European Commission

EUROPEAN REPORT
on the Free Movement of Workers in Europe in 2011-2012

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EXECUTIVE SUMMARY

During the period under consideration, free movement of workers has become a subject of less consensus among the political and media circles of the Member States. While in most Member States there has been little discussion of the right and its use, including some of the largest Member States such as Germany, Poland and Romania, in some other Member States the right has been subject to substantial attention, such as France, the Netherlands and the UK. There seem to be two types of attention paid to free movement of workers. First, in some Member States where there is little or no discussion, there is little concern about numbers of persons using their rights even when these are substantial (such as in Germany) or there is little inward movement of EU workers (Finland, Slovenia Greece etc). In some states there is concern about nationals of the state being required to leave to search for work in another Member State. While this may be the subject of criticism in the media against economic situations, it is not seen as a ground to limit the right to move in search of work. In other states where there is media and political attention, such as Denmark, the Netherlands, the UK or France, the concerns expressed are narrowly focused on two groups – third country family members of EU citizens who have exercised their free movement rights (for example Denmark, the Netherlands and the UK), or citizens of Member States which joined the EU in 2004 and 2007 (for example the Netherlands, France). There does not appear to be any sustained correlation between concerns about free movement of workers and unemployment rates among the Member States.

The first source of attention, the treatment of family members of EU citizens, arises from various political choices in the relevant states regarding the limitation of family reunification of the state's own nationals with third country national family members. As these national rules which apply to the state's citizens are made more stringent, the rules which apply to EU citizens appear to national political leaders as excessively generous and constitutionally problematic. The state's citizens ask their state authorities why they should have fewer rights in their own country than EU citizens have there. The second source of attention is the use of free movement rights by citizens of the Member States which joined the EU in 2004 and 2007. The end of the transitional arrangements for the 2004 Member States' nationals in 2011 only affected those who wanted to work in Austria, Germany and the UK (a rather anomalous situation in this last state). InGermany this appears to have occurred with very little public attention. The continuation of the transitional arrangements for workers from the Member States which joined the EU in 2007 (and the reintroduction of arrangements for Romanian workers in Spain) has been accompanied by public debate and administrative action in some Member States such as France and of course Spain (where the argument about unemployment was particularly strongly put).

The Commission's efforts to ensure correct implementation of the rights of workers appears to have resulted in a number of successful outcomes where Member States, once made aware of inadequate transposition of EU obligations have either changed their law or have made proposals for such changes to bring it into line with the EU legislation and jurisprudence. Two actors at the national level have been particularly important in ensuring the delivery of free movement rights: increasingly ombudsmen in a number of Member States are taking up complaints by EU workers to good effect, secondly, national judges seem to be increasingly aware and sensitive to EU free movement rights as reflected in the

reports on cases in the period under consideration. This is also resulting in a number of important preliminary references to the CJEU of general relevance.
The greatest source of concern in the implementation of free movement rights of workers is regarding the delivery of equal treatment with national workers. In this area there are numerous problems reported regarding working conditions and pay. Discrimination on the basis of nationality in some cases appears to be augmented by discrimination on other prohibited grounds.

GENERAL INTRODUCTION

1. Political and economic developments

The issue of free movement of workers is a subject of frequent debate in political fora and in the press in some Member States, such as in Denmark, France and Netherlands, Spain and the UK. In other Member States free movement is not perceived as a major public issue, either because the public is not aware of the large number of migrant workers from other Member States (e.g. Germans in Austria) or because the number of EU citizens that move for the purpose of employment is relatively small (Finland, Greece, Poland, Romania, Slovakia, Slovenia) or because migrant workers from other Member States are actually not perceived as a major problem (e.g. Germany and Italy), other issues drawing more attention. The populist political reaction to the economic crisis in some Member States is explicitly focussed on nationals of some other Member States (Polish workers in the Netherlands), whilst in other Member States that reaction is directed primarily against nationals of third countries or against nationals returning after having resided in another Member State (Danes returning from Sweden).

As a result of the economic crises both labour migration from Member States with high unemployment rates to those with relatively low unemployment and return migration to the home Member State increased. Due to the large differences in unemployment rate between Member States and the tendency of nationals of a Member State to move for work purposes to specific other (neighbouring, culturally or historically related) Member States the effects of the economic crises on the use of free movement is unevenly distributed among Member States. The three main target countries of Hungarian nationals, using their right to free movement are Austria, Germany and the UK.. Romanian nationals predominantly migrate for the purpose of employment to Italy and Spain. In some Member States the high net emigration and the negative birth rate have resulted in a considerable reduction of the population (e.g. Latvia and Romania).

2. Transposition of Directive 2004/38

In Bulgaria, Greece and Spain the transposition of the directive improved after the adoption of new legislation. In the Czech Republic, Romania and Slovakia consolidation of the national rules implementing the directive made those rules more accessible. In the Czech Republic the rules on free movement are now implemented in a separate Law, distinct from the Immigration Law on the admission and residence of third-country nationals. This avoids the problem mentioned in the Latvian report, that implementation of free movement rules in a separate Decree, based on the national Immigration Act but having a lower status in the hierarchy of norms, may have the result, that notwithstanding that separate decree, the general rules of the Immigration Act concerning third-

country nationals are applied to Union nationals and their family members in violation of Directive 2004/38.

From several reports it becomes apparent that there is a problem of transposition of Directive 2004/38 in several national legislative instruments that are incoherent or even in contradiction with each other, or using very general terms. This is mentioned explicitly in the Slovenian report, but it is implicit in other reports as well. Another problem is the implementation of the directive in ministerial circulars: in the Netherlands several rules on free movement of Union citizens in 2012 were transferred from the Aliens Circular to the Aliens Decree making them legally binding and complying with the case law of the CJEU that directives have to be implemented in binding national law. A few months earlier, however, new rules restricting access of nationals of other Member States to public assistance and enlarging the scope for expulsion of those Union citizens had been introduced in the Aliens Circular. Most of these developments raise questions as to their compatibility with the Union law principle of legal certainty.

Some Member States still require EU nationals to present documents not mentioned in Directive 2004/38: a housing certificate (Czech Republic), translation of all documents in the Lithuanian language or information on means of subsistence that has to be systematically checked according to a French decree of 2011. In the UK applicants are asked to agree with the sharing of the information provided on the application form with authorities in non-EU countries. In several Member States (e.g. Lithuania, Malta and Poland) the provisions on retention of residence right in Article 14(4) of the directive are not properly or not explicitly implemented.

The introduction of new national rules or practices on expulsion of Union nationals on public order grounds is reported with respect to Denmark[1], France, Italy and Netherlands. In France after intervention of the European Commission the implementation of the procedural rules of Union citizens on protection against expulsion improved considerably. Rules in administrative circulars were replaced by proper legislation. According to the Spanish report the CJEU case law restricting the expulsion on those grounds is not properly reflected in the case law of higher national courts. In Belgium EU nationals are required to leave the country after they have received social assistance for more than six months. The Italian report mentions an unexpected side-effect of the transferral of the registration of Union citizens to the local population registers. The national rule that those who do not respond to the Census are considered to be no longer resident in the municipality, could result in the removal of Union citizens from those registers, making it more difficult to prove their residence right.

3. Equal treatment

Unequal pay, substandard working or housing conditions or downright exploitation of EU-8 workers are mentioned among others in the reports on Ireland and the Netherlands.

The perseverance of traditional barriers to employment is mentioned in several reports: the requirement to apply for a license (Malta) and the nationality conditions in rules on professional sports (in ten reports). Language requirements are mentioned as an obstacle to access to employment in the private sector in the reports on Greece, Finland, Latvia, Lithuania, Luxembourg

[1] See for more detail Chapter I section 3 Other issues of concern.

and Malta. Some of those requirements are reported to be clearly disproportionate. Language as a practical barrier to access to jobs in the public service is mentioned in the Polish and the Swedish report. In Portugal the rules on competition for vacancies in the public service virtually exclude nationals of other Member States in most of the competitions. In Romania, positions in administration, for which are no specific rules, are open to all nationals of EU Member States, where the application of the principle for equal treatment with Romanian citizens is provided.[2] . Spanish nationality is no longer mentioned as a requirement in the advertisements on vacancies in the public service, but the rules on seniority are disadvantageous for non-nationals. In Poland only 3% of the vacancies for jobs in the civil service published in a certain period in 2011 was open to non-nationals. The Lithuanian rule that a national needs permission of the government to enter the public service of any foreign state provides an additional barrier to entering the public service in other Member States. Measures reducing discrimination of nationals of other Member States in the maritime sector are mentioned in the British and the Lithuanian report.

Absence of clear national rules on the rights of job seekers is mentioned in several reports (Bulgaria, Finland and Germany). In Finland the requirement to have a national identification number as a condition for opening a bank account may present a problem for job seekers from other member states, who find it difficult to obtain such number before their registration that in turn is may depend on having a job. In Germany the access of jobseekers to social benefits continues to be subject of debate and divergent decisions of national courts. Rules on the registration of vehicles (e.g. in Latvia) may present a practical obstacle to acquiring a job in that Member State. Problems of frontiers workers are mentioned in the Irish report (the one-night-a-week-in-Ireland rule), in the Latvian report (restricted access to educational facilities and to tax deductions[3]) and restrictions on access to study grants in Luxembourg.

Similar traditional barriers to access to social benefits continue to apply or were introduced: residence requirements in Denmark, Greece, Ireland and Poland and a four month of employment requirement in Finland.[4] Access of EU workers, their children or TCN family members to education is restricted by national rules reserving grant to nationals or Union citizens (excluding third-country national family members) or by residence requirements in Luxembourg and Poland. In Austria the 'mobility grant' is only available if the applicant has an Austrian higher education entrance qualification, five years of residence and an Austrian bank account. In the UK export of study grants is not possible at all. In Greece

[2] According to the Romanian legislation in force, a civil servant is a person who has been appointed to officiate as a public functionary. Civil service represents the ensemble of prerogatives and responsibilities established with regard to the law, by central, local or autonomous public authorities, in order to fulfil their attributions. The civil servant has a service relationship with the public authority (there is no labour contract, but an appointing administrative act), the contractual employee has a labour contract and is in an employment relationship with the public authority. The restrictive rules apply for the civil servants. The position of the contractual personnel is governed by the labour legislation, therefore this kind of positions are open for European Union citizens. For the contractual personnel of public services, including that of public administration, obligations and rights similar to those for civil servants, are determined according to the Law no. 53/2003, republished - Labour Code, with the exception of the fields of prohibitions and incompatibilities. This situation reveals that the civil servants' statute - Law no. 188/1999 concerning the Civil Servants' Statute, does not apply to contractual staff or to the personnel with special status.

[3] Except residents of another Member State of the European Union or European Economic Area that in a taxation year have acquired more than 75 % of their total income in Latvia.

[4] See for Finland: Freedom of Movement within the Social and Labour-market Area in the Nordic Countries, p. 38, to be found on http://www.norden.org/fi/julkaisut/julkaisut/2012-014.

research grants of (semi-)public institutions are by law to be granted only to citizens of the country.

In Italy and other Member States national courts have a tendency to refer to national provision on equal treatment in cases of discrimination of nationals of other Member States rather than to the Union law prohibition of nationality discrimination. Estonia introduced a general prohibition of discrimination on the ground of nationality in employment relations in its new labour legislation. A similar rule exists in Dutch and Slovenian law.

4.Third-country national family members and reverse discrimination

In some Member States nationals returning with their third-country family members after a period of residence in another Member States are subject to systematic and rigorous checks. In Denmark the spot checks policy was amended after the change of government in 2011. In the UK the CJEU judgments in Eind and Metock were finally implemented in the Immigration Rules. In Estonia the procedural rights of third-country family members have been improved. Problems with access of family members to educational grants have been mentioned already in the previous paragraph.

The issue of reverse discrimination is discussed in the reports on Belgium, Estonia, Germany, Ireland and Spain. In Belgium in 2011 an income requirements for admission of third-country national parents of Belgian nationals was introduced, restricting the equal treatment of Belgium nationals and EU migrants codified in the Belgian Aliens Act since 1980. The question of the compatibility of this new rule with the Belgian Constitution and with EU law is pending before the Belgian Constitutional Court.

The judgments of the Court of Justice in Zambrano, McCarthy and Dereci have given rise to an extensive case-law of national courts in many Member State with regard to the question under which circumstances third-country national parents of minor Union citizens are entitled to a residence right in a Member State in order to protect the right of their children to live in that state or in the Union.

5. Transitional measures

The end of the transitional measures restricting free movement of EU-8 workers in Austria, Germany and France on 1 May 2011, apparently, did not result in a large increase of EU-8 workers migrating to those Member States in 2011 or 2012. It remained within the limits predicted by the experts. In several EU-15 Member States the economic situation was used as a justification to prolong the transitional measures concerning workers from Bulgaria and Romania until the end of the transitional period, i.e. 31 December 2013.. Apparently, in several Member States political rather than economic arguments supported the decision to prolong the transitional measures. The Spanish report informs about the effects of the reintroduction of the transitional regime (with explicit authorization by the European Commission) in the summer of 2011. The Dutch government in 2011 introduced a more restrictive practice regarding the issue of work permits for Bulgarian and Romanian workers. In 2012 only half the number of permits issued for EU-2 workers was issued as compared with the previous year. National courts have held this new policy to be incompatible with the standstill clause in the Accession Treaties. Those judgments did not result in a public

decision to end the new policy. Apparently, the restrictive policy continues to be applied in practice notwithstanding this jurisprudence.

6. Roma

The national reports on France, Hungary, Ireland, Romania and Sweden mention serious problems with respect to the treatment of member of the Roma minority, either those living and working in their home Member State or those who used their free movement rights for work purposes. The French report discusses the reactions to the expulsion of Roma to Romania. In Hungary the willingness of Roma to move to other Member States and look for employment possibilities in those States was documented in a recent study. The Swedish report points to the discrimination of Roma on the labor market.

7. Positive developments

In several Member States proposals or actual measures aimed at introducing new restrictions the free movement rights of national of other Member States were reversed, withdrawn or not implemented after the intervention of the European Commission or a change in the composition of the government (e.g. Denmark, France, Hungary and Malta).

In Portugal barriers to the access to employment in certain professions and rules on the recognition of foreign qualifications in the national legislation were removed after this was demanded by the Troika (European Central Bank, European Commission and International Monetary Fund) as a condition for receiving monetary assistance.

In the Czech Republic an amendment of the nationality legislation providing less strict conditions for naturalization of nationals of other Member States is under discussion.

In Denmark, Greece and Sweden the national Ombudsman continues to play an important and visible role in enforcing the rights of EU workers and in combating unequal treatment of EU workers and their family members. In Cyprus the national equal treatment institution performs that function. In some Member States, however, the national equal treatment body is hesitant as to its competences to apply EU rules prohibiting discrimination on the ground of nationality (Denmark and the Netherlands).

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. Between 1 January 2011 and 1 July 2012 national courts of Member States in 31 cases made preliminary references to the Court of Justice of the EU on questions regarding free movement of workers, Directive 2004/38, social security of migrant workers, Union citizenship or discrimination on grounds of nationality. This is a clear increase as compared with the 24 references on those issues made between January 2010 en July 2011.

Chapter I – The Worker: Entry, Residence, Departure and Remedies

INTRODUCTION

This chapter examines the transposition in the 27 EU Member States of the provisions of the EU Citizens Directive (hereafter "the Directive")[5] regarding the entry, residence and departure of EU workers and their family members, and the remedies available to them in the event that their rights have been violated. It also considers the specific situation of EU job-seekers in Member States with reference to the pertinent provisions of the Directive, although a fuller treatment is provided in the separate analytical report that has been prepared on this subject. The chapter also highlights a number of shortcomings concerning residence rights in some Member States; expulsion of EU citizens, particularly those coming from the EU-2 and EU-8 (referred to as A2 and A8 nationals); and in the application of procedural safeguards and remedies. Building on the information provided in the 2010-2011 report, the situation of the free movement of EU workers of Roma origin is re-examined from the perspective of both EU destination and origin Member States.

1. Transposition of provisions specific for workers

While the transposition of the Directive's provisions in most of the EU Member States does not differ significantly from the information provided in the reports since 2008, the reporting period (2011-2012) has seen the introduction of key amendments in a number of Member States (*Bulgaria*, *Denmark*, *France*, *Greece*, *Italy*, *Lithuania*, *Netherlands*, *Slovakia*, *Spain*) which have generally (with some notable exceptions) resulted in improved transposition, and these are highlighted below. The concern expressed in the 2010-2011 report that transposition is not always undertaken by express legal guarantees but in other instruments such as circulars, which have been found unacceptable for implementation of a directive (C-361/88 and C-59/89, *TA Luft*), has been addressed in the *Netherlands* where a number of provisions during the reporting period were moved from the Aliens Circular to the Aliens Decree. In *France*, however, a circular implementing amendments to the law that transposes the Directive was adopted during the same period (i.e. in September 2011). While the Directive is implemented in *Latvia* by regulations, the rapporteur reiterates the observation in earlier reports that this is problematic in terms of ensuring supremacy of EU law because regulations are lower in the hierarchy of legal norms than ordinary laws in the country. In *Romania*, the principal measure transposing Directive 2004/38 is still the Government Emergency Ordinance No. 102/2005.

Improvements in transposition in a number of Member States 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, 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*, *Slovakia*, *Romania*, *Sweden*,

[5] 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).

United Kingdom); and (3) partial or incomplete, where more gaps or serious deficiencies in transposition have been highlighted (*Bulgaria*, *Lithuania*, *Slovenia*, *Spain*). In *Spain*, amending legislation was adopted in the reporting period which finally transposed Articles 7 and 8(3)-(4) of the Directive. As noted in the 2010-2011 report, however, verbatim transposition, does not guarantee smooth application of the Directive's provisions in practice which is evident from the dialogue of the Commission with *Cyprus* on the transposition of Directive 2004/38.

There are some more favourable rules relating to these provisions in a few Member States. As observed 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 a five-year period is still required for students. This favourable position is likely to change in the future if one of the proposals before Parliament to revert to a minimum period of five years of residence to apply for Belgian nationality is accepted, because the qualifying period for permanent residence would also change to five years, although the law adopted in July 2012 amending the Aliens law does not modify the three-year period. However, reverse discrimination against Belgian nationals who have not exercised free movement rights was reintroduced in respect of family reunification conditions by the above law. 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, continues to retain the status of worker for one year rather than the minimum six months specified in the Directive.

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

Most EU Member States have transposed this provision correctly (*Austria, Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia*, *Slovenia*, *Spain*, *Sweden* and the *United Kingdom*). In *Italy*, however, a problem has arisen in relation to the 2011 Census. Given that the registration of EU citizens is also included in the local population registry, a person who did not complete the Census form is considered to be no longer resident in the municipality, resulting also in the removal of EU citizens from these registries thus making it more difficult for them to prove their residence. Whether EU citizens have actually been removed from these registries because they failed to complete the census and if so how many is not yet known. Likewise, it is too early to know what the implications of removal from the registry are for the individual who suffers this fate.

The concern raised by the rapporteur in *Poland* about the compatibility with EU law of the legislation on evidence of people, which obliges all foreigners – including EU citizens and members of their families – to register their stay if the period of their stay exceeds three days, and also to register after three months (which is not the same registration as that understood within the meaning of Directive 2004/38) and then further on obtaining permanent residence, will no longer be founded once the new law on evidence of the people enters into force on 1 January 2013 because the obligation to register will be moved.

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) is reported to be in place in *Austria*, *Belgium*, *Czech Republic*, *Cyprus*, *Denmark*, *Estonia*, *Finland*, *France*, *Germany*, *Greece*, *Hungary*, *Latvia*, *Luxembourg*, *Malta*, *Netherlands, Poland*, *Portugal*, *Romania*, *Slovakia*, *Spain*, *Sweden* and the *United Kingdom*. But no transposition of these provisions has taken place in *Lithuania*, with the result that the status of EU workers and self-employed persons after the termination of the employment relationship remains unclear. However, the rapporteur takes the view that there is no clear violation of the Directive because such persons would be caught by provisions in the Aliens' Law, which provide that persons can stay in the country when they have sufficient resources for themselves and health insurance. There are also proposed amendments to the Aliens' Law to introduce the Article 7 provisions.

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 previous 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. This is not in accordance with Article 7(3)(d) which does not exclude vocational training related to the previous employment in the event of involuntary unemployment. This discrepancy was not addressed in the amendments adopted in March 2012. In *Ireland*, the minor ambiguities in the wording of the regulations transposing Articles 7(3)(c) and (d), observed in previous reports, are still in place.

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

Correct transposition of this provision has taken place in *Austria*, *Belgium*, *Bulgaria*, *Cyprus*, *Denmark*, *Estonia*, *Finland*, *Germany*, *Greece*, *Latvia*, *Luxembourg*, *Netherlands, Portugal*, *Romania*, *Slovakia*, *Slovenia, Spain* and *Sweden*. In *France*, new legal provisions passed in September (and clarified in a subsequent Circular) grant powers to Prefects to check, as soon as doubts arise, the conditions under which EU nationals either practice a professional activity or possess sufficient resources so that they do not become a burden on the social security system, although such checks cannot be undertaken on a systematic basis. In the view of the rapporteurs, these provisions appear to be adding a condition to the right of EU nationals to stay in the country for more than three months. In the *United Kingdom*, as described in previous reports, there have been improvements in the times taken to process registration certificates and residence cards, but, as discussed in the final section in this chapter, there are still significant delays.

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. In *Lithuania*, as also observed in previous reports, no additional documents are required under the legislation, although those documents that have to be provided must be certified and officially translated into the Lithuanian language, which may serve as a practical barrier to obtaining the residence certificate. In *Malta*, a licence has first to be issued for employment. While the law expressly stipulates that such a licence

shall not be withheld, this formal requirement may nonetheless constitute an administrative impediment to free movement of workers. For the time being, there is no requirement in the *Czech Republic* for EU citizens to register if they intend to stay longer than three months in the country (although it appears that this is likely to change in future), but if the EU citizen concerned 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. This has been observed in previous reports and the Rapporteur notes that the European Commission is aware of the problem. In *Poland*, the application 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. In addition to the continuing delays in processing EEA/EU residence documents in the *United Kingdom*, applicants for such documents – particularly family members – are still being asked too many questions and are requested too many documents that goes beyond what is stipulated in the Directive. On the other hand, in *Latvia*, the introduction of a special application form for EU citizens and their family members requesting only basic data on registration of their residence corrects a discrepancy in the implementing regulations referred to in the 2010-2011 report.

The earlier concerns expressed by the European Commission to the Government of *Cyprus* regarding the apparent requirement for EU workers to possess a certain level of income in order to obtain the right of residence for more than three months have now been addressed to the Commission's satisfaction. In *Hungary*, however, there continues to be a minimum 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 will not be deemed to become an unreasonable burden on the social assistance system. As noted in the 2010-2011 report, 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.

As noted in previous reports, 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.

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

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

There are no specific national provisions in the laws of *Bulgaria*, *Germany*, *Ireland*, *Lithuania*, *Latvia*, *Malta*, *Poland*, *Slovenia*, *Spain* and the *United Kingdom* fully transposing Articles 14(4)(a) and (b), although in *Lithuania* EU nationals can only be expelled if they lose their right of residence. In *Bulgaria*, an amending provision inserted into the law now expressly indicates that mere recourse to social assistance or job-seeking does not serve as a ground for

expulsion. In *Ireland*, as described in previous reports, 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 concerned 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 since there is no such condition. In *Slovakia*, the rapporteur observes that the amending foreigners' legislation appears now to be in conformity with Articles 14(4)(a) and (b). Similarly, in *Latvia*, family members of EU citizens have been omitted in the transposing measures leading to the possibility that an expulsion order could be exercised against them, even though the authorities contend that this will not occur in practice. In the *United Kingdom*, the pilot project operated by the UK Border Agency, in conjunction with local police forces and aimed at removing homeless EU nationals who have been in the country for more than three months and are not self-sufficient, appears to be continuing, although it is unclear whether it remains a pilot or not. While a freedom of information request regarding the project by the AIRE Centre was refused, the Centre learnt in March 2012 that a large number of Romanian nationals in Glasgow were being targeted. It appears that, according to a first-tier tribunal decision in June 2011, the targeting in this way of A2 nationals who are registered as job-seekers is unlawful.

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

Full transposition of Article 17 has taken place in *Austria*, *Belgium*, *Bulgaria*, *Cyprus*, *Denmark*, *Finland*, *France*, *Germany*, *Greece*, *Hungary*, *Italy*, *Latvia*, *Lithuania*, *Luxembourg*, *Netherlands*, *Poland*, *Portugal*, *Romania*, *Slovakia*, *Slovenia*, *Sweden* and the *United Kingdom*.

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 official confirmed and translated into the Lithuanian language. In *Estonia*, the national legislation does not contain any rules relating to Article 17(4)(c), which is considered as not fulfilling the Directive's requirements, while, in *Malta*, Article 17(2) has not been transposed literally, which in the rapporteur's view may give the impression that there is incorrect transposition, but these persons are covered by the Immigration Act.

As noted in the 2010-2011 report, 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.

In *Ireland*, while the transposition of Article 17 is generally correct, as noted in previous reports, two small discrepancies have been identified in the implementing regulations in relation to Articles 17(1)(c) and 17(3), and, in *Spain*, all the provisions in Article 17 have been transposed but for Article 17(1)(a). Article 17 has been transposed in the *United Kingdom* and the UK Border Agency's guidance now accurately reflects the judgments of the Court of Justice in C-192/09, *Lassal* and C-325/09, *Dias*, namely that any continuous period of five years lawful residence entitles EU/EEA nationals or their family members to permanent residence. However, the rapporteurs observe that the guidance does not address in sufficient detail what amounts to continuous

residence, with the result that this issue appears to be left to the discretion of the caseworker. Indeed, the guidance stipulates that any period of time A8 nationals were required to demonstrate that the they were registered under the Workers Registration Scheme (WRS) – which closed on 30 April 2011 – is included, which begs the question how the courts will treat those A8 workers who previously failed to comply with the provisions of the WRS.

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

The derogations in Article 24(2) have been transposed in *Cyprus*, *Denmark*, *Estonia*, *France*, *Germany*, *Greece*, *Ireland*, *Italy*, *Lithuania*, *Malta*, *Netherlands*,[6] *Poland*, *Portugal* and the *United Kingdom*, but there are no explicit national provisions transposing this provision in *Austria*, *Bulgaria*, *Hungary*, *Romania*, *Slovakia*, *Slovenia*, and *Spain*. The degree of transposition in *Belgium* is less clear, as Article 24(2) has only been recently transposed by a law amending the legislation on reception of asylum-seekers, which is considered regrettable by the rapporteurs, and the last part of the provision following the terms "maintenance aid" in relation to studies has not been transposed.

In *Romania*, there have been no changes to the position stated in previous reports 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 previous reports, in *Estonia*, the position is favourable because all persons who have a right to stay (on either a permanent or "fixed" basis) also have the right to obtain social assistance, study loans and vocational training. In *Finland*, workers, self-employed persons, and those who retain this status, as well as members of their families, continue to be entitled to social assistance since their entry into the country. They are also entitled to maintenance grants for studies. As noted in previous reports, 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, although, in practice, it seems that permanent residence is not needed to receive such a grant.

Transposition of Article 24(2) in *Latvia* continues to be inaccurate 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. Further, only EU citizens have a right to education on the basis of equality with nationals, and not their third-country national family members. As noted in previous reports, in *Sweden*, in principle, for periods of stay of up to three months, those persons (irrespective of their nationality) who are not resident in the local community are only entitled to acute social assistance in emergency situations.

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[6] 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.

2. SITUATION OF JOB-SEEKERS[7]

As noted in the three previous reports, there are two broad categories of national rules applicable to job-seekers coming from other EU Member States: (1) where the rules explicitly govern their status 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 of any Member State, although its application is implicit in some.

Member States in which the position is unclear

The specific situation of EU job-seekers in a number of Member States is unclear and has not been addressed on transposition of the Directive. In *Estonia*, as observed in previous reports, no special rules are foreseen for this group. In *Greece*, there are no 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 151 EU citizens were registered as job-seekers in *Lithuania* during 2011 according to information from the national Labour Exchange Office. In *Bulgaria*, as noted in the 2010-2011 report, 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, to Article 14(4)(b) (see above) or to 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). The position of job-seekers who enter *Ireland* continues to be very unclear according to the rapporteur. References to EU job-seekers are found in the regulations explicitly excluding them from assistance under the social welfare legislation and operational guidelines issued by the Department of Social Protection requiring the authorities to take "special care … to ensure that all EU nationals have genuinely come to Ireland with the intention of seeking employment". But there is no legal obstacle to "genuine" job-seekers entering and residing in the country because of the absence of a requirement to register. In *Spain*, the rapporteur observes that the legislation is in accordance with Article 6 and Recital 9 of the Directive, but not with Article 14(4) which has not been transposed.

Residence registration requirements

In some Member States (*Estonia*, *France*, *Greece*, *Hungary*, *Lithuania*, *Luxembourg*, *Netherlands*, *Poland*, *Portugal*, *Slovakia*, *Slovenia* and *Spain*), the general rules on residence, either expressly or implicitly, also apply to EU job-seekers who need to register their residence if they are going to stay longer than three months in the territory. On the other hand, in other Member States (*Belgium*, *Czech Republic*, *Denmark*, *Finland*, *Latvia*, *Malta*, *Sweden*, *United Kingdom*) there is no such requirement, although this situation is now expected to change in the *Czech Republic*. In *Belgium*, EU job-seekers can obtain a registration certificate with no formalities from the municipality as soon as they arrive in the country. This is a provisory document issued by the local administration, which is confirmed when jobseekers bring documents attesting

[7] See also the separate report on the "The situation of job-seekers under EU law on free movement: National practices and legislation" prepared during this reporting period.

their jobseeker status. In *Cyprus*, all job-seekers, including EU citizens, are required to register with the district job-seeking and social insurance offices. In *Hungary*, EU job-seekers need to supply as proof a document that they are seeking work, if they have been placed by the competent labour centre.. In *Portugal*, EU job-seekers staying longer than three months are required to register their residence in the municipality within a period of 30 days after 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 of honour 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). Similarly, in *Slovakia*, the EU job-seeker applying for registration of residence for a stay longer than three months for the purpose of seeking employment has to make a solemn declaration that she or he is continuously looking for work in the country.

Registration with employment agencies and access to employment services

In a number of Member States, it is important for job-seekers (including own nationals) to register with the national or local employment agencies or labour offices so that they can access their services (*Austria, Bulgaria*, *Czech Republic*, *Cyprus*, *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. In *Finland*, as noted in previous reports, labour market training is conditional on having a home municipality in the country, which EU citizens obtain once they have registered their residence. However, because it is not possible to register residence on the basis of job-seeking alone, 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. A further practical consequence of non-registration is that job-seekers are generally unable (unless there are exceptional circumstances) 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. In *Latvia*, the law does not require possession of a registration certificate/card in order to register officially as unemployed or a job-seeker with the State Employment Agency, but, in practice, the Agency requires notice of the award of a Latvian personal code and an officially registered place of residence, which is issued by the Office for Citizenship and Migration Affairs and which cannot be obtained without a registration certificate/card. As observed in the 2010-2011 report, the situation in *Lithuania* is also restrictive because employment support (i.e. counselling, mediation, active employment measures, etc.) is only provided to nationals and lawfully resident foreigners, which seems to indicate that EU job-seekers are excluded from this definition because they are unlikely to be considered as resident, meaning that they would only have access to basic health services.

Right of residence of up to six months or more

In *Denmark*, *Latvia*, *Malta*, *Romania* 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. In *Denmark* and *Sweden*, 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. In the *United Kingdom*, however, the UK Border Agency's guidance to caseworkers expects the job-seeker to find work within six months of starting to look for it. There is no reference to national or EU case law confirming that EEA job-seekers will have an extended right of residence for so long as they are genuinely seeking employment and have a reasonable change of obtaining it, and no account is taken of the difficult economic situation.

While job-seekers are required to register their residence after a period of three months in *Greece*, *Hungary*, the *Netherlands* and *Portugal*, in principle there is no time limit on their stay so long as they can demonstrate that they are looking for work and have a reasonable prospect or genuine chance of obtaining it. In Greece Law 4071/2012, modifying the conditions of the right of residence of EU citizens and the right of residence on Greek territory without any conditions or any formalities other than the requirement to hold a valid identity card or passport is now extended *automatically* for another three months for jobseekers. A similar situation exists in *Cyprus*, where the rapporteur observes that the practices seem to be in line with the criteria in the *Antonissen* judgment and where there are no formalities that job-seekers need to complete after the end of six months of looking for work in order to secure their residence rights for a further period. According to the rapporteur, this period is presumably indefinite so long as they do not seek recourse to public funds.

In the *Czech Republic*, as noted in the 2010-2011 report, 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, although job-seekers cannot be removed from the country even if they constitute a burden on the Finnish social security system. In *Germany*, as also observed in the 2010-2011 report, the Administrative Guidelines on the Implementation of the Freedom of Movement Act explicitly refer to *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, based on their qualifications and the situation on the labour market, they have a reasonable prospect to be successful with their job applications. Residence to a job-seeker, however, may be denied if the EU citizen does not display any serious intention to take up employment.

Access to benefits

The question of access to social benefits was not addressed in all of the national reports. In some reports, it is recalled that job-seekers can normally transfer unemployment benefit from their EU Member State of origin if they register their job-seeking status with the destination country employment services (*Czech Republic*, *Hungary*, *Ireland*, *Latvia*). [8]In other Member States, they may, in principle, request social welfare/assistance payments (*Austria*), social integration (*Belgium*) or Jobseeker's Allowance (*Ireland*), provided they meet certain qualifying conditions. However, such payments are not automatically granted and accessing them puts job-seekers at risk of becoming a burden on the social

[8] This is governed by art. 64 and 65 Regulation 883/2004.

assistance system of the Member State concerned. In *Cyprus*, job-seekers wishing to access allowances need first to 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 to test whether the type of social assistance in 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, particularly as all persons with a "right to stay" are entitled to obtain social assistance. In *Denmark*, however, first-time EU job-seekers are expressly excluded from social cash benefits, with the exception of those benefits 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 of the solidarity sub-system. But it might still be possible for them to access an allowance applicable under a 2003 law on social income for insertion, which is aimed at fostering integration in the labour market, if they are between 18 and 30 years of age and register as a job-seeker in their residence employment centre for at least six months.

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 forms of support, such as general assistance to find a job and participation in various workshops and vocational trainings that aim to raise their qualifications with a view to securing employment. The validity of restrictive social legislation preventing access to social assistance for EU job-seekers continues to be discussed by the social courts in *Germany*. The effect of a judgment of the Federal Social Court that such legislation cannot be applied to nationals of contracting States to the European Convention on Social and Medical Assistance (which has been ratified by 15 EU Member States, including Germany) was effectively reversed by further government reservations to the agreement in December 2011. Given their unregulated situation in *Lithuania*, EU job-seekers are likely to experience difficulties in accessing social security benefits, particularly if they have not been contributing to such benefits or are not permanent residents.

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 a problem in *Cyprus* and the *United Kingdom*, where, despite improvements in both countries, residence applications still take between two and four months (or more) to be processed.

With regard to the refusal of entry and expulsion of EU citizens, as also observed in previous reports, concerns persist in a number of Member States that nationals of the EU-8, and especially of the EU-2, are being treated less favourably. 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.

As noted in previous reports, discrepancies continue to exist in *Finland* 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.[9] Ambiguities regarding the transposition of the provisions in the Directive relating to entry and procedural safeguards are also found in *Malta*. In the case of entry, 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 case of procedural safeguards, no literal transposition of the pertinent provisions of the Directive can be detected even though the rapporteur notes that such safeguards are generally respected by the courts.

In the *Czech Republic*, the discrepancies identified in the 2010-2011 report regarding the expulsion of EU citizens have now been resolved. Amendments have been introduced ensuring that the proportionality principle is taken into account when decisions on the expulsion of EU citizens are taken, in conformity with Article 28(1) of the Directive. Moreover, the application of the notion of "public policy" is no longer problematic because an extended bench of judges of the Supreme Administrative Court has ruled that this notion needs to be given a uniform interpretation.

