Revised version

EUROPEAN REPORT
on the Free Movement of Workers in Europe in 2005

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General Observations

From the national reports it appears that the Commission's report on the functioning of the **transitional arrangements** was well received by the Member States. The actual development of the migration between Member States and the Commission's conclusions have stimulated several Member States to adopt more liberal policies or lift restrictions imposed in 2004. Generally, the provisions on free movement inside the enlarged European Union have been respected. This may have contributed to the positive development of the economy in most Member States in 2005.

Some of the national reports contain indications of the economic and demographic effects of free movement after the accession of ten new Member States in 2004. The reports on *Cyprus*, Ireland and the *UK* mention the role of workers from the EU8 in stimulating the economy. The report on *Lithuania* mentions the emigration of large numbers of young mainly highly educated workers to the EU15 Member States, this depopulation having negative effects on foreign investments because the needed workforce has emigrated and creating demand for workers from outside the EU. The report on *Estonia* mentions the upwards pressure on wages to persuade Estonians employed in Finland or elsewhere in the EU to return.

Several national reports indicate that a large share of the workers from EU8 Member States are employed in seasonal or other temporary jobs in EU15 Member States and frequently return to the their home state after the temporary employment has between completed or in between two temporary jobs. Thus, the number of EU8 workers registered in the *UK* and *Ireland* or issued with work permits in *Germany* and the *Netherlands* by far outnumbers the nationals of the EU8 registered as immigrants (in the Netherlands) or being covered by or benefiting from social security in the host Member State (Germany and the UK). Especially, workers from *Poland* and *Slovakia* appear to be employed primarily in temporary jobs and to return to their home country after the job. Problems with unlawful low payment, irregular working conditions and sub-standard housing of those temporary workers are mentioned in several reports.

Free movement of the nationals of the EU8 in 2005 appeared the be a hot topic, attracting much political and media attention in some EU15 Member States (*Denmark, Finland, Ireland, Netherlands,* and *the UK*), whilst not being a dominant issue or absent in the public debate in other Member States, such as *Austria, France, Greece, Portugal*, *Spain* and *Sweden*.

The **access to public service** is dealt with extensively in most national reports. In 2005, several Member States have opened up most of the public service jobs to nationals of other EU Member States. *France* has finally implemented the ECJ case law of the 1980s in its legislation. *Estonia* has implemented the community law rules and *Ireland* has opened up the employment in its police force both to EU nationals and resident nationals of third countries. However, in *Luxembourg*, where nationals of other Member States make up more than 30% of the total population, less than 1% of the public service jobs are performed by nationals of other Member States.

The admission and treatment of **third-country national (TCN) family members of EU migrants** remains a recurrent theme in many national reports. Long delays in obtaining the visa required by several Member States, systematic consultation of SIS and refusal in case of

a SIS registration, discriminatory long inspections at the boarder, non-implementation of the MRAX judgment, prove of sufficient income as a condition for a residence card incompatible with Community law, quota for family reunification, requirement and refusal of work permits and no equal treatment in respect with social rights are among the problem issues mentioned in the national reports on at least 16 Member States.

From the overview in Chapter V, it appears that almost forty years after Regulation 1612/68 entered into force, third-country national family members, both in 'old' and in 'new' Member State, still are confronted in many respects with the same obstacles and discrimination, that were gradually abolished in Member States practices for EU citizens over the past decades.

Several reports mention the issue of **reverse discrimination** of TCN family members of EU nationals who have not used their free movement rights. Community law now provides for rules on family reunification for the family members of EU migrants (Directive 2004/38/EC) and the family members of lawfully resident nationals of third countries (Directive 2003/86/EC). Moreover, it provides for residence rights and equal treatment of admitted family workers of Turkish nationals as well (Association Council Decision 1/80). It appears that family members of EU nationals who have not migrated are not protected by Community law. Their legal status remains be regulated by national law and the minimum guarantees of human rights law. This issue does not arise in Member States, that provide in their national law for a treatment equal to that of family members of EU migrants or for a privileged regime for family members of own nationals. However, in some Member States the national law standards for family members of nationals are inferior to the Community law standards for EU migrants (*Latvia* and the *UK*) or even inferior to the Community law standards for family members of third-country nationals (*Denmark* and *the Netherlands*). In practice this reverse discrimination predominantly hurts TCN of EU nationals with a migration background. This difference in treatment creates frictions, is not easy to justify and raises questions as to its compatibility with Article 12 and Article 18 EC Treaty.

Most national reports mention the implementation of the **case-law of the Court of Justice**. The eligibility of workers for workers councils in *Austria*, the MRAX case in *Belgium*, the access to public service in *France*, the Baumbast and the Chen judgments in the *UK* are prominent examples. However, several reports mention that Member States authorities have given a rather restrictive interpretation of the ECJ judgments when implementing those judgments in their national legislation. Examples are the implementation of the judgment in Bidar and in Oulane in the Netherlands and the Baumbast and Chen judgments in the UK. In several Member States the judgments in Collins and Trojani appear to have resulted in suggestions for legislative or regulatory changes in national law, restricting the access of EU migrants to social benefits. Such suggested changes are reported for *Belgium*, *Netherlands*, *Sweden* and *the UK*. The accession of the EU10 gave rise to similar changes in the national law in Denmark and Ireland in 2004. Several reports on EU10 Member States give indications for the lack of knowledge of the ECJ case law among officials, lawyers and judges in those Member States. The situation, however, also occurs even in founding Member States. The *Luxembourg* report illustrates the lack of awareness of the Community law and the ECJ judgments on the rights of third-country national spouses of EU migrants among the national judges, working at so little distance of the seat of the Court.

It appears from the national reports that several Member States had started or even completed the **implementation of Directive 2004/38/EC** on the free movement and residence of Union citizens and their family members already in 2005. In *France*, where the obligation for EEA nationals to apply for a residence card was abolished already in 2003, it appeared two years later that not having a clear prove of lawfully residence created practical problems for EU nationals when applying for social benefits.

The full implementation of Directive 2004/38/EC no doubt will be one of the central themes of the national reports on 2006.

See for recommendations the annex to this report.

Chapter I
Entry, residence, departure and remedies

Introduction

The EU rules relating to the entry, residence and departure of EU citizens and members of their families are in a state of flux because of the fact that the EU Citizens Directive[1] had to be transposed into the laws of Member States by 30 April 2006. The transposition of the Directive has resulted in amendments to the pertinent foreigners' or aliens' primary legislation in a number of Member States and the passing of secondary legislation to implement the Directive. In some Member States the rules in the Directive were already being applied by the end of 2005 (*Slovakia*) while in others the legislation in place or under consideration was due to enter into force in 2006 (*Austria*, *Cyprus*, *Czech Republic*, *Denmark*, *Germany*, *Finland*, *Estonia*, *Ireland*, *Lithuania*, *Sweden*). In a few Member States (*France*, *Hungary*, *Italy*, *Latvia*, *Netherlands*, *Spain*),[2] however, there was no or limited activity in 2005 to transpose the Directive. Moreover, not all the reports discussed the state of transposition of the Directive.

Concerns regarding the rules on entry, residence, departure and remedies appear in several 2005 national reports. Their application in those Member States which joined the EU in May 2004 (hereafter "A10 Member States') is still rather patchy, and some obvious inconsistencies remain, although generally improvements can be identified due to the passing of a number of amendments in those Member States in 2005 as well as the steps taken to transpose the EU Citizens Directive. However, given the relatively small number of EU citizens from other Member States employed and resident in the A10 Member States and limited practice, it is difficult to assess the impact of this apparent incomplete transposition of Community free movement law. The family members of EU citizens, particularly those holding the nationality of third countries, are still unable to benefit from the full application of free movement rules in many Member States. While the subject of a separate chapter, country rapporteurs also referred to their treatment in this chapter, particularly as regards their entry and residence. Excessive bureaucratic hurdles regarding the granting of residence permits continues to be a problem in a number of Member States, and gaining a residence status on the basis of treaty rights (Article 18 EC), in accordance with ECJ jurisprudence was not adequately addressed in the legislation of some Member States. Finally, the application of the public policy, public security, and public health exceptions to the entry, residence and expulsion of EU citizens, and the remedies available to them if faced with a negative decision, is problematic in a number of Member States.

1 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).

2 Interestingly, however, the Italian rapporteur refers to a first instance judgment in Florence ruling that the Directive has direct effect and could be invoked by a same sex partner of an Italian citizen to obtain a residence permit even though the time limit to transpose the Directive had not yet expired and that same sex relations in Italy are not treated equivalent to marriage or even officially recognised.

Entry

, The rules regarding the entry of EU and EEA citizens are generally uncontroversial and all Member States permit the entry of EU or EEA nationals on the basis of a travel document or national identity card. The problematic issues relate to the other documentation that might be permissible to prove identity and nationality in the absence of these documents, or in the absence of the required visa in the case of third-country national family members, and the continuing difficulties surrounding the admission of family members and particularly third-country national family members of EU citizens in some Member States.

With regard to the first issue, there are a number of discrepancies concerning the application of the judgment of the Court of Justice in *Oulane* (C-215/03). In *Finland*, for example, the requirement that EU citizens possess a passport or identity card on entry is formulated as absolute, although it would appear that the interpretation of this requirement allows for some discretion on the part of the immigration authorities. According to the rapporteurs for the *Netherlands*, *Oulane* has not been applied properly. Proving unequivocally one's identity and nationality by other means (i.e. not involving the production of a valid identity card or passport) has been interpreted restrictively as doing so "without any doubt". However, the Dutch courts have agreed that *Oulane* is applicable to the third-country national family members of EU citizens.

It remains unclear in a number of Member States whether the Court of Justice's decision in *MRAX* (C-459/99) would be applied if the third-country family member turned up at the border without the requisite visa (*Cyprus*, *Estonia*, *Greece*, *Hungary*, *Italy*, *Lithuania*, *Malta*, *Poland*, *Slovenia*). In a number of Member States, the legal provisions or the administrative measures interpreting them, clearly apply *MRAX* (*Czech Republic*, *Finland*). In *Spain*, the Department of Immigration has responded to the negative judgment of the Court of Justice in *Commission* v. *Spain* (C-157/03) of 14 April 2005 by issuing an Instruction in June 2005 stating that no residence visas are to be required from third-country national family members of EEA citizens unless they are nationals of countries that have been placed on the negative visa list. The Spanish rapporteurs have therefore questioned whether this requirement is in accordance with the judgment of the ECJ.

As far as the second problematic issue is concerned, there appear to be obstacles surrounding the admission of family members, and particularly third-country national family members, of EU/EEA citizens to some Member States. In *Luxembourg*, it is difficult in practice for parents of EU citizens and third-country national family members to join EU citizens. The former cases mainly concern Portuguese parents of EU citizens who have been refused entry on the grounds that the level of their pensions was too low and in respect of which the Ombudsman has successfully intervened on a number of occasions. In *Portugal*, certain provisions concerned with the granting of visas to third-country national family members of EU citizens have a negative impact on free moment and the entry of family members. Residence visas can still be issued and these can also be refused automatically if the family members concerned have been sentenced to six months imprisonment even if they do not constitute a threat to public policy and public security. The incompatibility of the procedures in *Slovakia* with EU entry rules in 2004 has been resolved to a certain extent by legislation transposing the EU Citizens Directive which came into force on 15 December 2005. However, a number of gaps remain. Family members of EEA nationals continue to be required to demonstrate sufficient financial resources for their length of stay in *Slovakia* and, while they no longer have to pay a fee for a visa at the border, a fee is still payable in the regular visa application procedure. The rapporteurs for the *United Kingdom* note that EEA

nationals are generally not questioned on entry into the country, although their family members are routinely asked whether they are still married to an EEA national or if their spouse continues to reside in the UK. The rapporteurs express their concerns that the juxtaposed border controls carried out by UK immigration officials in Belgium and France are contrary to Article 2 of Directive 68/360/EEC because third-country national family members of EEA citizens may be prohibited from leaving Belgian and French territories.

In some Member States, the grounds upon which entry may be refused to EU citizens appear to go beyond the scope of the public policy, public security and public health exceptions stipulated in EU law. For example, in *Latvia*, there is some doubt whether non-economically active EU citizens have to produce evidence of valid health insurance at the border, although, according to the Office of Citizenship and Migration Department, possession of such insurance is not obligatory. The amended Aliens Act in *Slovenia* permits refusal of entry on the basis of 'international relations', which therefore appears to apply incorrectly to EU citizens one of the grounds for refusal of entry in the EU Borders Code applicable only to third-country nationals at the external border. In *Italy*, EU citizens enjoy the right to enter Italy except for limitations provided by criminal law and for those designed to safeguard public policy, public security or public health, although the meaning of 'limitations provided by criminal law' (other than those decided on the grounds public policy, public security or public health) is unclear.

Residence

Residence permits are generally not required in a number of Member States (*Estonia*, *Finland*, *France*, *Germany*, *Ireland*, *Latvia*, *Spain* and *United Kingdom*). While the need for a residence permit has been dispensed with in both *France*[3] and the *United Kingdom*, it is still possible to request a permit under the law, and the possession of a residence permit is still important for practical reasons, such as enabling a third-country national spouse to obtain a residence permit, obtaining a visa to travel to a third-country, or participating in elections. Similarly, in *Ireland*, residence permits are optional, but only the time for which a permit has been held is calculated for the purpose of an application for a naturalisation certificate. In 2005, some Member States were in effect exercising their option (or preparing to do so) under Article 8(1) of the EU Citizens Directive to require EU citizens to register their residence (without the need to obtain a residence permit) (*Estonia*, *Slovakia*, *Slovenia*, *Sweden*). In Germany, EU citizens are required to register their residence with the local or city authorities, which then submit the necessary information to the aliens' authorities for the issue of a residence certificate, but a number of Länder have called for a substantial simplification of the procedure which would require the abolition of issuing such certificates to EU citizens. The Evaluation Report on abuse of market freedoms (March 2005) observes *inter alia* that a substantial facilitation for EU citizens and a simplification of procedures could be achieved by a complete abolition of the registration of EU citizens as aliens in the central registry. This would mean that EU citizens would be treated in every respect on equal

3 The French report also refers to the interesting judgment of the European Court of Human Rights in *Mendizabel* v. *France* (Application No. 51431/99) of 17 January 2006, which held that the non-issue of a residence permit of the requisite length to a Spanish national who had resided regularly in France since 1975 constituted an unjustified interference with the right to family life in Article 8 because of the precarious and uncertain situation in which the applicant had lived during that period.

terms with German citizens and would only be obliged to register with the local or city administration when taking up residence.

As noted in the introduction, the full application of EU free movement law with regard to residence is hampered by a number of bureaucratic administrative hurdles. In *Finland*, the registration process can take up to three months in certain police districts (e.g. Helsinki), which is explained by the rather large number of registrations compared with the small number of staff responsible for handling them. This delay is not in conformity with Directive 2004/38/EC, which requires the registration certificate to be issued immediately (Article 8(2)). Concerns are expressed by the rapporteur for *Italy* in her 2005 report noting the response by the Italian Interior Ministry to a letter from the European Commission referring to numerous complaints against the administrative practice for issuing resident permits. The Ministry reminds the Police HQ (*Questura*) to interpret the law to EU citizens as favourably as possible. In Belgium, administrative reforms will have to be introduced as a result of the Court of Justice judgment of 23 March 2006 in *Commission* v. *Belgium* (C-408/03**)** finding that the administrative practice in *Belgium* of interpreting the sufficient resources condition to mean that the person him/herself must possess such resources is in breach of Community law.

, EU workers in *Cyprus*, wishing to be issued with a residence permit, are required to obtain a statement from their employer, certified by the Department of Labour, that he or she intends to employ the applicant and the duration and type of the work to be performed, although this procedure is not supposed to constitute an obstacle to the immediate implementation of the employment contract. EU citizens can also be fined up to 500 Cypriot pounds if they do not possess the employer statement or residence permit, although these fines are less strict than those imposed on Cypriot nationals who fail to apply for a national identity card, and in practice the authorities are reluctant to prosecute EU citizens and instead instruct them to obtain a permit as soon as possible. However, the rapporteur refers to a July 2005 court case where charges were brought against a Cypriot shop owner for employing a Greek national without a residence permit and the EU citizen was also prosecuted. A similar fine can be imposed on non-economically active EU citizens if they fail to produce the requisite documentation (health certificate, medical insurance and evidence of adequate financial means). In *Malta*, in order to work in the country, the EU national has to obtain an employment licence, at the cost of 60 EUR for one year and 180 EUR for an indefinite period, which is issued within a period of 10 days, in addition to obtaining a residence permit, although s/he can begin to work before the residence formalities have been completed.

Often, these administrative obstacles have the greatest impact on the third-country national family members of EU citizens. In some Member States, however, there have been attempts to mitigate the adverse impact of this bureaucracy on the person/s concerned. In *Belgium*, for example, administrative instructions are sent to diplomatic missions in Morocco, Tunisia and Turkey to issue return visas to third-country nationals who go on vacation there while their family reunification applications are still pending in Belgium. In the *United Kingdom*, the processing of EEA permits improved considerably during 2005 (4-6 weeks for straightforward applications according to anecdotal evidence) and the Home Office applies flexible procedures when processing residence applications from EEA nationals, for example, by permitting them to submit applications without their passports in order to facilitate their travel. However, the UK rapporteurs argue that there is clear discrimination against EEA nationals and their family members because they are expressly

disallowed from entering the fast-track or 'premium service' where such documents could be issued in one day rather than the aforementioned 4-6 weeks.

