Free movement of persons – a synthesis

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Preface

The Central and Eastern European countries have several things in common in the field of the free movement of persons in the context of the Single Market.

First of all, all these countries are traditionally looked at as "sending countries", meaning that the majority of flow directions are outflow (in other words, emigration). This finding, which seems simple, is, however, a very serious statement that has and had a considerable impact on the legal and practical approach taken by (old) Member States of the European Union around the year 2000 (accession negotiations) and afterwards (as regards the transitional periods) concerning the issue of the freedom of movement of persons. I think time has come to compare the circumstances that influenced the accession of these countries with the post-accession era, especially in light of the fears and the trends that actually materialised. This is the most important common denominator so this will be a weighty part of this paper. The focus will be on Hungary but the conclusions from this are of general validity.

Of course, most of the (old) Member States soon acknowledged the fact that Member States commonly constitute the European Union and foster a strong European unity in which the freedom to move is an inherent opportunity. The majority opinion is, therefore, that the freedom of movement of persons cannot be restricted, and that the requirements laid down in the Treaty, the secondary legislation and the case-law shall be observed everywhere. Evidently, the proper implementation of the *acquis communautaire* in this field must be stressed; this is the way forward through which not only economic but also individual social mobility is emphasised.

A important related aspect will be tackled, namely the problems occurring after the entry into force of the Accession Treaties, partially based on the divergent interpretation of the text and spirit of the Treaty and partially due to other Member State considerations. Here, the problem of posting will especially be highlighted. Posting is a complex legal issue, and lays on the borderline between the freedom of movement of persons and the freedom to provide services. It is dealt with based on two reasons: because it was also problematic around the date of accession and because it is still one of the most debated topics.

In the last Chapter the focus will be put on the compliance of Central and Eastern European Member States' laws with the *acqui*s. Interestingly, these countries have no major problems with implementation; quite the contrary, the national measures giving effect to European law are rather generous. Because these countries are not target countries for migration, the issue has no real magnitude; it is mostly social security questions that arise. This paper cannot develop all relevant issues and examine the situation in all new Member States. The objective is to present some issues, as regards the right of residence and equal treatment, which, in the author's view, best present the common denominators in this region.

The author hopes that the readerswill be able to grasp the notions of the past ten years in this area. The paper cannot cover all related issues; it tries to focus on the essentials.

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I. The importance of free movement

A citation from 2009: „Today more than 8 million Union citizens have taken advantage of their right to move and reside freely and now live in another Member State of the Union. The free movement of citizens constitutes one of the fundamental freedoms of the internal market and is at the heart of the European project."[1]

This sentence best summarises the essence of the freedom of movement of persons: to foster mobility for those who are eager to change their place of living and/or work, and very importantly, to guarantee the widest possible entitlements in the host Member State to persons exercising their right to free movement.

The topic of the free movement of persons has a history more than forty years long. Much has been done during this time, including

- the unification of the principles as regards right of residence into a single legal instrument, [2]
- the specification of the terms "worker", "work" and family member,[3]
- the extension of parts of workers' rights to economically inactive Union citizens,
- the narrowing of the scope of exceptions, especially that of the public service exception,[4]
- the introduction of Union citizenship.[5]

I.1. Right of residence

According to presently effective provisions of EC law, Member States are obliged to guarantee the exercise of residence rights related to the free movement of persons. The most important piece of legislation is Directive 2004/38/EC, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, implementing Article 39 (3) (b)-(d) of the Treaty of Rome.[6]

The Directive embodies an obvious proof of pro-migratory developments in EC law. The regulation of residence rights promotes a liberal and citizen-friendly approach instead of

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[1] Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009)313 final. p. 4.

[2] Extensively: Ryszard Cholewinski, Free Movement of Workers and Residence Rights, in Minderhoud, Paul-Trimiklinioties, Nicos (eds), Rethinking the free movement of workers: the European challenges ahead, Wolf Legal Publishers, Nijmegen 2009, p. 61-69. Duarte, Maria Luísa, Rights of residence of Community workers and derogations: reflections on the meaning of „worker-citizen", in Thirty years of free movement of workers in Europe, European Communities, Luxemburg, 2000. p. 177-190.

[3] Extensively: Tomkin, Jonathan, The Worker, the Citizen, their Families and the Court of Justice: Tales of Free Movement from Luxembourg in Minderhoud, Paul-Trimiklinioties, Nicos (eds), Rethinking the free movement of workers: the European challenges ahead, Wolf Legal Publishers, Nijmegen 2009, p. 39-60.

[4] Comission Staff Working Document, Free Movement of Workers in the Public Sector COM(2010)1609 final of 14.12.2010.

[5] Extensively: Davis, Roy W., Citizenship of the Union … rights for all?, European Law Review (2002) 27: 121-137. Guild, Elspeth, The Legal Elements of European Identity – EU Citizenship and Migration Law, Kluwer Law International, The Netherlands 2004.

[6] HL L 229, 2004.4.29.

keeping the competences of the Member states as regards controlling and managing migration. In addition, it codifies several legal issues which previously existed only in the case-law of the ECJ. The legal approximation contributes to the simplification and transparency of law.

The issues dealt with in the Directive are as follows: personal scope, right of exit and entry, right of residence and right of permanent residence, the latter having never been regulated before in EC law. The new provisions on personal scope take into account the changes that occurred in family relationships in the last decades and define cohabiting registered partners as family members if the legislation of the host Member State treats registered partnerships as equivalent to marriage. Parallel to extending the definition of family member, the Directive also strengthens the legal safeguards surrounding third-country family members. Divorce, annulment of marriage or the death of the Member State's national family member shall not affect the right of residence of the third-country national if she/he can meet the requirements of lawful residence laid down in the Directive. The development of EC law organically correlates to the case-law of the European Court of Human Rights, which has constantly facilitated the enhanced rights of family members in the last decades.[7]

The Directive promotes the fundamental right of free movement by granting union citizens and their members of family the right of entry *with* a valid identity card instead of upon *production* of it. Moreover, there are explicit provisions that Member States may require persons to report their presence within its territory but this must be reasonable, and failure to comply with the requirement might only result in proportionate sanctions. The change in merit and in terminology from residence permit to registration certificate marks a significant step forward in that the document evidences and does not constitute the right of residence. The establishment of the right of permanent residence is the main novelty in the directive because this legal instrument did not exist before. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. On the one hand the right benefits every union citizen who meets the requirement of five year continuous, lawful residence. On the other hand, important additional rights are attached to permanent resident status, e.g. permanent residents shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty and can only be expelled from the host Member State on serious grounds of public policy or public security. By the introduction of permanent residence a legal status encompassing a wide range of rights has been established.

I.2. Equal treatment

Both secondary law[8] and the case-law of the ECJ explicitly aim at facilitating inter-Community migration.[9] The ECJ decided, its judgements related to union citizens, in favour of the individuals while the personal scope of secondary EC law has in the meantime gradually been extended. Moreover, EC law made the first steps to determine the rules on access to employment of third-country nationals. The directives on third-country nationals published between 2003-2005 laid down important entitlements, even if these are restricted or

[7] Guild, Elspeth, Security of Residence and Expulsion of Foreigners: European Community Law, in Guild, Elspeth and Minderhoud, Paul (eds.), Security of Residence and Expulsion, Kluwer Law International, The Hague, 2001, 59-80.
[8] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, L 257. 19/10/1968 P. 0002 – 0012.
[9] Gellérné Lukács Éva, Munkavállalás az Európai Unióban, KJK Kerszöv, Budapest, 2004.

not clear enough.[10] In spite of the uncertainties, these directives provide a good start and will for sure gain more and more substance in the future.

The strengthening of pro-migratory policies is not only evidenced by the extension of personal scope and the gradual involvement of third-country nationals in the realm of EC law. This approach can be traced by the evolution of the definition of work in the sense of EC law.[11] In the beginning, Member States were free to construe the definition of work and Community worker in their national labour laws in such a way that resulted in the exclusion of persons not working in typical employment relationships from the scope of the definition and from the related advantages. The case-law of the ECJ however declared that the work performed in the framework of free movement of persons has a separate EC law, meaning that it has to be interpreted in the possible broadest way. Now it is established case-law that every job performed on the basis of a legal employment relationship that is effective and genuine qualifies as work in EC law, independent from the definition of national law, from its duration and its remuneration.[12]

The concrete rights of Community workers are as follows: right to search for work, equal treatment in respect of any conditions of employment and work (including assistance for the unemployed and reinstatement), in respect of social and tax advantages, in respect of access to training in vocational schools and retraining centres, in respect of membership of trade unions and the exercise of rights attached thereto and in respect of housing. *Van der Mei* uses the terminology "functional approach" for the activity of the ECJ in the field of free movement of persons, according to which every right has been awarded to the Community worker and his/her family that is capable of fostering the exercise of free movement rights - recalling the principle of equal treatment.[13] This functional approach can be found in the case-law of the ECJ that was twofold. First, the rights have been confirmed, as second, they have been broadly construed, noting the examples of seeking employment and social advantages.

The right to seek employment is not limited in the Treaty of Rome or in the case-law of the ECJ.[14] The compliance with EC law is dependent upon the reasonableness of the search and chance of getting to work; however, Directive 2004/38/EC sets a limit of six months for the lawful seeking period. There appears to be no coherence between the case-law and the secondary law instrument. The case-law concerning social advantages plays a crucial role in the field of free movement of persons. Invoking the concept as a point of reference, the ECJ extended EC law to social areas that originally fell outside the ambit of the Treaty.[15] The conclusion can be drawn that the rights of Community workers and family members faced a

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[10] Tóth Judit, The Long-term Resident's Status in the Directive and in the Hungarian Law, Conference paper - Seminar on the Long-term Resident's Directive, 10 February 2006 - Radboud University, Nijmegen, the Netherlands. Gyulavári Tamás - Gellérné Lukács Éva, A legális és az illegális bevándorlók jogai az Európai Unióban. Európai Tükör 4/2005: 47-75.

[11] Király Miklós, Az Európai Közösség belső piacának szabályozása, PPKE, JÁK, Budapest, 2002.

[12] Case 53/81 *Levin* v Staatsecretaris van Justitie (1982) ECR-1035. Case 66/85 *Lawrie-Blum* v Land Baden-Würtenberg (1986) ECR-2121. Case 139/85 *Kempf* v Staatssecretaris van Jusitite (1986) ECR-1741. Case 316/85 Centre public d'aide sociale de Courcelles v Marie-Christine *Lebon* (1987) ECR-2811. Case 39/86 Sylvia *Lair* v Universität Hannover (1988) ECR-3161. Case 196/87 *Steymann* v Staatssecretaris van Justitie (1988) ECR-6159. C-357/89 *Raulin* v. Minister van Onderwijs en Wetenschappen (1992) ECR I-1027. C-3/90 M.J.E. *Bernini* v Minister van Onderwijs en Wetenschappen (1992) ECR-1071.

[13] Van der Mei, Anne Pieter, Union Citizenship and the 'De-Nationalisation' of the Territorial Welfare State, European Journal of Migration and Law (2005) 7: 203-211. p. 208.

[14] Case C-292/89 R. v Immigration Appear Tribunal, ex parte *Antonissen* (1991) ECR I-745.

[15] Case 207/78 Gilbert Even (1979) ECR 2019. para. 22.

notable expansion, and a lawfully resident Community worker enjoys the same protection in labour and social law as the host Member State's own nationals.

I.3. Narrow scope of derogations

The interpretation of derogations from the principle of free movement has been greatly changed in favour of the migrants. It is argued that the circle of exceptions has gradually been narrowed, while the guarantees surrounding the application of exceptions have continuously been strengthened. This process was based on the case-law of the ECJ,[16] however, it is also a notable example of consensus-based co-operation between the Member States and the organs of the EU – taking into account Directive 2004/38/EC. Where there are exceptions, the equal treatment of host and other nationals (because host nationals can never be expelled) is enshrined in the comparability of the sanctions applied.