As underscored in previous reports, the inclusion in *Hungary* of HIV infection as a disease endangering public health that conditions the residence of an EU/EEA national is not in conformity with EU or international law. For example, ILO HIV and AIDS Recommendation, 2010 (No. 200) prohibits exclusions from migration on the basis of the migrant worker's "real or perceived HIV status".[10] In *Lithuania*, amendments adopted in December 2011 to the provisions in the Aliens' Law on the timelines for departure are not in conformity with the Directive because they have abolished the guarantee of one month for EU nationals and introduced a general time-limit of 7-30 days, which in practice may mean that EU nationals will have less than one month to leave the country. However, the rapporteur observes that there has not yet been any practice applying this provision. Moreover, as outlined in the 2010-2011 report, the absence of specific rules on detention of EU nationals is problematic because this means that they could be detained under the same conditions or grounds as foreigners generally. The application of the stricter criteria of the "gliding scale" in the *Netherlands*, introduced for the withdrawal of residence on public order grounds in respect of non-nationals who have been convicted of serious offences or are habitual offenders, is continuing, and the scale has been tightened even further despite the concerns raised by the Advisory Committee on Migration

[9] Refusal of entry as described here is possible if the person has an effective prohibition of entry. The duration of the entry ban depends on the seriousness of the criminal activity and it can vary between 1 and 15 years.

[10] See ILO Recommendation No. 200, para. 28: "Migrant workers, or those seeking to migrate for employment, should not be excluded from migration by the countries of origin, of transit or of destination on the basis of their real or perceived HIV status".

Affairs (ACVZ), which expressed its doubt on the proportionality and legitimacy of the proposals and their application to migrants covered by the Directives on family reunification and long-term residents. The rapporteurs also observe that in many instances the case law demonstrates that 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.

In *Bulgaria*, exit bans imposed on Bulgarian citizens and their conformity with the Directive has been the subject of the bulk of judicial practice relating to the Directive at the national level. Two preliminary rulings by the Court of Justice (C-434/10, *Aladzhov* and C-430/10, *Gaydarov*) have already been issued, and a third case, described in the previous report, is pending (C-249/11, *Byankov*). A new concern regarding entry and residence is found in the amending law which, in view of the impending accession of Bulgaria to the Schengen Information System (SIS), would allow for the withdrawal of a residence permit of a third-country national family member of an EU citizen if that person has been signalled in the SIS.

As observed in previous reports, in *Denmark*, when deciding cases regarding expulsion of EU citizens, it appears that the courts, in general, 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 it is argued that they apply a low threshold. In April 2012, following the intervention of the European Commission, a Bill was introduced to modify the amendments to the Aliens' law (described in the 2010-2011 report) requiring that non-nationals who committed any crime resulting in imprisonment had to be expelled unless such expulsion would "with certainty" be contrary to Denmark's international obligations, including EU free movement rules, by removing the "with certainty" requirement. In *France*, the legislative reform of June 2011 contains a provision providing for a right of residence for EU, EEA and Swiss nationals for a maximum period of three months without any conditions or formalities provided that they do not become an unreasonable burden on the social security system, which is considered by a number of commentators as targeting Roma who are nationals of an EU Member State. 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. 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 remedies, and 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 continues to raise the concerns of the rapporteurs about the compatibility of the Belgian legislation with Article 31 of the Directive In *Italy*, legislative amendments have strengthened the rules on remedies in respect of challenges to both a refusal of the right of residence and expulsion orders.

4. Free movement of Roma workers

The two general trends identified in the previous report with regard to EU Roma workers persist during this reporting period: (1) EU nationals of Roma origin are continuing to make 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 other EU 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 difficulties in demonstrating their quality as "workers", 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. Further, the transitional arrangements restricting the access of EU-2 workers to employment that have been extended in several EU Member States 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, particularly in education, has been the subject of cases before the European Court of Human Rights, for example *D.H. and others* v. *Czech Republic*, which the rapporteur notes has not yet been resolved. Consequently, free movement to other Member States is seen as an opportunity for EU nationals of Roma origin, particularly those who are less-skilled, to escape poverty and discrimination at home. In *Latvia*, the rapporteur reiterates he information submitted in the 2010-2011 report 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. In the *Czech Republic*, the departure of Roma to seek asylum in Canada remains a topic on the political agenda, while, in *Hungary*, the rapporteur also notes that some Roma Hungarian citizens are seeking asylum abroad. In *Luxembourg*, there are still a high number of asylum applications from former Yugoslavia, especially Serbia and the FYROM, with approximately 75 per cent being lodged by persons of Roma origin, and Roma also arrive to *Sweden* with the intention of seeking asylum.

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 Member States because of the absence of relevant official statistics (*Czech Republic*, *Hungary*, *Lithuania*). In *Hungary* there are no statistics on Roma regardless of their nationality. 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. While there are no official statistics relating to the number of Roma workers in *Ireland*, an NGO Roma Support Group estimates that there are more than 3,000 Roma in the country, with the majority from Romania and smaller numbers from the Czech Republic and Slovakia, although it is not clear how many are workers under EU rules. Official figures in *Latvia* count 8,582 persons of Roma origin, although experts estimate there are approximately 15,000 (see above). While no estimates are provided on the number of EU nationals of Roma origin in *Germany*, the report cites figures of approximately 70,000 German Sinti and Roma living in that country, and, in *Poland*, the 2011 national Census revealed that about 16,000 persons declared their Roma affiliation, whereas in *Sweden* around 50,000 persons of Roma origin are living in the country.

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*), and so are often viewed in terms of 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*, the numbers of Roma appear to be higher in the summer than in the winter, and many Roma earn their living by playing music, collecting empty bottles, or begging in the streets, an activity for which they can be fined if the person is disturbing public order or endangering public security. In *Ireland*, Roma are frequently charged with theft, begging and casual trading offences. Media reports in *Germany* have noted instances of exploitation and mistreatment of Roma migrant workers taking up employment in the country, particularly in the construction sector (including unauthorized work in the case of Bulgarian and Romanian citizens), for example by being paid lower wages than those required by the law or employment contract. Various incidents or attacks on Roma families have also been documented. In *Sweden*, EU Roma job-seekers experience discrimination in society generally and in the labour market, and also have difficulties in accessing employment because of a low level of education. Consequently, they resort to other means to earn a living, such as begging. In *Lithuania*, the rapporteur draws attention to the actions of the Vilnius municipality, which, in 2012, started to destroy temporary housing occupied by persons of Roma origin, and which have raised concerns among human rights organizations. In the *United Kingdom*, recent studies on the situation of Roma workers, including those from A-8 and A-2 EU Member States, note that their access to mainstream employment with decent wages remains very limited. Roma often work as day labourers and opportunities for this type of work have decreased during the economic recession. They are also frequently denied welfare benefits through the misapplication of the habitual residence test by staff of the Department of Works and Persons. The rapporteurs point to the lack of any national strategy or plan to promote the social inclusion of the Roma population, which is confounded by the lack of official data. In Northern Ireland, a report published in June 2011 by the Joseph Rowntree Foundation documents instances of severe exploitation and even forced labour in respect of the Roma working in that part of the United Kingdom.

Facilitated expulsion of Roma contrary to the strict EU free movement rules and human rights law is also widely reported. In *Ireland*, deportation of Roma has been successfully challenged on three principal grounds: (i) procedural failings; (ii) insufficient evidence of a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society", as required under Article 27(2) of the Directive; and (iii) humanitarian reasons. As noted in the 2010-2011 report, in June 2011, the Parliamentary Ombudsman in *Sweden* criticized the police authority in Stockholm County 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. The Ombudsman took the view that these expulsions were contrary to Swedish and EU law. In *France*, as observed above, legal amendments make it easier for the authorities to expel Bulgarian and Romanian nationals belonging to the Roma minority, which continues to be stigmatized in the public and political debate. For example, referring to a report analyzing crime levels among foreign nationals concerning a parliamentary bill introduced in 2012, the rapporteurs note that an entire section of the report is devoted to the Romanian population and that Romanians are the only EU Member State nationality mentioned.

In *Spain*, no obvious limitations have been put into place in respect of the free movement of EU Roma workers, although most of the expulsion cases discussed in the national report concern Romanian nationals. On the other hand, in *Finland*, it is reported that the authorities are well aware of the rights of Bulgarian and Romanian nationals belonging to the Roma minority as EU citizens and that there is no information on any unlawful expulsions having taken place.

In *Ireland*, while deportation figures are not made available to the public, figures on voluntary return are available, and, in 2011, 240 Romanian nationals were voluntarily repatriated to Romania, as compared with 302 in 2010. While these data are not disaggregated on the basis of ethnicity, anecdotal evidence suggests that the majority of Romanian nationals repatriated voluntarily are members of the Roma community.

It is of concern to learn 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 funds returnees have received from the expelling authorities rather than on the nature of the expulsions. While the voluntary return and expulsion of persons of Roma origin to *Romania* is noted as a concern that requires an effective European-wide response to protect Roma from discrimination and to assist their integration, the rapporteur observes that no problems have been encountered regarding the free movement of Roma workers to Romania from other EU Member States.

A number of positive initiatives in respect of the Roma community are also reported. In *Germany*, a reply by the Federal Government to members of the *Bundestag* draws attention to a number of programmes to improve the situation of Roma in various *Länder*. The EU Roma Framework Strategy, adopted in May 2011 by the Employment, Social Policy, Health and Consumer Affairs Council (EPSCO), will be integrated into future national human resources initiatives in *Hungary*. In *Ireland*, at the end of January 2012, the Department of Justice and Equality submitted an integration strategy for the Roma community in the country as required by the European Commission under the EU Framework for National Roma Integration Strategies. In *Italy*, the rapporteur observes that the change of government at the end of 2011 has brought with it new attitudes towards the Roma. The Office of the Prime Minister adopted a National Roma Integration Strategy in February 2012 and will be submitting a draft law to recognize the Roma as a national minority (to date only territorial minorities are recognized in this way). There are also number of integration initiatives underway for the Roma in *Poland*, including the Governmental Programme on the Roma Community, which will be continued until 2013 and which prioritizes education but also includes activities such as combating unemployment, guaranteeing security, supporting culture and disseminating knowledge about the Roma community in Poland. Roma issues were also one of the important subjects of the Polish EU Presidency in the second half of 2011. In *Spain*, in March 2012, the government submitted a report to the European Commission highlighting the key elements of its integration programme for the Roma. A new long-term strategy for inclusion of persons of Roma origin has also been launched by the government in *Sweden*, with the aim of ensuring full equal treatment for Roma with other ethnic groups within a period of 20 years. Approximately EUR 4.5 million was allocated for local projects during 2012-2015.

In some Member States, the rapporteurs observe that there are no EU workers of Roma origin in the country (*Malta*) or that their presence did not give rise to any problems or specific issues of concern in the reporting period (*Cyprus*, *Estonia*, *Portugal*, *Romania*, *Slovenia*), or that no importance was attached to them in the media or academic literature (*Austria*, *Greece*). Finally, the issue of Roma workers leaving or entering the country has not given rise to any debate in *Slovakia*.

Chapter II Members of a Worker's Family

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

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. In *Poland* no provision is made for the family members listed in Article 3(2) Directive 2004/38/EC in the Act on Entry. These family members do benefit from the Act on Aliens, which provides for a right of temporary residence where family ties exist in Article 53a. A discrepancy between the national and European definition of family members is reported for *Slovakia* that does not recognise the children of registered partners who are under 21 and not dependant of the parents.

There are no changes reported by the Member States regarding the recognition of registered partners as family members within the meaning of Directive 2004/38/EC. Only in *Greece* Art. 42, par. 1 of Law 4071/2012 replaced the term "children" by the term "direct descendants" in order to implement Directive 2004/38 in a better way. In the *Cypriot*, *French*, *Italian Maltese* and *Polish* reports the position of partners in sex marriages/partnerships is discussed.

Though recognised by *Cypriot* law as partners who qualify for rights under the Citizens Directive,[11] the administrative practice concerning registered and same sex partners was one of the concerns expressed by the European Commission in its 2011 letter asking Cyprus to clarify its procedure for facilitated admission of family members in a registered and same sex partnership (see 2010-2011 European report). The adjustments made by Cyprus to bring its practice in line with European law by adopting the Circular *Passport Control of Union Citizens and of the Members of their Families* of 18 July 2011 was acknowledged as ensuring compliance with European obligations by the European Commission in its letter dated 22 March 2012. The Cypriot rapporteur, however, questions whether current practice ensures full compliance with European law. He points out that though partnership relations, both same sex and different sex, are treated alike in the sense that they are considered as beneficiaries of free movement rights as partners in a durable relation even if there is a marriage or a registered partnership, regarding the issuing of visa, this only partly addresses the issue of sexual orientation and does not touch upon the issue of full compliance with Treaty obligations, in particular non-discrimination irrespective of nationality. In this context he discusses various complaints lodged with the Cypriot Equality Body regarding discrimination endured by LGBT EU-citizens.

The *Italian Tribunale di Reggio Emilia* found that though same sex partners cannot marry according to Italian law, for the purpose of the Citizens Directive, a same sex marriaes should be recognized if they have been convened in accordance with the law of the State where the marriage took place. Though it does recognise that there is no obligation under the Citizens Directive to recognise same sex marriages, it justifies this decision by emphasising the increasing number of States that are favourable to same sex relations, the position of the European Court of Human Rights on this issue and the gender neutral wording of the right to found a family in the EU Charter on Fundamental

[11] Article 4(2)(a), Law 7(1)/2007.

Rights.[12] The Questura issued the residence card to the applicant, as required by the court.[13]

Same sex relations are not recognised in *Malta*.

In *Poland* there is no recognition of registered partners, be it between same or different sex partners. As reported in the 2010-2011 European report, a certificate necessary to marry abroad is still not issued to applicants who apply for this certificate to enter a same sex marriage.

(Proposals for) amendments to the legal framework are reported for *Bulgaria*, *Cyprus*, *France*, *Lithuania*, *Malta*, *the Netherlands* and *Spain.*

An amendment to the provision implementing Article 2(2) of Directive 2004/38/EC has brought the *Bulgarian* definition of family member in line with the Citizens Directive as it now includes not only the descendants and ascendants of the EU-citizen's spouse, but also those of his/her partner.[14]

As reported in the 2010-2011 European report, *Cyprus* received a warning letter regarding its implementation of Directive 2004/38/EC in 2011. Amongst the provisions which the European Commission feels have been implemented incorrectly is Article 2(2)(c) in combination with article 8(5)(d) of the Directive (Article 10(6)(d) of the Law7(1)/2007). To ensure full compliance with the Citizens Directive the Cypriot government has drafted a bill,[15] establishing that the direct descendants of the EU-citizen and his/her spouse must prove that they are either 21 or that they are dependents of the EU-citizen. Instructions for the direct application of Article 8(5)(d) of Directive 2004/38/EC are found in a Circular dated 18 July 2011.[16]

Article R. 121-2-1 0f the CESEDA, now allows the *French* authorities to apply the rules on entry and stay to the family members of an EU-citizen irrespective of their nationality listed in Article 3(2) of the Citizens Directive.[17] The personal situation of these family members is the guiding principle when examining their applications.[18] Circular of 21 November 2011 NOR IOCL1130031 regarding the methods of application of Decree 2011-1049 of 6 September 2011 passed in application of Laws No. 2011-672 relating to immigration, integration and nationality and residence cards clarifies that the right of entry and residence accorded to these family members is not automatic and that decisions must reflect the right to private and family life.

In *Lithuania* a proposal to broaden the definition of family member, tabled in 2011, was not adopted.
Amendments to the definition of family member in *Malta* now mean that a person qualifies as family member irrespective of his/her nationality if s/he was dependent or a member of the household of the EU-citizen in the country of

[12] Tribunale di Reggio Emilia, decreto 13 February 2012, *Diritto immigrazione e cittadinanza*, 2011, 4, 155. On the judgment: A. Costanzo, Matrimonio tra persone delle stesso sesso contratto in Spagna e diritto di soggiorno nell'ambito dell'Unione europea, *Famiglia, persone, successioni*, 2012, 4, 310.
[13] *Il Sole-24 ore*, 27-3-2012, 27.
[14] State Gazette No. 21 of 13 March 2012.
[15] The bill proposes to amend the law on seven points which were found to be non-compliant with the Directive.
[16] Circular File No. 15/2006/III dated 18 July 2011.
[17] Article L. 121-1(4) and (5) CESEDA.
[18] Article R. 121-4-1 CESEDA.

former residence or a person who requires personal care by the EU-citizen for serious health reasons.[19]

Following a ruling of the Judicial Division of the Council of State,[20] the *Dutch* policy rules listing the evidence that can be submitted as proof of a durable relationship duly attested were adapted to accommodate with this ruling (*infra*).[21] By extending the list of admissible evidence with 'rental contract or other considerable and lengthy legal/financial commitments such as a mortgage for the purchase of living accommodation, bank statements on both partners names' the policy rules in *Vreemdelingencirculaire* 2000 A2/6.2.2.2 (Admission of EU Citizens and Nationals of the EER-States and Switzerland) and B10/1.7 (Nature of Residence EU Citizens) now reflect the objective of Directive 2004/38/EC (preserve family unity), the Commission's 2009 Guidelines[22] and the Judicial Division of the Council of State's findings.

Following a ruling of the *Spanish* Supreme Court of 1 June 2010, discussed in the 2010-2011 European report, amendments were introduced to the Royal Decree 240/2007 by Royal Decree 1710/2011 of 18 November 2011. These amendments concern the position of Spaniards (*infra, Reverse discrimination*) and the right of residence following legal separation of the spouses. The latter has resulted in a redrafting of Articles 9.4 and 9.5 of the Royal Decree of 2007 that no longer include the words 'legal separation'. This means that legal separation no longer affects the right of residence of the spouse who has been issued a residence permit as a family member of an EU-citizen.

Case law

References to case law are found in the *Austrian*, *French*, *Italian*, *Dutch* and *UK* reports.

In a case concerning the refusal by the Austrian authorities to admit a mentally disabled 25 year old woman, the *Austrian* Administrative Court found that Article 8 ECHR had to be respected.

The *French* rapporteurs discuss two cases concerning third-country national partners in a durable relationship with an EU-citizen. In both cases the relationship was not classed as durable as the partners had only been together for three[23] respectively four[24] months before they applied for residence permission relying on Directive 2004/38/EC. In the third case reported, an error of law is established because the Prefect has disregarded the fact that partners who have signed a Civil Solidarity Pact effectively enjoy the same level of protection in many legally protected social situations as spouses. Therefore they

[19] Amendment to LN 191/2007.
[20] Bestuursrechtspraak Raad van State, 6 September 2011, 201009139/1/V4, LJN: BS1678, JV 2011/429.
[21] Besluit van de Minister voor Immigratie en Asiel van 16 december 2011, nummer WBV 2011/17, houdende wijziging van de Vreemdelingencirculaire 2000 [Decision of the Minister for Immigration and Asylum of 16 December 2011, No. WBV 2011/17, amending the Aliens Circular 2000], *Staatscourant* 23 December 2011, No. 23324, p. 2 & 15.
[22] Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (further 2009 Guidelines), 2 July 2009, COM(2009) 313 def.
[23] Administrative Court of Appeal of Bordeaux, 8 November 2011, No. 10BX03057.
[24] Administrative Court of Appeal of Marseilles, 13 March 2012, No. 10MA01524.

qualify as family members within the meaning of Article 2(2)(b) of Directive 2004/38/EC.[25]

In *Italy*, the position of a minor whose custody is ruled by Moroccan customary law, the *kafalah*, as a family member remains unresolved notwithstanding the judgment of the Supreme Court of 1 March 2010, which was discussed in the 2010-2011 European report.[26] The question was deferred to the Grand Chamber in January 2012 by the Sixth Chamber of the Supreme Court.[27] The position of siblings was decided on by the Supreme Court in September 2011. Where it had found that a sister did not qualify as family member within the meaning of the Citizens Directive (see 2012-2011 European report), it now found that a brother can be admitted if dependant on the EU-citizen or where serious health reasons indicate the need of personal care by the EU-citizen.[28]

On 6 September 2011, the Judicial Division of the *Dutch* Council of State put an end to the discussion, as reported in previous European reports, which documents can be submitted as evidence of a durable relationship, duly attested.[29] Taking the Commission's 2009 Guidelines on the application of Directive 2004/38/EC as its starting point it acknowledges that Member States enjoy a certain degree of discretionary powers in setting the qualifying conditions for a durable relationship, but then argues that this does not include the setting of an exclusive criterion, i.e. GBA-registration which – in practice – is hard to satisfy, because registration in the Municipal Population Registration is subject to lawful residence. As to the justification of a rejection, the Judicial Division of the Council of State rules that the mere specification that there is no GBA-registration is insufficient. This case is now the leading case.[30]

The *UK's* courts had to deal with issues concerning extended or other family members. *Aladeselu and Others* found that there can be no prohibition on the entry of extended or other family members prior to the entry of the EEA-national sponsor as this might inhibit the effective exercise of free movement rights,[31] a position which would seem to be supported by the AG's opinion in *Rahman*.[32] Prior residence does not have to be lawful in character, though illegal entry might be an issue when determining whether to permit entry under Regulation 17(4) of the 2006 Regulations provided this is after proper examination as required by the regulations and by Article 3(2) Directive 2004/38/EC. The UK courts also had to deal with the question of prior dependency. *Moneke* found that

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[25] Administrative Court of Appeal of Marseilles, No. 10MA04089.

26 Supreme Court of 1 March 2010, No. 4868. References to this judgment are found in: Supreme Court, Sixth Chamber, order 23 September 2011, No. 19450, and order 7 October 2011, No. 20722; Appeal court of Rome, decree 31 January 2011, Diritto immigrazione e cittadinanza, 2011, 2, 183. Contra appeal Court of Venice decree 9 February 2011, Diritto immigrazione e cittadinanza, 2011, 2, 181.

[27] Supreme Court, order 24 January 2012, no. 996.

[28] Supreme Court, Civil Branch, First Chamber, 7 September 2011, No. 18384.

[29] Afdeling Bestuursrechtspraak Raad van State, 6 September 2011, 201009139/1/V4, LJN: BS1678, JV 2011/429.

[30] Afdeling Bestuursrechtspraak Raad van State, 10 May 2012, 201105665/1/V4, 4 May 2012, 201004915/1/V4, *ibid*., 4 May 2012, 201012514/1/V4, *ibid*., 26 April 2012, 201008207/1/V4, LJN: BW 5635, *ibid*., 12 April 2012, 201007067/1/V4; *ibid*., 23 March 2012, 201012514/1/V4; *ibid* 24 February 2012, 201011515/1/V4,; *ibid*., 30 December 2011, 201100112/1/V1; *ibid*., 27 December 12011, 201012900/1/V4; *ibid*., 2 December 2011, 201108034/1/V4; *ibid*., 24 November 2011, 201108566/1/V4; *ibid*., 21 November 2011, 201106238/1/V4; *ibid*., 21 November 2011, 201009090/1/V4 & *ibid*., 11 October 2011, 201100799/1/V4.

[31] *(2006 Regs – reg 8) Nigeria* [2011] UKUT 253 (IAC).

[32] CJ EU case C-83/11, *Secretary of State for the Home Department* v *Muhammad Sazzadur Rahman and Others*, Conclusion Advocate-General Bot, 27 March 2012, n.y.r..

an extended or other family member relying on dependency did not need to have been resident in the same country as the sponsor during the period of dependency provided the sponsor was an EEA national at the time of dependency and the dependency occurred prior to the extended or other family member's entry to the UK.[33] This was confirmed in *Ihemedu* which also noted that the class of extended or other family members is nowhere exhaustively defined.[34] The rapporteur feels that this judgment is consistent with the AG's opinion in *Rahman*. In *Dauhoo* the Tribunal referred to Regulation 8 of the 2006 Regulations which requires that dependency or membership of the household must continue after entry.[35] The use of the present tense in the Directive suggests that a snapshot is required at the moment of entry and the requirement that the situation be continuing is arguably a gloss on this. If that is so, it must be questionable whether this will be correct if the AG's opinion in *Rahman* which found that dependency does not have to immediately precede the move, is followed by the Court of Justice. Though the Home Office usually applies the criteria applicable under the domestic immigration rules, including a requirement for two years prior cohabitation, to define a durable relationship, the Upper Tribunal does not seem to regard cohabitation as a pre-requisite for a 'durable relationship',[36] but that it may fail because of its short duration.[37] The rapporteurs point out that the guidance regarding durable relationships makes it clear that a durable relationship may be evidenced in other ways and states at 5.1.3 of the European Casework Instructions: *Each case must be considered on its merits, taking into account all the facts and circumstances, as there may be cases where notwithstanding that one or more of these points [i.e. those required by domestic policy] is not met the caseworker is still satisfied that the parties are in a durable relationship.*

Miscellaneous

The following information is taken from the *Bulgarian*, *Greek* and *Swedish* report. The *Bulgarian* provisions implementing the definition of family members in the descending and ascending line (Articles 2(2)(c) and (d) Directive 2004/38/EC) do not include the word 'direct'. The lack of clarity regarding the rights of partners in a registered partnership and partners in a durable relationship as reported in previous reports, remains. Though partnership relations are gaining recognition in Bulgaria, the problem how to provide evidence of a durable relation still exists.

In *Greece* Art. 6, par. 2 of P.D. 106/2007 was providing that family members of a Union citizen who are third-country nationals shall have the right of residence in Greece for a period of up to three months without any conditions or any formalities, provided that they hold a valid passport or visa, where required, and they accompany or join the Union citizen. Law 4071/2012 eliminates the condition of holding a visa, as a visa is necessary concerning the right of entrance and not the right of residence. Family members continue to be required to hold a valid passport.

The decision of the Migration Court, confirming the right of family reunion for the husband with his wife and her child, after he had been found guilty of and condemned to a prison sentence for repeated assault against the former wife,

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[33] *(EEA – OFMs) Nigeria* [2011] UKUT 341 (IAC).
[34] *(OFMs – meaning) Nigeria* [2011] UKUT 00340(IAC).
[35] *EEA Regulations* – Regulation 8(2) [2012]UT 79.
[36] (*Rose (Automatic deportation - Exception 3) Jamaica* [2011] UKUT 00276(IAC).
[37] *Dauhoo (EEA Regulations – Regulation 8(2))* [2012] UKUT 79 (IAC).

saw the *Swedish* Migration Board requesting more strict rules on family reunification in April 2012.

1.2 Reverse discrimination, including return situations

Reverse discrimination is not an issue in *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).

Assimilation is also the case in the *Czech Republic*, *Malta*, *Portugal* and *Italy*. Though the assimilation principle is also part and parcel of the *Czech* law, in practice Czech nationals with third-country national family members do experience less favourable treatment than EU-citizens, for instance in health care insurance, social security and the issuing of residence cards. The rapporteur notes that the overall situation might change as new Immigration rules are being drafted.

Though *Maltese* nationals are not covered by the definition of EU-citizens, their free movement rights are guaranteed through the Maltese Constitution and the Immigration Ac. The Maltese authorities are aware of and respect the Court of Justice's ruling in *Surinder Singh*.[38] In *Poland* the courts are obliged to ensure de facto and de jure equal treatment by disapplying rules which put Polish nationals in a less favourable position than EU-citizens from other Member States.

Though the Decision of the Ministerial Committee for the Employment of Aliens of 28 August 2009 intended to put an end to reverse discrimination in *Cyprus*, this is not the case in every day practice. National court decisions are divided on these matters and there have been numerous complaints to the Ombudsman[39] illustrating the inadequacy in the treatment of Union citizens on the family reunion of Union citizens, including Cypriots. The national courts persistently ignore the Ministerial decision, subjecting the family members of Cypriots to a more stringent regime than the family members of EU-citizens. [40] Already in 2009, the Cypriot Ombudsman pointed out that there is 'a contradictory and defensive position' by the immigration authorities. [41] The rapporteur notes that in the light of the *McCarthy* ruling, the exclusion of static EU-citizens from free movement rights can be expected to persist.

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[38] CJEUcase C-370/90, The Queen v *Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265.

[39] See for instance the section entitled "iii. The right of entry and stay of a third country national who is a spouse or a partner of a Union Citizen" (in Greek: Το δικαίωμα εισόδου και παραμονής πολίτη τρίτης χώρας που είναι σύζυγος ή σύντροφος Κύπριου ή Ευρωπαίου πολίτη) in 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 (accessed 29.09.2009).

[40] *Svetlana Shalaeva v. Republic of Cyprus* (No. 45/2007, dated 27.4.2010); *Republic of Cyprus* v. *Svetlana Shalaeva* (No. 72/2008, dated 22.12.2010); *Abdulkader Majed v. Republic of Cyprus* No. 1099/2009, 7.2.2011.

[41] Report of the Commissioner for Administration regarding the implementation in Cyprus of the Community acquis in the area of family reunification and unfavorable treatment of Cypriot citizens and the members of their families who are third country nationals (in Greek: *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)*, ref. A/P 1623, A/P 1064, dated 6 May 2009, p. 1.

Amendments to legislation and/or policy rules

Amendments to the rules governing the rights of own nationals were reported for *Belgium*, *Spain* and the *United Kingdom*.

A proposal to amend *Belgium* law, which was reported in the 2011-2012 European report, was adopted on 8 July 2011 by the Belgium Parliament and took effect on 22 September 2011, marking the re-instalment of reverse discrimination. The view expressed by the Belgium Council of State that the amendments were at odds with Article 20 TFEU, as interpreted by the Court of Justice in *Ruiz Zambrano* ('genuine enjoyment of the substance of rights'), were not taken on board. The aim of the new law is to restrict the number of applications for family reunion by Belgians of foreign origin whose spouse comes from their country of origin, as a rule Morocco. This is to be realised by applying the general conditions for family reunification which apply to applications made by non-EU citizens. The Belgium rapporteur mentions that the compatibility of this law with, in particular, the stand still-principle that applies to fundamental rights protection, will be reviewed by the Constitutional Court in the near future, By March 2012 38 applications for cancellation had been filed.[42] The Constitutional Court is asked, amongst others things, to consider the validity of this law in relation to the general stand still-principle in the field of fundamental rights, i.e. considering the level of protection achieved in the past.

In *Spain* an amendment to the definition of family member in Royal Decree 240/2007 – deletion of the phrase 'from another Member State - has put an end to reverse discrimination.

Regulation 9 of the *UK* Immigration (European Economic Area) Regulations 2006 covers the family members of British nationals returning to the UK after having worked as a worker or self-employed person in another Member State. A policy document dated 19 May 2011 from the European Operational Policy Team, obtained after a Freedom of Information request, shows that on return to the United Kingdom, a British national, following *Eind*,[43] does not need to show that s/he is a qualified person, but only that s/he was a worker or self sufficient person before returning to the United Kingdom. It is unclear whether this reference to self sufficient is a mistake, given that the relevant Regulation refers to self employment and worker status. The guidance available on the Home Office website has yet to be amended (see 5.5.1 of the European Casework Instructions). Regulations and guidance make no provision for family members in Carpenter situations.[44] An amendment to the Regulations to accommodate the Chen ruling,[45] following the judgment in *M (Chen parents: source of rights) Ivory Coast,*[46] has been delayed by the decisions in *Ruiz Zambrano*, *McCarthy* and *Dereci*. Until such date, *Chen* cases are dealt with under national law and there is no right to take up employment for the parents.

Case law

[42] Joined as application No. 5227.
[43] CJEU case C-291/05, *Minister voor Vreemdelingenzaken en Integratie* v *R. N. G. Eind* [2007] ECR I-10719.
[44] CJEU case C-60/00, *Mary Carpenter* v *Secretary of State for the Home Department* [2002] ECR I-6296.
[45] CJEU case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen* v *Secretary of State for the Home Department* [2004] ECR I-9925.
[46] *M (Chen parents: source of rights) Ivory Coast [2010]UKUT 227 (IAC).*

In the following Member States the issue of reverse discrimination was the subject of case law: *Austria*, *Belgium*, *Cyprus*, *Germany*, *Ireland*, *Italy*, *the Netherlands*, and *Spain*. Developments concerning the *Ruiz Zambrano*, *McCarthy* and/or *Dereci* cases are reported in the reports on *Austria*, *Belgium*, *Bulgaria*, *Ireland*, *Germany*, *Luxembourg*, *the Netherlands* and *the United Kingdom*. These developments are discussed in detail in the Follow-up report on the case law of the Court of Justice EU.

The *Austrian* Administrative Court, was asked to rule on the rights of an Austrian national who had travelled to the Czech Republic twice a week over a period of five months to teach German to a private person charging € 5 per hour. Toiling with the right to provide services and the right to free movement of workers the Court decided that in this case the economical activity qualified as marginal and ancillary. The Austrian rapporteur remarks that the three month period in Section 57 SRA needs to be read in the light of the facts of a case a thus requires a case by case interpretation. As a result of the *Dereci* case, the Austrian Administrative Court has forced the national authorities on multiple occasions to consider Article 8 ECHR in all cases concerning static EU-citizens.

The *Belgium* Constitutional Court reaffirmed that the legislature has failed to provide for a time limit that applies to applications made for family reunification from outside Belgium. The omission violates the principle of equality and non-discrimination, thus it established in a case concerning a visa application made for the child of a non-national husband with a Belgium wife.[47] The CCE cancelled a withdrawal of a residence permit and the subsequent order to leave the Member State finding a violation of Article 8 ECHR. In this case the fact that the third-country national mother had been granted child custody over her child in Belgium had not been included in the decision taken on the basis of the fact that the mother did not maintain family life with the Belgium father and that the mother lacked sufficient financial means.[48]

Of the two cases pending before the European Court of Human Rights against *Bulgary*, which were both discussed in the 2009-2010 and 2010-2011 European reports, one was struck from the list and one was decided on the contents on 10 May 2012, albeit without discussing the issue of reverse discrimination.

In *Cyprus* the national courts are divided on the issue of reverse discrimination.[49] The *German* rapporteurs discuss various cases concerning returning German nationals. At the beginning of 2011 the Federal Administrative Court confirmed that EU free movement rules only apply to returning German nationals if their move within the EU can be qualified as 'substantive'.[50] Moves which are not considered to meet this qualification are those for the sole purpose of getting married, which were discussed in the 2010-2011 European report. This case law has been criticised as being too restrictive as any move to another Member State should trigger the application of free movement rules upon return.[51] The

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[47] Constitutional Court, judgment 12/2011.

[48] CCE, judgment 62.006, 23 May 2011, *R.D.E.,* 2011, p. 370.

[49] *Svetlana Shalaeva v. Republic of Cyprus* (No. 45/2007, dated 27.4.2010); *Republic of Cyprus* v. *Svetlana Shalaeva* (No. 72/2008, dated 22.12.2010); *Abdulkader Majed v. Republic of Cyprus* No. 1099/2009, 7.2.2011.

[50] In German: „Wenn der deutsche Staatsangehörige von seinem unionsrechtlichen Freizügigkeitsrecht nachhaltig Gebrauch gemacht hat." Federal Administrative Court (BVerwG), 11 January 2011, 1 C 23/09, *NVwZ* 2011, 871.

[51] For instance *Oberhäuser*, „Dänemark-Ehen", Unionsrecht und Inländerdiskriminierung, NVwZ 2012.

Administrative Appeal Court of North Rhine Westphalia clarified which formalities apply in these cases: a provisional certificate has to be issued to family members of a returning job-seeking German national irrespective of any requirements concerning sickness insurance or sufficient means of living according to Sec. 5 para Freedom of Movement Act.[52]

The *Irish* high Court quashed a decision of the Department of Justice and Equality refusing to allow an Irish citizen to bring her South African parents to Ireland finding that the Department's decision was not based on a fair and reasonable assessment of the underlying facts of the case and that inadequate consideration had been given to balancing the interests of the State in maintaining an immigration system, and the applicants' family rights. Though leave to have the decision reviewed was granted because the decision to refuse permission amounted to a disproportionate interference with the applicant's constitutional right to protection of the family and the issue of reverse discrimination, the latter is not addressed in the judicial review hearing.

Though in *Italy* nationals and EU-citizens from other Member States are treated alike, the Supreme Court has ruled that a residence permit is constitutive of the right to free movement. Failure to apply for a residence permit within three months of entry means that the Legislative Decree does not apply.[53] Though not entirely unambiguous, the approach adopted is hard to reconcile with the *Metock* case, according to the Italian rapporteur.

