11(1) of Directive 2004/38/EC, but in practice had only received a residence permit that was valid for a few months. This means that they are forced to travel back and forth between Cyprus and their countries of nationality to apply for a new visa and a new certificate.

The Czech rapporteur mentions that non-compliance with Directive 2004/38/EG persists regarding the documents to be presented with the application for a residence card and the length of the procedure for issuing visa at the borders to third-country national family members. There are, however, no complaints regarding the issuing of visa at the external borders. In Denmark administrative fees are imposed on applicants for family reunification under the general rules of the Aliens Act.<sup>88</sup> However, as payment of such fees is not required if this is incompatible with EU law,<sup>89</sup> this implies a general exemption for beneficiaries of free movement rights and Turkish nationals who derive rights from Decision No. 1/80 of the EEC-Turkey Association Council.<sup>90</sup>

In France the right to continued residence ex Articles 12 and 13 of Directive 2004/38/EC does not include the right to be reunited with further family members under the terms of Directive 2004/38/EC.

In Hungary a period of 72 hours is given to EU-citizens and their family members to obtain the necessary documents, as required by Article 5(4) of Directive 2004/38/EC and the CJEU's decision in the MRAX-case. A small border traffic permit can be obtained at the Hungarian Consular Office by family members of EEA/Hungarian nationals living in the adjacent States.<sup>91</sup> There is no right of appeal against the refusal or annulment of a short-stay visa. HIV and AIDS are still classed as reasons to refuse/terminate rights in Hungary.

The difficulties experienced in Latvia, as reported in the European report 2009-2010 (i.e. written permission of both parents when a residence card is applied for on behalf of a minor and documents have to be drawn up in Latvian, Russian, English, German or French), are still not solved.

The validity of a residence permit, including a permanent residence permit, issued to a child, including foster children, by the Lithuanian authorities is linked to the duration of formal education, where this is shorter than five years respectively ten years, in the case of a permanent residence permit. The double stage system is still in place for the issuing of a residence permit,

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<sup>88</sup> Act No. 1604 of 22 December 2010 amending the Aliens Act.

<sup>89</sup> Section 9 h (1) and (2) of the Aliens Act.

<sup>90</sup> Explanatory remarks to Bill No. 66/2010-11.

<sup>91</sup> Reg. 1931/2006/EC and Bilateral Treaties.

allowing the authorities to repeal a decision granting residence permission if this is not formalized within a period of six months. The Lithuanian rapporteur labels this procedure as 'unnecessary and creating additional bureaucracy'.

In *Malta* the legislation implementing Article 5(4) Directive 2004/38/EG does not provide for a reasonable time to have the documents listed in that provision delivered.

The *Polish* rapporteur has expressed concerns that the omission to include a cross-reference to Article 19a of the Act on Entry in Article 44 of that Act might mean that beneficiaries of Article 19a will not be entitled to a right of permanent residence. As the latter provision only entered into force on 21 May 2011 there is no case law on this issue.

The implementation of Article 13(2)(c) of Directive 2004/38/EC (Article 45b(5)(b)(3) of the Foreigners Act) is questionable, even under the *Slovakian* Draft Foreigners Act

### II.3. Implications of the *Metock* judgment

The overall picture is that of compliance with the CJEU's ruling in the *Metock* case. As reported in previous reports, the *Metock* judgment did not cause any problems in *Latvia*, *Poland*, *Portugal*, *Romania*, *Slovakia*, and *Slovenia* as these Member States never imposed the condition of prior lawful residence. *Bulgaria*,<sup>92</sup> the *Czech Republic*,<sup>93</sup> *Denmark*<sup>94</sup>, *Finland*,<sup>95</sup> *France*,<sup>96</sup> *Italy*,<sup>97</sup> and the *United Kingdom*<sup>98</sup> have witnessed an amendment bringing legislation/administrative practice in line with the prohibition not to require prior legal residence of third-country national family members or a clarification of the existing law. The *Austrian* rapporteur states that as circulars are not made public, it is unknown whether or not the Federal Ministry for Interior Affairs produced a circular on the implications of the *Metock* ruling. Article 3(2) family members also benefit from the *Metock* decision in *Ireland*. In the *United Kingdom*, most cases concerning family permits have been given priority over other applications and have been dealt with swiftly since the issuing of

<sup>92</sup> Article 9a LERD.

<sup>93</sup> Explanatory report of the Government to the draft law, which was then adopted as Act. No. 427/2010 Coll., available at: <http://www.psp.cz/sqw/text/tiskt.sqw?O=6&CT=70&CT1=0> (Czech only, accessed June 10, 2011). Section 22(5), 23(2) and 26 (1) and (3) EU Residence Order.

<sup>94</sup> Section 153(3) of the Aliens Act as amended by the Act 432/2010. Entry into force: 1 July 2010. Visa are issued in accordance with Chapter III of the Visa Handbook 2010, that is in line with the *Metock*-ruling.

<sup>95</sup> Circulaire No. NOR/IMIM/1000/116/C du 10 septembre 2010 relative aux conditions d'exercice du droit du séjour des ressortissants de l'Union européenne, des autres Etats parties à l'Espace économique européen (EEE) et de la Confédération Suisse, ainsi que des membres de leur famille, texte non paru au Journal Officiel.

<sup>96</sup> Decree-Law No. 89 of 2011. The local authorities were informed of the discrepancy between national and EU law by circular letter of 10 November 2010 No. 7645.

<sup>97</sup> SI 2011/1247, entered into force: 1 June 2011.

guidance after *Metock*. Entry clearance posts also clearly seem to understand that no fee is chargeable.

From the following reports it can be deduced that that these Member States have also embraced the second point made by the CJEU in the *Metock* ruling, i.e the rules in Directive 2004/38/EC can be relied on irrespective of the residence status of a third-country national at the time when the relationship with the EU-citizen started: *Austrian, Belgium, Finish, French, Maltese, Portuguese and Spanish*. In Sweden the Tax Agency has confirmed that a relationship between a family member and an EU-citizen can be established after entry to Sweden.<sup>99</sup> From the information provided it is not possible to establish whether this is general practice in Sweden or not.

## Case law

In the following Member States the courts have handed down case law in which the *Metock* ruling is mentioned: *Austria*,<sup>100</sup> *Cyprus*,<sup>101</sup> *France*,<sup>102</sup> *Ireland*,<sup>103</sup> *Italy*,<sup>104</sup> *Dutch*,<sup>105</sup> and *Spain*<sup>106</sup>. The *Bulgarian and Estonian* rapporteurs explicitly mention that there is no case law available.

The *French* case law concerns the obligation to obtain an entry visa. In a decision of 2 February 2010<sup>107</sup>, the Conseil d'Etat in an urgent procedure, refused a request for suspension of the refusal of a long stay visa to a Moroccan national on the ground that at the time of her application she was not a dependent relative in the ascending line of an EU worker (her Spanish national son working in France). The basis for the decision was that she had not produced sufficient evidence that her son had been sending her money regularly and further the French authorities were not satisfied that the Spanish national could afford, on his salary to take charge of another family member when he already had four children at home to support.

<sup>99</sup> Skatteverkets ställningstaganden, Folkbokföring av EES-medborgare och deras familjemedlemmar (1 June 2010) Dnr/målnr/löpnr: 131 380303-10/111. Information retrieved on 7 June 2011 from: <http://www.skatteverket.se/rattsinformation/stallningstaganden/2010/stallningstaganden2010/13138030310111.5.1a098b721295c544e1f80005173.html>.

<sup>100</sup> Administrative Court, 2 July 2010, 2007/09/0194, *ibidem.*, 9 November 2010, 2007/21/0558, *ibidem.*, 14 December 2010, 2008/22/0175, *ibidem.*, 14 December 2010, 2008/22/0846, *ibidem.*, 7 April 2011, 2011/22/0005, *ibidem.*, 12 April 2011, 2007/18/0241.

<sup>101</sup> Supreme Court, *Svetlana Shalaeva v. Republic of Cyprus*, No. 45/2007, 27 April 2010.

<sup>102</sup> CAA de Marseille, 18 novembre 2010, n°08MA03953, *Ramos Martins c Préfet de la région Provence-Alpes-Côte-d'Azur* (no explicit reference to *Metock*), CAA Marseille, 28 mars 2011, n°09MA01719, *Trapani c Préfet du Vaucluse*, CAA Marseille, 12 mai 2011, n°09MA02203, *Mballa Ze c Préfet de la région Provence-Alpes-Côte-D'azur and CAA Paris*, 18 février 2010, n°09PA04280.

<sup>103</sup> *Tagni v Minister for Justice, Equality and Law Reform*, (2009) JR 598.

<sup>104</sup> Court of first instance of Vicenza, decree 6 April 2010, Court of first instance of Asti, decree 30 July 2010, Court of first instance of Vicenza, decree 7 October 2010, Cassazione, Civil Branch, judgment 23 July 2010 No. 17346 (on this case: P Morozzo della Rocca, Sul coniuge di cittadino europeo (italiano) la Cassazione non si conforma alla giurisprudenza della Corte di giustizia, *Corriere giuridico*, 2010, 1582) and Cassazione, Criminal Branch, judgment 28 April 2010 No. 16446.

<sup>105</sup> ABRvS, 7 September 2010, 201000085/1/V1, LJN: BN6683, *JV* 2010/438.

<sup>106</sup> High Court of Justice of Castilla y León, 66/2010 of 29 January 2010.

<sup>107</sup> CE, réf., 2 févr. 2010, no 334549, Zammouri

The only case handed down by the *Irish* courts, concerned the review of applications made after 28 April 2006 which had been refused because there was no prior lawful residence. The Irish rapporteur mentions that it is unknown in how many cases an application for review has been lodged. In the case that made it to court, the court declared that the Minister for Justice, Equality and Law Reform had failed to render a decision on the issue of residence within a reasonable time.

In *Italy* the courts of first instance appear to be happy to comply with the *Metock* ruling. The Italian Supreme Court, however, has ruled that the residence card does not have declaratory effect. According to the Supreme Court the right of residence in Italy until a residence permit has been issued is governed by national law.

The *Luxembourg* Ombudsman recommended that a third-country national who married a Luxembourg citizen during the period of validity of his short-stay visa should be granted residence permission.

The *Dutch* Council of State has explicitly stated that *Metock* only concerns the situation in the host-Member State and not the rights of family members in the Member State of which the EU-citizen is a national (return cases).

### **Miscellaneous**

Though retrospective application of the *Metock* judgment is not an issue in *Cyprus*, the rapporteur feels that there is a strong case for correcting situations and reconsidering cases where previous legal residence was considered to be a necessary requirement, as is happening in Ireland.

In *Denmark* and *Ireland* prior lawful residence is no longer requested. This acknowledgement of the CJEU's ruling in *Metock*, however, has been accompanied by increased efforts of the authorities to prevent abuse of free movement rights. A similar development is witnessed in *Sweden* in relation to marriages of convenience (see section 4).

The concerns reported by the *Lithuanian* rapporteur regarding third-country national family members of Lithuanian nationals in previous reports have been resolved. Article 100(2) of the new Aliens Act provides the dire needed clarification.

The *Dutch* government has expressed its intention to open negotiations at the European level to end the so-called 'Europe route'.

## II.4. Abuse of rights, i.e. marriages of convenience and fraud

Fraud and abuse of the right to free movement are grounds to refuse, terminate or withdraw a residence permit in most Member States. Most frequently, Member States regulate marriages of convenience through their immigration rules, either through their definition of spouse or by including fraud as a ground to revoke, terminate or withdraw rights or a combination of both. *Belgium*, that is still in the process of adopting legislation on marriages of convenience,<sup>108</sup> and *Spain* address marriages of convenience through their Civil law. Other Member States use their Civil Code in combination with their immigration rules to combat marriages of convenience (e.g. *Austria*, *Ireland* and the *Netherlands*). No information on abuse is included in the *Cypriot* report.

In *Austria* a court decision annulling a marriage is not necessary to withdraw a residence right granted on the basis of a marriage of convenience. In *Greece* and *Malta* a marriage of convenience has to be proven in court.

In *Austria* and *Poland*, it is a criminal offence to contract a marriage of convenience. Amendment I 135/2009, that introduced Section 30a into the *Austrian* SRA, has made it impossible to benefit from a forced marriage in terms of residence rights.

In *Austria*, *Slovenia*<sup>109</sup> and the *United Kingdom* the rules also apply to non-marital relationships. Proposals that include non-marital relationships are pending in *Belgium* and *Lithuania*.

In *Germany*, *Lithuania*, *Romania* and *Slovakia* there are no special rules applicable to a marriage of convenience involving a beneficiary of Directive 2004/38/EC. This issue is covered in their general immigration laws. In *Germany*, however, these rules do not apply to beneficiaries of Directive 2004/38/EC. In *Lithuania*, Article 110(1) § 2 and § 4 of the draft for a new Aliens Law will provide for the termination of rights derived from a relationship with an EU/EEA national if obtained through fraud or if there are serious reasons to believe that the marriage, registered partnership or adoption is to be qualified as one of convenience.

Marriages of convenience are covered by Section 138 of the *Irish* Immigration, Residence and Protection Bill 2010, that was restored by the incoming government on 23 March 2011. It is, however, unknown when this legislation will be passed and a recent statement of the Minister for Justice, Equality

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<sup>108</sup> Six proposals have been presented to the Belgium Parliament, all of which still have not been voted on: Doc 53, 0481-001; Doc. 53, 1102-001; Doc. 53, 0890-001; Doc. 53, 0718-001; Doc. 53, 0719-001 and Doc. 53; 0891-001. In May 2011, Parliament adopted a law that reinstated reverse discrimination that is designed to combat marriages of convenience involving Belgium nationals.

<sup>109</sup> Article 128 new Aliens Act.

and Law reform suggests that the envisaged rules on marriages of convenience may be amended before the Bill is adopted.

From the information provided by the rapporteurs, it follows that the Commission's 2009 Guidelines and the CJEU's case law are used to establish whether a marriage is a marriage of convenience in *Finland*, *the Netherlands* (case law), *Portugal* and *Sweden*.

### **Case law**

In a case in which the *Irish Gardaí* lodged an objection under Section 58 of Civil Registration Act 2004 (which allows for an objection to a marriage before the solemnization takes place on the grounds of marital status, age, capacity, incest and gender) and arrested the groom for attempting to avoid deportation. The Court subsequently held that, according to Irish law, an objection to a marriage can only be made on the basis of capacity, age, marital status, incest or gender of the couple and an alleged marriage of convenience does not fall within any of those grounds.<sup>110</sup> The Court also stated that the State has not provided a legal basis to allow the authorities to prevent an alleged marriage of convenience from taking place. The law, as it stands, provides that an alleged marriage of convenience can only be reviewed by the Department of Justice, Equality and Law Reform following the solemnization of the marriage.<sup>111</sup>

In *the Netherlands*,<sup>112</sup> *Spain*<sup>113</sup> and *Sweden*,<sup>114</sup> the decision that a marriage between an EU-citizen and a third-country national had been correctly labelled a marriage of convenience was upheld by the courts. The *Dutch* National Ombudsman did, however, find a complaint regarding the intrusive nature of the checks performed to establish a marriage of convenience well-founded.<sup>115</sup> A complaint was made to the *Hungarian* Ombudsman by a Hungarian-Egyptian couple who experienced problems in obtaining a Schengen visa for the Egyptian spouse as their marriage was considered to be 'supposedly false'.<sup>116</sup>

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<sup>110</sup> Section 58 of the Civil Registration Act 2004

<sup>111</sup> Section 21 of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006.

<sup>112</sup> Rechtsbank 's-Gravenhage, zp Haarlem, 27 January 2011, Awb 10/37306, Awb 10/37307, LJN: BQ2080.

<sup>113</sup> *Provincial court of Seville*, 127/2010, 22 April 2010 (no prior personal relations between spouses and no cohabitation after the marriage).

<sup>114</sup> Migration Court of Appeal, Case MIG 2009:11.

<sup>115</sup> Report Nationale Ombudsman 2010/194, retrieved from <http://rapporten.nationaleombudsman.nl/rapporten/2010/194>.

<sup>116</sup> Dr. Haraszti Katalin head of unit, Ombudsman Office (31 March 2009) pending.

## Statistical data

The *Irish*, *Latvian* and *Polish* report provide statistical data on the number of marriages of conveniences witnessed in their Member State. In *Greece* abuse of rights is no issue as there are not many EU citizens in that Member State.

*Ireland* is witnessing large numbers of EU citizens and third-country nationals marrying, with the third-country national subsequently applying for residence rights in Ireland on the basis of the spouse's residence rights under EU law.<sup>117</sup> The figures presented in January 2010 for applications made under Directive 2004/38/EC show that, out of a total of 384 Pakistani applicants, 116 were married to Latvians, 50 were married to Poles and 47 were married to Estonians. In 2010 almost 400 residence applications were lodged in that Member State by non-EEA nationals (mainly Pakistani nationals and to a smaller extent, Ukrainian and Indian nationals) following their marriage to Latvian nationals.<sup>118</sup> Interviews are now common practice where there is a suspicion that there is a marriage of convenience and in January 2011 the Minister for Justice, Equality and Law Reform announced that Department officials will 'examine as a matter of urgency the possibility of deploying biometric technology in the context of visa applications from Pakistan. This technology has proven to be very effective to date, particularly in the area of tackling abuses in the asylum, immigration and visa areas of activity'.<sup>119</sup>

Though the number of marriages of conveniences established has declined in 2011, marriages of convenience are a cause for great concern in *Latvia*. The misbalance between men and women over 34 has meant that Latvian women are marrying Turkish and Egyptian nationals whose intention to marry a Latvian national is purely to obtain residence permission not to start family life. A point of serious concern is that an increasing number of Latvian girls who have married third-country nationals resident in Western Europe, in particular Ireland and the United Kingdom, are becoming victims of human trafficking and kidnapping. Groups and schemes of transnational organized crime were discovered by the police in 2010.

In *Poland* a marriage of convenience was established in 185 cases (out of 8.000 applications for residence permission as a spouse), after establishing that the spouses did not live together, did not speak a common language and/or were not familiar with each other's personal details. The majority of cases concerned marriages between Polish nationals and Pakistani, Nigerian

<sup>117</sup> <http://justice.ie/en/JELR/Pages/PR11000079>.

<sup>118</sup> 2010 statistics on the number of applications for residency in Ireland based on marriages to EU spouses indicate that the highest number of applications were made by Pakistani and Nigerian nationals respectively. It is estimated that two thirds of applications by Pakistani nationals involved an EU partner from one of the Baltic States.

<sup>119</sup> <http://www.justice.ie/en/JELR/Pages/2010-asylum-stats>.

and Vietnamese nationals. The Polish nationals received up to 7.5000 Euros for the marriage.

In 2011 the Swedish Migration Board reported 53 cases concerning marriages of convenience.<sup>120</sup> This figure includes marriages involving children under 18.

### **Miscellaneous**

The following information is taken from the *Austrian, Bulgarian, Czech, Danish, Greek, Irish, Italian, Maltese, Dutch, Polish,, Swedish* and *UK* reports.

In *Austria* marriages of convenience, as a ground to refuse or withdraw residence rights, are special reasons within the meaning of Article 8(2) of the ECHR.<sup>121</sup>

In *Bulgaria* a residence permit issued to EU-citizens and their family members can be withdrawn if the right of residence was granted on the basis of incorrect data. To fill the gap caused by the omission to detail the procedures governing the withdrawal of the right of residence, the Bulgarian rapporteur suggests that the rules on marriages of convenience in the Law of Foreign Nationals should be applied by analogy. The evidence that can be used to establish a marriage of convenience listed in that Law corresponds with the Commission's 2009 guidelines.

The *Czech Republic* is experiencing serious problems where the paternity of a child whose mother is a foreigner is recognized by a Czech national to give the child Czech citizenship and the third-country national mother a right to family reunification with the Czech child and the father. According to Czech law the child cannot be deprived of Czech citizenship. The Czech rapporteur questions whether this would be in the best interest of the child as prescribed by Article 3 of the Convention on the Rights of a Child.

In *Denmark, Ireland* and *Sweden* compliance with the *Metock* ruling saw an intensification of the attention of their authorities for situations of abuse and fraud. The *Irish* rapporteur notes that the outlawing of the prior lawful residence test has made establishing marriages of convenience extremely difficult. Since 2008 this Member State has raised the issue during Council of Minister meetings as Ireland is confronted with unusual marriage patterns (see *infra*).

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<sup>120</sup> Skrivelse 15 February 2011 till Justitiedepartementet, Enheten för migration och asylpolitik, *Delredovisning av Migrationsverkets uppdrag att föra viss statistik* (Ju2010/5032/EMA). Available (in Swedish) at: <http://www.migrationsverket.se/download/18.46b604a812cbcd7dba800021229/GD-mall+uppdrag+vers2.pdf>.

<sup>121</sup> Section 60(1) APA.

The 2010 political agreement on the Danish State budget has seen an increase of 25 % (up to 50%) of random checks to establish possible fraud or abuse of the EU rules on residence rights, in particular concerning third-country family members of Danish citizens returning from another Member State.<sup>122</sup>

In Ireland the *Gardaí Síochána* (the national police force), as part of Operation Charity (aimed at tackling marriages of convenience), has lodged objections to alleged 'sham marriages' with marriage registrars.<sup>123</sup> It is estimated that the *Gardaí* have objected to 150 alleged marriages of convenience. It is reported that only three of these were upheld by marriage registrars on the basis that there were concerns over identity-fraud resulting from false documentation. It is also reported that the objections were not upheld on the basis that they were suspected marriages of convenience. In a case taken by a couple whose marriage was stopped because the *Gardaí* objected on the grounds that it was a marriage of convenience.<sup>124</sup>

In Italy the 2009 amendment of Article 116 of the Civil Code has meant that every non-national marrying in Italy not only has to submit a statement of the competent authorities in the country of nationality regarding marriage impediments, but also has to provide evidence that residence in Italy is lawful. It is now clear that Article 116 of the Civil Code applies to third-country national family members of EU-citizens.<sup>125</sup>

In the Netherlands and Sweden, there is an assumption that the information provided regarding a marriage is correct. Where doubts arise, it is for the national authorities to provide evidence that the marriage is one of convenience which justifies further examination into the nature of the relation between the spouses.

An envisaged amendment to the Dutch Civil Code and several related legislative acts, required by the entry into force of the *Wet elektronische dienstverlening burgerlijke stand* [Act on online services for the Registry Office], will mean that where a marriage is envisaged and at least one of the partners is not a Dutch national, the spouses-to-be will have to state in writing that their marriage is not a marriage of convenience. This so-called 'own statement' (*eigen verklaring*) will replace the current statement of the head of the local police concerning lawful residence. The 'own statement' will be filed and can be used by the Immigration and Nationality Department to

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<sup>122</sup> Finanslov 2010: Initiativer på Integrationsministeriets område, Press release from the Ministry of Refugee, Immigration and Integration Affairs, 12 November 2009.

<sup>123</sup> Irish Times, James Smyth, Just three of 150 objections to marriages upheld, March 21 2011.

<sup>124</sup> *Izmailovic and Elmorsy v Commissioner of an Garda Síochána, Minister for Justice, Equality and Law Reform*, (2011) IEHC 32.

<sup>125</sup> On this amendment, see: D. Berloco, I casi più ricorrenti di matrimoni tra cittadini e stranieri, *Lo stato civile italiano* (2010-3), p. 7-14 and P. Palermo, Diritto al matrimonio e 'clandestinità': tra diritti fondamentali e discrezionalità del legislatore, *Famiglia e diritto* (2010), p. 1155-1164.

prevent and combat marriages of convenience. False statements will amount to a criminal offence,<sup>126</sup> justify termination of the right of residence and will be the legal basis for an administrative fine once the new rules enter into force. A new section will be added to Article 1:58 of the Civil Code explicitly stating that no marriage can be convened if the primary intention of the marriage is to acquire a right of residence in the Netherlands. An exemption will be provided for non-nationals who have a permanent residence status or derive a right of residence from European law. The use of the word '*gemeenschapsonderdaan*' suggests that this exemption should include the third-country national spouse-to-be of an EU-citizen. However, this is not explicitly spelled out.<sup>127</sup>

As an external border Member State, marriages of convenience are taken seriously by the *Polish* authorities. Special seminars and workshops are given to the authorities who are responsible for the detection of marriages of convenience.

In *Poland*, if there is a child born out of a marital relationship, the latter is assumed to be a true marriage, not a marriage of convenience.<sup>128</sup> If a marriage is found to be a marriage of convenience and one of the spouses is a Polish or EU-citizen with permanent residence, the expulsion order is not executed, unless there is a threat to State security, defence or public security and policy. The only exception being that the sole purpose of marriage was to avoid the execution of an expulsion order.

In *Romania*, only marriages which involve third-country national are verified for the purpose of establishing if there is a marriage of convenience. If the third-country national's EU-citizen family member has resided in another Member State as a beneficiary of Directive 2004/38/EC verification does not take place.

In *Sweden*, applications for a residence permit as a spouse made by minors, though not explicitly provided for, are regularly refused, though there are no explicit rules on this issue. Where a child has been born from the relationship or the wife is pregnant, a residence permit is granted even if the application was made by a minor. The results of a public investigation are due in May 2012.

The obligation to obtain a certificate of approval from the *United Kingdom* Home Office for a marriage with a person subject of immigration control (this includes third-country national family members of EEA nationals) re-

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<sup>126</sup> Article 227-227b of the Criminal Code.

<sup>127</sup> Tweede Kamer 2009-2010, 32 444, Wijziging van Boek 1 van het Burgerlijk Wetboek en enige andere wetten in verband met de inwerkingtreding van een elektronische dienstverlening bij de burgerlijke stand (Wet elektronische dienstverlening burgerlijke stand), No. 4, p. 7-8.

<sup>128</sup> Files No. V SA/WA 189/09.

quired approval of parliament, which was expected to be given on 9 May 2011. Damage claims by those refused permission under this scheme, designated as unlawful by the British courts and the ECtHR, are possible following the ECtHR's judgment in '*O'Donoghue v UK*'.

## II.5. Access to work

With a few exceptions, in most Member States a work permit is not required to take up employment, neither for EU-citizens nor their family members. This is, however, not the situation in *Estonia* where third-country national family members still need a work permit during the initial three months and until residence permit is issued, *Latvia*, where the position of third-country national family members prior to the issuing of a residence permit is not explicitly regulated and *Lithuania* where a list of exemptions establishes which third-country national family members do not need a work permit. In *the Czech Republic* the employer is still obliged to inform the labour office when non-national workers are employed.<sup>129</sup> In *Cyprus* family members in same sex relations are equated to third-country national workers with restricted access to the labour market.

The following rapporteurs explicitly state that there is nothing to report on this issue: *Belgian, Bulgarian, Danish and Luxembourg*. The *Belgium* rapporteur does, however, report that as a result of the decision in *Ruiz Zambrano*, the father of a Belgium national residing in Belgium is entitled to a work permit. In the following reports no (new) information is provided: *Finnish, German, Greece, Malta, Portugal, Slovakia, Spain, Sweden and the United Kingdom*.

Legislative amendments are reported by the *Austrian and Slovakian* rapporteurs. The Austrian amendment entered into force on 1 July 2011. Section 1 § 2 l and m of the Aliens Employment Act now specifies that:

- foreigners, who are entitled to free movement of workers according to a legal act of the European Union (l) and
- the spouse and minor unmarried children (including adopted children and stepchildren) ('core family') of Austrian citizens who are entitled to reside according to the SRA (m).