In addition to bureaucratic administrative hurdles, some legal provisions in Member States concerning the issue or non-issue of residence permits appear to conflict with Community law. For example, in *Hungary*, the conditions for rejecting or withdrawing a residence permit on account of the EEA national having suffered certain specified diseases endangering public health do not appear to be in conformity with Directive 64/221/EEC with reference to the diseases referred to in the Annex. The non-specification of the diseases in question in other Member States (e.g. *Estonia*) also raises doubts whether refusal of the first residence permit on public health grounds would be in accordance with Community law. The earlier argument that the grounds introduced by the new provisions of the amended aliens' legislation in *Slovenia* on the basis of which the entry of EU citizens can be refused contrary to Community law is equally applicable to the reasons upon which the registration of residence can be refused, which included international relations and the performance of work in Slovenia which is not in accordance with labour law or employment regulations.

While strictly-speaking, the information below will be pertinent to the 2006 report, the rapporteur for *Ireland* notes that the EU Citizens Directive, which has been applicable in Ireland since the end of April 2006, implements the residence provisions unevenly because the right of residence for up to 3 months is hedged in by an additional condition not foreseen in the Directive, namely that the person concerned 'does not become an unreasonable burden on the social welfare system of the State'. Similarly, in *Lithuania*, there appear to be additional conditions imposed for the issue of residence permits to EU nationals, such as possession of evidence that the applicant has a place in which to live under an ownership, rent or use agreement and health insurance (a condition that should only be applied to students). The sufficient resources condition is also applied to applications for permanent residence permits, which is not in conformity with the EU Citizens Directive, which states in Article 16(1) that the right to permanent residence is not to be subject to the same conditions applied to the right of residence.

The rapporteur also observes that the latter condition has been included in the draft law, which amends the aliens' law transposing the EU Citizens Directive. Furthermore, this draft legislation has deleted the provision in the earlier law allowing EU workers or job-seekers to extend their stay in the country beyond the three-month period without the need to meet formal procedures, which casts doubt on the proper application of the *Antonissen* (C-292/89) judgment. In *Slovakia*, an accommodation condition for the grant of the first residence permit was also applicable in 2005, but this has now been changed by the new law transposing the EU citizens Directive, which entered into force in December 2005. However, this law raises a number of other questions regarding its conformity with the Directive. An EU citizen temporarily unable to work because of illness or accident (which is not an occupational disease or accident that was the reason for termination of employment) will lose his/her residence on the basis of the first residence permit in Slovakia, which is not in conformity with Article 7(3) of the EU Citizens Directive.

In *Latvia*, a number of inconsistencies regarding the correct transposition of Community law continue to exist. The rule in the *Antonissen* case appears to be interpreted very restrictively; there is no possibility of extending residence beyond six months even though the EU citizen in question is able to provide evidence that s/he is continuing to seek employment and has genuine chances of obtaining it. Moreover, a distinction persists between the residence rights of students who are EEA nationals and third-country nationals in that the former can only obtain a residence permit for a maximum period of one year, while the latter are issued with 5-year residence permits. Third-country students appeared to be treated more favourably

than EU nationals. This rule was applicable until 18 July 2006 when new Regulations were adopted and the situation was remedied.

Finally, the problems regarding the cumbersome procedure for registering residence and the imposition of a maximum fine of 40 EUR in the event of non-registration are ongoing. The 2005 Latvian report refers to the situation in the Riga City Council where 137 foreigners have been fined. It is unclear how many of these persons are EU nationals, but it would appear that approximately 30 percent of these persons come from Nordic EU Member States, namely Denmark, Finland and Sweden.

With regard to those EU citizens who are not economically active, the 2005 reports describing the situation in a number of the A10 Member States, observe that the procedures require them to verify that they possess sufficient financial resources and medical insurance, which is permissible in respect of this category under Directive 2004/38/EC, rather than just to provide a declaration to this effect, as is, for example,expressly provided for in *Finland*. However, in *Germany*, the draft Bill introducing new provisions in the 2005 Free Movement Act with a view to transposing the EU Citizens Directive would also permit the competent aliens' authorities to require proof that EU citizens dispose of *inter alia* sufficient means of subsistence, although there is no further information how this would be achieved. It is also clear that in some Member States lack of sufficient resources can result in the non-renewal or withdrawal of the residence permit. In *Finland*, the reliability of the aforementioned declaration is assessed if the EU national subsequently avails her/himself of the social assistance system. In *Denmark*, the Immigration Service tests, on a case-by-case basis, whether the employment of EU nationals is actual and effective and not of such a limited extent that the income from it appears as a purely marginal supplement to a person's other income or means.

Departure

It is unclear whether it is possible to depart from all Member States without a passport or identity card if EU citizens and their family members can prove identity by other means in accordance with Court of Justice case law (e.g. *MRAX*). In some Member States, however, recent amendments to the foreigners' law or proposed amendments explicitly allow for this possibility or would allow for it (e.g. *Czech Republic*, *Sweden*). In the *Netherlands*, the detention of EU citizens is possible for up to 4 weeks if no residence right is acquired. The *Oulane* judgment, discussed above in the context of entry, has been implemented restrictively by the Aliens Circular, which questions its conformity with the Court of Justice ruling. The Dutch courts have distinguished between proving one's identity (e.g. presentation of a driving license, birth certificate and 'family book' in the case of persons claiming to be from France) and nationality.

The expulsion of EU citizens after criminal sentences without examining the personal conduct of the individual concerned to determine whether he constitutes an actual and serious threat to the fundamental interests of society (public order and public security) continues to occur in some Member States, or at least gives this impression in the absence of firm evidence to the contrary. In a number of Member States, the law appears to be properly applied by the courts even in the case of commission of very serious offences, such as repeated drugs offences, rape and murder (e.g. *Luxembourg*, *Netherlands*). In *Portugal*, the Supreme Court of Justice ruled in April 2005 that an additional penalty of deportation in respect of an EU citizen convicted of a crime may only be legally permissible if it can be

demonstrated that the person concerned poses a serious threat to public policy or security. While the law in *Finland* on the expulsion of EU nationals on public policy grounds seems to be in conformity with Community law and the jurisprudence of the Court of Justice (i.e. criminal convictions are not sufficient in themselves to justify deportation), the practice of administrative courts in 2005 indicates that there were still problems in how the Directorate of Immigration and the courts apply the grounds for refusing entry or deportation in respect of EU citizens. Indeed, there were several decisions (mainly concerning Estonian citizens) in which a conviction for a drugs offence or gross drugs offence was considered tantamount to constituting a threat to public policy without examining whether the conduct of the individual concerned continued to present such a threat. In *Hungary*, it appears that expulsion of an EEA permit holder will be ordered if s/he has not left the territory voluntarily and *inter alia* on his/her release from imprisonment for an intentionally committed crime. The report for *Denmark* refers to a 2005 Supreme Court judgment sentencing a dual Polish-German citizen to 8 years imprisonment for smuggling cocaine into Denmark with the intention of its distribution. This judgment resulted in a High Court order for his expulsion from Denmark, although the expulsion decision was not appealed to the Supreme Court. In the *United Kingdom*, concerns have been expressed over the Home Office's interpretation of the Court of Justice judgment in *Bouchereau* (C-30/77) and the rather prescriptive approach taken to the definition of serious offences (i.e. by reference to periods of custodial sentences). This approach lists a number of offences which would justify deportation of EEA citizens without the need to show that the personal conduct of the person concerned constitutes a new and serious prejudice to the requirements of public policy as evidence of the propensity to offend.

More generally, in *Latvia*, the regulations implementing Community law on entry, residence and departure do not foresee a 'sliding scale' to be applicable in cases when public policy and security grounds are invoked concerning EU citizens. Similarly, in *Lithuania*, the legislation regulating departure in 2005 was applicable to all foreigners, including EU citizens and thus they would have been subject to broader grounds in respect of their expulsion than those stipulated in Community law, although there was no practice on the expulsion of EU citizens in accordance with these rules. But some of the proposed amendments to the 2004 Aliens Law transposing the EU Citizens Directive relate to expulsion and, if adopted, would improve the legal situation. In *Slovenia*, however, the new chapter on entry and residence inserted into the amended Aliens Act do not include express provisions on departure and there is no discussion on available remedies even though the Slovenian report notes that 21 applications for residence permits were refused in 2005 and that there were only 2 appeals against such refusals While EU citizens can only be expelled in *Poland* for public policy and public security reasons, these terms are not defined and there is no specific legal act treating EU citizens in a privileged manner. Similarly, in *Slovakia*, while the situation relating to the application of Community law in this area has improved considerably since the law amending the Foreigners' Act came into force towards the end of 2005, the provisions enabling EU/EEA citizens to be expelled for serious reasons of a threat to the security of the country or public order are vague and not defined affording considerable discretion to the police authorities.

The consequences of the *Orfanopoulos* and *Oliveri* (C-482/01 and C-493/01) judgment are discussed in the report on Germany. This case law has been applied to Turkish workers in analogy to Community law, but contradictions have appeared in national judicial decisions regarding prohibition of entry ('blocking function'). One court decided that unappealable

expulsion orders taken before the entry into force of the Free Movement Act on 1 January 2005 lose their blocking effect whereas another court decided that expulsion orders that become unappealable are also effective in respect of EU citizens relying upon free movement. In *Spain*, the report refers to a Supreme Court judgment in February 2005 invalidating the provisions in the foreigners' law requiring EU citizens to leave the country after a certain period of time if a residence card is refused. The Court underlined that this could only occur for public order and security reasons.

The Aliens Act in *Finland* is rather problematic because it also appears to permit the deportation on public health grounds of EU nationals who have already registered their right of residence and who have a right of permanent residence. In *Hungary*, it appears that expulsion of an EEA permit holder is possible if s/he suffers from any disease that represents a danger to public health and the disease had already existed before his/her entry, although, as noted above in the section on Residence, diseases endangering public health in Hungary do not seem to conform to those recognised by the World Health Organisation according to the Annex to Directive 64/221/EEC. In *Italy*, a literal reading of the 2002 Legislative Decree concerned with EU conditions for entry, residence and departure suggests that it is possible to refuse renewal of a residence permit on specific public health grounds while Community law states that such grounds can only be applied in respect of refusal of entry or issue of the first residence permit.

The Supreme Court in *Italy* ruled in November 2005 that it is not possible to expel an EU national convicted for criminal offences in lieu of serving a term of imprisonment notwithstanding the application of such a possibility to third-country nationals and even if the EU citizen concerned requests expulsion (in order to avoid imprisonment). However, where greater protection against expulsion is afforded third-country nationals, the courts have intervened. For example, in the *Netherlands*, the court found discrimination against an Italian national denied residence after 15 years of lawful residence on public order grounds given that, under Dutch migration law, third-country nationals could not be removed in similar circumstances. This is because the criminal offence in question in the context of public order and security is balanced against the duration of residence.

Remedies

While some Member States appear to have carefully implemented Articles 8 and 9 of Directive 64/221/EEC concerning challenges by EU nationals (or Turkish nationals under equivalent provisions in Decision 1/80) to refusal of entry or residence decisions and to expulsion, access to the requisite remedies in other Member States gives rise to a number of problems. It should be underlined here that not all reports provide complete information in this regard. There continues to be no appeal against the decision of the Foreign Minister in *Latvia* to include a foreigner on the 'blacklist' of foreigners (also applicable to EU and EEA nationals until 2006 amendments of the legislation) prohibited to enter Latvia because they are considered to be a threat to national security and public order or have committed a serious crime. While the law was amended in June 2005, in response to a Constitutional Court judgment in December 2004, providing for the possibility of appealing the Interior Minister's decision on this issue to the Senate of the Constitutional Court, no appeal is possible from the Foreign Minister's decision. Moreover, a further amendment, adopted in January 2006, states that blacklist decisions, taken on the basis of information provided by state security institutions and acquired as a result of the activities of intelligence or

counterintelligence activities (and if confirmed by the Public Prosecutor General), are not subject to appeal proceedings.

The impact of the Court of Justice's judgment in C-136/03, *Dörr and Ünal*, which underlines that Article 9 of Directive 64/221/EEC calls for a remedy with suspensive effect, was discussed in some reports. In *Austria*, the impact of this judgment was significant in both legal and practical terms. The contested decision and over 300 other administrative court decisions were withdrawn in 2005. A number of these decisions concerned the third country spouses of Austrian nationals as well as Turkish workers. There were also financial consequences for the Austrian State because the procedural costs of the claimants had to be reimbursed. In other Member States, however, appeals against refusal (of entry) decisions either have no suspensive effect (*Slovakia*) or the courts retain discretion to order suspensive effect (*Hungary*). Moreover, in *Hungary*, only judicial review of a negative decision is possible and there is no independent review. In *Belgium*, the most important development in 2005 was a Conseil d'Etat judgment ruling that an application lodged by Belgian husband to obtain a suspension of a refusal of visa decision for his third-country national wife was inadmissible because he was not the recipient of the administrative act containing the refusal decision and only the family members (who are normally abroad) have a sufficient interest as they are the subjects of decision.

In *Italy*, Article 8 of Directive 64/221/EEC has not been transposed into Italian law, although Article 24(1) of the Constitution provides for the right of all persons to commence judicial proceedings to protect their individual rights and legitimate interests.

There were also a number of legislative developments and proposals in 2005 relating to remedies for EU citizens in the event of refusal of entry, withdrawal or non-renewal of a residence permit, and expulsion. In *France*, a new decree passed in 2005 (Decree 2005-1332) specifies that the EU citizen is to be notified of the reasons for the decision and the decision cannot be executed before an opinion of the Commission on residence permits as foreseen in the Law of 24 November 2004 on the entry and residence of foreigners and the right of asylum, which entered into force in March 2005. The rapporteurs for *Belgium* also raise questions in respect of draft legislation introduced in 2005 proposing the establishment of a new administrative court (jurisdiction) to deal with all immigration law cases including those concerning EU citizens. The details of the competences of the new court are still rather sketchy. In particular, it is unclear whether the court would conduct a mere review of the legality of the decision, which would be problematic from the point of view of Community law as it would no longer be possible for aliens (including EU citizens) to obtain advice from an independent consultative body before expulsion (*Dörr and Ünal*).

Chapter II
Access to employment

Equal treatment

Most of the reports give a short overview of the general provisions in their country prohibiting discrimination in the field of employment between EU citizens and own citizens. The direct applicability of Regulations 1612/ 68 and 1408/71 ensures in *Lithuania* still the equal treatment of EU nationals with regard to concluding labour contracts and conditions of work. The *Belgium* report notices that a debate on the workers who cross the border every day from France to Belgium (and profit from the different tax and social security systems) could, in the future, raise a more general debate on the cross-border regions in Europe.

Until the end of the transitional period there is no equality of treatment of all Union nationals in the area of access to work in *Poland* on the basis of reciprocity. Only Irish, British and Swedish nationals as well as the nationals of the EU-10 Member States have the same access to work as Polish citizens. Among the nationals of the other EU-15 Member States there are differences in restrictiveness of provisions. The same applies to *Hungary*. Hungary applies reciprocity in terms of the Accession Treaty, but attaches importance to the right application of the equivalency rule. Other transitional arrangements are dealt with in Chapter VIII on Enlargement.

The *Danish* integration assistance, which does not apply to EU citizens and members of their families also does not apply to third country nationals who are granted a residence permit as family members of EU citizens according to the principles of the *Singh* judgment (see also Chapter V).

The *Dutch* report indicates that although there is a statutory right to equal access to employment, there are four other mechanisms that in practice may work as a barrier for employment of an EU migrant getting access to employment in the Netherlands: (1) the recruitment procedures, (2) the security checks for jobs with private employers designated as security functions, (3) language requirements, and (4) the recognition of foreign diplomas. There are long security checks which take a long time for foreigners and these procedures dissuade employers from hiring them for jobs designated as security jobs.

German authorities may not restrict the exercise of a medical doctor practising on the basis of his admission in Belgium if the exercise of medical profession is only of a temporary nature, according to the German Federal Civil Court.

Language requirement

In *Finland* there are no statutory language requirements at the private sector. In practice it is rather common to require that the applicant command either Finnish or Swedish to be employed. This does not necessarily, however, apply to low-skilled jobs.

For access to most professions there are no absolute requirements in *Sweden* for Swedish language, but regarding language the following information is provided by the National Board of Health and Welfare: “No knowledge of the Swedish language or national legislation is required for recognition. However, this is not to be interpreted as a possibility

to practise in other languages. The patients must be entitled to be able to communicate with the professionals and the migrant must acquire the language knowledge necessary for performing his/her professional activities in Sweden."

In *Lithuania* language proficiency requirement is still applied in certain spheres of the private sector, including the maritime sector. However, there are progressive developments in eliminating obstacles to free movement like new acts for barristers and guides and the preparation of a Draft Law on Professional Qualifications to transpose Directive 2005/36.

The language requirements in *Latvia* are complicated and in certain cases disproportionate. The requirements set for language proficiency in the private sector are confusing and subject to different interpretations. They also include relatively high levels of language proficiency for positions such as psychologists and taxi drivers.

In *Italy* the recognition of a primary and secondary school teacher diploma is conditional upon the proof of knowledge of Italian language.

The knowledge of the *Slovenian* language is not required by the legislation which covers the private sector. But with regard to the implementation of the EC rules on the recognition of qualifications of medical doctors, the Slovenian report specifically observes that a health worker is required to use the Slovenian language at work (and in addition Italian or Hungarian in the respective regions). This requirement is a possible obstacle to the employment of doctors from other Member States.

Knowledge of the *Czech* language is required to the extent that it is necessary for the pursuit of the regulated activity. There are no language requirements in law for architects, lawyers and veterinary doctors. In *Slovakia* there are no language requirements for access to employment in the private sector.

Language requirements can be found in *Hungarian* law in two aspects: a) regarding recognition of foreign diplomas, and b) in the acts dealing with the legal status of civil servants and public officials.

EU nationals who intend to take up an employment in any regulated profession in *Poland* should submit a declaration on their language capability. This obligation arise from the regulations issued by the relevant ministers.