On 17 May 2011, the *Luxembourg* Administrative Court issued its decision in an appeal against a 15 December 2010 Administrative Tribunal decision upholding the immigration ministry's 15 January 2010 refusal to grant a residence permit to the petitioner's nephew. The petitioner, a Luxembourg citizen had filed a family reunification application for his nephew, a Nigerian national. The immigration ministry refused the uncle's request on the grounds that family reunification extends only to direct descendents and ascendants.[54]

The Judicial Division of the *Dutch* Council of State handed down two decisions in which Dutch nationals had invoked Directive 2004/38/EC as the correct legal source for a right of residence for their third-country national family member.[55] In both cases the Judicial Division of the Council of State found in favour of the State as it finds that not applying Directive 2004/38/EC upon return cannot be considered to affect the effective enjoyment of free movement rights by the Dutch national, as the stay had only lasted two weeks respectively the purpose of exercising free movement rights was to investigate the career possibilities of the third-country national family member. In a case concerning an application for family reunion submitted by a Dutch steersman resident in the Netherlands and employed by a Belgium company based in Antwerp the Amsterdam District Court found that frontier workers qualify as workers within the meaning of Article 45 TFEU if their economical activity is genuine and effective. By de facto

[52] Decision of 24..4.2012 18B 1572/11 ; The Freedom of Movement Act does not require a proof of these requirements for jobseeking Unioncitizens
[53] Article 19 Legislative Decree 1998, No. 286.
[54] Cour admin. 17 mai 2011, No. 27704C, pp. 1-2.
[55] Afdeling Bestuursrechtspraak Raad van State, 30 December 2011, 201010287/1/V2, *Jurisprudentie Vreemdelingenrecht* 2012/98 and *idem*., 29 February 2012, 201006036/1/V2. Examples of cases which were found 'unfounded' are: Afdeling Bestuursrechtspraak Raad van State, 16 February 2012, 201103487/1/V4, *idem*, 13 February 2012, 201100234/1/V4, *idem*, 13 February 2012, 201108229/1/V4, and *idem,* 13 December 2012, 201012607/1/V4.

imposing a residence condition the Dutch authorities had obstructed the exercise of free movement rights.[56]
The rulings discussed by the *Spanish* rapporteur, though not explicitly referring to the *Ruiz Zambrano* case law, concerned the parent(s) of Spanish children subject of expulsion measures and an entry ban.[57] These decisions, so the rapporteur feels, sit uneasily with EU law and case law.

Miscellaneous

The following information is taken from the *Danish*, *Finnish* and *Irish* reports.
Guidelines adopted by the *Danish* Ministry of Refugee, Immigration and Integration Affairs (now Ministry of Justice) have ensured compliance with the *Metock*[58] and *Eind*[59] rulings, as it is now clear that all Danish nationals returning to their Member State of nationality after exercising free movement rights benefit from the protection offered by EU-law. The fees for applications for family reunification were abolished, taking effect 15 May 2012.
Though static *Finnish* citizens do not benefit form free movement rules, the issue of reverse discrimination has not given rise to any considerable debate in that Member State.
The *Ruiz Zambrano* and *McCarthy* judgments have reopened the discussion on reverse discrimination in *Ireland*. In the context of reverse discrimination the *Irish* rapporteur notes that recent developments have made it easier for non-EEA migrants to reside in Ireland, with the Minister for Justice and Equality announcing two new immigration initiatives in early 2012 allowing non-EEA migrant entrepreneurs and investors to enter and reside in Ireland with their family members.

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.

Amendments to the law and/or policy are reported for: *Bulgaria*, *Denmark*, *France*, *Italy*, *the Netherlands*, *Romania*, *Slovakia*, *Spain* and *Sweden.*

In *Bulgaria* the following amendments were introduced in March 2012.[60] Articles 4(2) and 6(2) LERD now require that there is a **valid** passport for admission and residence up to three months. Article 4 (3) of LERD was amended to stipulate that the visa requirement is waived on condition that the third country national **accompanies or joins his/her EU citizen family member** and is in

[56] References to: CJEU cases C-419/92, *Scholz* [1994] ECR I-505; C-18/95, *Terhoeve* [1999] ECR I-345; C-385/00, De Groot [2002] ECR I-11819; and C-213/05, *Geven* [2007] ECR I-6347.
[57] High Court of Justice Castile and Leon, Decision No. 100/2012 de 24 February 2012, JUR 2012\121177; Superior Court of Murcia, Decision No. 304/2012 de 26 March 2012, JUR 2012\137244 and Court of Justice of Castile and Leon Decision No.. 622/2012, 30 March 2012, JUR 2012\139034.
[58] CJEU case C-127/08, *Blaise Baheten Metock and Others* v *Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.
[59] CJEU case C-291/05, *Minister voor Vreemdelingenzaken en Integratie* v *R. N. G. Eind* [2007] ECR I-10719.
[60] State Gazette No.21 of 13 March 2012.

possession of a residence card **for a family member of an EU citizen** issued by another Member State. Article 4 (4) LERD now stipulates that no entry stamp is placed in the passport of the third country national, provided that he/she has a residence card *of a family member of an EU citizen* issued by another Member State. Articles 8(2), 9(3), 10 and 31 now include the requirements for possession of a **valid** ID card or passport and that the third-country national **should accompany or join** the EU-citizen. The latter condition is also reflected in **the naming of the documents** issued to family members of EU citizens in Bulgaria. The residence cards include the phrase that they belong to a **'family member of EU citizen'**.[61] With regard to **retention of the right of residence** by family members in the event of death or departure of the Union citizen, Article 15(1) LERD now provides that the third-country national should have been residing in Bulgaria for at least one year before the Union citizen's death **in the capacity of his/her family member**. In the event of divorce, annulment of marriage or termination of registered partnership, previously Article13(2)(c) of the Citizens Directive had been transposed as to referring only to cases of victims of domestic violence and not to 'other particularly difficult circumstances'. This omission has been addressed. Article 15(3) LERD includes "*other cases when that is justified with regard to particularly difficult circumstances that took place beyond the will of the foreign national and which he/she could not predict or prevent*'. **A discrepancy in the transposition** of Articles 12 and 13 of the Citizens Directive, which has been reinforced by an explicit new provision inserted in the LERD, i.e. Article 15, Paragraph 4, is the requirement that the conditions in Article 7(1) (a) or (b) of the Citizens Directive are met for the right of residence to be retained and not in order to acquire permanent residence. A second amendment is the entry into force of the Ordinance on the Conditions and Order for Issuance of Visas and Determination of the Visa Regime on 4 August 2011.[62] Like the 2008 Ordinance, it contains several provisions that facilitate the issuance of visas to third-country national family members of EEA-citizens. The only documents required to be presented with their visa application is evidence regarding their family tie. They are explicitly exempted from the obligation to present evidence for means of subsistence, housing, transport and health insurance. Furthermore, the Ordinance also provides for a procedure when a visa is denied to a family member of an EEA citizen. The denial to issue a visa is reflected in a standard form according to a sample provided in an annex to the Ordinance. The grounds (motives) for the denial shall be written down in the form, with the exception of reasoning related to national security. There should also be an indication of the date of handing over or sending of the form to the person concerned.

There is a general exemption for beneficiaries of free movement rights in *Denmark* of the obligation to pay fees for applications for family reunification.

The amendments to the *French* CESEDA were introduced by the Decree of 6 September 2011.[63] Article R. 121-1 of the CESEDA is a new provision that also applies to the French Overseas territories Saint Saint Barthélemy and Saint Martin. It stipulates that a third-country national family member of an EU-citizen is admitted to France 'on condition that he does not pose a threat to law and

[61] §1, points 4 and 5 of the Additional Provisions to LERD and Article 19 LERD.

[62] *Наредба за условията и реда за издаване на визи и определяне на визовия режим*, State Gazette No.55 of 19 July 2011.

[63] Resulting from decree no. 2011-1049 of 6 September 2011 passed in implementation of Law no. 2011-672 of 16 June 2011 relating to immigration, integration and nationality and relating to residence cards, French Official Journal no. 0207 of 7 September 2011.

order and that he hold, in the absence of a valid residence card issued by a Member State of the European Union bearing the words, 'residence permit of family member of a citizen of the Union', a valid passport, a visa or, if issued, a document establishing his family relationship'. The consular authority must issue, free of charge and 'as quickly as possible and as part of an accelerated procedure', the required visa upon proof of his family relationship. The Decree provides the Prefects with further powers to verify compliance with residence conditions by third-country national family members[64] and introduces new inspection methods.[65] Further amendments are found in the circular of 21 November 2011, detailing the right of residence of third-country national family members.[66] The relevant amendments in this circular are that prior lawful residence cannot be asked of third-country national family members and an extension of the deadline to three months for the application of the initial right of residence. In March 2011 it had already be established that this cannot equate to a rejection of the application, but only obliges the third-county national family member to obtain a visa to regularise his/her stay.[67] Fines are provided for in Article R. 621-2 CESEDA.[68] Finally the Law of 16 June 2011 amended Article L. 511-4 CESEDA that no longer protects third-country national family members against expulsion if they could not provide evidence of their lawful entry or had remained in that Member State after their visa had expired.

By decree 11 May 2011, the *Italian* Ministry of Foreign Affairs established new rules on entry visa. All applicants for family reunification need a visa, though different substantive conditions apply. The family members listed in Article 2 of Legislative Decree 2007 No. 30 (corresponding to Article 2 of the Citizens Directive) need to apply for a visa. What has remained unchanged is the fact that there is no specification regarding visa for the reunification of other members of the family (Article 3 of the Legislative Decree and Article 3 of the Directive).[69] A further amendment concerns the rules in Legislative Decree 2007 No. 30 on entry and residence rights regarding the means of proof of the family relation. Both EU-citizens, who do not enjoy the right of residence by themselves, and third-country national family members, must submit a document issued by the relevant authority in the country of origin or in the country from which they are coming, certifying that they are members of the family of the EU-citizen, and, when required, that they are dependent on the EU-citizen, or members of the household of the citizen of the Union, or proof of the existence of serious health grounds which require the personal care of the family member by the citizen of the Union.[70] Though the new provision reproduces almost *verbatim* Article 8(5)(e) Directive 2004/38/EC, the Italian provision seems to apply in any case in which a family member has to prove his/her

[64] The provisions mentioned in this respect are: Article L. 121-1, points 4 and 5, Articles R. 121-4 and R.121-7 CESEDA.

[65] The provisions mentioned in this respect are: Articles L. 121-1, L. 121-3, L. 321-1, L. 331-2, R. 121-8, R. 121-13, R. 121-14 and R. 121-14-1 CESEDA.

[66] Circular of 21 November 2011 NOR IOCL1130031C concerning the methods of implementing Decree 2011-1049 of 6 September 2011, passed in implementation of Law no. 2011-672 relating to immigration, integration and nationality and relating to residence cards.

[67] By virtue of Circular NOR IOCV1102492C of 11 March 2011.

[68] Article R. 621-2 CESEDA: Family members who are nationals of a third-party State, mentioned in Article L. 121-3 who have failed to apply, within the statutory deadlines, for issue of the residence permit referred to in Article R. 121-14 shall be punished by a fine provided for fifth category offences.

[69] *Definizione delle tipologie dei visti d'ingresso e dei requisiti per il loro ottenimento*, OJ 1-12-2011 No. 280.

[70] New Article 9, para. 5, lit. b, and Article 10, para. 3, lit. b) of Legislative Decree no. 30 of 2007.

status, while the EU provision only applies to the other members of the family under Article 3(2)(a) Citizens Directive.

The amendments to the *Lithuania* legislation and by-laws have clarified the documents which have to be submitted, for instance by family members of Lithuanian nationals.

To accommodate for the adoption of the Visa Code, the *Dutch* policy rules on the issuing of short-stay visa were amended in 2011.[71] To ensure correct application of the obligations vis-à-vis third-country national family members who qualify for admission under Directive 2004/38/EC, amendments were introduced to *Vreemdelingencirculaire* 2000, A2/4.3.1 (*Algemeen* [General]), A2/6.2.2.1 (*Overeenkomsten, betrokken landen en toepassingsgebied* [Agreements, participating States and application]) and A2/6.2.2.2 (*Onderdanen van de EU, de EER en Zwitserland (en familieleden)* [Citizens of the EU, Nationals of the EER and Switserland (and family members)]. The amendments to *Vreemdelingencirculaire* 2000, A2/6.2.2.1 concern the substitution of references to national rules, which are no longer in force, by references to the Visa Code. The amendments to the other two sections aim at ensuring correct application of Directive 2004/38/EC. *Vreemdelingencirculaire* 2000, A2/4.3.1 now includes a reference to Article 8.9 *Vreemdelingenbesluit* (Article 5(2) Directive 2004/38/EC). The exemption to hold a short-stay visa if a residence permit ex Article 10 of that Directive has been issued by one of the Member States) is, however, explicitly linked to family members whose purpose of crossing borders is to accompany or join the EU-citizen from whom they derive their right of residence under Directive 2004/38/EC. Interestingly, there is no further elaboration how to ascertain whether the purpose of travels by the third country national family member is to join the EU-citizen. The same restriction is found in *Vreemdelingencirculaire* 2000, A2/6.2.2.2.

Following the entry into force of Law No. 80/2011, the rules on the issuing of entry visa to third-country national family members was modified in *Romania*. Entry visa are now issued within 48 hours and free of charge by the Diplomatic and Consular offices upon approval of the National Visa Center of the Ministry of Foreign Affairs. Third –country national family members of EU-citizens are exempted from the obligation to obtain a entry visa if they accompany or join the EU-citizen exercising free movement rights and if a residence permit evidencing a right of residence in another Member State as a family member of an EU-citizen is presented.

In *Slovakia* family members now have to register for a residence permit. Applications for residence permits are to be made within 30 days after the initial period of three months residence has expired.[72] Article 70(5) Foreigners Act now provides as reasons for retention of the right of residence: domestic violence, dependence on alcohol, narcotic drugs, psychotropic substances, hazardous games or other serious reasons. To qualify for a right of residence under Article 13(2) Directive 2004/38/EC, all conditions set out in Article 7(1)1-c have to be satisfied or s-he is a family member of the person who fulfils these conditions and the family was established in the Slovak Republic territory.

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[71] Besluit van de Minister voor Immigratie en Asiel van 23 september 2011, nr. WBV 2011/11, houdende wijziging van de Vreemdelingencirculaire 2000 [Decision of the Minister for Immigration and Asylum of 30 September 2011, No. WBV 2011/11, amending the Aliens Circular 2000], *Staatscourant* 20 September 2011, No. 17496.

[72] Article 70(8) Foreigners Act.

The Decision of the *Spanish* Supreme Court of 1 June 2010 annulled Article 9.2(2) Royal Decree 240/2007. This means that in the event that the citizen of the Union, national of an EEA-Member State or Swiss national, dies, the family members retain their right of residence in Spain if they were resident in Spain prior to this event and have reported the death of the EU-citizen national of an EEA-Member State or Swiss national to the authorities.

Chapter 14 § 5a of the *Swedish* Aliens Act has been amendment to the effect that there is now a right to appeal a decision refusing to issue an entry visa. This amendment entered into force on 1 July 2011.

Case law

Case law concerning entry and residence rights is found in the *Belgium*, *German*, *French*, *Hungarian*, *Italian*, *Luxembourg* and *UK* reports.

A decision to withdraw a residence permit in cases where the applicant claims to be the victim of domestic or conjugal violence can be challenge in *Belgium* if the authorities fail to take the fact that there has been violence into account with deciding to withdraw the residence permit.[73]

The *German* Administrative Appeal Court in Hamburg found that a shift in status meaning that free movement rules apply does not automatically leave an expulsion order null and void. This is only the case if the conditions set out in Article 27(2) of the Citizens Directive are not satisfied.[74]The same court found that the intention to marry an EU-citizen means that a Dublin claim cannot be executed until the authorities have given consideration to this new residence entitlement.[75] Finally, the Administrative Appeal Court of Baden-Württemberg discusses whether, in the absence of specific procedural provisions, the rules of the Residence Act may by applied by an analogy to EU-citizens. In principle the rules of the Residence Act are not applicable with the exception of some specific provisions to which § 11 refers. The court argues that the wording and the purpose of § 11 of the Freedom of Movement Act preclude any recourse to the provisions of the Residence Act by analogy with an exception of those provisions to which § 11 explicitly refers. Therefore, the general rule on competence of the alien authorities in § 71 of the Residence Act cannot be used as a legislative basis for a special competence of the higher alien authorities to enact decisions on loss or non-existence of a right of free movement.[76]

The *French* Administrative Court of Appeal of Lyons upheld a decision to refuse a residence permit to the family member because the EU-citizen did not satisfy the conditions in Article 7(1)(a), (b) or (c) of Directive 2004/38/EC. The fact that the EU-citizen was incapable of pursuing an economical activity, due to poor health conditions, was considered immaterial.[77] The Administrative Court of Appeal of Bordeaux upheld the decision of the Prefect to refuse residence permission to a

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[73] CCE, judgment 67.203 of 26 September 2011.

[74] Administrative Appeal Court of Hamburg, Decision of 27 July 2011, 4 Bs 97/11. See, however: OVG Bremen, Decision of 21 January 2011, 1 B 242/10, juris.

[75] Administrative Appeal Court of Hamburg , Decision of 27 July 2011 , 4Bs 97/11.

[76] Judgment of 28 June2011, 1 C 18.10. This judgment was overruled on appeal by the Federal Administrative Court in June 2011.

[77] Administrative Court of Appeal of Lyons, 12 April 2011, no. 10LY01619. For a similar decision, see: Administrative Court of Appeal of Versailles, 18 October 2011, no. 11VE00943. In the latter case, the fact that the third-country national spouse cared for his wife's son did not outweigh the fact that there were not sufficient resources.

third-country national family member of an EU-citizen who was found not to qualify as worker due to the limited hours of work and low salary, the absence of a health insurance and sufficient resources. As there is a child involved, consideration must be given to Article 3 of the ICRC. This, however, does not mean that in this case permission to reside in France must be granted, as the third-country national family member has resided in the Member State of which the EU-citizen and her daughter are nationals.[78] The Administrative Court of Appeal of Nantes repealed the decision of the Prefect to issue a residence permit to a Turkish family member of an EU-citizen who resided in France as a holder of permanent residence. Following a traffic accident, the EU-citizen no longer can work and therefore depends on an allowance for a disabled person. The total income per month exceeds the required minimum income, therefore she must be considered to satisfy the income requirement.[79] The Administrative Court of Appeal of Marseilles upheld the decision of the Prefect not to issue a residence permit in a case concerning a third-country national family member of an EU-citizen who had a past criminal record and been subject of a ten year entry ban issued in 1997. The fact that his children are lawful residents of France was not a reason to find a breach of Article 8 ECHR.[80] The Administrative Court of Appeal of Marseilles upholds the decision of the Administrative Court of Marseille that the Prefect could not refuse residence permission to the spouse of a Belgian national pursuing an economical activity in France and the mother of a Belgian national living in France.[81] Finally the Administrative Court of Appeal of Paris finds no disproportionate violation of Article 8 ECHR in a case concerning a third-country national family member who cohabits with an EU-citizen with whom she has a child who is also an EU-citizen. The applicants has not made a case that family life outside France is not an option, nor can she provide adequate evidence of the duration of her relationship with the EU-citizen.[82]

In *Hungary* the bilateral agreement with Ukraine was interpreted as only giving a right of residence (for economic, cultural or family reasons) for a period of maximum three months uninterrupted stay within six months.[83]

The *Italian* rapporteur discusses various cases concerning access to social benefits and the obligation to submit a residence permit if the family members are not themselves EU-citizens.[84]

The *Luxembourg* Social Security High Council (*Conseil supérieur de la sécurité sociale*) rejected an appeal from the National Family Benefits Fund (*Caisse nationale des prestations familiales)* against a National Insurance Arbitration Board (*Conseil arbitral des assurances sociales*) decision which reversed the CNPF's 21 February 2008 decision to reject an application for prenatal and maternity benefits from a third-country (Republic of the Congo) national mother

[78] Administrative Court of Appeal of Bordeaux, 3 November 2011, *Da Costa* vs. *Prefect of Haute-Garonne*, No. 11BX00006.
[79] Administrative Court of Appeal of Nantes, 8 April 2011, Bo. 10NT00410.
[80] Administrative Court of Appeal of Marseilles, 2 November 2011, Borges Pente vs. Prefect of the Region of Provence, Alpes, Côte d'Azur and Prefect of Bouches du Rhône, No. 09MA03726.
[81] Administrative Court of Appeal of Marseilles, 9 June 2011, Prefect of the Region of Provence, Alpes, Côte d'Azur and Prefect of Bouches-du-Rhône vs. Marir née Mehnane, No. 09MA04680.
[82] Administrative Court of Appeal of Paris, 24 May 2012, Police Headquarters vs. Eugenio Da Silva, no. 11PA02200.
[83] Bírósági Határozatok 2011/265 with reference on the bilateral agreement published in Act CLIII of 2007
[84] Tribunale di Modena, 14 March 2011 and Administrative court of Trentino-Alto Adige, 11 Mau 2011 No. 132.

in a partnership registered in Holland with a Dutch national living in Luxembourg. The CSSS found that the preamble, Directive 2004/38/EC and Article 20 of the TFEU directly confer rights on EU-citizen's family members, and the granting of a residence permit is not the granting of the right to establish one's domicile in a Member State, but simply an administrative formality that acknowledges that right directly conferred by the above-mentioned Directive 2004/38/EC and the TFEU. The mother had taken all required steps to legally establish her domicile in Luxembourg. Thus, in stating that the mother's legal domicile was in Luxembourg only from the time she received her residence permit violated the directive and the TFEU. The CSSS decision in this case followed the Court of Cassation's reasoning when it decided on the matter on 19 May 2011.[85] On 12 December 2011, the Administrative Tribunal confirmed the immigration ministry's 19 November 2010 refusal of an EU citizen family member permanent residence card. The petitioner, a non-EU citizen, had filed a request with the immigration ministry on 6 September 2010, but the request was refused on the grounds that he did not fulfil the requirement of having been married to the EU citizen for at least 3 years before beginning legal divorce proceedings.[86] On 12 May 2011, the Administrative Court rejected the petitioner's appeal against the 26 January 2011 decision and upheld the Administrative Tribunal's decision as Article 24 of the Law of 29 August 2008 allows the authorities to revoke a residence permit if an EU citizen does not fulfil the resources condition and becomes an unreasonable burden on the social assistance system of the host-Member State.[87]

The case law discussed by the *UK* rapporteurs concerns the obligation for the Secretary of State to justify a revocation of a residence card on the basis of changed circumstances,[88] the retention of the right of residence following divorce and the right to permanent residence. In *Amos v SSHD*,[89] the Court of Appeal held that the burden of showing conditions had been met, including that of employment etc. by the EU citizen, was on the applicant and there was no independent obligation on the Secretary of State to assist the parties by providing evidence of this. However, such evidence could be requested and might be required as part of the proceedings. The court also over-ruled the previous case of *OA (Nigeria)*[90] which had held that divorced parties must show that the former spouse had exercised free movement rights throughout the entire five year period. *HS (EEA: revocation and retained rights) Syria*[91] found that the Home Office should disclose prior applications made by the EU citizen spouse if these assist the applicant. In *Okafor v SSHD*,[92] the Court of Appeal held that, following *Dias*, periods spent under Article 12(3) of the Directive (right of children to remain in education after death of the EU citizen and right of father to remain as custodial parent) did not amount to lawful residence for the purpose of qualifying for permanent residence. This apparently authoritative ruling also concluded that residence under Article 10 Regulation (EU) 492/2011 was not lawful residence for this purpose. Nonetheless, the Upper Tribunal seems to have

[85] Conseil supérieur de la sécurité sociale, 12 décembre 2011, No. ADIV 2009/0031, p. 2, et Cour de cassation, 19 mai 2011, No. 2834, .
[86] Trib. admin. 12 décembre 2011, No. 27950.
[87] Trib. admin. 26 janvier 2011, n°26951, Cour admin. 12 mai 2011, n°27981C.
[88] *HS (EEA: revocation and retained rights) Syria* [2011] UKUT 00165 (IAC).
[89] [2011] EWCA Civ 552.
[90] [2010] UKAIT 00003.
[91] [2011] UKUT 00165 (IAC).
[92] [2011] EWCA Civ 499.

been unconvinced on the point and, in *Alarape and another*,[93] referred the question of entitlement to permanent residence under the regulation to the Court of Justice. *PM (EEA – spouse –"residing with") Turkey*[94] confirmed that residence 'with' the EU citizen in the Member State for the purposes of qualifying for permanent residence does not require that the parties live together. *Idezuna (EEA – permanent residence) Nigeria*[95] observed that care is needed to make sure that all relevant periods of residence are counted including a five year period of co-residence before divorce which made the question of retained rights after divorce immaterial. *EN (Continuity of residence – family member) Nigeria,*[96] however, found that the EU citizen as well as the spouse must have resided continuously for the five year period. Separated spouses have had difficulty establishing that the EU citizen spouse was exercising treaty rights for the three year period prior to divorce, which has been deemed necessary to qualify for the retained right of residence under Article 13(2) of Directive 2004/38/EC. *HS (EEA: revocation and retained rights) Syria*[97] suggested that the critical test was whether the EU citizen spouse was exercising treaty rights at the time of divorce not for the entirety of the three preceding years. Nor do divorced spouses have to show one year's cohabitation under Article 13(2), only that they were both present in the Member State for one year. (*Alarape and another Nigeria*[98]) referred to the Court of Justice the question of the meaning of the term 'primary carer' in respect to Article 10 Regulation (EU) 492/2011. This was in the context of a non-EEA citizen mother providing financial support for her 25 year old son who was undertaking Ph.D studies away from the family home. The Tribunal agreed that the son, who was the EU citizen's step-son, was a child of the family.

Miscellaneous

The comments, infra, are taken from the *Austrian, Belgium, Cypriot, Czech*, *Maltese*, *Polish* and *UK* reports.

The *Austrian* rapporteurs notes that according to Sect. 21a SRA third-country nationals have to provide evidence of knowledge of the German language through a certificate when applying for a residence permit.

The *Belgian* Aliens law does not provide for redress if the six-month period for issuing a visa is breached.

Concerns regarding the documents requested from third-country national family members (photographs and evidence of accommodation) and the 14-day period for the issuing of visa at the border are expressed by the *Czech* rapporteur. Though shorter than the 30-day period which is the normal period for issuing entry visa, the Czech rapporteur questions whether 14-days qualifies as 'as soon as possible', as required by Article 5(2) Directive 2004/38/EC.

As reported in the 2010-2011 European report, following a notification by the European Commission, the *Cypriot* authorities introduced various amendments to their legislation concerning entry and residence of EU-citizens and their family members by adopting Circular on 18 July 2011amending the Law of 7(1)/2007 to

[93] [2011] UKUT 00413 (IAC).
[94] [2011] UKUT 89 (IAC).
[95] [2011] UKUT 00474.
[96] [2011] UKUT 55 (IAC)
[97] [2011] UKUT 00165 (IAC).
[98] [2011] UKUT 00413 (IAC).

the extent that it introduces the necessary adjustments. The European Commission responded to these amendments by letter of 22 March 2012 stating that the issue of proportionality of sanctions was resolved regarding the obligation in Article 8(2) of the Citizens Directive, but that this was not the case for the obligation in Article 5(5) of the Citizens Directive. Subsequently, the Cypriot authorities have drafted law reducing this fine to € 1 000. Following the negative response of the European Commission to the initial amendment to the provisions implementing Article 17(2) and (4)(c) of the Citizens Directive the Cypriot authorities have issued a new circular to bring the national law in line with the European obligation.

The omission of the words 'reasonable time' in the *Maltese* provision implementing Article 5(4) Directive 2004/38/EC might, so the rapporteur feels, prejudice the persons concerned.

There is an obligation to register residence as a family member of the EU-citizen within 4 days of arrival in *Poland* until 1 January 2013. Residence cards for third-country national family members are issued free of charge in *Poland*.

The *UK's* authorities give priority to family permits over other applications and on the whole they are dealt with swiftly. No fees are due for these applications and Swiss nationals appear not to have any concerns about the treatment of their applications. Multiple applications for family permits are reported, which are caused by the delays in issuing residence cards. The concerns reported in the 2010-2011 report on guidance for family permits remain – irrelevant documents are still being requested, biometric data is still being taken and irrelevant information is still required. Residence cards, in particular for extended family members, take six months to be issued and certificates of registration, confirming the application for such a permit, take well in excess of four weeks to be sent out. Like with family permits, more information is required than necessary and evidence not needed is requested. The 'pre sift' system, referred to in last year's report, remains in place with the same concerns and delays. As set out in the last report, the UK Border Agency was considering providing a same day service or express service for third country nationals to obtain residence cards. A free same day service to obtain a registration certificate already exists. Despite moving towards setting this up, it has as yet not gone ahead. The rapporteurs believe that this is due to the issue of fees, which the Home Office had hoped to set in the region of £300, arguing that the charge would be for the enhanced service, not the document itself. The current position of the UK Border Agency is not known.

3. Implications of the Metock judgment

The overall picture of compliance with the Court of Justice's ruling in the *Metock* case, as reported in previous European reports, has not changed. The *UK,* the last to bring its rules in line with this judgment, made the necessary adjustments to the Immigration (EEA) Regulations 2006 in 2011. Neither the UK Border Agency, nor the courts have problems applying these adjusted rules.[99]

The *Bulgarian*, *German*, *Spanish*, *Swedish* rapporteurs explicitly mention that there are no national court rulings in which the *Metock* case is referred to. New references to this judgment are reported by the *Austrian* and *Italian* rapporteurs.

[99] Statutory Instrument 2011/1247.

Miscellaneous

The following information is taken from the *Czech*, *Cypriot*, *Danish*, *Irish* and *Lithuanian* reports.

Compliance with the *Metock* judgment is ensured in the *Czech Republic* through Instructions of the Minster of the Interior.[100]

Though the question of retroactive application of *Metock* is not an issue in *Cyprus*, the rapporteur feels that there is a strong case for correcting situations and reconsidering cases where previous lawful residence was required, as is the case in Ireland (see: 2010-2011 European report). Individuals may well use the *Metock* case for the courts to reopen their cases, albeit not to claim its retrospective application but for the purpose of correcting current and future status.

The intensification of measures to combat abuse of free movement rights which accompanied the amendments to ensure compliance with the *Metock* judgment in *Denmark,* which were reported in the 2010-2011 report, remain everyday reality. Spouses and partners have to certify that their relation is not one of convenience when applying for a family member's registration certificate or residence permit and the principal person has to declare that residence in Denmark is 'genuine and effective' if there are reasons to assume that rights are being abused.[101]

The *Irish* rapporteur notes that the European Commission has not supported amendments to the Citizens Directive for which it and the Danish government had lobbied. Rather, it has sought to resolve legitimate Member State concerns through its 2009 Guidelines.

The amendments to the *Lithuanian* Aliens Law, as proposed in 2011, clarifying that third-country national family members of Lithuanian citizens would be entitled to apply for an EU-temporary residence card if they arrive together with the Lithuanian national who has exercised free movement rights have not been adopted. Prior lawful residence in another Member State still applies to Lithuanian nationals.

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. In *Italy* and *Latvia*, the authorities regulate marriages of convenience through their Civil Law.
In *Latvia* the Civil Status Law provides that non-nationals can only enter matrimony in Latvia if they stay legally in Latvia. Unlike Latvian citizens, citizens of other states may enter into marriage with a foreigner, who possesses a

[100] See the 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 (accessed 10 June 2012).
[101] Sections 23(1) and 26(2) EU Residence Order.

permanent residence permit in Latvia.[102] The fact that this makes it more difficult for EU-citizens to marry with foreigners in Latvia than Latvians, the rapporteur feels, sits uneasily with the principle of equal treatment in European law. A proposal to remove the permanent residence condition is pending.[103] Interviews are the common way to establish whether there is a marriage of convenience. Explicitly mentioned in the *Swedish* and the *UK* (*infra*) reports is the fact that the onus of proof is on the State. In *Latvia* the responsibility to establish whether a marriage is genuine lies with the State Border Guard and the OCMA, not the Civil Status Units. The former can conduct interviews and carry out inspections at the place of residence. In *Lithuania* this issue is regulated through the general immigration rules. A proposal to include the possibility to terminate the right of residence where EU/EEA citizens are concerned tabled in 2011 was rejected.

No provision is made for marriages of convenience and/or fraud in *Luxembourg* and *Slovakia*. A proposal to tackle marriages of convenience is pending in *Luxembourg*. This proposal was criticized by the National Commission on Human Rights in 2011 because it lacks a nationality condition and would entitle the State attorney to oppose such a marriage.[104] The *Slovakian* law provides that the documents submitted as evidence of the claimed family relationship are scrutinized by the national authorities who do not issue a residence permit if they feel that the documents submitted do not prove the family relationship in a trustworthy manner.

The issue of abuse of immigration rules has lead to discussions on child and forced marriages in *the Netherlands* and *Sweden*.[105]

The discussions on the amendment of the *Dutch* Civil Code and several related legislative acts to accommodate for the entry into force of the *Wet electronische dienstverlening burgerlijke stand* [Act on online services for the Registry Office] which will require the spouses to be to make a written statement regarding the nature of their intended marriage are still ongoing. In October 2011 it was discussed by the *Vaste commissie voor veiligheid en justitie* of the *Eerste Kamer*. Only *Groen Links* [Greens] intervened on the issue of marriages of convenience. They asked the government to confirm that irregular residence would not equate to the impossibility to enter into matrimony and asked the government to explain how this proposal relates to the plans to combat force marriages.

Concerns about child marriages were subject of a public investigation with a view to criminalise forced marriages and marriages involving a person under 18 in *Sweden*. The current rule is that if a resident permit is applied for before the wedding involving a person under 18 has taken place that application is rejected by the Migration Board. In exceptional cases, e.g. where there is a child born out of or due in a marital relationship in which one of the spouses is under 18 the

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[102] According to the Article 18 of the Law of Civil status documents registration, entered into force on January 1, 2013, in order to enter matrimony, it is not obligatory anymore for foreigners to possess a permanent residence in Latvia, just the right to reside in Latvia, but it is also not enough to have only traveling permission.

[103] Telephone interview with Director of Department of Civil Status Acts of Ministry of Justice on 12 June 2012.

[104] Projet de loi 5908 ayant pour objet de lutter contre les mariages et partenariats forcés ou de complaisance ainsi que de modifier et compléter certaines dispositions : (1) du Code civil (2) du Nouveau Code de procédure civile (3) du Code pénal, Avis 01/2011, in: Rapport d'Activites 2011 de la Commission Consultative des Droits de L'Homme du Grand-Duche de Luxembourg, retrieved from: http://www.ccdh.public.lu/fr/publications/rapports-activite/Rapport_annuel_2011.pdf, p. 11-20.

[105] In Sweden there is a proposal to widen the scope of the criminalisation of forced marriages.

permission is granted. This exception would be abolished. Marriages involving a person under 18 convened in a State that allows such marriages by law would be exempted.[106] In 2011 the results of a public investigation regarding women and children who have been exposed to violence after being issued a residence permit was presented.[107]

Case law

The question whether free movement rights have been abused featured in case law in *Italy*, *the Netherlands*, *Portugal*, *Romania* and *the United Kingdom*.

The obligation for non-nationals wishing to marry in *Italy* to provide evidence of lawful residence in Italy, according to the Italian Constitutional court amounts to a violation of the Constitution and Article 12 ECHR.[108] Following this ruling, the Municipality of Chiari reinstated the obligation to establish lawful residence in its Municipal Order, which, in turn, the court in first instance of Brescia held to be discriminatory and in breach of the Italian Constitution.[109]

The Judicial Division of the *Dutch* Council of State's decision of 23 February 2012 sheds light on the level of detail which underlies a decision to ascertain whether a marriage qualifies as one of convenience.[110] Taking the Commission's 2009 Guidelines as reference point the court upheld the decision to earmark a marriage as one of convenience.

The Portuguese *Tribunal Central Administrativo Norte* held that there is no right to a residence permit for family reunification in cases where fraud is established.[111]

The issue of abuse only arose in relation to case law dealing with the Emergency Ordinacen No. 194/2202, not Directive 2004/38/EC and Emergency Ordinance No. 102/2005 in *Romania*.