Sub-section l covers third country national family members of EU-citizens and Bulgarian and Romanian citizens if they qualify as family member of an EU-citizen. Third-country national family members of Austrian citizens are captured by sub-section m, so have to qualify as a member of the 'core family'. *Slovenia* witnessed the adoption of the Employment and Work of Aliens Act

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<sup>129</sup> Sect. 87, 102, Employment Act

on 29 March 2011<sup>130</sup> which now expressly provides for a family member's free access to the labour market. This right, found in Article 15(2), is subject to having obtained a temporary residence permit for a family member or a visa for long-term residence, unless an international treaty determines otherwise or the National Assembly adopts the measures as referred to in the third paragraph of Article 2 of the Act.<sup>131</sup> *Romania* still does not have special rules on the access to the labour market by EU citizen's family members – the general rules apply.

The following information is drawn from the *Cypriot, Estonian, French, Hungarian, Irish, Italian, Dutch, Polish* and *UK* reports.

In Cyprus it was necessary to submit a Certificate of Registration as a precondition for access to health and pharmaceutical services; the *Cypriot* government has now instructed its authorities to accept other evidence of an applicant's identity and permanent residents in Cyprus when seeking access to health and pharmaceutical services.<sup>132</sup>

Though a prohibition of discrimination applies in *Estonia*, language requirements can still be imposed.

Upon request, the *French* authorities issue a residence permit to family members who themselves are EU citizens which spells out their position as an EU-citizen's family member and that they can take up any paid activity.

As reported in the European report 2009-2010 the *Irish* Naturalisation and Immigration Service has moved third-country national family members from the 'Stamp 4-procedure' to the 'Stamp 3-procedure', which took effect on 1 June 2010. This means that third-country national family members cannot work until they have obtained a residence card. This change in policy was successfully challenged in a High Court case in 2010.<sup>133</sup> As a result, a third-country national family member of an EU-citizen has the right to work from the date of receipt of a letter of acknowledgment of a valid residence application from the Department of Justice, Equality and Law Reform. However, this right can be revoked with retroactive effect should the Department of Justice, Equality and Law Reform lawfully refuse to issue a residence card within six months.

In *Italy* no provision is made to ensure that third-country national family members have access to the public sector. In many cases they are not eligible to take part in competitions for a position in the public sector. In 2010 the

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<sup>130</sup> Official Gazette, No. 26/2011, ZZDT-1.

<sup>131</sup> According to paragraph 3 of the Article 2 the Government may propose to the National Assembly to introduce or eliminate measures provided for by the international treaties (transitional period or protection clause).

<sup>132</sup> Circular Ref. YY4.2.13.10.22 of 30 July 2011.

<sup>133</sup> *Decsi and Zhao v Minister for Justice, Equality and Law Reform*, (2010) JR 858.

Venetian court of first instance ruled that the Albanian wife of an Italian, who had been issued a residence card under Legislative Decree No. 30 of 2007, was entitled to participate in the competition for the post of a street educator organized by the Municipality of Venice.<sup>134</sup>

The policy rules in the *Dutch Vreemdelingencirculaire* (B10/5.2.2.) now explicitly spell out a family member's right to take up paid employment without a work permit. This right is subject to the condition that the EU-citizen is resident in the Netherlands. The right of residence is evidenced by a sticker in the passport stating that employment is permitted. In three court cases, the District courts established that for the purpose of legal redress, the act of affixing this sticker in a passport is a legal decision that can be contested under Article 72(3) *Vreemdelingenwet*. On the substance these courts argued that by affixing a sticker in the passport that work was not permitted, the Dutch authorities had acted unlawfully, as at the moment of the application it had been established beyond doubt that the applicant was a beneficiary of Directive 2004/38/EC and by virtue of that fact enjoyed the right to take up paid employment from the moment the application for a right of residence as a family member of an EU-citizen had been lodged.<sup>135</sup> The District Courts emphasize the declaratory nature of documents evidencing rights which are derived from European law and that the right to take up an economical activity is such a right as it follows directly from Article 23 Directive 2004/38/EC.

In *Poland* the right to take up employment is explicitly extended to family members who have a right to remain under Articles 12 or 13 of Directive 2004/38/EC. On 25 May 2011, the Polish Act on Entry was amended. Article 19a now provides that the caring parent of a child following education, as provided for by the CJEU in the *Ibrahim and Teixeira* cases, has a right to take up employment without a residence permit. The corresponding provision in the Act on Promotion of Employment, however, has not been amended. There has been no time for this discrepancy to give rise to case law.

The problems encountered by third-country national family members who want to pursue an economic activity reported by the *British* rapporteurs in their 2008-2009 and 2010-2011 reports are still everyday reality in 2010-2011. It is hoped that the reference to the CJEU in *MR and others*<sup>136</sup> will also provide clarity on the position of family members vis-à-vis the labour market. Increas-

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<sup>134</sup> Order of 8 October 2010.

<sup>135</sup> Rechtbank 's-Gravenhage, z.p. Amsterdam, 5 November 2010, Awb 09/35659, LJV BO 7515, JV 2011/60, cons. 7, Rechtbank 's-Gravenhage, z.p. Amsterdam, 4 May 2011, Awb 10/29769, cons. 10 and President Rechtbank 's-Gravenhage, z.p. Amsterdam, 11 May 2011, Awb 11/10661, cons. 5. See for a case where no right of residence was derived from EU law, because the child with whom residence was envisaged did not satisfy the requirement of sufficient financial means: Voorzieningenrechter Rechtbank 's-Gravenhage, zp Haarlem, Awb 10/30126, LJV: BP5960, cons. 2.12. In this case the act of affixing a sticker to the passport was considered lawful.

<sup>136</sup> *MR and others (EEA extended family members) Bangladesh* [2010] UKUT 449 (IAC).

ingly stringent monitoring of compliance of EU 8 workers with the *Worker Registration Scheme* for a year and to reregister if they change employment within the first year has meant that their third-country national family members are experiencing delays in obtaining documentation. Problems concerning the access to the labour market are also experienced by EU-citizens in *Chen*-situations.<sup>137</sup> A recent Upper Tribunal case suggests that there is a right under EU law for the parent carer to enter (not just to remain) subject to meeting the conditions implied in *Chen*.<sup>138</sup> Consistent with UK case law, the leave that is currently granted precludes employment or recourse to public funds. In light of the concerns raised by the Commission in relation to the restriction of the UK immigration rules to allow parents in *Chen* type scenarios to work and its incompatibility with Article 23 of Directive 2004/38/EC, the UKBA has indicated that this is will be amended which will mean that *Chen* parents will be allowed to work. No time frame for the change to the Immigration Rules has been announced. Questions of parental self-sufficiency and right to work must now be even more in question following *Ruiz Zambrano*.

## II.6. The situation of family members of job-seekers

The position of the family members of EU job-seekers remains very much the same. The majority of Member States have no rules concerning the position of EU job-seekers. In most Member States family members of job-seekers generally derive their right of residence from Article 6 Directive 2004/38/EC. The Maltese rapporteur mentions an obligation to register with the official authorities as a job-seeker. In *Estonia*, a third-country national family member will, as a rule, need a visa to remain in that Member State unless a mutual agreement provides otherwise. Family members who themselves are EU citizens can remain in that Member State with the EU job-seeker without further formalities. In *Cyprus* same-sex family members do not share in the right to a job-seekers allowance/unemployment benefit even if they are registered and they have paid contributions.

In the following Member States there have been no problems regarding family members of EU job-seekers and/or there is no case law on this issue, or no (new) information is provided: *Austria, Cyprus, Denmark, France, Finland, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Romania, the Slovak Republic, Slovenia* and *Spain*.

The following comments are taken from the *Irish, Latvian, Lithuanian, Polish, Swedish* and *UK* reports

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<sup>137</sup> CJEU case C-200/02, *Kunqian Catherine Zhu, Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

<sup>138</sup> M (*Chen parents: source of rights*) *Ivory Coast* [2010] UKUT 277 (IAC).

The 'lack of transparency' on the situation of EU job-seeker's family members, as reported by the *Irish* rapporteur in his previous reports, remains. Like in Ireland, the situation of family members remains somewhat unclear in the *United Kingdom*. An additional concern in the latter Member State are the delays in dealing with applications that is also affecting family members of EU job-seekers as they are being requested for updated information on the position of the EU-citizen, i.e proof that the latter is still seeking work. A further problem concerns the right of access to education that children enjoy by virtue of Article 12 Regulation (EEC) No. 1612/68, as they may be informed that they no longer have a right to remain in education in the event that their parent does not find work.

To be registered as a job-seeker in *Latvia*, a family member of an EU-citizen has to register as unemployed or job-seeker, which is not possible without a residence permit.<sup>139</sup> The processing of the latter can take 30 days, but, in practice, is issued more quickly.<sup>140</sup> To enjoy exportable social benefits registration as a job-seeker is necessary. Problems may occur for job-seekers if they need social assistance (requires a residence permit and personal code)<sup>141</sup> or want to follow education (requires a residence permit).<sup>142</sup>

In *Lithuania*, third-country national family members of EU job-seekers are only exempted from the obligation to obtain a work permit if they have entered that Member State for the purpose of family reunion, as intern or for the purpose of following vocational education that does not exceed a period of three months in a year. A report in the SIS does not affect these rights according to the Higher Administrative Court.

In *Poland* the Act on the Promotion of Employment and Labour Institutions provides for equal treatment of EU-citizens and their family members regarding job support services. This does not include a right to financial allowances. As the definition of family member in the Act on the Promotion of Employment does not cover dependant direct relatives in the ascending line there is a discrepancy between that Act and the Act on Entry. In *Sweden* family members of EU job-seekers are exempted from the obligation to obtain a residence card.<sup>143</sup> Their right of residence follows from Chapter 3 § 4, referring to § 3(2) of the Aliens Act. They also enjoy a right of equal treatment.<sup>144</sup>

<sup>139</sup> Article 2(2)(2) Law on the Support of Unemployed and Jobseekers, OG No. 80, May 2002, as amended until 2010, OG No. 51/52, 10 March 2010.

<sup>140</sup> Article 49 Regulations No. 243.

<sup>141</sup> Telephone interview with the Head of Migration Department of OCMA, 29 June 2011.

<sup>142</sup> Article 3 of Education Law, OG No.343/344, 17.11.1998, as amended until 2010, OG No. 205, 29 December 2010.

<sup>143</sup> Concerning judicial practice, in 2009 the Migration Court of Appeal in Case MIG 2008:34 decided that – referring to the Aliens Act Ch. 3a 10 § – the non-possibility to appeal against a decision on a residence card, is not contrary to EU law, as the card *per se* is not connected to any right. However, referring to Directive 2004/38/EC, there is an unconditional right to examine the right of residence before a court.

<sup>144</sup> Compare Socialstyrelsen (the National Board of Health and Welfare), *EG-rätten och Socialtjänsten – en vägledning*, Stockholm 2008, p. 47 ff.

There is a presumption that the pilot schemes of the UK Home Office, targeting homeless EU 8 nationals who are not in work and requesting them to leave the country within a month, which were mentioned in the 2009-2010 report, affect their family members

## II.7. Concluding remarks

Like in previous reports, the information provided on the implementation of the rules concerning an EU-citizen's family members reveals that – with some exceptions – the rules in Directive 2004/38/EC are respected and complied with in law and practice by the Member States. The increasing number of cases reaching national courts, as reported in the 2009-2010 report, has continued in 2010-2011. The position of nationals in their own Member State remains a point for concern. Though nearly all Member States recognize the right to return with family members, a number of Member States would like to see the CJEU's decision in the *Metock* case overturned. The *Metock* ruling saw a number of Member States shifting its attention to detect marriages of convenience, with differing results. It is still too early days to pass judgment on compliance with the CJEU's decision in the *Ruiz Zambrano* case. This year, references to the Commission's 2009 Guidelines are reported by various rapporteurs for the first time, as their national courts are relying on these guidelines to adjudicate in cases concerning rights in Directive 2004/38/EC.



## CHAPTER III ACCESS TO EMPLOYMENT: PRIVATE SECTOR AND PUBLIC SECTOR

This chapter gives an overview of the most important developments on the issue of access to employment in the period between June 2010 and June 2011. In section 1 the private sector will be addressed and in section 2 the public sector.

### III.1. Access to employment in the private sector

In all Member States equal treatment of EU citizens as regards access to employment is guaranteed by general legislation on equality and non-discrimination or by specific labour law. Some of the provisions refer to non-discrimination on ethnical or national origin, religion, age or sexual orientation and not explicitly to non-discrimination on nationality. In other countries like *Bulgaria* discrimination on the basis of nationality is explicitly prohibited, save in cases where the nationality requirement is stipulated by law. For a complete overview see the special report of the Network on the application of Regulation 492/2011 codifying Regulation 1612/68, <http://ec.europa.eu/social/main.jsp?catId=475&langId=en>.

One of the most important restrictions for access to employment – in the private as well as in the public sector – are the rules making this access dependent on authorisation and/or the possession of a certain diploma, showing that the applicant has the necessary professional qualifications.

In *France* during the year 2009, several decrees were adopted, aimed at recognising vocational qualifications and/or the professional experience of Union nationals for the purposes of practising certain activities – as a worker or as a self-employed person – in France. These decrees also include specific provisions concerning the free provision of services and freedom of establishment.

The *Portuguese* report that several acts regulating a particular profession open it implicitly or explicitly to EU citizens (notaries, private security, solicitor, psychologist and accountants).

The *UK* rapporteur remarked that in practice in some sectors, (EU) migrant workers enjoy preferential treatment in terms of access to certain (low quality) jobs above British workers. In her opinion this is not always to their benefit. A 2010 Equality and Human Rights Commission inquiry uncovered wide-

spread evidence of the mistreatment and exploitation of migrant and agency workers, employed in the meat and poultry processing sector.<sup>145</sup>

In January 2011, 4 international 'Citizen Service Centers' were established in four main cities in *Denmark* (Aalborg, Aarhus, Copenhagen and Odense). The aim of the centers is apparently to make it as easy as possible for foreign employees or job seekers and Danish employers to contact the Danish authorities.

In *Sweden*, due to new legislation, only teachers that are certified should be employed on positions as permanently employed teachers. Partly the new regulation will come into force in July 1, 2011, and full implementation will be reached in July 1, 2012.

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

Though discrimination in access to employment in the private sector does not seem to be a major issue in *Belgium*, problems could arise with regard to employment assistance and activation measures. Like many other Member States, Belgium has taken measures to promote the activation of job seekers. However, it is difficult to portray a simple picture of the existing measures, as these are numerous and because of the federal structure of Belgium.

EU citizens and their family members are formally entitled to public employment services, including assistance of employment agencies. As reported last year, in some countries there are practical problems regarding the registration of EU job-seekers for this assistance (*Bulgaria, Latvia*). Another obstacle is the sole use of the national language by the employment agency (*Cyprus, Latvia*).

In *Bulgaria* there is a provision in labour law that documented job-seekers who are EU citizens or family members have the same rights and obligations as Bulgarian nationals. However, the national law transposing Directive 2004/38 does not envisage a right of residence over 3 months for EU citizens who are documented job-seekers.

An issue of concern is still the fact that public employment agencies in *Cyprus* do not provide services in any language other than Greek which may be a barrier to Union citizens who are non-Greek speakers. Given that almost all civil servants and the vast majority of people are fluent in English it would not be difficult to make such services available in English.

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<sup>145</sup> <http://www.equalityhumanrights.com/media-centre/2010/march/inquiry-uncovers-mistreatment-and-exploitation-of-migrant-and-agency-workers/>.

In *Latvia*, EU and EEA citizens are formally entitled to any employment assistance and vocational training on equal basis once they have been registered officially as unemployed or jobseekers by the State Employment Agency. However, insufficient knowledge of the Latvian language still creates a serious obstacle, since all services and support is provided in Latvian only and it is almost impossible to get any employment in Latvia without knowledge of the official language.

In 2011 in *Denmark* the Act on *Danish Courses for Adult Aliens et al.* and the Act on *Integration* were amended to ensure compatibility with Directive 2004/38. According to the Act amending the Act on *Danish Courses for Adult Aliens* and the Act on *Integration*, the provisions thus clarify EU citizens' entitlement to Danish courses and introductory courses on the basis of presenting evidence of the status as a worker etc. pursuant to the EU rules, as opposed to the previous requirements on presentation of registration certificate and registration in the Civil Registration System. According to the Act on *Integration*, EU citizens and their family members are now comprised by the Act. This means that EU citizens and their family members residing in Denmark on the basis of the EU rules on free movement are entitled to an introductory course offered by the municipalities pursuant to the Act. The introductory course comprises a Danish course, a course in the Danish society, culture and history and offers aiming at employment.

In *Hungary* access to employment in the private sector is free for Union nationals and their family members. Usually employment is not subject to additional conditions. However, in certain cases affiliation to a certain chamber is required for the pursuit of a given profession (e.g. Chamber of Attorneys) union citizens are entitled to register. Due to recent changes (with effect from 1 April 2011) the health care professionals (doctors, pharmacists etc.) are again required to be affiliated to their respective chamber as a pre-condition of their lawful exercise of activity. The mandatory affiliation was terminated in 2006 and was criticized continuously, that is why one of the first actions of the new government was to restore the mandatory membership which contributes to professional supervision and credibility.

During 2010, there have been changes in administrative structures related to recognition of professional qualifications in *Lithuania*. Namely, the coordination functions for recognition of regulated professional qualifications were transferred from the MSSL to the Ministry of Economy from 1 July 2010. In this connection, there were several legislative developments during 2010 (including: amendments to the Law on Recognition of Regulated Professional Qualifications; appointment of the coordinator for recognition of qualifications; order on issuance of certificate on professional experience and its' duration for EU/EEA nationals departing from Lithuania; approval of a list of regulated professions; approval of composition of the National Council for Rec-

ognition of Professional Qualifications). In addition, legal acts of various institutions were amended as per comments of the European Commission concerning temporary provision of services under regulated professions, whereby verification of professional qualifications was eliminated, because certain professions are not related to public health and safety (architect, restaurateur, pedagogue, guide and social worker). Also, the list of regulated professions in Lithuania was complemented by profession of a construction engineer in 2010. Draft resolution of the Government on recognition of professional qualifications of third country nationals was prepared and coordinated with relevant institutions. It is due to be submitted to the Government for approval at the end of June 2011.

### III.1.2 Language requirements

There are no explicit statutory language requirements for private employment in *Austria, Belgium, Denmark, Finland, Greece, Ireland, Italy, Malta, The Netherlands, Portugal, Sweden and the UK*. But in practice, in all Member States applicants for most white collar jobs will always be required to have a good knowledge of the language of the country they seek work.

As already noticed in the 2009-2010 report, language requirements are also sometimes 'hidden' in the legislation regarding the recognition of diplomas and professional qualifications. For several regulated professions a formal or a practical language requirement exists. In *France* a general provision states: *A national of a Member State of the European Community or of another State party to the European Economic Area agreement whose vocational qualifications have been recognized must have the linguistic knowledge necessary to practise the intended profession in France*. In some states, as for instance *Cyprus, Estonia, Latvia, Lithuania, Luxembourg and Slovakia*, language requirements represent still a serious obstacle for the access to employment of EU migrant workers.

In *Bulgaria* in July 2010 important legal amendments in the Attorney's Act were adopted in order to transpose *Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained*.<sup>146</sup> The legal change abolished the condition previously envisaged in the Attorney's Act that a lawyer who is an EU, EEA or Swiss citizen was allowed to practice in Bulgaria only together with a barrister from the Bulgarian Bar. The new provisions provide for equal access to the practice of the profession of lawyer in Bulgaria for EU citizens who have acquired their professional qualification in an EU Member State. Still, however, it is noteworthy that the official language in Bulgarian institutions (including judicial hearings) is Bulgarian.

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<sup>146</sup> State Gazette No.53 of 13 July 2010.

Language requirements may constitute indirect discrimination on grounds of ethnic origin in situations where an employer imposes a language requirement which is not reasoned/objectively justifiable, is disproportionate and without relevance for the maintenance of the job in question. Hence in *Denmark* the *Board of Equal Treatment* (dealing with cases on direct and indirect discrimination inside and outside the labour market)<sup>147</sup> has in various cases decided on the compatibility of language requirements with the Act.<sup>148</sup>

In the *Czech Republic* knowledge of the Czech language can be required for some professions, where the language is so important that it constitutes the basic element of the profession. (a.o. doctors, dentists and pharmacists). Knowledge of the Czech language is also required for performance of a regulated activity, but it may be required only to the extent that is necessary for a pursuit of a regulated activity.<sup>149</sup> Czech Public Defender of Rights criticized the job advertisements for being discriminatory (every 6th advertisement pursuant to his analysis) in June of 2011. The Ombudsman pointed at the discriminatory character of those advertisements in their requirements of e.g. specific gender, marital status, age or knowledge of Czech language, where he explicitly mentioned the necessity to comply with relevant EU laws.<sup>150</sup>

The *Estonian* government still requires employees both in the private and public sector to be able to communicate in Estonian. There are three levels for understanding Estonian language: A, B and (the highest) C. According to the Language Act<sup>151</sup> employees of state agencies administered by government agencies and of local government agencies, and employees of legal persons in public law and agencies thereof, notaries, bailiffs and certified interpreters and translators and the employees of their bureaus must be able to communicate in Estonian at the level which is necessary to perform their service or employment duties.

In *Finland* it is rather common to require that employees command Finnish and in some cases also Swedish. According to a 2010 survey published by the Confederation of Finnish Industries, over the past five years the relative significance of the knowledge of Swedish has decreased and the importance of other languages such as Russian, German, Spanish and Portuguese has increased.<sup>152</sup>

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<sup>147</sup> Official website <http://www.ligebehandlingsnaevnet.dk/>.

<sup>148</sup> Cf. Case No. 53/2011, decision of 29 April 2011 and Case No. 116/2010, decision of 10 December 2010.

<sup>149</sup> Sec. 21 Act on Mutual Recognition of Qualifications.

<sup>150</sup> See <http://www.ochrance.cz/tiskove-zpravy/tiskove-zpravy-2010/kazdy-sesty-inzerat-nabizejici-praci-je-diskriminacni> (Czech only, accessed May 12, 2011).

<sup>151</sup> Keeleseadus –RT I 1995, 23, 334 I 2005, 1, 1.

<sup>152</sup> [http://www.ek.fi/www/fi/tutkimukset\\_julkaisut/2010/6\\_ksa/Tyoelamassa\\_tarvitaan\\_yha\\_useampia\\_kielia.pdf](http://www.ek.fi/www/fi/tutkimukset_julkaisut/2010/6_ksa/Tyoelamassa_tarvitaan_yha_useampia_kielia.pdf).

Generally speaking, the legal rules on the different medical professions require sufficient knowledge of the German language in order to communicate with their clients. The Federal Regulation for practicing medicine provide that an applicant in order to receive the admission as a medical doctor (Approbation) must dispose of the required language skills necessary for exercising the medical profession.<sup>153</sup>

In *Ireland* in relation to *doctors*, the difficulty in assessing the linguistic competence of EU citizens coming to Ireland to practice as doctors was highlighted recently by the Medical Council of Ireland at the seminar on the Free Movement of Workers in Dublin in November 2010.<sup>154</sup> The Medical Council is attempting to address this problem with a number of measures including seeking a declaration on the registration application affirming language skills and utilising the Guide to Professional Conduct and Ethics which provides that if a doctor does not have the professional or language skills necessary, he/she must refer the patient to a colleague who can meet those requirements.

As already reported last year in *Latvia* there are high levels of language knowledge required for a lot of professions (in the private as well as in the public sector), listed in a new 2009 Regulation No.733, titled 'On the level of knowledge of official language and procedure for verification of official language proficiency necessary for the performance of professional duties, for the acquisition of permanent residency permit and status of permanent resident of the European Community, and on state duty for testing of proficiency of official language'.<sup>155</sup> This Regulation provides for specifically defined means of proof of knowledge of the state language. This could be done either with a diploma of primary, secondary or higher educational establishment where studies are carried out in Latvian or a diploma issued by the state language proficiency examination commission. It seems that such provisions might not be in conformity with the case law of the CJEU, in particular *Angonese*.<sup>156</sup>

In *Lithuania* there is also a legal obligation for employees in some sectors to have sufficient knowledge of Lithuanian. Like in Estonia there are three levels. This applies a.o. in the fields of communications, transport, health care and service provision to residents.

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<sup>153</sup> 'Über die für die Ausübung der Berufstätigkeit erforderlichen Kenntnisse der deutschen Sprache verfügt'; Bundesärzteordnung (BÄO) of 16.4.1987, Official Journal I, p. 1218, as amended by law of 30.7.2009, Official Journal I, p. 2495.

<sup>154</sup> Key Issues in Free Movement in Ireland, Seminar, Law Society of Ireland, 5 November 2010, Una O'Rourke, Head of Registration, Medical Council. Regulation of doctors in Ireland. [www.ru.nl/.../report\\_specialised\\_seminar\\_5\\_november\\_2010\\_dublin.pdf](http://www.ru.nl/.../report_specialised_seminar_5_november_2010_dublin.pdf)

<sup>155</sup> OG No.110, 14.07.2009, repealing Regulation No. 296 'On the level of knowledge of the state language necessary for performance of professional duties and duties of position and procedure for verification of state language proficiency', OG No. 302, 29.08.2000

<sup>156</sup> C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA*. European Court reports 2000, p. I-04139

For most jobs in *Luxembourg* candidates still are required to speak several languages fluently, including Luxembourgish, French, English and/or German.

In *Romania* in some cases, there are regulations on language requirements. For example, in the case of credit institutions, if none of the directors or the members of the board have Romanian citizenship, at least one of them must speak Romanian.

In *Slovakia* an amendment to the National Language Act came into force 1 September 2009, stipulating that the execution of employment documentation in foreign languages is only possible if the text is also available in the Slovak language.

In *Poland* the Act of October 7, 2010 on Polish language<sup>157</sup> rules that in relations with consumers as well as in case of employment matters, the Polish language shall be used. However, there is an important exception to this rule that applies to foreign nationals, including EU citizens. Labour contracts may be prepared and signed in another than the Polish language, on application of a foreign employee (but not employer), if such an employee has been previously informed about the possibility to prepare such a contract in Polish. This amendment obviously makes it easier for foreigners, including EU citizens, to exercise the right to free movement at the territory of Poland.

### **III.2. Access to employment in the public sector**

This issue has been subject to an in depth study by professor Jacques Ziller ordered by the Commission: 'Free Movement of European Union Citizens and Employment in the Public Sector'.

The study is published in 2010 and exists of a general report and a part with country reports. The reports can be found on <http://ec.europa.eu/social/main.jsp?catId=465&langId=en>.

The report concludes that in most Member States, there have been reforms of public sector employment rules in order to ensure compliance with free movement of workers in the public sector. Most of these reforms have consisted in opening up access to employment in the public sector to EU citizens, whereas it was previously reserved to nationals. In some Member States there have also been more specific reforms of legislation and regulations on access to public employment and on working conditions in public employment, in order to eliminate obstacles to free movement which had appeared due to complaints to the European Commission or references for preliminary rulings to the CJEU. It seems that only rarely such reforms have been undertaken spontaneously by Member States; often they were the consequence

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<sup>157</sup> Ustawa o języku polskim, Journal of Laws of 1999, no. 90, item 999.

of an infringement procedure started by the Commission or of a judgement of the CJEU. On the basis of available information there is no reason to think that this will change in the coming years, as long as Member States do not set up specific monitoring systems in order to ensure compliance with the principles of free movement of workers in the public sector not only in legislation and regulations, but also in practice. Parallel to these specific reforms aimed at complying with EU law, public employment reforms have been going on in a number of Member States in the two or three last decades. In many cases, these reform lead to more or less de-regulation of public sector employment, sometimes in a rather radical way, by replacing legislation and regulations as a source of staff regulations by collective agreements. This being said, quite a number of Member State keep their traditional civil service system, most often based on special public law regulations, while adapting them to new trends in public management. Deregulation may lead to the suppression of some existing clauses in legislation and regulations which might be the source of obstacles to free movement; but this does not mean that deregulation is the better way to grant full freedom of movement to workers in the public sector. It may even be the contrary: deregulation means that potential obstacles to free movement will be mainly the result of discretion exercised by public employers. If there are not appropriate rules for reason giving and systems of appeal, there is a danger that deregulation leads to more infringements. Furthermore, if there are no appropriate monitoring systems within Member States, the information function which is usually embedded in general legislation and regulations is at risk of disappearing. Hence deregulation needs a special effort of Member States' authorities in issuing general information and guidelines on free movement of workers. Incremental reform, on the other hand, may well be a good way to adapt employment in the public sector to the needs of free movement. In order to facilitate such adaptations, specific procedures are needed in the reform process in order to use the opportunities of reform at the right moment. Agencies and offices involved in public service reform therefore need to give special attention to questions of free movement of workers in the public sector.