The Member States agreed, in Article 39 (3) of the Treaty of Rome, that the recourse to the derogation from the free movement for workers can only be justified on the basis of public order, public security and public health, meaning that the scope of exceptions was originally construed restrictively. Directive 2004/38/EC lays down cardinally new provisions in the field of protection against expulsion, in particular as regards the guarantees built into the administrative process. The protection of the family life of Union citizens is of outstanding importance. *Guild* argues that, prior to the entry into force of the Directive, EC law contained fewer legal guarantees to families then Article 8 of the European Convention of Human Rights.[17] As a consequence, the related case-law declared in the past years that family ties are capable of hindering expulsion while EC law has explicitly regulated the rights of permanent residents and family members only since the publication of the new directive. A similarly important new rule, that is without precedent in EC law, is the right to apply for the termination of a ban on entry and residence based on public order or public security within a reasonable time not exceeding 3 years. This right has not formerly been provided for *expressis verbis* in EC law.

Pursuant to Article 39(4), Member States are not obliged to guarantee free movement rights if the work performed relates to the exercise of public authority. The categorisation of posts depends upon whether the post involves direct or indirect participation in the exercise of powers conferred by public law, and thus presumes, on the part of those occupying them, the existence of a special relationship of allegiance to the State that has to be examined case by case. The most recent development in this field appears in the case-law of the ECJ, in which it has been stated that the nature of the post itself is not enough to justify the derogation but the holders of the posts need to exercise their public authority on a regular basis that does not represent a very minor part of their activities.[18] If the exercise of public authority is subordinate and ancillary in nature, it cannot justify the application of derogation at the same time: it obliges Member States to endure that other Member States' nationals sporadically exercise this power. The national transposition of the principle appearing in the judgement is at present a challenge for the Member States and will probably need several years to become successful.

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[16] Joined cases 115 és 116/81 Rezguia *Adoui* v Belgian State and City Lege, Dominique Belgian State (1982) ECR-1665.
[17] Elspeth Guild (2001) 66.
[18] Case C-405/01 Colegio de Oficiales de la Marina Mercante Española v Administración del Estado (2003) ECR I-10391.

I.4. Union citizenship

Since Union citizenship has been established, its development is based on analogies with the evolution of rights of Community workers and economically inactive Union citizens. The ECJ applied the same functional approach to Union citizens as withCommunity workers.[19] The ECJ granted economically inactive Union citizens every right and benefit that can facilitate free movement in spite of the lack of these rights in the Treaty and secondary legislation. The ECJ followed the same line of argumentation in all its decided judgments emphasising five main elements:

- Union citizenship is the fundamental status of Member States' nationals (Article 18 of the Treaty) that grants them rights; moreover
- economically inactive Union citizens lawfully residing in the territory of the Member State;
- in questions falling within the ambit of the Treaty
- can avail themselves of the prohibition of discrimination (Article 12); moreover
- derogations from the free movement principle have to be construed restrictively.

Several cases have been decided in favour of economically inactive union citizens as regards educational and residential rights, rights related to taxation, social benefits or the granting of first names. This dissertation praises the ambitious nature of the case-law but not without reservations. While the enjoyment of rights is first and foremost related to lawful free movement, if the ECJ follows the same line of logic, economically inactive union citizens might reach the same legal status enjoyed by Community workers. Union citizenship might provide the choice for every Member State national to decide the Member State's legal system to which s/he wishes to be primarily affiliated, taking into account the place of residence, while s/he retains rights following from his/her nationality. In this process union citizenship becomes in reality the source of additional rights.[20]

Central and Eastern European Countries have been involved with the framework since the end of the 1990s, when accession negotiations were initiated. The *acquis* screening and the legal approximation process made these countries familiar with the rules. The real application of the regime started on 1st May 2004 (for Romania and Bulgaria 1st January 2007). However, upon this date only Sweden, Ireland and the United Kingdom opened-up their labour markets; consequently, only a limited experience was to be gained by the newcomers. Although the Accession Treaty contained that the new countries were required to accept all the relevant norms in effect that time, the real mature operation of the legal framework started later. The new countries needed time to train their personnel for the application of the acquis and – in parallel – had to struggle with the problems occurring daily.

Of course, much is still ahead, most importantly the effective enforcement of the presently existing entitlements[21] and the fine-tuning of national practices: however, this task shall be accomplished together by old, new and the newest Member States.

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[19] Case C-85/96 María *Martínez Sala* v Freistaat Bayern (1998) ECR I-2691. Case C-184/99 Rudy *Grzelczyk* v Centre Public d'Aide Sociale d'Ottignies Louvain-la Neuve (2001) ECR I-6193.

[20] Fazekas Judit - Asztalos Zsófia, Uniós polgárok: hogyan tovább? Az uniós polgársághoz kapcsolódó jogok fejlődése a Maastrichti Szerződéstől az Alkotmányos Szerződésig. Acta Humana. Emberi jogi közlemények 2/2005. 76-114.

[21] Reaffirming the free movement of workers: rights and major developments COM(2010)373 final of 13.07.2010, p. 16.

II. Accession negotiations and transition periods

II.1. Situation in 2000 – accession negotiations

As Central and Eastern European countries submitted their application for EU membership they, at the same time, undertook the obligation to harmonise their laws with the acquis communautaire, including the rules on free movement of persons. After having received the application, the European Council mandated the Commission to begin the accession negotiations.

In the aspirant the negotiation process was based on the national legal instruments.[22] First the acquis screening took place; that aimed at examining and amending national laws in different fields in accordance with EC law. Free movement of workers was Chapter 2.[23] During personal meetings with the European Commission, questions were raised and explanations required. If the legal approximation was correct, the preparation was approved by the Commission in the evaluation reports. Subsequently, the Commission presented its standpoint as regards compliance, possible adjustments or transitional arrangements, and finally the parties were required to approve the Chapter with common accord.

During these negotiations the aspirant countries were given the opportunity to express their views on the transitional agreements, both in writing and in person.

II.2. Arguments of the aspirant countries

The Central and Eastern European aspirant countries were required to lay down their position as regards the free movement of persons. As a point of departure, these countries had no intention of putting on board any kind of derogations. Indeed, these countries expressed their adherence to the basic principles of EC law. All these countries declared themselves ready to apply the *acquis* in the field of free movement of persons from the date of accession without restrictions. The two most important elements were liberalisation and reciprocity. No more was asked for and proposed than equal treatment in accordance with Article 39 of the Treaty (now Article 45 of the Treaty on the Functioning of the European Union). In addition, these countries did not feel endangered by the introduction of the rules on the free movement of persons. The migration to these countries from the old ones was marginal and no signs could be traced that this situation would change.

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[22] In Hungary: 2093/1998. (IV.22.) Korm. határozat a Magyarország és az Európai Unió közötti csatlakozási tárgyalások első szakaszára vonatkozó mandátum - előterjesztések szempontjairól és az előterjesztések benyújtásának ütemezéséről; 2212/1998. (IX. 30) Korm. határozat a 2001. december 31-ig terjedő időszakra vonatkozó jogharmonizációs programról és a program végrehajtásával összefüggő feladatokról; 2184/1999. (VII. 23.) Korm. határozat 'az Európai Unió Közösségi Vívmányainak átvételéről szóló Nemzeti Program felülvizsgálatáról'.

[23] Very useful to browse the present process with Croatia. Download 23.11.2010. http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/index_en.htm

However, there was a growing concern in some 'old' EU Member States that providing free movement to workers from Central and Eastern European countries could cause distortions in their labour markets and thereby generate social tensions. Central and Eastern European countries were therefore invited to present their counter-arguments.

It is common ground in migration literature that the main push factor as regards migration is the net profit:

- wage difference between the sending and host country,
    - at purchasing parity standard;
- other factors that are influenced by economic performance in the respective countries,
    - Economic relations between the countries concerned,
    - Employment possibilities in the home country, unemployment rate, level and eligibility criteria ragrding social benefits. [24]

Because these factors undisputedly existed between the 'old' and the aspirant countries, the real question was the volume of anticipated migration. The newcomers argued that international and national studies had not confirmed the fears of a massive influx of labour from these countries after their accession to the European Union. There were almost a dozen studies that aimed to forecast the probable volume of migration. In these forecasts the yearly number of CEE migrants amounted to between 41,000 and 720,000.[25] However, it was admitted that the upper limit was unrealistic.[26] The European Commission also ordered a study.[27] The study was the expert opinion of the Commission in this field. It concluded (Executive Summary, a.): "Concerns that EU labour markets will be swamped by migrants from Central and Eastern Europe therefore seem to be ill-founded".

The vast majority of these studies also concluded that the migration of Central and Easter European workers would follow similar patterns to labour movement between the existing Member States, namely it would be in general temporary, limited to certain sectors and to border regions. The study for the Commission emphasised that temporary work form the highest volume.

These studies also pointed out that accession would not have any significant effect on the European labour market or on that of the Member States, neither in economic nor in social terms. It has been stated that in 2000 Central and Eastern European workers amounted to 0,3% of the workforce in the 'old' Member States. Quite the contrary, considerable surplus was to be awaited.[28]

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[24] Tassinopoulos A.-Heinz W, Mobility and migration of labour in the European Union, Luxemburg 1998.

[25] *Birner, A-Huber, P-Winkler, P.,* Schatzung des Potentials an Einpendlern und Arbeitsemigranten aus den MOEL und regionale Arbeitsmarktwirkungen, in Österreichisches Unstitut für Wirtschaftsforschung und Österreichischeds Institut für Raumplanung, Bécs 1998: p. 163-213. This paper envisaged 45,000 persons in the year of accession. *Brücker, H-Franzmeyer, F.,* Europaische Union, Osterweiterung und Arbeitskraftemigration, in DIW-Wochenbericht 5, 1997: p. 89-96. This paper forecasted yearly 340-680,000 persons. *Bauer, T-Zimmermann,K.F.,* Assessment of possible migration pressure and its labour market impact following EU enlargement to Central and Eastern Europe (1999). This paper envisaged 200,000 persons a year.

[26] *Borjas, G.J*, Economic Research on the Determinants of Immigration, WB Technical Papers 438., Washington.

[27] *European Integration Consortium: DIW, CEPR, FIEF, IAS, IGIER,* The Impact of Eastern Enlargement on Employment and Labour Markets in the EU Member States, Berlin and Milan, 2000. http://www.diw.de/documents/dokumentenarchiv/17/38468/EIC_Employment.pdf (download: 12.11.2010.)

[28] *Bernhard Welschke*, Die Erweiterung der EU aus Sicht der deutschen Industrie, in Rudolf Hrbek (Hrsg.) Die Osterweiterung der EU, Problemfelder und Lösungsansatze aus deutscher und ungarischer Sicht, Europaisches Zentrum für Föderalismus-Forschung, Tübingen, Mai 2000. p. 52-62.

II.3. Common position of the European Union

The studies on the anticipated volume of migration had been published around 2000 and Chapter 2 was provisionally closed with Hungary, Poland and Slovakia in the first half of 2001, meaning that the Member States and the Commission had quite a time to consider the pros and contras. Although the Czech Republic first expressed its negative position concerning the Common Position,[29] it eventually approved it. The Common Position contained the 2+3+2 year transitional arrangements.