In 2012 the *UK* Upper Tribunal has held that the burden of proof that a marriage does not qualify as one of convenience does not lie with the applicant but the decision maker who can only raise this issue if there are reasonable grounds to do so. Only if there are factors that support the suspicions for believing the marriage is one of convenience the burden of proof passes to the applicant. [112]

Statistical data

Data made available by the Latvian Embassy in Ireland reveals that more than 1000 Latvian women a have registered their marriage with a third-country national convened in Ireland over the past five years. Though only a few years ago such marriages were entered into freely by Latvian women, now they are victims of human trafficking who were recruited to the UK or Ireland for work purposes but found themselves lock in closed premises where they were

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[106] Official report SOU 2012:35 Stärkt skydd mot tvångsäktenskap och barnäktenskap.

[107] Official report SOU 2011:45 Kvinnor och barn i rättens gränsland.

[108] Judgment of the Constitutional Court of 25 July 2011, No. 245.

[109] Tribunale di Brescia, 11 April 2012.

[110] Afdeling Bestuursrechtspraak Raad van State, 23 February 2012, 201107451/1/V4, LJN: BW5634, cons. 2.2.5.

[111] Tribunal Central Administrativo Norte, 24 Febraury 2012, case 02370/08.3BEPRT, www/dgsi.pt.

[112] *Papajorgji* [2012] UKUT 38.

threatened and abused if they do not consent to marriage with a third-country national. The Latvian Embassy in Ireland reports 89 cases of trafficking in which it has provided assistance to nationals who have been trafficked for the purpose of entering a marriage of convenience.[113]

Upon request of the Government the *Swedish* Migration Board informed the former that in 2011 they had dealt with 53 cases concerning marriages of convenience , forced marriages and child marriages.[114]

In *Cyprus*, the last years there has been an upward trend of "Marriages of Convenience" from 2003 to 2011. The Republic of Cyprus had established 9 sham marriages in 2003 and 132 in 2011. On 2011 the highest number of marriages of convenience is with European citizens (86 compared to 46 with Cypriot citizens). In 2012 20 of the sham marriages were conducted with Cypriots and 54 with EU citizens. In 2012 the majority of marriages of convenience were as in 2011 with Romanian citizens (20) following with Bulgarian citizens (17).

Miscellaneous

The following information is taken from the *Czech, Cypriot, Romanian* and *UK* reports:

A problem in the *Czech Republic* is that children with a non-Czech parent are being recognized by a Czech national (who is not always the biological parent) thus making the child eligible for Czech nationality and hereby giving the non-national parent a right of residence.

The *Romanian* authorities only consider whether a marriage is one of convenience if one of the partners is a third-country national. If a marital relationship has been the reason to grant residence permission in another Member States, the marriage is not scrutinised for the purpose of establishing whether it is one of convenience.

The abolishing of the obligation to obtain written permission from the *UK* Secretary of State where marriages are envisaged between a non-EEA national and an EEA national by Order dated 9 May 2011, has seen the Registrars making more use of their powers to inform the Home Office of cases which they believe concern sham marriages prior to them taking place. There are cases known of immigration officials turning up on the day of the wedding to interview the non-EEA national intending to marry an EEA national. Ceremonies can proceed where questions have been adequately answered.

5. Access to work

The right to take up an economical activity in Article 23 of Directive 2004/38/EC, as a rule, is not subject to prior authorization by the national authorities, i.e. the issuing of a work permit. Exceptions are: *Lithuania* (third-country national family members fare only exempted from the obligation to obtain a work permit if the

[113] Cilvēktiesību komisijā meklēs risinājums fiktīvo laulību izskaušanai, http://www.delfi.lv/archive/print.php?id=42429304 (accessed 13 June 2012).

[114] Skrivelse 2011-02-15 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/18.46b604a812cbcdd7dba800021229/GD-mall+uppdrag+vers2.pdf

economical activity which they undertake is on a special list provided for by law) and *Malta* (third-country nationals always need a work permit).

Amendments to the law relevant to the right to take up an economical activity are reported for *Austria* and *Hungary*. An amendment to the Polish Act on promotion and labour institutions, does not affect the position of an EU citizen's family members.

In *Austria* an amendment of its Aliens Employment Act by Federal Law Gazette I 25/2011 entered into force on July 1, 2011 that now explicitly provides that this act does not apply to beneficiaries of EU free movement rules (section l) nor to the spouse and minor, unmarried children of Austrian citizens who are entitled to reside in that Member State according to the SRA (section m). The former is subject to the transitional arrangements that still apply to (the family members of) Bulgarian and Romanian nationals (see Chapter VIII). On March 1, 2012 the Act CXCIX on public officials entered into force, which provides for a right to lower ranked posts in the *Hungarian* public service for EU citizens and their family members. Articles 207(2) and 241(2) of this act consolidate the exceptions in Article 7(8) PuboA that employment in public service is restricted to non-confidential and non-managerial positions and proficiency in the Hungarian language. A Circular dated 21 November 2011has clarified the position of workers to whom a transitional measure applies, including their family members. Once they satisfy the conditions for permanent residence no work permit is required.[115]

Miscellaneous

The following comments are taken from the *Belgium*, *Bulgarian*, *Cypriot*, *Irish*, *Italian*, *Latvian*, *Dutch*, *Slovenian* and *UK* reports.

In *Belgium* the *Ruiz Zambrano* judgment has meant that a third-country national parent is entitled to a work permit.

In *Bulgaria* employers have to report an employment relationship to the local Employment Office within seven days until a family member qualifies for permanent residence.

Same-sex family members still experience difficulties in accessing the labour market in *Cyprus*. They find their right to take up employment restricted along the same lines as third-country nationals, i.e. primarily in the area of farming.

In *Estonia* family members are not permitted to take up an economical activity during the initial three months. After three months family members can take up an economical activity and they are protected by the prohibition of discrimination on race, sex and colour. This right is, however, subject to language requirements.

The policy change reported by the *Irish* rapporteur in last year's European report regarding the position of third-country national family members, who were to be granted a Stamp 3, rather than a Stamp 4 endorsement during the period of the application process, taking effect on June 1, 2010, has been challenged

[115] Circular of 21 November 2011 NOR IOCL1130031C regarding the methods of applying Decree 2011-1049 of 6 September 2011 passed in implementation of Law no. 2011-672 relating to immigration, integration and nationality and relating to residence cards.

successfully before the High Court. According to the High Court Article 23 of Directive 2004/38/EC provides a right to work once a family member has a right to reside which does not necessarily correspond to the moment when the residence card is issued. This means that the date of receipt of a letter of acknowledgement of a valid residence application is the date on which the right to work takes effect, albeit subject to revocation with retroactive effect if the residence application is turned down within six months. The choice for 'family members', and not 'spouse', is read as covering dependant family members.[116]
In *Italy* a provision establishing equal access to the public sector for third-country national family members is missing. In practice, third country national family members are overlooked when competitions are organized. In a number of cases third-country nationals have challenged their exclusion from these competitions. Though instigated by third-country nationals who do not qualify as EU citizen's family members, the mere existence of these cases, which are decided on under the non-discrimination principle, are seen as illustrative of the problems which third-country national family members encounter.

No work permit is required in *Latvia*. Third-country national family members may, however, experience difficulties in exercising their right to take up an economical activity until they have been issued a residence permit, providing them with evidence of their capacity of an EU citizen's family member.

In *the Netherlands* the Council of State ruled that the placing of a sticker in the passport as evidence that paid employment cannot be pursued could be appealed as it is a de facto decision within the meaning of Dutch Immigration Law. The ruling also reveals that Article 3(2) Directive 2004/38/EC family members are not entitled to take up an economical activity without permission until the authorities have ascertained that they qualify as a family member, in this case, in a duly attested durable relationship with an EU citizen.

In *Slovenia* an amendment to the Employment and Work of Aliens Act in March 2011 which was reported in last year's report ensures the third-country nationals free access to the labour market, though it remains questionable whether the condition of holding a residence permit for a family member or a visa for long-term residence are in line with European requirements.

Like in 2010-2011, accessing the labour market without a residence card, or when only in possession of a certificate of application remains problematic for family members in the *United Kingdom* due to delays in the issuing of documents in combination with the threat of a penalty which is imposed on employers who employ migrants without permission to work. The certificate of application does not provide a right to work to Article 3(2) family members. A Home Office memo for caseworkers dated 23 May 2011 clarifies the position of people who claim to be family members of EEA nationals but who have been refused documentation under the Immigration (EEA) Regulations 2006 regarding the right to work instructing caseworkers to check when contacted by employers whether a family member enjoys the right to work. Overall the authorities are generous in terms of allowing for possible delays within the Home Office and court system. Notwithstanding the fact that penalties can be imposed on employers who employ an employee with no residence permission, the Employment Appeal Tribunal found that as a family member's right to work does not depend on the

[116] *Decsi and Zhao v Minister for Justice, Equality and Law Reform*, (2010) JR 858

possession of a residence card, an employee cannot be suspended because his/her residence card has expired.[117]

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 job-seekers. In most Member States family members of job-seekers appear to derive their right of residence up to three months from Article 6 Directive 2004/38/EC. In the national reports that specify the duration of the residence right as a family member of a job seeker, a three months period which can be extended is the rule. In *Bulgaria* no provision is made in the LERD for an extension of the right of residence beyond three months. *Denmark* applies a six month period, which can be extended as provided for in the Court of Justice's decision in *Antonissen*[118] and in *Latvia* job-seekers have a right of residence for at last six months. Residence beyond three months for family members of job-seekers is permitted in *Luxembourg* if they provide evidence that they qualify as family member and are dependent on the job-seeker whom them have accompanied or joined.

In *Austria* and *Bulgaria* third-country national family members have to apply for a visa to authorize their three months stay as a family member of a job-seeker and a residence permit if their residence is longer than three months. Though there are no cases reported, the *Austrian* rapporteur points out that there might be a problem that can be traced to the requirement imposed on the job-seeker him/herself; i.e. the obligation to possess sufficient financial means. A similar obligation is found in *Denmark*, where the job-seeker has to be able to provide for the family members without becoming a burden on the public means. In *Finland* and *Lithuania* both job-seekers and their family membershave to satisfy the general conditions for free movement which will mean self-sufficiency, either through an economical activity or own means.

Miscellaneous

The following information is taken from the *Czech*, *Cypriot*, *German*, *Hungarian*, *Irish*, *Latvian* and *Maltese* reports.

In the *Czech Republic* the eligibility condition for social benefits is twelve months employment during the past two years. The general principle of equal treatment that applies to Czech labour law also covers job seekers. Job seekers can be entitled to two kinds of social benefits, which cannot be enjoyed simultaneously only successively. The first is a job seeker's allowance, i.e. an unemployment benefit. To qualify for this entilement the job seeker will have to have been employed for more than one year in the past two years and register as a job seeker with the competent labour office. The second is support during vocational training which does aim at reintegrating the beneficiary into the labour market. Measures which indirectly support job seekers, the so-called instruments of active employment policy (nástroje aktivní politiky zaměstnanosti), are also available for EU-job seekers and their family members.

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[117] *Okuoimose v City Facilities Management (UK) Ltd* Employment Appeal Tribunal 13 September 2011.

[118] CJEU case C-292/89, *The Queen* v *Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-745.

Same-sex partners are not entitled to job-seekers allowances and unemployment benefits in *Cyprus*. An unemployed person will register as unemployed at the unemployment service in the district office. Once registered, the jobseeker will be counselled as to the kinds of jobs he should be looking for by the labour advisors at the district labour office. The jobseeker will be referred to the relevant employers (public and private etc). There are schemes for encouraging particular vulnerable groups for certain jobs (e.g. persons with disabilities) on the basis of the relevant procedures and priorities. Jobseekers may also apply for vocational training schemes, for instance these are offered by the Human Resources Development Authority, which entitle the jobseeker to claim unemployment benefits or other social assistance. There are also programs subsidising employment, for instance covering 50% of their salary. In the meantime, if the jobseeker is eligible for unemployment benefit (i.e. has the necessary contributions) he/she can claim unemployment benefit; if not he/she may apply for public assistance as a person without means.

In *Germany* the issue of social assistance, has been subject of extensive albeit non-conclusive debates as to whether the *Vatsouras* judgment applies to social assistance within the meaning of section 7(1) of the Social Code II. The measures listed in the Social Code III which aim at facilitating access to the labour market are not subject of a nationality or residence requirement. One issue under discussion is the compatibility of the exclusion of job seekers from social assistance which necessarily affects family members, with EU requirements.

In *Hungary* instruments aiming at the reintegration of job-seekers have not been developed. The active and passive labour market instruments, which are financed from the Labour Market Fund and regulated in the UnemplA, used in this Member State are open to EU-citizens as they only require registration and cooperation with the labour authorities. By not including a residence condition, the *Collins* case does not affect Hungary. Examples of active labour market instruments are: providing information on the labour market and employment, consultation on work, career and employment opportunities, rehabilitation and local (regional) employment policies, placement services, training assistance, assistance to become an entrepreneur as well as employers benefits. Passive labour market instruments are the job seeker's allowance and the job seeker's assistance before pension schemes for which one only qualifies after having paid contributory payments during past employment. The payment of these benefits does not depend on the residence status.

The total lack of transparency, which was reported by the *Irish* rapporteur in previous years, regarding the situation of a job-seekers family member's right to take employment remains.

Family members still need a residence permit to be registered as a job-seeker or as unemployed[119] and to obtain access to education facilities[120] in *Latvia*. As the enjoyment of exportable benefits (Regulation (EC) No. 883/2004[121]) is subject to registration with the State Employment Agency, the obligation to acquire a residence permit also impacts on social security issues. Though officially the issuing of a residence permit takes 30 days, in practice the Latvian authorities

[119] Article 2(2)(2) of the Law on the Support of Unemployed and Jobseekers, OG No. 80, May 2002.

[120] Article 3 of Education Law, OG No.343/344, 17 November 1998.

[121] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ EU 2004, L 166/1.

issue these documents in approximately two weeks. This, however, does not alter the fact that the residence permit requirement is not compatible with Directive 2004/38/EC. In Latvia there are no specific benefits for job seekers within the meaning of the *Collins* and *Vatsouras* case law. Scholarships are issue to job seekers participating in re-integration programmes (e.g. for retraining or improving ones professional qualifications). There is a special programme that aims at the reintegration into the labour market of long-term unemployed persons as well as those suffering from the economical crisis who cannot find work due to high unemployment numbers. Both programmes are most likely not accessible to EU-citizens and their family members as one of the qualifying conditions is a language requirement.

Job-seekers have to register with the Employment and Training Corporation in *Malta*.

7. Concluding remarks

The overall picture regarding compliance with European rules on admission, residence and access to the employment market is positive. A good example are the adjustments made by the Member States to ensure the full effect of the *Metock* ruling, the UK being the last in a row to accommodate for this ruling in 2011. There is, however, a dark side to free movement which cannot go unmentioned; abuse of rights which has meant that Latvian women are enticed to go to Ireland with a promise of work, but once there are forced to marry a third-country national who then enjoys preferential treatment under the Citizens Directive. The shift in attention of the Member States towards fighting abuse of free movement rights, which was already dawning on the horizon in 2010-2011 is also visible in 2011-2012. Definitions of spouse in legislation implementing Directive 2004/38/EC include the exclusion of marriages of convenience and consideration is being given to amend family laws in such a way that forced and/or child marriages become a thing of the past.

Like in 2010-2011 the increasing number of court rulings concerning family members, in particular third-country national family members is apparent.

Chapter III Access to employment

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.

The *Finnish* report explicitly draws attention to the fact that, although in Finland access to employment in the private sector does not lead to problems, the position of posted workers is, in this regard, worse than that of directly employed workers. It is not uncommon that posted workers (from other EU Member States) are treated less favourably than directly employed workers as it concerns *e.g.* wages and overtime pay. Some other reports (*The Netherlands, Ireland and the UK*) raise this topic as well.

In *Cyprus* a particular issue relates to the conditions of employment of Union citizens who are trainees in the hotel industry and allegedly face nationality discrimination, particularly hotels and restaurant 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. The matter is currently being examined by the Cyprus Equality Authority.

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

In *France* new rules on the profession of sport agents were established in 2011. The rules specify the conditions under which nationals of other Member States (including EEA) can practise the activity of sports agent. The candidates must prove sufficient knowledge of the French language. If their qualification or their professional experience is recognised, if necessary after implementation of a compensation measure, a committee can grant them either a licence by equivalence or a certificate mentioning the temporary or casual practice of the activity of sports agent on the national territory. Also for professions associated with internal security new rules were established, giving access to nationals of other EU (and EEA) Member States.

In *Slovenia* the Labour Market Regulation Act differentiates between unemployed persons[122], other jobseekers[123] and jobseeker whose employment is at risk[124]. Different registers are laid down by the Act. Persons who have free access to labour market and have registered a residential adress in Slovenia can enter either in the register of unemployed persons or the register of jobseekers. Registers are kept by the Employment Service of the Republic of Slovenia. EU, EEA citizens and citizens of the Swiss Confederation may seek some kind of assistance from the EURES, when they do not want to register by the Employment Service or by one of the regional Employment Service offices. Registration gives access to various types of assistance in seeking employment, provided for by the Act, which can be carried out. The assistance/measures may be provided by the Employment Service of the Republic of Slovenia, domestic or

[122] A jobseeker meeting the conditions laid down by the Act.

[123] An economically active or inactive persons and students seeking employment.

[124] Jobseekers during the notice period in the event of ordinary termination of employment contract, persons whose work shall become redundant etc.

foreign legal entities with a registered office in the RS which obtain cocession in accordance with the Act (different agencies) and the Slovenian Human Resources Development and Scolarship Fund.

1.2 Language requirements

Language requirements are mentioned as a general obstacle to access to employment in the private sector in the reports on *Finland, Greece, Latvia, Lithuania, Luxembourg* and *Malta*.

As already mentioned in last year's report in the Bulgarian Attorney's Act the condition was abolished 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. The official language in Bulgarian institutions (including judicial hearings) is however still Bulgarian**.**

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 by the Medical Council of Ireland at the seminar on the Free Movement of Workers in Dublin in November 2010.[125] The Medical Council has attempted 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.

In *Lithuania* there are still extensive language requirement not only for the public, but also for the private sector at legislative level and at practical level. Most of the foreigners in Lithuania complain about language requirement as the main problem for access to employment.

In *Cyprus* there is a problem with the access to the profession of insurance brokers, where a requirement for applicants to take an exam in Greek is in place. In a decision dated 09.02.2012, the Equality Body found that the said language requirement could be justified only to the extent where the insurance contracts are addressed exclusively to Greek Cypriot or Turkish Cypriot insured persons whose mother tongue is Greek and Turkish respectively; however this is not case following accession to the EU and the entry of large numbers of Union citizens into Cyprus for work. The report concludes that the requirement to take the exam in Greek amounts to indirect discrimination, identifying this requirement as a case of language being used as a justification for excluding suitably qualified professionals from other member states, which is prohibited. The Equality Body recommended that the exam be offered in other official languages of the EU, in addition to the official languages of the Republic, stressing that in order to ensure equality of opportunity to succeed in the exam, Union citizens should also be offered access to exam material in languages beyond Greek.[126]

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[125] 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

[126] Report of the Equality Authority regarding indirect discrimination on the ground of language regarding the exercise of the profession of the insurance mediator, Ref. A.K.I. 9/2006 & A.K.I.A

2. Access to employment in the public sector

2.1 Nationality condition for access to positions in the public sector

In *Bulgaria* 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 *Estonia* generally speaking the public service now is opened for the workers from the other EU Member States. Complications could be connected with the language requirements. According to the language requirements rules the level A2[127] as a minimum is required.

In relation to accessing public employment in *Ireland*, senior positions in the *Irish* national police service are since March 2012 capable of being filled on a permanent basis by officers of the Northern Irish police service. Previously, these positions could only be filled on secondment. This further implements the 2002 UK/Irish Intergovernmental Agreement on Policing Co-operation

As a rule in *Italy*, competitions for access to public employment, under both fixed-term contracts or under contracts of indeterminate duration, are open to Italian and EU nationals alike. Nonetheless, some exceptions happen. The Municipality of Chiari issued a competition for the selection of enumerators open only to Italian nationals. The court of first instance of Brescia declared the notice null and void because issued in breach of the prohibition of any discrimination on the ground of nationality. It has to be highlighted that this case, as many other of similar nature, was brought to court by a non-EU national. (Tribunale di Brescia, order 29-12-2011 no. 3126). On the contrary, the court of first instance of Rimini decided that opening a competition for the recruitment of one social worker only to Italians was neither discriminatory nor unlawful. (Tribunale di Rimini, order 27-9-2011, *Foro italiano*, 2012, I, 936).

In *Malta* the new Nationality Requirements for Appointments in Public Administration Regulations were published on 2 August 2011. By virtue of article 3(1) of these requirements, no person shall be appointed to a public office unless that person is (a) a Maltese national; or (b) a national of another Member State of the European Union who is entitled to equal treatment to Maltese nationals in matters of employment by virtue of the provisions on the free movement of workers; or (c) a national of any other country who is entitled to equal treatment to Maltese nationals in matters related to employment by virtue of the application to that country of the provisions on the free movement of workers; or (d) any other person who is entitled to equal treatment to Maltese nationals in matters related to employment in terms of the law or the provisions on free movement of workers on account of his family relationship with a person mentioned in paragraph (a), (b) or (c); or (e) a third country national who has

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1/2012, dated 9th February 2012. Available at: http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/presentationsArchive_gr/presentationsArchive_gr?OpenDocument.

[127] Level A2 means, that a person is able to communicate on moderate beginners level.

been granted long-term resident status in Malta or who has been granted a residence permit, together with family members of such a third country national who have been granted a residence permit under the Family Reunification Regulations, 2007. Where suitable candidates for a public office cannot be found, the Principal Permanent Secretary may, after informing the Public Service Commission, waive the abovementioned requirements.

In *Poland* only 3% of the vacancies for jobs in the civil service published in a certain period in 2011 was open to non-nationals.

In *Spain* by Royal Decree 264/2011 of 28 February[128] the public offer of employment in the State Administration for 2011 was approved with 2235 posts distributed in free access posts and those with internal promotion and those for professional staff and those for auxiliary staff. The announcement does not refer to the requisite of nationality to access these posts. In 2012 the supply of jobs in the public sector has been frozen.

The introduction in *Sweden* in 2010 of new requirements for positions as school teachers and pre-school teachers has been delayed in 2012.[129] The new regulation came into force in July 1, 2011, and the intention was that full implementation should have been reached in July 1, 2012. However, the recognition procedure showed up to be complicated and in practice the regulation will not apply in 2012.

The Public Service in *Lithuania* is still closed for EU/EEA nationals. The Lithuanian rule that a national needs permission of the government to enter the public service of any foreign state provides an additional barrier to entering the public service in other Member States

In the *Czech Republic* the Act on Public Services is still not in force (adopted in 2002) and the area is covered by the provisions of the Labour Code, Antidiscrimination Act etc.

Undeniably in *Luxembourg* the tensions around the opening of the civil service to non-Luxembourg EU Member State nationals have calmed down since the adoption of the Law of 22 December 2009, amending the status of civil servants. Indeed the principle of reserving public sector positions for Luxembourg nationals has been reversed and civil service is now generally open to other EU citizens as well, with only some categories of posts reserved for Luxembourgers. It is still questionable if all the positions reserved by law or administrative practice is fully compatible with the EU Treaty. Especially, the language requirements, the knowledge of the three national languages i.e. Luxembourgish, French and German, are an obstacle for many applicants. However the use of these languages is a reality in Luxembourg, which cannot be neglected.

Appointment as a notary

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

[128] Official Gazette, 1.3.2011, num.51.

[129] Government proposition 2010/11:20 Legitimation för lärare och förskollärare. Amendments of the School Act (2010:800).

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.(See C-47/08, C-50, 51, 53 and 54/08 and C-61/08).

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

As a result of this judgement in Austria the Notarial Code was amended. Access to the profession of notary is now open for all citzens of the EU=EEA and Swiss Confederation.

As a consequence in *Belgium*, the law on the organisation of the notary profession [130] was also amended so as to comply with this judgment.[131] In accordance with the revised rules, to be appointed as an expectant notary, a person must in particular be Belgian *or* a national of a Member State of the EU. Following the judgment of the CJEU, a parliamentary question was addressed to the Minister of Justice, asking if Belgium had invoked Article 95, § 4, indent 3, 4° of the electoral code, which provides that presidents of the polling stations are designated *inter alia* among notaries. The Minister replied that Belgium did not rely on the electoral code and that, anyway, the article aforementioned would not have brought the CJEU to change its mind since presiding a polling station is not as such related to the professional activity of notaries.[132]

In *Luxembourg,* consequently, access to the profession of notary had to be modified so as to take into account this judgement. In order to guaranty a satisfactory level of a notary's service, it seems possible to set up language requirements which a candidate for notary must satisfy. Given Luxembourg's amendment to the Grand-Ducal Regulation of 10 June 2009 on the organization of legal internships and regulating access to the notary profession, the Commission closed its case against Luxembourg on 22 March 2012.[133]

The Grand-Ducal Regulation amendment now states that the completion of a professional internship by interns and candidates from a European Union Member State is one of the requirements to be admitted to the notary profession, and that access to the exam at the end of the internship requires that candidates provide a copy of their identification card proving Luxembourg citizenship, or citizenship of another European Member State.[134]

In *Germany*, it is clear from the judgment of the CJEU that the requirement of German nationality in the Federal Regulation is inapplicable with regard to applicants from other EU Member States. It is less clear to what extent the judgment, which is based upon Art. 51 TFEU, is to be applied with regard to

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130 Loi du 25 ventôse an XI contenant organisation du notariat.

131 *M.B.*, 10 February 2012, p. 10443.

132 Answer by the Minister of Justice to a parliamentary question asked by Deputy Laurent Louis on 15 June 2011, question n° 504, p. 48

133 "Condition de nationalité pour l'accès à la profession de notaires" ("Nationality requirement for access to the notarial profession"), (22.03.2012) www.paperjam.lu.

134 Règlement grand-ducal du 13 avril 2012 modifiant le règlement grand-ducal du 10 juin 2009 portant organisation du stage judiciaire et règlementant l'accès au notariat, Mémorial A N° 75 du 20.04.2012, p. 812.

regulations of the lender providing for a three-year-employment as assisting notary public in order to apply for a host as a notary public. There are also questions on the implications of the judgment with regard to the exercise of a profession as a notary public in the framework of an employment rather than as a self-employed activity. Since the court has assumed that the activities of a notary public are not connected with the exercise of public authority it must be assumed that the requirement of German nationality cannot be upheld whether in the context of an employment or as a self-employed activity.[135]

In *Greece*, the Code on the organisation of the notary profession was amended so as to comply with the CJEU judgment.[136] In accordance with the revised rules, to be appointed as a notary, a person must in particular be Greek *or* a national of a Member State of the EU.

In *Portuga*l, as a result of the thread of an adverse judgment of the CJEU, following the opinion of the Advocate-General, the Parliament (see Law 45/2010, of 3 September) authorized the Government to change 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. Article 1-A(1)(c) of the Notary Statute (approved by Decree-Law 15/2011, of 15 January) now states that notaries registered in another EU may work in Portugal as long as they fulfil the conditions set forth in the Statute.

In *The Netherlands*, the Bill abolishing the requirement of Dutch nationality for the appointment as a notary has been adopted in June 2012. However, the government has promised to introduce a new Bill that will re-establish the nationality requirement for third-country nationals, effectively restricting the exemption to nationals of Member States only.[137]

On 1 December 2011 the CJEU decided in the infringement procedure against the Netherlands on this issue in accordance with the other earlier decided cases. A nationality requirement is not allowed.[138]

In *Poland* there is still a requirement to possess Polish nationality for notaries, unlike for legal counselors and advocates.

In *Romania* from 1 January 2013 the nationality requirement for the appointment as a notary is abolished, but there will be a residence requirement and a language requirement.

An explicit statutory language requirement for notaries is also mentioned in the reports on *Estonia, Luxembourg* and *the Netherlands.* The new Dutch act mentioned above includes a provision requiring knowledge of the Dutch language as an explicit condition for appointment as a notary.

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135 For a critical review of the judgment see: Korte/Staiger, Deutschennotariat abgestempelt!, NVwZ 2011, 1243.

136 Law 4038/2012.

137 Eerste Kamer 31040, No. S; *Staatsblad* 2012, 272.

138 Case C-157/09, with annotation by Mok in *NJ* 2012, 41 and Van der Gronden in *NTBR* 2012, p. 21-25.

2.2 Language requirements

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 TFEU of the Treaty guaranteeing the free movement of workers. Greece has not yet implemented Directive 2005/36/EC.

Presidential Decree 5/2011 provides that "sufficient knowledge" of the Greek language is required for the posts of master and his substitute (chief mate) of merchant ships flying the Greek flag to be manned by EU citizens. The law states as reason of this provision the need to communicate with Greek authorities and to understand the Greek maritime legislation.

On 21 December 2011 the Law on Public Service was amended concerning the *Lithuanian* language of exams to public service. There is an explicit Lithuanian language requirement following from paragraph 2 of Article 9(1) of the Law on Public Service, which mentions requirements for admission to public service. No changes were introduced during 2011 or first half of 2012. The law does not specify proficiency of language level, but reference could be made to Lithuanian language exam, which is mandatory when requesting citizenship of Lithuania or EU long-term residence permit. The level of proficiency for language exam is based on European Council A2 level.

Language as a practical barrier to access to jobs in the public sector is further mentioned explicitly in the reports of *Cyprus, Poland* and *Sweden*.

2.3 Recognition of professional experience for access to the public sector

In *France* in this context an important judgment was done, in which the Court did not take into account the training a British doctor had had in the UK to decide on his eligibility for a medical post in a public hospital in France.[139]

In *Italy*, the recognition of professional experience, professional and academic diplomas for access to posts in the public sector was amended in 2012. According to this provision, the professional experience or the professional diploma acquired by EU nationals and necessary to participate to the open competition or to be appointed in the public sector, is recognized by a Decree of the President of the Council of Ministers – Department for the Civil Service, after the positive opinion of the Ministry for Education, University and Research. The same procedure applies when it comes to recognition of academic diplomas or seniority for access to the open competition or to be appointed in the public sector.[140]

In *Latvia*, the professional experience is important for the purposes of the award of qualification grade and determination of corresponding level of salary in the

[139] Administrative Court of Appeal of Nancy, 5 May 2011, no. 10NC00690, *Fortier vs. Centre national de Gestion*.

[140] Article 38 para. 3 of Legislative Decree no. 165 of 2001, which has been amended during the reporting period by Art. 8 of Decree-Law 9-2-2012 no. 5, turned into Law 4-4-2012 no. 35.

public sector. Latvian Regulation No.1651 explicitly recognizes only professional experience obtained in Latvian public institutions.

In June 2012 the European Commission has asked *Greece* to comply with its obligations under EU law by taking into account professional experience and seniority acquired by teachers in other Member States without any time limit. EU nationals have access to teaching posts in Greek state schools, but their previous teaching experience in other Member States is only taken into account when it has been acquired after those States' accession to the EU.

In *Austria* as regards taking into account *former working periods* for wages: There are limitations regarding working periods in Turkey and Switzerland (Sect. 12 Salary Act/Sect. 26 Contractual Employed Civil Servants Act [as regards Turkey] and Sect. 50a § 4 Salary Act for university professors [as regards Turkey and Switzerland]). Austria intends to amend this.

3. OTHER ASPECTS OF ACCESS TO EMPLOYMENT

In *Germany* there are currently discussions on support for students to find employment in Berlin. This support was given exclusively to German students. It should be noted, however, that many jobs which are described in the context do not cross the qualitative and/or quantitative threshold for employment within the meaning of Article 45 TFEU. Most importantly, moreover, these complaints do not concern the activities of the Federal Agency for Labour.

In 2010, the Board of Equal Treatment in *Denmark* ruled on 2 complaints regarding requirements on authorized translation of German diplomas imposed by a municipality and a hospital as employers in relation with the employees' applications on issuance of authorisations as health care assistants. The rulings imply that the Board does not consider the EU rules on free movement of workers as comprised by the Board's competence.

Chapter IV Equality of treatment on the basis of nationality

1.Working conditions – direct and indirect discrimination

The 2010-2011 report has highlighted the uneven application of the non-discrimination principle enshrined in Regulation 492/2011 due to diverging approaches in national legislation on this particular issue. Member States were broadly divided into three categories depending on how nationality discrimination was treated in their legislations: dealt with, ignored or dealt as related to other prohibited discrimination grounds (most often, race or ethnic origin). Currently, the European Commission is considering the adoption of a legislative instrument to promote and enhance mechanisms for the effective implementation of the principle of equal treatment for EU workers and members of their families exercising their right to free movement. This new instrument would respond to some of the issues identified by the Network's previous reports in the field of nationality discrimination.

For the period under consideration in this report (2011-2012), the majority of national rapporteurs did not indicate significant developments or assessed their state to be in compliance with EU requirements (e.g., Belgium, Germany, Italy, Latvia, Luxembourg, Portugal, Slovakia, Slovenia). Direct discrimination on the basis of nationality is generally considered to be very rare, although in the *United Kingdom* section 54 and Schedule 3 Nationality Immigration and Asylum Act 2002 discriminate directly against EU nationals in respect of some benefits which are reserved for British citizens (residential accommodation for adults who by reason of age, illness, disability or any other circumstances are in need of care and attention; services for children and their families and children leaving care as adults; accommodation provided for the promotion of well-being under the Local Government Act 2000). EU citizens may enjoy these benefits if they are necessary for the purpose of avoiding a breach of a person's rights under EU law (Articles 6 & 7 Directive 2004/38). In practice, UK local authorities may require the individual not only to be a worker but to show why the provision of residential accommodation is necessary to avoid a breach of EU rights.[141]

Several national reports raised concerns in respect of the treatment of EU workers, especially from the EU10, whose rights in relation to working and housing conditions were violated. This issue came up in Denmark where the treatment of foreign workers by employers and recruitment agencies or temporary employment agencies has been under scrutiny.[142] Following a political agreement on strengthening the efforts against social dumping,[143] concluded between the Danish Government and the Red-Green Alliance regarding the *Finance Act*, the Police and the Danish Working Environment Authority together with the Danish Tax Authority concluded an agreement on 20 February 2012. The agreement enhances the efforts against 'illegal work (social dumping)' and provides for a number of coordinated control actions to be conducted. Targeted businesses include the service industry and construction, including minor construction- and plant tasks performed in residential areas as well as in other

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141 *R (on the application of de Almeida) v. Kensington and Chelsea RLBC,* [2012] EWHC 1082 (Admin) 2012 WL 1358031 involving a Portuguese national with AIDS and other complications who was no longer able to work. The Court found the local authority to be in breach of the claimant's rights under articles 3 and 8 ECHR, contrary to s.6(1) Human Rights Act 1998.

142 Cf. http://www.centermodmenneskehandel.dk/nyheder/nar-migrantarbejdere-udnyttes.

143 In this regard, social dumping is defined as salary and working conditions for workers being unacceptable, when compared to the conditions applicable to Danish workers. See more below Chapter VIII.3 on the agreement.

pertinent localities.[144] Inquiries by the Danish Centre against Human Trafficking regarding the green sector, the cleaning business and au pairs highlighted problems such as poor working and living conditions and exploitation in respect of migrant workers including workers from the newer member states. In 2012, the Danish Working Environment Authority established a *hotline on foreign companies* where potential violations of the legislation on working environment may be reported. [145]

In *Finland* posted workers were identified as vulnerable and treated worse than their national counterparts, despite the lack of formal and legal complaints on this topic. According to the occupational health and safety authorities, incidents of discrimination against citizens of the old member states are rather rare, most discriminatory situations involving citizens of EU8 and EU2. The authorities have come across incidents of discrimination both against workers employed directly by Finnish employers *e.g.* as cleaners, as well as against posted workers working *inter alia* as cleaners, in constructions and shipyard industry.

Similar concerns were expressed in relation to the treatment of workers from the new member states in *Ireland*. The creation of the National Employment Rights Authority (NERA) was supposed to secure compliance with employment rights legislation, including the principle of non-discrimination. In March 2008, the Employment Law Compliance Bill was introduced, to put NERA on a formal legislative footing, and to strengthen inspection and enforcement powers. However, the Bill did not advance under the previous government: as of June 2012, the Bill has lapsed. The Equality Tribunal is an impartial and independent quasi-judicial body charged with hearing or mediating claims of alleged discrimination under the Employment Equality Acts and other legislation. [146] During 2009, 2010, 2011 and 2012, a number of decisions have been taken on complaints made by workers from other EU Member States (mainly from Latvia and Lithuania) on grounds of race. In its recent case law, the obligation of the employer to provide foreign workers with contracts in a language they understand has been qualified as currently such requirement no longer applies.[147] However, discrimination may arise where there is a failure to take action to ensure an employee understands a contract that is in a language that he cannot understand.[148] As a minimum, employers should provide and follow appropriate procedures to ensure that non-native English speakers have been made fully aware of the terms and conditions of their contract and their rights as provided within the contract.[149] Likewise, in the past, where an employer failed to provide non-Irish employees with health and safety statements in a language they could understand, there would be a finding of discrimination.[150] In more recent cases, this has been modified by a requirement to take meaningful action to ensure that the employee understands the health and safety training, in order

144 http://www.politi.dk/da/aktuelt/nyheder/Styrket+indsats+mod+ulovligt+arbejde+%28social+dumping%29. htm., accessed on 12 June 2012.