Explicit requirements as to sufficient knowledge of the *Dutch language* are included in the statutory rules on employees of railways and metro companies, having security related functions, on the requirements for candidate maritime pilots in and for Muslim, Hindu and Buddhist religious leaders working in prisons and other detention institutions. An explicit requirement of sufficient knowledge of the Dutch language is also included in the rules on the recognition of diplomas and experience obtained in another Member State by advocates, notaries, candidate-bailiffs and fire brigade officers.

Recognition of professional qualifications and diplomas

Most reports give an overview of the regulation which implements the relevant general and sectoral Directives on recognition and describe the procedures to get the necessary recognition. Sometimes it is difficult to make a strict separation between the requirements regarding the private and the public sector, which is dealt with in Chapter IV. Several reports (*Belgium, Cyprus, France, Greece, Ireland, Italy, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, and Spain*) focus in some detail on the implementation of the rules relating to medical doctors, nurses, dentists, veterinarians, lawyers and architects.

The *French* report shows the most changes on this issue in 2005. After years of not implementing the relevant Directives (2001/19, 89/48 and 92/51), France was condemned in several court cases for not fulfilling its obligations (cases C-198/04 and C-164/05) This has led to a series of legislation to bring French law in line with the relevant Directives.

The *Spanish* report already refers to some court decisions of 2005, which might give rise to doubts regarding the future compatibility with the system of harmonised recognition in the EU which is subject to the new Directive 2005/36, which should simplify the system before October 20, 2007.

In accordance with the main rule, a person having a professional diploma from another Member State (EEA or Switzerland) should have the right to exercise his profession in *Sweden*. A Swedish dissertation on recognition of professional qualifications in the EU was published in 2005 (Staffan Ingmanson, *Erkännande av yrkeskvalifikationer inom EU*, Juridska insititutionen vid Umea universitet no 11/ 2005).

In *Denmark* an Executive Order was issued on the recognition of foreign qualifications for service on merchant ships implementing Directives 2003/103 and 2001/25.

The *Latvian* government adopted in 2005 a number of new regulations regarding the recognition of qualifications of pharmacists, dentists, (maternity) nurses, doctors and veterinaries. The Latvian government also adopted a regulation on additional requirements for recognition aiming at setting up standard procedures for recognition. There was also legislation adopted in case of recognition of qualifications of third country nationals. In 2005 186 diplomas of non-regulated professions obtained in another EU Member State were recognised and 20 diplomas of regulated professions.

In *Lithuania* the texts in force are largely in line with the EU general and sectoral directives on recognition. A few new Acts were adopted in this field in 2005 regulating the recognition of professional qualification of doctors, nurses and midwives, dentists, veterinary surgeons, pharmacists, architects, barristers and guides. Draft legislation for other professions is pending.

The recognition of diplomas in *Italy* is subject to an aptitude test for a number of professions among which lawyers, accountants, industrial property agents and professions of ski-monitor and mountain guides. The discussion of the case law in the Italian report reveals that there seem to be still a number of inconsistencies in this respect between specific pieces of Italian legislation and EC law.

In *Malta* there is a special Mutual Recognition of Qualifications Act. At the hart of the Maltese system of mutual recognition is the Malta Qualifications Recognition Information Centre, established in 2005, which deals with the requests for recognition.

The recognition of diplomas of foreign universities has been modified in *Greece* in 2005. A new institution, the Hellenic National Academic Recognition and Information Centre, has been established. Pursuant to the declarations of the Government this law will facilitate the procedure of recognition of foreign degrees. This new organization does not recognize the diplomas granted by foreign universities collaborating with private Institutes operating in Greece.

The recognition of diplomas issued by public and private universities in other EU Member States has also become a controversial issue before *German* courts and in the debates before German ministries for science, research and education. There are increasing cooperations in the university sector between public universities and private university-like institutions. Frequently, there is a substantial commercial activity with issuing “recognised bachelor or master degrees” on the basis of a distant learning programme.

The new Minister of Education in Luxembourg decided to facilitate the recognition of non-EU diplomas of secondary schools, which ended up in a new grand-ducal regulation in 2005.

Also in *Slovenia* a new Act came into force regulating the recognition of diplomas. The act inter alia provides procedures of i) recognition with a view to access to education in the Republic of Slovenia and ii) recognition with a view to access to employment in the Republic of Slovenia. The system of mutual recognition of qualifications within EU Member States applies to the nationals of EU Member States and, in Slovenia, also to the nationals of third countries who have obtained their qualifications in the territory of the EU and who wish to pursue in Slovenia a certain regulated profession or professional activity either in a status of employee or self-employed person.

In a case of the unsuccessful attempt of two Polish law students applying for admission to a trainee status in *Germany*, the Administrative Appeal Court stated that the *Morgenbesser* and *Vlassopoulou*-decisions[4] do not imply a general recognition of legal diploma without a comparative examination of whether the skills required and examined correspond with each other. If there is only a partial correspondence the competent national authorities may decide that additional skills have to be proven either by an additional course or practical experience.

The *Czech Republic* has more than 450 regulated professions listed (to be found on the website of the Ministry of Education, Youth and Sport)

The *Cypriot* report mentions the introduction of new legislation in order to apply the General System for the Recognition of Professional Qualifications on the principle of reciprocity. The legislation covers both the *Sectoral Directive*s, (which cover one profession each, such as doctors, nurses, dentists, veterinarians, midwives, architects, lawyers and pharmacists) and the three Directives of the *General System* that cover all the other professions. The report on *Cyprus* also pays attention to the problem of exceeding of the four month period limit within which the competent authorities have to inform applicants of their decision. The *Irish* report discusses the Building Control Bill 2005 which contains provisions on the registration of architects and surveyors, and the relevant regulations concerning lawyers and veterinarians. The report mentions case law concerning an applicant who had been called to the English bar but did not obtain an on-the-job-training. She applied to be automatically admitted to the Irish Bar, but her application was refused, while she did not comply with the mutual recognition provisions of the 1989 Directive or the 1991 Regulations, since she did not have the right to practise as an independent barrister in England and Wales. Specific questions relating to the rights of advocates to practise in the courts of other Member States are discussed in other reports as well. The Slovak report mentions in this respect the withdrawal of Article 85 of the Act on Advocates, according to which registration of an "Euroadvocate" from any Member State may be refused when an advocate from Slovakia is prevented to provide legal services in that Member State. The Slovenian report refers to the coming into force of a new chapter in the Lawyers Act under the title "Performance of services and the practice of law by foreign lawyers in the Republic of Slovenia" and the different modalities for foreign lawyers to exercise their profession in Slovenia. The same is true for the Spanish report.

The Belgian report raises the problem of the lack of harmonization in the recognition of diplomas coming from third countries. It mentions the case of an applicant who wanted to pursue his university studies in Belgium after studying one year at Luxembourg University.

4 European Court of 7 May 1991, case C-340/89, ECR I-1991, 2357.

He claimed the recognition of his Congolese secondary school diploma by Luxembourg but the Belgian authorities refused the recognition. The issue is complex while it concerns the recognition of a recognition obtained in another EU Member State, which is still outside the sphere of EU law.

Follow-up of Burbaud

The decision of the ECJ in the *Burbaud* case (C-285/01) is of particular interest to the Commission. In this case, the ECJ decided that France cannot oblige migrant workers fully qualified in their country of origin to participate in a competition which is intended to recruit people for a training and which is a precondition for access to the employment concerned. The *Austrian, Czech, Danish, Dutch, Estonian, Finnish, German, Greek, Hungarian, Irish, Latvian, Slovak, Slovenian* and *Swedish* legislation does not provide for a system of recruitment of civil servants or employees in the public service comparable to the system of *concours* applied in France. Therefore there is no follow-up. So far, the *Burbaud* judgment had also no impact in *Lithuania*.

The *Italian* procedures on recruitment of the management staff in the public sector are similar, but not identical to the French ones. It is in Italy not possible to exempt a national of a Member State in the position similar to Ms Burbaud from the procedure. In *Portugal* a system of competition exists for posts in the public sector, which are open to EU citizens. It is questionable whether this system is compatible with the *Burbaud* judgment, but until now, no measures have been taken or planned by the Portuguese government to alter the system.
The *French* superior court (*Conseil d' Etat*), on receiving the judgment of the ECJ, confirmed the opinion thus opening up public sector posts to nationals of other Member States. However, the decision of the court does not require automatic recognition of experience and diplomas.

Nationality conditions for captains of ships

In some countries there appear to be no nationality conditions. In *Cyprus, Ireland, Latvia, Malta, Poland, Slovenia* and the *UK* it is explicitly expressed that there are no relevant nationality requirements for captains and first officers of ships flying the flag of that country. However, in *Poland* a regulation containing training programs and exam requirements towards seafarers came into force.

In *Estonia* there was in 2004 the requirement of Estonian citizenship for captains. This has changed since 1 July 2005, when the principle of equal treatment between EU citizens and Estonian citizens was fully applied. The *Slovak* maritime navigation act does not contain a requirement that the captain of a Slovak ship has to be a Slovak citizen. There is however one provision in this act that implies that Slovak citizens are preferred above other EEA citizens.

The *Spanish* legislation has been adapted to the case law of the ECJ by modifying the regulation on the minimum level of training in maritime professions. EU citizens have to pass a test on knowledge of Spanish maritime legislation regulated by a ministerial order. The Spanish report questions the compatibility of this new regulation with the principle of equal treatment.

In *France* legislation entered into force in 2005 stipulating that the captain and the first officer of a ship are French.

According to the Sea Act, the captain of a *Finnish* commercial ship has to be a Finnish national. In a reply dated on 2.9.2005 to a letter of formal notice by the Commission, Finland stated that the nationality requirement concerning captains of commercial ships shall be abolished. No Government Bill on this was yet given in 2005. At the maritime sector there are no other statutory requirements concerning nationality. Still, in practice members of crew of Finnish ships are normally Finnish nationals. This is to a great extent caused by the requirement that the members of crew have to command the working language of the vessel well enough to understand the security information and orders given in that language and the fact that the working language at the Finnish ships is normally either Finnish or Swedish. Thus the requirement concerning language proficiency may in practice impede the access of the citizens of the other Member States to the Finnish maritime sector.

In *Sweden* there is a nationality condition for access to posts as captains of ships in the mercantile marine and fishing boats. Concerning commanders on fishing-boats, the Swedish Vessel Safety Regulation could be questioned in the light of the judicial practice from the ECJ.[5] In 2005 the regulation from the Maritime Administration has been amended. A foreign certificate on competence should be recognized by the Swedish authority for a period not longer than five years. Regarding commanders from other Member States the applicant must show proof of a certain education on knowledge in adequate Swedish regulations.

The *Greek* rules still restrict the posts of captains and first officers of all vessels to Greek nationals. There are no measures planned to change these rules. The *Czech* law also requires Czech nationality for the captain of a ship. Citizens of the EEA Member States are exempted from the rule that requires captains of *Dutch* ships to have Dutch nationality, but this exemption does not apply to captains of fishing vessels

In *Denmark* the ECJ judgments in the cases C-405/01 and C-47/02 have already led to a change in Danish law in 2004 as the Act on Ships' Crew has been amended with the specific aim to widen the scope of those permitted to hold post on ships to EU nationals, but the implementation by Executive Order was even in July 2006 not established.

Although the rules on the nationality of the crew of *Italian* ships in the Italian Navigation code was modified with specific reference to EU citizens, the implementing rules still require Italian citizenship to matriculate as a seafarer. The Code itself requires Italian citizenship as a condition to matriculate as crew in the inland waterways sector

In *Lithuania* there is a provision stating that not less than 2/3 of the crew of a ship (including the master and chief assistant) should be composed of nationals of the EU Member States or permanent residents of Lithuania. The post of master and chief assistant however may only be occupied by Lithuanian citizens. Captains of ships sailing by regular passage to ports in Lithuania shall know the Lithuanian language, if the captain has permission to sail without a pilot.

In *Germany* the changes made following the *Anker* decision (C-47/02) still require German nationality or equivalent certificates for the captains and two officers.

5 Case C-47/02 Albert Anker, Klaas Ras and Albertus Snoek v Bundesrepublik Deutschland.

Chapter III
Equality of treatment on the basis of nationality

Working conditions

All reports show there is formal equality of treatment regarding working conditions. This is mostly regulated in non-discrimination legislation or in labour legislation. There is an overlap with the information on equality of treatment in Chapter II

In *Austria* at last the legislation on the eligibility of migrant workers for the election to workers chambers (*Arbeiterkammer*) and work councils (*Betriebsrat*) has been brought in line with Community law as a follow up to the ECJ judgments C-171/01 and C-465/01.

The problems regarding the difference between the working conditions and the payment of Danish and Polish sailors on ships sailing under *Danish* flag are still unsolved. A court case on this issue was dismissed by the Danish labour court because of the general and principle nature of the dispute. The Danish Labour Union might file a new case and has brought the issue before the European Commission.

Although the *Estonian* relevant legislation set forth the general principle of equal treatment, the behaviour of employers concerning the Russian speaking population shows a tendency towards unequal treatment. There is no case law on this issue.

The *Slovak* Act on Services of Employment was amended in 2005, expanding the general clause on the equality of treatment of EU citizens also to citizens of EEA countries, Switzerland, and their family members.

Social and tax advantages

In *Hungary* the implementation of the *principle of equal treatment* is effectively regulated in the rules on employment (prohibition of both covert and direct discrimination), concerning the access to housing, and on the entitlements to social advantages. An interesting legal question of general importance occurs whether it is practically possible to apply Article 7 (2) of Reg. 1612/68/EEC when Articles 1-6 are suspended. See also Chapter X.

A *French* ministerial note issued in 2005 recalls explicitly that income support is awarded to Community nationals and those in similar categories, as well as to members of their families regardless of their nationality under the same conditions as applicable to French nationals.

In *Finland* in 2005 two significant reforms took place in the area of tax legislation affecting persons working or living in another EU Member State.

The *Greek* report mentions a discriminatory rule in Greece regarding a special pension including free medical care for Greek citizens older than 68 years, not having sufficient resources. This pension is not available to EU citizens residing in Greece.

According to Directive 2003/109 the communal apartments have to be made accessible to aliens who are already in the Member State for more than five years. At the end of 2005 the capital of Austria, Vienna decided to grant this access to its 220.000 apartments. The automatic salary increase, which was limited in Austria to employment in the public service only after 7 November 1968 (date of entering into force of Regulation 1612/68) was in 2005

removed following the ECJ judgment *Österreicher Gewerkschaftsbund* of 30 November 2000 (C-195/98).

The introduction of the habitual residence test for access to several social benefits in *Ireland* has led to questions on the application of the equality principle. See further Chapter X.

In *Latvia* the right to social services and social assistance is linked to the possession of a personal number. EU/EEA citizens acquire such a personal number if they are permanent residents. Latvian citizens can qualify for these services and assistance even when they have not resided in Latvia for five years because they keep the personal number.

The *Italian* 2004 Community Law, which entered into force in 2005, tries to avoid reverse discrimination of Italian citizens, while implementing principles deriving from EC law such as the principle of equal treatment, the right of establishment en the freedom to provide services. The Italian constitutional court declared a law of the Lombardy region unconstitutional because it limited the entitlement to free benefits of public services to Italian invalid citizens.

Every person (whether Maltese or any other EU citizen) not fulfilling the five-year continuous residence requirement is to be considered as a non-resident for the purpose of the acquisition of immovable property in *Malta* by such person. The fact that such Maltese or other EU citizen are in possession of a valid residence permit is irrelevant. The *Slovenian* Personal Income Tax Act treats an EU worker, if he is resident according to the tax legislation, the same as a Slovenian worker. Special treatment is stipulated for non-residents. This special treatment applies to tax exemptions and tax relief. Non-residents are not obliged to pay income tax out of capital profits and savings profits with its source in Slovenia.

In Baden-Württemberg (*Germany*) working persons without a high school diploma have access to a study at a university in their professional field, if they fulfil some other requirements, like having their main residence for at least a year in Germany etc. Since these requirements may be difficult to fulfil by Union citizens, questions may arise as to the compatibility of these provisions with the principle of non-discrimination according to nationality.

The permanent residence requirements for access to social benefits and services (like nursing homes) in the *Czech Republic* were not applied in practice to EU workers. The national authorities applied Art. 7(2) of Regulation 1612/68 instead.

In the *UK* the authorities established a scheme to assist workers in the public sector who are designated as key workers to have preferential access to credit in order to purchase their own homes in areas of particular price pressure. The scheme was opened in 2005 to nationals of any country (including EU citizens). Also the access to banking facilities has begun to raise issues for nationals of other Member States. In order to respond to the UK's implementation of the money laundering regulations, UK banks have begun to require more and more detailed information confirming an individual's previous address before accepting to open a bank account. This leads to complaints of EU citizens not being able to open an account.

In *Spain* in 2005 some new legislation came into force stipulating the equal treatment of Spanish and EU citizens regarding social advantages and social protection measures. There is although a residence clause which requires special attention from a Community law perspective.

The main issue in *Belgium* is at the moment the conditions of residence to benefit from social rights like unemployment benefits. Important is the ECJ judgment in the *De Cuyper* case, which is dealt with in more detail in Chapter X.

According to an in 2005 amended Decree in *The Netherlands* on double taxation, implementing the ECJ judgment in *De Groot* (case C-385/00) personal tax advantages are fully taken into account when a taxpayer who also pays taxes in another State in that State was taxed without his personal and family circumstances being taken into account. According to a revised Act on stimulation of private ownership of housing, EU and EEA nationals and Turkish nationals whose right of residence directly flows from the Association Agreement are entitled to a financial contribution to acquire their own house on an equal footing as nationals and holders of a permanent residence card.