As regards Bulgaria and Romania the whole screenplay was repeated: acquis screening, negotiations, common position of the EU, and provisional closing of the negotiations. Interestingly, the first Common Position was ready in October 2001 and the final was adopted in June 2002 –very close in time to the first wave's countries. Bulgaria should be congratulated and thanked for publishing all of its documents in the website of the Ministry of Labour and Social Policy, enabling us to explain this 'common position'![30]

In the first Common Position "The EU invites Bulgaria to provide its assessment regarding the work-related migration and cross-border mobility that would arise from the application of the *acquis*, as well as the effects on labour markets and the wider economy. Bulgaria is invited to inform the Conference whether it expects a significant inflow or outflow of workers, following accession, and if so, what measures it is taking to deal with this. Bulgaria is invited to provide quantitative information, regarding the present number of EU nationals working in Bulgaria and Bulgarian nationals working in EU Member States, and on possible forecasts of their future numbers."[31] And "The EU stresses that freedom of movement concerns not only the economic but also the social and cultural integration of migrant workers and their families in the host Member States. The EU recalls the political and practical importance of this area of the *acquis* and notes that there are sensitivities over the issue of mobility of workers. Therefore, in view of the sensitivity of this issue and the lack of reliable estimates of future labour movements, the EU considers that transitional arrangements for the smooth liberalisation of the movement of workers are needed.".[32]

In the second (final) Common Position that can be read in full in Annex 2. the EU takes note of the information Bulgaria has given and proposes the same structure of transitional arrangements that was applicable with the EU8 countries.[33]

II.4. Transitional measures and conclusions

As regards the EU8 countries the Council of the European Union decided to accept the applications of the Central and Eastern European states for membership in the European Union on 14 April 2003.[34] The Treaty of Accession entered into force on 1st May 2004.

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[29] http://www.radio.cz/en/section/curraffrs/czech-republic-refuses-eus-position-on-the-free-movement-of-labour Download: 12.11.2010.

[30] http://www.mlsp.government.bg/en/integration/euro/chapter-2/chronology/index.htm (Download: 11.11.2010.) See the Common Position of Bulgarian in full.

[31] http://www.mlsp.government.bg/en/integration/euro/chapter-2/chronology/index.htm - Common Position 6 6 2002, p. 6. Download:11.11.2010.

[32] Ibid, p. 6-7.

[33] http://www.mlsp.government.bg/en/integration/euro/chapter-2/chronology/index.htm - Common Position 8 10 2001, p. 6. Download:11.11.2010.

All acceding countries took over and implemented the acquis under free movement of persons as from the date of accession, subject to the specific arrangements set out below - except for Malta and Cyprus. The transitional arrangements agreed (2+3+2 years) are limited in time and scope:

- a two year period during which national measures would be applied by the 'old' Member States to the newcomers. National measures could also imply full labour market access;
- after this period reviews would be held, one automatic review before the end of the second year after accession and a further review at the request of the new Member State affected.
- an additional three years could be used by the 'old" Member States;
- the transitional arrangement should in principle come to an end after five years, but could be prolonged for a further two years in those Member States where there were serious disturbances of the labour market or a threat of such disruption could be expected.

Additionally a standstill clause applied, whereby 'old' Member State labour markets could not be more restricted than that prevailing at the time of the signature of the Accession Treaty. Member States must give preference to the nationals of the new countries over non-EU labour. Austria and Germany have the right to apply flanking national measures to address serious disturbances or the threat thereof, in specific sensitive service sectors of their labour markets, which could arise in certain regions from the cross-border provision of services.

Under the transitional arrangements the rights of nationals from new Member States who are already legally resident and employed in a current Member State are protected. The rights of family members are also taken into account consistent with the practice in the case of previous accessions.

The same transitional arrangements have been approved for Romania and Bulgaria (EU-2 countries), essentially on the same basis as described above. The transitional arrangements of Hungary can be read in full in Annex 3. and the present state of affairs in Annex 4.

Some conclusions can be drawn. The EU's common position was presented as 'common'. However, in practice it was certainly not, each Member State had the possibility to bring its own decision on a bilateral basis. The EU explained the transition period with the sensitivity of the issue, it wanted to accommodate the population of both sides, especially, however, that of Germany and Austria. The introduction of the transitional period was not surprising, indeed. Two special reasons also underpin the transition: (i) the existence of transition for the earlier acceded members (Spain, Portugal, Greece), and (ii) the typical sending state status of the new aspirant countries. Migration can overally be positive for the host state's economy. However, social transfers can also be attached to the migrant worker status, like social assistance and family benefits. With the development of integration, social rights are even wider, and social policy was therefore also very carefully examined during the screenings.

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[34] DECISION OF THE COUNCIL OF THE EUROPEAN UNION of 14 April 2003 on the admission of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, HL L236. Volume 46. 23 September 2003. EUurópai Unió-8 refers to these countries except Malta and Cyprus.

III. Post-accession era

One of the political arguments for introducing the transition period was to accommodate the citizens of the "old" Member States with the enlargement of the European Union. These Member States were mostly concerned with social abuse, namely that Central and Eastern European workers would arrive in their countries not for work, but in reality only to get social benefits. This is the famous threat of social dumping. Already in 2000 it was obvious that this threat was unrealistic.

Much more realistic issues, such as the economic potential of these labourers, the danger of brain-drain for the sending countries, the loss of a highly qualified workforce and the settling of families with small children in other Member States were not discussed at all. These issues have been begun to be dealt with only several years after the accession.

III.1. General remarks

III.1.1. Reaction in 2004-2006

Three horizontal evaluating reports were prepared soon after the accession of the EU-8 Central European Countries, two by the ECAS in 2005 and 2006 and one by the European Commission itself in 2006, upon the completion of the first phase of the transition period.[35]

The most important findings of these reports are unanimous:[36]

1. In the vast majority of EU-25 countries, third country nationals make up the biggest part of the foreign resident population, while in Luxembourg, Belgium, Ireland and Cyprus, EU-15 nationals are the most represented.
2. The post-enlargement migration from the Accession States, primarily for work purposes, was targeting the traditional destinations of Germany and Austria, and more recently the United Kingdom and Ireland.
3. A8 labour migration remained low. The number of EU-10 nationals residing in the EU-15 is only around 0.2% of the total EU-15 population. Those countries which host the most migrant workers from Central and Eastern European countries, both in absolute terms (Germany, the United Kingdom) and in relative terms (Ireland), were able to absorb the increased inflow and rely on the additional workforce, allowing the supply to meet the demand.
4. Polish and Baltic States' nationals were the most inclined towards long-distance mobility.
5. Enlargement presented its regional benefits as well, with Slovakian nationals migrating primarily in Central Europe and Estonians, Lithuanians, Latvians in both the Baltic and the Nordic states.

[35] „Who is afraid of EU enlargement?" Report on the free movement of workers in EU-25. ECAS, August 2005. "Who is still afraid of EU enlargement?' ECAS Report, 2006. Report on the functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004 – 30 April 2006). COM(2006) 48. final.
[36] Compiled ECAS 2006, p. 43-44.

6. Migrants are usually young (18 - 35), have secondary or higher education, but usually take up employment which does not correspond to their qualification.
7. Labour migration is mainly of a temporary nature with most migrants taking up seasonal jobs.
8. The migrant workforce complements and does not compete with the native labour supply. As a consequence, migrants play a key role in filling employment gaps and skills bottlenecks.
9. The presence of A8 workers is reported to have contributed to the performance of national production, while it did not represent an additional burden on public finances. A8 migrants prove to be hard-working. The employment rates of A8 nationals in some countries (Ireland, Spain and the United Kingdom) are higher than those of nationals and very similar to employment rates of the native population in the remaining European countries. Applications for income support or social assistance are very low indeed.

All these findings showed that Central and Eastern European migrants have not gone to the "old" Member States to obtain social benefits but to work there,[37] as it had already been forecast by the newcomer Member States during the accession negotiations.

These reports tried to be balanced and show the situation from the point of view of the receiving and sending countries. In essence, however, they aimed at justifying labour migration by pointing out the beneficial effects for the receiving economies.

What is contained in the report of the Commission on Central and Eastern European countries? Two remarks:

- "As for EU-8 Member States, virtually all called for lifting the restrictions. They stressed the fundamental nature of their citizens' right to freedom of movement as workers in the EU-25 and pointed to statistical evidence showing that their citizens had not, in fact, flooded EU-15 labour markets nor had they caused any surge in welfare expenditure by EU-15 Member States. They also underlined the role of their citizens in alleviating problems caused by the EU-15's ageing workforce." [38]
- "Since enlargement, labour market developments in the EU-8 have been positive, with unemployment rates dropping significantly in almost all of them (…). This suggests that there is no reason to expect increased pressure to move outside EU-8 countries, also as the outlook for economic growth remains bright and as substantially increased Structural and Rural Development Funds start to bear fruit in promoting economic growth and employment creation."[39]

The most important receiving country in this phase, the United Kingdom, has carried out its own evaluation, which agreed with the overall findings.[40]

Al quite complex survey was also published in the UK that time.[41] In this very valuable and balanced paper, the author emphasises that the "EU's enlargement to the East has been an

[37] Julianna Traser, Rules governing the free movement of workers in EU-25 after 01/05/2006 In Julianna Traser (ed.) A Regional Approach to Free movement of Workers: Labour Migration Between Hungary and its Neighbouring Countries, Klebersberg Kuno University Press, Szeged, p. 15-24., 23.
[38] Commission Report COM(2006)48 final, point 10.
[39] Ibid, point 22.
[40] Traser (2006) 22-24.
[41] Katinka Barysch, East versus West? The EU economy after enlargement. Centre for European Reform, London, 2006. Download: 23.11.2010. http://www.cer.org.uk/pdf/essay_social_model_barysch_oct05.pdf

economic success"; at the same time "politically, however, the EU has not digested the accession of the ten new members".[42] It is argued that many false perceptions of the "New Europeans" – as cheap labour and showing a disregard of social standards that leads to job losses in Western countries – have build up the stereotypes; while in reality the level of taxation in the new states was not much different from the Western countries and the social security coverage is sometimes even more complete than in the Western part.[43] For example, the level of insurance-based maternity benefits in Hungary is to be regarded as high also by international comparision.[44]

An interesting aspect of the paper is that, unlike other documents. it examined quite extensively the situation in the Central and Eastern European countries. It states that "gradual economic integration with the EU has been the key to the new members' economic success", with the positive effect of trade liberalisation as their starting point.[45] However, it also states that "in economic terms, enlargement was the equivalent of adding an economy the size of Netherlands to a single market with 380 million consumers." It then enumerates the problematic areas in Central and Eastern countries, low birth rates, high unemployment, and expensive social security systems, that are very similar to those in the Western part.

It can be affirmed that the reactions to enlargement and the free movement of workers in the period of 2004-2006 concentrated on convincing the 'old' Member States of the benefits of enlargement while it was taken as obvious that Central and Eastern European states only benefited from accession. The real (small) volume of economic output and its (small) effect on the Western part, and the problems of the newcomers, were probably only seen by the European Commission and by a few journalists and researchers whose voice was overall very silent. The population of Western Europe was quite unaware of these issues and kept pointing to Eastern enlargmenet as a major reason for their own problems.[46] It is probably not accidental that the second wave of Eastern enlargement (Romania and Bulgaria) received almost zero media attention, unlike the accession ceremony in Athens in 2003.[47]

III.1.2. Reactions in 2007-2010

In 2007 and 2008 new evaluating articles came to light that are worth mentioning. One is the Commission's joint evaluation of the EU-8 and EU-2 new Member States.[48] The Report was, on the one hand, the first obligatory evaluation of the Bulgarian and Romanian situation and, on the other hand, the second evaluation of the transitional period of EU8 countries, following the submission of their request.

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[42] Ibid, page 1-2.
[43] Ibid, p. 6-7.
[44] Gellérné, Lukács Éva, Családi ellátások az Európai Unióban, Családi Jog, 2004/4. 1-10.
[45] Barysch (2006) p. 1.
[46] Ez mutatkozott meg az új európai alkotmány elutasításában is.
[47] Herzog, Hubert, Rules applicable to workers of Hungary, Slovakia and Romania in Austria – The working of Transitional Arrangements in practice, p. 39-49., in Julianna Traser (ed.) *A Regional Approach to Free movement of Workers: Labour Migration Between Hungary and its Neighbouring Countries*, Klebersberg Kuno University Press, Szeged, 2006., p. 39.
[48] The impact of free movement of workers in the context of EU enlargement Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty, COM(2008)756 final.