145 Cf. http://arbejdstilsynet.dk/da/arbejdsmiljoemner/andre-emner/registret-for-udenlandske-tjenesteydere-rut/hotline-om-udenlandske-virksomheder.aspx, accessed on 20 June 2012. The identity of the informant must be known to the Authority but will not be known to the company in question.

146 The decisions of the tribunal can be accessed online at http://www.equalitytribunal.ie

147 *Diadiajev* (DEC-E2011-039, 7 March 2011) and *Frumosa* (DEC-E2011-181, 23 September 2011).

148 *Bernotas* (DEC-E20110011, 25 January 2011) *Block et al* (DEC-E20110205, 3 November 2011).

149 *Cityus* (DEC-E2011 – 013, 27January 2011).

150 *Arinizis* (DEC-E2009-088, 9 October 2009), *Saluhanskas* (DEC-E2009-103, 10 November 2009), *Stukonis* (DEC-E2009-12, 31 December 2009).

to avoid a finding of discrimination.[151] Regarding dismissal, in a 2011 case the Equality Officer found that the employees had been discriminatorily dismissed because the employer had cut the pay of non- Irish workers resulting in these employees having no other choice but to leave in circumstances where the pay cut did not equally apply to Irish workers.[152] In another case, the Equality Officer found that there was discrimination where the employer failed to pay over the foreign national complainant's tax and social welfare contributions (which were deducted from his salary) to the Revenue Commissioner while the tax and social welfare contributions for Irish nationals were duly paid.[153] In 2012, the Equality Tribunal found discrimination based on race where Polish workers were discriminated against in relation to their conditions of employment. The Equality Tribunal accepted their arguments that, in contrast to their Irish counterparts, they were not paid for annual leave, given more dangerous tasks and no social welfare contributions were paid on their behalf.[154]

In *Cyprus* the conditions of employment applicable to trainees' part of ERASMUS, LEONARDO and other exchange programmes working in the hotel industry are currently under investigation by the Cypriot Equality Body. Trade unions complain that there are about 1500-2000 trainees in hotels, particularly hotels and restaurants offering an 'all inclusive package' who are used for social dumping, displacing other workers who are regularly employed in hotels, since trainees have no contract and are not bound by collective agreements, as opposed to regular workers. There are concerns that trainees are not paid any remuneration but are merely provided with accommodation and food and occasionally pocket-money, in return for their work. This issue was raised at the Advisory Committee on Vocational Training in 15-16 June 2011 in Brussels[155], as well as at various meetings with the Labour Office of the Ministry of Labour and Social insurance, requiring that action be taken. Proposals for action include measures such as ensuring that there is a ratio on trainees and regular workers, a maximum number of trainees per regular employee in supervisory role, a contract that maintains minimum conditions of employment as trainee to be signed between trainees and employers lodged with Ministry of Labour as well as and a monitoring role by trade unions and labour inspectors. [156]
The *Cypriot* hotel industry has been the subject of another investigation by the national equality body in 2011. The Equality Body published an opinion on the violation of the principle of equal treatment between Cypriots and Union citizen workers in the hotel industry,[157] following concerns that hoteliers were dismissing Cypriot workers, unionised under a regime of a collective agreement, in order to replace them with non-unionised Union citizens, who instead had personal contracts with inferior working conditions and pay. With references to articles 49 and 45 of the TFEU, article 7 of Regulation 492/2011, Directive 2004/38/EC and articles 13, 15, 21 and 34 of the EU Charter of Fundamental Rights, the Opinion concluded that, whilst the adoption of a more modern and

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151 *Bernotas* (DEC-E2011-011, 25 January 2011) and *Tonisson* (DEC-E2012-004, 9 January 2012).
152 *Aukscionis* (DEC-E2010-227, 16 November 2010).
153 *Czyzycki* (DEC-E2011-260, 22 December 2011).
154 Kapusta & Ors (DEC-E2012-050, 26 April 2012).
155 EAC/B.4/AJ/fa Ares (2011) http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=6078&no=1
156 The matter was put to the Cyprus Employers & Industrialists Federation (OEB) by the Cypriot expert and received a reply on 24 August 2011; see "Cyprus Employers & Industrialists Federation (OEB) positions with regards to the queries on EU nationals employment".
157 Decision of the Cyprus Equality Body as regard the violation of the principle of equal treatment between Cypriots and Union citizen workers in the tourism industry (A.I.T. 1/2011, 22/6/2011).

flexible practices aiming at improving competitiveness and productivity is a desirable goal, the means for attaining that goal had to be appropriate and necessary. It concluded that the practice of signing personal contracts with terms less favourable to those contained in collective agreements leads to the deregulation of labour relations and the gradual abolition of collective agreements, the failure to implement the laws and regulations and the creation of workers of two or three speeds in the hotel industry.

Some national rapporteurs mentioned the low number of cases of nationality discrimination that come before the courts or other competent bodies. Although the lack of litigation may give the impression that no discrimination takes place in their state, the rapporteurs suggested the possibility of alternative explanations. In *Finland* for example, it seems that the police and prosecutor's office consider such offences as minor and do not investigate them or the victims of discrimination are not prepared to claim their rights. In 2011, *France* has also created a new centralizing body "Le défenseur des droits" with attributions in the field of equality. In *Lithuania* the issue is connected with the fact that equal treatment provisions are included in the Aliens' Law with the consequence that the institutions responsible for applying the principle of non-discrimination in concrete situations lack understanding and knowledge of this particular aspect of it.

Specific issue: Working conditions in the public sector

Regarding this topic, the most relevant developments are connected with the manner in which comparable professional experience and seniority/ working periods acquired in other EU member states are taken into account when calculating seniority, grade etc.

In *Greece* seniority in the public sector of another EU State was taken into consideration in order to determine the salary of the employee, while seniority in the private sector was not recognized. According to new legislation some problematic provisions have been introduced. Art 6 of Law 4024/2011 provides that the entire seniority in the Greek public sector is taken into consideration in order to determine the salary and the degree of the worker. Seniority in the public sector of another EU State is also taken into consideration if it has been completed under the same or equivalent qualifications compared to those at the time of recruitment in the Greek public sector. In addition, there is a seven years cap on the maximum number of years of seniority acquired in another Member state that can be recognized in Greece. Law 4024/2011 also provides that a Presidential Decree will determine the conditions of recognition of the seniority in the private sector in Greece or in another EU State.

In *Hungary* the principle of equal treatment is to be observed in the public sector. In practice, there are no provisions on the recognition of professional experience for the purposes of determining the grade and upon it, the salary and career perspectives of a worker. Moreover, there is an assumption that said professional experience can be acquired only in Hungary..[158] Different rules apply in the public sector in respect of several rights such as the right to strike and the right to joint political party. [159]

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[158] Németh Erika: A jegyzői jogviszony és a közigazgatási áthelyezés. *Jegyző* 2010/5 (26 October).

[159] According to Article 85 Paragraph 4 Point b) of Act CXCIX of 2011 on the Legal Status of Public officials public officials are entitled to be members of political parties and have the right to be

Latvian legislation does not contain express norms on the prohibition of unequal treatment of migrant Union citizens regarding working conditions in the public sector. However, according to the Regulation No.1651 only professional experience in the public sector in Latvia is taken into account for the award of qualification grade and corresponding salary.[160] Education is the determining factor for award of grade in public sector and normative acts do not contain any specific requirements with regard to diplomas obtained in particular educational establishments or countries for the purposes of determining qualification grade, salary or any other working conditions.[161]

Lithuanian policy is even more restrictive since the public service is restricted to Lithuanians only. Nevertheless, the Methodology on description and evaluation of public servants' functions (approved by the Government on 20 May 2002) does not mention the place of acquiring professional experience, suggesting that professional experience acquired in other EU MSs would be recognised. Potential problems concern the calculation of years of service for the purpose of grades and categories of public servants, because according to current legislation, service supplements are being paid on the basis of service performed for the Lithuanian state only (up to 30% supplement).

In *Malta*, previous periods of comparable employment acquired by teachers in another Member State are not always taken into account when determining working conditions. This also affects Maltese teachers who have worked in a public school in another Member State, as their experience abroad is not taken into account when returning to Malta.

Poland and the *Netherlands* are in compliance with the equality principle in this field.

A particular issue came up in two cases decided by the *Danish Board of Equal Treatment* in 2011. The complaints challenged requirements on substantiated vocational education imposed on taxi drivers applying for taxi licenses by a municipal authority which administered tasks pursuant to the legislation on taxis.[162] Both complainants were of a different ethnic origin than Danish. The Board ruled that the adoption of the criterion on substantiated vocational education may imply indirect discrimination as drivers of Danish origin in general have a higher educational level than drivers of a different ethnic origin than Danish. The criterion was thus suitable of placing drivers of a different ethnic origin in a situation worse than ethnic Danish drivers.

An interesting development is mentioned in the Cypriot report, a country that does not have a large number of EU citizens working in its public sector. This situation may be about to change since as a consequence of the economic crisis affecting Greece, several thousands of Greek nationals have sought employment

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nominated in local and general elections. However, they are not allowed to hold a position in a political party, and undertake a public appearance on behalf of the political party.

[160] Regulations on remuneration, qualification grades and their determination for officials and employees of state and municipal institutions (*Noteikumi par valsts un pašvaldību institūciju amatpersonu un darbinieku darba samaksu, kvalifikācijas pakāpēm un to noteikšanas kārtību*) OG No.206, 31 December 2009.

[161] Law on remuneration of officials and employees of state and municipal institutions *(Valsts un pašvaldību institūciju amatpersonu un darbinieku atlīdzības likums)*, OG No.199, 18 December 2009.

[162] Rulings No. 140/2011 and 141/2011 of 30 September 2011.

in Cyprus, including in the public sector where their good knowledge of the Greek language is an advantage.

2. Social and Tax Advantages

In several Member States no new developments took place during the reporting period (e.g. *Austria, Greece, Latvia, Portugal, Romania, Slovenia, Spain*). In some states issues identified in previous reports continue to exist, such as the conditionality of accessing social advantages upon being able to produce a residence permit (e.g. *Hungary*, *Estonia*) or differences between EU citizens and nationals as regards the obligation to register as VAT payers in *Lithuania*. The Court of Justice has always emphasized the declaratory and not constitutive character of such permits. In some Member States, indirect discrimination in the form of residence requirements continues to impact upon the access of EU migrant workers to social and tax benefits.

The European Commission asked Cyprus for clarification regarding access to health care for EU citizens, which is supposed to be provided unconditionally. The Commission was interested in whether access to health care depends on the patient being subject to a system of health insurance and whether Article 6 of EC Regulation 883/2004 is complied with (this article requires that periods of residence completed in accordance with the legislation of another member state be taken into account when the completion of periods of residence are a precondition for access to health care). The Cypriot authorities have clarified that free and discounted health care is provided to Cypriots and to Union citizens for whom Cyprus becomes the competent member state in accordance with Title II of EC Regulation 883/04. In order to claim these rights, it is necessary to become subject to the national health system which is voluntary and does not require any contribution on the part of the beneficiary. Secondly, Article 6 of Regulation 883/2004 does not apply. Free health care is provided to Union citizens to whom Regulation 883/2004 applies and although the precondition of permanent residence in Cyprus applies, it does not require the completion of a minimum or fixed period of residence. It only requires that the beneficiary be permanent resident in Cyprus at the time of issue of a health card.

2.1 General situation as laid down in Art. 7 (2) Regulation 492/2011 Social advantages

In *Belgium* the activation measures introduced by the government in the previous years in order to stimulate unemployed persons continue to apply. These measures target especially long-term unemployed persons and young jobseekers and provide some sort of financial benefits that may be considered social advantages under Article 7 of Regulation 492/2011. As such, they may constitute a source of direct and mostly, indirect discrimination when refused to EU workers.

In 2010, *Denmark* has introduced the principle of accumulation in relation to child and young benefit allowance and child benefits.[163] A requirement on *residence or employment for 2 years in Denmark within the past 10 years* in order to receive full benefits is imposed on all beneficiaries of child benefit allowance and child benefits pursuant to *Lov om børne- og ungeydelse* ('Act on Child- and Young Benefit Allowance')[164] and *Lov om børnetilskud og forskudsvis*

163 Act No. 1609 of 22 December 2010.

164 Consolidation Act No. 964 of 19 September 2011 Section 2 (1) (7).

udbetaling af børnebidrag (`Act on Child Benefit and Advance Payment of Child Support').[165] A proportionate part of the benefits may be paid under more specified circumstances when the residence/employment requirement is not met.[166] Although the Danish government acknowledges that the residence requirement constitutes indirect discrimination under EU law, it considers that the introduction of the accumulation principle is substantiated by compelling general considerations and is proportional.[167] Its position is based on the Court's approach in *Förster* (C-158/07) and *Bidar* (C-209/03) regarding students' access to study grants[168] which seems a questionable extension in respect of the (stronger) rights of migrant workers under Regulation 492/2011 and the Court's interpretation thereof. As mentioned in previous reports the Act on Active Social Policy made the payment of full social assistance dependent upon having resided in Denmark during a total period of seven years within the past eight years. Although there was an exception for EU workers, there were concerns that the law and its interpretation by the National Social Appeals Board did not comply with CJEU case law. The residence requirement was abolished as of 1 January 2012[169] but the Parliamentary Ombudsman asked the Appeals Board for explanations for not having referred questions to the CJEU on the issues under dispute. [170]

The relationship between social advantages under Article 7(2) Regulation 492/2011 and social assistance under Directive 2004/38 remains problematic in several Member States. *France* has adopted legislative measures in respect of the universal health coverage system[171] and family allowances[172]. Both measures make the right of residence a condition for entitlement to these benefits; they pose problems for EU citizens who lack a right of permanent residence since they have to show compliance with the conditions set out in Articles 6 & 7 of Directive 2004/38. In respect of family allowances, in a decision from September 2011,[173] the application for a family allowance for two minor children was rejected because the conditions regarding legal residence in France were not met since the applicant lacked sufficient resources and did not perform economic activities.

The interpretation of the requirement to have sufficient resources in order to be considered regularly resident under EU law has been problematic in *Germany*, too. At first, the interpretation of the courts was that an EU citizen entitled to the

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165 Consolidation Act No. 439 of 14 May 2009 and amending Act No. 1609 of 22 December 2010 - Section 5a (1).

166 A report issued by the Ministry of Employment in 2011 deals with the possible application of an *accumulation principle* in relation to the reception of app. 30 Danish welfare benefits: *Rapport om Optjeningsprincipper i forhold til danske velfærdsydelser* by Udvalg om Udlændinges ret til velfærdsydelser, March 2011. In Chapter 3, the report accounts for EU law.

167 Bill No. L 79/2010-11 of 17 November 2010, general remarks para. 11.

168 Questions 4-7, available at http://www.ft.dk/dokumenter/tingdok.aspx?/samling/20101/lovforslag/L79/ spm.htm#dok, accessed on 13 June 2012.

169 Act No. 1364 of 28 December 2011, amending the *Act on Active Social Policy*.

170 Letter of 28 June 2011 from the Parliamentary Ombudsman to the National Social Appeals Board.

171 Circulaire DSS/DACI no 2011-225 du 9 juin 2011 relative à la condition d'assurance maladie complète dont doivent justifier les ressortissants européens inactifs, les étudiants et les personnes à la recherche d'un emploi, au-delà de trois mois de résidence en France

172 Circulaire N°DSS/SD2B/2012/164 du 16 avril 2012 relative au bénéfice des prestations familiales des ressortissants de l'Union Européenne, de l'Espace économique européen et de la Suisse en situation d'inactivité professionnelle sur le territoire français en situation d'inactivité

173 Cour d'appèl de Nîmes, 27 septembre 2011, *Ralitsa c Caisse d'allocations familiales*, req. n°10/03550

so-called *Freibetrag* (benefits which are granted irrespective of a certain amount of money derived from work) did not fulfil the requirement of having sufficient resources since he was a recipient of social benefits. This position has been revised in order to align the German jurisprudence to the *Chakroun* judgment of the CJEU. According to decisions from 2011, the *Freibetrag* is no longer taken into account.[174] Some *Italian* local authorities also require that EU nationals possess a residence card and sufficient economic resources for themselves and their family members in order to access social benefits.[175] It would seem that these local authorities make financial benefits conditional upon nationality or residence. Local legislation is often brought to court, and the cases are adjudicated according to the anti-discriminatory provisions of the general legislation on immigration. The residence card for EU nationals is not prescribed by Italian legislation, and EU workers cannot be asked for proof of having sufficient economic resources as a condition for access to social benefits. UNAR, the National office against racial discrimination, was asked to evaluate the case, and recognized the discriminatory and unreasonable nature of the decision. (Decree REP.2, 10-1-2012).

Issues regarding residence came up in *Luxembourg* in connection with differences in definitions used by the Labour and Civil Code in order to establish whether a person is domiciled in Luxembourg. The Ombudsman had to decide whether the refusal to award full unemployment benefits to a married couple was justified. Both spouses had a seven month season fix-term contract, at the end of which they applied for full unemployment benefits. Their application was denied since they were not considered to have been domiciled in Luxembourg for the duration required by the Labour code. The issue under dispute was the moment from which one starts to be resident ("domiciled"): the actual date one starts living in Luxembourg or from the moment one applies for certification with the local authorities.[176]

In the *Netherlands* employers can get a discount for 1 to 3 years on the payment of the contributions for employees they hire, who enjoy a Dutch unemployment or disability benefit at that moment. It is questionable whether this is an obstacle to free movement of workers. The Dutch tax authority's reply was negative. The purpose of this discount is to reduce the burden on the Dutch social security system and, therefore, is justified in their eyes.

Tax advantages

Due to its benevolent taxation regime, *Bulgaria* has started to be attractive for Romanian companies that prefer to register their seat in Bulgaria. This trend is expected to generate case law and administrative practice relevant for migrant EU citizens and their family members.

In several member states issues were reported regarding rules for tax deduction and tax exemption that seem to be preferential for national companies. In *Sweden* similar issues in respect of life insurance were signalled and a public investigation into the issue was launched in 2010. Rules regarding tax

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174 Sächsisches OVG, Decision of 15.12.2011, 3 B 122-11

175 Municipality of Chiari, Decision no. 182, adopted by the Municipal Council at the meeting of 26-10-2011

176 Rapport d'Activité du Médiateur, 01.10.2010-30.09.2011, R13.

deductions and tax exemptions for payments made to pension funds established in other Member States have also been discussed by the Government.[177]

Other relevant developments in respect of tax advantages include the preliminary question referred by the Supreme Administrative Court of *Finland* to the CJEU in a matter that concerns free movement of capital but may have relevance regarding free movement of workers, as well (see, C-322/11). The question was whether the fact that a person who is liable to tax in Finland is not allowed to reduce from her personal income tax a loss for assignment concerning a property located in another member state, while she would be allowed to reduce from her tax a loss for assignment concerning property located in Finland. On the grounds of a tax treaty which is in force between Finland and France, the income from a property located in France is tax-free in Finland. The Finnish Government argues that from this follows that a financial loss relating to such property cannot be reduced from taxation in Finland.

The situation of *Slovenian* frontier workers working in Austria has received attention from the government and there are efforts to ensure their treatment respects EU law and double taxation is avoided. The Slovenian government is searching for a proper solution.

In some member states (*Hungary* and *Italy*) administrative practices encountered at the local level are sometimes problematic in as much as they discriminate against EU workers. For example, in *Hungary* the Ombudsman found discriminatory treatment against EU nationals to be a current practice in the Somogy county tax department.[178] In *Italy*, The Municipality of Chiari required EU nationals applying for social benefits to possess a residence card and sufficient economic resources for themselves and for their family. (Decision no. 182, adopted by the Municipal Council at the meeting of 26-10-2011) The residence card for EU nationals is not prescribed by Italian legislation, and proof of having sufficient economic resources cannot be set as a condition for EU workers to enjoy social benefits. UNAR, the National office against racial discrimination, was asked to evaluate the case, and recognized the discriminatory and unreasonable nature of the decision. (Decree REP.2, 10-1-2012).

2.2 Specific issue: the situation of jobseekers

This part of the report focuses on the situation of jobseekers and access to social assistance and other benefits, taking into account relevant CJEU case law (e.g., Case C-138/02 *Collins*, Case C-22/08 and Case C-23/08 *Vatsouras*).

Access to social assistance

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[177] Concerning previously made amendments, see Finansdepartementet (the Ministry of Finance), Nya skatteregler för pensionsförsäkring, Promemoria February 1, 2007, and Finansdepartementet (the Ministry of Finance), Skr. 2006/07:47, Meddelande om kommande ändringar av skattereglerna för pensionsförsäkring (1 februari 2007), Government's proposition 2007/08:55 Nya skatteregler för pensionsförsäkring, m.m. with amendments of the Act (1999:1229) on income-tax law (Lag om inkomstskatt). Further, in October 2008 the Government presented a proposition meaning amendments of the regulations concerning the taxation of personnel options regulated in the Income tax Act (1999:1229); Government's proposition 2007/08:152 Slopad avskattning för personaloptioner. Hence, the former demand on taxation on the options when a person moves abroad was abolished on January 1, 2009. The amendment follows from EC law and a judgement from the Swedish supreme administrative court (Case no. 6324-06).

[178] MTI 30 June 2011 Elmarasztalt egy somogyi önkormányzatot az ombudsman.

This issue remains one of the most topical in respect of jobseekers, also due to the manner in which some Member States understand the relationship between enjoying social advantages under Article 7(2) Regulation 492/2011 and social assistance under Directive 2004/38. In most Member States, job-seekers do not have access to non-contributory public benefits such as welfare or social assistance benefits (Austria, Cyprus, Denmark, Estonia, France, Germany, Greece, Italy, Lithuania, Malta, Portugal, Slovenia, and United Kingdom). In *Austria*, EU jobseekers may receive "social-welfare" payments which are administered by the local authorities. In *Bulgaria* the issues signaled in previous reports regarding the non-transposition of certain relevant provisions of Directive 2004/38 for job-seekers continue to exist (right of residence for more than three months and protection from expulsion).

In *Denmark*, EU-10 workers were reported to have experienced problems when applying for social assistance upon dismissal from jobs in which they had been working for a longer period and while they continued to seek new jobs in Denmark. The underlying cause is related with poor knowledge of EU rules in some local municipalities and the confusion between the provisions on first-time jobseekers and the general rules concerning EU workers' access to social assistance on equal terms with Danish citizens. The National Directorate of Labour ('Arbejdsdirektoratet') apparently suggested patience towards the municipalities, but stated its preparedness to consider the need for additional guidance on the applicable law.[179] More general guidelines concerning the right of EU/EEA citizens to cash benefits under the *Act on Active Social Policy* were issued by the National Directorate of Labour in April 2008.[180] The guidelines are unclear regarding various aspects of the law, and fail to take into account the abolishment of the transitional rules concerning EU-10 workers as well as the abolishment of the residence requirement in the *Act on Active Social Policy*. A revision of the guidelines is expected in the future.[181]

In *Finland* the rules on social assistance in cases of acute need will also cover EU job-seekers. Social assistance is a last resort form of income security. It is available to anyone staying in Finland temporarily or on a permanent basis. The municipalities pay this means-tested assistance if the person concerned is not able to cover her acute expenses by other means. Accordingly, also job-seekers coming from other EU states and who need financial assistance to cover their most basic needs shall be granted this form of assistance.

In *Germany* the main issue remains the exclusion of jobseekers from social assistance on the basis of section 7(1) of the Social Code II (SGB II). This point has been a subject of debate in both literature and case law. In the absence of a position from the Federal Social Court, German social courts have taken divergent views on this topic. In a recent case from 2012 the Federal Social court has argued that the disputed provision in the SGB II should be interpreted

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

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

181 In the Danish comments to the FMoW Report 2008-2009 (Memorandum of January 2010 from the Ministry of Employment, p. 3) the National Labour Market Authority confirmed that the Guidelines would be updated in the near future. This does not appear to have occurred yet, cf. https://www.retsinformation.dk/ Forms/R0710.aspx?id=115636, accessed 26 June 2012.

narrowly, and applied only if residence is based solely on the fact that the applicant is looking for employment within Germany.[182]

Based on a 2010 decision by the German Federal Social Court[183] nationals of the contracting states to the European Convention on Social and Medical Assistance could not be excluded from social assistance as jobseekers.[184] In reaction to the decision of the Federal Social Court, the government of the Federal Republic of Germany on 19 December 2011 has registered this provision to the annex of this Convention, which lists provisions excluded from the scope of the Convention.[185] Implementing rules explain that the Convention now has stopped to apply to section 7 of the Social Code II (SGB II).[186] The judgment of the Federal Social Court has effectively been reversed by the executive. However, there are court challenges to this position based on public international but not EU law.

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.

Follow-up on 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(2) of Directive 2004/38 is not transposed in *Slovakia* the *Vatsouras* judgment is not relevant for Slovakia either.

As mentioned earlier, *Bulgaria* has not transposed the relevant provisions of Directive 2004/38. Moreover under the applicable legislation (Law on Social Assistance) allowances for job-seekers are considered "social assistance" irrespective of the Court's interpretation in *Vatsouras*. However, there are no reported cases on this topic. A similar approach is used in *Ireland* and the *UK*. EU jobseekers who do not have habitual residence (Ireland) or the right to reside

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182 BSG, Urteil vom 25.01.2012, B 14 AS 138/11 R. The case involved a Polish national who originally entered Germany as the child of Polish parents (although she did not reside with her parents in one flat; the court also does not decide the exact residence status of the parents, with regard to whom it was unclear whether they were workers/self-employed/residents with sufficient resources of their own, since the applicant would in all three cases have a residence rights a family member). The applicant only became an (unemployed) jobseeker after having lived in German for four years. The court concluded that she was therefore not covered by the exception of section 7(1) of the Social Code II (SGB II), since she had entered Germany as a family member so that her residence in Germany was not only based on the fact that she was looking for employment.

183 B 14 AS 23/10.

184 Parties to this agreement include Belgium, Denmark, Estonia, France, Greece, Ireland, Iceland, Italy, Luxemburg, Malta, Netherlands, Norway, Portugal, Sweden, Spain, Turkey and the United Kingdom of Great Britain and Northern Ireland.

185 It may be found online on the Council of Europe website at http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=014&CM=8&DF=9/17/2006&CL=GER&VL=1

186 See Geschäftsanweisung SGB II Nr. 8 v. 23.2.2012 – Vorbehalt gegen das Europäische Fürsorgeabkommen (EFA), Geschäftszeichen SP II 21 / SP II 23 – II-1101.1, available online at http://www.arbeitsagentur.de/nn_166486/zentraler-Content/HEGA-Internet/A07-Geldleistung/Dokument/ GA-SGB-2-NR-08-2012-02-23.html .

(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. The position of German courts as explained above is unclear and future clarifications are needed to end divergent solutions.

In the *Netherlands*, the *Vatsouras* decision led to questions in parliament (Tweede Kamer 2009-2010, *Aanhangsel van de Handelingen,* No. 684). The benefit enjoyed under the Dutch *Wet Werk en Bijstand (WWB*) is classified as a social assistance benefit and not as a benefit that facilitates access to employment, like the German benefit. The government confirmed that an economically active EU-citizen who has performed effective and genuine activities and has become involuntary unemployed has a right to a WWB benefit during the six months period he retains his status as a worker (according to Article. 7(3)(c) Directive 2004/38/EC). After that period the Immigration and Naturalisation Service decides on an individual basis whether a WWB benefit justifies termination of the right of residence because the EU-citizen has become an unreasonable burden on the financial means of the host-Member State. In April 2011 there was an announcement that the rules on expulsion of EU nationals on the ground of reliance on social assistance (laid down in Aliens Circular B.10/4.3) will be made more restrictive (Tweede Kamer 29 407, No 118). According to those new rules, during the first two years of residence an appeal by an EU national on social assistance or on social care in a hostel for more than eight nights will cause an expulsion order. In the third year the criteria for an expulsion decision are: social assistance for more than two months or complementary social assistance for more than three month or social care for 16 nights or more. In the fourth year: four to six months social assistance or social care for more than 32 nights and in year five: 6 or 9 months social assistance or social care for more than 64 nights (new par. B10/4.3 of the Aliens Circular 2000).

In *Sweden* the problem posed by *Vatsouras* is whether the applicants in their capacity as jobseekers were considered to be entitled to benefits reserved for workers or national jobseekers.[187] So far – and still in 2011 and 2012 – the cases have not been commented on in the Swedish debate. Until there is administrative or legal practice suggesting otherwise, the national rapporteur does not consider that there is a risk of incongruence between the CJEU case law and the application of Swedish law on the matter. Despite this, the demand for a national registration address, based on an expected stay for at least 12 months in a local community, for the right to social benefits based on residence could cause problems for temporary contract workers as well as jobseekers from other Member States.

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, under the law applicable to unemployment benefits (Act No. 435/2004 Coll., on Employment), the EU citizens and their family members are in general treated equally with the Czech nationals (Sec. 3) and the provision stipulating concrete preconditions for receiving unemployment benefits (Sec. 39) does not contain any restrictions in this regard. The same applies for *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

[187] Joined Cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900*.

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.

Chapter V Other Obstacles to free movement of workers

In a number of Member States, including *Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Germany Greece* and Romania no specific cases or administrative practices were brought to our attention under the heading "other obstacles".

In *Denmark* new amendments to the tax code make it harder for Danes to become tax resident outside Denmark and seek to capture EU workers who may only have limited economic links to the country as tax payers there. The objective appears to be to avoid social dumping from other Member States using tax treatment as an advantage. An increasingly restrictive interpretation of marginal and ancillary work is emerging in the authorities' practice with a lower threshold of 10-12 hours a week set in guidance. For example, an EU worker on a five week limited contract was held not to have acquired the status of worker as the employment was deemed not to be real and genuine. In *Latvia* residents of another Member State of the European Union or European Economic Area that in a taxation year have acquired more than 75 % of their total income in Latvia may deduct from taxable income the same allowances as are deductible for individuals – residents of Latvia (for example allowance for dependents, non-taxable minimum etc.).. In *Lithuania* the tax issue for frontier workers takes the form of difficulties in providing acceptable proof by the worker that he or she has paid taxes abroad on income arising there. As national requirements are applied which rarely correspond to the practices of other Member States these workers in practice find themselves in a situation of double taxation.

In *Finland*, in order to have contributions for unemployment benefit made in another Member State taken into account, the EU worker must complete at least four weeks employment in Finland. Nor is it clear how long the person retains the status of work-seeker. Further a benefit to pay for travel costs to a job interview for the unemployed is limited to *Finland*.

In *France*, the way in which rules relating to self employment operate with the social security contribution system, mean that individuals who are not actually exercising an economic activity may end up paying the same contributions as those who are.

In *Hungary* a troubling issue has arisen where municipal authorities are refusing to register EU citizens moving to the region in their population registers, mainly on grounds of a lack of minimum human residence criteria. More and more municipalities determine by way of a local decree the minimal criteria of "human residence conditions" for registration as resident with reference on environment protection, hygienic or tourism interests. If newcomer cannot demonstrate that they meet these requirements, the local clerk refuses registration. Although neither the Act on Inhabitants' Address Registry nor the Act on Local self-governments (Act LXV of 1990) entitles municipals to regulate address registration this situation has become spread. A number of complaints have been forwarded to the Ombudsman (mainly from Roma). Judicial review is also appearing. This appears to be an exclusionary technique to deprive mainly Romanians of access to the population register. Complaints have been made to the Ombudsman. The issue of vehicle registration is also an issue in *Portugal* (see below under frontier workers). In *Ireland* the habitual residence test continues to cause difficulties for EU citizens. This test is applied to determine eligibility for social benefits on the basis of an assessment of the 'real' home of the individual. Irish nationals returning to Ireland after losing their employment

elsewhere in the EU are regularly being refused access to benefits on the basis of this test. The Commission has begun proceedings against the UK in respect of their equivalent provision. In *Italy,* access to civil service, the alternative to the now abolished military service, is limited to Italian nationals. A variety of competitions for access to benefits are also limited to Italian nationals (eg the postal services' sale of flats). Access to housing on the basis of equal treatment continues to be a problem for EU workers in Italy. Where there is no direct discrimination, one often encounters indirect discrimination in the form of very long (five years or more) residence requirements for eligibility. There may also be issues of indirect discrimination regarding tax on immovable property which is categorized as a second home in particular as regards the deductions which can be taken into account against the tax assessed.

In *Luxembourg* problems are still arising regarding recognition of diplomas. A case was brought before the Ombudsman about a Romanian with physiotherapy qualifications where the relevant body refused to recognize the qualification making it impossible for the individual to obtain an internship necessary for completion of the national registration requirements.

The *Maltese* permanent derogation relating to the purchase of immovable property continues to create friction. There is a requirement of five years residence within the territory before an EU national may purchase property in *Malta*. There is an ongoing problem regarding the recognition of teaching experience obtained outside Malta and elsewhere in the EU by teachers seeking employment in the state. Notwithstanding a spirited defence of its position in the face of Commission criticism resulting from CJEU jurisprudence, the Maltese authorities were taking steps to bring their legislation into conformity. On the more positive front, the legislation has now been changed to permit EU nationals to exercise the profession of notary in the country though they are subject to language requirements and need a warrant.

A Dutch legislative proposal to make knowledge of the Dutch language a requirement for social assistance and compulsory adult education has caused some concern in the *Netherlands.* The Commission has intervened requesting clarification regarding EU citizens. The bill is still pending. A national court found that neither EU citizens nor Turkish nationals could be required to participate in integration courses or pass integration exams. In response, the authorities have proposed a compulsory adult education applicable only to (but to all) non Dutch nationals living in the *Netherlands*.

There is encouraging information from *Poland*. There has been a substantial improvement in the ability of Polish authorities to work in foreign languages where their positions require them to deal with EU citizens. Information leaflets have been produced in some languages to explain the Polish system for those who do not speak Polish. There has been some political concern expressed in the *Swedish* parliament about the potential link between circular mobility within the EU and social dumping. The parliament criticized the 2012 initiative of the Commission on mobility. There has been some political concern expressed in the *Swedish* parliament about the potential link between circular mobility within the EU and social dumping. The parliament criticized the 2012 initiative of the Commission on mobility.[188]

[188] Utlåtande 2011/12:AU14 Subsidaritetsprövning av förslag till Monti II-förordning.

In *Cyprus* and the *UK* border controls with the other Member States (other than Ireland) continue to be an important obstacle. In Cyprus the problem is access to the whole of the territory of the Island which remains problematic. The doctrine about this division of the territory is extensive and raises fundamental issues for the EU and Cyprus. In the *UK* a recent official report criticizes the operation of border controls with other Member States and press reports of chaos at airport immigration desks have been raised in Parliament in Spring 2012.

Chapter VI Specific Issues

Frontier Workers

Two issues arose consistently regarding frontier workers the 2011 reports: treatment of wages for tax purposes and eligibility for social benefits. Regarding both issues, one development has been towards the settlement of bilateral agreements among Member States to resolve aspects of these issues. This approach has been adopted by *Austria* and *Germany* regarding access to unemployment benefits to resolve the issues between their countries.
Alternatively, as in *Estonia and Slovenia,* there is no specific legislation on frontier workers as they are not recognized as an important category. In *Romania* the existing legislation on frontier workers only applies to third country nationals. In *Finland* there are some questions but because of the dense web of treaties among the Nordic countries no issues arise. The information on Estonia and Finland is interesting as there are substantial numbers of frontier workers who work in Finland but live in Estonia. These two countries are not linked by the Nordic web of agreements, cooperation between Finland and Estonia in the field of social security is very active.

Yet problems have yet to emerge as legal issues.