Chapter IV
Employment in the public sector

The access of nationals of other Member States to employment in the public service remains a controversial issue in several Member States. This relates both to the definition of the jobs that are reserved for nationals and to other obstacles to access to employment in the public service, such as language requirements. Yet, some Member States (*Cyprus*, *Estonia*, *France*, *Ireland* and *Greece*) have opened up in 2005 a part or even most of the public service jobs to nationals of other EU Member States.

Nationality condition for access to positions in the public sector

One of the most important changes occurred in *France* that finally has implemented the ECJ case law of the 1980s in its national legislation.

Most public offices in *Finland* were formally opened also to persons who are not Finnish citizens in 1989. Exceptions to this rule are laid down in the Finnish Constitution and in the Act on public offices.

In *Sweden* requirements of Swedish citizenship for various jobs in the public sector are still present. For clerks in an (administrative) court of appeal amendments have been made in order to abolish requirements of Swedish citizenship. However, such a position is usually the starting point for a career within the judicial system, and since there are requirements for Swedish citizenship for obtaining a higher position it may not be tempting for a foreigner to apply for a position as a clerk at the courts.

The opening of the public sector to EU citizens in *Luxembourg* goes still very slow. 99% of the public positions are still held by Luxembourg nationals.

The *Greek* Council of State concluded in 2005 that that it is not legal to prohibit EU citizens to have access to the posts of engineers, translators en interpreters employed by the Greek courts, as their duties do not relate to the exercise of public power an the safeguarding of state interests on a permanent basis.

Access to civil service in *Austria* in general is still restricted to Austrian citizens and to those who have an equal position according to EC law. Some functions are reserved to Austrians only, if the function requires a specific solidarity with Austria, which could be expected only from Austrian citizens. The relevant legislation requires the need of knowledge of the German language.

A survey held in 2004 in *Denmark* covering the Danish ministries conclude that there are in general no posts within the public sector where a requirement on Danish citizens is upheld except for certain posts within the Ministry of Defence and the Prison and Probation Service

Since May 1, 2004 EU citizens have a right to be appointed on a position in the *Estonian* state and local government agencies, in line with the restrictions laid down in EU legislation and case law.

Employment in the public service in *Lithuania* remains restricted to Lithuanian citizens except a few jobs that are available to foreigners under labour contracts without performing the function of public administration. There is no public or political discussion on this issue. The situation in Latvia is very much the same as in Lithuania.

In *Ireland* in relation to access to the public service, it is particularly noteworthy that access to the police force – *An Garda Síochána* – has recently been opened up not only to nationals of other EU Member States but also to resident third-country nationals. That said, the application of the public service exception in Article 39(4) of the EC Treaty to Irish public sector employment generally remains opaque. There is no list – in the legislation or even as a matter of administrative record – of posts reserved to Irish nationals (attempts to obtain a list of posts limited to Irish nationals have up to now proved fruitless and it is not possible to extrapolate such a list from public sources). However, the vast bulk of the public service is open to nationals of other EU Member States.

In *Slovenia* the Civil Servants Act does not require Slovenian nationality for the employment as a civil servant, but there are still nationality requirements for the functions with the courts, the public prosecutor's office, the attorney general's office, the police, the defence and the customs service.

In *Germany* it is largely undisputed that notaries, in whatever function they perform services whether as employed or self-employed persons, exercise public functions and therefore this function may be reserved to German nationals contrary to the view of the European Commission. The *Czech* legislation regarding the access to the public sector is rather extensive and the requirement of Czech citizenship is included in the conditions for the positions where there is direct or indirect exercise of the State's powers. There are a number of positions unavailable to nationals of other Member States. The *UK* report complains that it is still unclear in which manner it is determined whether or not a given post is within the EU concept of 'public service'. What is lacking is a public list of the positions which other EEA nationals and their family members are eligible to apply for.

In principle, employment in the public sector in *Belgium* is quite open to EU citizens unless when there is direct or indirect participation in the exercise of powers conferred by the public law. In practice, there does not seem to be much refusal of access to employment or of professional advantages due to language requirement, recognition of professional experience or of diplomas. However, the rate of non Belgian in the public sector seems to be low.

In *Hungary* EU nationals and their family members can be employed as civil servants only in executive positions like clerks, not having any leading or confidential position under the condition of having sufficient knowledge of Hungarian language necessary to work in the position concerned. Nationality is not only required for positions of public power but also in various public services with no public power at all. In *Spain* in 2005 the *Basic Statute of the Public Employee* was presented by the Ministry of Public Administrations. This is an extensive document which is intended to be the starting point for the drafting of the future parliamentary Act modifying current Spanish legislation concerning civil servants, which has been in force since 1984. It seems in line with Community law.

On *Cyprus* in 2005 legislation has been adopted to regulate the employment of EU citizens in the public or semi-public sector if the post is not deemed to be important for the public interest of the State. On *Malta* there is a court service list of posts identified which are reserved for Maltese nationals. It is confidential. The ministry is working on guidelines on access to the public service but these have not yet been finalised.

Language requirement

In *Finland* the requirements concerning language proficiency are rather rigid and they may therefore impede the access of the citizens of the other EU States to the public sector. The requirements concerning linguistic competence are bound to the qualification requirement (for example university degree) and not, for example, to the post and tasks in question, which would be a more flexible approach.

Although EU candidates are exempted from the nationality condition for jobs in some public sectors not related to the sovereignty of *Luxembourg*, the knowledge of the three national languages (Luxembourgish, French and German) is still required for most jobs. In 2005 a case has been brought before the European Court of Justice (C-193/05) concerning this requirement of knowledge of these three languages for a foreign lawyer who wants to settle in Luxembourg (Chapter II).

Knowledge of the *Greek* language is necessary for employment in the public sector in Greece. The *Austrian* legislation asks for "good command in word and writing; if the job requires less, an adequate command has to be shown."

In *Estonia* there exists the requirement of language proficiency on three different levels (basic, intermediate and advanced) The requirements concerning linguistic competence of professors and other teachers at universities are not as strict as the requirements concerning civil servants. Persons who have passed an Estonian language proficiency examination receive a certificate. In *Latvia* there are also strict language requirements for civil servants.

In the *Italian* report special attention is paid to the fact that although the official language is Italian in some regions other languages like French, German and Slovenian have a special status. In these regions besides Italian the knowledge of the other language concerned for that region is a condition required for posts in educational institutions (French and Slovenian) or even for all posts in the public service (German).

Language requirements in the *Czech Republic* depend on the conditions for participation in a recruitment procedure, which are stated by the employer.

The knowledge of *Slovak* language is one of the conditions for admission to the civil service, but there are no specific provisions how this knowledge has to be examined.

On *Cyprus* EU citizens applying for a job in the public service for which knowledge of the Greek language is required, have to provide the same evidence as Cypriot citizens.

Recognition of diplomas

In *Finland* and *Sweden* in 2005 no significant developments took place regarding the rules and practices on recognition of diplomas for access to the public sector.

Luxembourg adopted regulation allowing for easier recognition of diplomas issued in a non-EU country. In *Greece* also in 2005 new regulation entered into force providing that university diplomas acquired in EU countries are accepted for access to the public sector if an act of recognition of professional equivalence is granted.

In *Denmark* the recognition of degrees obtained at foreign universities are to be evaluated on a case-by-case basis. This is done by an organisation called Cirius, established in 2005 replacing the former authority in this area. The statistics of this organisation showed that in 2005 6% of the applications for recognition was denied.

The *Irish* Public Appointments Service operates a non-published procedure for the recognition of diplomas. It is very difficult to judge whether this raises difficulties under free movement rules.

The Estonian, Slovenian and Slovakian system of recognition of diplomas does not make any distinction for posts in the public sector in comparison to posts in the private sector.

The *Spanish* rapporteurs conclude that the recent case law shows that the Spanish legislator has to redraft a new legal framework, which adapt more clearly the obligations imposed by Community law on this issue.

Recognition of professional experience and seniority acquired in another Member State

This issue has not been systematically addressed in most national reports, because there is no relevant legislation on it.

In *Finland* and *Estonia* no developments took place in 2005 in this respect. There are no specific rules concerning the way the professional experience and seniority acquired in another Member State should be taken into account for the purposes of access to the public sector or for the purposes of the determination of professional advantages. All relevant matters contributing to the professional competence should be taken into account in the discretion concerning professional competence. Professional experience and seniority acquired in another Member State should be taken into account in a similar manner as corresponding experience and seniority acquired in Finland and Estonia.

In *Latvia* public service performed in another Member State will not be taken into account when calculating remuneration a public service job in Latvia.

In *Greece* there is a provision that the seniority in the public sector of another EU State is also taken into account in order to determine the height of the salary. There is no regulation regarding the private sector.

In the *Italian* legal system there is no general legislation on the recognition of professionall experience gained by Italian civil servants in the public sector in Italy or in other Member States. The relevant legislation regarding participation by Community nationals in competitions to recruit teaching staff in Italian State schools, which was criticized in case C-278/03 *Commission v Italy,* was modified in 2004 in order to take into account the professional experience acquired in another Member State for the purposes of access to the selection procedures of teaching personnel in the Italian public sector..

Referring to the recognition of professional experience the *Polish* report stated that in many cases of employment in the public sector the requirement of the seniority (length of employment) may be applied. Usually this requirement does not refer to the experience in a specific profession but generally to the period of employment. Sometimes the experience of being an executive/manager is required. Seniority has influence on the remuneration of an employee (seniority bonus). In *Hungary* recognition of professional experience for the purpose of determining the professional advantages has remained a marginal issue due to low number of cases and in particular in low-qualified public officials jobs available for non-nationals in public sector.

Although there are general rules on the recognition of professional experiences, the *Portuguese* report notices that the absence of more specific legislation regarding EU citizens could become a problem in the near future because there is a large number of Spanish doctors and nurses working in the public hospitals and centres of the National Health

Service. In Luxembourg, apart from a general rule concerning the taking into account of seniority for calculating starting salaries of civil servants, there is no specific regulation regarding EU citizens.

Chapter V
Family Members

Most problem issues dealt with under this heading in the national reports relate to family members who are nationals of third countries. Some issues relate both to EU and third-country nationals. Examples are certain Member States not providing for equal treatment of spouses and registered partners or same sex marriages (e.g. *Greece, Poland, Slovakia* and *Spain*) or the statutory requirement in *Cyprus* that family members of EU students have to present a health certificate with their application for a residence card. The requirement of **adequate housing** may effectively block family reunification in *Lithuania*. In *Denmark* the accession of the 10 new Member States gave rise to the introduction of a housing requirement for the admission of family members of the nationals of all other Member States. It was provided that this requirement should be applied in a rather lenient way and not in the strict way applying to family members of third country nationals. The immigration law of *Malta* grants a large discretion to the immigration officers in this respect.

Several reports mention national rules requiring family members or their EU sponsors to prove that the family has sufficient income, e.g. *Denmark, Hungary, Latvia, Lithuania, Luxembourg, Slovakia* and *Slovenia*. Slovakian legislation requires a declaration that family members will be no burden to the national health system and the social security system, when applying for a residence permit. It is not always clear whether these **income requirements** apply to third country national family members or to EU nationals as well. If such conditions are applied to family members of workers or self-employed Union citizens, this would clearly not be compatible with Community law. The national law in *Hungary* provides for **automatic loss of residence rights** in case the information provided by the sponsor or the family member is held to be incorrect or no longer valid.

Special rules on **marriages of convenience** are mentioned in the reports on the *Czech Republic, Ireland, Lithuania, Luxembourg* and *the UK*. Under the Lithuanian rules all spouses married less than five years deserve special scrutiny. In Ireland recently married couples will have to provide extensive information on the history of their relationship. A Czech rule provides that the birth of a child is prove that the marriage is no (longer) a marriage of convenience (due to the best interest of the child and protection of the family life). The relevant rules often are formulated as applying to all marriages, but in practice they will apply almost exclusively to marriages with a third-country national spouse. In the *Netherlands* the prospective spouses of EU nationals are exempted from the special rules aiming at prevention of marriage of convenience.

In the legislation of *Greece* explicit rules on the **special position of third-country nationals (TCN) family members** have been introduced in the national law in 2005. However, no rules on TCN family members are to be found in the *Lithuanian* immigration law. Neither do the *Luxembourg* rules on visa provide for the privileged treatment prescribed by Community law.

The **visa requirement** presents a major obstacle to the family reunification of TCN family members in many Member States. In some Member States the MRAX judgment has been implemented and TCN family members having entered without a visa are not refused a residence card on that basis (*Belgium, Czech Republic* and *Netherlands*). However, this judgment has not been implemented in *Estonia, Slovakia* and *Sweden*. In *Malta* entry without

the required visa is a ground for refusal of the residence card. Systematic checks in the SIS are made by the consular officers of several Member States (e.g. *Denmark, Portugal* and *Spain*). In *Denmark* internal instructions state that a SIS alert in itself should not be sufficient grounds for refusal of a visa or a residence card to a TCN family member. *Italy* requires extensive documentation with the visa application and provides that even if all information is presented the TCN family member is not entitled to a visa. In *Belgium* a husband does not have the right to file an appeal against the refusal of a visa for his wife.

Problems for TCN family members to get **entry at the borders** are mentioned in the *UK* report, whilst the reports on *Poland* and *Slovakia* mention the possibility for TCN family members to obtain the required visa at the border.

In some Member States **long delays in the handling of applications for a residence card** for TCN family members or the actual production and issue of the new cards with ID technology remain a problem, e.g. the *Netherlands*. The handling of those applications has been speeded up in the *UK*, but there is no national rule allowing TCN family members to **work** while their application is pending, which still may take a long time. According to the internal instructions in *Finland* such applications should be handled as urgent cases. A special problem arises in *Estonia* where the national rules provide for a **quota** for admission of family members. Since no quota is provided for TCN family members, they are simply refused admission once the general quota for that year has been exhausted. *France* has abolished the obligation for Union citizens to apply for a residence card. But the obligation is still in force for TCN family members and the national law provides for criminal sanctions in case of late application for renewal or residence in France without the required residence document. The Baumbast judgment has not been implemented in *Denmark*. It has been implemented in a rather restrictive manner in the *UK*.

The treatment in respect of the **economic and social rights** of TCN family members appears to be unsatisfactory in several Member States. In *Luxembourg* and *Malta* TCN family members are required to apply for work permits. In Luxembourg such a permit may even be refused. The report on *Hungary* mentions that the equal treatment with respect to social rights is not codified in the national law. In the *Netherlands* TCN family members are, pending the judgment in the Jia case (C-1/05), only provisionally exempted from the obligatory integration requirements introduced under the new national “integration policy”.

Hopefully, the Court in its judgment will provide more clarity on the position of TCN family members of Union citizens who **return to their own Member State** after having exercised their freedom of movement. *Denmark* interprets the Singh judgment as covering only economically active EU migrants and not students nor to EU citizens who live in Sweden but work in Denmark. *German* authorities take the view that the Akrich judgment allows Member States not to admit TCN family members of returning migrants if they did not have a residence permit in the other Member State. The *Netherlands* government in the Eind case (C-291/05) has argued that only TCN family members of returnees have to be admitted, who already were granted a residence permit in the Member State of origin before the Union citizen left that country to exercise his freedom of movement.

From this overview it appears that TCN family members, almost forty years after Regulation 1612/68 entered into force, still are confronted in many respects with the same obstacles and discrimination, gradually abolished in Member States practices for EU citizens over the past decades.

A new issue mentioned in several reports is the **reverse discrimination** of third country family members of EU nationals who have not (yet) used their free movement rights. After the end of the term for transposition of Directive 2003/86/EC in October 2005, Community law now provides for directly applicable rules on family reunification for the family members of EU migrants and the family members of lawfully resident nationals of third countries. Moreover, Community law provides for residence rights and equal treatment of admitted family workers of Turkish nationals as well. However, it appears that family members of EU nationals who have not migrated are not protected by Community law. Their legal status appears to be regulated by national law and the minimum guarantees of human rights law. This issue does not arise in Member States, such as *Austria, Belgium, Italy* and *Slovenia*, that provide in their national law for a treatment equal to that of family members of EU migrants or for a privileged regime for family members of nationals (e.g. *Germany*). However, in some Members States the national law standards for family members of nationals are inferior to the Community law standards for EU migrants (*Latvia* and the *UK*) or even inferior to the Community law standards for family members of third-country nationals (*Denmark* and *the Netherlands*). This difference in treatment creates frictions, is not easy to justify and raises questions as to its compatibility with Article 12 and Article 18 EC Treaty.

Chapter VI
Relevance, influence, follow-up of recent ECJ decisions

There are substantial differences among the Member States as regards the effects of recent ECJ jurisprudence. Most rapporteurs were able to assess the effects of some decision, particularly those where the ECJ had handed down judgments in which the Member State was specifically involved. Slovakia presented a particular problem as the lack of access to national judgments hampers the rapporteur's ability to assess how the courts of that state are applying ECJ judgments.

One worrying aspect of the reports is the number of cases where the national expert is concerned about an apparent misapplication of EU law and in particular the jurisprudence of the ECJ by a national court. Examples from Germany, France, the Netherlands, Spain and the UK are discussed. It may be that further attention should be given to training of judges at the national level in their duty of obedience in good faith to the interpretation of EU law provided by the ECJ.