The Report stated that "the number of Bulgarian and Romanian citizens resident in the EU-25 increased from around 690 000 at the end of 2003 to about 1.8 million at the end of 2007, a process which had started well before the accession of both countries to the EU in January 2007 (see Table A1). This amounts to an average net growth of about 290 000 persons per year. Romanians accounted for around 19% of all recent intra-EU movers who took residence in another EU Member State over the previous four years, Bulgarian citizens for about 4%"[49] As regards EU8 countries, taken together with Cyprus and Malta „Since the 2004 enlargement, the number of (these) citizens resident in the EU-15 has increased by roughly 1.1 million. Totalling over 900 000 in 2003, it now stands at about 2 million (with numbers of EU-2/10 citizens living in other EU-2/10 Member States generally negligible)". [50] The Report emphasised that a large part of this mobility is rather temporary.

As regards the future prospectives the Report explicitly states that „A further surge of labour mobility from the new Member States seems unlikely."[51] Moreover, „Mobility from the EU-10/2 has had a clearly positive impact on economic growth in the EU" and „the impact of recent migration and mobility flows on public finances and the welfare state (including its financing) is negligible or positive at national level.[52]

The German opinion was summarised in form of an IAB short report.[53] The IAB short report – dealing not only with present trends but also with future prognosis – emphasised that the Eastern enlargement produced a considerable surplus for the German economy.[54] As regards the relevance of migration in this regard, the paper stresses that the United Kingdom and also Ireland deflected large numbers of migrants from Germany. It focuses on the positive effects of migration in terms of increasing productivity although it also adds that the presently decreasing unemployment rate would probably stagnate.

The final accord of these papers is inevitably the positive effect of the Central and Eastern European accession on the economies of Western countries, very similarly to what we have seen in the period of 2004-2006.

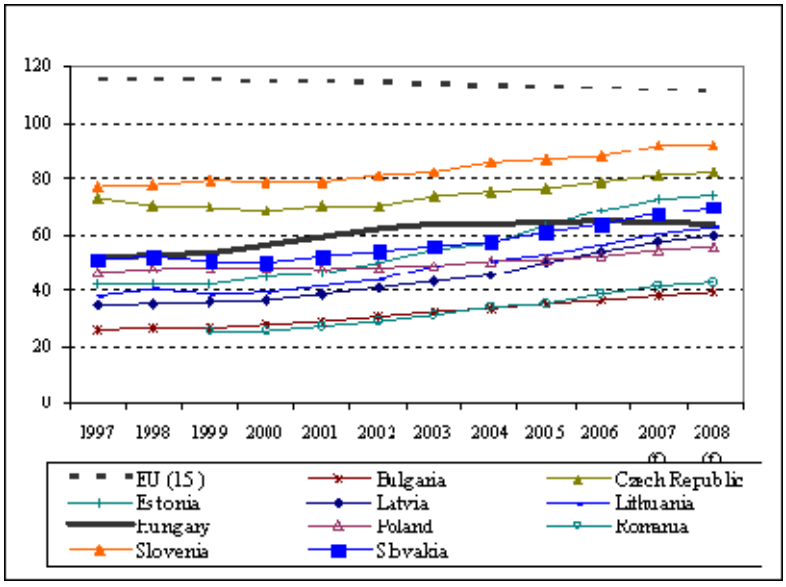
These facts and citations show best that facts at the end of the day did not fit what many Western politicans and journalists were saying. In the receiving Western European countries the direct economic effects of immigration were unambiguously positive in spite of the unenthusiastic and critical (sometimes offensive) political statements. In Central and Eastern Europe the effect of outflow is or was at least mixed (loss of workforce, brain-drain) and in spite of this the political statements were continuously supportive and confirmative.

[49] Ibid, p 5.
[50] Ibid, p 7.
[51] Ibid, p 8.
[52] Ibid, p 12-13.
[53] IAB Kurzbericht, 6/2007. Beachtliche Gewinne für die deutsche Wirtschaft. http://www.iab.de/177/section.aspx/Jahrgang/2007
[54] Ibid, p. 5.

III.2. Statistics on the migration of Central and Eastern European nationals

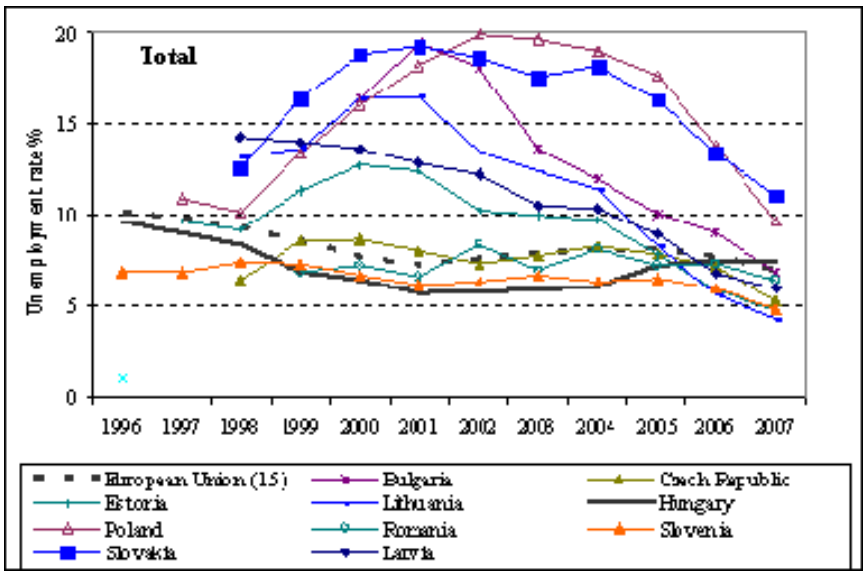
Migration is most dependent upon the economic performance of the home country or the level of social transfers.[55] If we look at the statistics it can be seen that push factors would support migration from the Central and Eastern European region from every country.

Per capita GDP (PPS)
1996-2008 (EU-27=100)



Source: collected by Ágnes Hárs, Eurostat on line database (2010).

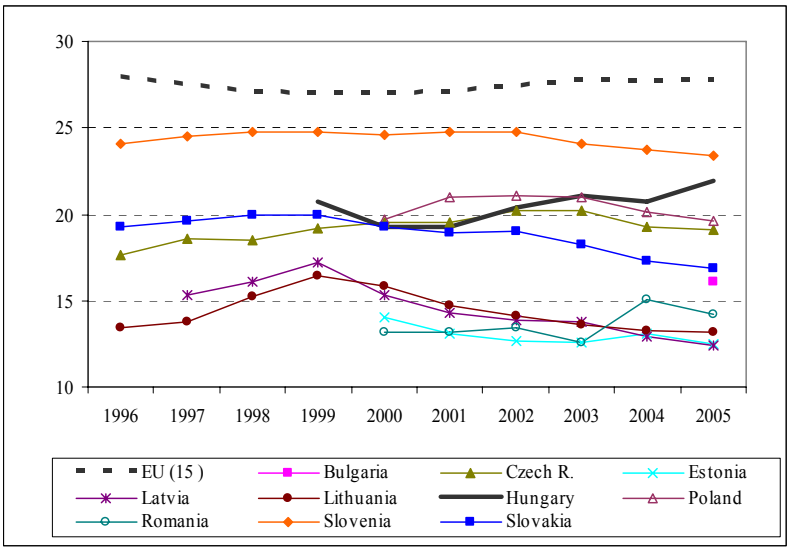
Unemployment rates
1996-2007, %



Source: collected by Ágnes Hárs, Eurostat on line database (2010).

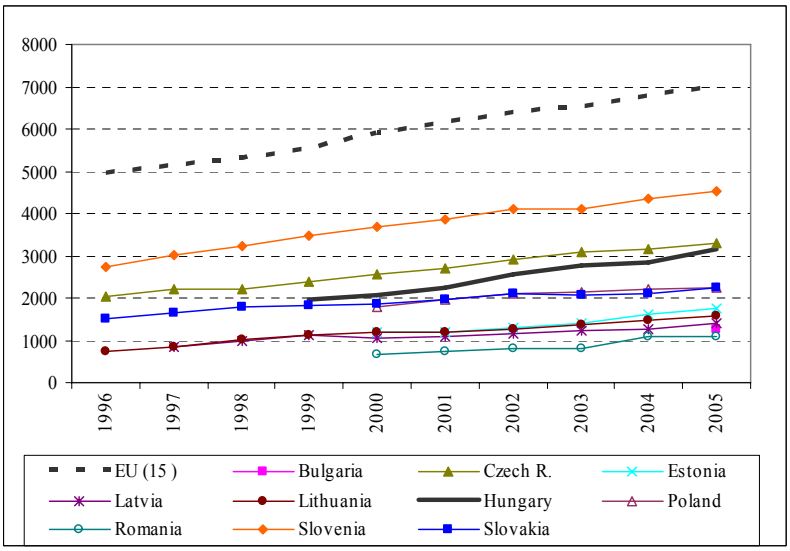
[55] Hárs Ágnes, A munkaerő migrációja és az uniós csatlakozás, Kopint-Datorg műhelytanulmányok, 2002/34, 2002 február.

Social insurance expenditure, % of GDP



Source: collected by Ágnes Hárs, Eurostat on line database (2010).

Social insurance expenditure, per capita, at purchase parity standard



Source: collected by Ágnes Hárs, Eurostat on line database (2010).

The relevant factors – per capita GDP, unemployment rate, social expenditures – are still below the EU average. Progress has been experienced during the last ten 10 years (between 2000 and 2010), however, there is still a considerable gap between the EU average and the individual perfomace of the Central and Eastern European states. In 2000 *Hönekopp* envisaged that while the GDP per capita amounts to 50% of the EU average, and expectations are well-founded as regards the increase of employment rates, decrease of unemployment rates and restructuring of the economy, at least 30-40 years are necessary for the new states to reach the EU average.[56] All in all, the gap would theoretically justify migration.

[56] *Elmar Hönekopp*, EU-Osterweiterung: Auswirkungen auf die Arbeitsmarkte der Mitgliedslander der EU (Schwerpunkt: Arbeitskraftefreizügigkeit), in Rudolf Hrbek (Hrsg.) Die Osterweiterung der EU, Problemfelder und Lösungsansatze aus deutscher und ungarischer Sicht, Europaisches Zentrum für Föderalismus-Forschung, Tübingen, Mai 2000. p. 120.

Because the United Kingdom was the first country to open up its labour market – together with Ireland and Sweden where, however, no large volume migration can be traced – it is worth taking a closer look to the statistics of the United Kingdom.

Data from the United Kingdom showed the composition of Central and Eastern European workers in the year following the accession (May 2004 – June 2005). Altogether 231 545 persons from the EU 8 countries obtained work permits.

Czech R	Estonia	Hungary	Latvia	Lithuania	Poland	Slovakia	Slovenia	Others	Total
6%	2%	3%	7%	15%	57%	11%	0,5%	0,5%	100%

Source: The Accession Monitoring Report, May 2004 – June 2005. A joint online report by the Home Office, the Department for Work and Pensions, the HM Revenue & Customs and the Office of the Deputy Prime Minister. 23 August 2005.

The most recent information on registration for employment by EU8 nationals in the United Kingdom shows that "a total of 925,825 EU8 nationals had come to work at some point between 1 May 2004 and 31 December 2008. The most recent statistics also show a decline in the rate of new registrations during 2008, with the annual figure of 156,295 down 26% on 2007 (210,800), and down 31% on the peak in 2006 (227,875). Moreover, the number of new registrations in the fourth quarter of 2008 (26,815) was 47% down on that for the fourth quarter of 2007 (50,820)."[57] As regards EU2 nationals the yearly numbers remained solid. In 2007 42,995 permits were issued altogether while in 2008 ir was 38,845. [58]

Read together with the statistics of the Report of the Commisison from 2008 it would appear that migration was absolutely not over-excessive in the light of push factors. Forecasts that envisaged a migration between 200-300,000 migrant yearly became the realistic scenario. Migration has not reached anywhere near the high levels expected.