In *Sweden*, the importance of frontier workers in the region is particularly evident as at least 40,000 people commute daily or weekly across EU borders for work. There is a substantial information infrastructure to assist these workers. Specific attention has been paid to the Malmo-Copenhagen region where there has been an increase in cross border working the state objective has been to assist with practical information on state obligations and benefits etc. A cross border forum has been established in the Nordic Council to resolve outstanding questions which generally relate to social security matters.

Double taxation agreements are increasingly used to resolve tax problems for frontier workers, such as between *Austria, Germany, Hungary, Slovenia*[189] and *Switzerland*. Such agreements generally provide for tax liability in the country of residence rather than work. The situation for frontier workers on the French Belgian borders is particularly unsatisfactory. French fiscal obligations are applied both to those workers who work in *France* but reside in *Belgium* and those who reside in *France* and work in *Belgium*. An agreement will gradually phase out the French taxation of workers who work in *Belgium* and reside in France by 2033. Those who receive public law salaries are in an even worse situation though at least an agreement has diminished some of the most pernicious consequences of double taxation. Researchers and academics seem to be particularly affected. In *Denmark* tax treatment of frontier workers causes friction. A modification to the legislation provides that where the workers earn at least 75% of his or her global income in Denmark (subject to conditions) he or she may choose to deduct expenses there for the purposes of tax relief. The provisions also apply in such a way that frontier workers may fall under national withholding tax rules as well. The Danish authorities do not consider that the CJEU judgment in *Hartmann* affects frontier workers residing in Denmark and working in their home state. For the purpose of residence rights, such persons, under Danish law, must be self sufficient. In the *Netherlands*, the authorities have announced that in accordance with the CJEU decision in *Renneberg* frontier workers can now offset mortgage interest on a property owned outside the

[189] See also the information regarding tax advantages in Chapter IV.

Netherlands against Dutch tax liabilities so long as they earn at least 90% of their income in the Netherlands In *Spain*, a bilateral agreement between the region of Navarra and France permits mutual recognition of the status of frontier worker. In *Sweden* a new bilateral tax agreement has been signed with Denmark. The Swedish authorities consider that they probably lose in the region of €50,000,000 (including tax revenue and social costs) per year as a result of frontier workers working in Denmark and living in Sweden. The *UK* has now entered into double taxation agreements with all other EU states (the UK Hungary agreement came into force in 2011).

Regarding the second issue, in *Bulgaria* an application for social benefits must be submitted at the place of permanent residence. Although an issue arose whether a third country family member of a Bulgarian had a permanent address in the country, the Bulgarian court unanimously rejected, on the basis of Directive 2004/38, the state authorities' arguments. The very limited numbers of frontier works in the country means that few problems surface. The abolition of transitional arrangements in *Greece* as regards Bulgarians has raised the issue of frontier workers though no specific problems have yet surfaced as legal problems. There are no rules other than the EU ones nor bilateral agreements. Social benefits in the form of some types of public pensions are residence based only. The situation in *Germany* is straight forward – residence determines access to social benefits with only very limited exceptions. This includes any entitlement to job seekers allowance as determined by the Federal Social Court. There is a substantial rise in *Hungarian* frontier workers working in Austria but this movement is limited to frontier zones. As a legal term, frontier work only appears in Hungarian social law, nowhere else. In *Ireland* the density of economic activity in the north bordering on Northern Ireland leads to many issues around the treatment of frontier workers. Normally, persons resident in Ireland but working in the UK are considered to be habitually resident in Ireland. Those who live in Northern Ireland and work in the Republic are not so resident in Ireland subject hover to the overarching provisions of EU law. The *Hartmann* and *Geven* CJEU judgments are particularly relevant here. According to officials, however, few cases have actually arisen and they have all been resolved on the basis of a flexible approach to national benefits rules. In *Italy* residence requirements for access to social benefits may result in discrimination against frontier workers. In *Lithuania* national legislation has been amended to bring it into line with Regulations 883/2004 and 492/2011 so that frontier workers and their family members can received a range of social benefits if resident there. The *Hartmann* problem does not arise there as child benefits are paid on the basis of employment not residence. However if the parents work in different countries then the benefit is paid in the country of residence. More complex rules apply where the parents are working outside the country but the child is resident in it. In practice issues arise between *Lithuania* and *Poland* where there is substantial cross border activity but it is not clear that much of it is captured by state practices and regulation. As a result concerns about fraud and abuse exist. In the *Netherlands,* legislation does not permit frontier workers working in the country access to additional social assistance benefits. The Commission is pursuing this discriminatory treatment with the authorities.
In *Luxembourg* a national court handed down an important decision on the rights of frontier workers, but also relevant to job seekers. According to the decision, the individual was not required to have completed four weeks on the unemployment register in the country of origin before becoming entitled to a job seekers benefit in Luxembourg. In another court decision, a third country national family member of an EU frontier worker succeeded in obtaining a family benefit because the requirement of the authorities that this was only available on

presentation of a residence card did not correctly apply EU law according to which such cards are declaratory only. However, there are substantial issues regarding access to study grants for frontier workers and their family members as a result of the 2010 reforms. Those who work in the country but live elsewhere no longer receive study assistance for their children in higher education (over the age of 18) as these children are now classified as independent and as they are not resident in Luxembourg are no longer eligible (notwithstanding the fact that their parents pay tax and social contributions in Luxembourg). Substantial numbers of appeals were submitted against these assessment of ineligibility. In a decision on four cases (but affecting 600 others), because of the issue of indirect discrimination contrary to Article 7 Regulation 492/2011, the national court has made a reference to the CJEU. There are important similarities with the case C-542/09 *Commission v Netherlands* (decided against the Netherlands on 14 June 2012) and the Commission has renewed its efforts to bring the Luxembourg authorities into compliance. The national ombudsman has received many complaints regarding the treatment of these children of frontier workers. In *Poland* social benefits related to child birth are residence related. A new social assistance law may affect frontier workers – the main criteria for eligibility is income and applies also to EU citizens who reside in Poland on the basis of permanent residence. A national court held that short and defined-length absences for the purpose of education from the territory do not have the effect of breaking the link of an EU citizen with Poland for the purposes of eligibility to social benefits. In the *UK* the main issue regarding frontier workers is with Ireland and it seems that most issues about social benefits are resolved between the authorities (see above). In *Cyprus* and *Romania* no problems have been notified on access to social benefits for these workers.

Issues of discrimination arise in a slightly different context in *Latvia* where access to education is dependent on possession of a residence certificate (or card). This can create problems in particular for third country national family members of EU frontier workers. Similarly access to grants and loans depends on possession of this documentation.

In *Portugal* the problem has been a law which prohibits the use of a foreign registered car in Portugal for professional activities. This law was amended to allow car registered in adjacent areas (ie Spain). 'Adjacent' was first clarified as meaning within a 60 km area of the border. Then as that clarification created problems as well the 60 km limit has now been lifted and the exception applies to all cross border workers.

Sportsmen and women

The complexity of the legal frameworks across the Member States which apply to different sporting activities continues to cloud any picture of the free movement of worker as sportspersons. In this regard there has been little change in 2011. For instance, in *Austria*, there were no legal rules on sporting frameworks either on the Federal or Laender level. This is also the case in *Estonia.* In *Italy*, by contrast, distinctions are made among players not on the basis of nationality but on the basis of where they trained. This can also give rise to questions. Again, in *Latvia* the organization of sporting activities is generally left to the clubs with little state intervention, even in professional sports.

Two on-going issues in a number of sports are: transfer fees and other discriminatory fees for the movement of players and nationality quotas. As regards the first issue, in Belgium there appear to be transfer fees payable in a number of sports including volleyball. In *Bulgaria* there are discriminatory levies on EU national players in basketball. A possible equivalent of transfer fees in *Denmark* are classified as training or solidarity compensation in football and basketball. There is a fixed fee for transfer in Danish volleyball and an education compensation in handball which can be as high as €24,000. In *Hungary* a relatively new sponsorship programme is assisting amateur sports with the reallocation of real estate. It does not appear to constitute a problem as regards unlawful support. Also in *Hungary* there seems to be an issue around the consent of stakeholders to the transfer of players in a variety of games. This seems to result in the transfer of money. The problems described in depth in the 2010 report in *Italy* are still occurring in football, basketball, volleyball, handball and rugby. In *Latvia* there are discriminatory transfer fees in ice-hockey depending on the nationality of the player. In *Latvia* football participation fees depend on the number of foreign players with an ascending scale the larger the number of non-Latvian players per club. Similarly there are substantial fees on transfer in basketball on a rising scale as well based on overall numbers. But for the rather limited scale of Latvian volleyball, there would be problems in practice with the transfer fee rules. In *Lithuania* potential transfer fee equivalents occur in basketball in the form of training fees which are substantial and differential if the players are not Lithuanian. There are also very substantial transfer fees in place. In *Portugal* differential and disadvantageous registration fees apply depending on whether the transfer is international or national in football. A specific case of a German child raised much media interest. Similar practices are current in volleyball and handball. In *Sweden* reimbursement of training costs forms part of the transfer arrangements in football with a very substantial hike in the costs as players become adults.

As regards the second issue of quotas, in *Belgium* there is a practice of requiring a new player to produce a 'no objection' certificate from the home federation in hockey. In *Bulgaria* while there has been a change in the volleyball rules on quotas this has been to make them even more exclusive and there is no exception for nationals of other Member States unless they have permanent residence. Similarly, there are quotas on EU nationals (other than Bulgarians) in basketball. There are also problems in ice hockey in *Bulgaria* where only Bulgarians or foreigners with permanent residence may compete with no exception for EU nationals. Previously, in *Cyprus* regarding amateur EU football players, the possession of the Certificate of Registration, according to the Free Movement and Residence of Nationals of the European Union Member States and their Family Members, Law 2007-2013, used to be a requirement for the Cyprus Football Association. Currently this requirement does no longer apply. In

Denmark the system of quotas for home grown players in football continues. In *Denmark* there are proposals to introduce quotas in handball. These still exist in ice-hockey there. In *Finland* there is an informal quota system in basketball and a formal one in volleyball. But in ice-hockey the quotas have been abolished. And none exist for EU nationals in football. There are some quota issues in basketball and volleyball in *Greece* particularly in amateur sports. In *Italy* in ice-hockey, the categorization of players into A and B groups in respect of which quotas apply results in discrimination against EU workers. Also in *Latvia* there appears to be discriminatory quotas in ice-hockey in place because of the dominance of the Russian based Continental Ice-Hockey League's rules. Football rules there also include quotas. In *Lithuania* there are existing problems of quotas on non-national players in football and basketball. In *Malta* there are ongoing quotas in football based on the 'home grown' rule. Although water-polo has been the subject of concern, the Commission has approved the Maltese rules in this sport. The rules of the basketball authority are being changed to permit more EU national players to compete. Here again, intervention by the Commission was needed. In the *Netherlands* there are still quotas in basketball and baseball. In *Poland* there are still quotas on foreigner players in volleyball, basketball and ice-hockey (and rugby but this is not a popular sport in Poland). In *Portugal* a quota was abolished in women's basketball. But the locally trained quota is still applicable in football. In *Portugal* while there are no quotas in football there are still some in ice-hockey, volleyball, basketball and handball. In *Romania* there are nationality quotas regarding membership of managing boards of federations and other structures. In *Spain* quotas are still in existence in handball and volleyball. Quotas apply in some areas of basketball in the *UK* while home grown requirements carry out a similar role in football. In rugby there are quotas which affect EU citizens.

A less prominent third issue relates to residence requirements. These arise in *Denmark* where there is a two year residence requirement for some volleyball tournaments. In *Germany* there have been no changes since last year. Discrimination against EU nationals is fairly straight forward as regards the job of coach in most sports in *Greece* where this is reserved for nationals of the state. When it comes to football coaches, the permission of the General Secretary for Sport is needed before a non Greek can be employed.

Maritime Sector

Fortunately over the past five years there has been a gradual improvement in the treatment of EU workers in the maritime sector as regards nationality discrimination. Now there are few Member States where there is still direct discrimination. Among those where this does *not* exist are *Austria, Belgium, Cyprus, Estonia, Germany* and *Hungary. Bulgaria* has changed its law to permit EU nationals to be captains and chief engineers on ships.

Access to Posts:
In *Denmark* there is on-going concern among trade unions regarding a court judgment which found against Polish seafarers who had claimed discrimination on grounds of nationality. While formal discrimination is prohibited between seafarers of EU nationality in *Finland*, in practice there are still problems. However, the relative weakness of the workers has been an obstacle to claims for rights. In *Greece* while there is no discrimination on the basis of nationality there are some questions about the level of language knowledge which is required. A new law in *Italy* brings an end to discrimination against EU workers seeking posts as captains and chief mates of ships flying the Italian flag. There

is, however, an important language requirement. Similarly in *Latvia* while there is no nationality requirement there is a consideration language one. In *Lithuania* the nationality requirements have now finally been relaxed but as in respect of other countries in this category, language requirements are substantial. In *Romania* there is no nationality discrimination for captains.

Tax and Working Conditions:
In *Greece* the 2010 levy on passengers on ships flying the flags of other states is reduced by 20% where the number of Greek seafarers exceeds one per cent of the crew. An aid scheme which rebates social contributions made by employers for seafarers in *Ireland* to assist the maritime sector will be prolonged until the end of 2016. This concession, agreed by the Commission, came about after a particularly problematic period of turmoil in the sector with much reflagging and job loss taking place in 2005. In *Lithuania* an issue arises regarding taxation of seafarers. While those working on Lithuanian flagged ships are not subject to income tax, those working on ships flying the flag of any other state are at a rate of 15%. While there has been Parliamentary debate on the subject and Commission interest in it, the problem has yet to be resolved. A parallel discrimination applies to health charge levies on income which are collected from those working on Lithuanian flagged ships (not on other ships). For workers in Lithuanian this levy is charged to the employer not the worker.

Seafarers' organizations are concerned about the conditions under which Lithuanian workers are required to work on ships flagged in other Member States. It seems there are few direct complaints but the organizations have ascertained that their workers are treated as third country national workers as regards working conditions and pay on ships flagged in Norway and Germany. There is a new maritime code in *Poland* which does not discriminate against EU workers. In *Portugal* there is a legal requirement to provide equal treatment on flag bearing ships for workers of Portuguese and other nationalities.

In *Portugal* the issue of wages and conditions in the maritime sector has been the subject of bilateral agreements with three non EU countries (Australia, Israel and Korea). In *Sweden* the arrangements of collective agreements provide equal treatment for EU workers though there are issues about the terms on which foreign contractors operate. Sweden ratified the ILO maritime labour convention in 2012. In the *UK* differential rules on wages and working conditions which disadvantage EU citizens (other than British nationals) have been a bone of contention. This problem appears to have been resolved by new regulations in 2012.

Researchers and Artists

The problems which researchers and artists encounter tend to revolve around access to types of grants for researchers and treatment for tax purposes for artists. One problematic issue is the application of withholding taxes on fees and income paid to artists (and researchers) who perform on an irregular basis in a Member state other than where they live. Depending on the income of the artists or researcher, the tax amount withheld in the country of performance may exceed the tax liability in the individual's home state. In such circumstances, double taxation agreements which permit the offsetting of tax paid in one Member State for the purposes of calculation of liability in another may not necessarily compensate for the income loss caused by the tax withheld. Similarly, expenses related to the performance/activity in the second Member State may not be deductible from the assessment of taxable income in the home state. In *Austria* there are no nationality qualifications for grants for researchers and no problems notified. A law in *Belgium* that only companies with a headquarter in *Belgium* could have access to financial aid from the French Community has been liberalized but the counterpart from the Flemish Community so far retains just such a restriction. *Bulgarian* law has been amended to bring greater equality to Bulgarian and other EU national artists. In *Cyprus* the sector has been expanding rapidly but problems have not yet emerged regarding discrimination. In *Estonia* a new agreement permits students of medicine to be classified as employees by their hospitals. The status of researchers in *Finland* is clear: if they are affiliated to a Finnish institution they are workers, if the affiliation is with a foreign institution they are treated as posted workers. There is no special legal status for researchers or artists in *Greece*. In *Latvia* academics must have their non-Latvian qualifications recognized by the Latvian authorities (a procedure which takes two weeks) before they can be considered for the purposes of employment. In *Lithuania* while there do not appear to be legislative obstacles, there does seem to be a certain pattern that EU workers only come for very short periods – a few days or weeks. The practice of privileging academics with pervious work experience at institutions is also may constitute an informal barrier.

In *Hungary* a special taxation regime is available for artists and musicians (and also sportsmen) of all types so long as they make less than €90,000 per annum from their artistic activities. The scheme is open to all EU citizens and their family members. The scheme applies a low rate of tax and social contributions but still guarantees acceptable levels of benefits. In Denmark for artists the main issue is the application of the Danish Withholding Tax rules. This seems to be a common issue which is not always clearly articulated. In *Ireland* a tax scheme of substantial benefit to artists based in the country clearly discriminates on the basis of residence. The Commission has recommended that it be discontinued as a result of the discriminatory effects. Since 2011, the tax regime for artists has been substantially changed to increase considerable tax rates and the way in which taxes are collected from this category. For artists receiving income from outside the country the tax regime is only marginally modified to take into account withheld tax from source. Notwithstanding a number of double taxation agreements, the problem *Lithuanians* have is once again being able to produce evidence in a form acceptable to the national tax authorities that they have indeed paid tax in the country of source of income. At the same time a bill has been proposed to reduce the administrative requirements for artists to obtain access to social benefits however the proposal appears to have vanished and in any event it is unclear whether it would have applied to EU workers who are not

also Lithuanian. There is no withholding tax applicable on artists in the *Netherlands* so long as there is a bilateral agreement. The general problem which has been identified is between subsidized artists and commercial ones and differentiating correctly between the tax treatment appropriate to each. No problems were notified in *Romania*. In *Sweden*, an amendment to legislation on the taxation of artists means that a foreign sportsperson can opt to pay tax in Sweden and then claim against the liability costs incurred (this was in response to the *Renneberg* judgment). The tax treatment of artists and researchers depends on a wide variety of factors, first being the length of time which the individual is present in the country and where the income is paid. Artists paid in the UK are subject to a withholding tax of 20% equivalent to the basic rate of tax. This is calculated on the gross income. It is possible to seek official approval for a lower tax rate to apply which would correspond to the artists final liability on payment deducted (a reduced payment application).

Access to Study Grants

Two types of situation arise both of which raise questions regarding the correct implementing of free movement of workers. The first relates to access by EU workers from a state other than that of his or her underlying nationality to study grants in the host Member State and the second is where students seek to export their study grants where they wish to study elsewhere in the Union. As regards the first situation, in *Austria* there is no problem – students are entitled to Austrian study grants when studying in *Austria* and there is no residence requirement. However, in *Belgium* (French Community) students only have access to study grants where they reside in the country and one of their parents has been employed there. In the Flemish Community the conditions are even stricter as the EU national must have worked there for two years and on 31 December of the relevant academic year have worked for at least 12 months for at least 32 hours per month. Access to study grants and student maintenance grants in *Cyprus* are based on residence not nationality for EU citizens. There are income level requirements applied. In *Denmark* the law has not been changed which requires Danish nationality for anyone claiming state educational support.[190] As for students not being Danish citizens, these may be given a status equal to that of Danish citizens on conditions following from the Danish rules.[191] EU nationals who are not workers or self employed must complete five years residence and permanent residence before they qualify.[192] In 2012 a question was posed to the CJEU regarding the practices. Further there is follow up to a report by the Danish Ombudsman last year on worrying practices in education grants and their export. The CJEU judgment of 14 June 2012 in *Commission v Netherlands* is likely to require a further consideration of the rules. In *Germany* regarding the first issue, unless the EU national is a worker, he or she will have to acquire permanent residence to become eligible to study grants. However, in a recent Administrative Appeal Court in North Rhine, Italian nationals who had lived for more than ten years in the country but did not qualify for EU residence certificates according to the authorities were denied study finance as they were not entitled to equal treatment. In *Hungary* all EU nationals are eligible for scholarships if attending vocational schools. University education is open to EU/EEA citizens and loans (for maintenance and fees as

[190] Cf. *SU-loven* ('Act on Study Grants'), Consolidation Act No. 661 of 29 June 2009 Section 2 (1) (1), referring to Section 2a (1).
[191] Cf. *SU-bekendtgørelsen* ('Executive Order on Study Grants'), Executive Order No. 1269 of 17 December 2012, Section 66.
[192] *Act on Study Grants* Section 2a (2) – (3) and *Executive Order on Study Grants* Section 67.

well) are available for all EU/EEA citizens studying at Hungarian higher education institutions, who are having a residence (over 3 months) in the country. In the *Netherlands* a national court found that the right to a study grant for the child of an EU worker ended when the parent no longer had the status of worker in EU law. The case is being appealed.

In *Ireland* there is a differential fee level for university education which for EU citizens depends on a residence requirement anywhere in the EU of three years out of the five preceding the commencement of the studies. The same criteria apply to eligibility for the newly created Student Universal Support scheme. In *Lithuania* EU workers are eligible for study grants on the same basis as Lithuanians but the treatment of their third country family members is not equal. While previously EU workers and their family members had to have obtained permanent residence before being eligible for national study grants available for those with limited means, this has now been changed and the problematic limitation removed. Study grants and loan legislation is closely linked. In *Luxembourg* the substantial changes to study financing introduced in 2010 are now apparent in practice. See above under frontier workers for further information. In the *Netherlands* EU workers have equal access to study grants with own nationals. Any student who works at least 32 hours a month is considered a worker rather than a student according to national legislation though this threshold will rise to 56 hours a month from 1 January 2013.

In *Greece,* the state scholarship foundation only provides study grants to Greek nationals. The Ombudsman has raised concerns about discrimination against EU nationals and long term resident third country nationals. In *Italy* and *Latvia* third country national family members of EU workers are excluded from eligibility for study grants. In *Finland*, so long as the EU national is residing for a purpose other than study and they have received a registration certificate they are eligible for study finance. In *Poland* there is non-discriminatory access to study grants for EU citizens as long as they have permanent residence. This includes their family members. Special provision is made for EU workers but the economically inactive before acquiring citizenship have now been excluded for certain social benefits. However, the nationality limitation which previously applied regarding student grants and loans has been removed. In *Portugal* there are two types of grant: study grants and social study grants. As regards social study grants for studies abroad, EU citizens are only entitled to apply if they hold permanent residence. There does not appear to be any exception for the children of EU workers. In *Slovakia* access to study grants is premised on holding permanent residence, but the residence of EU/EEA citizens and their family members is considered as permanent residence. In *Sweden* once an EU citizen has permanent residence he or she is entitled to equal treatment in access to study grants. Special arrangements are made for visiting scholars. There are no tuition fees for foreign students. There is a continuing issue regarding the definition of family members for the purposes of study grants. However, concerning higher education for students that are third-country nationals fees for the admission to university education has been introduced from July 1, 2011.[193] In national legislation this is correlated to Directive 2004/38 – under 21 or dependent children - which does not take into account fully the CJEU jurisprudence in *Teixeira* on Regulation 492/2011. A public investigation is currently examining the situation and will report its findings by the end of June 2013. In the *UK* a three year waiting period before access to home student tuition fees and study grants applies.

[193] The Riksdag's standing committee for education (Utbildningsutskottet) 2009/10:15.

A related but different problem arises in Belgium where quotas apply to non-resident students who seek to follow courses in certain subjects. While this has been limited to physiotherapy and veterinary studies there is a political project to extend the quotas to medical studies and dentistry.

As regards the second type of problem, while *Austria* does provide a study abroad grant which is available to enrolled student seeking to go abroad for more than three months, its mobility grant is perhaps a cause of concern. To be eligible the student must have an Austrian higher education entrance qualification and have lived in Austria for more than five years before commencing studies. These two rules may not be consistent with the CJEU jurisprudence.[194] The only national jurisprudence predates the establishment of the mobility allowance and is very restrictive regarding the export of study finance to complete studies abroad. For the purposes of export, in *Finland* EU citizens and their family members need to have resided before the start of studies for a minimum of two years during the preceding five in a home municipality. In *Germany* an Administrative Court in Karlsruhe found that a study grant to support a continuing study program abroad which was premised on three years residence after commencing studies amounts to discrimination and sought a reference from the CJEU. A student loan scheme is in effect in *Hungary* which provides some support for students (free use loans) studying elsewhere in the EEA but it is available only for Hungarian students. In *Italy* grants for studying at post graduate level abroad are only available for Italian nationals. In the *Netherlands*, students are allows to export their study grants so long as they have been legally resident in the Netherlands for three years out of the preceding six (before the start of studies). This rule has now been struck down by the CJEU in C-542/09 *Commission v Netherlands* on 14 June 2012. Frontier workers were particularly affected by the rule. In *Portugal*, in respect of the export of study grants, EU citizens are eligible to apply if they hold permanent residence. In *Romania* there are few EU citizens at universities. No problems were notified. The *UK* has not implemented the right for students to export their study grants yet.

Young workers

A number of Belgian activation measures require a young person to have completed six years study at an authorized Belgian educational institution in order to be eligible. A new program in *Bulgaria* to improve youth employment does not discriminate on the basis of EU nationality. In *Cyprus* no issues were drawn to our attention. In *Denmark,* a young worker who is still a minor and seeks a registration certification must produce evidence of the nature of the work; with whom he or she will live in Denmark; a statement of income and expense in connection with private accommodation and an original declaration of consent from the person(s) having parental rights and responsibilities.

Employment stimulation programmes in *Finland* which neutral regarding citizenship on the surface often include indirect discrimination as the criteria often mean that the young worker must already have a strong base in the country. Measures to stimulate employment in *Greece* do not discriminate on the basis of nationality or residence. The same is the case in *Hungary* but as in the case of *Greece* there seem to be very few individuals in these categories. A new social benefit in *Ireland* designed to assist young people who are unemployed is

[194] C-542/09 *Commission v Netherlands.*

neutral as regards nationality criteria. However, some of the qualifying criteria will be substantially easier for young people who have been living in the state to fulfill than for those who may have recently arrived.

In *Latvia* adolescent workers may only work (subject to limitations on numbers of hours and specific pay scales) where both parents have registration certificates or permanent registration certificates (where EU workers).

In *Lithuania*, national concerns about youth unemployment have resulted in a number of new initiatives to tackle the problem. In principle these programmes are open to EU citizens as well but there are language requirements. Further as EU nationals are required to obtain residence certificates after 90 days and as these are only available to EU nationals who have a fixed address (as evidenced only in specific ways), EU citizens who are not Lithuanian are substantially disadvantaged. A specific issue relates to agricultural land. The authorities have established a particular program to assist young people to take up farming. However, the limitation on purchase of farm land which applied under the transitional arrangements until 1 May 2011 has not been entirely lifted and the authorities are seeking the Commission's approval to extend it. The assistance for young farmers is dependent on ownership of a minimum amount of arable land.

In *Poland* a number of employment initiatives have been established for young people. These have taken the form of diminished social contributions for people under certain ages and are not limited on the basis of nationality. In *Portugal* the rules on young workers are related to their protection and do not differentiate on the basis of nationality. In *Sweden* on account of relatively high youth unemployment three specific measures to boost employment among this group are in place. They are all open to all EU citizens fulfilling the criteria which include being registered as a job-seeker at an unemployment office. An alternative strategy to address unemployment benefits to unemployed persons is to give tax reliefs to employers who employ unemployed persons.[195]

Conclusions

There are still outstanding issues regarding frontier workers which seem difficult to resolve. Tax treatment and social benefits eligibility are the most common. Notwithstanding the CJEU's judgments in *Hartmann* and *Geven* there is still a need for clarification. In the field of sportsmen and women, while there seems to be fewer problems with quotas in football, basketball and handball remain sports where quotas a commonly applied against EU citizens who are not nationals of the state. Transfer fees also remain common while question arise about some types of training fees. Good progress has been made in the maritime sector in abolishing nationality discrimination against non national captains and officers on EU flagged ships. Equal treatment in working conditions, however, continues to be a concern in some Member States. As regards researchers and artists, again tax treatment is emerging as an area of concern. Particularly for those artists who do not command high fees or are subsidized by their home state, withholding taxes seem to act against a level playing field for these EU citizens. Access to study grants remains rather patchy. While there appears to be a

[195] This is the case concerning the measure *Nystartjobb,* i.e. tax relief for the employer for employing persons who at the beginning of the year is 20–26 years of age and have been unemployed for at least six months (might also be granted for persons being 26 years or older, and have been looking for work for at least 12 months). See Ordinance Förordning (2006:1481) om stöd för nystartsjobb.

general acceptance and transposition that EU citizens are entitled to equal treatment in access to these grants once they have acquired permanent residence, the treatment to which the children of EU workers are entitled under Regulation 492/2011 seems to be less clearly and uniformly applied. The implementation of the right to export of study grants is still very uneven, which is not surprising in light of the very recent judgment of the CJEU in *Commission v Netherlands*.

Chapter VII Application of transitional measures

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

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 EU-15 Member States. By 2009 the transitional measures were abolished by all EU-15 Member States with the exception of *Austria, Germany* and *the United Kingdom*. The expiry of the transitional period on 1 May 2011 meant that *Austria* and *Germany* had to grant full access to their labour market to EU-8 workers. The following information was provided by the *Maltese* and *UK* rapporteurs.

The transitional arrangements negotiated by *Malta* prior to its accession to protect its labour market and which applied to workers from all EU-Member States ended in April 2011. The current position for Malta is that it may still seek a remedy when there is a disproportionate influx of EU-workers, albeit it through the EU-institutions rather than unilaterally. These arrangements are confirmed by a Joint Declaration between Malta and the European Union annexed to the Final Act to the Accession Treaty.[196] The rapporteurs notes that they resemble the position accorded to Austria when it acceded to the EU in 1995.

The *United Kingdom*, that had required workers from EU-8 Member States to register each employment relationship within one month, repealed the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004 No. 1219) when the transitional period expired on 30 April 2011.[197] The 2011 Regulations now include provisions concerning the status to be given to periods of residence by EU-8 nationals prior to 1 May 2011 which apply to EU-8 workers who on 30 April 2011 remained subject to the requirement to register each employment.

I Continuity as a worker or self-employed person: periods of inactivity (implementation of Article 7(3) Directive 2004/38/EC and 2006 Regulations, Regulation 6(2))

The new Regulation 7A(4) provides for the retention of the status of worker by *an EU-8 worker subject to a requirement to register*[198] during temporary periods of inactivity if one of two conditions is met:

- the one-month period that person was allowed to register an employment under the former Workers Registration Scheme covered the date 30 April 2011; or,
- the period of inactivity began on or after 1 May 2011.

The implication of these rules is that, in other circumstances, inactive EU-8 nationals do not have a right of residence as worker for periods of inactivity which began before 1 May 2011 and means that they are excluded from social assistance. The rapporteurs express their doubts whether it was ever compatible with the Citizens Directive to deny EU-8 nationals the right to retain their worker status for a period of inactivity which began before 1 May 2011.

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196 See also: Article 5(7) of the Maltese Immigration rules (LN205/2004).

197 Repealed by: SI 2004 No. 1219.

198 There is no attempt to deny accession nationals who were self-employed the benefit of Article 7(3) for periods of inactivity which began prior to 1 May 2011.

II.Duly recorded periods of unemployment counting towards permanent residence of former workers and self-employed (implementation of Article 17 Directive 2004/38/EC[199] and 2006 Regulations, Regulation 15)

The new Regulation 7A(3) provides that, for EU-8 workers subject to a requirement to register, periods of duly recorded involuntary unemployment count *only* if one of two conditions is met:
- the period of duly recorded unemployment was within the one-month period given to EU-8 workers to register an employment under the former Workers Registration Scheme; or,
- "the unemployment began on or after" 1 May 2011.

The rapporteurs point out that the exclusion of periods of unemployment of EU-8 nationals, which began before 1 May 2011, appears questionable under EU-law. In *Ziolkowski*,[200] the Court of Justice held that EU-citizens may count pre-accession periods of lawful residence towards permanent residence under Article 16 of the Citizens Directive, if the periods would have fallen within Article 7 of that Directive had they been EU-citizens at the time. By analogy, periods of lawful residence in another Member State while an EU-citizen subject to transitional measures should also count towards permanent residence under Article 17 Citizens Directive, if they were covered by Article 7 of that Directive. In particular, an EU-8 national ought to be able to count such periods if their residence was lawful during the period of inactivity – e.g. because they were covered by Article 7(3) of Directive 2004/38/EC or were a qualifying family member under that Directive.

III.Counting periods prior to 1 May 2011 towards permanent residence

The general right of permanent residence applies to persons with five years' continuous lawful residence in accordance with Article 7 of Directive 2004/38/EC.[201] The new Regulation 7A(5) provides that, *where on 30 April 2011 an EU-8 worker remained subject to the requirement to register each employment*, periods of time spent in the United Kingdom by an EU-8 national prior to 1 May 2011 count towards permanent residence in two circumstances:

- they were "legally working"; or,
- the period was within the one month allowed for registration of an employment under the former Workers Registration Scheme.

Under the 2006 Regulations, periods spent in the United Kingdom during which a person is not working, self-employed, a student or self-sufficient will count towards permanent residence if:
they are within three months of admission,
- the person was a job-seeker, or
- they are a qualifying family member (see Regulations 5, 6 and 7).

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199 It may be noted in passing that the 2006 Regulations limit the benefit of this rule to a "worker", as opposed to a self-employed person, whereas the Directive arguably requires that both categories should benefit from it.

200 CJ EU joined case C424/10 & C-425/10, *Tomasz Ziolkowski and Barbara Szeja a.O.* v. *Land Berlin*, 21 November 2011, n.y.r.

201 Article 16 Directive 2004/38/EC, as interpreted in *Ziolkowski*, and 2006 Regulations, Regulation 15.

The rapporteurs note that new Regulation 7A(5) does not appear to prevent EU-8 nationals from benefitting from those provisions for pre-1 May 2011 periods. Nevertheless, its inclusion introduces confusion, as it suggests that the two cases listed are the only circumstances in which unemployed EU-8 nationals may count time spent in the United Kingdom towards permanent residence.

Case law

The *German* report is the only one that includes case law concerning EU-8 workers. Two cases concern expulsion decisions following convictions for a criminal offence. On 1 December 2011 the Bavarian Administrative Appeal Court ruled that a Polish citizen could not rely on Article 28(2) or (3) of the Citizens Directive, as he did not qualify for permanent residence within the meaning of Article 16 of that Directive. Though resident in Germany since 1989, residence in the period 2002-2004 was irregular, i.e. without a residence permit. Following the Polish accession to the European Union, the applicant had been without work and relied on social benefits, therefore did not satisfy EU-residence conditions. On 1 June 2011 the same court upheld the decision to expel a Czech national who had been convicted for robbery. Though she had been repeatedly convicted for small crimes, i.e. theft and 'earned' her living by begging, the German rapporteurs argue that the case cannot be taken as a precedent that EU-citizens can be expelled because they have repeatedly been convicted for minor crimes, as in this case it is the conviction for robbery that justified the expulsion decision.[202] The last case was handed down by the Administrative Appeal Court of Hesse ruling that loss of protection under the EU-free movement rules places the EU-citizen within the scope of German immigration rules. This means that there is no suspensive effect of an expulsion order as the free movement rules no longer apply.[203]

Miscellaneous

The following comments were made by the *Austrian*, *Belgium*, *German*, *Hungarian* and *Dutch* rapporteurs.

Information released at a press conference on 7 May 2012 reveals that in *Austria* immigrants from the EU-8 Member States have replaced 'old' immigrants. A total of 26 000 EU-8 nationals meant an increase of € 350 million taxes and social security contributions. 40 percent of EU-8 workers are frontier workers, 60% have settled in Austria. The impact of free movement for EU-8 workers is mainly felt in eastern Austria, in particular the border regions with Slovenia, Hungary, Slovakia and the Czech Republic.

The 2010 Migration Report reveals a decrease of self-employed persons in *Belgium*. The current decrease in numbers is linked to the increase of self-employed persons, starting in 2003 (35%) and continuing until 2007-2008 (12% per year) which is explained by the restricted access of EU-8 workers to the Belgium labour market in that period.