Benefits

As regards the judgments in *Trojani*, *Collins* and *Ioannidis* a number of rapporteurs advised that either no action has been taken yet notwithstanding the applicability of the judgments or inadequate action by the state authorities. Among these states are *Austria* where there had not yet been a response from the national authorities, *Belgium* where the authorities have followed up the decisions but a national court decision has raised questions whether a residence requirement contained in national legislation which must be satisfied in order to receive entitlement to a benefit is contrary to the right of a citizen of the Union to move and reside freely within the territory of the Member States where the applicant is an unemployed person who is not required to be available for work[6], the *Czech Republic* where action has been taken but the formula applied to assess an unreasonable burden on the social assistance scheme raises some questions, *Denmark*, *Finland* and *Latvia* where action has yet to be taken. In *Sweden* an official report has been published but no follow up had yet taken place. In a number of other Member States no action has been taken but the rapporteur indicates that there are no similar benefits to those in question in the three cases. Among these Member States figure *Greece*, *Italy* and *Poland*. Some rapporteurs stated that in their Member State the judgments have resulted in a hardening of the law such as in *Ireland* where a habitual residence test has been introduced. In the *UK*, the state directly implicated in the *Collins* judgment, the national court found that the application of the habitual residence test to exclude the applicant was in accordance with the ECJ's ruling which decision is the subject of a further appeal. In *Portugal* only those EU citizens in possession of a residence permit are entitled to social benefits.

As regards the judgment in *Bidar*, more activity has been noted. In *Finland* it has been implemented and in the *UK* the requirement of settled status (the source of the complaint) has been lifted. In the *Netherlands*, however, the application of a five year residence test for access to the student benefit has been questioned as excessive (see also chapter XI).

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6 See Chapter X and the answer of the ECJ to this question in case C-406/04 (*De Cuyper*).

In *Denmark* access to full benefits is limited, for some types of benefit to persons with seven out of eight years residence in Denmark. Although this seven years residence requirement was actually not meant to impact on EU/EEA citizens, who are largely exempted from this requirement, administrative practice has cast some doubts on the scope of this exemption. In the *Netherlands* changes to the social benefits system which has resulted in the de facto exclusion of former Dutch residents abroad is highlighted. In *France* the Cour de cassation considered a question of reimbursement of hospital costs of a woman who had treatment in Italy. It rejected the claimant's case for reimbursement on the grounds that Community law does not prevent the application of legislation requiring prior authorization for medical treatment abroad. The court did not wait for the result of the then pending UK reference.

Car Tax

The *Van Lent* and *Commission v Denmark* judgments on car taxes do not seem to have had the same impact across the Member States. In *Denmark* the authorities have brought national law into conformity with the judgment according to our rapporteur. *France* continues to have a specific tax regime which is designed to discourage hiring of cars in neighbouring Member States by way of a specific tax. A French court has referred further questions to the ECJ on tax in general. In *Hungary* there are possible important implications of the judgments but no action has been taken yet. In *Ireland* where there is clear applicability no action has been taken in the reporting period either.

Sports and the ECJ jurisprudence

There are still substantial differences among the Member States regarding the application of the ECJ's jurisprudence on free movement of workers in the sports sector and national regulation of the sector. For instance, in *Austria* there remain problems of transfer payments and waiting periods which impede free movement. *Finland* has applied a somewhat anomalous rule in that the limit of foreign players applies only in ice hockey for the 2004/5 season and as a result of a ' gentleman's agreement' among the clubs! *Greece* has been quite successful in applying the ECJ's jurisprudence in this field. Few questions if any arise regarding the application. In *Hungary*, a Senegalese basketball player was subject to a foreign player exclusion notwithstanding the non-discrimination provision of the Cotonu Agreement. Further information about sportspersons in *Hungary* is contained in Chapter II of the national report. There has not been a serious effort to implement the ECJ jurisprudence regarding the designation of sportspersons who are nationals of other Member States on a non-discriminatory basis with own nationals. In *Italy*, the sheer complexity of the rules is astonishing but the end result is unlikely to comply with the ECJ's jurisprudence. In *Lithuania* an interesting formula has been adopted in some sports where there is a quota for foreign players *and* a separate quota for EU nationals! This is unlikely to be consistent with the ECJ's jurisprudence. There also appears to be some difficulty as regards transfers, this information is contained in Chapter II of the national report. In Latvia the main problems are related to team sports. There are limitations in basketball and football as to how many foreign players can be fielded which is not in compliance with the *Bosman* judgment. In *Slovenia* discrimination in foreign players is still applied, for instance in basketball. In *Slovakia* again there are limitations of foreign players which appear to apply even to EU nationals but the sector is not wealthy and thus rarely in a position to pay sums sufficiently

interesting to attract foreign players. However, an application of the exception to promote training of young persons has also been important here. In *Spain* no action has been taken to implement the *Simutenkov* judgment (nor indeed that in *Kolpak*). In *Portugal*, it would appear that some of the regulations of certain sporting associations infringe Community law by discriminating against EU citizens. For example, the Basketball Clubs League only allows for 5 foreign players per team, a rule that is also applicable to EU citizens. At the national legislative level there are no restrictions to the free movement of sportspersons. In *Sweden* the Swedish Football Association was awaiting the outcome of the discussions between UEFA and the European Commission before taking a position. The Association will probably adopt the recommendation from UEFA concerning the Home Grown Players Rule.

Other Issues

In *France* the *Burbaud* decision has been of great importance. The superior court (Conseil d' Etat), on receiving the opinion of the ECJ, confirmed the judgment of the ECJ. In *Germany* compliance with the duty to provide protection against expulsion for EU citizens (*Orfanopoulos*) has been half hearted – while the authorities have put in place some rights to remedies the time limits for accessing the remedies are strict. However, in *Portugal* the Supreme Court ruled on the exclusivity of the grounds of expulsion of EU citizens as public policy, security and health, excluding a wider interpretation of the expulsion option of the state based on criminal conviction alone. In the maritime sector, the changes made following the *Anker* decision still require German nationality or equivalent certificates for the captains and two officers. In the *UK* it is the limited application of the *Chen* and *Baumbast* judgments which is noted. Further, the UK authorities have indicated they will be applying the restrictive interpretation of the *Akrich* judgment – ie that EU nationals' family reunification right with third country national family members only applies once the third country nationals have been lawfully admitted for the purpose of family reunification in one Member State. The pending case of *Jia* may provide further clarification of this rather vexed issue. Further both the *UK* and the *Netherlands* reports indicate continuing problems with the correct application of the ECJ's jurisprudence on the EC Turkey Agreement as is applies to Turkish workers and self employed. In the UK there has still been no transposition of Decision 1/80 into national law. The results of a number of further references are awaited.

In general, there appears to be increasing awareness of the consequences of ECJ judgments but their application beyond the state directly implicated in any particular judgment appears to be influenced by the degree of attention paid to the issue by other actors.

Chapter VII
Policies of a general nature with possible repercussions on the free movement of EU workers

Introduction

The principal policies addressed by the country rapporteurs in this chapter essentially cover issues as: economic migration of third-country nationals; developments in integration policy; family reunion; citizenship and naturalisation; anti-discrimination law and policy; and measures to prevent irregular employment. Four reports provide no or very limited information in these main areas of interest, or refer to other chapters. The report on *Germany* refers to the 'General remarks' section at the beginning of the report which discusses the draft Bill amending the 2004 Immigration Act (concerning the transposition of a number of EU Directives, including the EU Citizens Directive) while the report on *Italy* notes that the treatment of third-country nationals is governed by the 1998 consolidated law on immigration as amended by the Bossi-Fini Act of 2002. The report on *Austria* states that free movement of workers is not a significant topic of debate in the country, and the report on *Hungary* refers to other chapters.

Economic migration of third-country nationals

Significant policy developments took place in a number of Member States regarding the admission of third-country nationals for the purpose of employment, which indicates the existence of labour shortages in sectors requiring both highly-skilled and lower-skilled workers in those countries. In the *United Kingdom*, the Government's philosophy is that economic migration should be maximised for the benefit of the country with the result, according to the UK rapporteurs, that the interests of the migrants themselves risks being sacrificed at the altar of economic expediency. The report describes the new proposals for the admission of third-country nationals for employment, based on a 5-tier points system, and favouring the settlement of highly-skilled and skilled workers. Although this system would also support the admission of low-skilled workers on a temporary basis, the Government believes that the jobs in question can be filled by A8 nationals with the result that two specific schemes for lower-paid employment, the Sectors Based Scheme (SBS) and the Seasonal Agricultural Workers Scheme (SAWS), are due to be phased out by the end of 2006 and 2010 respectively. Not surprisingly, economic migration from both third countries and the EU has resulted in extensive policy developments in *Ireland*. The Irish Government is committed to the preparation of a new Immigration and Residence Bill to consolidate legislation and to provide for future developments, although this Bill had not been published at the time of the report. Parliament is also debating an Employment Permits Bill, which would provide for a new employment permit system including *inter alia* the establishment of a 'Green Card' scheme for occupations in which there are skills shortages; labour protections for employees, such as granting the permit to the worker rather than the employer, the inclusion of a statement of rights and entitlements in the permit itself, and the right of migrant workers to change their employer; and sanctions for infringements of the legislation.

As far as workers from A8 Member States in Ireland are concerned, the overall public perception is that migrant workers are beneficial to the economy and society, although only 23% of the population believes that more foreign workers should be admitted and 78% are of the view that A8 workers should be subject to the work permit system.

The reports of two Member States focus on measures to facilitate the admission of highly skilled workers. In the *Czech Republic*, a pilot project on the selection of qualified labour from specified third countries is in place to attract skilled workers for settlement. This scheme can also be accessed by students who have studied in Czech universities and high schools. In the *Netherlands*, there is a special accelerated procedure for so-called 'knowledge migrants', who are not only exempt from work permit requirements but also from the existing integration obligations (see below).

A particularly interesting development that appears, to a certain extent, to be the result of the outflow of their nationals to other Member States for the purpose of employment concerns the growing labour shortages that have been identified in *Estonia*, *Latvia* and *Lithuania* and the interest expressed by employers there in hiring workers from third countries. In *Estonia*, employers would like to employ qualified workers, particularly in the construction and IT sectors but they are discouraged by the complex rules applicable to hiring workers from third countries. In *Latvia*, plans are being discussed to facilitate access of employment for third-country nationals, particularly specialists, in light of depopulation and the low birth rate. A related development concerns amended regulations, which enable students in Latvia to work up to 20 hours a week and the possibility for asylum-seekers to obtain a work permit until a final decision is taken on their status. Emigration from *Lithuania* has resulted in a significant decrease in the population, which is not however reflected in the official statistics indicating that by the end of 2005 there were 22,100 fewer persons in the country than by the end of 2004. As a result, job shortages have appeared in the construction and retail sectors, hospitals and educational establishments. There has also been an adverse impact on investment in Lithuania with some companies considering withdrawal or reconsidering their entry in the country because of the lack of an appropriate labour force. While only 1,389 work permits were issued in 2005, increased cooperation has been noted between Lithuanian companies and those from third states. Most foreign workers in Lithuania are from Ukraine (31%) and Belarus (29%).

Developments in integration policy

There have been further developments regarding integration policy in a number of Member States. In the Netherlands, the Act on Integration Abroad was passed on 22 December 2005 (entry into force March 2006) and a Bill on Integration was introduced in September 2005 (still pending). The first measure provides for an integration test abroad and a compulsory integration programme after arrival in the Netherlands, although it will not apply to EU citizens, EEA or Swiss nationals, and third-country national family members of EU citizens. However, discussions are continuing with regard to this latter category of persons. The Government has agreed to exclude this category so long as the persons concerned are residing in another Member State, but the intention is to apply the integration requirements to third-country national family members who are not yet residing in EU territory on the basis of the *Akrich* (C-109/01) case. The European Commission disagrees with this assessment of *Akrich* and consequently any decision on this matter has been suspended pending a preliminary reference to the Court of Justice. The Commission also doubts

whether the proposed legislation is compatible with standstill provisions in Association Agreements, especially the EEC-Turkey Association Agreement.

Two reports discuss integration contracts. In *Finland*, all migrants, including EU citizens, who moved to Finland after 1 May 1997, are entitled to have their own personal integration plans, which are not compulsory. The report on *France* provides updated information on the implementation of reception and integration contracts, a policy introduced in 12 French Departments in July 2003 and extended to an additional 14 Departments in 2004.[7] As of 1 June 2005, nearly 70,000 contracts had been signed between newcomers and the prefects of the Departments concerned. Algerians (27.1%) and Moroccans (16%) were the two most represented nationalities. By far the most signatories (85%) were aged under 40 and family members of French nationals were in the majority (60.2%). The importance of successful integration for access to and continued residence in the country as well as for the purpose of family reunion is observed in two other reports. Parliamentary discussions continue in *Latvia* over the introduction of an integration declaration, including exams in the Latvian language, for those migrants applying for a temporary permit. If applied to EU citizens, such a declaration would clearly be contrary to Community law. During 2005, an amendment was introduced into Parliament providing for such a declaration but it was not signed by the President on the grounds that it provided for an overly wide discretion and interpretation. In the *Czech Republic*, the participants in the pilot project on the selection of qualified labour discussed above have to be assessed on their 'level of integration' before they can be recommended for permanent residence. This assessment is carried out by the Ministry of Labour and Social Affairs in conjunction with employers, representatives from municipalities and educational institutions. In *Denmark*, an addition to the family reunion rules is the requirement that both the applicant and his/her spouse already living in the country sign an integration declaration regarding the applicant's (and accompanying children) active participation in the applicant's training in Danish language and culture. The signing of this declaration is an indispensable requirement for the issue of a permit for family reunion.

The question of integration also arose in discussions in some Member States on measures concerning the transposition of the Long-term Residents Directive.[8] In *Cyprus*, while the Directive had not yet been implemented, legislation was pending before Parliament in 2005 that would provide for language and culture tests for third-country nationals applying for permanent residence. According to a draft law to transpose the Directive in *Latvia*, persons applying for long-terms resident status will have to pass a Latvian language test.

Family reunion

The restrictive family reunion rules in *Denmark* were discussed again in 2005. While these rules do not apply to EU citizens exercising their free movement rights, they continue to be relevant for Community law on free movement because many persons who are unable to comply with the strict requirements of the Aliens Act are invoking Community law to circumvent them. A number of minor amendments were introduced in 2005 to the Danish family reunion rules. The first concerns the integration declaration discussed above. The

7 The report notes that the policy is to be extended to all Departments in 2006.

8 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2003 L 16/44.

second amendment is a positive feature introduced in response to criticism of the rules by the Council of Europe's Commissioner for Human Rights and requires particular weight to be given to family unity considerations in a number of specific cases concerning the possible issue of a residence permit to a family member.

The question of family reunion was also touched upon briefly in three other reports. In *Greece*, the new law on the status of aliens (Law 3386/2005) established a framework for the facilitation of family reunification, although no further details are provided in the report. In *Sweden*, the official Government report issued in March 2005 on the new Aliens Act and Ordinance (presented in February 2006) refers to the transposition of the Family Reunification Directive and observes that the optional stable resources and health insurance conditions for family reunion will be applied, although the official report also notes that in practice health insurance is already provided to migrants who are long-term residents because Swedish social security law is based on residence. In *Ireland*, the Department of Justice issued guidelines in February 2006 on the visa application process for the spouse and dependant unmarried children of non-EEA nationals who are in possession of valid work permits/visas, although the guidelines did not specify whether this concerned the implementation of the Family Reunification Directive.

Citizenship and naturalisation

Issues relating to citizenship and naturalisation are discussed in four reports. In *Ireland*, the Irish Nationality and Citizenship Act 2004, which came about largely as a result of the *Chen* (C-200/02) case, provides that children of non-Irish nationals (with the exception of UK nationals) born in Ireland after 1 January 2005 are entitled to *jus soli* citizenship only if a non-national parent has satisfied the minimum residence requirements (i.e. residence in the island of Ireland for 3 out 4 years immediately preceding the child's birth). In the aftermath of the application of this law, the Government revised arrangements concerning the parents of Irish children born before 1 January 2005 effectively regularising their stay. The status of non-citizens in *Latvia* was discussed in the light of the transposition of the Long-term Residents Directive, with the European Commission agreeing that this group can be equated with third-country nationals for the purpose of the Directive. The Latvian report noted that during the past 10 years the number of non-citizens has decreased by almost half from 735,000 in 1995 to 452,000 in 2005. However, only 85,352 non-citizens have acquired Latvian citizenship and it is estimated that approximately 130,000 persons will remain non-citizens for the remainder of their lives. The question of dual nationality is also discussed in the report, which observes that generally under Latvian law a person acquiring Latvian citizenship cannot be a dual national. Similarly, in *Lithuania*, dual nationality is not recognised with the exception of individual cases established by law. If a Lithuanian citizen acquires the citizenship of another state, s/he automatically loses Lithuanian citizenship. In *Poland*, the facilitated acquisition of Polish citizenship for EU nationals (i.e. without having to meet the 5 years residence requirement), appears to have been removed not by a change in legislation but by a change of the practice of the Ministry of Interior and Administration, which reported in 2005 that EU nationals may apply for Polish citizenship on the same terms as other foreigners resident in the country.

Anti-discrimination law and policy

The impact of developments in anti-discrimination law and policy on the free movement of citizens is discussed in a number of the reports. Some of this discussion is also connected to the transposition of the two equal treatment directives in the Member States concerned.[9] The *Luxembourg* report refers to the two judgments of the Court of Justice against Luxembourg for failing to transpose these two Directives, and also notes a national administrative court decision finding that the provision in the statute on civil servants stating that a person can only become a civil servant in Luxembourg if s/he is under 45 years of age is not contrary to Directive 2000/78/EC because Article 6 of the Directive provides for a possible exception based on age that would allow for this restriction. In *Poland*, the new Government has abolished the post of the Plenipotentiary on Equal Status of Women and Men as a separate organ transferring its competences to the Minister of Labour and Social Policy. This development has raised concerns about the fate of the 2004 National Programme against Racial Discrimination established to implement anti-discrimination law and policy in practice. In *Sweden*, amendments have been introduced to the anti-discrimination law ensuring that sex discrimination is explicitly prohibited in all areas covered by Directive 2000/43/EC. In *Portugal* the Law 18/2004 was introduced, transposing Directive 2004/43/EC. This Law applies to the public and private sectors in relation to social protection, including social security and health care, social advantages, education and access to and supply of goods and services available to the public, including housing.