Data from Germany and Austria, the other biggest host states, will be provided in more detail under the next point.

III.3. Posting

Posting is a complex phenomenon; it relates both to the free movement of persons and the free movement of services. From a legal point of view, posting situations now clearly fall under freedom of movement of services even if the service is performed by "workers". However, it was not always unambiguous. For a long time, Member States insisted on treating the legal situation of workers by requiring them to meet all the separate requirements under the free movement of workers regime: right of residence, work permit, payment of all kinds of social contributions and taxes, and compliance with local standards.

The whole case history began with workers who did not have full access to the labour market of Member States. In the *Rush Portuguesa* case the workers were Portuguese nationals during the transitional period, in *Vander Elst* of Moroccan nationality. The Court, based on its landmark cases of *Rush Portugesa* in 1990[59] and *Vander Elst* in 1994,[60] made it clear that workers employed to perform a duty under a service-provision contract shall not be made

[57] Free movement of Workers, UK Report 2008-2009., p. 35.
[58] Ibid.
[59] Case C-113/89 *Rush Portuguesa* v Office National d' Immigration [1990] ECR I-1417.
[60] Case C-43/93 *Vander Elst* [1994] ECR I-3803.

subject to the rules governing access to the labour market. Consequently, a "Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions whose object is to guarantee the freedom to provide services".[61] Moreover, "Workers employed by an undertaking established in one Member State who are temporarily sent to another Member State to provide services do not in any way seek access to the labour market in that second State, if they return to their country of origin or residence after completion of their work."[62] It meant that workers who fulfiled these conditions had access to the labour market of the state where provision of services occured without being obliged to meet the requirements of access to the labour market there.

The Court declared the principle of *auxiliarium principali sequitur*. However, the Court acknowledged that „Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means."[63]

This gave the basis for the subsequent adoption of Directive 96/71/EC on posting.[64] The Directive aims at a balance between the provision of services and the social protection of workers.[65] It foresees equal treatment for workers in the host state, meaning that in terms of wages and social coverage they cannot be in a less favourable situation than the workers of the state.[66] Financially, it means that they can not be cheaper than the workers in the host state. Equal treatment is the core idea of the Directive. The Directive has an outstanding role in branches of industry with high labour-intensity. These are above all construction and also the food industry. These sectors are „sensitive to social dumping and unfair competition, arising from the special character of the sector".[67]

III.3.1. Posting of non-EU nationals

In the ruling of *Vander Elst* 1994, the ECJ found that non-EU employees of EU companies, who are being sent to other EU Member States to provide services, fall under the free movement rules on service provision. Member States are precluded to require work permits from them. In spite of the ruling, several Member States have continued to apply restrictive measures and maintained certain requirements.

On 19 January 2006, the ECJ handed down an important judgment, in the case *Commission v Germany* on posted workers.[68] The Court found that Germany is in breach of its obligations under Article 49 by applying a prior control measure to third country national posted workers

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[61] Case C-43/93 Van der Elst para. 17.
[62] Case C-43/93 Van der Elst para. 21.
[63] Case C-43/93 Vander Elst, para. 23, C-113/89 Rush Portuguesa, para. 18.
[64] Directive of 16 December 1996 concerning the posting of workers in the framework of the provision of services, HL L 018 , 21/01/1997 P. 0001 – 0006.
[65] Extensively, Donders, Peter-Cremers, Jan (eds.), The free movement of workers in the European Union, CLR Studies 4., Brussels 2004.
[66] Csóka, Gabriella, A külföldi munkavégzésre vonatkozó közösségi jogi szabályozás, in Dr. Lukács Éva-Dr. Király Miklós (szerk.), Migráció és Európai Unió, AduPrint Kiadó, Budapest, 2001., p. 199.
[67] Ibid, p. 9.
[68] C-244/04 Commission v Germany [2006] ECR I-885.

by declaring that „by not confining itself to making the posting of workers who are nationals of non member States for the purpose of the provision of services in Germany subject to a simple prior declaration by the undertaking established in another Member State which intends to post such workers, and by requiring that they have been employed for at least a year by that undertaking, the Federal Republic of Germany has failed to fulfill its obligations under Article 49 EC."[69] Moreover, the Court went on to find that the requirement that the worker must have been employed with the business for more than 12 months before the posting is disproportionate to the objective of preventing social dumping. The Court argued that any period of prior employment would be disproportionate.

In the newest case in this area, the *Santos Palhota* case,[70] the Court declared that prior declaration and a subsequent notification of the posting by the host state is not compatible with the Treaty either, because it is not a declaratory procedure.[71] The ECJ, however, also stated that „National legislation can require an employer, established in another Member State and posting workers to the territory of the first Member State, to keep available to the national authorities of the latter, during the posting, copies of documents equivalent to the social or labour documents required under the law of the first Member State and also to send those copies to the authorities at the end of that period."[72]

These judgments mean that Member States may now not require any minimum prior period of employment before a non-EU national can be sent to provide services within the EU on behalf of their employer. In addition, any prior visa requirements or obligation for prior notification will also not be justifiable.

III.3.2. Restriction of the Posting Directive for newcomer countries in accession treaties

In the accession treaties the same texts were approved for every newcomer country in the field of freedom of movement of persons.[73] In addition, a special safeguard clause has been inserted in favour of Austria and Germany on the posting of workers in certain sectors.

Althought the Treaty guarantees the free movement of services, the Acts of Accession introduced transitional arrangements for Germany and Austria. These enable the countries to cope with the risk of disruption in certain vulnerable sectors (building industry and related professions, interior decorators, industrial cleaning) and to limit the posting of workers in relation to the provision of services, so Germany and Austria may take measures where they depart from Article 49 of the EC Treaty until 2011:

> "Germany and Austria may, after notifying the Commission, derogate from the first paragraph of Article 49 of the EC Treaty[74] with a view to limit, in the context of the provision of services by companies established in Hungary, the temporary movement of

[69] Ibid, para. 34.
[70] Case C-515/08 Santos Palhota and others, Judgment of the Court of 7 October 2010 (not yet reported).
[71] Ibid, para. 34.
[72] Ibid, para. 59.
[73] Report on the results of the negotiations on the accession of Cyprus, Malta, Hungary, Poland, the Slovak Republic, Latvia, Estonia, Lithuania, the Czech Republic and Slovenia to the European Union prepared by the Commission's departments – page 7.
http://ec.europa.eu/enlargement/archives/pdf/enlargement_process/future_prospects/negotiations/eu10_bulgaria_romania/negotiations_report_to_ep_en.pdf
[74] Now Article 59 in the Treaty on the Functionning of the European Union.

workers whose right to take up work in Germany and Austria is subject to national measures."[75]

This means that, primarily in the building industry and related sectors, these countries can continue to determine the number of workers posted from Hungarian enterprises to German and Austrian companies. Germany defined four sectors where restrictions are lawful (in construction and industrial cleaning), and Austria eight sectors: horticultural service activities, cutting, shaping and finishing of stone, manufacture of metal structures and parts of structures, construction, including related branches, security activities, industrial cleaning, home nursing and social work activities without accommodation.

In the two biggest host states of migration in the context of East-to-West mobility, the protection of local workers was necessary by temporarily restricting freedom to provide services. Germany and Austria took the view that these are necessary, "taking into account national absorption capacity, the need to integrate all migrants, including those from non-EU countries, and to accompany internal structural reforms. Nevertheless, it was acknowledged that the restrictions may have encouraged EU-8 nationals to look for other ways to perform economic activity in EU-15 Member States, reflected in an exceptionally high influx of posted workers or workers claiming to be self-employed."[76]

What was legally meant by these restrictions? First of all, this rule gave a green light to posting in any other sector including, most importantly, to catering services and the food industry. Secondly, it contributed to the keeping bilateral agreements that had an impact on labour migration in the restricted sectors in effect.

There have been several bilateral agreements in force between Germany, Austria and the Central and Eastern European countries starting in the 1990s, mostly aimed at seasonal work, frontier work and service provision (Werkvertrag).[77] The volume of these reached hundreds of thousand of workers. The number of workers in these categories, however, changed immensely. In Germany, in the beginning of the 1990s there were 170,000 seasonal workers and 80,000 posted workers while in 2004 the quota for Central and Eastern European seasonal workers exceeded 300,000 – most of whom were Polish nationals – while the number of posted workers did not reach 30,000.[78] According to the most recent statistics, in 2009 the number of Central and Eastern European posted workers in the framework of Werkverträge had not even reached 10,000 in the following setting:

[75] Point 13. of Annex X of the Accession Treaty (Hungary).
[76] This has been reaffirmed by the Commission Report COM(2006) 48 final, point 9., p. 5.
[77] Extensively: Müller, Andreas, *Die Entsendung von Arbeitnehmern in der Europaischen Union*, Nomos, Baden-Baden, 1998.
[78] Barbara Dietz, Die Integration mittel- und osteuropaischer Zuwanderer in den Deutschen Arbeitsmarkt, p. 25-46. in Nowicka, Magdalena (hg.), *Von Polen nach Deutschland und Zurück – Die Arbeitsmigration un ihre Herausforderungen für Europa*, Transcript-verlag, Bielefeld, 2007. p. 33-34.

Average number of posted workers (Werkvertrag) 2009- first half of 2010.

EU Member State	**2009**	**1-6/2010**
Latvia	7	25
Poland	5678	6309
Slovakia	288	341
Slovenia	55	18
Czech Republic	112	105
Hungary	880	926
Bulgaria	286	393
Romania	1934	1947
TOTAL	**9239**	**10064**

Source: Deutscher Bundestag, 2010. Drucksache 17/2722. p. 7.

In Austria, the yearly rate of immigration is about 150,000 out of which – in 2004 - 45.000 were Hungarians, Slovaks and Romanians, out of which 25.000 were seasonal workers.[79] Evidently, the nature of migration changed from structured forms to more flexible solutions.

III.3.3. Posting in the construction and in the meat industry – the SOKO cases

As it has been pointed out, free movement of workers in the framework of posting was not restricted, except in Germany and in Austria and only there in certain sectors, most importantly in the construction sector. It entailed that bilateral agreements in the construction sector gained importance while other sectors became free from any restrictions.

It seemed that the situation of labour markets and the protective reactions in the accession treaties coincided and calm would prevail.

The issue of posting, however, caused real tensions between Germany and Hungary beginning in 2004. The precise reason for the tension was the different interpretation of the complex legal surroundings of posting.

Cooperation between Hungary and Germany was for long based on the agreement between the governments of these countries about the Hungarian workforce of enterprises in Germany, signed on 3 January 1989 (called Werkvertrag), that was fruitful and mutually beneficial for more than 16 years.[80] Within the confines of the agreement the number of Hungarian workers who could be employed in Germany in every month of the accounting period - from 1 October to 30 September in the following year - was set by a quota.[81] In the last 20 years, hundreds of Hungarian enterprises and more than 120,000 Hungarian workers got a chance to work in Germany. The small and medium-sized companies were competitive and their cooperation with German companies was successful, in many cases it resulted in the establishment of joint ventures.

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[79] Herzog (2006) p. 46-47.

[80] Germany has signed 13 contracts like this together, for example with Poland, Czech Republic and Romania.

[81] Csóka, Gabriella, A munkaerőmozgás tárgyában megkötött nemzetközi szerződések, in Berke Gyula, Gyulavári Tamás, Kiss György (szerk.), *Külföldiek foglalkoztatása Magyarországon*, Budapest: KJK Kerszöv, 2002. 119-120.