This study has led to a Commission Staff Working Document 'Free movement of workers in the public sector' SEC(2010) 1609 final, published 14.December 2010, to be found on <http://ec.europa.eu/social/main.jsp?catId=465&langId=en>.

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

Basically, Member States use one of two systems with regard to the nationality condition: in the first system all functions in the civil services are reserved for nationals and certain exceptions to that general rule are made for posts; in those exceptional cases EU nationals are exempted from the requirement

or assimilated with nationals; in the second system the general rule is that EU citizens can be appointed in the public service both at the national and local level in all functions except in those functions where the relevant legislation explicitly requires that the appointed or chosen person is national. The exemption or the explicit requirement may be codified in the special legislation concerning that function or in a list of (all) functions concerned codified in one single instrument incorporated in or annexed to the general law on the civil service. Several national reports list posts reserved for their nationals (*Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Romania, Slovakia, Slovenia, Sweden*). The employment in the public service in *Lithuania* still remains restricted to Lithuanian citizens except a few jobs that are available to foreigners under labour contracts without performing the function of public administration. Civil servants have better working conditions. The situation in *Latvia* and *Romania* is very much the same as in *Lithuania*. In *Romania* there is no discussion on opening up certain functions in the public sector to nationals of other Member States: the civil service is still considered to be 'a territory belonging to the national sovereignty'. In many Member States the nationality requirement applies for all functions designated as security functions.

Certain Member States, however, do not list the functions that require the nationality, but list the agencies, departments of ministries concerned. This implies that for all functions within such institutions, irrespective of the tasks to be performed, the nationality of the state is required and nationals of other Member States are excluded. This raises questions as to the compatibility with EU law, since in those states, such as *Estonia, Finland, Hungary, Poland* and *Slovakia*, the nationality requirement often is not related to the task to be performed by those employed in that part of the public service. In *Estonia* exemptions of the nationality requirement for EU nationals are decided on a case by case basis. In *Hungary* the Minister or the Head of the department has a wide discretion in granting or refusing to exempt EU nationals from the nationality conditions. This implies that EU nationals are not entitled to equal treatment as Hungarian nationals even for jobs where there is no relation with the exercise of public authority or state power whatsoever. The latest amendments in the public sector provisions in *Hungary* show two opposite trends. On one side the list of elected positions excluding non-nationals has become longer, while on the other side the general access to public servant positions for EU citizens has been improved. A new announcement (2010-2014) for the submission of an application to the Office for Employment and Social Affairs requires the candidate to be Hungarian.<sup>158</sup>

As reported last year, on 1 January 2010 in *Luxembourg* a new Act on the status of civil servants and State employee regime, came into force. It provides that EU citizens can now be employed as *Luxembourg* civil servants,

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158 Hivatalos Értesítő, 2010/10 [Official Gazette].

except where the positions involve direct or indirect exercise of public authority, or safeguard State interests or that of other public legal entities. It can be noted that formally at least, the number of open positions for other European Union citizens is growing, because the Luxembourg nationality is less required. However in reality there are problems that are surfacing slowly. The language requirement, namely the knowledge of the three administrative languages, is more and more required. While in most positions there is a general understanding that this requirement is adequate to the Luxembourg society's multilingual environment, in some cases remains the question on the reason of requesting knowledge of these 3 languages altogether for some positions in the administration. Moreover, it appears that the level required for different positions was significantly strengthened. This level seems to be very difficult to attain, but for natives of Luxembourg who went through the classical Luxembourg school curriculum and thus for many foreign persons who master some of the requested languages fairly well and others with more difficulties.

In the *Czech Republic* the strange situation occurs that the Act on Public Services<sup>159</sup> is still not in force, although it has been adopted already in 2002 and that a new Act one is now being prepared.

In *Denmark* job advertisement may not impose a requirement of Danish citizenship in a manner discouraging nationals from EEA countries from applying for the position, unless the position is encompassed by restrictions justified by regard for public policy, public security and public health. Other practical problems are mentioned in the reports of *Cyprus*, *Estonia*, and *Poland*.

In *Poland* the new legislation that came into force, does not change the principle that only Polish nationals can be appointed as civil servants. It allows that on a case by case basis, after consent of the Head of the Civil Service, a post may be opened for EU nationals as well, if it is not related (in)directly to the exercise of public power. The 2008 legislation did not delete the nationality requirement for any post in the national or local public service, it only opened the way to exemptions in individual cases. A national of another Member State who wants to apply for a vacancy may first have to convince the competent Polish authorities that the job in question is not covered by the exception of Article 45(4) TFEU. By the time that dispute is resolved another person may well be appointed in the vacancy. There is an official list of accessible posts for both Polish and foreign nationals available on the website of the Civil Service ([www.dsc.kprm.gov.pl](http://www.dsc.kprm.gov.pl)). In June 2011 from the 141 announced posts only 3 were accessible for foreign nationals, including EU citizens. Analysis of the remaining 138 posts that were opened solely to Polish citizens leads to the conclusion that plenty of them are not connected

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159 Act. No. 218/2002 Coll., On Public Services (Zák. č. 218/2002 Sb., o státní službě).

to the exercise of public power and should be opened to other than Polish citizens. Although the Act on civil servants formally opens access to this public sector for EU citizens, in fact the vast majority of such posts are closed for them and reserved only to Polish citizens.

In *France* and *Italy* a complete reorganization of the status of persons employed in the civil service, including the entry procedures is taking place. Such comprehensive revisions of the system may have major consequences for the access of nationals of other Member States to jobs in the public sector in those two Member States. In *France* also the internal competitions are now open for Union citizens, who are fully qualified in their profession in another Member State and who have acquired a certain amount of professional experience. But they do not have to have the status of civil servant in the other Member State. In 2010 the procedures for the recruitment and ranking of EU and EEA nationals in a corps, a level of employment or a position in the French public sector have been modified.

In *Italy* the public employment is undergoing a major reform process and the Parliament has vested the Government with the power to amend Legislative Decree no. 165 of 2001, laying down the general legislation on the employment in the public sector. Within the aforementioned reform process, the President of the Council of Ministers issued a Decree establishing the rules on the access to management posts by way of open competition.<sup>160</sup> The posts are reserved to Italian nationals. Those who passed the open competition, before being hired, have to complete a six-month preparatory training period at a public administration of another Member State or at the European Union. At the end of the training period, the foreign administration shall report to the Italian administration on the evaluation of the performance of the Italian candidate. If the evaluation is good, the candidate is hired by the Italian administration. In March 2011 a EU citizen brought an action for damage against the Ministry of the Interior, because it called a competition for 650 fixed-term posts as junior accountant at the one-stop-shops for immigration, open only to Italian nationals.<sup>161</sup> The Court of Bologna found that the Ministry infringed Article 39 EC (now Article 45 TFEU) and Article 19 of the Legislative Decree no. 30 of 2007, corresponding to Article 23 of Directive 2004/38/EC, and ordered it to pay an amount of money corresponding to the salary the applicant would have received from the time she had been hired to the date of her effective recruitment (since the Ministry offered her a different position).

In the relevant *UK* legislation the exemption of the nationality requirement for EEA nationals is extended to Swiss nationals and to Turkish nationals by

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<sup>160</sup> DPCM 26-10-2010, published in the OJ 2-5-2011 no. 100.

<sup>161</sup> Court of first instance of Bologna, judgment of 8-3-2011 no. 528/2010.

virtue of the Articles 6 and 7 of Association Council Decision 1/80. All three groups are defined as 'relevant Europeans' for this purpose.

In *Bulgaria* a significant legislative change took place in 2008 to include also EU, EEA and Swiss citizens as eligible to be appointed as civil servants.<sup>162</sup> However, high ranking positions and certain sections from the public sector are still reserved for Bulgarian citizens. The scope of posts in the public sector reserved for Bulgarian nationals remains questionable as to its conformity with Article 45 (4) TFEU and the narrow understanding of the public service by the CJEU. For example, all posts in the Ministry of the Interior are reserved for Bulgarian nationals, regardless of whether it is a civil servant or labour contract employee. The Law on the Administration also requires Bulgarian nationality for an extensive list of posts.

In *Portugal* a public job offer for a technical job in the Portuguese Diplomatic Institute of the Ministry of Foreign Affairs was published in the Official Journal<sup>163</sup> mentioning as an admission requirement the Portuguese nationality of the applicants, except when exempted by the Constitution, specific legislation or international convention. According to the Portuguese rapporteur, this is a clear case of a competition that should be open to every EU national, but where the announcement expressly refers the Portuguese nationality.

Regarding *The Netherlands*, the above mentioned 2010 report by Jacques Ziller correctly points to two obstacles to access to public service job: (a) due to the vagueness of the clause in the Civil Service Act on so-called functions of confidences, reserved for Dutch nationals, and as there is no comprehensive list of the relevant functions it is difficult to say whether the law and its application are compatible with Article 45(4) TFEU and (b) the absence of legal rules on the recognition of seniority acquired in other EU Member States may generate an obstacle to free movement for EU citizens, including returning Dutch nationals.

Several national reports provide information on the position of notaries. In many Member States notaries are self-employed, but in other Member States they are employed in the public service. In 2008 the Commission brought infringement procedures before the Court of Justice of the EU against six Member States (*Austria, Belgium, France, Germany, Greece and Luxembourg*) concerning the nationality requirement for appointment as a notary.<sup>164</sup>

On 24 May 2011 the CJEU ruled that Member States may not reserve access to the profession of notary to their own nationals. Even if the activities of

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<sup>162</sup> State Gazette, No. 43/29.04.2008.

<sup>163</sup> Diário da República of 31 December 2009, p. 52711.

<sup>164</sup> See C-47/08, C-50, 51, 53 and 54/08 and C-61/08.

notaries pursue objectives in the public interest, they are not connected with the exercise of official authority within the meaning of the EU Treaty.

In *Belgium* the day of the Court's judgment, the Royal Federation of Belgian Notaries published a press release stating that: 'the judgment does not jeopardize the quality of the service a citizen can expect from a notary [...] and [...] confirms that [the profession of notary] is an activity practiced in the general interest and does not question the procedure leading to obtaining the title'.

There was also an infringement procedure against *Portugal* (C-52/08) because of incompatibility of the admission grounds (exams and periods of training) with Directive 2005/36. Although Advocate-General Pedro Cruz considered that Directive 2005/36 is not applicable to the activities of notaries in Portugal, since they perform public duties, the Portuguese Parliament, through Law 45/2010, of 3 September 2010 authorized the Government to change by decree-law the Notary Statute in order to grant notaries already working in a EU Member State the right to establish and provide services in Portugal without the need to successfully complete an admission exam and, after that, a period of training in Portugal. After the entry into force of the Decree-Law 15/2011, of 15 January, Art 1-A(1)(c) of the Notary Statute states that notaries registered in another EU may work in Portugal as long as they fulfill the conditions set forth in this Statute.

An explicit statutory language requirement for notaries is mentioned in the reports on *Estonia*, *Luxembourg*, *Romania* and *the Netherlands*. In the last country a bill, proposing to delete the nationality requirement and to introduce an explicit language requirement is postponed until a decision of the CJEU in a still pending infringement procedure against *the Netherlands* on this issue (Case C-157/09).

### III.2.2 Language requirements

In the legislation of most Member States there is an explicit requirement that a person to be employed in the public sector or to be appointed as a civil servant should have sufficient knowledge of the national language. In some Member States it is explicitly required that the applicant speaks and writes the official language of the country, e.g. in *Austria*, *Estonia*, *Finland*, *Latvia*, *Lithuania*, *Germany* and *Romania*.

In seven Member States, *France*, *Hungary*, *Ireland* (with regard to English), *Netherlands*, *Poland*, *Sweden* and the *UK*, an explicit language requirement has not been codified or only for a few special functions. In those Member States the language requirement is applied in practice or it is implied or indirectly imposed by other rules. In *Hungary* there is a rule providing for additional remuneration for civil servants if they master certain foreign languages besides the Hungarian language and the admission exam for the civil service

is conducted in the Hungarian language. Although explicit language requirements are rarely found in separate legislation in *Bulgaria*, the fact that Bulgarian is the official language in the State, knowledge of it is presumed as naturally needed in order to perform a civil servant post.

In at least four Member States proof of knowledge of more than one language may be required for appointment in the public service. Although EU citizens now have formal access to the public sector in *Luxembourg*, applicants are still required knowledge of three languages (Lëtzebuergesch, German and French) and they have to pass a test of Luxembourg history as well. Two languages are required in *Malta* (Maltese and English), *Finland* (Finnish and Swedish) and for certain teaching jobs in *Ireland*. Interestingly, the Irish report mentions that on the job training in Gaelick (the Irish language) is provided after appointment in the national police and the military. Justification for requiring knowledge of more than one language are the necessity to communicate with members of the public (in all four Member States) and constitutional obligation or the government's policy to promote use of the national language (*Ireland* or *Malta*). In *Italy* and *Romania* in certain border regions the knowledge of the language of minority population living in those areas may be required. The same applies for *Spain* but the Supreme Court in 2009 has struck down requirements to speak the regional language in the legislation of certain autonomous communities (Euskera in Navarra) for appointment in certain public service jobs.

*Belgian* legislation on the use of languages for administrative purposes (la 'loi sur l'emploi des langues en matière administrative') provides that candidates who wish to work in the local public sector in the Dutch, French and German speaking regions and who have not followed education in the Dutch, French or German language must prove their linguistic abilities in the language of the region concerned by obtaining a certificate issued further to passing exams organized by SELOR (the Belgian governmental recruiting service). No other certificates are accepted as proof of language knowledge. The Commission takes issue with the rule stating that *only* certificates issued by the SELOR are accepted as proof of language knowledge, which it considers contrary to the rules on free movement of workers of article 45 TFEU, and more specifically, the rules of Regulation 1612/68. The Commission considers the fact that it is not possible to submit proof of the required linguistic knowledge by another means – 'in particular by equivalent qualifications obtained in other Member States' – to be disproportionate and to amount to discrimination of grounds of nationality (Press release IP/11/602).

And in *Sweden* for certain public service jobs the requirement of knowledge of Swedish language does not apply to person having another Scandinavian language as their mother tongue.

In *Estonia, Finland, Greece and Latvia* the language requirements are particularly rigid and developed. Different levels of knowledge of the national language are required for different functions. As already indicated above in the section on the private sector the *Estonian* legislation distinguishes between three different levels of knowledge of the Estonian language. The Estonian Government has established the mandatory levels of language proficiency for public servants, employees and sole proprietors in a new 2011 decree.<sup>165</sup> In *Finland* the required level is not related to the tasks to be performed but to the level of education required for the job. In practice there occur no problems.

The European Commission has formally requested Greece to amend its legislation requiring qualified EU teachers to have an excellent knowledge of the Greek language. This request has taken the form of a reasoned opinion. The Commission considers that by imposing an excellent knowledge of the Greek language on foreign teachers Greece violates Article 53 of the Directive 2005/36/EC on the recognition of professional qualifications as well as Article 45 of the TFEU guaranteeing the free movement of workers. Greece has not yet implemented Directive 2005/36/EC.

In *Lithuania* de facto the same level of knowledge is required for naturalization as is required for employment in the public service. In *Latvia* the language proficiency levels required for persons working in public sector are higher than those imposed on workers working in the private sector. It leads to an absurd situation where persons performing the same professional duties but in different sectors (public or private) are subject to different official language requirements.

In some Member States a statutory provision on language knowledge was introduced or existing provisions extended in other federal or regional legislation at the occasion of the implementation of Directive 2005/36/EC, e.g. in *Germany* and the *Netherlands*.

In several reports (e.g. the reports on *Cyprus, Latvia and Poland*) questions are raised with regard to the proportionality of the statutory language requirements and the lack of justification of the required (level of) knowledge considering the tasks to be performed.

In *Cyprus* there are no EU nationals in public service, except in the area of public education, which has a number of Greek nationals, which is increasing with the crisis in Greece. The language barrier is the main obstacle to access the public service.

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<sup>165</sup> Avaliku teenistuja, töötaja ning füüsilisest isikust ettevõtja eesti keele oskuse ja kasutamise nõuded. Vabariigi Valitsuse määrus nr 84, 01.07.2011, Mandatory levels of ability to communicate in Estonian language for employees, public servants and self-employed persons Governmental Decree No 84, 01.07.2011.

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

This is not a topic which seems of great interest in the Member States. In a lot of Member States there is no specific legislation on the recognition of professional experience for access to the public sector (*Austria, Belgium, Czech Republic, Estonia, Finland, Germany, Malta, Netherlands, Portugal, Slovenia, Sweden and the UK*). See also Chapter IV under the heading specific issue: working conditions in the public sector. The general rules on recognition of diplomas and experience acquired in other Member States apply to jobs both in the private and the public sector. In *Lithuania* and *Romania* this issue has practical relevance mainly for returning nationals of that state, who have acquired professional experience in another Member State, since the civil service in those countries is almost completely restricted to nationals of those countries.

In *Latvia* the professional experience is important for the purposes of the award of qualification grade and determination of corresponding level of salary in public sector. The new 2011 Regulation No.1651 explicitly recognizes professional experience obtained in Latvian public institutions only. In *Latvia* previous professional experience is also important with regard to the amount of remuneration. The Latvian legislation recognizes professional experience in the public sector for this purpose<sup>166</sup>, but this public sector is limited to Latvian public institutions only. This regulation seems not in conformity with the EU law.

In *Denmark* and in *France* the recognition of professional experience acquired in other Member States is explicitly referred to in the general circular with instructions on employment in the public service. The reports on *Poland, Portugal* and *Sweden* mention the relevance of the national equal treatment legislation as the legal basis for this recognition. *Polish* labor law explicitly allows for the recognitions of professional experience acquired by Polish or all other foreign workers abroad to be taken into account for entitlement to extra holiday rights and for additional remuneration. In *Portugal* the employment of an increasing number of Spanish nationals in the public health sector has been facilitated by a practice of recognition of their qualifications and experience obtained in Spain.

In *Cyprus* according to the Department of Public Administration there is full recognition of qualifications, professional experience and seniority for access to the public sector.

In *Spain* in the evaluation criteria of Order PRE/1740/2010, of June 21, reference is made to the fact that *seniority of two years* in the State Administration is taken into account together with training criteria when the training is

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<sup>166</sup> Points 11 and 11.1

directly related to the functions of the Corps the person wishes to join and which has been announced, taught or approved by the National Institute of Public Administration, by other Public Administration Institutes or by Trade Union Organisations or other promoter agents within the framework of the IV Agreement on Continuing Training in the Public Administrations. These criteria may entail a disadvantage for citizens of the EU-EEA-Switzerland who entered the Spanish Administration in 2009 as professional civil servants or permanent auxiliary staff.

In *Bulgaria* important amendments to the Labour Code that took place in 2010<sup>167</sup> brought clarity to the issue of the period of employment that is recognized as professional experience in Bulgaria. A new Paragraph 2 to Article 351 of the Labour Code was introduced to stipulate that a period of employment is also the period of time of fulfilling civil service or work under a labour contract according to the legislation of another Member State of the European Union, Member State of the EEA or Switzerland, as well as the period of employment in an European Union institution that is evidenced by a certifying act for the initiation and the termination of the employment relationship.

In *France* several decrees specify the conditions for recognition of qualification obtained in other EU Member States for jobs in public health institutions and for technical or specialist jobs in the military. In *Sweden* an official report on the access to teaching jobs proposed to that rules on the recognition of foreign qualifications applying both to the private and the public sector should be introduced in the new legislation.

The Court of Appeal of Toulouse (*France*) judged in November 2010<sup>168</sup> in line with a judgment by the French Court of Cassation of March 2009, sanctioning the provisions of the SNCF statutes that were discriminatory with respect to Union nationals in the sense that they did not take into account length of service, experience and qualifications acquired in another Member State.

### III.3. Other aspects of access to employment

The *Hungarian* government has introduced in 2009 a system of entry exams for access to the public service similar to the system of the concours applied in France and other Member States. But according to a draft regulation the whole recruitment to public administration will be reformed, so the entry exam is likely to be ceased in September 2011.

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<sup>167</sup> State Gazette No.15 of 2010; in force since 28 August 2010.

<sup>168</sup> Court of Appeal of Toulouse, 3 November 2010, no. 09/01531, Mr. Denis Demaret versus SNCF.

The *Italian* report shows that although competition notices usually recognize diplomas as certified teacher gained in other Member States as equivalent to the ones acquired in Italy, which is in line with the EU principle of equal treatment in access to employment, it is still not sufficient to prevent public administration from any kind of discrimination in access to positions as a teacher. An administrative court of first instance, (judgment of 7-2-2011 no. 241) said that when a public administration decides that residence shall be a condition for access to public employment or for obtaining additional points in an open competition, it is under an obligation to give reasons for its decision. Vague reasons are not acceptable. Instead, the public administration shall prove that residence is essential to adequately perform the tasks associated with the public post in question.

A *Lithuanian* study on the evaluation of the payment conditions in the public service in 2009,<sup>169</sup> concludes that the most unfavourable conditions of payment are for persons who work under labour contracts in the public service. As described above these are the only jobs open for non-Lithuanians.

In *Malta* with regard to selection procedures for the public sector, insofar as the criterion 'Qualifications', or 'Related Qualifications' or 'Relevant Qualifications' is concerned, no marks are awarded for qualifications which are a prerequisite for the post or position as indicated in the relevant call for applications. Marks may nevertheless be awarded for the ranking obtained in the relative degree or other qualification. However, marks given for ranking should not exceed 25% of the total mark for the criterion approved by the Public Service Commission.

In *Portugal*, in most sectors of the public service competitions are initiated which should be open to any EU nationals, but where the announcement only expressly refers the Portuguese nationality. The lack of reference to EU nationals may lead the administration to follow the interpretation that the post is reserved solely to Portuguese nationals. Moreover, in 2010/2011, the economic crisis has led to budget cuts determining that the vast majority of competitions are opened solely to applicants having already a permanent work relation with the Portuguese State. Since these internal competitions do not allow applications from public servants in other Member States, the public sector in Portugal is virtually closed to other EU nationals at the moment.

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<sup>169</sup> Valerija Gerikienė, Inga Blažienė, Problems of Regulating Remuneration for the Work of Public Sector Employees in Lithuania, *Jurisprudencija*, No. 4(118), 2009, p. 314.

## CHAPTER IV EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY

### IV.1. Working Conditions – direct and indirect discrimination

According to the 2011 Thematic report on the application of Regulation 1612/68 the Member States can be divided roughly into three categories in relation to the question of whether discrimination on grounds of nationality is specifically addressed in their national legislation.

The first category of States includes those where it is specifically addressed. *Portugal* is a model in this respect. There, discrimination on grounds of nationality in respect of workers is a matter of constitutional principle. Article 15 of the Portuguese Constitution establishes the principle of equality between foreign nationals staying or residing in Portugal and Portuguese citizens; the main exceptions are for political rights and the exercise of public offices that are not predominantly technical in nature. Article 59 further sets out workers' rights, including the right to equal pay and decent working conditions, and makes explicit that all workers are entitled to those conditions 'regardless of their... nationality'. The Portuguese Labour Code also protects the general principle of equality between Portuguese and foreign workers. The Labour Code also explicitly prohibits direct and indirect discrimination based on nationality in relation to all of the areas Regulation 492/2011 covers. More typical of this category is *Ireland*, whose Employment Equality Acts include nationality as one of the nine grounds on which employment discrimination is prohibited, and whose Protection of Employees (Part-Time Work) Act 2001 extends employment protections to posted workers and to others, 'irrespective of [their] nationality'. Other Member States in this category include *Slovenia*, *Poland*, *the Netherlands*, *Lithuania*, *Finland* (which also prohibits employment discrimination on grounds of nationality in its Penal Code) *Bulgaria* and *Italy*. *Luxembourg's* law on equal treatment explicitly excludes nationality as one of the protected grounds, but nationality based discrimination in employment is an offence under the penal code (unless nationality is a determining condition for employment). Although nationality is not included in the protected grounds in the anti-discrimination provisions of *Spain's* constitution, it is included explicitly in Spanish laws prohibiting discrimination in employment and other fields.

The second category includes Member States in which discrimination on the grounds of nationality is not specifically addressed in national legislation. *Germany* provides an example of this. The German Basic Law includes a

general prohibition on discrimination on grounds of, *inter alia*, 'national or social origin', but does not mention nationality. A recent law prohibiting discrimination likewise does not mention nationality. The closest term it includes is 'ethnic origin'; however, the German courts have made it clear that these provisions do not prohibit discrimination based solely on grounds of nationality. Victims of such discrimination can nonetheless rely directly on Regulation 492/2011 and other EU law provisions to seek redress. In some Member States, including *Latvia* and *Estonia*, nationality is not explicitly included as a ground on which discrimination is prohibited, but this list of prohibited grounds is not exhaustive, leaving open the possibility that nationality-based discrimination might be covered. This is also true in *Hungary*, where one unpublished judgment involving employment discrimination found that nationality discrimination might be prohibited under national legislation. Likewise, the Constitutional Court in *Belgium* has found that discrimination based on nationality can be unlawful if the action taken is not proportionate to a legitimate aim. In *Denmark* and *Greece*, it appears that individuals who have been discriminated against on grounds of nationality can only make claims if they can somehow show (directly or indirectly) that this constituted discrimination based on grounds of race or ethnicity. *Cyprus's* antidiscrimination legislation does not include nationality or national origin as grounds on which discrimination is prohibited. However, 'national origin' is included in the mandate of *Cyprus's* equality body, creating a gap: the equality body can promote equality, including the prohibition on national-origin discrimination, but such discrimination is not actionable as a matter of Cypriot law. In *Malta*, nationality is not included as a protected ground, apparently so as to facilitate restrictions on the rights of third-country nationals.

There is a third category of Member States whose laws in this area are somewhat ambiguous, or simply do not fit neatly into the two categories set out above. In the *Czech Republic* and *Slovakia*, experts remarked that while national legislation prohibits discrimination based on nationality, the term 'nationality' does not mean the same thing as citizenship but instead refers to ethnic origin. *Sweden's* legislation does not explicitly prohibit discrimination based on nationality, but the *travaux préparatoires* to that legislation indicate that the term 'ethnic origin', which does constitute a prohibited ground of discrimination, also encompasses nationality. Likewise, the *United Kingdom* prohibits discrimination based on race, defining 'race' as including 'nationality'. *Romania's* legislation bans discrimination based on 'national affiliation'. In *France*, discrimination based on 'belonging or non-belonging, true or supposed, to... a nation' is prohibited in the Labour Code. This is considered to cover the concept of national origin. In these six Member States, nationality appears to mean more than simply holding the citizenship of another Member State; as a result, individuals claiming discrimination on this basis may have to show more than in the States listed in the first category, or may simply be discouraged from making their claims if they do not feel that the

discrimination they have experienced is prohibited by national law. In *Austria*, the legislation dealing with discrimination in employment and other areas, the Equal Treatment Act, does not specifically cover nationality or any related concept, although nationality-based discrimination (putting someone at an 'unjustified disadvantage' or preventing her/him from entering a location or using services which are for public use) is an administrative offence.