Measures to prevent irregular employment

Measures to prevent irregular employment were adopted or proposed in a number of Member States in 2005. In the *United Kingdom*, the Gangmasters Licensing Authority was set up in April 2005 and is responsible for licensing gangmasters in the agriculture and shell-fishing sectors. The application of the licensing arrangements to the various stages of food-processing has been a subject of discussions. New employer sanctions proposals have also been put forward with a view to imposing 'on-the-spot' fines on employers in the form of civil rather than criminal penalties, and which would replace the offence in Section 8 of the Asylum and Immigration Act 1996. Punishments on employers for the illegal employment of foreign workers in *Denmark* were increased to two years imprisonment by amendments introduced to the Aliens Act in 2004 and applied in 2005. Foreigners taking up illegal work can also now face up to one year of imprisonment. In *Slovakia*, the Government document on the 'Migration Policy Conception of the Slovak Republic', adopted in January 2005, is mainly concerned with irregular migration and asylum.

The issue of irregular employment also raised concerns in a number of other Member States. In *Belgium*, economic migration and the extent of illegal work was discussed in the Senate after the death of a Polish worker in the construction sector. In *Cyprus*, the increase in irregular labour migration and the appalling living and working conditions of irregular migrant workers is a particular concern. The report of *Greece* briefly refers to a

9 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22, and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

regularisation of irregular migrants residing in Greece, which was carried out at the end of 2004. The extent of irregular employment in *Latvia*, which is concentrated mainly in the construction sector, is also discussed with reference to the numbers of such workers apprehended and successful prosecutions of both workers and employers. The report of *Luxembourg* discusses employer sanctions and the fact that no criminal intention needs to be proven for such sanctions to be applied.

Chapter VIII
EU Enlargement

The reporting period of this study is the calendar year 2005. However, on 1 May 2006 the first transitional period ended regarding movement of workers from the EU-8 to the EU-15 before which date those Member States which had applied transitional arrangements were required to make a declaration to the Commission if they wished to continue to apply transitional arrangements restricting access to their labour markets to workers from the EU-8 (hereafter TAs). Two Member States had not applied TAs from accession of the EU-10, Ireland and Sweden and the UK had applied only a very light TA (an ex post worker registration scheme). Their situation did not change. Four Member States which had applied TAs in 2004 chose not to extend them as from 1 May 2006 – Finland, Greece, Portugal and Spain. Three EU-8 states applied reciprocal TAs in respect of the EU-15 – Hungary, Poland and Slovenia. Of them only Slovenia announced it would lift its reciprocal TAs on 25 May. Italy lifted its TAs a month later. It is anticipated that the Netherlands will lift the TAs in 2006.

In order to understand better the legal developments over the year 2005 and their consequences as regards free movement of workers in the EU 25, we have chosen to divide the Member States into seven groups:

1) Those Member States which did not apply TAs – but including the UK with its very light TA;
2) Those EU-15 Member States which had applied TAs but lifted them on 1 May 2006 (including Italy which has announced the lifting of the TAs subsequently in July 2006);
3) Those EU-10 Member States which did not apply reciprocal TAs;
4) Slovenia – which applied reciprocal TAs then lifted them;
5) The two island EU-10 Member States – Cyprus and Malta to whose nationals TAs did not apply;
6) Those EU-15 Member States which applied TAs and continue to apply them;
7) Those EU-10 Member States which applied reciprocal TAs and continue to apply them.

The European Commission issued an excellent report: *Communication from the Commission: Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Agreement (Period 1 May 2004 – 30 April 2006) COM (2006) 48 final* in accordance with its obligations under the Accession Agreement. The report provides an extremely important source of information and statistics on the exercise of movement rights of workers in the EU 25. This chapter must be read in conjunction with that report – the factual information contained in that report will not be repeated here. This chapter, will, instead, amplify and deepen our understanding of the legal process of achieving free movement of workers in the EU 25 on the basis of additional information provided by the rapporteurs of the Network Free Movement of Workers regarding the relevant period.

Before moving to an analysis of the information available on the seven groups of states a number of general comments may be useful. First, from the information available in the national reports, it appears that those Member States which have chosen not to apply TAs (or light ones – and for these purposes we will include the UK in this category) there has been substantial state commitment to the project. While there have been concerns in two of them

in particular about pay and working conditions, the debate on worker protection is taking place in the context of legality of employment. In those Member States which applied TAs but have now lifted them, one wonders whether the complexity of the arrangements designed to fulfil the legal obligations, including the EU preference did not create a certain fatigue among the officials charged with their application. Certainly from our national reports it is clear that political concerns about illegal work, abuse posting of workers and disguised employment were substantial over the year 2005. The same is also true, however, of those EU 15 Member States where a decision has been taken to extend the TAs but here the discussion must take into account the possibility of irregular workers from the EU-8, whose status is unauthorised by the TAs, thus dealing with pay and working conditions issues is more complex. One final general comment relates to data – virtually all our rapporteurs noted that there is substantially conflicting data from difference sources and ministries regarding numbers. There appears to be a general lack of knowledge by the authorities of who is on their territory.

EU 15 Not Applying TAs (including UK)

Ireland: the Irish Government has strongly defended its position in not applying TAs notwithstanding some public concern regarding numbers of workers from EU 8 states working in Ireland. Indeed, the Irish authorities have considered Ireland a model system for enlargement and free movement of workers. Although concerns about pay and working conditions led some voices to call for the introduction of a work permit or registration system, this has been strongly rejected by the Government. However, the Irish Government has intervened in the reference by a Swedish court to the ECJ *Laval* regarding collective agreements, industrial action and the protection of pay and working conditions. In response to public concern, the Irish authorities introduced a habitual residence test for social benefits applicable to all EU nationals in 2004. Notwithstanding some newspaper reports alleging a scandal regarding childcare benefits the authorities have resisted making any further changes. No decision has yet been taken regarding movement of workers from Bulgaria and Romania after their accession.

Sweden: there has been little further debate in this Member State regarding free movement of workers. Although there had been concern regarding social benefits, in fact the levels of claims by EU 8 nationals has been light – EURO 94,000 in Sweden and EURO 16,700 for child benefits paid for family in the state of origin. The main source of concern has been the treatment of posted workers from EU 8 states working primarily in the construction sector. The levels of their pay and their working conditions have resulted in industrial action. A reference has been made by a Swedish court to the ECJ regarding the allocation of collective agreements to contractors and sub contractors in the *Laval* case (C-341/05).

UK: The worker registration scheme has been the subject of very little change since 2004 except for an increase in the fee from BP 50 to BP 70. Although the numbers of EU 8 workers coming to the UK far exceeded expectations, the authorities are confident that their arrival and participation in the labour market has been beneficial to the UK economy. The government reports have been produced which come to the same conclusion – confirming that the workers have filled gaps in the labour market rather than displacing British workers and very low levels of social benefit claims. Interestingly, the greatest resistance to the worker registration scheme is coming from employers who find it cumbersome and yet

another piece of red tape. Very recent indications from the UK government suggest that TAs might not be applied in respect of Bulgarian and Romanian workers on accession.

EU 15 which lifted TAs

Finland – in the first two years after accession much discussion took place regarding the abuse of service provision and the possibility of avoidance of pay and working conditions legislation by companies in EU 8 states sending posted workers to Finland. The sectors of particular concern were construction and restaurants. The largest group was from Estonia. The authority's response was to increase the numbers of inspectors and inspections of work places. Finland does not intent, at this time to apply TAs to Bulgarian and Romanian workers.

Greece – the description of the application of the TAs in Greece is surprisingly complex. One can well imagine the difficulty of the administrator in applying them as well as the concern that the duty to give priority to EU 8 workers in relation to third country nationals was properly respected. According to our rapporteur, there was little discussion on lifting the TAs.

Italy – only after the elections in 2006 and the change of Government were the TAs lifted. The Italian TAs appear to have been structured around quotas for EU 8 workers, which quotas were also sectoral but rather fluid. The application of such rather changing and fluid quotas must be difficult. As the rapporteur notes, the quotas were fixed not on the basis of an analysis of the Italian labour market but on the basis of past quotas used in other circumstances.

Portugal – here a strict system of prior visa was maintained for EU 8 workers wishing to work in Portugal. Such workers were required to obtain a visa in their country of origin before going to work in Portugal. Clearly there are difficulties here with the right of free movement of citizens of the Union.

Spain – no change was made to the legislation regarding the TAs until they were lifted. However, at least one case came before the courts regarding expulsion of EU 8 nationals.

EU 8 not applying Reciprocal TAs

Czech Republic – public support for free movement of workers has remained high here. No change has been made to the legislation.

Estonia – there has been no discussion about the application of TAs in Estonia as there is little movement to the country but there has been substantial concern about the numbers of young Estonian workers moving to other Member States. Pressure is now coming from the employers federation for an opening up of the labour market in the construction and bus driver sectors to third country nationals.

Latvia – as in respect of Estonia, there has been little concern regarding movement of workers to Latvia as the numbers have remained very low. However, Latvia requested the EU 12 to lift TAs not at least on the basis of their concern for their nationals who might be working in irregular situations.

Lithuania – the situation in this Baltic state resembles that of the other two but perhaps there is even more concern about the loss of workers to other Member States. Again there is

some pressure mounting here to open labour migration for third country nationals to fill vacancies. However, notwithstanding the uncertainties of the data sources, there appears to be a gradual drop in the numbers of workers leaving Lithuania in 2005 in comparison with 2004.

Slovakia – according to our rapporteur the situation here has not changed in 2005.

EU-8 Lifting Reciprocal TAs – Slovenia

The Slovenian government announced on 25 May 2006 it would lift the reciprocal TAs which it was applying to the pre 1 May 2006 EU 12. All workers from the EU 12 had required work permits and there are questions as to whether the priority of EU workers over third country nationals was properly implemented. The Slovenian government advised the EU 12 that following a study of the intentions of its citizens, there is no question of Slovenians moving in substantial numbers to the EU 12.

The Island EU 10

Cyprus – although the statistics indicate a substantial movement of EU nationals to this state there has been no change to the legislation and little debate on the subject.

Malta – this state applies a work permit scheme to all EU workers coming to the state under a special arrangement in the Accession Treaty. No change is anticipated. Once again it is not clear that the priority of EU workers over third country nationals is fully applied.

The EU – 12 which did not lift TAs

Austria – the rules on access to employment of EU 8 workers are contained in the Foreign Employment Act; bilateral agreements with Hungary in particular provide for greater access to the labour market. There is little official information, which according to the rapporteur may be the result of the impending elections in October 2006.

Belgium – substantial concern has been raised about irregular work and the abuse of posted worker rights. New measures have been adopted to seek to combat the two. A registration scheme for all workers is being introduced in this regard. While the authorities accept that there are unfilled vacancies, they are proposing new retraining schemes to get local workers into the labour market again. As regards EU 8 workers, work permits are issued automatically for specified sectors in four regions on the basis of labour market need. Our rapporteur notes that two reports both based on EU data and the Commission's work but one by a government appointed Council and the other by the Centre against racism come to opposite conclusions about the lifting of TAs – the former against, the latter in favour.

Denmark – although Denmark continued to apply TAs in respect of EU 8 workers, the measures have been loosened gradually to prepare for free movement. No labour market test is made in respect of a work permit for an EU 8 worker though there is substantial verification of the existence of the employer and the post. The post must be full time and comply fully with pay and working conditions applicable nationally. An amendment to permit part time employment of 30 hours per week falls outside the reporting period.

France – the gradual lifting of the TAs continues though there appears to be only poor quality data on actual movements of workers. As with other Member States applying TAs, there has been substantial concern about abuse of service provision. The government has indicated it will not extend the TAs to the final two years of the transitional period. A bilateral agreement with Poland is putting into place an experiment in opening up some sectors and diminishing the procedure for work permits for nationals of this country. There have been reports both by the Senate and the National Assembly on the issue.

Germany – according to our rapporteur there is little to report here. An expulsion decision regarding an EU 8 national taken before accession but executed after was accepted by a national court, which decision appears in contradiction to the ECJ jurisprudence relevant to the case. The position of family members of EU 8 workers has now improved in line with the Accession Agreement and implemented correctly in Germany. There appears to have been a loosening of access to social benefits. In general, though, the TAs as implemented at the national level appear rather complex.

Luxembourg – according to our rapporteur there is no change to the TAs in this state. However, there has been a loosening of the work permit requirements for EU 8 nationals in the construction and hotel/restaurant sectors which have been suffering a labour shortage.

The Netherlands – there is a very rich and full national report on the TAs in this Member State. Five changes have been singled out – three new measures in respect of posted workers seek to address fears of abuse; the skill shortages lists have been changed four time and fines for employing irregular workers and inspections have been increased substantially. There are question raised about the treatment of students; a potential violation of the Accession Agreement standstill provision is noted in the recent restriction on switching from self employed or a service provider/posted worker to worker which was not evident at the time of accession.

EU – 8 continuing TAs

Hungary – concern has been expressed here about the correct application of TAs in other Member States to Hungarian workers – specifically whether they are being issued work permits for 50 weeks rather than 52 in order not to be accorded accumulation rights. The Hungarian authorities have been careful to ensure that the reciprocal restrictions on EU 12 workers are kept in line with changes in those states. It is not clear how the EU preference is being applied.

Poland – the reciprocal TAs have been extended but there has been no change to them. There is little movement from the EU 12 to Poland and little discussion of the Polish reciprocal TAs.

Chapter IX
Statistics

Differences in the availability, the access, the detail and the quality of the data between Member States continue, notwithstanding the efforts of Eurostat and the proposal of the Commission to create a clear basis in Community law for the systematic collection of data on migration. In some Member States EU nationals are not obliged to report to the authorities, or only EU10 nationals are under an obligation to register. In those Member States data of nationals of other Member States are not available from population registration, but only from other sources. It is remarkable that the national reporters of some EU10 Member States (e.g. *Hungary, Slovakia* and *Slovenia*) were able to produce relevant, detailed and up to date statistical information on EU migrants, whilst the report on some EU15 Member States (e.g. *Belgium* and *France*) due to the lack of publicly available official data, could only provide unofficial, outdated or incomplete statistical information. All those factors limit the comparability of the data of the national reports. Thus, most of the conclusions drawn below are based on data from a limited number of Member States. This year we will also pay attention to information on gender and regional distribution of EU migrants within the Member States.

Less than half of the national reports contain data on the **total number of EU nationals resident** in the country or their share in the total foreign population. The absolute number EU migrants and their share in the foreign population varies considerably between Member States. In a small group of Member States, EU nationals account for two thirds or more of the foreign population (*Belgium, Ireland* and *Luxembourg*). On the other hand there are Member States where the EU migrants are only a tiny minority of the non-national residents: e.g. in the three *Baltic States*, in *Greece* (1.5%), in *Slovenia* (5%) and in *Italy* (8%) of the foreign population. In a third group of Member States nationals of other Member States make up approximately one third of the foreign residents: e.g. in *Germany* (31%), *Malta* (35%), *Netherlands* (33%) and *Portugal* (28%). In *Spain* their share is clearly smaller: only 17% of the non-nationals are EU nationals. The largest absolute numbers of EU migrants are resident in *Germany* (almost 2 million), *France*, the *UK* (1,1 million persons born in other EU Member States), *Spain* (570,000) and *Belgium*. In *Slovenia* a total of 3,300 nationals of other Member States are registered, less than 5, 000 in *Latvia* and in *Cyprus* 5,300, nationals of Greece, Poland, UK and Slovakia making up more than 90% of the EU migrants in Cyprus.

The large majority of EU migrants originates form the neighbouring countries or from a Member State with a common cultural tradition (e.g. Greece and Cyprus, Finland and Estonia, Latvia and Sweden, Ireland and the UK, Austria and Germany, Czech Republic and Slovakia, Spain and Portugal). *Polish* and *British* nationals are working or resident in large numbers in other Member States that are not geographically or culturally close to their home country. These two nationalities might overall be the largest groups of Union citizens living or working in other EU Member States.

In several Member States the **immigration** of nationals from other Member States was considerably higher in 2005 than in the previous year due to the accession of the EU-10. In *Ireland* the total immigration in 2004/2005 was estimated at 70,000, the highest number since such estimates started in 1987. 38% of those immigrants came from the EU10, 17% were Polish nationals. In *Luxembourg* 13,500 EU nationals immigrated and 11,000 left the country, the 1,000 immigrants from the EU10 clearly outnumbered the 250 EU10 departures.

In *Greece* the number of registered British and German nationals decreased, whilst the number of Polish and Cypriot residents grew in 2005. In the *Netherlands* the number of immigrants from other EU Member States was almost equal to the number of EU nationals leaving the country. However, one third of the immigrants came from the EU8, predominantly Poland. A similar development occurred in *Germany*. The number of EU14 nationals that emigrated from Germany in 2004 exceeded the number of immigrants from those countries by 44,000. However, from the EU10 Member States there was an immigration surplus of 42,000. Thus, the net immigration from the EU-24 was near nil. The *Netherlands, Poland* and the three *Baltic States* in 2005 were the only Member States where the total number of emigrants outnumbered the immigrants.

The data on **residence documents** issued gives some insight in the different categories of EU nationals using their free movement and possibly in the administrative practices of some Member States as well. In 2005 in *Sweden* 34% of the residence documents issued to EU-12 nationals were issued to students, 32% to workers, 25% to family members, 7% to service providers and 2% to self-employed persons (no data for migrants from Finland and Denmark). The figures for EU-10 nationals were: students 10%, workers 55%, family members 26%, service providers 5% and self-employed 4%. In some other Member States a large share of the residence documents for EU nationals were issued to students too: in *Denmark* (46%) and in *Lithuania* (35%). This reflects the success of the Erasmus/Socrates programme and the high educational level of the majority of Union citizens using the freedom of movement. The *Swedish* data also illustrate that, once free movement of workers is allowed, the pressure to come rather as self-employed person or service provider is absent: the percentage of residence permits issued for these two categories was 9% among migrants from the 'old' Member States and those from the 'new' Member States. One quarter of the residence documents were issued to family members both from the old and the new Member States. The share of workers the EU10 was higher and the share of students lower than from the EU12 (no data on Danish and Finnish migrants).