In 2005 nearly 260 Hungarian companies – mostly small and medium-sized enterprises – were functioning on the German market through this construction. The total value of Werkvertrag exports from Hungary to Germany was 500-600 million Euros (3-4 per cent of total exports).[82]

After 1 May 2004 the quota for the Hungarian workforce specified by the German party was 3801 for every month of the accounting period from 1 May 2004 – 30 September 2004 and 1 October 2004 – 30 September 2005. More than 100 companies with thousands of employees were doing business in the liberalised areas such as the installation industry and meat industry. Because it was not necessary to have work permits for workers in these sectors, no real numbers were made available, though, based on former experiences, around 1800-2200 Hungarian workers had worked in the meat industry and 1500-2000 persons in other liberalised sectors.[83] There were companies which simultaneously functioned in both the restricted and int the liberalised sectors. Companies offering new services, which had no experiences with the Werkvertrag, had arrived to the market, too.

III.3.3.1. SOKO Pannonia and SOKO Bunda

In 2004, according to estimates, around 26,000 workers in Germany were made redundant in the meat industry alone because of the influx of Central Eastern European workers.[84] Germany did not have a national minimum wage, there was no sectoral minimum wage for slaughterhouses, and there were Polish, Czech and Hungarian abattoir workers who were willing to work for less than the local workers.[85] Unemployment was high; it affected 5.2 million people. It led to accusations that the employment of workers from Central and Eastern European countries was unfair and illegal.

On 21st April 2004, in an action which became famous as ,,SoKo (Sonderkommando - special force) Pannonia", around 1100 representatives of the police, customs and financial authorities of Germany (in Germany customs are responsible for labour inspection) made an inspection within the premises of 23 companies in Germany that were active in service provision. Investigations were also made in Hungary at 40 locations at the same time, with the Hungarian Prosecutor General's permission, by representatives of the Hungarian National Police and German police and customs.[86] Several witness testimonies were collected, authorities seized documents and computers; they investigated private homes and blocked the accounts of all companies. The overall result was that companies had to stop working in Germany, because they were unable to pay their workers. It became completely impossible for these companies to continue and they went bankrupt. More than 1000 Hungarian workers were affected.[87] The Hungarian companies concerned had suffered significal financial losses, their business relations were damaged.[88]

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[82] http://www.hirado.hu/Hirek/2009/01/22/07/SoKo_csak_azert.aspx
[83] Ibid.
[84] Tuengerthal, Hansjiirgen Herrn Prof. Dr., Zum Stand der strafrechtlichen Verfahren gegen deutsche Unternehmen, die mit Werkvertragsunternehmen aus den neuen Mitgliedstaaten der EU tátig geworden sind, sowie deren auslandische Werkvertragspartner", Referat, Seminar "Werkvertrage Ost II" am 05.10.2007, Sheraton, Frankfurt. p. 3. Download (22.11.2010.):
http://werkvertrag-osteuropa.org/2007/Stand_strafrechtliche_Verfahren.pdf
[85] Barysch (2006) 4.
[86] http://www.nol.hu/archivum/archiv-410908 Download 21.11.2010.
[87] http://www.remekinfo.hu/bunda Download: 21.11.2010.
[88] http://www.nol.hu/archivum/archiv-444112 Download: 22.11.2010.

In April 2005 the second inspection (called SOKO Bunda) took place. In this action 20 sites were investigated; it affected 18 companies, 3 of them working in the meat industry, 15 in construction. Measures related to SOKO Bunda (commando action, seizing computers and documents, freezing accounts) and its effects were the same as a year before, 1500 workers were affected.[89].

Hungarian governmental bodies started to communicate with their German partners and tried to address the problem. A Hungarian - German Joint Committe was set up. Moreover Olajos Péter, Member of European Parliament adressed an urgent question to the Comission on 18 July 2005, on „Illegal harassment of Hungarian/EU businesses providing services in Germany" (see Annex 5.). The Comission's answer was the following: « Comme suite à plusieurs questions parlementaires et à des lettres des autorités d'un État membre, les services de la Commission ont adressé une lettre aux autorités allemandes le 29 juin 2005, attirant leur attention sur les nombreuses plaintes et courriers concernant des contrôles des entreprises exécutés par des autorités allemandes, surtout dans le secteur de la construction et leur demandant des informations supplémentaires sur la situation actuelle. Les autorités allemandes disposent d'un délai de deux mois afin de répondre à cette lettre et la Commision n'a pas encore reçu de réponse. Dès réception de la réponse, la Commission l'examinera attentivement au regard notamment du Traité d'adhésion et des règles du Traité CE en matière de libre prestation des services ».[90]

Presumably, it was the Comission's intervention that caused actions like these to stop.

III.3.3.2. Complex interpretative issues and follow-up

What was the legal reasoning behind all these actions?

Fifty-one Hungarian companies were accused of conspiracy in smuggling large numbers of workers to the Federal Rebublic of Germany and of employing them as cheap labour. The accusation included:

- withholding of payments,
- social security fraud,
- tax evasion,
- rack rent,
- abandonment of illegal labour,
- trafficking in human beings.

Evidence was sought to support these serious accusations. First, German authorities tried to prove that the labour law requirements for posting (work is performed under the direction of the German partner, wages and other working conditions are in compliance with German rules) were not met. Secondly, it was argued that these persons were not posted workers; the Hungarian sending firms were not in fact operational (only post-box firms). Consequently, workers fell under the social security legislation of Germany and they should have paid German social insurance contributions. Their E101 forms – and their predecessor D/H 101

[89] http://www.origo.hu/uzletinegyed/vilaggazdasag/20070621felmentettek.html

[90] http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2005-2625&language=HU
Answer on 6 September 2005 (Charles McCreevy). Available in French and Hungarian. Download: 15.10.2010. The essence of the answer is that the Commission has concerns as regards the compatibility of the action with the free movement of services.

forms – were not accepted as valid.[91] Finally, in the absence of lawful posting, the workers were regarded as "regular" workers who should have met all the requirements, of having a work permit and a residence permit, as individual workers. All these missing, the workers were regarded as illegal, and based on their large number, the employers were accused of even trafficking in human beings. The firms denied the accusations and availed of the lawfulness of posting both in terms of labour and social insurance law.

Most of the proceedings were stopped and also the reasoning of the German prosecution was dismissed. Some Hungarian firms want to take legal proceedings toreceive compensation from Germany and from Hungary because the Hungarian Prosecution Service helped the German authorities in their actions.[92] An overall conclusion of the outcome of the court cases can still not be drawn.[93]

Some benchmarks have been already laid down, very importantly as regards the validitiy of E101 forms. The ECJ stated in the *Herbosch Kiere* case that: "As long as it has not been withdrawn or declared invalid by the authorities of the Member State which issued it, an E 101 certificate (…) binds the competent institution and the courts of the Member State in which the workers are posted. Consequently, a court of the host Member State of such workers is not entitled to scrutinise the validity of an E 101 certificate as regards the certification of the matters on the basis of which such a certificate was issued, in particular the existence of a direct relationship (…) between the undertaking established in a Member State and the workers which it has posted to another Member State, during the period of their posting."[94] Consequently, the social status was said to be a serious determinant.[95]

The German Highest Court (Bundesgerichtshof) confirmed the legally binding character of the E101 form in its judgment of 24 October 2006.[96] It handed down in the judgment that „Eine von einem anderen Mitgliedsstaat der Europäischen Union erteilte Entsendebescheinigung (E 101) bindet auch die deutschen Organe der Strafrechtspflege."[97] The reasoning emphasised „Der Senat sieht vor diesem Hintergrund auch die an einem innerstaatlichen Strafverfahren beteiligten Behörden und Gerichte an eine von einem ausländischen Sozialversicherungsträger ausgestellte E 101-Bescheinigung gebunden, soweit sich das Strafverfahren auf eine Verletzung der Beitragspflicht des Arbeitgebers zieht".[98] The situation is the same if there is doubt that the E101 form was obtained by fraud. The only institution that can challenge the validity of the form, including withdrawal, is the authority that issued it. Based on the decision of the Bundegerichtshof, lower instance courts also decided on the validity of E101 forms.[99]

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[91] http://www.nol.hu/archivum/archiv-444112 Download: 22.11.2010.
[92] http://www.inforadio.hu/hir/belfold/hir-212880 Download: 23.11.2010.
[93] https://hirkozpont.magyarorszag.hu/hirek/vizsgalat20050629.html Download: 22.11.2010.
[94] Case C-2/05 Herbosch Kiere [2006] ECR I-1079.
[95] Berki Gabriella, Posting of workers: a kiküldött munkavállalókra vonatkozó munkajogi és szociális jogi szabályok az Európai Unióban, SZTE, Szeged, 2010.
[96] 1 Str 44/06, Bundesgerichtshof. Urteil des 1. Strafsenats vom 24.10.2006 - 1 StR 44/06 – Download: 11.12.2010.
[97] Point 1 of the judgment.
[98] Ibid, para. 22. of the reasoning.
[99] Tuengerthal (2007) p. 8.

In essence the horizontal validity of E101 forms mean that, if the E101 form is not withdrawn, the social insurance contributions are lawfully paid in the sending countryand so any alleged fraud in this sphere cannot be upheld. [100]

III.3.3. Follow up

In 2005 the mass inspections of Hungarian posted workers ended. This time the German authorities also tried to carry out similar inspections in Poland as they carried out in Hungary, but negotiations began and the inquiries regarding Polish undertakings ended sooner.[101]

Another serious dispute was underway, however, with Poland; an issue regarding posting that resulted in an ECJ judgment handed down in January 2010.[102] The problematic issue was the scope of the Polish-German posting agreement (Werkvertrag).[103] The agreement stated that Polish workers can only be posted to Germany in the framework of the agreement if the undertaking that receives the workers is „from the other side". In the German interpretation these were only Germany-based undertakings; in the Polish interpretation these could have been undertakings established in other Member States of the European Union as well. The Poles availed themelves of the ECJ *Gottardo* case, that stated: „when a Member State concludes a bilateral convention with a non-member country, the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so".[104] Based on this judgment they asserted that not only German undertakings but also other undertakings can employ posted Polish workers – in accordance with Directive 96/71 and the Treaty of Accession.

The ECJ stated that the German administrative practice created direct discrimination,[105] and "Germany has failed to put forward any convincing argument which could be based on one of the grounds set out in Article 46 EC, since economic considerations and mere practical difficulties in the implementation of the German-Polish Agreement are not, in any event, sufficient to justify restrictions on a fundamental freedom (…) or, *a fortiori*, a derogation under Article 46 EC, which presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society."[106] The judgment confirmed that the freedom to provide services implies the termination of any discrimination against a service provider by reason of nationality or place of establishment. The requirement that a company must set up a permanent undertaking in the member state where the service is provided runs counter to the freedom to provide services.

Posting is an extremely hot issue in Germany. In the German Bundestag there has been a written question addressed to the federal government regarding the effects of posting on the

[100] See Annex 6 and 7 for more information.
[101] http://www.piacesprofit.hu/magazin.html?mag_id=736&hir_id=3363 Download: 23.11.2010.
[102] Case C-546/07 Commission v Germany, Judgment of the Court of 21 January 2010. (nyr)
[103] Agreement of 31 January 1990 between the Government of the Federal Republic of Germany and the Government of the Republic of Poland on the posting of workers from Polish undertakings to carry out works contract.
[104] Case C-55/00 *Gottardo* [2002] ECR I-413.
[105] Case C-546/07, para. 40.
[106] Ibid, para. 51.

German labour market.[107] Members of the Federal Parliament asked the federal Government about the planned measures to combat the illegal employment of foreign labour and against tax and social insurance fraud. The federal government is under continuous pressure to show its dedication to protecting the German labour market. It underlined the importance of bilateral agreements with Bulgaria and the Czech Republic on co-operation.[108]

III.4. Questions as regards the right of residence

The issue of residence rights is a crucial one because the lawful presence of union citizens in the territory of other Member States is the necessary pre-requisite of their other rights.