This diversity indicates more than simply uneven application of the non-discrimination principle contained in Regulation 1612/68. In some Member States (i.e. the first group), discrimination based on nationality is taken as seriously as discrimination taken on other grounds such as race or sex. In others, it is either neglected altogether or, as in Germany, it is assumed that EU law will provide a backstop. The expert from *Belgium* noted, for example, a decree the French Community adopted prohibiting discrimination; it did not include nationality as a prohibited ground but noted, in the legislative instrument, that EU law prohibits discrimination on grounds of nationality. In the third group of States, the notion of 'nationality' is explicitly or implicitly bound up with ideas about race or ethnicity. This might impede the effective operation of the non-discrimination principle as embodied in Regulation 1612/68 if victims of nationality-based discrimination cannot show or do not feel that the treatment they suffered is somehow connected with their race or ethnicity.

Rapporteurs in the majority of the Member States expressed that discrimination against EU national workers had not been a problematic issue in their state over the reporting period. An exception is *Cyprus* where the rapporteur raises a particular issue of concern regarding the engagement and conditions of employment of trainees in ERASMUS, LEONARDO and other exchange programs at various hotels in tourist resorts: trade unions complain that there are an estimated 1500-2000 trainees in hotels, particularly hotels and restaurants offering 'all inclusive package' who are used for social dumping, displacing other workers who are regularly employed in hotels, as trainees have no contract and are not bound by collective agreements. Trainees are allegedly merely provided with accommodation and food, and occasionally pocket-money, in return for working as trainees.<sup>170</sup> The rapporteur of Cyprus also referred to a 2011 report of the Equality Authority on the violation of the principle of equal treatment between Cypriots and Union citizen workers in the hotel industry.<sup>171</sup> In issue here was the alleged practice of hoteliers to dismiss Cypriot workers, unionized under a regime of a collective agreement, in order to replace them by nonunionized Union citizens, who instead had personal contracts under inferior working conditions and pay.

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<sup>170</sup> Information provided by the General Secretary of the the hotel workers trade union SYXKA-PEO.

<sup>171</sup> A.I.T. 1/2011, 22.6.2011, 'Τοποθέτηση της Αρχής Ισότητας αναφορικά με την παραβίαση της αρχής της ίσης μεταχείρισης μεταξύ Κυπρίων και κοινοτικών εργαζομένων στη ξενοδοχειακή βιομηχανία'.

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

As indicated by the Ziller report (part I, p. 102) provisions that establish or confirm that comparable professional experience and seniority/working periods acquired in other EU Member States have to be taken into account on the same footing as professional experience and seniority acquired in the host Member State are often lacking in most Member States.

As reported last year in *Bulgaria* recent amendments made in the 'Ordinance on the Structure and the Organization of the Salary' also aim to achieve equality with regard to working conditions. The change has been meant to put Bulgarian legislation in line with the judgment in the Case C-187/96 *Commission v. Hellenic Republic*. Recognition by Bulgaria of periods of employment in the national public service of another Member State currently guarantees equal treatment with regard to salary, grade and seniority. Application of legal amendments in practice will continue to be an object of further reporting.

In the *Czech Republic* the professional experience acquired in another Member States may be taken into account establishing the level of salary group of civil servants.

In *Denmark* regarding salary, grade, career perspectives etc., the *Guidance on Personnel Administration* states that *professional experience obtained in another EU/EEA country* has to be accounted for in the same manner as had the occupation been in Denmark.<sup>172</sup> Hence, the comparison of previous occupation has to be performed on an objective and non-discriminatory basis, and without accounting for whether the previous employment was under the conditions for civil servants or collective agreements. These principles apply to both workers from other Member States and Danish citizens working in another Member State. Regarding grade, which per definition is a single reward granted for employment by the same employer for a certain period of time (i.e. loyalty), the explicit statement on seniority being estimated from the first employment within the Danish State only, has been removed by *Circular No. 9111 of 15 April 2011*. There is thus no explicit referral to the Danish State. However, the Circular stipulates that within the seniority, employment within the State and the national church is included. Further, employment in the public school prior to 1 April 1993 is counted in. In addition, the Circular stipulates that employment in independent institutions after 1 April 2011 is included to the extent the person concerned has been comprised by the Ministry of Finance's competence to determine or agree on salary and working conditions.

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<sup>172</sup> Chapter 16.2.3.2.

In *Finland* it follows from the principle of non-discrimination that such factors shall be taken into account in a similar manner as corresponding diplomas, experience, and seniority acquired in Finland.

As already mentioned in last years' report, new 2010 *French* legislation modifies the recruitment and ranking procedures for nationals of other Member States of the European Union in a corps, a level of employment or a position in the French public sector. In 3 judgments of 11 March 2011,<sup>173</sup> the French Council of State confirmed the requirement, imposed by EU law, that previous professional activities that a national may have fulfilled be taken into account at the time of recruitment into the public sector, even in the capacity as civil servant under private law in another Member State, with a view to establishing his reclassification based on length of service.

In *Germany* provisions on recognising professional experience for access to the public sector are frequently contained in the regulations of the Länder on recognition of professional qualifications of other EU Member States as a condition for a specific career within the public administration. German civil service law distinguishes between different careers differentiating according to the type of civil service. There is a traditional distinction between services requiring no specific diplomas or professional certificate (*einfacher Dienst*), the career of requiring professional skills and a diploma certifying such skills (*gehobener Dienst*) and higher services requiring generally a university study of at least 3-4 years at a university of equivalent institution of higher learning (*höherer Dienst*). Within the German states the recognition of professional qualifications and other professional requirements for access to the public service in all three careers is regulated by laws and additional regulations adopted on the basis of laws.<sup>174</sup>

In *Greece* legislation provides that the seniority in the public sector of another Member State is taken into consideration in order to determine the salary of the employee. The recognition of seniority in the private sector is not regulated. In *Latvia* only professional experience acquired in the public sector in Latvia is taken into account for the award of qualification grade and respective amount of salary.<sup>175</sup>

In *Malta* no difference is made between professional experience in Malta and professional experience abroad. In the Maltese Public Service it is normal practice to distinguish between professional experience and service in

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<sup>173</sup> Council of State, 11 March 2011, no. 338403, Kaeufling versus Ministry for Ecology, Sustainable Development, Transport and Housing, Council of State, 11 March 2011, no. 338404, Dollinger versus Ministry of Defence and War Veterans, Council of State, 11 March 2011, no. 338405, Auble versus Ministry of Defence and War Veterans.

<sup>174</sup> Laufbahngesetz; Verordnung über die Anerkennung von Berufsqualifikationen anderer Länder der Europäischen Union als Laufbahnbefähigung, VO Laufbahnbefähigung-EU.

<sup>175</sup> OG No.206, 31 December 2009, as amended until 2011, OG No.58, 13 April 2011.

the grade. Professional experience is a core eligibility requirement and selection criterion which is assessed by the Selection Board at the interview stage. In either case, according to the Public Service Commission, credit is given for relevant professional experience regardless of the country in which it has been obtained. The selection criteria are determined in consultation with the Public Service Commission before the calls are issued. Such a system is meant to ensure that selection criteria are not tweaked to favour or disadvantage any of the applicants. This system has been in place for over 40 years.

As already mentioned in last years' report, the new 2009 Labour Code in *Portugal* continues to ensure equal treatment regarding access to employment, vocational training, promotion and working conditions, and prohibits discriminations on the grounds of nationality. Employers are expressly prohibited from any form of discrimination and the worker or applicant who is the victim of a discriminatory act is entitled to compensation for material and moral damages.

In the *Slovak Republic* the 2009 Act on Civil Service refers explicitly to recognition of professional experience for the purpose of determining the working conditions and the taking into account of diplomas for determining working conditions. Being aware of the importance of highly skilled migrants for the economy, in 2010 the *Slovenian* government drew attention to the fact that in Slovenia access to professions and professional activities is too much limited by the requirements related to professional education.

In the case of the *UK*, the system of public service recruitment is open to criticism for the lack of published requirements as regards the recognition of qualifications and experience.

## **IV.2. Social and Tax Advantages**

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

#### **Social Advantages**

Regarding the issue of social advantages not many developments took place during the reporting period.

Pertaining to *language courses and introductory courses*, the Act on *Danish Courses for Adult Aliens et al.* and the Act on *Integration* were amended

in 2011 to ensure compatibility with Directive 2004/38 Art. 25.<sup>176</sup> Also, in 2010, the Act on *Integration* was amended to comprize also EU citizens and their family members;<sup>177</sup> The provisions now clarify EU citizens' entitlement to Danish courses and introductory courses on the basis of presenting evidence of the status as a worker etc. pursuant to the EU rules, as opposed to the previous requirements on presentation of registration certificate and registration in the Civil Registration System.<sup>178</sup>

Although the Danish *Act on Active Social Policy* <sup>179</sup> makes it a requirement for the payment of full social assistance that the recipient has resided in Denmark during a total period of 7 years within the past 8 years. There is an exemption for EU workers. Some decisions from the National Social Appeals Board have created doubts about the scope of this EU exemption, in particular regarding Danish citizens who have resided under the EU rules in another Member State, and then move back to Denmark.

In *France* a new circular came into force defining the conditions for residence in France and housing occupation in order to determine the right to family allowances and housing benefits.<sup>180</sup> A benefit under the Universal Health Coverage system is also depended on the right of residence according to a judgment of the Court of Appeal of Versailles.<sup>181</sup>

Operational Guidelines on the habitual residence condition in *Ireland*,<sup>182</sup> updated in July 2010, make it clear that those entitled to social advantages under Article 7(2) of Regulation 492/2011 – which includes Supplementary Welfare Allowance – cannot be subject to the condition. However, the authorities will need to be satisfied that the person concerned qualifies as a 'worker' in EU law (applying the tests laid down by the European Court of Justice). It is therefore considered that 'an EEA national who is engaged in genuine and effective employment in Ireland is regarded as a migrant worker under EU law and does not need to satisfy HRC for the purpose of any claim to Supplementary Welfare Allowance'.

The *Latvian* report describes that there might be problems with equal treatment in areas of social benefits falling outside the scope of Regulation 883/2004. In particular it concerns flat-rate state social benefits provided un-

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<sup>176</sup> By Act No. 462 of 18 May 2011.

<sup>177</sup> By Act No. 571 of 31 May 2010.

<sup>178</sup> Explanatory remarks to Bill No. L 149/2010-11 of 23 February 2011, general remarks paras. 2.6, 3.4, and 8 and specific remarks paras. 1.3, 1.5 and 2.1.

<sup>179</sup> Consolidation Act No. 946 of 1 October 2009.

<sup>180</sup> A Circular CNAF no. 2010-014 of 15 December 2010

<sup>181</sup> Court of Appeal of Versailles, 21 October 2010, no. 08/03196, Local Health Insurance Fund of Yvelines versus Abdallah L.

<sup>182</sup> See [http://www.welfare.ie/EN/OperationalGuidelines/Pages/swa\\_habres.aspx](http://www.welfare.ie/EN/OperationalGuidelines/Pages/swa_habres.aspx).

der the Law on State Social Allowances<sup>183</sup> and social assistance and social services provided under Social Assistance and Social Services Law<sup>184</sup>. Both laws expressly provide that they entitle foreigners to the rights provided thereby under the condition they reside in Latvia permanently.<sup>185</sup> Although Article 45 of TFEU and Article 7(2) of Regulation 492/2011 overrule said national provisions and the Ministry of Welfare<sup>186</sup> considers that after obtaining a residency permit (registration card) and a personal code and the inclusion into the Population Register, a Union citizen and his/her family member qualifies as beneficiaries for state social allowances, social assistance and social services, such national law provisions of respective law may mislead both – workers and their family members and state and municipal officials who take decisions on award of social benefits.

According to the *Polish* report, although there are general rules requiring to treat all employees in similar or comparable situations equally, in practice regarding different social advantages there are residence clauses that may affect the situation of migrant workers, including frontier workers and be not compatible with Article 7(2) of Regulation 492/2011.

Some local authorities in *Portugal*, namely the cities of Famalicão and Salvaterra de Magos, applied a provision of the Decree-Law 797/76, which granted the right to enter into a competition for a house subsidized by the State only to Portuguese citizens that do not have a proper house and wanted to live in those cities<sup>187</sup>. EU citizens who wanted to apply could not participate in these competitions. This obviously infringes the non-discrimination principle foreseen in the Treaties.

### **Tax Advantages**

In *Belgium* the Court of Appeals of Antwerp ruled in favour of the Belgian Tax Administration in a judgment of 2 February 2010 related to free movement of workers. The case concerned a couple, where the husband received professional income (only) in Belgium and the wife (only) in the Netherlands. According to the relevant Belgian-Dutch tax treaty, the wife's income was exempted from Belgian taxes, but taken into account with regard to progression (under the 'exemption with progression method'). The couple's issue with the Tax Administration was that it had deducted tax deductions for child

<sup>183</sup> OG No.168, 19 November 2002, as amended until 2010 OG No.47, 24.March 2010.

<sup>184</sup> OG No.168, 19 November 2002, as amended until 2010 OG No.170, 27 October 2010.

<sup>185</sup> Article 4(2) of the Law on State Social Allowances, OG No.168, 19 November 2001, as amended until 2010 OG No.47, 24.March 2010; Article 3(1) of the Social Assistance and Social Services Law, OG No.168, 19 November 2002, as amended until 2010 OG No.170, 27 October 2010.

<sup>186</sup> Letter of 09.03.2009. No.09.2-07/753

<sup>187</sup> The precise provision of the mentioned Decree is art. 8.º, n.º 2 (<http://dre.pt/pdf1sdip/1976/11/26000/25272530.pdf> (see also newspaper Público of 22 Abril 2010, p. 12).

care and 'service-checks'<sup>188</sup> on *both* incomes, thereby limiting the advantage of the deductions (the deduction on the wife's income being lost). The couple considered this to be contrary to European rules on freedom of movement (and equality and non-discrimination rules provided for in articles 10 and 11 of the Belgian Constitution). The Antwerp Court of Appeals rejected the couple's arguments, confirming instead the Tax Administration's and Tribunal of First instance's positions. Referring to the case-law of the Court of Justice (Court of Justice, Judgement of 12 December 2002, *De Groot*, [C-385/00](#)), the Court of Appeals of Antwerp stated that it was the State of residence's duty to acknowledge such tax advantages. Only when all or most of the income comes from the State where the taxpayer works, must the latter take into account the worker's personal and family situation. The Court considered that by applying the tax deduction for child care and service-checks on both incomes, the Tax Administration had not acted in a way contrary to European rules (or national rules on equality). In the Court's view, the fact that such deductions are not possible in the Netherlands (where the wife's income is taxed) does not imply a breach of rules on freedom of movement, but is simply the consequence of a difference in the two State's tax legislations.<sup>189</sup>

In another case, the Court of Appeals of Antwerp ruled that for a Member State to refuse a tax reduction for a health insurance premium introduced by a worker who has exercised his right to free movement when such a reduction is accepted for workers who have not exercised their right is incompatible with article 39 EC (45 TFEU). Specifically, if Belgian residents may, on the basis of article 52, 8° of the Income Tax Code, deduct as professional expenses premiums paid for a complementary insurance with a recognised Belgian mutual, the same rule should apply for premiums paid for a private health insurance in the Netherlands.<sup>190</sup>

Problems in *Bulgaria* with regard to non-deduction of expenses for the purposes of determining the basis of assessment of taxation of the income have been resolved by amendments in the legislation; Infringement proceedings against Bulgaria (Commission case 2007/4881) were removed on 5 May 2010.

In *Lithuania* on 1 January 2009 the legislation expanding the personal scope of social taxation entered into force. These amendments did not specifically relate to taxation of EU nationals, but will in the opinion of the rap-

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<sup>188</sup> 'Service-checks' or 'service-stamps', in French 'titres-services', are vouchers which can be bought and used to pay for certain services such as home cleaning, assistance to elders, etc. Part of the cost of 'titres-services' may be fiscally deducted.

<sup>189</sup> See also Annotation Antwerp Court of Appeals, 2 February 2010, N.j.W., 2011, p. 47; A.F.T., 2011, p. 29.

<sup>190</sup> Antwerp Court of Appeals, Judgment of 7 September 2010.

porteur significantly reduce Lithuania's attractiveness for mobility of EU nationals.

In Spain in 2010 the Law on Non-Resident Income Tax was modified in order to adapt this to community legislation. In relation to Non-Resident Income Tax, modifications were added which intend to favour the free movement of workers, the provision of services and the movement of capital in accordance with Union Law.

As regards tax advantages in the UK, Regulation 3(5) Tax Credits (Residence) Regulations provides that Child Tax Credits and Working Tax Credits, which are social benefits administered under the tax system, are only available to EEA nationals who have a right to reside. This means that unless the EEA national has permanent residence or otherwise satisfies the right to reside test they will not be eligible. The UK authorities accept that both types of credit are social advantages within the meaning of Article 7(2) Regulation 492/2011. The UK authorities have changed the basis of the tax regime to one where there is greater equality on the surface regarding tax payers. The change in the exemption from UK taxation of some income based on the principle of domicile has come into force. It is not yet clear whether this will have specific impacts on EEA national workers in the UK.<sup>191</sup>

#### *IV.2.2 Specific issue: the situation of jobseeker*

This section deals with the access to social assistance and other benefits, taking into account CJEU case law especially in the cases C-138/02 (*Collins*) and C-22/08 and C-23/08 (*Vatsouras*).

The *Latvian* report mentions a peculiarity: a Union citizen wishing to register officially as a jobseeker in Latvia should take into account that he/she will be obliged to re-register his/her car in Latvia immediately after acquiring the registration card (residency permit), because he/she is not allowed to drive in Latvia otherwise.

In the UK from 1 May 2011 when the transitional arrangements for EU Accession State nationals from the A8 States ended, those Accession State nationals will be in the same position as other EU citizens/EEA nationals and will be able to hold jobseekers status. Thus they will be able to access income-based Jobseekers' Allowance (and thereby Housing Benefit and Council Tax Benefit). The position for A2 nationals from Bulgaria and Romania remains unaltered on and after this date and restrictions will still apply to them.

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<sup>191</sup> [http://www.hmrc.gov.uk/cnr/nr\\_landlords.htm](http://www.hmrc.gov.uk/cnr/nr_landlords.htm)

### **Access to social assistance**

With the exception of unemployment benefit which is limitedly exportable under EU social security provisions,<sup>192</sup> it is generally not possible for job-seekers to access non-contributory public benefits, such as social welfare or social assistance benefits, in most Member States (*Austria, Cyprus, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Lithuania, Malta, Portugal, Slovenia, United Kingdom*). For example, in *Denmark*, a EU citizen who is a first-time job-seeker cannot access social assistance or starting assistance, which are available to EU citizens and their family members with residence rights under EU law. In *Belgium*, however, it is possible for job-seekers to request social assistance, although this is not automatic because the public authorities consider that job-seekers are supposed to possess sufficient resources in order to remain on the territory, which appears according to the rapporteur to be in conformity with the judgments of the Court of Justice of the EU in C-138/02, *Collins* and C-258/04, *Ioannides*. But, in accordance with Article 14(4) of Directive 2004/38, removal cannot be an automatic consequence of the social assistance application. Therefore, before deciding on removal, the Belgian authorities take account of the personal situation of the job-seeker, the amount of assistance provided, the period of residence, and whether the assistance claimed is to address temporary difficulties. In *Finland*, everyone staying in the country either temporarily or permanently is entitled to social assistance if there is an acute need. The municipalities pay this means-tested assistance if the person concerned is not able to cover the acute expenses by other means. Hence, also job-seekers coming from other Member States, who need financial assistance to cover their most basic needs, shall be granted this form of assistance. Job-seekers can only be removed from the territory if they constitute a threat to public order or security or public health, and therefore cannot be removed even though they by resorting repeatedly to social assistance provided in the Act on Social Assistance or other comparable benefits or in other similar manner during their short-term stay, become an unreasonable burden despite the fact that the prohibition on imposing restrictions on freedom of movement to serve economic ends in Article 27 of the Directive has not been explicitly transposed. In *Poland*, job-seekers from EU Member States are entitled to all forms of support that are afforded job-seekers of Polish nationality, but this does not include financial support which is subject to special conditions. In *Slovakia*, as noted above, there is no obligation for EU citizens (including job-seekers) to register their residence, but if they do their residence is considered as a first residence and on this basis it is possible to request any social assistance available for those possessing a first residence document.

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<sup>192</sup> However, the report of *Luxembourg* refers to two cases in which EU workers (a French citizen and his wife) living and working in Luxembourg and whose employment was terminated were denied unemployment benefits by that country's Employment Administration (*L'Administration de l'Emploi – ADEM*). Both persons appealed on EU law grounds. In the first case, the appeal was unsuccessful and the matter is now being taken up by the Court of Cassation. The second case resulted in a successful outcome for the applicant.

In *Italy*, the legislative decree implementing Directive 2004/38/EC stipulates that EU citizens who entered the country to seek employment are not entitled to social assistance for the first six months of residence unless such assistance is granted under the law. There is a similar rule in *Malta*. In *Lithuania*, given that the situation of job-seekers is not regulated, their lack of an 'official residence' status would preclude their access to employment support (e.g. counselling, employment mediation, active employment measures), although they would be entitled to basic health services.

In some Member States, EU job-seekers may have access to benefits connected with the employment situation. In *Hungary*, EU job-seekers can access job-seeking assistance when they register with the relevant employment office, and, in *Ireland*, it is theoretically possible for EU job-seekers to qualify for Jobseeker's Allowance if the conditions, including the habitual residence condition are satisfied. In the light of the judgments in C-22/08, *Vatsouras* and C-23/08, *Koupatantze*, in which the Court of Justice of the EU held that Article 24(2) of Directive 2004/38 does not apply to social benefits facilitating access to the labour market, although left it to the competence of national courts to attribute the character of a social benefit by way of its basic nature and purpose and condition of entitlement, the Federal Ministry of Labour in *Germany* has argued that the exclusion clause in the Social Code continues to apply to foreigners (including EU citizens) who are staying in Germany solely for the purpose of seeking employment because the social benefits in question can be attributed to social assistance in the sense of Article 24(2). The *United Kingdom* rapporteurs, however, contend that similar benefits designed to integrate individuals back into the labour market, such as Job Seekers Allowance and Income Support, fall outside the scope of the Article 24(2) derogation. In *Portugal*, it may also be possible for EU job-seekers to access allowances aimed at facilitating the insertion of persons in the labour market.

### ***Follow-up of the Vatsouras judgment***

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. Financial benefits equivalent to the one which was in question in the *Vatsouras* case do not exist in *Italy*, *Latvia* and *Poland*. In *Romania* the judgment has only a theoretical importance for future legislation. While Article 24 of Directive 2004/38 is not transposed in *Slovakia* the *Vatsouras* judgment is not relevant for *Slovakia* either.

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 provid-

ing 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'.

According to the *Cypriot* rapporteur the *Vatsouras* case may be illuminating in clarifying possible confusion in the practices by Cypriot authorities: work which had lasted barely more than one month was considered to be professional activity, following an overall assessment of the employment relationship, which may be considered by the national authorities as real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of Article 45 TFEU. The *Czech* report underlines that the Czech courts have to apply the EU understanding of the notion of worker. The same applies to *Slovenia*.

The decision should have an impact on *Estonia* too in determining the notion of worker. Also in *Belgium* it is necessary to insist on the wide definition of the notion of worker.

In *Austria, Czech Republic, Finland, Hungary, Lithuania* and *Sweden* the existing legislation seems to be in conformity with the *Vatsouras* case.

According to 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. The same applies to *Austria*. EU job seekers are treated as Austrians and have access to the same benefits. Also the *Finnish* system is in line with the *Vatsouras* judgment. *Hungarian* law too makes no distinction as regards the receipt of unemployment benefits on the basis of the legal status of the migrant. In *Lithuania* unemployment benefits are applicable to nationals of other EU Member States as well, although there might be a problem while the applicant should have a work record of 18 months within the last 36 months.

In *Bulgaria, Denmark, Estonia, Germany, Ireland, Netherlands, Portugal* and *the UK* the existing legislation is questionable. 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 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. Specifically, section 3 (2) of the *Act on Active Social Policy* makes it a precondition for entitlement to social assistance of longer duration – defined as more than half a year, cf. Section 3 (3) – that the recipient be either a Danish citizen or an EU citizen or a family member who has a right of residence under EU law, or have such entitlement under an international agreement. Provided that these provisions are administered on the basis of a correct understanding of the EU rules on residence right, they should not give rise to violations of Arts. 24 (2) or 27 of Directive 2004/38 or Art. 7 (2) of Regulation No. 1612/68. However, the impact of CJEU judgments such as *Collins*, *Trojani*, *Ioannidis* and *Vatsouras and Koupatantze* on the application of the Act on Active Social Policy has not yet been clarified by the National Social Appeals Board. In particular, the latter judgment would seem to limit the applicability of Section 12 a of the Act to first-time jobseekers in the strict sense of this notion. The provision according to which 'first-time jobseekers' are excluded from these benefits is most probably not in conformity with EU law. Also in *Estonia* it is still unclear whether benefits to facilitate access to the labour market are excluded from the notion of 'social assistance'. In *Germany* it is still controversial whether the benefit concerned does qualify as social assistance or as social benefit in order to facilitate the access to the labour market. There is as yet no official pronouncement on the issue.

## CHAPTER V OTHER OBSTACLES TO FREE MOVEMENT

In the 201-2011 national reports on free movement of workers, this chapter provides an opportunity for the experts to raise issues of concern which are not otherwise dealt with in specific chapters. Experts from the following Member States did not consider there was anything further to add here: *Austria, Belgium, Bulgaria, Czech Republic, Estonia, Greece, Latvia, Slovakia, Slovenia and Spain*. In the other Member States the issues raised came with three main categories:

- Tax related issues which impede worker's leaving their home state or discriminate against in-coming workers;
- Obstacles to the acquisition of qualifications relevant to employment;
- Residence and other requirements.

In the first category, the *Danish* report notes that Danish citizens encounter great difficulties in de-registering their residence in Denmark when they take up residence and work in another Member State. Heavy tax liabilities result from continuing registration but do not apply when the person is able to de-register. The Danish courts have upheld the tax authorities regarding continuing registration even in cases which seem most marginal such as where the individual continues to own a holiday cottage in Denmark even though it is not habitable in winter. The *Lithuanian* report describes a national practice of requiring the payment of tax in Lithuania on all income including that arising abroad for permanent residents of Lithuania. While the tax authorities accept that tax paid abroad on income must be taken into account for the purpose of calculating what is due in Lithuania, in practice these authorities demand documentation which in some cases is not produced in the country where the tax was paid. The *Dutch* report describes problems regarding the opening of bank accounts for non-resident Dutch nationals as a result of the refusal of the tax authorities to issue such citizens a citizens' service number. The problem has been resolved by the Ombudsman's office.

The second category, obstacles to the acquisition of qualifications, gives rise to problems described in the *Hungarian* report regarding driving licenses. A new obligation provides that a person must be able to read and write in order to take a driving test in Hungary. Driving schools only accept Hungarian basic school certificates to satisfy this requirement. Further, an obligation of registration of vehicles already registered for work purposes in another Member State still arises notwithstanding the CJEU's judgment in *Van Lent*, as the Hungarian legislation requires registration of the car even where the individual is only temporarily in Hungary and works partially elsewhere in the EU.