In *Denmark* the total number of residence documents issued to EU nationals in 2005 was 14,900 (8,000 in 2004). In *Slovenia* 2,000 temporary and almost 100 permanent residence documents were issued. In *Hungary* 500 green cards were issue and 16,000 EU7 were registered, mainly to Slovak nationals.

The number of EU residence documents issued to third-country national family members of EU migrants varied a lot: in *Finland* such documents were issued to 5 persons and in *Lithuania* to 14 persons. In *France* 1,123 third-country national family members received an EU residence status in 2003 and in *Sweden* this category counted 1,234 persons in 2005.

In most Member States very few applications for **residence documents** are **refused**: in *Denmark* 107 out of 10,000 applications, in *Finland* 161 refusal, in *Slovenia* 21 refusals, in *Lithuania* none. According to the report on *Slovakia* 46 EU nationals were registered as having "tolerated" residence. *UK* is the exception: 19% of the 21,380 decisions on applications for documents by EU14 nationals were refusals, whilst the refusal rate for EU10 nationals was 9%. In the *Netherlands* 630 EU nationals applied for a residence permit for a spouse they married after entry, 480 cases were decided and 6% of the permits were refused.

The data on **work permits** mainly relate to EU8 workers in the EU15 Member States. In *Germany* 286,000 work permits were issued to nationals from Poland in 2004 for seasonal labour. Only 62,000 Polish nationals were covered by German social security in that year. In the *Netherlands* 29,500 work permits were issued to EU8 nationals in 2005 also mainly to Polish nationals (26,500) for seasonal labour. In *Belgium* 1,900 work permits were issued to

employed EU8 nationals, again mostly to Polish workers and 4,500 work permits for self-employed nationals of the EU8 Member States.

From the information on the **branches of employed** it appears that in the EU15 States the profile of the EU workers is rather similar to that of the national workers of the host Member State and differs considerably from the profile of the third-country workers in these countries. In *Spain* the pattern of employment nationals of other Member States is almost identical to that of Spaniards, with EU nationals working somewhat more often in catering jobs and somewhat less in construction.

From certain reports it appears that there are clear differences in job patterns between workers from the EU15 and the EU10. In *Hungary* nationals from EU10 countries, mainly Slovak citizens, are employed predominantly in transport, construction and unskilled jobs, whilst nationals of the EU15 are highly skilled or self-employed. Only 2% of the nationals of EU15 worked in unskilled jobs as opposed to 18% of the EU10 workers. A similar discrepancy is reported in the *UK*, where the EU10 workers are overrepresented in manufacturing, construction, distribution, restaurants, and workers from the EU15 are employed mostly in banking, finance, insurance, public administration, health and education. In *Denmark* most of the EU10 workers are employed in jobs covered by collective labour agreements. They are working in farming, services, construction and hotels. In *Malta* nationals of other Member States work predominantly in service, construction and hotel jobs. In *Latvia* and *Poland* EU migrants work mainly in processing, IT, education, trade or in managerial jobs. In *Slovenia* half of the 3,500 EU migrants employed have a university degree and another 27% have a completed secondary education. They are working predominantly as manager, technician or in sciences.

With regard to the **age** of the migrants it appears from the Spanish report that EU nationals on the average are older than third-country national migrants, only 6% of the EU residents in Spain are under 16 years of age (TCNs: 22%) and 16% of the EU nationals is over 64 years (TCNs: 2%). In *Germany* only 9% of the EU migrants were 65 years or older. In contrast, the EU migrants in *Slovakia* are relatively young: 85% is between 25 and 54 years of age. The data for EU migrants in Lithuania present a similar picture.

Information on **gender** of EU migrants, either on all residents or on workers only, is available in seven national reports. In *Finland* the percentage of women among Estonian nationals, the largest group of residents from other EU Member States is considerably higher 55%, but lower among other nationalities: 44% of the Swedish residents, 36% of the German residents and 21% of the UK nationals in Finland are female. In *Germany* the differences between the main immigrant nationalities are relatively small: 44% of the Polish nationals resident in Germany are women, 45% of the Greek, 44% of the Portuguese and 41% of the Italian nationals in Germany are women. In *Spain* 47% and in the *Netherlands* 49% of the resident EU nationals are female. An equal sex ratio is an indication that an immigrant group is well established in the host country. Apparently, this applies for both immigrant groups in Spain. In the *UK* 55% of the working age residents born in the EU14 Member States are female and 48% of those born in the EU10. In the *Czech Republic* 39% of the EU residents are female. In *Poland* 20% of the EU nationals that applied for a residence permit in 2005 were female. In *Slovakia* 15% of the EU workers employed are women and among the posted workers in that country, half of them French nationals, only 6% are women.

The fact that the large majority of the nationals of other EU Member States living or working in Poland and Slovakia are male, may be an indication of the recent migration and of the kind of jobs performed by those migrants.

In the 'old' Member States, the limited data available for Germany, Spain and the UK indicate no large discrepancies between the share number of male and female EU migrants: in Germany and Spain around 45% of the EU migrants is female and in the UK 55% of the migrants from 'old' and 48% of those from the 'new' Member States is female. Only in Finland, as mentioned above, there is a clear discrepancy between the workers from Estonia and those from two large 'old' Member States, Germany and the UK. Again, this may reflect that Estonian workers in Finland perform different jobs than the German and British workers.

Five reports provide data on the **regional distribution** of EU migrants resident in those countries. In three countries (*Czech Republic, Hungary* and *Slovenia*) the largest segments of the EU migrants are living in or around the capital of the host Member State and in the border regions. In *Portugal* 30% of the EU migrants is living in the Lisbon area and another 30% in the Faro region. However, in *Spain* 88% of the nationals of other Member States live in the main tourist areas, such as the Valencia region and Andalusia, not in the Madrid region. These EU nationals are either working in tourism or other services or they are retired workers or pensioners.

Data on **cross-border employment** in the *Netherlands* indicate that the steadily increasing employment of EU nationals living in Belgium and Germany but working in the Netherlands may reflect that increasing numbers of Dutch nationals decide to live in Belgium and Germany, but remain employed in the Netherlands. The movement across the border is not for work but for better living conditions in the neighbouring countries. Similar movements across internal EU borders are reported between Denmark and Sweden.

Two national reports provide information on residents with **refugee status** or the number of **asylum applications** filed by nationals of other Member States. In *Belgium* more than 800 EU nationals (mainly Polish nationals) have refugee status, most of them have been resident already twenty years or more in Belgium. In 2005 6% of the asylum applications (903 out of a total of 16,000 applications) were made by nationals of the EU8 Member States, 773 by Slovak, 93 by Czech, and 90 by Hungarian nationals. In the *UK* in 2005 two asylum applications were filed by Czech nationals and 5 asylum applications by Polish nationals and 5 by Czech nationals were decided. In all cases asylum was refused.

Two trends are visible in the data on **naturalisation**. First, the propensity of EU nationals resident in another Member State to acquire the nationality of the host Member States, generally is relatively low. The naturalisation of Slovak nationals in the Czech Republic can be noted as an exception to that trend. The other trend is that among the small number of Member States, having a policy opposing dual nationality, some states have become clearly more liberal in the application of that policy with regard to nationals of other EU Member States.[10]

In 2003, in *Germany* 140,000 persons were naturalized, among them 56,000 Turkish nationals and 4,000 nationals of the EU14. 80% of the nationals of other EU Member States became dual nationals upon naturalisation in Germany, only 14% of the Turkish nationals were allowed to retain their first nationality. In *Finland* 1,000 EU nationals were naturalized, among those were 690 Estonians and 150 Swedes. *Hungary* liberalised the requirements for

10 For a recent analysis of the major trends in the naturalisation policies of the EU15, see B. de Hart and R. van Oers (2006) 'European Trends in Nationality Law', in R. Bauböck, E. Ersbøll, C. Groenendijk and H. Waldrauch (eds.) *Acquisition and Loss of Nationality. Policies and Trends in 15 European Member States, Volume I, Comparative Analyses,* Amsterdam: Amsterdam University Press, p. 309-349.

naturalisation of EU nationals, but most of the non-citizens naturalised were nationals of the neighbouring countries, Ukraine, Rumania and the former Yugoslavia.

In *Italy* 2% of the naturalisation applications in 2004 were filed by EU nationals (263 out of a total of 11,941 applications), whilst EU nationals make up 8% of the non-citizen residents in the country. Only 14 applications by EU nationals were refused. In *Latvia* five nationals of Lithuania and one national of Estonia were naturalized in 2005. The only EU nationals among were 5 Lithuanian and one Estonian national. In *Lithuania* in 2001-2005 a total of 2445 persons were naturalized, among those only 10 nationals of other EU Member States. In 2005 the total number of naturalised persons was 435, most of them were either stateless or nationals of Russia, only two were nationals of an EU Member State, one national of Poland and one of Latvia. In the *UK* EEA nationals were 2% of the persons naturalised in 2004, whilst nationals of European countries outside the EU made up 8% of the naturalisations. *Slovakia* granted its nationality to a total of 177 non-citizens since its independence, none of them were nationals of an EU Member State.

In the *Netherlands* 1% of the resident nationals of other EU Member States acquired Dutch nationality in 2004. The overall naturalisation ratio was four times higher. Polish residents were the only group of EU nationals with a higher propensity to acquire Dutch nationality (5%) above the average. After the introduction of the strict naturalisation test in the Netherlands in 2003 the total number of EU nationals naturalised was reduced with more than 30% in 2004 in comparison with the previous year.

The reports on *Germany* and the *Netherlands* contain data on **multiple nationality**. The German data have been mentioned above. The *Hungarian* report states that the number of residents with multiple nationality is increasing, but no statistical data on multiple nationality are available. In the *Netherlands* the total number of Dutch nationals registered as having another nationality stood at 977,000 in January 2005, being 6% of the total Dutch population. The largest groups of Dutch nationals also having the nationality of another EU Member State were those with the nationality of Germany (45,500), the UK (42,500), Belgium (29,400), Italy (18,200), Poland (15,7 00) and France (14,900). These numbers are almost equal to the number of nationals of those EU Member States resident in the Netherlands, having only the nationality of the other Member State. Since only the latter group is counted in the official population statistics, the total number of EU nationals resident in the Netherlands might be twice as high as the number presented in the official statistics.

Chapter X
Social Security

The follow up of ECJ judgments of special interest for social security and social benefits (Collins, Trojani and Ioannidis) is dealt with in Chapter VI.

The *Hungarian* expert raises an interesting legal question of general importance whether it is practically possible to apply Article 7 (2) of Reg. 1612/68/EEC when Articles 1-6 are suspended. Seemingly, Hungarian law only awards social advantages to those persons who are able to fall within the personal scope of that Regulation. It would be interesting to comparatively see this issue in the Member States. As regards social security and free movement of workers, another issue in Hungary is the connection between the transition period and Regulation 1408/71. The Accession Treaty envisages a transition phase during which certain EC law norms are suspended. Reg. 1408/71 is not suspended meaning that the obligations following from that Regulation must be fulfilled by the Member States. The debated point is a borderline question. Reg. 1408/71 foresees the right for *unemployed persons* to export their benefits to other Member States in order to search for work there. However, Articles 1-6 of Reg. 1612/68 are suspended, out of which Article 5 regulates the right to search for work. On the one hand, there is a right to benefit export and search for work, on the other hand, there are restrictions to that right. Some Member States (mostly the EU-15) strictly oppose to except unemployed persons intending to make use of the provisions of Reg. 1408/71, some (mostly the new Member States, but Austria as well), however, accept these unemployed.

In *Latvia* the Law on Social Insurance has been amended in 2005 to include the necessary references to Regulation 1408/71. In the Law on Support for Unemployed and Job Seekers, however the status of job-seeker is not accessible for temporary residence holders (including EU nationals) residing in Latvia.

The *Swedish* report provides a list of social benefits based on residence in Sweden and a list of benefits related to income based on the requirement that a person is working in Sweden. A social benefit that is not covered by Regulation 1408/71 should be granted to EU workers and their family members referring to Regulation 1612/68.

In *Denmark* there are still unsolved problems regarding which social benefits are covered by Regulation 1408/71 and which not.

On *Malta* an international relations unit has been set up within the Department of Social Security in order to deal specifically with issues related to the application of Regulations 1408/71 and 574/72. In 2005 this unit received 195 applications for social security benefits related to the application of Regulation 1408/71. The Maltese report pays once more attention to the fact that the transitional arrangement system has given employers from the EU-15 the opportunity of setting up ‘satellite’ companies in Malta for the purpose of recruiting employees from the East European Countries and then posting them immediately to the country where the ‘mother’ company is situated. The consequence of this construction would be that these workers would fall under Maltese social security legislation. The Maltese authorities only allow this if the company constitutes ‘habitual and significant’ activities, as indicated in the *Fitzwilliam* case (C-202/97). If not, E101 certificates will not be issued. In particular the presence of an administrative base in Malta will not, in itself, be regarded as satisfying this condition.

The report of the *Czech Republic* indicates that one of the difficulties in the application of European social security rules by the Czech authorities is the use of the notion of 'residence', which has a different meaning under Community law than under Czech legislation. Therefore, in case of persons covered by Regulation 1408/71, the permanent residence conditions of several social security laws are not applied and are replaced by the provisions of 1408/71.

In *Ireland* in adopting a "habitual residence" test for access to social welfare benefits in 2004, there was some initial confusion as to how this test should be applied, vis-à-vis beneficiaries of free movement, to social advantages under Regulation 1612/68 and "family benefits" under Regulations 1408/71 and 574/72. It has been accepted, as a matter of administrative practice, that EU law takes precedence over national rules and that relevant "free-movers" will not have to satisfy the habitual residence test when claiming these benefits. The relevant guideline has been published on the Internet, but it is not very easy to locate the pr

The precondition for insurance under the *Finnish* residence based social security system is that the employment or the self-employed activities last at least for four months. The Finnish report notes that the compatibility of this so called 'four months rule' with EU legislation is questioned..

The report on *Lithuania* pays attention to two specific issues concerning the social security system. The first deals with the application of Regulations 1408/71 and 574/72 between Lithuania and Estonia and Latvia concerning the calculation of employment periods of workers in the former USSR before restoration of their independence. There is a bilateral draft treaty now which will prevent that these periods will be counted double or triple. The other issue concerns the social security position of Lithuanian sailors working on ships of other EU/EEA countries. After discussion in the Administrative Commission the initiative to conclude bilateral treaties was abandoned out of fear for social dumping. Most sailors are now insured according to the provisions of Article 14(b)(1) Regulation 1408/71 under the laws of the sending state (i.e. Lithuania).

The report on *Slovakia* mentions still an inconsistency with Art. 73 and 74 Regulation 1408/71 concerning conditions of permanent or temporary residence of children to be entitled to maintenance payments. The requirement of permanent or temporary residence is also a condition for the entitlement of other benefits like a parental allowance and a childbirth benefit and according to Slovakian expert not in line with EU law

As a result of the *Van Pommeren-Bourgondiën* case (C-227/03) the *Dutch* government has created a retrospective possibility for insurance for old age pension and survivors pension on a voluntary basis over the period 2001-2006 for EU/EER/Swiss-citizens with a Dutch social security benefit abroad.

In the *UK* the test of having a lawful 'right to reside' for certain means-tested income-related benefits (Income Support, Pension Credit, Jobseekers Allowance, Housing Benefit and Tax Credit), introduced in 2004 alongside the 'habitual residence' test, is currently subject to challenge in court, the question is currently being heard by Social Security Commissioners and an answer should be forthcoming during 2006. The *Collins* case is now pending in the Court of Appeal, after a hearing before a Social Security Commissioner during 2004 the lawfulness of the habitual Residence test was accepted on the basis that it was indeed objectively justified, this is being challenged further on appeal.

Supplementary pension schemes

This issue is not systematically addressed in all national reports. It is not an important topic in most countries. The reports give the impression that the legislation of most countries is inline with Directive 98/49/EC on safeguarding supplementary pension rights.

Supplementary pension schemes are not commonly used in *Sweden* and in *Finland*; the pension system is by and large based on regulatory schemes. However, the provisions of Directive 98/49 are transposed into the national legislation in case supplementary pension schemes are used.

In *Luxemburg* there have been no developments as far as supplementary pension schemes are concerned.

The *Greek* report pays attention to the various provisions of the presidential Decree which has implemented in 2004 Directive 98/49 on safeguarding supplementary pension rights.

Directive 98/49 has not led to any changes in Danish legislation concerning supplementary private pension schemes. In *Denmark* there is a different treatment regarding taxation of pension schemes established in Denmark and pension schemes established outside the country. A case from the Commission against Denmark (C-150/04) on the incompatibility of this differential treatment with the EC Treaty is pending before the ECJ.

The *Czech* legislation was amended to become in line with Directive 98/49 permitting residents from other Member States to participate in supplementary pension schemes. In Slovakia in 2004 a supplementary pension schemes act was adopted in line with Directive 98/49. In Ireland this happened in 2002.The *Slovenian* and *Portuguese* legislation is also in line with 98/49.

In *Estonia* the main problem is still the impossibility of workers from other EU Member States to join part of the Estonian pension system, which is mandatory for Estonian workers who were born after 1 January 1983 and has a transitional period for elder Estonian workers.