III.4.1. Practical problem – delays in administrative procedures

The ECJ declared already in 1976 in the *Royer* case[109] that "the right of nationals of a Member State to enter the territory of another Member State and reside there (…) is a right conferred directly by the Treaty…", moreover, "the right is acquired independently of the issue of a residence permit of the competent authority of a Member State" and „the grant of this permit is therefore to be regarded not as a measure giving rise to rights but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of Community law".[110]

Consequently, the documentation of the right of residence can never be a constitutive action of the Member State but a declaration of the status of the Union citizen.

Having said that, however, delays in documentation can have serious negative effects "such as dismissal, treatment as illegal resident by employers and public agencies, difficulties when travelling abroad since the passport is with the immigration authorities, and the need to provide new documents since the documents originally provided are no longer valid or accepted by the immigration authorities by the time they finally deal with the application."[111]

The report of the European Network on Free Movement within the European Union concludes on this issue that: "The report on Cyprus mentions a backlog of 27,000 pending application for registration as a resident EU national. The UK report mentions ten to twelve month delays in handling applications for an EC residence card".[112]

III.4.2. Solid practices in the new Member States

[107] Drucksache 17/2722. 6.8.2010. http://dip21.bundestag.de/dip21/btd/17/027/1702722.pdf Download: 12.11.2010.
[108] Ibid, p. 10.
[109] Case 48/75, judgment of the Court of 8 April 1976, ECR (1976) 47. para. 31-33.
[110] Ibid, paras. 31-33.
[111] European Report on the Free Movement of Workers in Europe in 2008-2009, p. 6.
[112] Ibid, p. 6.

Central and Eastern European countries apply Directive 2004/38/EC from 2006 or 2007 depending on the concrete entry into force of the respective national implementation.[113] There is at least a 3-years long operational period that enables some conclusions.

The very first statement is that the usage of these rules is quite limited in volume. Statistics show that the presence of Union citizens in the Central and Eastern countries is rather marginal.[114] Second, none of these countries report any major problem as regards the application of EU rules: there are no delays in the entry and residence procedures and they go without major problems. It is true that implementation has not always occurred on time.[115] Compared to the UK for example, the intensity of migration is really much less than would be needed to affect the well-functioning of the system. The lack of intensive practice in the new Member States is a general feature in the application of the rules on residence in these countries.[116]

III.4.3. Connection between residence and social benefits

It could already be seen upon the 2004 accession that the fear of social dumping entailed measures –in the UK – that would be subjected to further inquiries. This is the legal instrument of the Habitual Residence Test (hereinafter referred to as HRT), according to which certain social benefits can only be applied for by persons who meet the requirements of the HRT, introduced in 1994.[117] The Social Security Regulations concern, *inter alia,* income support, jobseeker's allowance, pension credit and housing benefit.[118]

According to the UK, only those persons who have a sufficiently close link with the country, based on the length and continuity of residence, the person's future intentions, their employment prospects, their reasons for coming to the UK and where the person's centre of interest is, can receive these benefits. This line of argumentation can clearly be followed in the *Collins* case.[119] Prior to 1st May 2004, Union citizens who were present in the UK possessed the right of residence in terms of European Community law, and they needed to evidence their intentions to live permanently in the UK to successfully stand the HRT.

From 1 May 2004, in response to concerns about the impact of the enlargement of the European Union, HRT legislation was amended.[120] The change in 2004 meant that a pre-requisite was introduced before the original test:

An initial test to determine whether the person has a 'right to reside'; and then
The original Habitual Residence Test.

Any person who does not have a right to reside automatically fails the HRT, consequently, cannot qualify for the benefits.[121] Very importantly, unlike nationals of the „old" Member

[113] Probably the latest implementation was implemented by Hungary with effect from 1 July 2007 by Act I of 2007.
[114] Based on national reports on the Free Movement of Workers in Europe in 2008-2009.
[115] Tóth Judit, Migrant workers and free movement in Hungary, p. 25-32. in Julianna Traser (ed.) A Regional Approach to Free movement of Workers: Labour Migration Between Hungary and its Neighbouring Countries, Klebersberg Kuno University Press, Szeged, p. 29-30.
[116] Cholewinski (2009), p. 66.
[117] Gellérné Lukács – Szigeti (2005) 136-142.
[118] Latest amendment: http://www.legislation.gov.uk/uksi/2009/362/contents/made (Download: 30.10.2010.)
[119] Case C-138/02 Collins, Judgement of the Court on 23 Mach 2004., ECR (2004) I-02703.
[120] Social Security (habitual residence) Amendment Regulations 2004 (SI 2004/1232).

States, persons coming from the new Member States (so-called A8 (Central and Eastern European Countries which acceded to the EU in 2004 except Malta and Cyprus) and A2 nationals (Romania and Bulgaria) did not automatically obtain the right of residence.

> „For most workers coming to the UK from one of the new EU Member States, there are further conditions that must be satisfied. To have a right of residence, most workers from A8 countries need to be in work and registered under the Home Office Worker Registration Scheme. They have the right of residence – and with it access to in-work benefits – for as long as they are in registered employment. Once an A8 national has legally worked in the UK without interruption for a period of 12 months they do not have to register with the Home Office and have the same rights and access to means-tested benefits and tax credits as other EEA nationals. An A8 worker must not be out of work for more than a total of 30 days in the 12 month period. If they have completed 12 months uninterrupted work they can only retain worker status if they claim Jobseeker's Allowance (JSA), unless they are temporarily sick and have had an accident which temporarily prevents them working.
>
> Nationals of A2 countries (Bulgaria and Romania) are not covered by the Worker Registration Scheme. However, A2 nationals wishing to work in the UK must, except where they are exempt from the requirement, obtain a 'worker authorisation document' before they commence employment in the UK. To have a right to reside as a worker, an A2 national who is subject to worker authorisation must have a worker authorisation document and be working in accordance with the relevant conditions. An A2 national who has worked legally in the UK without interruption for a period of 12 months is exempt from worker authorisation and has the same rights and access to benefits and tax credits as other EEA nationals. For practical purposes, therefore, the rules closely mirror those for A8 nationals."[122]

It can be said that more stringent rules are applied for A8 and A2 nationals than to nationals of the "old" Member States. For these nationals a waiting period of 1 year is envisaged before becoming entitled, which is clearly a differentiation.

Originally this restrictive approach had been envisaged only for a limited time after accession, but these rules are still in force, as confirmed by the UK authorities in April 2009. These rules are even openly emphasised as being a necessary corollary to free access to the labour market: "Limiting EU nationals' access to UK social benefits remains a priority for the UK authorities. As the Minister stated in April 2009 when justifying the extension of transitional provisions for EU8 workers in the UK past 1 May 2009: 'Maintaining the restrictions also means A8 nationals will not have full access to benefits until they have been working and paying tax for at least 12 consecutive months.'"[123] These restrictions shall be repealed as of 1st May 2011 when the transition ends – for A8 nationals.

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[121] House of Commons, The Habitual Residence Test. Social Policy Section. (Download: 17.11.2010.) http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snsp-00416.pdf

[122] Ibid, p. 18.

[123] REPORT on the Free Movement of Workers in the United Kingdom in 2008-2009. p. 3. Download: 22.10.2010. http://ec.europa.eu/social/keyDocuments.jsp?pager.offset=20&langId=en&mode=advancedSubmit&policyArea=24&subCategory=475

Even the European Report on Free Movement within the European Union mentions that "In the UK the right to reside test continues to give rise to legal challenges concerning who may rely on Article 7 of Regulation 1612/68; whether the residence test can be objectively justified and is proportionate to the objective pursued, and whether it goes further than what is required to achieve a legitimate objective pursued by national legislation seen in the light of the ECJ judgment in the *Hendrix* case[124]".[125] No special reference is made to newcomer Member States, although they are hit the most by this test.

There was a connected case, *Zalewska*[126], in which the connection between social benefits and right of residence was dealt with by the House of Lords. An EU8 national worked altogether for more than 12 months in the United Kingdom, but she failed to re-register under the Workers Registration Scheme when she changed employer, resulting in a subsequent unlawful working period. As she could not aggregate the unlawful period with the lawful ones, she could not obtain the 12 months' continuous lawful employment that is necessitated under the HRT. As a consequence, she was not eligible for income support. The House of Lords concluded that her rights as a migrant worker were not breached because she had not fulfilled the requirements of labour market access laid down by UK law. As to whether these requirements were proportionate to the aims pursued, the House of Lords emphasised the necessity for effective gathering of up-date statistics that explains the system of the HRT.[127]

III.4.4. Expulsion of nationals of the new Member States

As had been agreed during the accession negotiations by every newcomer state, in the field of free movement of persons only access to employment was to be temporarily restricted. However, even the terms of the Accession Treaties provided for restrictions that are inherently necessary in the field of residence rights.[128] The piece of legislation that time was Directive 68/360/EEC which, however, has been repealed and replaced by the new composite Directive 2004/38/EC. The change of law left the possibility of restrictions intact.

As regards the admission and expulsion of EU nationals to or from the territory of another Member State, not only the rules of the Internal Market but also general migration laws – in terms of home affairs – play a role. With countries of the Schengen free travel area no real problems are to be reported. However, outside of the Schengen Area problems have occurred, especially with regard to Lithuanian, Romanian and Bulgarian nationals.[129] According to the Free Movement of Workers Report of the UK:

> "There are still problems regarding exercise of free movement rights by Bulgarian and Romanian citizens ('EU2 nationals') who are working in the UK. While the Regulations provide that Immigration Officers may not examine EEA nationals on entry unless they

[124] In the concrete case the ECJ accepted that eligibility for a special non-contributory benefit can objectively require residence, however, it is evident that the proportionality of withdrawing the benefit based on the lack of residence was questioned. Case C-287/05 Hendrix, Judgment of 11 September 2007. ECR (2007) I-6909.
[125] European Report on the Free Movement of Workers in Europe in 2008-2009, p. 28.
[126] Zalewska v Department for Social Development case. [2008] UKHL 67.
[127] UK Report 2008-2009, p. 35-36.
[128] Point 9.:"Insofar as certain provisions of Directive 68/360/EEC may not be dissociated from those of Regulation (EEC) No 1612/68 whose application is deferred pursuant to paragraphs 2 to 5 and 7 and 8, Hungary and the present Member States may derogate from those provisions to the extent necessary for the application of paragraphs 2 to 5 and 7 and 8."
[129] Cholewinski (2009), p. 68.

have 'reason to believe' that exclusion may be justified on grounds of public policy, public security or public health, EU2 nationals are asked to produce an Accession Worker Card or Registration Certificate. It is a criminal offence for an EU2 national to take employment without authorisation under Regulation 13 of the Accession (Immigration and Worker Authorisation) Regulations 2006, but no examination of this type should take place at the border and the offence of unauthorised working does not fall with ambit of public policy. The Regulations 2009, now provide wider powers to detain EU nationals – Reg 24 provides that 'if there are reasonable grounds for suspecting that a person is someone who may be removed from the UK... that person may be detained under the authority of an immigration officer'. This purports to permit Immigration Officers to take detention decisions against EU nationals without a court decision, on the basis of their own suspicion."[130]

III.5. Equal treatment and the ECJ case-law

Equal treatment is guaranteed in the Treaty. Article 18 lays down: „Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." The general equal treatment clause is reiterated in Article 45: „1. Freedom of movement for workers shall be secured within the Union. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."

Equal treatment is a general principle: there is no restriction on equal treatment as a whole in the framework of the transitional arrangments. In this section, first, the appearance of equal treatment prior to accession will be dealt with, and as second we deal with the controversial issue of job-seeking.