Registration entails attending at three different authorities and paying substantial fees. In *Portugal* vehicle tax registration requirements present problems as they require national registration for any car which spends more than 180 days in Portugal in a calendar year irrespective of the activities of the owner. Spanish frontier workers were particularly affected as they were fined for failure to respect the regime. A local area exception has been introduced into national law for those living and working within a 60 kilometer area of the border. Following subsequent problems for frontier workers in particular, the 60 kilometer limit was lifted. In the *UK* also car tax issues cause problems. Although a single market for car insurance is supposed to exist between the UK and Ireland substantial differences still exist. The registration of cars imported from Ireland raise problems in that the first year rates for registration are higher than the normal rate. The *Luxembourg* report describes a problem with the recognition of diplomas from private schools in other Member States. Where a certificate from the competent Ministry of National Education is not available then the Luxembourg authorities may refuse to recognize the diploma. A similar problem has arisen in *Germany* but with a wider remit. A German court has found that its authorities are not required by EU law to take into account any school certificates acquired in another Member State. According to the German court, EU law is only competent regarding the recognition of university degrees. According to the *Maltese* report, access to the notary profession is still limited to Maltese nationals only (see also chapter III). The Commission has commenced infringement proceedings against the country but is awaiting clarification from the CJEU regarding the Maltese authorities' argument that notaries in Malta are exercising official authority in their duties.

In the third category, residence and other requirements, come some provisions in *Ireland* where returning Irish nationals are excluded from some social benefits on the basis that they have not been habitually resident in the country thus leaving them destitute. In *Italy*, according to the national report the courts have struck down a number of exclusionary provisions of local and regional authorities because their residential requirements offend against EU non-discrimination obligations. Specifically, residence requirements of 10 years for child birth allowances, one year for rent assistance and 36 months for social assistance were struck down. However, the courts accepted residence requirements of five years for social housing. The courts have also dis-applied an Interior Ministry requirement of registration in the population registry for access to contributory benefits. In Luxembourg a problem which has created difficulties for EU nationals obtaining health services has been resolved – the right to cross border healthcare has now been implemented (through early transposition of the new directive on the subject). In Malta the problem of access for EU workers to purchase immovable property continues to exist. The country had negotiated successfully a permanent derogation, reflected in a Protocol annexed to Malta's EU Accession Treaty. By virtue of this arrangement, Maltese and other EU citizens, on a non-

discriminatory basis, will not be granted authorization to purchase a second property in Malta, unless they have resided in Malta for at least five years prior to acquisition and obtained the necessary permit. In *Poland* a difficulty which has been raised is the lack of foreign language knowledge among public officials which makes it difficult for EU nationals who do not speak Polish to establish their rights. The *Swedish* report notes that while there has been a rise in unemployment in the country, there is simultaneously a need for migrant workers with different skills from those available in the domestic labour market. One government project aims to enable migrant workers to access language training to help their labour market integration. The project is only available to new migrants who must be free to choose a programme if they wish. Additionally, the Swedish authorities are considering extending the possibility of export of social benefits beyond EU Member States to facilitate circular migration. In the *UK* the problem of border controls with other EU states (except Ireland) continues to be a source of friction for EU nationals. Also, according to the national report, the unlawful detention of foreigners in the UK (including, though not limited to, EU nationals and their third country national family members) has required the authorities to pay £4 million in compensation in 2010 and a provision has been made in the budget of £4.5 million for 2011.



## CHAPTER VI SPECIFIC ISSUES

### VI.1. Frontier workers

According to the 2011 national reports, the problems which frontier workers have fall mainly into three different categories:

- Residence clauses and where to access social benefits for themselves and their families;
- Taxation issues and the existence or absence of double taxation agreements;
- Other obstacles.

In a number of Member States no issues were noted including: *Estonia*, *Germany* and *Malta*. In *Finland* the position of frontier workers is regulated by bilateral agreements among the Nordic countries and no problems were encountered. In *France* frontier workers who live in France are entitled to permanent residence under national law after three years (rather than five years for permanent residence).

As regards residence clauses (cf. C-212/05 *Hartmann*) and access to social benefits according to the *Austrian* report three bilateral agreements respectively with Germany, Switzerland and Liechtenstein allow these workers to claim unemployment benefit in their country of residence. This is clearly very important for these workers. Under *Luxembourg* law, frontier workers living in Belgium but working in Luxembourg were excluded from child benefits. However, they should be eligible for these in Belgium. In the same Luxembourg law, the children of frontier workers living outside Luxembourg (for instance in Belgium) are excluded from study grants. A recent EURES report provides more detail on the subject (also see below under study grants).<sup>193</sup> The Bulgarian report notes that there is an issue about where a permanent residence is for frontier workers. A narrow interpretation by a national court has raised new problems for these workers. In the *Czech Republic*, there is no special legal scheme for frontier workers but the direct application of EU secondary legislation appears to resolve the problem of access to social benefits. In *Denmark* the residence issue is not directly related to benefits but to lawfulness of presence. Where a frontier worker lives in Denmark and ceases the economic activity in another Member State he or she has a right to residence for more than three months in *Denmark*, provided that the ear-

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<sup>193</sup> MKW Wirtschaftsforschung GmbH, Scientific Report on the Mobility of Cross-Border Workers within the EU-27/EEA/EFTA Countries, January 2009.

lier activity and residence lasted at least three years. As the CJEU *Hartmann* decision was not about permanent residence, the Danish authorities consider that their position regarding this three years criterion is compatible with the judgment. Frontier workers who reside in Denmark are deemed to have sufficient resources. In *Greece* access to social benefits is dependent on employment rather than residence. Until the end of the transitional period on workers from the EU2 *Greece* does not anticipate many frontier workers. According to the *Hungarian* report, frontier workers who live in Hungary but work in Austria are increasing in number. There are services available for Slovak-Hungarian frontier workers and Austro-Hungarian workers but not yet with Romanian counterparts apparently for lack of interest – the main movements between these countries is of seasonal workers and low skilled. Hungarian law does not present issues regarding the *Hartmann* judgment. As *Ireland* has a habitual residence test for access to social benefits, frontier workers who live in the UK but work in Ireland are not regarded as fulfilling the test and so not eligible for benefits. There has been no official recognition in *Ireland* that frontier workers are entitled to child allowance from the country of employment. In *Italy* child birth/adoption allowances remain available only to women living in the country. Frontier workers who work but do not reside in *Lithuania* are subject to social insurance there thus no problem as regards *Hartmann* type situations arise. If state benefits are available and greater than those granted by *Lithuania* then the second state must top up the benefit. Where the parents work in two countries child benefits are paid by the country in which the child is living, if this is with one of the parents. According to the Dutch report, frontier workers from the *Netherlands* working in Belgium (or any other frontier workers working in Belgium) may suffer discrimination as they are not eligible for education vouchers which are based on residence. In *Poland* a number of key social benefits including child birth benefits are only available to persons resident in Poland. A national court has held that the requirement to be resident must be interpreted in accordance with the Polish civil code. In *Slovakia* a residence requirement for access to child birth bonuses was withdrawn in 2009 and replaced with an income limit – now anyone who earns 90% of his or her income in *Slovakia* is eligible for the benefit. However, all social benefits in the country are dependent on residence or permanent residence so there may still be questions regarding compliance with the *Hartmann* judgment. The situation in *Slovenia* is that entitlement of social benefits is not dependent on permanent residence. In *Sweden* there has been a continuous increase in frontier workers. Substantial official attention has been paid to frontier workers particularly between Sweden and Denmark. Regarding social benefits, the new Swedish law 2011 sets out a list of those benefits based on residence and the others based on work. Child birth allowances are based on the principle of residence not work. In *the UK* child benefit, a universal benefit paid in respect of children under 16, is also available for frontier workers working in the UK or UK frontier workers working elsewhere in the EU. The amount is subject to any other child benefits which the individuals receive in the other state on the basis that the

UK authorities top up the benefit to the UK standard level where necessary. Similarly, other UK social benefits, in particular working tax credits are available to frontier workers but form the subject of substantial friction in practice.

Double taxation agreements between *Austria* and *Germany* include special provisions on frontier workers. *Austria* also has in force agreements with the *Czech Republic*, *Hungary*, *Slovenia* and *Switzerland*. Along similar lines, an amendment to the Belgian-French Agreement provides that frontier workers pay tax only in the country of residence (with one exception). In *Denmark* special provision is made in the tax arrangements so that frontier workers are not subject to the general rules but have limited tax liability to which tax relief is possible. If a worker earns at least 75% of his or her income in Denmark then he or she may be able to opt into the Danish system in total. According to the *Irish* report, emerging issues on frontier workers were examined at a seminar in 2010 which revealed friction regarding taxation of frontier workers between Ireland and the UK including lack of information and advice, recognition of qualifications and bank charges. *Latvian* law is unclear about the right to tax deductions for family members resident in other Member States where the frontier worker is employed in Latvia and subject to its tax regime. In *the Netherlands* the national court has applied the CJEU decision in *Renneberg* however the tax authorities now require frontier workers who wish to deduct expenses to choose to be treated as internal taxpayers rather than external. For the former there is a higher rate of tax. A national court decision in favour of a Belgian frontier worker that he could deduct his mortgage payments in Belgium has been challenged by the tax authorities. A new journal has been established in *the Netherlands* on the tax and social security problems of frontier workers. Access to higher education in *Poland* is dependent on the person being resident in the state. The *Portuguese* report noted that problems regarding car registration which affect in particular frontier workers between *Portugal* and *Spain* have been resolved (see above in chapter v). In *Spain* two double taxation agreements, one with Portugal and one with France are in force and have been the subject of consideration recently. Two regions have established a register of transfrontier workers to assist the authorities in determining tax liability. In one of the regions a frontier worker can only invoke the agreement if he or she is registered. In *Sweden* an agreement between Denmark and Sweden on tax matters has facilitated frontier workers by simplifying their tax affairs and making adjustments for differences in tax revenues between adjacent regions differentially affected by increasing numbers of frontier workers.

In *Italy* problems identified in 2009 regarding restrictions on banking have been resolved. Frontier workers are now exempt from the provisions. According to the *Latvian* report, access to education for third country national family members of frontier workers resident in Latvia causes difficulties as this can only be accessed with a residence permit. The same applies to study grants. In *Luxembourg* there are many frontier workers and a substantial number of

problems. In 2010 the CJEU considered an issue which arose regarding a French commuter in receipt of an invalidity benefit in her country of origin who was classified in Luxembourg as a job seeker but refused an unemployment benefit. The CJEU held that the Member State of residence cannot rely on an invalidity pensions in another Member State to refuse unemployment benefits. Obtaining documentation obligatory under national rules can be problematic in *Luxembourg*. For instance, the authorities require a certificate of residence from the home Member State even where that state does not produce such documents and thus the worker is unable to provide them.

## V.2. Sportsmen and women

Sadly, player quotas on the basis of nationality in some games are still a problem in the EU. Similarly transfer fees which have the effect of diminishing the capacity of persons working in the area to enjoy their free movement rights are also alive and in operation in many Member States and in numerous games. In this section a resume of these concerns is set out:

### **Nationality quotas**

In *Austria* it appears that quotas in a variety of games including basketball still apply where the club seeks state subsidies. As noted in 2009, the basketball association applies quotas on EU players. *Belgium* does not apply nationality quotas in hockey. All other sports associations have refused to provide information to the rapporteur. In *Bulgaria* new rules in volleyball apply even more restrictive nationality quotas than before and make no exception for EU nationals (though those with permanent residence are excluded). There are no quotas in basketball or handball under new rules adopted. But in ice-hockey only Bulgarians or those with long term residence may compete. In the *Czech Republic* there are no nationality quotas for EU nationals as regards the relevant games (except in football for the national team). In *Cyprus* there is pressure from the football clubs for quotas but no evidence of discrimination on the basis of nationality. In *Denmark* the football association adopted rules in 2009 requiring teams in the SAS league to have a minimum of eight home grown players – those who have been educated in another Danish club for at least 36 months between the ages of 15-21. The rules of the basketball and handball federations and the rugby association do not permit nationality quotas against EU nationals. In volleyball there is a two year residence requirement for players. In ice-hockey a rule permits a total of eight non Danish players to be fielded. In *Estonia* there are no central rules on sports. Generally there are no restrictions on EU nationals playing in the games relevant here. In *Finland*, there is a gentlemen's agreement in basketball which limits EU players to three per team. A quota also applies in vol-

leyball which permits only two foreign or EU players to be fielded. There are no longer quotas applicable to EU nationals in ice-hockey and football.

In *France* the rules on basketball have been subject to amendment to avoid discrimination against EU nationals. In *Greece* quotas do not apply in football but EU nationals are still subject to different treatment in basketball. Greek rules on equal treatment protect EU nationals with permanent residence (but not those without this status) from discrimination in other sports. There is an on-going problem regarding the employment of coaches and their assistants, one of which must be Greek. In *Hungary* there are substantial state support schemes for spectator sports. Quite complex tax arrangements apply to professional players. In all sports, players must obtain a racing certificate and racing permit which are not limited on the basis of nationality but the legislation does specify the category of 'Hungarian athlete'. New rules on handball permit third country nationals with permanent residence to play but the situation for EU nationals is less clear. Boxing, wrestling and swimming all present problems of discrimination against EU nationals. In *Ireland* no problems are noted. The only possible area where there is a nationality consideration is in Gaelic sports but the emphasis is on *Irishness* not on nationality.

In *Italy* there is no restriction on recruitment of EU nationals in football. Following the *Olympique Lyonnais* judgment of the CJEU, the federation issued a press release confirming it would seek to protect 'training colts'. In basketball any player can be affiliated after having played four consecutive seasons in the Youth Championships. While the rules in volleyball and handball make a distinction between Italians and foreigners it seems EU nationals are assimilated to the former. In rugby 50% of players must come from the national training colt. In ice hockey, national rules establish two categories (A) and (B). In A2 championships teams can field 19 players from (A) and 3 from (B). The difference between the two categories is that (A) applies to Italians affiliated to Italian teams and foreigner affiliated to Italian teams and (B) those affiliated to foreigner teams including Italians (subject to time limits). In *Latvia* only five foreign players can be fielded in championship games but in other games there do not seem to be nationality quotas. In *Lithuania* new football rules still have not resolved the nationality quota problem. Foreign players, (including EU nationals) are limited to four per game (this is down from six in 2008). Similarly in both men's and women's basketball there are nationality quotas in place which operate against EU nationals and high registration fees for non-Lithuanians. No problems are noted regarding volleyball, ice hockey or handball. On rugby there is no information. In *Luxembourg* considerations are under way as to whether nationality quotas in football which act against other EU nationals are permissible. At the moment it seems that a home grown requirement for six players is the likely limitation to be imposed. The authorities are aware of concerns by the Commission as they have been responding to letters regarding football and boule-

petanque. In basketball, EU nationals are assumed to the position of Luxembourg nationals provided they have lived or worked in the country for one year. EU nationals are assimilated to the position of the Luxembourg citizens for the purposes of the volleyball rules.

In *Malta* in football there must be at least eight home grown players fielded in every match. In May 2011 the basketball authorities announced that it will amend its rules to limit (or hopefully abolish) nationality quotas against EU nationals. This followed pressure from the Commission regarding a particular case. However, there are quotas still in volleyball (two foreign players) and handball (three players) but not in rugby (except the national team). In the *Netherlands* quotas exist in basketball (there must be a minimum of five Dutch players) and concerns to impose quotas in field hockey. As regards baseball, a new nationality quota has been introduced – only three players without Dutch passports may play in any game. In *Poland* in football games there must be at least eight Polish nationals on each team. No quotas apply in handball but in volleyball there must be at least four Polish nationals on each team in the 1<sup>st</sup> League and five in the 2<sup>nd</sup>. In basketball there must be at least two Polish nationals per team and in basketball at least six Polish nationals (or five where competing in European competitions). In ice hockey the rules only permit three foreign players (but the goalie counts as two). EU nationals are counted as foreign (unless they have Polish parents or grandparents). In rugby the limit for foreign players is three.

In *Portugal* an informal agreement not to hire foreign players was applied in professional men's basketball but has now been revoked by a new competition regulation. In women's basketball only three foreign (including EU) players can be on a team and only two fielded at a time in games. In football there must be at least eight locally trained players which is likely to be indirect discrimination. Ice-hockey is subject to quotas on players in *Slovakia* where only two foreign (including EU) players can be fielded at a time in championship games. Five foreign players (including EU nationals) may play in the ZOK 1 league. Similarly in volleyball teams at championship level only three foreign players may compete. It seems that EU nationals are for these purposes 'foreign'. In basketball and handball EU nationals are assimilated to Slovak players. In *Spain* the basketball federation has adopted new rules in 2010 which permit a wide margin of discretion on issuing licenses. In particular reference is made in the rules to protection of the job market and national sports teams in general. The problem is more pronounced in women's basketball where a formal quota applies – six home grown players. In handball the Spanish rules require three national players to be selected for Spanish teams. In volleyball, licenses will not be issued to more than five players who are not from the Royal Spanish Volleyball Federation. In *Sweden* generally EU nationals are subsumed into the category of nationals in all sports. There are some issues about the category of home grown players particularly in football. The *UK* also subsumes EU nationals to UK nationals for the purposes of

limitations on foreign players in most games. However, in ice hockey ten overseas players only are permitted and these are defined as non-British trained players in one league, three non-British trained players in another and only two in a third. In football, the UK authorities have adopted a quota on the lines of home grown players consistent with the UEFA proposal. In rugby, it seems home grown player rules are also being applied as well as salary caps. A study on equal treatment in individual sports competitions reveals interesting information on access of EU nationals to competition in the UK.

### **Transfer fees**

The *Belgian* report states that the French Community has banned transfer fees. Only training fees are still acceptable. In *Bulgaria* fees apply in basketball but the sums are limited (€100) and apply to everyone equally. In football a solidarity fee is payable in *Denmark* equivalent to 5% of the compensation paid to a former club on transfer which does not include a training compensation component. In basketball a new rule was adopted in 2009 which requires a compensation sum be paid to clubs of origin of young players where they move on to better series. The sum is currently €270 for men and €130 for women. In volleyball, a transfer fee of €1,000 must be paid. In handball a fee is payable in the form of education compensation. This compensation may be required for players between 16 – 23 on contract with the club for the preceding 12 months and appearing in the match report. The maximum education compensation is €2,500 per season to a maximum of €24,000. In ice-hockey the transfer fee in the form of issuance of the transfer card is €1,000. There are no transfer fees in rugby. In *Hungary* transfer fees are permitted in football.

In *Latvia* ice-hockey, football, basketball and volleyball players pay different registration fees depending on whether the player is Latvian or a national of another Member State. Transfer fees apply in all these games. In all sports in *Lithuania* transfer fees are common. In *Malta* the Commission examined the transfer fee provisions regarding water polo and found them acceptable. In *Portugal* the press attention in 2009 to the case of a 14 year old German boy whose family moved to Portugal and who wanted to play football continued in 2010. The young man was required to pay a registration fee of €1320. If he had been in the framework of a transfer the fee would have been €37.50. In *Sweden* transfer fees for young players can be substantial. An 18 year old who signs a professional contract pays a fee of €4,300 and for a 21 year old the sum is €10,760. In the UK transfer fees apply in ice hockey, football and other sports generally in accordance with the rules of the international governing bodies.

### V.3. The maritime sector<sup>194</sup>

The maritime sector continues to present a challenge for the free movement of workers in EU law. The key problem which arises is that not all Member States have successfully abolished nationality discrimination in working conditions on ship bearing their flag. There are two key issues: (1) different and disadvantageous working condition for sailors not holding the nationality of the state where the ship is flagged in comparison with the conditions required for nationals of the flagging state; (2) nationality requirements for senior members of crews. Both have been matters of concern for the Commission for a number of years. The current state of affairs according to the national experts is as follows.

No problems were noted regarding this sector in: *Austria, Belgium, Bulgaria, the Czech Republic, , Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia and Slovenia.*

In *Greece* the post of captain has now been opened to all EU nationals but is subject to a language requirement. A new law applies a levy on passengers on ships flagged outside Greece and operating cruises to and from Greek ports. The levy is reduced by 20% where the number of Greek seamen engaged on the ship is higher than 1%. EU national seamen do not count towards the reduction. *Ireland* presents an unfortunate situation. The main ferry company has now reflagged its vessels to Cyprus and the Bahamas, replaced its Irish staff with staff from the Baltic states and massively reduced wages. As the law of the flagging state applies nothing has been done. In *Lithuania* the law has been changed to assimilate all EU nationals to the position of Lithuanians as regards the composition of ship crews. Where the captain or chief officer does not speak Lithuanian then a pilot must be used on entry into Lithuanian ports. There is preferential tax treatment for seafarers working on Lithuanian or EU flagged ships. But sailors working on ships flagged in third countries have a fixed fee for health insurance which is lower than the 6% which those working on EU flagged ships must pay. The Lithuanian seafarers' organizations are, however, concerned about the treatment of Lithuanian seafarers working on ships flagged in other EU Member States. There is information that some employers are not paying social security contributions for these workers and paying them lower wages than to other workers in similar post on the same ship. Instead they are employing Lithuanian workers through Russian agencies and treating them as if they were third country nationals. In *Spain* a nationality requirement for captains and first mates only applies if the Maritime Administration designates the job as one involving the exercise public powers. In *Sweden* there are no provisions in the relevant collective agreements on pay and wage levels of EU national

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<sup>194</sup> See also the 2011 report on Seafarers of the Network prepared by Catherine Barnard.

seafarers so they are set individually. However where seafarers are engaged through a contractor they will enjoy the protection of a collective agreement.

In the *UK* there is still a problem regarding British flagged ships. Seafarers on such ships who are not British are not protected by UK wage and working condition legislation even when working on regular trade and fixed routes between UK ports. The Commission has commenced infringement proceedings against the *UK*.

#### **V.4. Researchers and Artists**

These two categories, researchers and artists, encounter problems when exercising free movement rights which relate to a reluctance in some Member States to treat them as workers. The status of researchers is sometimes ambiguous, falling between worker and student. For artists, the issue is often whether they are treated as self employed or employed and the tax consequences which result. Often artists spend little time in the state where they perform or work but have trouble deducting their expenses from income for tax purposes. Both groups include higher levels of mobility than in many other sectors.

No problems were reported in the following countries: *Austria, Bulgaria, the Czech Republic, France, Germany, Greece, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Slovakia, Slovenia* and *Spain* (though the Commission has raised questions about the possibility for artists to deduct expenses at source).

In *Belgium* financial assistance for aspects of film production is limited to companies based in the country. New guidance is available to help artists moving to the country. The Commission has been pressing *Belgium* to permit the deduction at source of expenses incurred by artists from income generated in the country. In *Denmark* national rules on duration of employment and minimum number of hours worked are applied to researchers and artists to determine their status. A preferential tax rate has been established for non-Danish researchers (or researchers who have not yet been liable to Danish general taxation rules) which discriminates against workers, Danish or other who have already been subject to Danish tax liability. In *Estonia* student doctors may be treated either as workers or students depending on the agreement with the university. In *Finland* EU researchers are treated as employees if they have a contract with a Finnish university or centre but as visiting scholars or posted workers if their contract is with a foreign university. Researchers on scholarships are not treated as workers. Similarly artists may be either self-employed or workers depending on their activities. In *Hungary* artists may opt for an advantageous tax regime, however it results in lower social benefits.

The option is available for all (including EU) artists except the very highly remunerated. It is not available for researchers. In *Ireland*, a contentious regime of tax exemption for artists resident in the country has not (yet) been abolished but its value has been reduced substantially (from an exemption capped only at €250,000 to a cap of €40,000 in 2011). In *Lithuania* while there are no legal obstacles for researchers from other EU Member States, there may be informal practices. The tax arrangements for artists have been changed in 2010 but do not appear to be discriminatory against nationals of other EU states. In *Sweden* the law has now been changed to allow artists and athletes to deduct expenses from taxable income at source. In the UK researchers and artists often find themselves in something of a tax grey zone. Depending on the nature of their contracts, they may be treated for tax purposes as employees or self-employed. Normally if self-employed they can deduct expenses from income at source.

## V.5. Access to Study Grants

Two main issues arose in 2010 regarding study grants (1) are nationals of other EU Member States able to access study grants on the basis of equality with nationals and (2) when EU students move to study in another Member State can they take their study grants with them.

No problems on either count were reported in: *Bulgaria, the Czech Republic, Estonia and Malta*.

In *Austria* students from other EU states are treated as Austrians for the purposes of study grants. No residence requirement applies. When Austrian students study elsewhere in the EU for more than three months they are entitled to study grants. There have been court decisions on the issue but they relate to the previous law which discriminated against Austrians studying abroad. In *Belgium* in the French community the student must reside in the country and one of his or her parents must be employed or have been employed in Belgium. The consequences of the *Bressol* decision (CJEU) before the national court have been considered and discrimination against nationals of other Member States in different fields has been adjudicated on the basis of the criteria the CJEU provided. Discriminatory access to studies in physiotherapy and veterinary studies was upheld but not in midwifery, occupational therapy, speech therapy, podotherapy, audiology and specialized education. In *Denmark*, EU nationals are assimilated to the position of Danish students for study grant purposes where they have worked, their parents or spouse/registered partner or child work in Denmark or they have completed five consecutive years residence in the country. For studies abroad, there are two categories – study periods abroad and study programmes abroad; a two year out of the last ten years residence requirement applies to study programmes abroad. There has been substantial jurisprudence on study

grants in the country and the Ombudsman produced a report in 2010 which deals with failures correctly to identify the rights of EU nationals and to apply them. The relevant authorities are seeking to remedy the situation. In *Finland* EU citizens whose residence is registered in the country are entitled to study grants to study in Finland. For Finnish and Finnish based EU nationals, grants for studies abroad are available if the individual has lived in the country for two years during the five years preceding the beginning of the studies. In *Greece* scholarships are limited to Greek nationals. In *Hungary*, students following vocational courses on missing crafts are all entitled to grants. Hungarian national students are eligible for support to study abroad. Students, nationals of other EU states are entitled to study support where they have permanent residence or have worked or are family members of workers. There is very wide diversity of types of study support. In *Ireland* the general rule of access to EU fees for higher education is that the individual has lived in the state for three out of the five years prior to commencing studies. However there are variations in application by the institutions. The same three years out of the last five applies for financial support. In *Italy*, there is a regional residence quota for 10% of study grants. A 2010 law has introduced a merits test to study grants.

In *Latvia* EU nationals must have a temporary or permanent residence certificate to qualify for study grants. In *Lithuania* a substantial reform of education financing took place in 2009. EU nationals who are workers or family members thereof may obtain state funded loans on the same basis as nationals but other EU nationals must acquire permanent residence first. Scholarships for the poor are only available to EU nationals with permanent residence. In *Luxembourg* a new law has come into force which appears to exclude the children of frontier workers from getting study grants as it requires residence in Luxembourg for EU nationals to be eligible (either as workers or their family members or with permanent residence). Study grants and loans have now been subsumed under the heading of family benefits raising the question whether they must be classified as social advantages. There has been much resistance to the changes because of the substantial numbers of frontier workers in the state whose children are now excluded from grants. In *the Netherlands* any EU or Dutch student who has lived in the Netherlands for three out of the past six years before the commencement of the course of study can export their study grants elsewhere in the EU. As in the case of Luxembourg, this creates issues as regards frontier workers. A worrying development concerns study grants for the children of EU workers. A tribunal has held that where the parent loses his or her employment the child loses the right to a study grant as there is no longer a relationship between the studies and employment.<sup>195</sup> In *Poland* EU nationals have a right to higher education if they are related to or are a worker or have permanent residence. EU nation-

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<sup>195</sup> See *X. v. Ministry for Education, Culture and Science – District Court Groningen*, 10 June 2010 nr. 09/738 WSFBSF.

als with sufficient resources are also admitted to higher education but are excluded from study grants. A grants system for poor people is available to EU nationals who are related to workers or permanent residents. In *Portugal and Slovakia* grants are available to EU nationals who have permanent residence or in the context of bilateral agreements. In *Slovenia* a programme of public scholarships for studies abroad is conditional on Slovenian nationality. In *Sweden* generally there is a requirement of permanent residence for EU nationals before they become eligible for grants (except where they are related to or former workers). Generally, the study grant system is under scrutiny and being applied less generously than has previously been the case. In *the UK* the general rule is that EU or national students must have been resident in the EU for three years before commencing a course of studies to be eligible for home student fees and financial support. Where the EU national has worked before commencing studies or is the child of migrant workers then he or she is immediately eligible (as are Turkish workers and their family members). Although the UK has accepted its commitment to *portability of educational loans and grants around the EU*, this had not yet been implemented by August 2011.