Judicial practice

The *Finnish* legislation and practice are in conformity with the ruling of the ECJ (C-50/05 *Nikula*) concerning the interpretation of article 33(1) Regulation 1408/71 on the calculation of the height of a sickness insurance contribution of someone who had worked in Sweden and Finland.

The *Luxembourg* report pays attention to 7 court cases on social security in which free movement issues are referred to (one on refusal of survivor's pension, one on refusal of family benefits and five on reimbursement of medical expenses abroad).

The *German* chapter consists also of an overview of judgments of the Federal Social Court related to 1408/71. The most interesting case concerned the question whether retired Germans, living in Spain who are entitled to a German retirement pension as well as to a Spanish retirement pension were subject to the German obligatory care insurance (Pflegeversicherung). With a reference to article 13(2)(f) 1408/71, which does not give any provision concerning the scope of application of this kind of insurances the Court gives a negative answer based on German law. This judgment was criticized because the Court had failed to take into account articles 27 and 28 Regulation 1408/71 concerning the obligation to pay insurance duties.

The *Danish* National Appeals Board on Social Welfare examined in 2005 three cases of a principle nature pertaining Regulation 1408/71.

An important legal question that arises in *Estonia* regarding social security is the question about guaranteeing parental benefit. Parental benefit is a benefit paid to the parents until the child reaches the age of one year. The amount of that benefit usually depends on the amount of the social tax that was paid in the last year. It is not clear at the moment, if this benefit should be defined as maternity benefit or as a family benefit. This situation leads to legal uncertainty by guaranteeing this benefit to EU migrant workers.

The *Austrian* Supreme Court stated that according to Article 4 of Decision 3/80 Turkish workers and their families members are entitled to regional care allowance ("Landespflegegeld"). The report also mentions several cases regarding tension between EU legislation and the entitlement to the Austrian maintenance payment ("Unterhaltsvorschuss") a kind of family benefit. The Supreme Court implemented the ECJ´s preliminary ruling in *Effing* (20.1.2005, C-302/02) that it is in accordance with EC law if a national requirement for "Unterhaltsvorschuss" is the fact that the debtor is in domestic imprisonment. Since in this case the German father of German children living in Austria was detained in a German prison, there was no claim for Austrian "Unterhaltsvorschuss".

The *Belgian* report pays attention to the opinion of Advocate-General Geelhoed delivered on 2 February 2006 in the ECJ Case C-406/04 (*De Cuyper*) which supports the position of the Belgian government. In this case, the industrial Tribunal of Brussels referred questions to the Court under Article 234 EC, asking essentially whether a residence requirement contained in national legislation which must be satisfied in order to receive entitlement to a benefit is contrary to the right, under Articles 17 and 18 EC, of a citizen of the Union to move and reside freely within the territory of the Member States where the applicant is an unemployed person who is not required to be available for work. That initially raises an issue as to how the benefit should be classified in Community law. Once that classification is made, the main issue to be addressed is the exportability of the benefit under the Community social security rules. According to the Advocate General the Court should reply as follows to the questions referred by the industrial tribunal: It is not contrary to Articles 17 and 18 EC to require as a condition for the award of unemployment benefits for an unemployed person aged over 50 who enjoys an exemption to reside in Belgium. If the ECJ follows the opinion of the A.G., which it did on 18 July 2006, it could reinforce the role of residence in the exercise of citizenship.

The *French* report summarizes several court cases on the application of various Articles of Regulation 1408/71.

Miscellaneous

The *Italian* report mentions a lot of recent legal literature among which an article (in Italian) on the definition of the concept of "insured person" for the purpose of the application of regulation 1408/71 and on the relationship between regulation 1408/71 and article 7 of regulation 1612/68. (S. Borelli, *Il campo di applicazione soggettivo della normativa comunitaria di coordinamento dei sistemi di sicurezza sociale, Rivista di diritto della previdenza sociale*, 2005, 509-530).

Chapter XI
Establishment, provision of services, students

Establishment

Three reports (*Denmark*, *Estonia* and *Finland*) observe that the domestic laws implementing the general EC rules on free movement of workers are also applicable to establishment, the provision of services and students, with the exception of a few differentiations regarding the validity of the resident permit and support requirements.

The *Latvian* report mentions the adoption in 2005 of the *Law on European Company* and the discussions during 2005 on the need to make it easier to register as a self employed person or company. The relevant amendments to the Commercial Code were adopted on 16 March 2006.

The *Lithuanian* report still identifies a discrepancy in registration for tax purposes, which imposes additional bureaucratic requirements on EU nationals. Whereas Lithuanian nationals are granted an exemption from registering as VAT payers if they are able to demonstrate they earned less than 100,000 Litas (approximately 29,000 Euros) in the past year, foreigners, including EU nationals, are required to register.

The *Kondova* (C-235/99) and *Panayotova* (C-237/02) decisions of the Court of Justice play an important role in the *Austrian* and *Dutch* reports. To enjoy the right of establishment embedded in the Association Agreements with Bulgaria and Romania a Bulgarian or Romanian citizen has to have a residence permit. The same counts for the requirement to apply from abroad. In the Austrian case the illegal stay (of one month) of a Bulgarian citizen was considered as a serious infringement of a very important public interest in the meaning of the public order clause of Article 54 Europe Agreement and sanctioned with a residence ban of 5 years!

The *UK* report discusses in length the right of establishment and self-employment of Turkish nationals, as well as provision of services, and whether these rights, in accordance with the standstill clause in Article 41 of the Additional Protocol to the Ankara Agreement, should be applied on the basis of the 1973 immigration law, a matter which has now been referred for a preliminary ruling to the Court of Justice in Case C-16/05, *Tum*. Pending the outcome of *Tum* the Home Office issued further guidance on the application of the standstill clause to those are seeking entry to the UK to establish themselves in business. The guidance states that applications will be considered under the current Immigration Rules and the 1973 Rules simultaneously. If the person does not have entry clearance or does not otherwise satisfy the current immigration rules the Officer will then examine the case under the 1973 Rules. If the person seems likely to be able to satisfy the 1973 Rules then the person will be granted temporary admission with a prohibition on taking employment but permitted to start their self-employment. The cases will then have to be re-examined after the ECJ ruling in *Tum.*

Finally, the Dutch report mentions in this respect the ruling of a District Court. According to the court the introduction of an obligatory long-term visa in the Aliens Act 2000 constitutes a new restriction on the freedom of establishment and the freedom to provide services which infringes the standstill provision of Article 41, section 1 of the Additional Protocol, while under the previous legislation the requirement was not embedded in the Act itself.

Provision of services

Only the report of *Hungary* notes that it has put into place reciprocal restrictions in respect of the provision of services by Austrian and German companies in accordance with the transitional arrangements in the Accession Treaty.

The provision of services in one Member State through the posting of third-country national workers by companies established in another Member States continues to meet resistance in some Member States. Moreover, the provision of services and the posting of workers raise a number of sensitive issues in the context of EU enlargement, particularly in the light of the restrictions on free movement of workers applied by most Member States in accordance with the transitional arrangements in the Accession Treaty. These questions are mainly discussed in Chapter VIII on enlargement, although they are also addressed in this chapter. There was an extensive debate in *Sweden* in 2005 regarding the application of the Swedish trade unions' right to collective action in protest against the activities of contractors from Latvia, which have concluded contracts on the Swedish labour market under conditions according to which the wages of the posted workers are on average lower than the wages stipulated in collective agreements. In the *Netherlands* the legislation on the labour conditions of cross-border posted workers was extended to employment in all sectors. Originally the Act, according to which the core provisions of generally binding collective labour agreements apply to posted workers as well, was limited to the building industry only. The extension to all sectors is apparently related to migration from the new Member States to the Netherlands, but is generally worded and applies to posted workers of all Member States. A comparable development took place in France with the introduction of Law 2005-882. This law is aimed in particular at imposing the minimum hard core provisions of France labour law on companies established in France with cross-border posted workers.

Furthermore the *French* report discusses in some length Law 2005-1564 which aims to implement Directive 2002/92 on insurance mediation and Decree 2005-386 regarding the coverage of health care received outside France with its procedure for prior authorisation. Authorisation must be notified within a deadline compatible with the level of urgency and availability of the care envisaged and no later than two weeks from receipt of the request. In the absence of a response upon expiry of this deadline, the authorisation is regarded as granted. Denial of authorisation was the subject of several rulings of the Court of Cassation. Furthermore, this Decree introduces a provision which enables a laboratory established in another Member State to carry out bio-medical analyses on patients resident in France and to be reimbursed for this work provided that the laboratory certifies that its activities conform to the applicable measures in France and that its staff possess appropriate qualifications for the activities concerned. The laboratory is also required to obtain administrative authorisation after verification of these conditions.

The *German* report mentions a decision of the Hamburg Administrative Appeal Court of 27 January 2005 concerning the question whether the freedom to provide services implies a right of entry and residence for a Union citizen and his third country spouse if the Union citizen moves to another Member State in order to receive for an unlimited duration services. With reference to the Chen ruling of the Court of Justice (200/02) the Hamburg court stated that the provisions of community law on the freedom to provide services are not applicable in this case.

In *Luxembourg* a Belgian company was sued in a criminal court for executing services in the building industry in Luxembourg without having asked at the Ministry of Economy a certificate by which the Minister declares that the company may indeed provide services in

Luxembourg, after having checked that the company is legally admitted to do so in the country of origin. The Court decided that such a requirement is not contrary to European Community law, while Luxembourg companies also have to be registered to be able to provide services in Luxembourg. According to the Luxembourg report the decision of the court clearly breaches EC law.

In the *Netherlands* the work permit legislation was amended in 2005 as to replace the obligation of service providers to have a work permit for their employees by an obligation to notify the Dutch authorities of the use of their work force before the start of the service provision. Although generally worded the obligation to notify concerns mainly employees from the eight new Member States in Central and Eastern Europe as long as the transition period for free movement of workers will be in force. The Council of State had advised negatively while the Council of State considers the introduction of the obligation to notify an infringement of Article 49 EC Treaty, not justified by any rule of reason as accepted in the case law of the Court of Justice.

Students

Free movement of students has not been discussed in all of the reports, but it is apparent from those reports addressing this question that still some of the new Member States have not fully implemented EU legislation or appear to have devoted insufficient attention to this question. For example, the *Cypriot* report observes that, as of 1 May 2004, draft legislation which will provide for educational grants for EU citizens on the same footing as Cypriot nationals is still pending before Parliament. Any reference to educational grants for EU citizens is lacking in the *Estonian* and *Czech* reports. According to the *Latvian* report, there is no direct reference in the relevant legislation to the position of students who are EU nationals. The *Slovenian* report mentions the Rule on scholarships which demanded Slovenian citizenship as condition for entitlement to scholarships. Although this provision was annulled by the Slovenian Constitutional Court in 2003, the same condition still applies for entitlement to students' loan subventions. *Hungary* appears to be an exception in this respect and the report observes that equal treatment with Hungarian nationals is foreseen for EEA students, for example with regard to access to scholarships and any education subsidies available to Hungarian students.

With regard to the support arrangements in the Students' Directive, the *Finnish* report notes that students are not required proving a secure income and that a statement to this effect is sufficient. However, students' right of residence may well be revoked if they avail themselves of the social security system. While the *Portuguese* report observes that students must show that they have sufficient resources by way of a declaration or an alternative way of their choice, it would appear that some tangible evidence is needed given that the authorities require students to prove that their means of subsistence are at least equivalent to the minimum national salary. The procedure is rather stricter in *Malta*, however, where students are required to make a declaration of resources at the time of entry, i.e. that they have sufficient funds to support themselves and their dependants in order to avoid becoming a burden on the Maltese social assistance system during the residence period. The *Lithuanian* report discusses the provisions of the 2004 Aliens Law, which also regulates the status of EU nationals who are students in accordance with the EU citizens' Directive (to be transposed by April 2006). While the law appears to generally comply with the Directive, the report observes that the accommodation condition for students might create obstacles for those

students who are not provided accommodation at the educational establishments where they are enrolled. Amendments and Supplements to the Aliens' Law of 2004 are pending. Once adopted, they would introduce the right of students to work during the period of studies. However, the duration of employment can not exceed 20 hours per week and engagement in employment would be permitted only from the second year of studies. The student would also need to obtain a work permit if he wants to get employed during the period of studies, which would make his situation different from other EU nationals who are not requested to obtain work permits.

The access of students to maintenance grants in Member States, particularly in the light of the *Bidar* judgment (C-209/03), is discussed in a number of reports. To implement this judgment the Study Grants Office in the *Netherlands* issued a new policy concerning the application of study grants by students from EU, EEA or Switzerland. With reference to the Bidar judgment of the Court and Article 24 Directive 2004/38/EC (maintenance aid after five years continuous residence) the Study Grants Office decided to extend the entitlement to the full study grants according to the study grants legislation to those students from other EU, EEA Member States and Switzerland who have resided in the Netherlands during a continuous period of five years. Students from EU, EEA or Switzerland who have resided in the Netherlands for less than five years are still entitled to the so called Raulin compensation, a reimbursement of the enrolment fees only.

With particular regards to the *Bidar* ruling, the *Maltese* report observes that access to student maintenance grants is subject to conditions of possession of Maltese nationality (or the Maltese nationality of at least one parent in respect of students in post-secondary education) or for non-nationals a period of five years residence before the commencement of studies. This five years' residence provision in The Netherlands and Malta would appear to be potentially at odds with the findings of the Court of Justice in *Bidar*. The implications of the *Bidar* judgment may also affect the compatibility with EC law of law and administrative practice in *Poland*, where EU/EEA students have no right to obtain maintenance grants unless these are made available through international agreements or by the decision of the Education Ministry or school principal.

The *French* report discusses a Conseil d'Etat decision of 2 February 2005 (no. 257984). The Council of State repealed a circular from the Minister for Youth, National Education and Research concerning the methods for awarding higher education grants based on social criteria. According to the Council "the Minister for National Education and Research could not, without ignoring the principle of equal treatment among persons satisfying the Community definition of migrant worker or child of a migrant worker, exclude nationals of other Member States of the European Union, even though they might satisfy the Community definition of migrant worker or child of a migrant worker and might fulfil the conditions required of French students for the payment of the study allowance or the higher education grant based on social criteria".

Both *Austria* and *Belgium* claim a special position as regards German respectively French students. In particular in medical studies Austria is confronted with 30% to 50 % German students. The same is true for Belgium with regard to French students in particular in paramedical studies, for which France applies a numerus clausus. The decision of the Court of Justice of 7 July 2005 (C-147/03) concerning the admission to Austrian universities and the recognition of diplomas awarded in other Member States (read Germany) was heavily criticised. In Belgium a draft decree would limit in certain enumerated (paramedical) studies the number of non-Belgium students who are not resident for at least 3 years to a

maximum of 30%. The draft seems overtly in contradiction with the non-discrimination principle of EC law. The Austrian report mentions negotiations with Germany, the Commission and Belgium on a new system for student sharing (75% of the places at medical universities are reserved to persons with an Austrian school certificate).

Chapter XII
Miscellaneous

As always this section is fascinating in the variety of information which the experts provide about the situation in year in their country. It is not possible to group the issues together as they tend to be diverse so we will refer to the most striking. In *Austria* a superior court refused to take into account the change of circumstances of a third country national family member of a citizen of the Union resulting in her loss of residence rights. A third country national had entered into a marriage of convenience in respect of which she was refused a residence permit and banned from the territory for five years but shortly after the ban came into force she married another Austrian but the court would not take this into consideration (argument was based on the *Olivieri* judgment). In the *Belgian* report, our attention was drawn to the recent study of the Council of Europe on dual nationality. There has been further political discussion on the possibility of permitting dual nationality in Belgian but not formal decision has been taken or is on the horizon. There has been substantial new literature published in Belgian on our subject. In *Cyprus* the anomalous situation as regards the Green Line dividing the island and its treatment as an existent but legally ambiguous border within the EU has still not been fully resolved. However the authorities have issued a circular seeking to limit the consequences of border controls at the Green Line for citizens of the Union and long term resident third country nationals.

In the *Czech Republic* there has been substantial training for lawyers and others but mainly on third country nationals. In *France* a rather interesting development is the settlement of a readmission agreement with Germany (excluding the Dublin II cases) to facilitate the return of third country nationals. The return to the bilateral is surprising. In *Germany* our rapporteur notes a court ruling where on the basis of reciprocity a national of a Member State was not required to renounce his original citizenship to acquire Germany citizenship as his country of origin would not require a German to renounce to acquire its citizenship. In a number of Member States our rapporteurs note substantial new books or articles or training courses on free movement of persons. This is the case in respect of *Greece, Ireland, Latvia, Lithuania, Luxembourg, Spain* and *Sweden*. It is expected that the entry into force of Directive 2004/38 may have had some influence on the arrival of new literature on the market in so many Member States.

In *Hungary* our rapporteurs complain of the lack of serious research and data on labour law. They also note that in effect the naturalisation requirement of residence in Hungary is three years for EU citizens as they acquire a residence right which is secure from the start of their residence. For third country nationals the effective period is six years. In *Malta* the issue of concern is voting rights. Maltese nationals who exercise free movement rights lose the right to vote in Malta is they remain outside the country for more than 6 months out of 18. The consequence is that the exercise of free movement rights results in effective disenfranchisement.

In the *Netherlands* the non-discrimination principle has been used to privilege Dutch residents over others as regards compensation for violence crimes committed anywhere in the Union! The selective extension of benefits for child care to provisions provided outside the Netherlands is highly questionable. Problems may also be foreseen if the proposed legislation on withdrawal of citizenship is adopted as this could well apply to citizens of the Union who hold the nationality of another Member State. In *Slovakia* which dual citizenship

is permitted there is very little demand, and virtually none from citizens of the Union. In the *UK* a citizenship test has been introduced as a requirement for naturalisation.