In *Germany*, the expiration of transitional measures for EU-8 nationals proceeded smoothly. No legislative measures were required as the only thing that changed in the status of nationals from EU-8 Member States was their right

[202] Bavarian Administrative Appeal Court, 1 June 2011.10 B 10.2690, *InfAuslR* 2011, 230.
[203] Hesse Administrative Appeal Court, 18 August 2011, 10 B 821/11, *InfAuslR* 2011, 21.

to take up employment. Statistics provided by the German Federal Government reveal that extending free movement rights to EU-8 nationals has not had a substantial impact on immigration or the labour market.[204] The statistics indicate an overall increase of 44.448 entries in the period May 2010 - 2011(31.1 %).[205] The figures show a larger increase of labour immigration from EU-8 Member States than from other European countries. The end of the transitional period has lead to concerns, expressed in the literature, about irregular employment in private households and carers of the elderly. Though no work permit is required, it remains lucrative to not register employment as this means that no contributions to the social security system have to be paid.

In *Hungary*, employers still have to notify the National Tax and Customs Authority one day before they employ somebody, irrespective of their nationality. This information is only passed on to the employment office if the employee is a worker from an EEA-Member State or a family member of such a worker. The Hungarian rapporteur labels this obligation an administrative burden, as the National Tax and Customs Authority, a State organ, already possesses this information. Records have to be stored for three years by the employer.

The announcement by the party of Geert Wilders (PVV, *the Netherlands*) early 2012 to open a special website where members of the public could post their complaints about migrants from CEE countries, not only were the cause of concerns amongst the Dutch public, but also amongst the ambassadors of the EU-10 Member States in The Hague who voiced their concerns in a public declaration and during a meeting with the Dutch Minister of Foreign Affairs.[206] A further development reported for the Netherlands is the publication of a report on free movement of workers from the accession Member States in September 2011, which was requested by the Dutch Second Chamber in March 2012. The report reveals that the use of free movement of workers by accession States was underestimated by experts prior to the accession of these Member States. It is estimated that in January 2011 around 200,000 citizens from CEE-countries were employed or living in the Netherlands. The majority of EU-8 workers are Polish nationals. By 2011, 60% of the migrants who came from Poland in 2003-2009 had returned home. The report observes the exploitation, underpayment and bad housing conditions of many a CEEC-worker and recommends the improvement of registration of EU-8 and EU-2 workers, a better exchange of information on those workers between tax, social security and population registration agencies and compliance of employers with the law and collective labour agreements.[207]

A final development, which was noted by the *Hungarian* rapporteur, concerns the introduction by the Swiss authorities of a yearly quota (2000) for settlement (permanent) residence permits for EU-8 workers on 1 May 2012. Though the number of EU-8 workers employed in Switzerland is no more than 10% of all Union workers and therefore can be labelled symbolic, the effects of the quota will mean a reduction of work permits for EU-8 nationals from 6500 to 2000. The Hungarian rapporteur notes that though the agreement between Switzerland and EU allows for temporary restrictions, albeit it not of a discriminatory nature.

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204 See BT-Drs. 17/822 of 16.12.2011.

205 See table No. 3, BT-Drs. 17/822.

206 Tweede Kamer 2011-2012, 29 704, No. 137.

207 Tweede Kamer 2011-2012, 32 680, No. 4.

2. Transitional measures imposed on workers from Bulgaria and Romania

2.1 Continuation of transitional measures

Romanian and Bulgarian workers are still subject of transitional measures in *Austria, Belgium, France, Germany, Luxembourg, Malta, the Netherlands* and *the United Kingdom*. The reasons given to extend the transitional arrangements by these Member States are their concerns about the situation of their labour market. All Member States have decided to apply transitional measures until 31 December 2013. No transitional arrangements are in place in *Cyprus, the Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia* and *Sweden*. Neither *Bulgaria* nor *Romania* installed transitional measures for EU-15 or EU-8 nationals.

Though initially the *Irish* Government had decided to extend transitional measure until 31 December 2013, on 20 July 2012 it announced the end of the restrictions on Bulgarian and Romanian workers entering the Irish labour market as from 1 January 2012.[208] The following circumstances were reported to have been considered by the Government in reaching this decision:

- "A review by Government which looked at studies conducted by the [European] Commission and Forfás which concluded that subsequent to this decision the likely outlook remains for a flat or even a marginal decline in the number of Bulgarian and Romanian nationals seeking to work in Ireland;
- Bulgarian and Romanian nationals already have considerable rights of access to the Irish labour market, in particular students, and self-sufficient/self-employed people;
- The population of such nationals in Ireland is estimated to have dropped by approximately 3,000 over the last three years;
- Full and unrestricted access to the Irish labour market for Bulgarian and Romanian nationals will have to be provided in 17 months in any event, under the Treaties of Accession;
- Only 9 of the 27 other EU Member States currently retain restrictions of any sort on access to their labour markets by Bulgarian and Romanian nationals with Italy and the Czech Republic having removed restrictions from 1st January last;
- Legal advice received on the feasibility of continuing transitional arrangements;
- Arguments presented to the Government by the [European] Commission and the Bulgarian and Romanian governments for removing restrictions; and
- The importance of sustaining and maintaining positive relations with the [European] Commission and other member states at a time of political and economic flux in the European Union."[209]

Following a decision of the European Commission on 11 August 2011 *Spain* has been authorized to temporarily suspend the application of Articles 1 to 6 of Regulation (EU) No. 492/2011 of the European Parliament and of the Council on Freedom of Movement for Workers within the Union with regard to Romanian workers.[210] As result of this Decision the Spanish Government approved Instructions DGI/SGRJ/5/2011 of 22 July 2011, governing entry, stay and work

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208 http://www.djei.ie/labour/workpermits/bulgariaromania.htm.

209 http://www.enterprise.gov.ie/News/Labour_market_issues_relating_to_2005_EU_Accession_Treaty.html.

210 OJ L207/22, 12.8.2011.

in Spain for Romanian workers and their families. In April 2012 this Instruction was repealed by Instructions SGIE/1/2012 on the regime applicable to workers Romanian and their families. The latter will apply until 31 December 2012. This measure does not affect Romanian citizens who were already in Spain on 22 July 2011 and were registered with the Spanish Social Security system, or were registered as job seekers with the public employment services. These workers do not need to obtain an employment permit in order to work in Spain. De facto the Instructions operate as a legal way to force the legalization of Romanians residing in Spain, but not registered with the authorities. An evaluation of the effects of this transitional arrangement will be conducted by the government at the end of 2012. Whether these temporary arrangements will be extended, depends on the outcome of this evaluation. The following diagram reveals the legal complications which are a result of this temporary arrangement until April 12, 2012. Post April 12, 2012, Royal Decree 240/2007 applies to the spouse and children under 21 or dependent, irrespective of their nationality, of a Romanian worker entering Spain after July 22, 2011 and those who entered earlier but are not registered for Social Security or with the Office of Employment and job seeker. Non-EU family members, not covered by the previous section, of Romanian workers, who are in Spain post-July 22, 2011, fall under the Royal Decree 240/2007, unless the non-EU family member wishes to take up employment. In this case the Instructions provide that the Foreign Aliens Act 4/2000 (Article 63.4 b) to g) and the Regulation on work permits apply. The competent authorities, however, do not apply the national employment situation test when issuing a work permit (Article 63.4. of Foreign Aliens Act 4/2000).

FAMILY SITUATION	RULES APPLICABLES	CONDITIONS: PRIOR 22 JULY 2011	CONDITIONS: POST 22 JULY 2011-12 APRIL 2012.
Access to labour market regime applicable to Romanian workers' family members, who are nationals of EU/EEA States	The European rules on foreigners (RD 240/2007) apply in their entirety, regardless of the legal regime applicable to the Romanian national.	Independently of the Romanian Worker	
Access to the labour market regime applicable to Romanian family members of Romanian employees	RD 240/2007	If the family member had entered Spain prior to July 22, 2011 and remains in Spanish territory and the worker is already in Spanish territory and registered in the corresponding Social Security scheme or is registered as unemployed in the Public Employment Services that date, the family member shall be subject to the RD 240/2007.	If family members do not meet the conditions specified in the first paragraph above, the provisions of Law 4/2000 and the Regulations on work permits for others apply to the family members. However, the national employment situation is not taken into account when obtaining authorization.
Romanian family members of EU citizens and citizens of another European Economic Area State or Switzerland		If the family had entered Spain prior to July 22, 2011 and remains in Spanish territory and the worker is already in Spanish territory and registered in the corresponding Social Security scheme or is registered as unemployed in the Public Employment Services on hat date, family members shall be subject to RD 240/2007.	When family members do not meet the conditions specified in the first paragraph above, to the provisions of Law 4/2000 and the Regulations on work permits for others apply, but the national employment situation is not taken into account when obtaining authorization.

2.2 Case law

The *Austrian*, *French*, *Irish*, *Luxembourg*, *the Netherland's* and *the UK's* rapporteurs have included case law concerning the transitional measures that apply to Bulgarian and Romanian workers in their national reports.

The *Austrian, Irish* and *UK* reports include references to procedures before the Court of Justice. The *Austrian* rapporteur notes that the Court of Justice has found that the Austrian rules on the right to take up employment as a student were incompatible with EU-law when applied to Bulgarian students.[211] The second case mentioned in the Austrian report is the Court of Justice's ruling in the *Pavlov* case in which it established that the refusal to list as a trained lawyer does not amount to discriminatory working conditions.[212] The Austrian rapporteur emphasises that this decision concerns the rules in the Accession Agreement and that the case dates back to the period prior to Bulgarian's accession to the European Union.

A reference to the European Court of Justice was prepared by an *Irish* court concerning the rights to supplementary welfare allowance of Romanian citizens who have ceased to be self-employed.[213] As the matter was subsequently settled, the reference did not proceed. A similar case, Solovastru, is still pending before the Irish Supreme court.[214]

The CJ EU case reported by the *UK's* rapporteurs is an infringement proceeding that the European Commission has opened against that Member State in which it challenges the UK authority's failure to issue workers from EU-2 Member States the same residence documents during the first 12 months as workers from other Member States. According to the European Commission, EU-2 workers once issued a work permit enjoy the same right of residence as all EU workers and must therefore be issued the corresponding residence documents.[215]

Case law decided by national courts is reported from *France, Germany, Ireland, Luxembourg* and *the Netherlands*.

The *French* Administrative Court of Appeal of Marseilles ruled that the refusal to issue a residence permit to a Romanian national because she had not provided evidence that she had applied for work permission was justified. The fact that the receipt issued as evidence that she had applied for a residence permit explicitly mentioned that she was not authorised to take up paid employment did not affect the decision to refuse a residence permit.[216]

The *German* report includes references to two decisions concerning EU-2 nationals. In the first case, the Bavarian Social Appeal Court gave the same broad EU reading of

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[211] CJ EU case C-15/11, *Leopold Sommer* v *Landesgeschäftsstelle des Arbeitsmarktservice Wien*, 21 June 2012, n.y.r..

[212] CJ EU case C-101/10, *Gentcho Pavlov and Gregor Famira* v *Ausschuss der Rechtsanwaltskammer Wien*, 7 July 2012, n.y.r.

[213] The High Court Judicial Review, Rec no[2011/640jr], *Zaharia Hrisca a.O, applicants*, and *Minister for Social Protection, respondent*, 16 February 2012.

[214] The High Court Judicial Review, Rc No [1331 J.R./2012] Petru Solovastru and Aurica Solovastry, appl;icants, and the Minister for Social Protection, Social Welfare Appeals Office, the Health Service Executive, Ireland and the Attorney General, responants, 9 February 2011 [2011] IEHC 532

[215] European Commission IP/12/417.

[216] Administrative Court of Appeal of Marseilles, 3 October 2011, *Stog* v *Prefect of the Region of Provence, Alpes, Côte d'Azur and Prefect of Bouches-du-Rhône,* No. 09MA02728.

family member to the concept 'family relatives' entitled to privileged access to the labour market in the Social Code III.[217] The second case confirms that EU-2 nationals whose right of access to the labour market has been restricted under the transitional rules cannot claim equal treatment when applying for a job seekers allowance under Section 7 of Social Code II.[218] To be eligible for a job seekers allowance prior employment can be required.

The *Irish* High Court ruled that EU-2 nationals who have ceased their economical activity as a self-employed person have no right to remain in Ireland unless they are able to obtain the right to stay on another ground, for instance by applying for and being granted a work permit.[219] The rationale is that the protection afforded under Article 7 of the Citizens Directive only covers workers. Now that the transitional period has been ended, this is a problem of the past.

In August 2011 the *Luxembourg* Médiateur requested the ADEM to reconsider its decision to award full unemployment benefits. The allowance had been refused because allegedly the applicant did not possess a valid residence permit allowing her to work and, therefore, had been considered as not being available for the Luxembourg labour market by the ADEM. As the Luxembourg law only required a work permit for actual access to the labour market and the Accession Agreements themselves specify that labour market restrictions only apply during the initial twelve months of employment in that Member State, ADEM's refusal was found to have neglected the fact that the applicant had obtained two successive six-months work permits and, therefore, enjoyed an unrestricted right to take up employment. The ADEM reconsidered its decision, as requested by the *Médiateur*, and the applicant was awarded full unemployment benefits.[220]

The cases reported for *the Netherlands* concern the access to the labour market, the annulment of fines for employing EU-2 nationals without a work permit and the stand still-clause in the Annex to Article 14 of the Accession Agreements. Regarding the right of access to the labour market the Amsterdam immigration chamber ruled that access to the labour market is to be regulated through work permits during the first twelve months of employment, even if the EU-2 national has acquired the status of permanent residence.[221] In March 2012 the *Centrale Raad van Beroep* held that the refusal to register an EU-2 national as a job seeker was justified as she did not benefit from the protection offered by Regulation 492/2011 and needed a work permit to take up paid employment.[222] Two cases are reported in which the Judicial Division of the Council of State annulled a decision to impose a fine for infringement of the obligation to obtain a work permit for EU-2 workers. In the first case, the fine had been imposed for employing four Romanians as trainees. Relying on the *Vicoplus* case[223] the court ruled that a permit had been issued to employ the Romanians as trainees, who therefore were not taking up regular positions on the labour market.[224] In the second case the Judicial Division of the Council of State acknowledged the broad reading

217 Bavarian Social Appeal Court, 31 March 2011, L 10AL 43/11 B ER.

218 Social Appeals Court (LSG) North Rhine-Westphalia, 18 November 2011, L 7 AS 614.

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

220 Rapport d'Activité du Médiateur, 01.10.2010-30.09.2011, R13.

221 District Court Amsterdam 8 June 2012, No. Awb 12/13086.

222 Centrale Raad van Beroep, 16 March 2012, 10/4003 SUWI, LJN BV9903.

223 CJ EU, joined cases C-307/09 & C-308/09, *Vicoplus SC PUH, BAM Vermeer Contracting sp. zoo and Olbek* Industrial *Services sp. zoo* v *Minister van Sociale Zaken en Werkgelegenheid*, 10 February 2011, n.y.r.

224 Judicial Division of the State Council 2 May 2012, 200908210/1/V6, LJN: BW4553.

given to the concept of 'worker' used in the *Wet arbeid vreemdelingen*, but argued that this does not include every person providing services.[225]

2.3Data 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* and *Dutch* reports.

The statistics in the 2010 Migration Report for *Belgium* reveal an increasing number of work permits issued to Romanian nationals in the period 2008-2009, whereas the number of work permits issued to Bulgarian nationals stagnated in this period.

Hungary has seen a decrease of the number of EU-workers registered with the labour market centres in 2011 (11 847, down from 18 485 in 2009 add 13 198 in 2010). Looking at the nationalities of EU-workers it becomes apparent that 53.8% of these workers are Romanians, 13.6% Slovakians and 10.4 % UK citizens. Most EU-workers are found in the Hungarian capital Budapest (41.0% in 2011) and are fairly evenly divided over unskilled (34.7%), skilled (20.1%) and highly skilled (23.0%) jobs. The most popular profession are in agriculture, IT, communications, supporting services, trade and industry.

The *Irish* rapporteur notes that the data for Ireland do not allow for firm conclusions as there is no exact correlation between applications for permits and permits issued/refused, as an application can be made one year and decided on in the next. The data are:

Year	Nationality	New Permits	Renewals	Total Issued	Refused	Withdrawn[226]
2007	Bulgaria	33	5	38	15	-
	Romania	94	25	119	57	
2008	Bulgaria	22	0	22	23	-
	Romania	120	6	126	67	-
2009	Bulgaria	28	1	29	2	0
	Romania	195	1	196	38	8
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
2012[227]	Bulgaria	7	0	7	4	4
	Romania	205	5	210	111	7

On 1 January 2011 more than 25.000 nationals of Bulgaria or Romania resided in *the Netherlands*. Almost half of these EU-2 nationals had between resident in the Netherlands for between 1-5 years and 30% had resided in this Member State for more than 5 years.[228] The total number of persons born in Bulgaria with registered residence in the Netherlands increased from 4 582 (2007) to 16 961 (2011); the figures for persons born in Romania are: 9 374 (2007) compared to 15 785 (2011).

[225] Judicial Division of the State Council 22 September 2011, 201012735/1/V6, LJN: BT2154, *Jurisprudentie Vreemdelingenrecht* 2011/436 with commentary by T. de Lange.

[226] Data on withdrawals is not available for 2007 and 2008.

[227] Numbers accurate as of July 2012. For more up to date statistics, see: http://www.djei.ie/labour/workpermits/statistics.htm.

[228] CBS Webmagazine, http://www.cbs.nl/nl-NL/menu/home/default.htm.

According to the population registration 2 721 migrants born in Romania migrated to the Netherlands in 2011. This is considerably less than in 2010 (4 212) and in 2009 (4 300). In 2011 a total of 5 213 immigrants born in Bulgaria were registered in the Netherlands. This is considerably more than in 2010 (2 697) and in 2009 (2 227). The total number of work permits issued for Bulgarian and Romanian workers during the first eight months of 2011 was 1510 (1 161 for Romanian and 349 for Bulgarian workers) down from 3 589 worker permits for the entire 2010. During the first eight months of 2012 the number of work permits was yet considerably lower: a total of 883 (765 for Romanian and 118 for Bulgarian workers). One of the causes of this reduction is the introduction of the restrictive policy with regard to admission of EU-2 workers in Spring 2011.

2.4 Miscellaneous

The following information has been taken from the *Estonian, French, Italian, Dutch* and *Romanian* reports.

The problems reported by *Estonia*, regarding nationals moving to EU-15 Member States reported in the 2010-2011 European report remain. The vacancies caused by Estonian nationals moving to the EU-15 Member States are still being replaced by workers from Russia and the Ukraine.

The *French* rapporteur notes that though the transitional arrangements have been extended until December 2013, the new government could bring this date forward. There are, however, no signals that this might happen. The French report details the adoption of a resolution of the senators of the Ecology Group that is part of the new parliament, calling for the lifting of the transitional measures as the extension of these measures is mainly explained by the distrust of the Roma population living in France. They argue that the precarious position of Romanians, Bulgarians and the Roma in France is explained by stigmatisation, discrimination and obstacles to integration, rather than their resistance to work and integrate.

Italy, that had decided not to extend the transitional period beyond 2011,[229] has witnessed, as a non-intentional consequence of this decision that Romanians and Bulgarians no longer benefit from Article 35 of Legislative Decree 1998, No. 286 that provides for urgent and essential treatment for non-nationals who are sick or meet an accident in Italy. If Romanians and Bulgarians qualify as workers, they can register with the Italian national health system. If not, they are entitled to emergency treatment, but cannot be treated for mild or chronic diseases or purchase medicine other than non-prescription medicines. A survey conducted by NAGA, a medical ONG, established that in Lombardia (one of the richest Italian Regions) there are between 20 000-40 000 EU-citizens who were entitled to health care services under Article 35 of the consolidated law on immigration, but not as EU-citizens, and can only be treated by volunteers.[230]

The decision of the *Dutch* Minister for Social Affairs to reduce the number of work permits issued for seasonal jobs, which was reported in the 2010-2011 European report, resulted in new rules for the issuing of work permits to Bulgarian and Romanians which were published in the form of a letter from the Minister of Social Affairs to the Dutch Second Chamber.[231] The new rules were received with much criticism by the national Federation of Employer Organisations (VNO-NCW). Employers

229 Prog. 35/0000620, 3-2-2012.

230 *Comunitari Senza Copertura Sanitaria*, March 2012.

231 Tweede Kamer 29 407, No. 128.

who found their applications turned down lodged appeal proceedings and requested interim injunctions. The Hague District court granted permission to employ EU-2 nationals pending appeals proceedings to four employers, who could then employ 180 EU-2 workers.[232] The question whether the more strict application can be justified considering the stand still-clause in the Accession Agreements is still pending. In response to parliamentary questions the Minister for Social Affairs argued that the conditions had not been amended, they were only being applied more strictly.[233] The figures on work permits issued for Bulgarian and Romanians have, however, dropped. Whether or not a side effect of these developments, the number of EU-2 workers employed by service providers notified to the labour authorities rose considerably: from 6 525 in 2010 to 8 809 in 2011, with Romanians in pole position (80%).

The decision to suspend the application of Articles 1-6 Regulation (EU) No. 492/2011[234] by Spain was good for an internal political debate in *Romania.*

3. Conclusions

Transitional arrangements for EU-8 nationals are a competence of the past. Romanians and Bulgarians are still limited in the exercise of their free movement rights in eight Member States, with Spain introducing temporary restrictions for Romanians only. The justification given for these arrangements is the overall economical situation in these Member States. Ireland that had extended its transitional arrangements until December 2013 decided to open its labour market in 2012, taking effect on 1 January 2012.

Chapter VIII Miscellaneous

This chapter first examines the relationships between EU social security rules (Regulations 1408/71 and 883/04) and Regulation 492/2011as well as between Directive 2004/38 and Regulation 492/2011with 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 centers, which EU citizens can approach for information about their rights) under free movement law or to resolve difficulties in accessing these rights.

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

In most countries there have been no new developments on this relationship during the reported period. New developments are mentioned in the reports of *Austria, Belgium, Germany, Hungary* and *Lthuania.*

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232 Voorzieningenrechter District Court of The Hague 22 July 2011, AWB 11/20541, LJN: BR2785. See also: *id*., AWB 11/17142, LJN: BR2788, *id.* AWB 11/19142, LJN BR2778 and *id*., Awb 11/21417, LJN BR27, *Jurisprudentie Vreemdelingenrecht* 2011/401 with note by P.J. Krop.

233 Aanhangsel Handelingen Tweede Kamer 2010-2011, No. 3364. See also on the compatibility of the new measures with the stand still-clause in the Accession Agreement: Second Chamber in October 2011, Tweede Kamer 29407, no. 131, p. 6 en 19.

234 *OJ EU* 2011, L 141/1.

In *Austria* there is a request for a preliminary ruling regarding "additional payments for pensions" ("Ausgleichszulage"). In February 2012 the Supreme Court for Civil Law and Penal Law asked whether this additional payment is a "social assistance payment" in the sense of Article 7 (1) b Directive 2004/38/EC. The same Court decided in 2011 [235] that Union citizens are entitled to these payments if they are habitually living in Austria and their (foreign) pension doesn´t reach a fixed amount. It has to be noted that Sect. 51 (1) 2 SRA rules that EEA citizens have the right to stay for more than three months if they do not need social assistance payments or "additional payments for pensions". The CJEU´s decision is therefore of great importance for residence law as well as for social security law.

In *Belgium* an Italian spouse of an Italian retired worker lodged an action against the National Office for Pensions (ONP) claiming for guaranteed income for elder people. She never worked in Belgium or abroad. Invoking the CJEU judgment *El Youssfi c ONP* (C-276/06), she alleged that she was entitled to this social allowance as it was a special social security scheme, whether contributory or non-contributory as stated in Article 4, § 2*bis* of the 1408/71 Regulation. As an EU worker citizen's family member, she claimed equal treatment regarding Articles 2 and 3. The Industrial tribunal accepted the action but the ONP appealed to the Labour Court. The Labour Court referred to ECHR judgments *Gaygusuz c. Austria* (18 September 1997) and *Stec and others v. United Kingdom* (6 July 2005) as well as Article 6 of the Treaty of Maastricht to confirm that such social allowances are under the scope of Regulation 1408/71 (now Regulation 883/2004).

In *Germany* is an emerging debate about the relationship between Regulations 1408/71-883/04 and Directive 2004/38. In the context of the discussion on the implications of the European Court of Justice's *Vatsouras* judgment on access of job-seekers to social assistance under section 7 of the Social Code II (see chapter 4.2.2 above) a number of courts interpret the inclusion of social assistance into the scope of Regulations 1408/71-883/04 as an indication that the measures are not covered by Article 24(2) of the Residence Directive 2004/38. The argument has first been put forward by regional social appeals courts in judgments delivered in late 2010 (which are discussed in last year's report). In 2011/12 other regional social appeals courts added their view, such as the court of Berlin-Brandenburg[236], Schleswig-Holstein[237] or North Rhine-Westphalia [238]. Most importantly, however, Federal Social Court (BSG) may have hinted at a forthcoming change in his jurisprudence in para. 17 of a judgment of 18 January 2011 in which it states – without further explanation – that social assistance is not covered by Regulation 1408/71 and that, in casu, it was not necessary to deal with the regulatory framework in Regulation 883/2004, since this regulation did not yet apply to the facts under scrutiny.[239] A final statement will come sooner or later.

At the conference organised within the framework of this network in June 2011 in Berlin some participants moreover put the question whether social assistance for job-seekers may indeed be covered by Article 70 Regulation 883/2004 in combination with Annex X of the Regulation. If that was the case, the interpretation of Article 24.2 Directive 2004/38 would no longer be decisive in order to determine whether job-seeking Union Citizens can be excluded in line with § 7 of the Social Code II and the

[235] 30.8.2011, 10 ObS 181/10f and 21.7.2011, 10 ObS 172/10g
[236] LSG Berlin-Brandenburg, Decision of 28.02.2011, Az. L 34 AS 92/11 B ER.
[237] Social Appeals Court (LSG) Schleswig-Holstein, Decision of 14.09.2011, L 3 AS 155-11 B ER.
[238] Social Appeals Court (LSG) North Rhine-Westphalia, Decision of 07.12.2011, L 19 AS 1956-11 B ER.
[239] Federal Social Court (BSG), judgment of 18 Jan 2011, B 14 AS 138/11 R.

European Court of Justice's *Vatsouras* judgment. Instead, a right to social assistance would have to be extended to them on the basis of Regulation 883/2004.
The *Hungarian* report draws attention to the fact that there have been some cases where, in the view of the Hungarian party, some discriminative rules were in force in Germany on the basis of Regulation 1408/71/EEC. Albeit this regulation has already been repealed by Regulation 883/2004/EC, in terms of legal consideration, some pending cases require attention. Especially where a Hungarian father who is a registered as self-employed in Germany, whilst the mother resides in Hungary with a child/children, without receiving salary or any similar remuneration, is not granted the same amount of family benefits as a German self-employed person.
Lithuania has specific regulation with Estonia concerning the calculation of the insurance periods acquired in the territory of former Soviet Union (Agreement with Estonia ratified in 2008). The purpose is to avoid duplication of insurance periods, acquired in the territory of former Soviet Union, whereby this period could have been calculated both in Lithuania and also in one of the other Baltic States. On 5 May 2012, a similar agreement was signed with Latvia. The agreement will avoid situations where the insurance periods were not calculated at all or were calculated twice in both countries. As a result of this agreement, pensions may increase for those persons whose insurance periods of working for companies of the former Soviet Union were not calculated. The agreement ensures that the person receives full pension for the duration of all working experience

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 *Swedish* report and seems to be only leading to some problems in the Northern Member States of the EU.
In *Denmark* the Ministry of Refugee, Immigration and Integration Affairs states that *Hartmann* (C-212/05) concerns issues on social benefits under Regulation 492/2011which, 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 of Directive 2004/38/EC. As a justification of this, the Ministry refers to COM (2009) 313, p. 4.

The *Latvian* report mentions that provisions of Directive 2004/38 and Regulation 492/2011may 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 492/2011against frontier workers if for enjoyment of a particular right there is a residence requirement. It especially concerns the right to state flat-rate social allowances and social assistance and social services.

The Swedish report mentions here the problem concerning residence and frontier work raised in the *regional seminar concerning cross-border* work between Denmark and Sweden, held in Copenhagen in May 31, 2012, and organized by the Free movement of workers network in the EU. An unemployed person that is residing in Sweden but has been working in another Member State is entitled to unemployment benefits in Sweden. However, if the person is part-time unemployed in the other state, he or she should receive unemployment benefits in that state.[240] This not always happens correctly.

[240] See Inspektionen för Arbetslöshetsförsäkringen (IAF), Report 2008:8. Gränsarbetare i Norden. En redovisningoch analys av hur tillämpningen av regelverket för arbetslöshetsförsäkringen fungerar avseende

3. EXISTING POLICIES, LEGISLATION AND PRACTICES OF A GENERAL NATURE THAT HAVE A CLEAR IMPACT ON FREE MOVEMENT OF WORKERS

3.1 Integration measures

As also observed in previous reports, 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*).[241] 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.[242] This is also true of Turkish workers in the light of the Court of Justice's judgment in C-256/11 *Dereci*, as indeed confirmed by the Administrative Court in *Austria*. In the *Netherlands*, the discussions noted in the 2010-2011 report on the proposal to amend the Law on Labour and Social Benefits to include a Dutch language requirement that would also apply to EU citizens in the country are ongoing.

In a number of Member States, EU citizens can also access general language courses available to foreigners residing in the country. In the *Netherlands*, however, a proposed amendment to the integration legislation will abolish the assistance provided to those foreigners, including EU citizens, who opt for voluntary integration. As observed in the 2010-2011 report, 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. While EU nationals in *Germany* are not obliged to participate in language classes, they may do so on a voluntary basis, and, in *Sweden*, basic language courses offered to foreigners in general are also available to EU citizens. The Swedish government has also announced a forthcoming integration strategy with a view to reducing the gap in unemployment (presently at 17 per cent) between migrants -in particular third-country nationals- and persons born in the country.

As discussed in some detail in the 2010-2011 report, in *Ireland*, there is an emerging national integration policy applicable to the integration of immigrants generally, and includes a number of strategies such as the Intercultural Education Strategy 2010-2015, the National Intercultural Health Strategy 2007-2012, and, most recently, an integration strategy for the Roma community submitted to the European Commission at the end of January 2012 and referred to in Chapter I. As also observed in the previous report, in *Italy*, EU citizens are excluded from the implementation of integration measures foreseen for foreigners in the general legislation on immigration, 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. One of the aims of the "Migration Policy for *Poland*", announced in April 2011, is to help foreigners integrate into Polish society.

Finally, as discussed in the 2010-2011 report, 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

personer som är bosatta i Sverige och arbetar i ett annat nordiskt land, Stockholm 2008. Accessible at http://www.iaf.se/Tillsyn-Uppfoljning/Arkiv-for-granskningsresultat/Granskningsresultat-2008/Gransarbetare-i-Norden/ (Internet in 2011-06-11.)

[241] Not all national reports expressly discussed integration measures during this reporting period and therefore it has been assumed that the situation remains unchanged in the Member State concerned.

[242] In Austria also third country national family members who enjoy the right of free movement are clearly exempted from the requirement of integration measures.

or legislation, and, in *Portugal*, the Second Plan for immigrants' integration, approved by a Council of Ministers Resolution in July 2010, develops the national strategy concerning the reception and integration of immigrants, and includes measures in a wide range of fields (employment, vocational training, health, education, social benefits, etc.).

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

There continues to be an interest in some Member States to attract more highly skilled migrants despite the economic recession. For example, the quota system for immigration in *Austria* has been replaced by a points-based system, which includes the category "extraordinary qualified workers", and lists 26 professions where there are known shortages. The third-country national workers concerned are entitled to a "Red-White-Red Card". Within the first year of the scheme's operation, approximately 1,500 such cards were granted, with 100 issued to extraordinary qualified workers. In the *Czech Republic*, the "Green Card" scheme has been in place since 2009 and the "Blue Card" Directive was introduced in 2010. A number of other Member States also transposed the Blue Card Directive during this reporting period (*Austria*, *Bulgaria*, *Germany*, *Luxembourg*, *Netherlands*, *Poland*). Various schemes (green card scheme, positive list, pay limit scheme, corporate residence permit) are also in place in *Denmark* and facilitate access to the labour market for highly qualified employment.
During the reporting period, new migration or integration policies in relation to third-country nationals and institutions, have been unveiled or proposed in the following EU Member States: *Cyprus* – a Ministry of Interior study on the participation in public life of migrants with a long-term stay with a view to creating enabling conditions for them to exercise rights akin to citizenship; *Finland* – a new Act on Promotion of Integration that entered into force in September 2011 contains provisions on voluntary integration measures to be provided to persons moving to the country, and also applies to EU citizens who have registered their residence, to EU family members who have obtained a residence card, and to those persons who reside in Finland by virtue of a residence permit; *Italy* – the annual quota for third-country nationals provided for the admission of 35,000 seasonal workers and 4,000 non-seasonal workers who had completed a training and education programme; *Netherlands* – a proposed amendment at the EU level to Directive 2004/38/EC that would permit Member States to refuse an application for residence as a family member if the application is preceded by prior irregular residence, and more frequent use of an entry ban and termination of the right of residence of EU citizens and their family members who are categorized as habitual offenders; *Sweden* – a tightening up of the rules in January 2012 concerning the recruitment of foreign labour under the 2008 labour migration law (discussed in previous reports) requiring employers in specific sectors to guarantee that wages will be paid and, if they have recruited migrant labour previously, to provide evidence that the workers have been paid. The purpose is to prevent foreign workers from being exploited on the Swedish labour market. In *Poland*, the regularization exercise, referred to in the 2010-2011 report, and which came into effect on 1 January 2012, has resulted, as at 2 July 2012, in the submission of 8,801 applications (mainly by citizens of Vietnam, Ukraine and Pakistan). Those nationals who receive a positive decision will be issued with a residence permit valid for two years. In the *United Kingdom*, the age limit of 21 years in respect of the sponsorship of the spouses of third-country nationals, with a view to preventing forced marriages, was found to be unlawful by the Supreme Court in November 2011 and the rule was changed to require only 18 years.

As observed in the national reports for this reporting period as well as in previous reports, the Union preference principle is applied in most EU Member States (*Austria*,

Bulgaria, *Czech Republic*, *Denmark*, *Finland*, *Germany*, *Ireland*, *Lithuania*, *Luxembourg*, *Malta*, *Poland*, *Portugal*, *Romania*, *Slovakia*, *Slovenia*, *Sweden*), whether explicitly in law or in practice. For example, in *Bulgaria*, third-country nationals who wish to work in the country have to pass a strict labour market test. They will only be granted access to the labour market if their prospective employer can demonstrate that no other Bulgarian, EU national or permanent resident third-country national is able to perform the job, and this test is applied in respect of all third-country nationals who hold a "continuous" residence permit which is renewable on an annual basis. As noted in the 2010-2011 report, 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 (i.e. Finnish citizens, citizens from other EU Member States and lawfully resident third-country nationals) from finding a job.[243] In *Malta*, third-country nationals must possess a employment licence and its issue is subject to a labour market test, which is not conducted in the case of those who are long-term residents, while in *Sweden*, which introduced in 2008 an employer demand-based system of labour migration from third countries that has been discussed in previous reports, a work permit is only granted if it is consistent with that country's EU commitments. The Swedish Migration Board assesses whether the employer's recruitment is in conformity with the EU preference principle, for example that information about the job in the employment office is also available on EURES – the European Job Mobility Portal.

In a number of Member States (*Czech Republic*, *Denmark*, *Germany*, *Poland*, *United Kingdom*), exceptions to the EU preference principle are possible in respect of certain categories of third-country national workers in sectors where a need exists. As observed in the 2010-2011 report, in *Denmark*, when issuing residence permits on the basis of highly qualified employment, 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 material requirements imposed on third-country nationals as opposed to EU citizens who may enter Denmark and work without restrictions, a position that is questioned by the rapporteurs. The transposition of the Blue Card Directive in *Germany* has resulted in the non-application of the EU preference principle in respect of highly qualified migrants, even though the discretion to apply a labour market test to this group is retained in the Directive. On the other hand, transposition of the Blue Card Directive in *Bulgaria* has been accompanied with the retention of this principle in respect of this category of workers. In *Poland*, as observed in the 2010-2011 report, a relatively large number of categories of third-country national workers do not require a work permit, such as permanent residents, EU long-term residents, and persons of Polish origin coming from the territory of the former Soviet Union and holding a document know as the Charter of a Polish National ("*Karta Polaka*"), which provides free access to the Polish labour market.