## V.6. Young Workers

The protection of young workers is an on-going concern for the Commission. As a group they have particular vulnerabilities and may have greater difficulties in exercising their free movement rights as workers than adults. Yet they too are entitled to use their free movement right to improve their situation. Laws designed to protect young people must be compatible with the rights of these citizens to enjoy free movement for economic purposes. In 2010 the network prepared a detailed thematic report on the situation of young workers. In this synthesis, we seek to update that thematic work rather than repeat it.

No specific new issues regarding young workers were reported by the experts in the following Member States: *Austria, Belgium, the Czech Republic, Denmark, Estonia, France, Germany, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, Spain and Sweden*.

In *Bulgaria* a new programme to stimulate the employment of young people has been set up. It provides financial assistance to employers to hire those under 29 years of age. No residence requirement applies and EU nationals are equally eligible. In *Finland* a number of programmes have been set up to help young people into employment. They are operated by a variety of actors including non-governmental organizations with state assistance. EU nationals are also eligible and while there is no express residence requirement this may be a de facto one as availability on the Finnish labour market is required in some cases or reliance on Finnish social security benefits

for others. Likewise, in Greece employment promotion programmes are also available for young EU nationals. In Hungary our expert noted that the lack of information about young workers makes it difficult to determine their treatment. In the political debate there, EU young workers are effectively invisible. In Ireland state programmes to help young people back into the labour market (or into the labour market) do not have express nationality requirements and are open to EU as well. But most programmes require the individual to have a previous employment record and to have received unemployment benefit (Job seekers allowance) for six months. To be eligible for Job seekers allowance the person will have to be habitually resident in Ireland. The Youthreach programme specifically for 15 – 20 year olds does not discriminate on the basis of nationality. In Italy our expert noted that a new programme for apprentices permits longer training where the individual needs to learn or improve his or her Italian but is only open to non-EU nationals. In Latvia quite a different problem arises – the hourly rate of minimum pay for adolescents is higher than for adults. This makes young workers less interesting to employers than older workers. In Lithuania unemployment among young workers rose to 35.1% in 2010. The authorities have adopted measures to stimulate the employment of young workers which are non-discriminatory. However, EU nationals are only permitted 90 days to seek a job in the country. Further a place of registration is needed to access the right to stay. Thus EU young workers are caught between the time limit on stay and the inability to get a registration document to access employment placement services. A special programme to assist young farmers can now be accessed by EU nationals from other Member States. The benefit depends on ownership of agricultural land in the country. Nationals of other Member States have only had the right to buy agricultural land in Lithuania since 1 May 2011. In Poland the exemption from making pension and annuity contributions for workers under the age of 26 makes them attractive to employers and diminishes youth unemployment. The rule applies without discrimination to Polish and other EU young workers. In the UK there is a work based learning scheme for young people between 16 – 18 years of age who are normally not eligible for any other benefits. It does not discriminate on the basis of EU nationality.

## V.7. Conclusions

As regards the specific issues which the experts considered in their 2010 reports, it is clear that there are divergences in many areas but also some convergences. It is particularly encouraging to note the number of cases where over the past twelve months Member States have adjusted their rules and practice to get rid of discrimination against EU nationals other than their own citizens. In many cases this was the result of action by the Commission, expert reports (including the current ones) and pressure from civil society organizations. It seems that Member States address issues of discrimination most co-

herently when they occur within the scope of national law or practice. When the practices result from the rules outside direct state control, such as of sporting associations, practices of driving schools etc. it seems more difficult for states to act. Some areas of discrimination affect substantial numbers of people – such as study grants for the children of frontier workers in Luxembourg – in other cases there seems to be little pressure for change. In some areas, the subject matter, such as facilitating employment of young workers, seems to escape the nationality frame in the thinking of state authorities. The social issues relating to youth unemployment is not perceived as related to issues of movement of workers.

## CHAPTER VII APPLICATION OF TRANSITIONAL MEASURES

### VII.1. Transitional measures imposed on EU-8 Member States by EU-15 Member States and situation in Malta and Cyprus

Eight of the ten Member States joining the European Union on May 1, 2004 were confronted with transitional measures restricting the right to free movement accorded to workers in the 'old' Member States. By 2009 the transitional measures were abolished by all 'old' Member States with the exception of *Austria* and *Germany*. The expiry of the transitional period on 1 May 2011 has meant that Austria and Germany had to put an end to their transitional measures. Though one of the reasons to apply transitional measures in *Austria* was the fear that its geographical location would attract a lot of EU 8 nationals, the first two months following the end of the transitional measures have not led to an influx of EU-nationals seeking access to its labour market. The Federal Government stated in the *Bundestag* that it did not expect significant effects of the expiry of the transitional period, as the 2007 and 2009 rules already provided for the issuing of a labour permit for certain professions to EU-8 nationals (see European report 2010).<sup>196</sup> What has happened is that Polish seasonal workers are being replaced by Romanians.

To ensure that EU-8 nationals are not requested to obtain a work permit, Sect. 32a § 11 of the amended *Austrian Aliens Employment Act* now provides that all work permits issued to EU-8 nationals have expired, because they are no longer required.<sup>197</sup> In *Germany* the Federal Agency for Labour was instructed to inform its agencies that EU-8 nationals no longer need a labour permit. No amendments to the rules on residence and the issuing of labour permits were made. Amendments were, however, necessary to ensure compliance with social standards, compliance of which is now closely monitored. Minimum wages for time limited employment contracts (*Zeitarbeit*), which apply to internal employment relations and EU-citizens dispatched from other EU Member States for a limited time to an enterprise seated in Germany, have been introduced and are fixed in close cooperation with employers and trade unions.<sup>198</sup> The minor legislative amendments in Germany resulted in criticism of the party '*Bündnis 90/Die Grünen*' (the Greens) that blamed the Federal Government for neglecting to introduce

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<sup>196</sup> BT-Drs. (official records of the Bundestag) 17/5863 of 18 May 2011, p. 2; see also BT-Drs. 17/5132.

<sup>197</sup> Federal Law Gazette I 25/2011.

<sup>198</sup> See *Arbeitnehmerüberlassungsgesetz* in the version of 30 April 2011; for a special information leaflet on the occasion of the expiry of the transition period see [http://www.bmas.de/portal/51150/a805\\_entsendung\\_eu\\_burger.html](http://www.bmas.de/portal/51150/a805_entsendung_eu_burger.html), available in Polish and English language.

substantive legislative changes that would ensure full freedom of movement for EU-8 nationals. This party has introduced a draft bill to the effect that all references to the Accession Treaties and corresponding rules are removed and recognition of the lawful nature of residence of both EU-citizens and their family members, before and after the transitional period.<sup>199</sup>

The transitional arrangements in place in *Hungary* and *Malta* remain in place.

In April 2011 the special arrangements were adopted regarding access to the *Maltese* labour market by nationals from other Member States. The current position of Malta is that it may still seek a remedy where there is a disproportionate influx of EU-workers, albeit it through the EU institutions rather than unilaterally. The arrangements are laid down in a Declaration<sup>200</sup> and resemble the position accorded to Austria when it acceded to the EU in 1995. For the purpose of monitoring the Maltese labour market, an employment licence system is maintained which should enable the authorities to anticipate potential disruptions to the labour market. The fees for employment licences for EEA and Swiss citizens, their spouses and dependants are currently: € 58.23 (new employment licence) and € 34.94 (extension of an employment licence).

The following comments were made by the *Estonian, Latvian, Dutch, Swedish* and *British* rapporteurs.

*Estonia* still faces shortages on its labour market due to its own qualified workers moving to the EU-15 Member States to pursue an economic activity there. The sectors experiences shortages remain the same: building and construction; services; and public transport (bus drivers). Vacancies are filled by Russians and Ukrainians. A new trend is for third-country nationals to enter the Estonian labour market as a member of the board as this allows for accelerated access to the Estonian labour market.

German language courses are fully booked in *Latvia*, which raised a fear of an upcoming mass exodus of Latvian nationals to Germany. So far, this has not occurred.

In *the Netherlands* politicians still call for the reintroduction of immigration controls for EU-12 nationals, in particular Polish nationals. So far, to no avail (see also: European report 2009-2010). An inquiry into the lessons which can be drawn from the experiences with EU-12 labour migration was commis-

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<sup>199</sup> Entwurf eines Gesetzes zur Anpassung der deutschen Rechtsordnung an die volle europarechtliche Arbeitnehmerfreizügigkeit für die EU-8-Staatsangehörigen, BT-Drs. 17/5777 of 11 May 2011.

<sup>200</sup> Joint Declaration between Malta and the EU annexed to the Final Act to the Accession Treaty and Article 5(7) of the Maltese Immigration rules (LN205/2004).

sioned in March 2011.<sup>201</sup> In April 2011 the Minister for Social Affairs communicated a number of measures to the Second Chamber that will impact on EU-citizens' rights under Directive 2004/38/EC. Though drafted in a general fashion, a number of measures explicitly focus on EU-12 nationals. Amongst the measures envisaged, are mandatory integration courses where Dutch languages skills are found inadequate as a condition to qualify for social assistance. The measure is presented as one that improves employability.<sup>202</sup>

The discussion on services and posted workers in Sweden, as reported in the 2009-2010 European report, continued in 2011.<sup>203</sup> On 1 June 2011 a majority in the Swedish *Riksdag* approved a proposal obliging foreign undertakings posting workers in Sweden to have a representative stationed in that Member State. While these discussions were not strictly about EU 8 nationals, the issue arose on the political agenda as a result of the 2004 enlargement.

Regulations 4 and 5 of the 2004 Regulations have meant that EU-8 nationals seeking employment in the *United Kingdom* have no right of residence in that Member State. As a consequence they are not entitled to social benefits as they do not pass the 'right to reside' test. On 28 October 2010 the Commission delivered its Reasoned Opinion in the infringement proceedings on the compatibility of the Worker Registration Scheme that applies to EU 8 nationals seeking access to the United Kingdom labour market with Article 7(3) of Directive 2004/38/EC.

## VII.2. Transitional measures imposed on workers from Bulgaria and Romania

### VII.2.1 Continuation of transitional measures

The position of Romanian and Bulgarian workers remains unchanged in all Member States. They are still subject of transitional measures in *Austria, Belgium, Estonia, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, and the United Kingdom*. A decision on the extension of the transitional arrangements is due for the end of 2011. The Member States which have invoked the additional 2 year period must justify this on the basis of arguments that to lift the measures would result in a serious labour market disturbance or the threat of one. In *Austria* the transitional measures have been prolonged to 31 December 2013. No transitional arrangements are in place in the *Cyprus, the Czech Republic, Denmark, Finland, Greece, Hungary, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia, Spain* and *Sweden*. Both

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<sup>201</sup> Tweede Kamer 2010-2011, 32 680, No. 1-2.

<sup>202</sup> Tweede Kamer 2010-2011, 29 407, No. 118.

<sup>203</sup> See for instance Lag & avtal, 30 March 2010.

Bulgaria and Romania have not installed transitional measures for EU-15 or EU-8 nationals.

The following information was provided by the *Austrian, Czech, French, Irish, Italian, Dutch* and *Portuguese* rapporteurs.

Access to the *Austrian* labour market by Bulgarian and Romanian workers is regulated by the *Fachkräfte-Bundeshöchstzahlenüberziehungsverordnung*.<sup>204</sup> This order lists 65 (skilled) professions with a shortage of workers (e.g. bricklayer, paver, data engineer, airport staff or payroll clerk) which have been opened to Bulgarians and Romanians. The rapporteur feels that extending the transitional measures is 'only for the public' as the list includes a wide range of professions, amongst which 'classical jobs for migrants' (e.g. in the building sector), and positions for highly educated migrants (e.g. data engineer). 2011 saw an amendment to sect. 32a of the Aliens Employment Act.<sup>205</sup> § 9 of this section now provides that the spouse and the unmarried minor children of Bulgarian and Romanian workers enjoy free access to the Austrian labour market.

An amendment to Sect.103 of the *Czech* Employment Act now provides in general terms for the introduction of transitional arrangements as currently applicable to Bulgarian and Romanian nationals. This will allow that Member State to introduce restrictions to its labour market – if deemed necessary – on the occasion of any future enlargement of the European Union.<sup>206</sup>

The position of Bulgarian and Romanian nationals in *France* is detailed in a circular dated 10 September 2010.<sup>207</sup> According to this circular Romanians and Bulgarians who do not pursue an economic activity for a period longer than three months, posted workers and those who have obtained a Master degree from an institution for higher education enjoy a right of residence if they have a document proving their nationality and they satisfy residence conditions. They are exempted from the obligation to obtain a residence permit. Where the purpose of residence is the pursuit of an economic activity as a worker or self-employed person will have to obtain a residence and, in the case of workers, a work permit is required. The issuing of these permits is determined by national immigration rules. This is also the case for third-country national family members.<sup>208</sup> Self-employed Romanian and Bulgarian nationals need a residence permit, which is to be issued as quickly as possible in order to allow them to satisfy administrative obligations connected to

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<sup>204</sup> Federal Law Gazette II 350/2007 as amended by II 395/2008.

<sup>205</sup> Federal Law Gazette I 25/2011. The amended text is included in the Austrian national report.

<sup>206</sup> Act No. 57/2008 Coll.

<sup>207</sup> Circulaire No. NOR/IMIM/1000/116/C du 10 septembre relative aux conditions d'exercice du droit de séjour des ressortissants de l'Union européenne, des autres Etats parties à l'Espace économique européen (EEE) et de la Confédération suisse, ainsi que des membres de leur famille, texte non paru au Journal Officiel.

<sup>208</sup> If the profession is listed in the Circular of 20 December 2007, then the acquisition of a work permit is facilitated, Circulaire NOR/IMI/N/07/00011/C of 20 December 2007.

the pursuit of their economic activity, but are not required to obtain a work permit. Students are permitted to take up work as a worker for no more than 60% of the normal annual working hours. Their access to the labour market is subject of national rules. The validity of the residence permit issued to a Romanian and Bulgarian worker is linked to the duration of the work contract, with a maximum of five years. However, in the case of study, the duration of validity of the residence permit is linked to the school/academic year and never exceeds a period of one year. A Master or equivalent degree obtain from a French institution for higher education exempts its holder from obtaining a residence or work permit and is an authorization to pursuit any economic activity subject to proof of professional qualifications and nationality.<sup>209</sup> A list of diplomas which are to be treated as equivalent to a French Master degree was drawn up by the Minister responsible for higher education on 12 May 2011.<sup>210</sup> A Master or equivalent degree obtained from an institution for higher education in another State does not exempt from the obligation to obtain a residence permit for highly qualified work. Special rules apply for scientific positions.

Transitional arrangements are under continuous review in *Ireland* and a decision on their extension is due for the end of 2011. No information is available on a crackdown, ordered by the Irish Minister for Enterprise, Trade and Employment, on the (alleged) 5,000 Romanians and Bulgarians suspected of working illegally in that Member State. It is also not known whether workers from these Member States are still being targeted by the Department of Jobs, Enterprise and Innovation in its fight against illegal work. Suggestions have been made that the rules on workers are being circumvented by claiming to be a self-employed person. Whether this is the case or not, claiming self-employment status will mean that there is no right to remain when ceasing to be self-employed, as there is no claim to protection as involuntary unemployed person under Article 7 Directive 2004/38/EC, nor as a job-seeker as the latter requires a work permit.<sup>211</sup>

The transitional arrangements applicable to Bulgarian and Romanian nationals were extended for *Italy* by Circular No. 707 of 23 January 2011 (for 2011). Bulgarian and Romanian nationals need a *nulla osta* (objection certificate) that is issued upon request of the prospective employer, unless the position concerns *employment* in agriculture, tourism and hotel business, construction, domestic work and personal assistance, mechanical engineering, management, highly skilled work or seasonal work. The *nulla osta* has to be presented to the local authorities when they register in the population

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<sup>209</sup> Article L.121-2 CEDESA.

<sup>210</sup> Arrêté du 12 mai 2011 fixant la liste des diplômes au moins équivalents au master pris en application du 2° de l'article R. 311-35 et du 2° de l'article R. 313-37 du code de l'entrée et du séjour des étrangers et du droit d'asile.

<sup>211</sup> *Petru and Aurica Solovastru v. Minister for Social Protection and others* (2010/1331JR, High Court, 9 June 2011, not yet reported).

registry. This obligation has been subject of criticism as Directive 2004/38/EG restricts the documents that can be requested for the purpose of registration with the local authorities to the presentation of the work contract.<sup>212</sup>

In *the Netherlands* the extension of transitional measures beyond 2011 has been requested by various political parties. A decision on this issue is due at the end of 2011 and is presently subject of a study commissioned by the government.<sup>213</sup> Calls for more strict rules on the issuing of a work permit to Bulgarian and Romanian workers, made by various MPs, lead to the adoption of a motion in the Second Chamber in which it asked for the introduction of further restrictions in December 2010.<sup>214</sup> April 2011 witnessed an amendment to the *Dutch* rules regulating work permits for seasonal jobs which took effect on 1 July 2011.<sup>215</sup> As seasonal work is the main reason why a work permit is issued, this is a major change in Dutch policy, which was not welcomed by employer organisations. Employers in need of seasonal workers have filled requests for interim injunctions (*infra*, section 2.2). 2011 has experienced a drop in applications for a work permit

## VII.2.2 Case law

The *Austrian*, *French*, *Dutch* and *British* rapporteurs have included case law concerning the transitional measures that apply to Bulgarian and Romanian workers in their respective national reports.

The *Austrian* Administrative Court has referred a question to the CJEU on a Bulgarian national's right to take up employment if the purpose of residence is study.<sup>216</sup> The questions concern the relationship between the Bulgarian Accession Treaty and Directive 2004/114/EC, in particular the interpretation of Article 17 of that Directive in the light of Austrian labour law that obliges employers to apply for a work permit.

On 28 April 2011 the *French Cour administrative d'appel de Nantes* ruled that Article L.121-2 CEDESA takes precedence over Article 39 EC (currently: Article 45 TFEU) by virtue of Annex VII read in conjunction with Article 23 of the Bulgaria and Romania Accession Agreements.<sup>217</sup> On 30 November 2010 the *Bordeaux Cour administrative d'appel* upheld an expulsion order in a case concerning a Bulgarian national who had worked without prior authorization. The *prefet* was found not to have exceeded the margin of appreciation under Article 8 ECHR when deciding that the relationship with a French

<sup>212</sup> Question no. 1206, *Lo stato civile italiano*, 2010, 11, 33.

<sup>213</sup> Tweede Kamer ... 29 407, Nos. 104-105.

<sup>214</sup> Tweede Kamer 2010-2011, 32500 XV, No. 37.

<sup>215</sup> Brief van de Minister van Sociale Zaken van 8 juli 2011, Tweede Kamer 2011, 29 407, No. 128.

<sup>216</sup> Case C-15/11, *OJ EU* 2011, C 113/3.

<sup>217</sup> CAA Nantes, 28 avril 2011, n°10NT01756, *Préfet de l'Orne c Gherman* CAA Nantes, 28 avril 2011, n°10NT01757, *Préfet de l'Orne c Husu* CAA Nantes, 28 avril 2011, 10NT01758, *Préfet de l'Orne c Schipor*.

sister-in-law was insufficient reason to abstain from adopting an expulsion measure.<sup>218</sup>

The amendment to the *Dutch* rules regulating work permits for seasonal jobs, which took effect on 1 July 2011 (*supra* section 2.1), was subject of legal proceedings. Interim injunctions were granted to employers in July 2011, obliging the authorities to treat them as if they were in possession of the required work permit.<sup>219</sup>

In *Tilianu* the *British* High Court<sup>220</sup> and Court of Appeal<sup>221</sup> each held that Article 7(3)(b) and (c) of Directive 2004/38/EC applied only to those who had previously been *employees*.

### VII.2.3 Data concerning EU-2 workers

Statistical data concerning the number of EU-2 nationals working in their Member State is included in the *Belgium, German, Hungarian, Irish, Italian, Dutch* and *Polish* reports.

*Belgium* witnessed an increasing number of working permits issued to EU-citizens in the period 2004-2008, in particular to Polish workers (1,046 in 2004 to 12,320 in 2008).<sup>222</sup> 2008 and 2009, however, saw the number of work permit issued to EU-10 nationals decrease by 48%, with a dramatical decrease of work permits issued to Polish citizens (12.320 to 1.943).<sup>223</sup> A similar trend is reported for self-employed workers.<sup>224</sup>

According to statistics of the *German* federal police in June 2010, 67.333 Bulgarian nationals and 114.848 Rumanian nationals were living in Germany of which 15.400 Bulgarian nationals and 32.083 Rumanian nationals have lived in that Member State for more than 8 years. From 2007 until 30 June 2010 in total 150 Bulgarians and 526 Rumanian nationals were deported to their home countries.. Between 2004-2009 the number of Polish seasonal workers reduced by 95.700 persons due to the fact that other Member States did not maintain restrictions on free movement for Polish workers. This reduction was compensated by increased recruitment of Romanian nationals who, in 2009, accounted for 89.172 seasonal workers (by comparison: 184.241 Polish seasonal workers in 2009). In 2009 two thirds of all seasonal workers were nationals of EU-8 Member States.<sup>225</sup>

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<sup>218</sup> CAA Bordeaux, 30 novembre 2010, n°10BX00993, *Gruewa c Préfet de la Haute-Vienne*.

<sup>219</sup> District Court The Hague 27 July 2011, AWB 11/20541, LJN: BR2785, *ibidem*, AWB 11/17142, LJ: BR2788, AWB 11/19142, LJN: BR2778 and *ibidem*, AWB 11/21417, LJN: BR2786, *Jurisprudentie Vreemdelingenrecht* 2011/401 nt P.J. Krop.

<sup>220</sup> [2010] EWHC 213.

<sup>221</sup> [2010] EWCA Civ 1397.

<sup>222</sup> Migration Report (2009) p. 164.

<sup>223</sup> Migration Report (2010) p. 142.

<sup>224</sup> Migration Report (2010) p.141.

<sup>225</sup> BT-Drs. 17/2645 of 26.07.2010.

The number of foreigner workers in *Hungary*, which is traditionally low, has continued to decline. In 2010 their total number dropped below 25.000. Romanian nationals still take the lead though the number of Romanian workers almost halved, from 12.566 (2009) to 6889 (2010), followed by Ukrainian nationals (4024 persons) and Slovak nationals (3294 persons). The number of workers from the EU-15 countries remains low; only 1729 EU-15 workers were notified to the authorities in 2010.

The figures for *Ireland* for the reporting period are:

Year	Nationality	New Permits	Renewals	Total Issued	Refused	Withdrawn <sup>226</sup>
2010	Bulgaria	69	1	70	8	2
	Romania	766	5	771	130	18
2011	Bulgaria	8	0	8	3	0
	Romania	121	2	123	22	10

As there is no exact correlation between the data for applications, permits issued and that for permits refused (a permit may be issued or refused in respect of an application during the previous year for example), the Irish rapporteur finds it difficult to draw any firm conclusions from the statistics.

In *Italy* the number of Romanian citizens increased from 342.200 (1 January 2007) to 887.763 (1 January 2010). The figures for Bulgarian citizens in this period are 17.461 (1 January 2007) to 40.026 (1 January 2010).

On 1 January 2011 more than 25.000 nationals of Bulgaria or Romania were living in *the Netherlands*. Almost half of these EU-2 nationals have been resident in the Netherlands between 1 and 5 years and 30% has a residence history of more than five years.<sup>227</sup> According to the population registration 4.241 migrants born in Romania migrated to the Netherlands in 2010 (approximately the same as in 2009: 4.300) and 2.565 left the Netherlands (net immigration: 1.676). 2010 saw 2.697 registrations of Bulgarians born in that Member State (in 2009, this figure was 2.227) and 1.443 Bulgarian nationals left the Netherlands (net immigration: 1.254). The number of temporary residence permits issued to Bulgarians in 2010 was 1,570 (in 2009: 2,000). The number of temporary residence permits issued to Romanian nationals (1,120) saw a slight increase compared with the previous year. The number of permanent residence permits issued to EU-2 nationals in 2010 is negligible. The number of work permits issued to EU-2 nationals in 2010 was considerably lower than in the previous year (2,722 to Romanian nationals (3,326 in 2009) and 867 to Bulgarian nationals (down from 924)). Most work permits were is-

<sup>226</sup> Data on withdrawals is not available for 2007 and 2008.

<sup>227</sup> CBS Webmagazine.

sued for seasonal jobs in horticulture and agriculture (80% Romanian workers and 60% Bulgarian workers). Only 10% of the applications for work permits for Romanian nationals were issued for highly qualified jobs. Most of the work permits are valid for 24 weeks or less; 1% of the permits for Bulgarian workers and 4% of the work permits for Romanian workers were valid for one year or longer. The latter are most likely the permits issued for highly qualified Romanian nationals employed in research and IT jobs. In March 2011 a total of 4.700 EU-2 nationals were registered as workers with the social security organisation UWW.

The statistics of the *Polish* Office for Foreigners reveal that the number of Bulgarian and Romanian nationals in Poland is not very considerable. The 1.203 Bulgarian citizens who had registered their presence in Poland in the period 2008-2010 amount to 5.9% of the total of EU-citizens registered in that Member States. This figure is 2.7% (548) for Romanian nationals. They are, however, both in the top three as far as negative decisions on registration of stay are concerned, with Germans (6417 registrations) taking the lead. The figures for 2008-2010 are: 45 negative decisions issued to Bulgarian applicants and 37 to Romanian applicants.

#### **VII.2.4 Miscellaneous**

In *France*, minors, who are nationals of Member States that are subject of transitional arrangements, and have lived in that Member State for five years are entitled to take up paid employment as a worker without a work permit.<sup>228</sup>

### **VII.3. Conclusions**

2011 saw the last two Member States abolishing the transitional measures which applied to EU-10 nationals with no mass movements occurring. In Germany Polish workers were replaced by Romanian workers, Bulgarian and Romanian workers are still subject of transitional measures in the majority of EU-15 Member States. Austria has already decided to continue transitional measures until 2013 and a decision whether or not such measures are to be extended is due by the end of 2011 in Ireland and the Netherlands. Insufficient labour capacity in Estonia, due to its nationals moving to the EU-15 Member States, is being remedied by attracting workers from Russia and the Ukraine.

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<sup>228</sup> Articles L.121.1, 4o and 5o and L.121.3 CESEDA.

## CHAPTER VIII MISCELLANEOUS

This chapter first examines the relationships between EU social security rules (Regulations 1408/71 and 883/04) and Regulation 492/2011 as well as between Directive 2004/38 and Regulation 492/2011 with regard to frontier workers. It then provides an overview of developments in Member States which impact on free movement of workers, with a focus on integration measures that apply to EU citizens, especially those from the EU-12; developments in immigration policies applicable to workers from third countries and the application of the EU preference principle; and the return of nationals to the new EU Member States. Information is also provided on non-judicial mechanisms in Member States (in addition to national SOLVIT centres<sup>229</sup>), which EU citizens can approach for information about their rights under free movement law or to resolve difficulties in accessing these rights.

### VIII.1. Relationship between Regulation 1408/71-883/04 and Art 45 TFEU and Regulation 492/2011

Like other Member States, *Belgium* took measures to promote the activation of job seekers, such as reduction of social security contributions, employment benefits, measures for older job seekers, reimbursement of outplacement costs, measures for part-time workers, measures for handicapped persons. Some of those measures may not fall into the scope of Regulation 1408/71 (or 883/2004) as social security, but could fall into the scope of Article 45 TFEU, and Regulation 492/2011, or into citizenship and Directive 2004/38.

As an illustration of the delimitation between Regulation No. 492/2011 and Regulation No. 1408/71 it could be mentioned, however, that in one of the cases concerning social assistance to *Danish* citizens upon return from another Member State the National Social Appeals Board noted that Regulation No. 1408/71 does not apply to questions concerning social assistance under the Act on Active Social Policy, as this cash benefit does not belong to the category of social security covered by the Regulation. Since the applicant in this case was not considered to have acquired the status of worker upon return to Denmark, she was found not to be entitled to full social assistance in accordance with the EU exemption from the residence requirement, but only to the reduced cash benefit of the starting assistance.<sup>230</sup> While the Appeals Board's reasoning again here is based on the less relevant criterion of acquired status of worker in Denmark, the result may be more appropriate in this particular case due to the fact that the applicant had been a long-distance student at a Danish university, in receipt of Danish study grants, dur-

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<sup>229</sup> For more information on SOLVIT, see the European Commission's web site at [http://ec.europa.eu/solvit/site/about/index\\_en.htm](http://ec.europa.eu/solvit/site/about/index_en.htm).

<sup>230</sup> National Social Appeals Board, decision of 24 September 2009. Reported in No. 207-09.

ing her residence in another Member State. The more general impact of EU citizenship in connection with such residence was not considered, however, as the Appeals Board only focused on the possible status of worker under Regulation No.492/2011.

In *Finland* it has been argued by the Social Insurance Institute that the judgment in C-213/05 *Geven* can be taken to offer support for the view that if the employment in Finland would be so minor as regards its duration and the weekly working hours that the person in question would not qualify as a worker for the purposes of the Regulation 1408/71 (now Regulation 883/04), she is not entitled to claim benefits under Regulation 1612/68, either.

In *Ireland* in previous reports, it was stated that it had not been possible to identify any concrete cases where the relationship between Regulation 883/04 and the equality rules in Regulation 492/2011 has been in issue. This question was raised in discussions with the Department of Social and Family Affairs in relation to the application of the *Hartmann* and other rulings of the CJEU. There had clearly been concerns about the application of the "habitual residence" condition to social security and social assistance payments, which may now be of largely historical importance. The Department made a clear distinction between payments caught by the Regulation 883/2004 regime, which (with certain exceptions) are payable by the Member State of employment and social welfare payments which are caught by Regulation 492/2011, so that the habitual residence condition cannot apply to frontier workers and others benefiting from the free movement provisions.

One specific problem in *Lithuania* in the field of social security similarly as in the other EU Member States is the definition of "residence" for the purpose of issuing family benefits or the benefits in the case of death. Lithuanian legislation relates it to the place of declared place of residence. In practice problems occur, because frequently persons departing from Lithuania do not declare departure.

The requirement to have a place of residence in *Poland* in order to be eligible for social pension was analyzed in 2010 by the Polish Court of Appeal in Lublin<sup>231</sup>. According to the court, after accession to the EU, Polish citizens acquired the right to free movement throughout the whole EU. Therefore granting social pension conditional upon having residence and domicile in Poland, discriminates Polish citizens, who consequently have a limited right to make use of this fundamental freedom to move and reside in other Member States. Therefore Art. 2.1 of the Act, which requires from Polish citizen to be resident in Poland for the purposes of granting social pension constitutes according to the court a violation of EU free movement rights. Although the court only analyzed (according to the present factual situation) the requirement to have residence in Poland as regards Polish citizen, the same analysis may be done as regards EU citizens and members of their families who are listed in Art. 2.3 and to whom the same obligation to have a place of residence in Poland applies.

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231 Judgment of May 13, 2010, file no. III AUa 335/10.

In the *Slovenian* legal system there are three benefits belonging to the list of special non-contributory cash benefits registered under annex X of Regulation 883/04: State pension, Income Support for pensioners<sup>232</sup> and Maintenance allowance. All these benefits are part of the Slovenian pension system. These benefits have a similar nature as the incapacity benefit to disabled young people in the *Hendrix* case, and could therefore be affected by this *Hendrix* ruling.

In Sweden, from January 1, 2011, a new *Social Security Code*, with in principle a corresponding division, came into force, replacing around thirty former acts on different social benefits.<sup>233</sup> Concerning different benefits there are transitional regulations depending on when a person has been qualified for a benefit etc. Hence, the crucial issue from a free movement of workers perspective is if social benefits should be granted to a person based on residence or on work respectively.<sup>234</sup>

The new Social Security Code will in principle lead to the same conclusions as the old one, and in the Government's proposition there are corresponding lists.<sup>235</sup> Hence, in accordance with the Government's proposition, a list comprising social benefits based on *residence* is presented in ch. 5 § 9 of the new Code, and a list comprising social benefits based on *work* is presented in ch. 6 § 6.<sup>236</sup>

In principle, a social benefit that is not covered by Regulations 1408/71 - 883/04 and residence should be granted to a worker referring to Regulation 492/2011, Article 7(2), and the principle of equal treatment, even if the worker is not settled in Sweden applies (for instance if he or she is a cross-border commuter working in Sweden but living in another Member State).<sup>237</sup>

## VIII.2. Relationship between the rules of Directive 2004/38 and Regulation 492/2011 for frontier workers

This is an issue that is only addressed in the Danish, Latvian and Lithuanian report. In *Denmark* the Ministry of Refugee, Immigration and Integration Affairs states that *Hartmann* (C-212/05) concerns issues on social benefits under Regulation 492/2011 which, according to the Ministry, do not apply directly to the rules on rights of residence of EU citizens and their family members under Directive 2004/38. The Ministry further states that frontier workers residing in Denmark and working in their home-country are considered to be persons with sufficient resources in terms

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<sup>232</sup> Correct translation of the benefit called Income support for pensioners is *Supplementary allowance*.

<sup>233</sup> See Government's proposition 2008/09:200 Socialförsäkringsbalk, and Government's proposition 2009/10:69 Socialförsäkringsbalk. Kompletteringar av socialförsäkringsbalken. (The new legislation was introduced through SFS 2010:111.)

<sup>234</sup> In an instruction issued by the former Swedish National Insurance Board in 2004 – to be applied by the Social Insurance Agency – there was a general and very short comment on the classification on social benefits in relationship to Regulation 1408/71 - 883/04 and Regulation 1612/68. Riksförsäkringsverket, *Tillämplig lagstiftning, EU, socialförsäkringskonventioner, m.m.* Vägledning 2004:11, Stockholm 2004.

<sup>235</sup> Government's proposition 2008/09:200 Socialförsäkringsbalk (chapter 3).

<sup>236</sup> Government's proposition 2008/09:200 Socialförsäkringsbalk.

<sup>237</sup> Official report SOU 2005:34 Socialtjänsten och den fria rörligheten, p. 57.

of Directive 2004/38/EC. As a justification of this, the Ministry refers to COM (2009) 313, p. 4.<sup>238</sup>

The *Latvian* report mentions that provisions of Directive 2004/38 and Regulation 492/2011 may lead to the situation where a frontier worker on the one hand is granted the right not to register his/her residence in the Member State where he/she works (Directive 2004/38) but on the other hand such a right may lead to unequal treatment under Regulation 492/2011 against frontier workers if for enjoyment of a particular right there is a residence requirement.

In view of issues analysed by the CJEU in the *Hartmann* case there should be no similar problems in *Lithuania*; because the family benefit may be paid to the person on the basis of workplace and not residence (the competent country is the country of work even if one of the parents is unemployed). According to the MSSL, the frontier worker would be paid family benefits even for family members residing in another state. If the allowance is bigger in the country of residence, then the later pays the difference.

### **VIII.3. Existing policies, legislation and practices of a general nature that have a clear impact on free movement of workers**

#### **VIII.3.1 Integration measures**

As also observed in the 2009-2010 report, there are no integration measures specifically aimed at EU-12 nationals in most of the EU-15 (*Austria, Belgium, France, Germany, Ireland, Italy, Netherlands, Poland, Sweden, United Kingdom*) and EU-12 Member States (*Bulgaria, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Romania, Slovakia, Slovenia*). Whereas mandatory integration measures exist for third-country nationals in some EU Member States (*Austria, Germany, Netherlands, United Kingdom*), it is expressly stated that EU nationals are not encompassed by such measures. In the *Netherlands*, however, the rapporteurs refer to initiatives exploring possibilities to advance the integration of EU workers and to a pending proposal to amend the Law on Labour and Social Benefits which will make the right to a benefit subject to adequate Dutch language skills.

In a number of Member States, EU citizens can also access general language courses available to foreigners residing in the country. For example, in *Denmark*, EU citizens and their family members residing in the country on the basis of EU free movement rules are entitled to an introductory course offered by the municipalities. This course comprises a Danish language course, a course on Danish society, culture and history and offers aiming at employment. In the *Netherlands*, The Hague and Rotterdam Councils offer integration activities in which an increasing number of EU workers from Central and Eastern European (CEE) Member States participate on a voluntary basis. In The Hague, 1,200 CEE nationals participated in

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<sup>238</sup> Cf. e-mail of 11 May 2010 from an official within the Ministry of Refugee, Immigration and Integration Affairs.

2010 and 500 in Rotterdam. In the country as a whole, approximately 9,000 CEE nationals participated in an integration activity offered at the local level. Employers are also being encouraged to facilitate and improve the language skills of CEE workers by affording such workers time, facilities and guidance with their integration. In the *Czech Republic*, free Czech language courses are offered to children with the citizenship of other Member States to assist their integration in elementary schools. In *Germany*, as noted above, EU nationals are exempt from the obligatory integration measures for third-country nationals, such as language courses, but in principle they may attend such courses. Basic language courses in *Sweden* offered to foreigners in general are also available to EU citizens.

In *Ireland*, there is an emerging national integration policy, which covers the integration of immigrants generally. The rapporteur refers to the Intercultural Education Strategy 2010-2015, drafted by the Department of Education and Skills and the Office of the Minister of Integration, which also discusses the successful integration of immigrants – including both EU nationals and third-country nationals – into education, while the National Intercultural Health Strategy 2007-2012 has also advanced a number of recommendations aimed at providing a better health service to all national and ethnic groups in Irish society, including those from EU Member States. EU citizens are excluded from the implementation of integration measures foreseen for foreigners in the general legislation on immigration in *Italy*, although some regional authorities have put in place integration measures, mainly in the fields of social assistance and health care, from which EU citizens in need can also benefit. In *Finland*, a new Act on Promotion of Integration was adopted by the Parliament in 2010. This Act abolishes the legislation described in previous reports. It contains provisions on voluntary integration measures and also applies to EU citizens.

While no special integration measures for EU nationals are envisaged in *Slovenia*, the rapporteur draws attention to the 'information points' for third-country nationals that have been in operation since 2010 and notes that their services – particularly those relating to employment, the labour market and residence – can also be accessed by EU citizens. In *Poland*, the draft Migration Policy for Poland, announced in April 2011 and sent for public consultation, states that the government wishes to improve cooperation with and services for foreigners, including both EU citizens and third-country nationals. Such a programme would facilitate access to information on legal and administrative issues, including where to lodge complaints.

In *Portugal*, the Second Plan for immigrants' integration was approved by a Council of Ministers Resolution in July 2010. The Plan develops the national strategy concerning the reception and integration of immigrants, and includes measures in a wide range of fields (employment, health, education, etc.). However, it is not stated whether the Plan also encompasses EU citizens and members of their families.

Finally, in *Lithuania*, the question of integration support to foreigners living in the country, in addition to persons granted asylum, has been the subject of discussion, but to date has not given rise to any concrete actions or legislation.

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

Despite the economic crisis, there continues to be an interest in attracting more highly skilled migrants to certain Member States. For example, in *Austria*, a new immigration system has entered into force replacing the quota system with a points-based system. In the *Czech Republic*, the 'Green Card' scheme and the 'Selection of Qualified Foreign Labour' pilot project facilitating the access of integrated skilled third-country nationals to permanent residence were described in the 2008-2009 report, and the rapporteur also notes that the 'Blue Card' Directive was introduced in 2010. New migration policies, integration policies for third-country nationals and institutions, have been unveiled during the reporting period in the following EU Member States: *Austria* – creation of a Federal Secretary of Integration with the duty to establish a comprehensive integration policy; *Cyprus* – National Action Plan for Integration for legally resident migrants 2010-2012; *Poland* – Migration Policy for Poland; *Slovenia* – Strategy on economic migration for the period 2010-2020. A further important development in Poland is the regularization exercise approved by the Government in June 2011 that will enter into force on 1 January 2012. The programme is aimed at third-country nationals in an irregular situation who have been continuously staying in the country since December 2007 and includes rejected asylum-seekers. If successful, applicants will be granted the right to stay to stay in Poland for a period of two years and to take up employment without a work permit.

As also observed in previous reports, the Union preference principle is applied in most EU Member States (*Austria, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Germany, Ireland, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden*), whether in law or practice. For example, in *Austria*, it is possible to issue a work permit to a third-country national if there is no Austrian national, EEA citizen or Turkish worker available for the job in question. In *Finland*, third-country nationals may only be issued with a residence permit by the Directorate of Immigration to work in the country if the employment office is satisfied that issuing such a permit would not prevent a person already in the labour market from finding a job. Such persons include Finnish citizens, citizens from other EU Member States and lawfully resident third-country nationals. In *Sweden*, which introduced an employer demand-based system of labour migration from third countries that has been discussed in previous reports, a work permit will only be granted if it is consistent with Sweden's EU commitments, namely an assessment by the Swedish Migration Board that the employer's recruitment is in conformity with the EU preference principle, for example that the job has also been posted on EURES – the European Job Mobility Portal.

The position is somewhat ambiguous in other Member States. For example, the rapporteurs for the *United Kingdom* note that it remains unclear how the changes to the general immigration system will impact on the EU preference principle. The work permit scheme has been retained for Bulgarian and Romanian nationals in accordance with EU rules to ensure preference is given to nationals from the EU-2 over third-country nationals regarding access to the labour market, and Turkish workers are also able to benefit from the most well-defined rights in Association

Council Decision 1/80 – for example, they are exempt from the high fees. In *Hungary*, however, the EU rules on Turkish workers have not been transposed with the result, for example, that there is no reference to free access of these workers to the Hungarian labour market after four years in accordance with Association Council Decision 1/80.

In a number of Member States (*Bulgaria, Czech Republic, Denmark, Germany, Poland, United Kingdom*), exceptions are possible in respect of certain categories of workers in sectors where a need exists. In *Denmark*, when issuing residence permits on the basis of highly qualified employment in relation to a number of schemes, the immigration authorities do not consult regional employment councils to determine whether there is available labour in EU/EEA countries within the sector in question. Nevertheless, the authorities consider the EU preference principle as being complied with because there are still additional administrative and financial requirements imposed on third-country nationals as opposed to EU citizens who may enter *Denmark* and work without restrictions, which, according to the rapporteurs, is a rather questionable position. In *Germany*, the real-life duration of the labour market examination conducted by the Federal Labour Agency may be different according to the profile of the job and the extent of efforts undertaken to find a suitable worker. As a general rule, the labour market test takes four weeks, although in individual cases it may take more or less than four weeks depending on the specificities of the job offer and the profile of the employment. In *Poland*, a relatively large number of categories of workers do not require a work permit and thus are not subject to a labour market test. These categories include permanent residents and EU long-term residents, Turkish workers on the basis of the EU-Turkey Association Agreement, artists, sportspersons, various categories of students, as well as third-country nationals participating in cultural or educational exchange programmes. Nationals from Belarus, Georgia, Moldova and Ukraine can also work for up to six months – usually in seasonal agriculture work where there is a strong demand – within a consecutive period of 12 months without a work permit. The future employer only needs to issue a declaration of work and submit this to the local labour office. Moreover, as discussed in previous reports, it is also possible for persons of Polish origin to apply for a document known as the Charter of a Polish National ('*Karta Polaka*'), which provides free access to the Polish labour market and targets individuals of Polish origin who live within the territory of the former Soviet Union and who lost Polish citizenship due to events connected with the Second World War and the post-war period. This distinction is supported by the Migration Policy for Poland, described above, which grants special treatment to certain categories of migrants, including persons whose Polish origin has been confirmed by statute and who therefore have the right to settle permanently in Poland.

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

As already observed in the 2008-2009 and 2009-2010 reports, there is considerable official evidence in some of the EU-8 Member States (*Estonia, Poland, Lithuania, Slovakia*) that their nationals are returning home after being employed in the former EU-15. Official statistics in *Lithuania* refer to 4,153 citizens who 're-emigrated' to the country in 2009, which constitutes a significant majority of the 5,213 persons

who 'immigrated' to Lithuania during that year. As of April 2011, preliminary data indicate 3,200 persons immigrating to the country. Estimates of returnees vary in *Poland*. According to the Polish Statistical Office, 213,000 citizens decided to return to Poland in 2007, but research conducted by the Office has demonstrated that these returns were planned and not caused by the economic situation. Data gathered by the authors of the "Migration Policy for Poland" document indicate that 400,000 Polish citizens left Ireland and the United Kingdom in 2009, although this does not necessarily mean that they returned to Poland. Starting in 2006, various programmes have also been initiated by the government for returning citizens, but, according to the rapporteur, these have not been very successful. The principal problems returnees experience concern transfer of social benefits, taxation, recognition of the education of their children and practical issues such as car registration. In *Slovakia*, there has been a recorded decrease in the number of Slovak citizens working in other EU Member States since 2007. In 2009, this number was 25 percent lower than in 2008, although statistics for 2010 were not yet available at the time of writing. In *Hungary*, the general trend has been a steady increase in the flow of workers to the EU-15, even during the period of the economic crisis, although data on returnees who have registered as unemployed is now available. Such returnees increased from 3,000 in 2008 to 15,000 in 2010, and included a greater proportion of women, young persons and semi-skilled or less qualified workers. In *Latvia*, no reliable data exist on how many persons have returned to the country from the EU-15, although unofficial data indicate that a higher proportion of Latvian citizens are leaving for the EU-15 than returning to Latvia.

With regard to data on returning nationals to the new EU Member States from the EU-15, this question is viewed as being less relevant in *Austria*, which only lifted transitional provisions at the end of the reporting period. In *Belgium*, as noted in the previous report, for the period 2004-2007, three of the top five countries for forced removals were EU Member States, namely Romania (11%), Poland (7%) and Slovakia (6%) for so-called 'indirect' departures; and Romania (24%), Bulgaria (21%) and Poland (18%) for 'direct' departures. In 2009, a total of 840 EU citizens were deported from *Germany* to their home countries and, in 2007, 3,441 decisions were registered in respect of those EU citizens who had lost their free movement and residence rights in Germany, with the largest number coming from Poland (829), followed by Romania (429), Lithuania (403) and the Netherlands (404). The question of establishing "transit rooms" for returning EU nationals has been debated at the political level in *Denmark*. In *Finland*, the rapporteur observes that the return of EU citizens to new Member States has not taken place in any significant numbers. There is also no significant evidence that EU nationals are returning from *Italy*. Indeed, a further increase of foreigners was recorded in the foreigner population in 2010 as compared to 2009. The two largest groups of foreign nationals in the country are EU citizens – 887,763 Romanian and 105,608 Polish nationals.

As noted in the 2009-2010 report, in *Ireland*, the Reception and Integration Agency, under the auspices of the Department of Justice, supported the Department of Social Protection in the repatriation of destitute EU-12 nationals who do not satisfy the habitual residence condition for social assistance. In 2010, a total of 548 persons were provided with return flights to EU-12 countries, which was less than the 664 persons assisted in 2009 and the 757 persons in 2008, which may also

reflect the lower numbers of EU-12 nationals now resident in Ireland. Since the scheme was introduced in 2004, a large proportion of returnees have been Polish nationals, but since 2007 large numbers of Romanian citizens have also returned: 150 in 2007 (27.8% of the total), 462 in 2008 (61%), 395 in 2009 (59.5%) and 302 (55%) in 2010. Nationals from the Czech Republic, Latvia, Lithuania and Slovakia are also significantly represented (together amounting to 27.8% of the total in 2010). As of April 2011, 270 Romanian nationals had already been voluntarily returned, followed by 54 Slovak nationals, 49 Poles, 38 Lithuanians and 33 Latvians. The rapporteurs for the *Netherlands* also refer to voluntary return activities for vulnerable persons (i.e. those in need of psychological or medical care) from the CEE EU Member States, organized in The Hague and Utrecht.

Finally, as discussed in Chapter I, some of the EU-15 Member States are tightening up their rules with regard to the residence and expulsion of nationals from the new EU Members which raises concerns regarding the conformity of such restrictions with EU law. Most of the cases relating to the expulsion of EU citizens in *France* concern Romanian nationals and usually persons of Roma origin, even if this is not explicitly acknowledged. In the *Netherlands*, stricter measures have been adopted to remove EU citizens in the event of criminality. Furthermore, general measures have been taken in the four largest cities (Amsterdam, Rotterdam, The Hague and Utrecht) to enable the authorities to revoke the residence rights of EU citizens who claim social assistance (i.e. financial assistance and social care). A pilot project has also been started to terminate the right of residence of EU citizens whose reliance on day and night care is classed as 'unreasonable'. Finally, in the *United Kingdom*, the UK Border Agency's pilot scheme to remove homeless EEA nationals – who in practice are likely to be EU-8 or EU-2 citizens – resulted in 116 persons being issued with 'minded to remove' notices and the actual removal of 13 such individuals. However, there seems to be no public information available whether this scheme continued into 2011.

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

With regard to a number of EU Member States (*Austria, Bulgaria, Czech Republic, Denmark, Estonia, Germany, Ireland, Lithuania*), the rapporteurs observed that, with the exception of SOLVIT centres, they were not aware of specific national non-judicial bodies to which complaints against violations of EU law could be addressed, with the exception of general administrative bodies, the ombudsman, or trade unions or professional organizations (see also below). The public institution of the ombudsman is specifically mentioned in the reports of *Bulgaria, Cyprus, Denmark, Finland, Greece, Hungary, Latvia, Luxembourg, Netherlands, Poland, Portugal* and *Romania*, and some examples of recent actions of relevance to the free movement of workers are described in the following EU Member States:

- *Bulgaria* – during the reporting period, the new Ombudsman has played an active role in respect of the imposition of exit bans limiting the right to free movement of Bulgarian nationals.
- *Finland* – the Parliamentary Ombudsman and Chancellor of Justice. In August 2010, the Parliamentary Ombudsman gave a decision in respect of a

complaint concerning the right to vote in elections to the European Parliament. The complaint was lodged by a Finnish citizen who had previously resided in Spain, where she had been entitled to vote in elections to the European Parliament, but who could not vote in Finland because she was still enrolled in the Spanish electoral register. The Ombudsman instructed the Population Register Centre of Finland to develop methods to more effectively inform individuals of their rights and the measures they will have to take in order to fully make use of these rights;

- *Hungary* – the Ombudsman received a number of complaints of relevance to free movement of workers, including a complaint in respect of Hungarian nationals resident abroad who could not continue their membership in a private pension fund at home in the absence of certified permanent employment or studies.

Equality or anti-discrimination bodies may also be pertinent to resolving free movement issues, and these are referred to by rapporteurs for the following Member States:

- *Belgium* – Centre for Equal Opportunities and Opposition to Racism;
- *Cyprus* – the Commissioner's Office for Administration (Ombudsperson) in its capacity as Equality body;
- *Italy* – UNAR (National Office against Racial Discrimination), which reported in 2010 that complaints of racial discrimination against foreigners is growing;
- *Netherlands* – Equal Treatment Commission.

Public authorities supervising employment and working conditions also play important roles. For example, the Occupational Health and Safety Authority in *Finland* may conduct inspections at work sites and screens job advertisements to ensure that no prohibited requirements (e.g. reference to a particular citizenship or disproportionately high language skills) are being applied. Employees who experience discrimination or other problems pertaining to working conditions may also contact the Authority. In *Belgium*, mediators at the federal and community levels are relevant. The Commissioner of Human Rights Protection (also known as the Ombudsman) in *Poland* is another key state body, although in *Slovakia*, as noted in previous reports, a similar institution, the Office of the Public Defender of Rights is not mandated to deal with possible violations of EU law, but only with those complaints alleging infringements of fundamental rights and freedoms. In 2010, a new law on complaints was also adopted whereby individuals or legal persons can lodge a complaint when they are seeking to protect their rights or legitimate interests which they consider to have been infringed by an act or omission of a public authority or when they identify specific deficiencies (e.g. infringements of legal acts) which public authorities have the power to address. In *Portugal*, it is possible to petition the Assembly of the Republic as well as make complaints to the Ministry of Home Affairs concerning the actions of the Border and Immigration Service and other entities for which the Ministry is responsible. Complaints can also be addressed to competent national authorities in *Romania*, such as the Ministry of Labour, Family and Social Protection and subordinate bodies, or the Immigration Authority. In *Sweden*, the Migration Board is the principal body responsible and complaints against its decisions can be made to any of the three migration courts.

As discussed in previous reports, assistance or representation can be sought in a number of Member States from the non-governmental sector, such as trade unions, employer associations, NGOs and advice centres. Some examples are provided below:

- *Austria* – Amnesty International, Caritas Österreich and Helping Hands;<sup>239</sup>
- *France* – GISTI and CIMADE;<sup>240</sup>
- *Ireland* – Immigrant Council of Ireland and other law centres which provide guidance and advice on free movement issues;
- *Luxembourg* – Caritas and the Luxembourg Open and Joint Action–Human Rights League;<sup>241</sup>
- *Poland* – Legal Clinics Foundation, Legal Bureaux for Foreigners, Helsinki Foundation for Human Rights, Institute for Public Affairs, and the Union of Citizens Advice Bureaux.

In *Poland*, the rapporteur devotes special attention to the Foundation Polish Migration Forum, which works for respect of migrants' rights. While the Forum has a particular interest in promoting dialogue between Polish citizens and foreigners who arrive in the country to seek protection, it also supports migrants from EU Member States. A series of non-governmental organizations can also be approached in the *United Kingdom*, such as Citizens Advice Bureaux, which serve as first-stop shops giving free advice to help persons resolve problems relating to debt, benefits, employment, housing and discrimination before they are referred on to more specialist agencies; Community Legal Advice providing assistance on a wide variety of issues such as housing, employment and social benefits; the Trade Union Congress for employment-related issues; the Advice and Information on Rights in Europe (AIRE) Centre, which specializes in matters of EU and human rights law; and Child Poverty Action Group, which provides expert advice and assistance on benefits' questions. In *Ireland*, another avenue of redress is the Eurojus consultant lawyer under the auspices of the European Commission.

### VIII.5. Seminars, reports, articles

As observed in the 2008-2009 and 2009-2010 reports, there are an increasing number of books, reports, articles and seminars relating to the free movement of workers, particularly in the EU-12 Member States.

In *Hungary*, a number of pertinent research projects of relevance to free movement have been undertaken, including: the IDEA project under the auspices of the European Commission's 6<sup>th</sup> Framework Programme, which analyzed the Mediterranean and Central and Eastern European countries as new immigration destinations in the EU, and the Hungarian results of which were published in 2010; and research financed by the Public Fund for Employment (OFA) on migrant workers from Hungary in the four Scandinavian countries (Denmark, Finland, Nor-

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<sup>239</sup> Information provided in the 2009-2010 report.

<sup>240</sup> Information provided in the 2008-2009 report.