[243] There are some specific types of work-based residence permits which can be issued without a prior consideration by the employment office.

3.3 Return of nationals to new EU Member States

There continues to be official as well as anecdotal evidence in a number of the EU-12 Member States (*Hungary, Lithuania*, *Poland*, *Slovakia*) that their nationals are returning home after being employed in the former EU-15. In *Hungary*, a more detailed breakdown of the growing number of Hungarian nationals returning to the country, which, as noted in the 2010-2011 report, increased from 3,000 in 2008 to 15,000 in 2010, is now available. Interestingly, the majority of returnees from the EU-15 were employed in less-skilled jobs, while those who returned from the other new Member States were mid-skilled workers, and the number of returnees employed in highly qualified work was marginal on the whole. Official statistics in *Lithuania* refer to 14,012 citizens (out of a total of 15,685) who "re-immigrated" to the country in 2011, which constitutes a significant increase compared to the 4,153 citizens (out of a total of 5,213) who "re-immigrated" in 2010. There are no figures yet in *Poland* on the scale of those Polish citizens who have returned to the country, but these are expected to be available at the end of 2012. However, according to preliminary results of the recent Census, as of 31 March 2012, there were 1.94 million Polish nationals abroad for a period of more than three months, which is considerably higher than the 786,000 recorded in the 2002 Census ten years previously. More than two-thirds of those Polish citizens were outside the territory of Poland for more than 12 months, with the most popular destinations being the United Kingdom – 30.2%, Germany 21.6%, United States – 11.4%, and the Netherlands – 4.6%. In *Slovakia*, as referred to in previous reports, there has been a gradual decrease in the number of Slovak citizens working in other EU Member States since 2007.

In *Latvia*, on the other hand, while there is still no reliable data on the number of persons who have returned to the country from the EU-15, unofficial figures indicate that a higher proportion of Latvian citizens continue to leave for the EU-15 than return to Latvia. In *Cyprus*, the exclusion of returning Cypriot nationals from the scope of the law transposing Directive 2004/38 has now been remedied in direct response to warning letters from the European Commission.

With regard to data from the EU-15 on EU-12 nationals returning to the new EU Member States, no significant report movements have been observed in *Austria* where 2011 figures indicate that 3,546 Polish nationals, 3,449 Slovak nationals and 7,550 Romanian nationals left the country. However, it is unclear whether they returned to their Member State of origin or to another Member State. In *Finland*, the rapporteur reiterates the position in the previous report that the return of EU citizens to new Member States has not taken place in any significant numbers. The provisional outcome of the 2012 Census in *Italy* shows that the number of foreigners ordinarily resident in Italy has increased by 282 per cent over the last ten years and that the foreign population in the country amounts to over 2.4 million. A further increase of foreigners was also recorded in the foreigner population in 2011 as compared to 2010. The two largest groups of foreign nationals in the country are EU citizens comprising 968,576 Romanian and 109,018 Polish nationals.

As noted in previous reports, in *Ireland*, the Reception and Integration Agency, under the auspices of the Department of Justice and Equality, supports the repatriation of destitute EU-12 nationals who do not satisfy the habitual residence condition for social assistance. In 2010, 416 return flights were booked for citizens of the EU-12, as compared with the 548 persons assisted in 2010. In 2011, Romanian nationals constituted the largest number of voluntary repatriations (240), followed by Polish nationals (65). The rapporteurs for the *Netherlands* refer to information provided to Parliament by the Minister for Social Affairs and Labour on labour migration from the

EU-12. This information reveals that there was a steady increase of EU-12 nationals who relied on social benefits in the period 2006-2010. Efforts to step up voluntary return activities of those EU citizens not entitled to reside in the country under EU law have also continued, including in the development and implementation of return programmes for vulnerable persons from the EU-12 Member States who regularly make use of the day and night care services and which have been organized on a pilot basis in Amsterdam, Rotterdam, The Hague and Utrecht. Further, in April 2012, the municipality of The Hague launched a return project for homeless EU-12 nationals.

Finally, as discussed in Chapter I, some of the EU-15 Member States (*France*, *Netherlands*, *United Kingdom*) have tightened up their rules regarding the entry, residence and expulsion of foreign nationals, which appears to have had a disproportionate impact on nationals from the EU-12, thus raising profound concerns regarding the conformity of such restrictions with EU law. For example, in *France*, the persons most affected by removal measures are EU-12 nationals. In 2011, a total of 1,556 EU citizens were obliged to leave *Germany* of which 1,332 left in reality, either voluntarily or by means of deportation. The largest number obliged to leave came from Romania (445) and Bulgaria (201), followed closely by Poland (197). In the *Netherlands*, it is reported that in the first nine months of 2011, 150 entry bans were adopted compared to 150 such bans for the whole of 2010, and the rapporteurs speculate whether this increase is related to the new policy tool that allows the Dutch Immigration and Nationality Department to read into the public policy concept offences committed by habitual criminal offenders, which in themselves would not justify an expulsion measure. Between 2010 and the first half of 2011, 175 EU citizens served with entry bans were reported to have left the country.

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

In *Austria*, *Bulgaria*, *Czech Republic*, *Denmark*, *Germany*, *Ireland*, *Lithuania* and *Slovakia*, the rapporteurs observed that, with the exception of national 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 continued to play an active role in respect of the imposition of exit bans limiting the right to free movement of Bulgarian nationals.
>
> *Hungary* – the Ombudsman received a number of complaints of relevance to free movement of workers, including violation of EU citizens' rights in respect of taxation, restrictive rules on the registration of cars purchased in other Member States, and non-registration of residence because of poor housing conditions that disproportionately affects persons of Roma origin who may also be EU citizens.

In *Latvia*, however, it is specifically reported that the Ombudsman has not reviewed any case regarding discrimination on the grounds of nationality against any EU citizen of another Member State.

Equality or anti-discrimination bodies may also be pertinent to resolving free movement issues, and these are referred to by rapporteurs of 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 continues to be very active, both in terms of issuing reports and recommendations on its own initiative and in responding to individual complaints;
Netherlands – Equal Treatment Commission.

Important roles are also played in EU Member States by those public authorities with responsibilities for supervising employment and working conditions. For example, the Occupational Health and Safety Authority in *Finland*, which was also mentioned in the 2010-2011 report, 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. Regional Foreigners Service Centres, supported by a special central government programme, are located in each of the 16 provinces of *Poland* where foreigners can obtain a range of comprehensive information. As also observed in the 2010-2011 report, 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, and, in *Romania*, complaints can also be addressed to competent national authorities, 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 for handling cases concerning applications of residenc permits and appeals against its decisions can be made to the migrants courts and the Migration Court of Appeal, which is the final legal instance.

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, employers' organizations and/or professional associations, NGOs and advice centres. Some examples are provided below:

Austria – Amnesty International, Caritas Österreich and Helping Hands;[244]
France – GISTI and CIMADE;[245]
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;[246]
Poland – Legal Clinics Foundation, Legal Bureaux for Foreigners, Helsinki Foundation for Human Rights, Institute for Public Affairs, the Union of Citizens Advice Bureaux, and Foundation of Polish Migration Forum.

In the *United Kingdom*, wholesale reform to the legal aid system has resulted in an abrupt reduction of access to legal aid for migrants, although, for the moment, EU nationals are unaffected by these changes. Moreover, a series of important

244 Information provided in the 2009-2010 report.
245 Information provided in the 2008-2009 report.
246 Information provided in the 2009-2010 report.

immigration advisory agencies, including the Immigration Advice Service, went into receivership during 2011. But, as noted in previous reports, a small number of specialized NGOs continue to provide advice, including to EU citizens, namely: the Advice and Information on Rights in Europe (AIRE) Centre, which specializes in matters of EU and human rights law; and the Child Poverty Action Group (CPAG), which provides expert advice and assistance on *inter alia* social benefits. In *Ireland*, another avenue of redress is the Eurojus consultant lawyer under the auspices of the European Commission's representation in the country.

5. SEMINARS, REPORTS, ARTICLES

As observed in previous reports, there are an increasing number of research projects, books, reports, articles, resource websites and seminars relating to the free movement of workers, including in the EU-12.

Pertinent research projects of relevance to free movement in *Hungary* have been undertaken, including AMICALL – Attitudes to Migrants, Communication and Local Leadership, an international project collecting good practices, in collaboration with municipalities and migrant communities in, *inter alia*, Germany, Hungary and the United Kingdom. In the *Czech Republic*, a website http://www.portal.gov.cz set up by the public administration contains useful information on free movement of workers and the rights guaranteed under the EU rules, including information on the possible action that can be taken in the event of termination of employment in an EU Member State. The website http://www.gouv.fr of the Government of *France* provides new statistical information on migration, including on labour force participation, unemployment and the percentage of the immigrant population, disaggregating the data on the basis of EU citizenship and nationality of third countries.

Below are some of the event highlights of relevance to free movement of workers held across the EU-27 during the reporting period (in reverse chronological order):

- Czech Republic-Slovakia seminar on "Free movement of Workers", June 2012, organized by the Czech and Slovak members of the network. http://ec.europa.eu/social/main.jsp?langId=en&catId=457&eventsId=580&furtherEvents=yes
- Regional Seminar concerning "Cross-border work between Denmark and Sweden", Copenhagen, 31 May 2012, organized by the Danish and Swedish members of the network. http://ec.europa.eu/social/main.jsp?langId=en&catId=457&eventsId=551&furtherEvents=yes
- Annual Conference on "Free Movement of Workers within the EU", Bucharest, 3-4 November 2011. http://ec.europa.eu/social/main.jsp?langId=en&catId=88&eventsId=385&furtherEvents=yes
- Finnish-Estonian seminar on "Free Movement of Workers", Tallinn, September 2011. http://ec.europa.eu/social/main.jsp?langId=en&catId=475&eventsId=381&furtherEvents=yes

The seminar concluded *inter alia* that Finland is the largest destination country for Estonians abroad, with an estimate of between 40,000 and 50,000 posted Estonian workers in Finland; a relatively large share of Estonian nationals are employed in Finland in marginal labour market positions as posted, self-employed or frontier workers, and that these groups of workers face specific challenges regarding co-ordination of social security; and that there was a lack of clarity in both countries

regarding the status of EU job-seekers, including their access to benefits that are aimed at the promotion of entry to the labour market.

- TRESS III Seminar on "La coordination de la sécurité sociale en Europe", Office des Assurances Sociales, Luxembourg, 12 July 2011. http://www.tress-network.org/tress2012/SEMINARS/Archive.jsp
- Colloquium on "Roma people facing the law in Belgium", University of Namur, 26 April 2011.
- Seminar on "Free Movement of Workers in Practice", organized by the chambers of commerce and the Polish Embassy in Germany, Berlin, 21 January 2011.

ANNEX I - COMMENTS OF AUSTRIA

General Introduction Point 5 (Transitional measures) and Chapter VII Point 3 (Conclusions):

With a view to the statement of the report "In several EU-15 Member States the economic situation was used as a justification to prolong the transitional measures concerning workers from Bulgaria and Romania until the end of the transitional period, i.e. 31 December 2013, also by Member States with the lowest unemployment rates in the EU and a large demand for foreign labor, such as Austria and Netherlands." it has to be noted that this statement is misleading, because the justification was based on the threat of serious disturbances of the labour market, taking account of problematic sectors of the labour market and the economic situation in Austria. Therefore, when mentioning the low unemployment rate of Austria, the authors of the report do not give the right picture of the situation and development in Austria which justified the prolonging of the transitional measures.

Furthermore it has to be noted that the demand for foreign labour in Austria is not an exceptional one, if one looks at it from an objective perspective. That demand is based on a limited lack of qualified labour in certain professions which could be covered mainly by skilled workers especially from EU-8 and EU-2.

Chapter I Point 1 (Transposition of provisions specific for workers):
The position of Austria is that the transposition of those rules in Austria was complete and correct.

Chapter I Point 2 (Registration with employment agencies and access to employment services):
The statement of the report "In a number of Member states it is important for job-seekers to register with the national or local employment agencies or labour offices 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.

Chapter I Point 2 (Access to benefits):
It is the position of Austria that its national rules do not violate the EU laws.

Chapter II Point 6 (The situation of family members of job seekers):
It has to be noted that there is a special rule concerning EU national's search for work (Sect. 66 Fremdenpolizeigesetz), which ensures the implementation of the Directive`s conditions concerning job-seekers and their family members. Therefore Austria has correctly transposed the Directive.

Chapter II Point 2.3 (Recognition of professional experience for access to the public sector):
With a view to the statement of the report concerning the former working periods for wages it has to be noted that Austria intends an amendment of Sect. 50a in relation with Sect. 12 of the Salary Act.

Chapter VI Specific Issues - Access to study grants:
The statement of the report may be misleading, because in Austria students from other EU-states are treated generally equally, as far as it may be concluded from the treaty. Therefore the statement should be deleted or the reference "in Austria students from other EU-states are treated generally equally, as far as it may be concluded from the treaty" should be added for reasons of clarification.

ANNEX II - COMMENTS OF CYPRUS

As regards **Chapter V (Other obstacles to free movement of workers)** of the report and in particular the finding that "border controls continue to be an important obstacle" attention should be given to the following:

The year 2008 marks forty-eight years since the birth of the Republic of Cyprus. For thirty-four of those years, the island and its people have been divided as a result of Turkey's invasion in 1974. The military aggression against Cyprus continues unabated to this date in the form of military occupation, forcible division, and violation of human rights, massive colonization, cultural destruction, property usurpation and ethnic segregation. A member state of the United Nations and the European Union today, Cyprus continues to be victim of unabashed international aggression by Turkey, a member of the UN and aspiring member of the EU. This is an insult to international legal order and a constant threat to regional stability.

Pending a settlement regarding the current situation in the island, the application of the acquis upon accession has therefore been suspended in the areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control. This suspension made it necessary to provide for terms under which the relevant provisions of EU law shall apply to the line between the above mentioned areas and those areas in which the Government of the Republic of Cyprus exercise effective control. Regarding persons, the policy of the Government of the Republic of Cyprus currently allows the crossing of the line by all citizens of the Republic, EU citizens and third country nationals who were legally residing in the northern part of Cyprus, and by all EU citizens and third country nationals who entered the island through the Government Controlled Areas. According to Regulation 866/2004 the Republic of Cyprus shall carry out checks on all persons crossing the line with the aim to combat illegal immigration of third-country nationals and to detect and prevent any threat to public security and public policy.

ANNEX III - COMMENTS OF HUNGARY

Chapter I Point 1 (Article 8(3), first indent – administrative formalities relating to the residence of EU workers and self-employed persons)

In Hungary, however, there continues to be a minimum 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 will not be deemed to become an unreasonable burden on the social assistance system."

It has to be noted that this statement of the report only informs about one of the rules concerning the decision on sufficient resources set out in Article 21 Paragraph 1 as this Article contains 7 further subsections that cannot be neglected when checking the transposition the relevant provisions of Directive 2004/38/EC.

Article 21 of Government Decree 113/2007 (V. 24.) on the Implementation of Act I of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence provides:
"(1) Sufficient resources shall mean if the per capita monthly income in the applicant's household reaches at least the prevailing minimum old-age social security pension. A person shall be considered to lack sufficient resources if drawing:
a) social welfare for the elderly under Subsection (1) of Section 32/B of Act III of 1993 on Social Administration and Social Welfare Benefits (hereinafter referred to as "SAA"),
b) benefits provided to persons of active age under Section 33,
c) attendance allowance under 43/B of the SAA,
for any period of more than three months.

(2) If the per capita monthly income in the applicant's household is below the prevailing minimum old-age social security pension, the competent authority shall check the applicant's income and financial position to determine as to whether the applicant has sufficient resources for him/herself and his/her family members not to become a burden on the social assistance system of Hungary during their period of residence.

(3) If the purpose of residence is to pursue studies, the competent authority shall determine the availability of sufficient resources without the examination referred to in Subsection (2), if the applicant provides a statement declaring to have sufficient resources for him/herself and his/her family members not to become a burden on the social assistance system of Hungary during their period of residence.

(4) The examination referred to in Subsection (2) shall cover, in particular, the following criteria:
a) number of family members of the household with any income or assets;
b) number of dependant persons living in the household;
c) as to whether the applicant is the owner, beneficial owner or user of the real estate property in which they reside.

(5) The applicant may verify of having sufficient means of subsistence with his/her financial assets or any regular income he/she receives in the form of:
a) payments from the social security or social assistance system of any EEA Member State;
b) income from funds or benefit plans financed by payment of membership dues or other regular contributions;

c) income from a deposit account or contract registered in any EEA Member State or any other bank or investment asset, a bank guarantee provided by a credit institution established in any EEA Member State or that is guaranteed by a legal person established in any EEA Member State;
d) income from maintenance or alimony supported by documentary evidence.

(6) The assets referred to in Subsection (5) may not comprise:
a) articles of everyday use and household equipment and accessories;
b) any property serving as the residence of the EEA national and his dependant family members;
c) the vehicle of handicapped persons; and
d) any assets which are required for the EEA national's gainful activity.

(7) The amount of monthly income shall be calculated as the monthly average of the sums:
a) received during the three-month period prior to the registration of residence for regular income;
b) received during the twelve-month period prior to the registration of residence for non-regular income.

(8) For the purposes of this Decree 'income' shall mean the income and assets defined, respectively, in Paragraphs a) and b) of Subsection (1) of Section 4 of the SAA."
Consequently Paragraphs 2 and 3 are necessarily needed in order to show the whole and clear picture of the Hungarian legislation on the condition of financial resources explaining that the decision-making is done on a case by case basis, which the writer of the report failed to do.
Please, correct the sentence in light of the afore-said circumstances.

ANNEX IV - COMMENTS OF LATVIA

Chapter I point 1 (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)

Concerning the following sentence,

Transposition of Article 24(2) in Latvia continues to be inaccurate 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.

the Latvian authorities have provided the following comment:

According to Law on Social Services and Social Assistance only EU citizens and their family members as well as third-country nationals holding permanent residence and who have registered their place of residence in a municipality, may access means-tested (last resort) social assistance benefits and social care and social rehabilitation services, provided by respective municipality.

Chapter IV Point 1 (Specific issue: Working conditions in the public sector)

Concerning the following sentence,

Latvian legislation does not contain express norms on the prohibition of unequal treatment of migrant Union citizens regarding working conditions in the public sector. However, according to the Regulation No.1651 only professional experience in the public sector in Latvia is taken into account for the award of qualification grade and corresponding salary. Education is the determining factor for award of grade in public sector and normative acts do not contain any specific requirements with regard to diplomas obtained in particular educational establishments or countries for the purposes of determining qualification grade, salary or any other working conditions.

the Latvian authorities have provided the following comment:

Ministry of Welfare would like to add that according to Law On Remuneration of Officials and Employees of State and Self-government Authorities, Employment legal relations, position legal relations or norms of the regulatory enactments regulating the course of the service shall be applied to officials (employees) in so far as it is not determined by this Law (Law On Remuneration of Officials and Employees of State and Self-government Authorities). Some of employment legal aspects are regulated in Labour law which prohibits any kind of discrimination - Everyone has an equal right to work, to fair, safe and healthy working conditions, as well as to fair work remuneration. These rights shall be ensured without any direct or indirect discrimination – irrespective of a person's race, skin colour, gender, age, disability, religious, political or other conviction, ethnic or social origin, property or marital status, sexual orientation or other circumstances.

Chapter II Point 6 (Miscellaneous)

Concerning the following sentence,

In Latvia there are no specific benefits for job seekers within the meaning of the Collins and Vatsouras case law. Scholarships are issue to job seekers participating in

re-integration programmes (e.g. for retraining or improving ones professional qualifications). There is a special programme that aims at the reintegration into the labour market of long-term unemployed persons as well as those suffering from the economical crisis who cannot find work due to high unemployment numbers. Both programmes are most likely not accessible to EU-citizens and their family members as one of the qualifying conditions is a language requirement.

the Latvian authorities have provided the following comment:

Scholarships are issued to job seekers and unemployed for participation in re-integration programmes (e.g. for retraining or improving ones professional qualifications). There are special programs that aims at the reintegration into the labour market of long-term unemployed persons as well as persons who have just become unemployed and willing to take part in active employment measures and those who cannot find work due to high unemployment.

Programs are also accessible to EU-citizens and their family members and person who has a permanent residence permit in Latvia or the spouse of the referred to person who has a temporary residence permit in Latvia and other person categories according to Support for Unemployed Persons and Persons Seeking Employment Law.

As the programs are provided in Latvian some of the EU-citizens, third-country citizens and their family members can't benefit from participating in them. To overcome the language barrier and fully participate in other active employment measures, persons are offered to join language courses first.

Information does not comply with national regulation and should be removed.
General Introduction Point 3 (Equal treatment) and Chapter III point 1.2 (Language requirements)

The rapporteurs declare, that language requirements in Latvia are mentioned as an obstacle to access to employment in the private sector.

Ministry of Justice of the Republic of Latvia considers the mentioned declaration as inadequate, as in the private sector use of the state language is not strictly regulated, unless private companies or organizations performs functions that affect the legitimate interests of society or perform any public functions. The recitation of such occupations in law is exact and allows no interpretation. The Law of State Language and the regulations of the Cabinet of ministers that enforces this law have been worked out in close cooperation with EDSO and experts of European Council and are deemed to be adequate toward international obligations of Latvia.

It should be emphasized that according to the mentioned Law and Regulations Latvian language should be used in private sector as far as the services are provided and the communication between the service provider and the service receiver is of crucial importance (public legal interest). Thus there is a principle of proper balance ensured taking into account public legal interests. Moreover the working opportunities of minorities, particularly the Russian speaking minority in labor market in Riga, where Russian language is broadly used, is more possible, than a person who has only single languages knowledge, even it is Latvian.

Therefore it could not be agreed that the mentioned legal framework has the discriminatory effect on the working opportunities. Taking into account the political and demographical processes of the region in Latvia the consistent language policy principles are essential to ensure the preservation of the language. The Official

Language Law saves, protects ant develops the Latvian language alongside taking into account the rights of the minorities to use their mother tongue and to develop and preserve cultural differences and ethnic peculiarities and Latvia has always tried to respect this balance.

Chapter II Point 4 Abuse of rights, i.e. marriages of convenience and fraud)

In the fourth paragraph of Chapter II rapporteurs declare, that fraud and abuse of the right to free movement are grounds to refuse, terminate or withdraw a residence permit in most Member States. In Italy and Latvia, the authorities regulate marriages of convenience through their Civil Law. In Latvia the Civil Status Law provides that non-nationals can only enter matrimony in Latvia if they stay legally in Latvia. Unlike Latvian citizens, citizens of other states may enter into marriage with a foreigner, who possesses a permanent residence permit in Latvia

According to the Article 18 of the Law of Civil status documents registration, entered into force on January 1, 2013, in order to enter matrimony, it is not obligatory anymore for foreigners to possess a permanent residence in Latvia, just the right to reside in Latvia, but it is also not enough to have only traveling permission. According to the mentioned law citizens of European Union, countries of the European Economic area or the Swiss Confederation or citizens of other states, stateless person, refugee or a person with alternate status and who at the marriage time is entitled to stay in the Republic of Latvia, may enter into marriage with a citizen of Latvia, Latvian non-citizen, European Union citizen, citizens from the countries of the European economic area, Swiss Confederation or citizens of other states, stateless person, refugee or a person with alternate status and who at the marriage time is entitled to stay (resides) in the Republic of Latvia.

According to the amendments in the Article 285.2 of Criminal Law, entered into force on April 1, 2013, in order to prevent the marriage of convenience the law provides criminal liability to the person who, with the malicious purpose provides the possibility to acquire the permanent residence in Latvia. The Criminal law provides enhanced liability for such activities, if they have been done with a purpose of covetousness or the permanent residence have been provided for two or more persons or if these activities have been done in group. That means, for example, that Latvian citizen can be punished by law if this person gets married with a citizens of other state in order to provide him the permission of permanent residence.

ANNEX V - COMMENTS OF SLOVENIA
Chapter I Point 1
Article 7(3)(a)-(d) – retention of status of the worker or self-employed person by EU citizens who are no longer in employment

The provision for the retention of the status of worker or self-employed persons referred to in Article 7 (3) (a)-(d) of the Directive has been transposed in the Slovenian legislation with the second paragraph of Article 120 of the Aliens Act (Ur.I.RS no. 50/11 and 57/11 - corr.; the Aliens Act) which provides that under the conditions laid down by the Directive the person retains the registration of residence, if he loses employment, which means that if the conditions laid down in Aliens act, implementing the Directive, are met, a person retains status or residence registration.

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

Supporting documents required in the process of issuance of the certificate of registration of residence are set out in the first paragraph of Article 120 and Article 121 of the Aliens Act and are listed cumulatively, except in so far as it relates to the requirement of a document issued by the employer attesting the intention to employ the EU citizen concerned or evidence of employment or other work if the EU citizen concerned is already employed or works or a document attesting that he is a self-employed person, which are, in accordance with the Article 8(3) of the Directive, listed as an alternatives.

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

Deportation of an EU citizen and family member is allowed only in cases specified by the first paragraph of Article 138 of the Aliens Act, namely if a final secondary sanction of expulsion of alien from the country has been passed on the EU citizen or family member, if the alien's residence is terminated, if a residence registration certificate or residence permit was refused, his registration certificate expired or his residence permit was annulled due to a serious and actual threat to public order and safety or the international relations of the Republic of Slovenia or due to the suspicion that his residence in the country will be associated with terrorist or other violent acts, illegal intelligence activities, trafficking in drugs, or with the commission of any other criminal offences or if the issuing of the first residence registration certificate or the first temporary residence permit was rejected since it might endanger public health referred to in the third indent of Article 124 of this Act. Aliens Act therefore does not specifically provide non- expulsion of EU citizens and their family members in the case they are workers, self-employed or job seekers, because the removal is only possible in the above mentioned cases and under the condition there is reasonable grounds to believe they will pose a threat to public order or security, they pose a genuine threat to public order, national security or international relations, or danger to public health. This means that the employee or job seeker or self-employed persons and members of his family in the country cannot be deported except as mentioned above, if they pose a threat to public order or security or a genuine threat to public order, national security or international relations the Republic of Slovenia or a threat to public health.

General

Taking the deficiencies, identified by the draft report, and the above mentioned explanations into account, we strongly oppose the conclusion, indicated by the draft

report, which ranks Slovenia as a country with "partial or incomplete transposition, where more gaps or serious deficiencies in transposition have been highlighted".

ANNEX VI - COMMENTS OF SPAIN

In any case, and before we specify which aspects of the different chapters we will comment on, we should point out that we do not consider it appropriate for the report to include general evaluations and comments on substantive aspects — both in the general introduction and on specific aspects such as case-law — without the said aspects being suitably identified in the report, as we will discuss below. The non-specific nature of the evaluations and comments means it is not possible to make an assessment and objective evaluation of their content or make any observations other than those relating to the insufficient identification of the matters cited.
There is also a lack of clarity in the information included in point 4 of the General Introduction to the Report, which makes several references to Spain's report on discrimination from which it is not possible to conclude whether the reference made in the latter case is to the report from the network of experts, Spain's report requesting the application of transitional measures and/or the extension of the same, or Spain's comments on the European Report for 2010/2011.

Chapter I, The workers: Entry, Residence, Departure and Remedies:
1. Transposition of specific provisions concerning workers

Even though the report refers to the amendment to Article 7 of Royal Decree 240/2007 transposing Article 7 of Directive 2004/38/EC of 29 April 2004, and emphasises that Article 7(1)a, 7(3)(a)-(d) and Article 8(3)-4 have been transposed correctly, it includes a comment in relation to the amendments made to national legislation concerning Cyprus to the effect that verbatim transposition does not guarantee smooth application of the Directive, which is unclear and could be confusing.

We therefore consider that the comment concerning the verbatim transposition ("…As noted in the 2010-2011 report, however, verbatim transposition, does not guarantee smooth application of the Directive's provisions in practice which is evident from the dialogue of the Commission with Cyprus on the transposition of Directive 2004/38") should be deleted, or that the facts giving rise to such comments should be specified, whichever is more appropriate.

As far as the failure to transpose Article 14(4) of Directive 2004/38/EC is concerned, and even though one could assume that the legislation had presumably not been amended at the time of publication of the report, we would point out that Spain has amended its legislation with the adoption of the second final provision of Royal Decree 1192/2012 adding a new Article 9a (9bis) to Royal Decree 240/2007 of 16 February 2007 on the entry, free movement and residence in Spain of citizens of Member States of the European Union and of countries party to the Agreement on the European Economic Area, in order to — among other things — strengthen the links between its interpretation and the content of Directive 2004/38/EC. This is without prejudice to the fact that the safeguard imposed by Article 14(4) would become unnecessary since there are no procedures in place for the expulsion of persons benefiting from free movement for reasons other than public order, public safety or public health.

Accordingly, we think it would be appropriate for this same paragraph and any other reference made in the report to the cited Article 14 to include a reference to the cited legislative amendment.

Moreover, the failure to identify the matters mentioned at the start of this report is of particular significance in view of the comments concerning the alleged expulsions of

Bulgarian and Romanian nationals made. These comments should either be deleted or made more specific, whichever is more appropriate.

In this connection, and to expand on the above, we would stress that while it is true that it is pointed out that there is no evidence of the existence of restrictions on the free movement of persons of Roma origin, the fact that the sentence goes on to state "although most of the expulsion cases discussed in the national report concern Romanian nationals" (…) could be confusing and misleading if account is not taken of the fact that checking data on expulsions of Romanian citizens of Roma origin would be entirely unfeasible as it is clearly anti-discriminatory.

The comment made in the General Introduction regarding the transposition of Directive 2004/38 — to the effect that Spanish case law does not adequately reflect restrictions on expulsion — should be deleted as it is not made clear what type of restriction is being referred to, nor can this be deduced since differing circumstances relating to other Member States are listed earlier on.

In this connection, and in the event that the restrictions refer to Article 14(4) of Directive 2004/38 (which is not made clear), it should be pointed out that Spain does not currently expel EU citizens because they are an excessive burden on the welfare system, nor does it expel persons benefiting from freedom of movement for reasons other than public order, public safety or public health.

Chapter II

Regarding **Chapter II, Members of a Worker's Family**, which deals with issues relating to the members of workers' families, the report incorporates the comments made on the 2010-2011 report including the reference to the Supreme Court ruling of 1 June 2010 that annulled various provisions and paragraphs of Royal Decree 240/2007 of 16 February 2007 on the entry, free movement and residence in Spain of citizens of Member States of the European Union and of countries party to the Agreement on the European Economic Area, transposing Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and which raised some problems of interpretation with the Directive, and to the amendment adopted by Royal Decree 1710/2011 of 18 November 2011 amending Royal Decree 240/2007, which includes the content of the cited ruling.

Along the same lines, and for information, it would be appropriate for a footnote to state that 30 June 2011 saw the entry into force of the new Regulation governing Organic Law 4/2000, approved by Royal Decree 557/2011 of 20 April 2011 (published in the Official State Gazette of 30 April 2011), repealing the Regulation adopted by Royal Decree 2393/2004 of 30 December 2004.

Lastly, and regarding the comment made concerning Spain in Chapter II Point 1.2 (case law), about Spanish court rulings that are supposedly not in line with EU legislation or with case-law in that regard — more specifically the Zambrano case — it should be pointed out that the rulings referred to in the footnote concern situations that differ significantly from the Zambrano case:

Thus, ruling 100/2012 of the High Court of Castile and Leon refers to an expulsion not for unauthorised stay but because the person involved, who did not live with his wife and child, had been sentenced to more than one year's imprisonment for drug dealing.

Ruling 304/2012 of the Murcia high court concerned the spouse of an EU citizen whose residence permit was not renewed because of public order offences (robbery with violence or menaces and drug dealing).

Lastly, ruling 622/2012 of the Castile and Leon high court also concerned a person who had been sentenced to more than one year's imprisonment and who had not yet started the process of obtaining nationality when the expulsion was ordered.

Chapter III

In section 2 of Chapter III of the report, "Access to Employment: Private sector and public sector, mention is made of a freeze on public-sector recruitment for 2012.

In this connection it must be noted that we would consider it appropriate, in the interests of ensuring that the information shown is up-to-date, for the paragraph referring to Spain to read as follows:

"In Spain, vacancies for public-sector posts in the General State Administration for the years 2012 and 2013 were approved through Royal Decrees 1694/2012 of 21 December 2012 and 218/2013 of 22 March 2013 respectively, with the corresponding posts to be filled by public recruitment, internal promotion and appointment of employees. The eligibility requirements are defined by the vacancy notices for posts in the various corps, grades and categories of employee, and not by the Royal Decree on Recruitment to the Civil Service."

Chapter VI

In the section on **Sportsmen and women** the report does not mention the fact that the Federación Española de Baloncesto (FEB, Spanish Basketball Federation), the Asociación de Clubes de Baloncesto (Liga ACB, Association of Basketball Clubs) and the Asociación de Baloncestistas Profesionales (ABP, Association of Professional Basketball Players) agreed on 19 July 2011 to amend the rules for player participation in the Liga ACB along the lines of the amendments adopted by the FEB, thus completing the regulatory changes that had begun in May 2011.

The Agreement, as reported at the time, brings the eligibility process for Liga ACB players into line with the recommendation made by the European Commission in relation to the application of Article 45 of the TFEU, thus doing away with the practices (establishment of nationality quotas) that discriminated against Community basketball players with regard to access to and participation in professional basketball competitions in Spain.

Chapter VII

Concerning **Chapter VII, Application of transnational measures, 2. Transitional measures imposed on workers from Bulgaria and Romania. 2.1. Continuation of transitional measures** we would inform you that, in application of point 7 of Annex VII to the Act concerning the conditions of accession of Romania and the adaptations of the Treaties founding the European Union, the Council of Ministers agreed in its sitting of 22 July 2011 to reactivate the "transitional period" for the free movement of employees of Romanian nationality.

For its part, on 11 August 2011 the European Commission adopted the Decision authorising Spain to temporarily suspend the application of Articles 1 to 6 of

Regulation (EU) No 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union with regard to Romanian workers. In application of the above Decision, the Secretary-General for Immigration and Emigration issued Instruction SGIE/1/2012 on the regime applicable to employees from Romania and their families until 31 December 2012.

Subsequently, on 20 December 2012, the European Commission adopted Decision 2011/503/EC authorising Spain to extend the temporary suspension of the application of Articles 1 to 6 of Regulation (EU) No 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union with regard to Romanian workers until 31 December 2013.

In application of the above Decision, on 27 December 2012 the Secretary-General for Immigration and Emigration issued Instruction SGIE/3/2012, which extended the validity of Instruction SGIE/1/2012 on the regime applicable to employees from Romania and their families until 31 December 2013.

In this connection, and concerning the reference made Chapter VII point 2.1, we would like to clarify that, in accordance with the cited European Commission Decision of 11 August 2011, the Secretary-General for Immigration and Emigration issued Instruction SGIE/1/2012 on the regime applicable to employees from Romania and their families until 31 December 2012, and not Instruction DGI/SGRJ/5/2011 of 22 July 2011, which was issued by the Directorate-General for Immigration prior to the European Commission Decision.

We therefore propose that the reference made to Instruction DGI/SGRJ/5/2011 of 22 July 2011 be deleted from the report, since the Secretary-General for Immigration and Emigration issued Instruction SGIE/1/2012 in the wake of the European Commission Decision of 11 August 2011.

In addition, we enclose a copy of Instruction SGIE/1/2012 for inclusion on Chapter VII point 2.1 so that the text of the cited Instruction can be accurately recorded in the report and so that the legal regime applicable to Romanian employees and their families can be clearly and accurately set out.

Lastly, and without prejudice to the possibility of making the appropriate comments once the final report and corresponding national factsheet become available, we must stress — as already stated in the 2010/2011 report — that we do not agree with the negative subjective evaluation ("informal ranking") made by the network of experts in Chapter I, section 1 of the Report in question concerning the transposition of Directive 2004/38 by Spain, which is ranked third along with Bulgaria, Lithuania and Slovenia. This is because the cited categorisation implies a value judgment by the network of experts with regard to the transposition by the Member States. We would therefore once again request that this be deleted. Should this not be possible, Spain's classification should be reviewed, since Royal Decree-Law 16/2012 of 20 April 2012 (State Official Gazette of 24 April 2012) transposes Directive 2004/38/EC of 29 April 2004 almost word for word and an analysis of the various aspects discussed in the Report indicates a high degree of compliance that does not justify the classification.