<sup>241</sup> Information provided in the 2009-2010 report.

way, Sweden). In Poland, a series of academic books relating to free movement of workers was published in 2010 covering such relevant topics as EU enlargement and labour migration, post-accession returns of Polish migrants, EU citizenship, and coordination of social security.<sup>242</sup> The rapporteurs for Spain refer to a EURES Spanish services annual paper on "Monitoring, Evaluation and Reporting", which contains a chapter examining obstacles to the free movement of job-seekers and EU citizens in respect of social security, taxation, recognition of qualifications, labour regulation, as well cultural and linguistic difficulties. In the *United Kingdom*, the principal journal for practitioners on immigration and asylum law is the *Journal of Immigration, Asylum and Nationality Law*, which published a number of EU law-related articles in 2010, including articles on free movement of workers.<sup>243</sup>

Below are some of the event highlights of relevance to free movement of workers which were held across the EU-27 during the reporting period (in reverse chronological order):

- Conference on the free movement of workers within the EU: Right of residence and social rights for Union Citizens and their family members, Berlin, 19-20 June 2011, (organized by the German rapporteur of the Network with the Federal Ministry of Labour and Social Affairs)
- Several seminars in the *Czech Republic* on the labour market situation in Austria and Germany in the light of the end of the transitional arrangements in those countries, April and May 2011.
- Regional conference on "Central and Eastern European Countries after and before accession – Possible ways of cooperation", ELTE Faculty of Law and Political Sciences, Budapest, 28-29 April 2011 (supported by a Jean Monnet Project, 2010-2011).
- Regional seminar discussing the Hungarian and Romanian experiences with free movement of workers, Szeged, 27-28 April 2011 (organized by the Hungarian rapporteur).
- Seminar on "Roma, expulsions and EU law", University of Copenhagen, 3 December 2010.
- Network Annual Conference on Free Movement of Workers, London, 25-26 November 2010 (organized by the Centre for Migration Law, Radboud University Nijmegen).
- Seminar on the "Free Movement of Workers in Ireland", Law Society of Ireland, 5 November 2010, which covered a wide range of topics on free movement of workers, including recent EU case-law, recognition of professional qualifications, language requirements for job-seekers, reverse discrimination, cross-border issues for workers, social welfare issues for EU nationals, and the Roma community in Ireland (organized by the Irish rapporteur)

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<sup>242</sup> See Godfried Engbesren, Marek Okólski, Cristia Pantiru (ed), *A Continent Moving West? EU Enlargement and Labour Migration from Central And Eastern Europe*, Amsterdam University Press, Amsterdam 2010.

Hajn Zbigniew, *Free Movement of Workers*, Warszawa 2010; Lidia Adamska, Joanna Krzyzewska, *Coordination of social security systems in the EU*, Warszawa 2010, Magdalena Lesinska, *Return migrants policy, Theory and practice*, Warszawa 2010, Izabela Grabowska-Lusinska (ed.), *Post-accession returns of Polish migrants*, Warszawa 2010.

<sup>243</sup> See A.Weiss, 'Unqualified Persons: The Lawfulness of Expelling Homeless EEA Nationals from the UK', *JIA&NL* Vol 24, no 3. pp 246-256. A. Kubal, 'Why Semi-Legal? Polish post 2004 EU Enlargement Migrants in the United Kingdom', *JIA&NL* Vol 23, No. 2. pp 148-164. S. Peers, 'Turkish Visitors and Turkish Students: New Rights from the European Court of Justice', *JIA&NL* Vol 23, No. 2, pp 197-203.

- Lithuania-Poland Free Movement Conference, Vilnius, 28 October 2010 (organized by the national rapporteurs in Lithuania and Poland).
- Regional Seminar on the Free Movement of Workers between Spain and Portugal 25 Years after the Accession to the EU of both EU Member States, Lisbon, 7-8 October 2010 (organized by the national rapporteur in Portugal).
- TRESS Seminar on "La coordination de la sécurité sociale en Europe", Office des Assurances Sociales, Luxembourg, 22 September 2010.

## ANNEX I. COMMENTS OF AUSTRIA

The Representative of the Austrian Government in the Advisory Committee on Free Movement of Workers provides the following comments to the „European Report on the Free Movement of Workers in Europe in 2010-2011 “ by the network of independent experts (Rapporteur: Prof. Dr. Kees Groenendijk, et al.) of January 2012.

### **Consequences of the economic situation (page 4)**

**Naming Austria among those “Member States where free movement of workers was not an issue of public debate in 2010-2011” is not supported by facts.** The facts show that the end of the transitional periods for the EU-8 in May 2011 was discussed in the Austrian parliament and communicated by newspaper articles also to the people outside of the parliament.

### **Transitional measures (page 7)**

**With a view to the statement of the report “**The end of the transitional measures restricting free movement of EU-8 workers in Austria and Germany on 1 May 2011, apparently, did not result in a large increase of EU-8 workers migrating to those Member states” **it has to be noted** that the figures of EU-8 migrant workers have remained within the limits which had been predicted in the analysis and prognoses of Austrian experts.

### **Residence registration requirements (page 17)**

**The statement of the report “**As observed in the 2008-2009 and 2009-2010 reports, in Austria the rule that all EU-citizens, including job seekers first have to report their presence in the territory within three days of arrival, which according to the rapporteur does not appear to comply with the requirement of a "reasonable and non-discriminatory period of time" in Article 5 para 5 of the Directive and the judgment of the Court of Justice in C-265/88, Messner, although the rapporteur notes that EU citizens are permitted more time if they are reporting their presence for the first time.” **is misleading.**

**It has to be mentioned in this regard,** that the provision of § 3 Meldegesetz was introduced in 1991 and contains the obligation to register the place of residence in Austria which has to be fulfilled by any person residing in Austria (by Austrian citizens just as well). That obligation is not covered by the meaning or purpose of Article 5 para 5 of the Directive 2004/38/EC.

**Article 5 para 5 was implemented by Article 53 para 1 of the Settlement and Residence Act (Niederlassungs-und Aufenthaltsgesetz=NAG)** which provides that EU

citizens who want to reside more than three months in Austria, have to announce that intention within the first four months after their arrival in Austria.

### **Registration with employment agencies and access to employment services (page 18)**

**The statement of the report** "It is usually necessary in a number of Member States for job-seekers to register with the national employment agencies so that they can access their services (Austria,...). " **may be misleading.**

**Nota bene:** That registration is due to equal treatment, because Austrian job-seekers also have to register with the employment agencies to have access to their services.

### **Implications of the METOCK Judgment (Page 49)**

**With a view to the statement of the report** " The Austrian rapporteur states that as circulars are not made public, it is unknown whether or not the Federal Ministry for Interior Affairs produced a circular on the implications of the Metock ruling." **it has to be noted that according to the Austrian Federal Ministry for Interior Affairs** the Austrian aliens authorities were informed without delay via circulars of the implications and correct implementation of Metock Judgment.

### **Sportsmen and women – nationality quotas (page 106)**

**With a view to the statement of the report** "In Austria it appears that quotas in a variety of games including basketball still apply where the club seeks state subsidies. As noted in 2009, the basketball association applies quotas on EU players." **the following remark was delivered by the Austrian Ministry of Sports:**

"The Austrian ministry of sports underlines the importance of the Lisbon treaty stating the „autonomy of sports“ including the right to set up specific regulations on all issues concerning the specific disciplines. The ability of its national federations to form a „National Teams“ is a central aspect of the specific concept of sports in a unified Europe. Small countries like Austria are strongly affected by the increasing number of non-resident players in different types of team sports. National federations – especially in disciplines less popular - have thus often been facing problems when trying to form their national teams, if there is no sufficient number of players with Austrian citizenship in the highest leagues.

Nonetheless, the ministry of sports is going to ask the respective organisations to review their regulations as far as quotas for EU-citizens are concerned. "

### **Transitional measures imposed on EU-8 Member states (page 115)**

**The statement of the report** "Though one of the reasons to apply transitional measures in Austria was the fear that its geographical location would attract a lot of EU 8 nationals, the first two months following the end of the transitional measures

have not led to an influx of EU-nationals seeking access to its labour market." **could give the false impression** that there were no movements at all from the EU-8 Member states after the abolishing of the restrictions in May 2011. In fact there also were movements in the first two months (and later), but they remained within the limits which had been predicted in the analysis and prognoses of Austrian experts.

### **Continuation of transitional measures (page 119)**

**In the first paragraph the statement** " In Austria the transitional measures have been prolonged to 31 December 2013" **is correct, but gives the impression that only Austria has done so.** That would be very surprising because so far the EU Commission has not mentioned that other Member states having notified their continuation of transitional measures would not continue those measures until end of the seven year period (i.e. 31 December 2013).

**In the third paragraph the statement** "Access to the Austrian labour market by Bulgarian and Romanian workers is regulated by the Fachkräfte-Bundeshöchstzahlenüberziehungsverordnung. This order lists 65 (skilled) professions with a shortage of workers (e.g. bricklayer, paver, data engineer, airport staff or payroll clerk) which have been opened to Bulgarians and Romanians. The rapporteur feels that extending the transitional measures is 'only for the public' as the list includes a wide range of professions, amongst which 'classical jobs for migrants' (e.g. in the building sector), and positions for highly educated migrants (e.g. data engineer). 2011 saw an amendment to sect. 32a of the Aliens Employment Act. § 9 of this section now provides that the spouse and the unmarried minor children of Bulgarian and Romanian workers enjoy free access to the Austrian labour market."**and the related footnote need the following corrections and clarifications:**

- **With a view to the order concerning the opened professions it has to be stated** that this order is not the only possibility of access for EU-2 workers and was amended twice (another time under Federal Law Gazette II 224/2008) and covers **67 (and not 65) professions** with a shortage of labour.
- **The opinion of the rapporteur in the third phrase** is too polemic and also wrong or misleading, because it forgets that low qualified labour is not covered by that order and generally not opened to EU-2 workers. The list of 67 professions is one important step in the gradual liberalisation process, but its potential does not imply that the further application of the transitional measures is not justified.
- **The statement** "2011 saw an amendment to sect. 32a of the Aliens Employment Act. § 9 of this section now provides that the spouse and the unmarried minor children of Bulgarian and Romanian workers enjoy free access to the Austrian labour market." **is partly wrong and misleading by giving the wrong impression that all those family members of EU-2 workers had only recently acquired free access to the Austrian labour market.** In

fact spouses and descendants (under 21 or dependants) of EU-2 workers admitted for 12 months or more at the date of accession have had free access as from the date of accession on 1 January 2007. (If the worker was admitted after the accession there was a waiting period of 18 months for the free access of his family members during the first two years after accession, as provided for in the Accession Treaty). The free access was (also) extended to registered partners in 2009, when the status of registered partnership was introduced in Austrian law. In 2011 the free access was extended to those family members of key and skilled EU-2 workers having been admitted less than 12 months.

### **Integration measures (page 127)**

**With a view to the statement** “ Whereas mandatory integration measures exist for third-country nationals in some EU Member States (Austria, Germany, Netherlands, United Kingdom), it is expressly stated that EU nationals are not encompassed by such measures.” **it should be notified or clarified that** not only EU citizens, but also their third country family members who enjoy the right of free movement are exempted from the requirement of integration measures.

## ANNEX II. COMMENTS OF MALTA

### Malta's Comments on the 'European Report on the Free Movement of Workers in Europe in 2010-2011'

#### Page 5

Malta proposes that the following text on page 3 of the Report should read as follows:

Specific examples of unequal treatment are mentioned: new residence requirements for access to social housing in Italy, exclusion from social housing in municipal rules in Portugal, ~~higher bus fares for non-nationals in Malta~~, exclusion from certain benefits in Austria and Latvia, and lower payment of posted workers from other EU Member States in Finland.

In this regard, Malta would like to point out that the reference to higher bus fares for non-nationals is factually incorrect, as 'workers' in Malta would be 'resident' irrespective of nationality, and therefore, eligible for equal treatment as any other resident.

#### Page 12

With regard to the implementation of Article 8(3) on administrative formalities relating to the residence of EU workers and self employed persons, the report notes that:

In *Malta*, as noted in previous reports, a licence has first to be issued for employment, and although the law expressly stipulates that such a licence should not be withheld, this may nonetheless constitute an administrative impediment to free movement of workers.

Malta rejects this statement as this requirement was in accordance with the provisions of the relevant Annex to the Accession Treaty whereby for the first seven years following its Accession to the European Union, Malta was allowed to retain its work permit system in the case of workers. With effect from 1 May 2011, such licence is no longer required unless transitional arrangements are in force vis-à-vis workers coming from the Member States subject to such arrangements. In this regard, the Free Movement of European Union Nationals and their Family Members Order 2007 (LN191/07), has been amended accordingly by the Free Movement of European Union Nationals and their Family Members (Amendment) Order, 2012 (LN107/12).

### **Page 13**

With reference to Articles 14(4)(a)-(b) – prohibition on expulsion of EU citizens or their family members if they are workers or self-employed persons, or job-seekers, the report states that:

There are no specific national provisions in the laws of *Bulgaria, Germany, Hungary, Ireland, Lithuania, Malta, Poland, Slovakia, Slovenia, Spain* and the *United Kingdom* transposing Articles 14(4)(a) and (b), although the rapporteur for *Germany* observes that Article 14(4) is taken account in administrative practice, while in *Lithuania* EU citizens can only be expelled if they lose their right of residence.

In Maltese legislation, the Free Movement of European Union Nationals and their Family Members (Amendment) Order, 2012 (LN107/12), clarifies the issue by the following amendment to Article 13(1):

Provided further that without prejudice to the provisions of this Order, a removal order shall not be issued in the case of a person who is a worker, or a self-employed, or a job-seeker, who can provide evidence that he is continuing to seek employment and that he has a genuine chance of being engaged, or the family members of such persons.

### **Page 14**

With regard to Article 17 – right of permanent residence for persons and their family members who are no longer in employment, the Report states that

In *Estonia*, the national legislation does not contain any rules relating to Article 17(4)(c), while, in *Malta*, Article 17(2) has not been transposed literally, which in the rapporteur's view may be interpreted as incorrect transposition.

Malta considers that the said provision has been fully and correctly transposed into Maltese legislation.

### **Page 22**

Under point 3, 'Other Issues of Concern' the Report states that:

Ambiguities regarding the transposition of the provisions in the Directive relating to entry and procedural safeguards are also noted by the rapporteur in *Malta*. In the former instance, the possibility in Article 5(4) of the Directive for EU citizens to bring their travel documents to the authorities within a reasonable period of time in the case that they do not have them is not found in the national legislation. In the latter instance, no unequivocal transposition of the pertinent provisions of the Directive can be detected even though such safeguards are normally respected by the courts.

In this regard, the Free Movement of European Union Nationals and their Family Members (Amendment) Order, 2012 (LN107/12), by means of the amendment to Article 14 of the Free Movement of European Union Nationals and their Family Members Order, 2007 (LN191/07), further clarifies the issue concerning procedural safeguards contained in Directive 2004/38.

As for Article 5(4), the relative provisions are adequately provided for by means of the provisions of Article 3 of the Free Movement of European Union Nationals and their Family Members Order 2007 (LN191/07).

### **Page 32**

Under Chapter II, the Report states that 'the *Czech, Maltese and Polish* rapporteurs explicitly mention that same sex relationships are not recognized by their Member State. Though *Cyprus* recognizes same sex partners, they do not benefit in full of free movement rights (infra sections 5 and 6).'

Malta notes that following the amendment to the Free Movement of European Union Nationals and their Family Members Order 2007 (LN191/07), by means of the European Union Nationals and their Family Members (Amendment) Order, 2011 (LN329/11), same sex partners are given facilitation as regards entry and residence in Malta when accompanying their partner who is a Union national.

### **Page 34**

The Report states that:

Admission of partners in a durable relationship, duly attested is subject to public policy in *Malta*. The Maltese rapporteur questions whether this is permitted under EU law. She finds a justification in 1) the omission to define the concept in Directive 2004/38/EC that permits the host-Member State to undertake an extensive examination of all relevant personal circumstances and 2) the CJEU's reading of public policy in the *Van Duyn* case, i.e. that public policy '*must in any event presuppose the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to one of the fundamental interests of society.*'<sup>244</sup> She feels, however, that it is too early to draw conclusions regarding the compatibility of the Maltese rules with EU free movement rules as, to date, there are no cases addressing the issue of admission of partners in the light of European rules.

Following an amendment to the Free Movement of European Union Nationals and their Family Members Order 2007 (LN191/07), by means of the European Union Nationals and their Family Members (Amendment) Order, 2011 (LN329/11), the reference to public policy in the case of partners has been deleted from the said legislation and as has already been mentioned, same sex partners are given facilitation as regards entry and residence when accompanying their partners who are Union nationals.

### **Page 49**

The second paragraph on page 49 states that "In *Malta* the legislation implementing Article 5(4) Directive 2004/38/EC does not provide for a reasonable time to have the documents listed in that provision delivered".

Malta would like to point out that, as mentioned above, the Free Movement of European Union Nationals and their Family Members (Amendment) Order, 2012 (LN107/12), by means of the amendment to Article 14 of the Free Movement of European Union Nationals and their Family Members Order 2007 (LN191/07), further clarifies the issue concerning procedural safeguards contained in Directive 2004/38.

As regards Article 5(4), the relative provisions are adequately provided for by means of the provisions of Article 3 of the Free Movement of European Union Nationals and their Family Members Order 2007 (LN191/07).

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<sup>244</sup> ECJ case 41/74, *Yvonne van Duyn v Home Office* [1974] ECR 1337.

### **Page 52**

Paragraph 2 on page 52 states that “In *Austria* a court decision annulling a marriage is not necessary to withdraw a residence right granted on the basis of a marriage of convenience. In *Greece* and *Malta* a marriage of convenience has to be proven in court”.

Malta clarifies that once the competent authorities have sufficient evidence that there has been abuse of free movement rights on the basis of a marriage of convenience, free movement rights of the person concerned are restricted notwithstanding that such marriage has not been declared as one of convenience by the Courts.

### **Page 78**

With reference to access to employment in the public sector and language requirements for appointment in such sector, the Report states that:

in *Malta* (Maltese and English), *Finland* (Finnish and Swedish) and for certain teaching jobs in *Ireland*. Interestingly, the Irish report mentions that on the job training in Gaelick (the Irish language) is provided after appointment in the national police and the military. Justification for requiring knowledge of more than one language are the necessity to communicate with members of the public (in all four Member States) and constitutional obligation or the government's policy to promote use of the national language (*Ireland* or *Malta*).

With regard to the statements that (i) *two languages are required in Malta (Maltese and English)* and that (ii) *justification for requiring knowledge of more than one language is the government's policy to promote use of the national language*, Malta would like to submit the following justifications:

- In terms of the provisions of sub-regulation (3)(4) of the “*Nationality Requirements for Appointments in Public Administration Regulations, 2011*” (LN315/11) issued under the Public Administration Act (Cap. 497), any language requirements which may from time to time be set for appointments to particular public offices must be proportionate and reasonably necessary for the proper fulfilment of the tasks involved.
- It is to be explained that when carrying out such assessments, the Public Administration Human Resources Office acts upon the advice submitted by the experts in the respective field (for example, by the Health Authorities in the case of any language requirements for doctors and nurses and the Education Authorities in the case of language requirements for teachers).
- Malta endorses language proficiency requirements as part of the eligibility criteria for the filling of vacancies when (i) where cogent justifications to this effect are submitted by Ministries and Departments, and (ii) provided that such requirements are proportionate and reasonably necessary for the proper fulfilment of the tasks involved.
- In effect and subject to what is stated above, the eligibility criteria for the filling of the various public service vacancies may either require the ability to communicate in both Maltese and English or else in either of the two languages.

## **Page 80 and 82**

With regard to the references on page 62 and 64 of the Report regarding recognition of professional qualifications and selection procedures in the public sector with regard to the criterion of qualifications, as follows:

*Page 80* "in a lot of Member States there is no specific legislation on the recognition of professional experience for access to the public sector (Austria, Belgium, Czech Republic, Estonia, Finland, Germany, Malta, Netherlands, Portugal, Slovenia, Sweden and the UK)"

*Page 82* "In Malta with regard to selection procedures for the public sector, insofar as the criterion 'Qualifications', or 'Related Qualifications' or 'Relevant Qualifications' is concerned, no marks are awarded for qualifications which are a prerequisite for the post or position as indicated in the relevant call for applications. Marks may nevertheless be awarded for the ranking obtained in the relative degree or other qualification. However, marks given for ranking should not exceed 25% of the total mark for the criterion approved by the Public Service Commission".

Malta would like to point out that the statements found on page 80 of the Report that (i) there is no specific legislation on the recognition of professional experience for access to the public sector and that (ii) the general rules on recognition of diplomas and experience acquired in other Member States apply to jobs both in the private and the public sector are correct.

It is further clarified by the Public Service Management Code (PSMC - <http://www.mpo.gov.mt/downloads/PSMC2011.pdf>) which states that:

Previous accredited experience, whether gained within the Public Service, or with a local / foreign employer, is reckonable for the purpose of satisfying eligibility criteria when a person is applying through a public call for applications for a post or position in the **Public Service** and is also taken into consideration when awarding marks during the selection process.

It is to be noted that the PSMC was assigned the legal status of a directive under the Public Administration Act, whereby the provisions of the Code are binding and enforceable in terms of article 15(2) of the said Act.

Further details regarding the issue of "professional experience" are highlighted below:

With regard to selection procedures for the public sector, re to the criterion 'Qualifications', or 'Related Qualifications' or 'Relevant Qualifications' as found on page 82 of the Report, it is being clarified that the provisions quoted therein have since been updated, in order to ensure a higher degree of fairness and transparency and to further strengthen the merit principle enshrined in the Public Administration Act. The following are the applicable provisions when it comes to the award of marks for recognised qualifications submitted by applicants for the filling of Public Service vacancies:-

- (i) No marks are to be awarded for those qualifications presented by an applicant which form part of the eligibility criteria and on the basis of which the applicant is considered as being eligible as indicated in the relevant call for applications. In such cases, marks may be awarded for the ranking obtained in the relative degree or other qualification (such as, First Class Honours, Distinction, etc). However, marks given for ranking should not exceed 25% of the total mark for the criterion approved by the Commission.

- (ii) Where an applicant satisfies more than one of the eligibility criteria in terms of qualifications, no marks are to be awarded in respect of the qualification on which the applicant is considered as being eligible. Marks are however to be awarded for the other qualification. Furthermore, where a call for applications includes alternative eligibility requirements, and an applicant satisfies more than one such requirement, the Selection Board should adjudicate the applicant as qualifying under the requirement that would not unnecessarily deprive the applicant of marks for the higher qualification.
- (iii) A candidate who submits an application on the basis of a qualification which is at a higher level than that required in the eligibility criteria, but is not in possession of the qualification at the required level, is to be considered eligible, provided that the candidate meets the other applicable requirements of the call including those specifying the subject matter of the required qualifications. Such cases may include, for example, instances where the eligibility requirement stipulated in the call for applications is for a First Degree in a particular field, whilst the candidate, albeit not in possession of the required qualification, is in possession of a Master's Degree in the same field. In such cases no marks are to be awarded for the higher qualification on the basis of which the candidate has been considered to satisfy the eligibility criteria.
- (iv) Marks are to be awarded for additional qualifications in accordance with the sub-criteria as established by the Selection Board and notified to the Public Service Commission.

The above provisions are included in the PSMC and are binding upon public officers as explained further above. Moreover, Public Sector entities should, as far as possible, abide by the provisions stipulated in the PSMC in the course of their selection and recruitment exercises.

#### **Page 84**

With regard to the reference on page 84 which states that "In *Malta*, nationality is not included as a protected ground, apparently so as to facilitate restrictions on the rights of third-country nationals", *Malta* would like to point out that according to the Employment and Industrial Relations Act (Cap. 452), 'discriminatory treatment' is defined as "any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association". The use of the word "including" means that the list of grounds is not an exhaustive list.

A specific piece of legislation on discrimination in employment, the Equal Treatment in Employment Regulations (SL452.95), issued by virtue of the Employment and Industrial Relations Act, lays down minimum requirements to combat discriminatory treatment on the grounds of religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin.

#### **Page 87**

With regard to the reference stating that "in *Malta* no difference is made between professional experience in *Malta* and professional experience abroad. In the *Maltese* Public Service, it is normal practice to distinguish between professional experience and service in the grade. Professional experience is a core eligibility requirement and selection criterion which is assessed by the Selection Board at

the interview stage. In either case, according to the Public Service Commission, credit is given for relevant professional experience regardless of the country in which it has been obtained. The selection criteria are determined in consultation with the Public Service Commission before the calls are issued. Such a system is meant to ensure that selection criteria are not tweaked to favour or disadvantage any of the applicants. This system has been in place for over 40 years.", Malta would like to make the following clarifications:

- For the purposes of entry into the Maltese Public Service, recognition and credit (in the form of marks during the selection process) is given for all accredited experience, irrespective of whether the experience was gained in Malta or in another country and irrespective of whether the experience was gained with the same employer, including the Malta Public Service itself, or with another employer, be it in the public or private sector.
- The term "Service in the grade", as distinct from "experience", refers to the number of years serving in a particular grade within the Public Service. In terms of the respective Classification Agreements, a public officer normally has to satisfactorily complete a number of years of service in the grade in order to be eligible for promotion to a higher grade within the same career stream.
- As a general rule, and unless otherwise stated in the respective Classification Agreement, in the case of an applicant for entry or re-entry in the Public Service in response to a public call for applications, previous accredited experience, wherever gained, as well as any previous service prior to resignation or termination of employment from the Malta Public Service itself, is not reckonable for the purpose of fixing a salary point, for progression to higher salary scales or for eligibility for promotion to higher grades.
- The reference to the determination of the selection criteria on page 68 is correct.

#### **Page 98**

Page 98 mentions that 'According to the *Maltese* report, access to the notary profession is still limited to Maltese nationals only (see also chapter III). The Commission has commenced infringement proceedings against the country but is awaiting clarification from the CJEU regarding the Maltese authorities argument that notaries in Malta are exercising official authority in their duties'.

In this regard, Malta would like to point out that by virtue of Act XXIV of 2011 (dated 16 December 2011), amending the Notarial Profession and Notarial Archives Act (Cap. 55 regulating the notarial profession in Malta), the nationality requirements of a notary in Malta have been amended. Article 6(a) of the said Act has been substituted in the sense that a notary in Malta can now be "a citizen of Malta or of a Member State of the European Union or of a State of the European Economic Area, provided that a State of the European Economic Area means Iceland, the Principality of Liechtenstein and the Kingdom of Norway". This provision is now in force.

#### **Page 116**

With regard to the comment on page 116 of the Report, whereby "the transitional arrangements in place in *Hungary* and *Malta* remain in place. In April 2011 the special arrangements were adopted regarding access to the *Maltese* labour market by nationals from other Member States. The current position of Malta is that it may still seek a remedy where there is a disproportionate influx of EU-workers,

albeit it through the EU institutions rather than unilaterally. The arrangements are laid down in a Declaration<sup>245</sup> and resemble the position accorded to Austria when it acceded to the EU in 1995. For the purpose of monitoring the Maltese labour market, an employment licence system is maintained which should enable the authorities to anticipate potential disruptions to the labour market. The fees for employment licences for EEA and Swiss citizens, their spouses and dependants are currently: € 58.23 (new employment licence) and €34.94 (extension of an employment licence)."

Malta would like to point out that the above paragraph is incorrect since as from 1 May 2011, an employment licence is no longer required in Malta in respect of workers coming from Member States which were members of the European Union on 1 May 2004.

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<sup>245</sup> Joint Declaration between Malta and the EU annexed to the Final Act to the Accession Treaty and Article 5(7) of the Maltese Immigration rules (LN205/2004).