III.5.1. Equal treatment prior to accession of Central and Eastern European states

Equal treatment was not a completely new phenomenon for the newcomer states. Already the Europe Agreements contained very important provisions as regards equal treatment. Article 37 (1) of the Europe Agreement between the Communities and Poland – that was identical to other agreements - provided that „Subject to the conditions and modalities applicable in each Member State: - the treatment accorded to workers of Polish nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals …".[131]

As practice showed, the legal statement on equal treatment was already of importance for citizens prior to the EU accession. There have even been ECJ cases that interpreted this

[130] Uk Report 2008-2009., p. 6.
[131] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part. Download: 12.11.2010. http://wits.worldbank.org/GPTAD/PDF/archive/EC-Poland.pdf

provision of the Europe Agreement: the *Pokrzeptowicz-Meyer* case and the *Kolpak* case.[132] The first case concerned a Polish national, the second case a Slovak national; both were employed in Germany. In both cases the validity and scope of the above-cited equal treatment clause, especially the relevance of the part 'Subject to the conditions and modalities applicable in each Member State' were disputed.

Beata *Pokrzeptowicz-Meyer* was a Polish language-assistant in Germany, employed half-time with a fixed term employment contract since 1992. In 1996 she was still employed with a fixed-term contract based on a special provision of German Law. The ECJ had already declared that provision to be discriminatory for EC nationals.[133] Mrs Pokrzeptowicz-Meyer argued that it should be discriminatory against her as well, based on the equal treatment clause of Article 37 (1) of the Europe Agreement.

First, the ECJ ruled that Article 37 (1) has direct effect; it „lays down, in clear, precise and unconditional terms, a prohibition" and „can be relied on by an individual to apply to a national court to set aside the discriminatory provisions of a Member State's legislation, without any further implementing measures being required for that purpose."[134] Land Nordrhein-Westfalen argued that the provision is „not unconditional, since the principle set forth in that provision is put into effect '[s]ubject to the conditions and modalities applicable in each Member State'".[135] The Court however declared that „That proviso may not be interpreted in such a way as to allow the Member States to subject the principle of non-discrimination set forth in the first indent of Article 37(1) of the Europe Agreement to conditions or discretionary limitations. Such an interpretation would render that provision meaningless and deprive it of any practical effect."[136]

The ECJ finally stated the Article 37(1) of the Europe Agreement: "precludes the application to Polish nationals of a national provision according to which positions for foreign-language assistants may be filled by means of fixed-term contracts of employment, whereas, for other teaching staff performing special duties, recourse to such contracts must be individually justified by an objective reason".[137]

Mr *Kolpak* was a goalkeeper in a German handball team. He had a valid employment contract and a valid residence permit. The German Handball Federation (GHF) issued him a player's licence marked with the letter A meaning that he was from a non-member country and he could only play with limitations. Mr Kolpak applied for a player's licence without limitation, but the GHF was of the opinion that it „covers only players who enjoy complete equality of treatment *vis-à-vis* Community nationals in respect of free movement of workers. (…) Mr Kolpak is not entitled to be issued with a licence which does not contain the limitations

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[132] C-162/00 case Land Nordrhein-Westfalen versus Beata Pokrzeptowicz-Meyer, Judgment of the Court of 29 January 2002., (2002) ECR I-01049. C-438/00 case Deutscher Handballbund eV versus Maros Kolpak, Judgment of the Court of 8 May 2003., (2003) ECR I-04135.

[133] Case C-272/92 Spotti [1993] ECR I-5185.

[134] Case C-162/00 Pokrzeptowicz-Meyer, para. 21. Also: „the limb of the sentence which appears in the first indent of Article 37(1) of the Europe Agreement lays down, in clear, precise and unconditional terms, a prohibition preventing each Member State from discriminating in relation to its own nationals, on grounds of their nationality, against Polish nationals covered by that provision as far as their conditions of employment, remuneration and dismissal are concerned. The Polish nationals who are entitled to the benefit of that provision are those who, having been previously granted the right to stay in a Member State, are legally employed there."

[135] Ibid, para. 23.

[136] Ibid, para. 24.

[137] Ibid, para. 45.

resulting from the addition of the letter A, as such general equality of treatment does not feature in the association agreements concluded with the countries of Eastern Europe."[138] This point of view had been supported by Greece, Spain and Italy.[139] They highlighted that "Article 38 of the Association Agreement with Slovakia is not intended to place on an entirely equal footing workers who are nationals of the Slovak Republic and workers who are nationals of the Member States of the European Union" and „solely with regard to conditions of work, remuneration or dismissal."[140] They asserted that the licence and the related unlimited right to play does not fall within the ambit of equal treatment.

The ECJ examined the same Article that was discussed above in the Europe Agreement with Slovakia (there the respective Article was 38 (1) para.). The Court shortly referred to the *Pokrzeptowicz-Meyer* case and declared the direct effect of this provision.[141] Then it stated that the equal treatment clause contains the ritgh to unlimited play. It declared that "The (Europe Agreement) must be construed as precluding the application to a professional sportsman of Slovak nationality, who is lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation in that State under which clubs are authorised to field, during league or cup matches, only a limited number of players from non-member countries that are not parties to the Agreement on the European Economic Area."[142]

With these two cases the ECJ sent a very important message: the equal treatment clause in Europe Agreements has the same validity as the general equal treatment clause in EC law. It did not only encompass certain aspects of employment (such as remuneration and dismissal) but all related rights, defined in a broad way as "working conditions". The approach of the Court is to be praised from legal point of view because this paved the way to a uniform implementation of equal treatment in EC law – whether it derived from the Treaty of from international agreements. In practice, it was also very important for every state party in these agreements that equal treatment in this sense would also be guaranteed after the accession. It was a message, too, that if an agreement uses the terminology of EC law, the content in EC law is attributed to it. The Stabilisation and Association Agreement with the Republic of Croatia from the year of 2005 contains the same wording in Article 45 (1),[143] as does the Stabilisation and Assocation Agreement with Bosnia and Hercegovina that entered into force in 2008 (Article 49 (1) para). The conclusion can be drawn that the EU has not altered the wording of the association agreements approved later because of the cases and conclusions of the ECJ.

III.5.2. Job-seeking

Right after the 2004 accessions, an increasing number of questions were raised in both old and new Member States with regard to the rights of job-seekers. It concerned the application of Article 5 of Regulation 1612/68/EEC and Article 69 of Regulation 1408/71 (social security regulation) concerning the export of unemployment benefits[144] during the transitional period

[138] Case C-438/00 Kolpak, para. 13.
[139] Ibid, paras. 38 and 41.
[140] Ibid, paras 38 and 39.
[141] Ibid, para. 37.
[142] Ibid, para. 58.
[143] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:026:0003:0220:EN:PDF Download: 10.12.2010.
[144] In the meantime Reg. 1408/71/EEC has been replaced by Reg. 883/2004/EC and Reg. 987/2010/EC with effect from 1 May 2010: the problem, however, remained intact: Regulation (EC) No 883/2004 of the European

for the free movement of workers from new Member States.[145] The issue was also discussed in the competent Administrative Commission on Social Security for Migrant Workers and in the Technical Committee on Freedom of Movement of Workers. [146]

III.5.2.1. Relationship between the transitional arrangements and job-seeker's benefits

The Transitional Arrangements contained in Annex V of the Accession Treaty with the ten new Member States provide that old Member States apply, by means of derogation from Articles 1-6 of Regulation 1612/68, solely national measures regulating the access of workers from the new Member States to their labour markets at least for the first two years following accession.

Article 5 lays down the right to job-seeking: "A national of a Member State who seeks employment in the territory of another Member State shall receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment."

The restrictions meant that job-seeking was also restricted.

The Accession Treaty did, however, not foresee any transitional arrangements with regard to the application of social security regulation. Article 69 of Regulation 1408/71 concerned the export of unemployment benefits, which is closely linked to the right of the beneficiary to have access to the labour market of another Member State (which implicitly includes their right to seek employment there).

The question was whether the unemployment benefit that has been obtained in a new Member State by the national of a new Member State could have been exported to a Member State that applied restrictions, which is equivalent to the permission for job-seeking, which, however, can be restricted under the Accession Treaty.

The new Member States took the view that, in the above case, export of benefit cannot be restricted. The 'old' Member States, however, declared that if the right of a worker from a new Member State to seek employment in that old Member State under Community law is suspended, the practical application of Article 69 shall therefore also be limited to those persons who are allowed to seek an employment in the old Member State in question according to its national legislation. Consequently, if a new Member State's national has access to the labour market of an 'old' Member State, it can also export benefit to this Member State. If, however, no access is foreseen, export of unemployment benefits cannot be implemented either.

Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1–123.) and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ L 284, 30.10.2009, p. 1–42.)

[145] This point is based on Gellérné Lukács Éva-Szigeti Borbála, Munkavállalási szabályok az EU tagállamaiban az átmeneti időszak alatt (Employment rules in EU Member States during the transitional period). KJK-Kerszöv, Budapest 2005. p. 26-28.

[146] Application of Article 69 of Regulation 1408/71 during the transitional period for the free movement of workers, CASSTM note 284/04.

There was, however, uniform interpretation as regards the right to unemployment benefits. The transitional arrangements did not allow 'old' Member States to restrict their entitlement to social security benefits as provided for by the social security regulation. This meant that the Member State concerned had to ensure the worker's acquired social security rights, such as their entitlement to unemployment benefits.

The right to seek a job and the export of unemployment benefits could not have been settled. In the Central and Eastern European countries no restrictions have been put in place as regards Union citizens, even if this could have been taken as part of the reciprocity clause. In the EU-15 countries, practice was completely different in terms of the measures applied – this changed sometimes within distinct regions of a certain country.

III.5.2.2. Length of job-seeking and reverse discrimination

Two other issues also deserve attention, one is reverse discrimination, the other is the length of job-seeking.

Reverse discrimination means that the situation of a Member State's own national is detrimental in comparison with a national of another Member State living / working in the first Member State.[147] As the cases of the ECJ show, usually the members of family suffer from the negative effects of reverse discrimination. There is a recent case from the Czech Republic in which the Highest Administrative Court clearly stated if the third-country national family member of a migrant Union citizen has free access to the Czech labour market, the third-country national family member of a Czech national also needs to obtain the same legal treatment otherwise discrimination would occur.[148]

As has been mentioned at the outset, job-seeking cannot be restricted to 3 months, during which period no formal requirements shall be met, but due attention shall be paid to whether the job-seeking is reasonable and properly evidenced.[149] In the single ECJ case dealing with this issue, the questionable period was 6 months, but the judgment was more horizontal in content, meaning that there is no clear-cut time-limit for the residence rights of job-seekers. It raises the question of case-by case analysis. However, national administrations do not favour situations in which discretion prevails and extensive inspection must be carried out. Member States – both old and new – usually set a time-limit (Bulgaria 3 months, Hungary 6 months) or do not mention this issue but deal with it in the general frame.

The Czech solution is worth considering as a very straightforward solution, indeed, it does not require Union citizens to register after 3 months – including job-seekers.[150] In the Czech Republic the beneficial treatment of job-seekers is extended to every Union citizen, they can stay freely except if they represent a threat to public security, public order or public health.

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[147] Verschueren, Herwig, Reverse Discrimination: An Unsolvable Problem?, in Minderhoud, Paul-Trimiklinioties, Nicos (eds), Rethinking the free movement of workers: the European challenges ahead, Wolf Legal Publishers, Nijmegen 2009, p. 99-118.
[148] FMOW Report of the Czech Republic, 2008-2009, p. 14.
[149] Case C-292/89 R. v Immigration Appear Tribunal, ex parte *Antonissen* (1991) ECR I-745.
[150] FMOW REport of the Czech Republic, 2008-2009, p. 8.

IV. (Preliminary) conclusions

The field of free movement of persons has always been troubled with stereotypes and fears. On the one hand, sending countries are mainly concerned with brain-drain while, on the other hand, receiving countries fear social dumping and loss of work places by home workers. Additionally, this is a fundamental freedom in European Law, and embodies a complex set of laws regulating the whole chain of activites beginning with the arrival in the host state and ending with a possible return at the end of the working career. Not only residence and employment rights, but severe social rights are attached to the legal status of 'Community worker' or 'union citizen'. Albeit free movement functions quite smoothly in Central and Eastern Europe, both fears and the magnitude of legal rules are responsible for the problems that occurred before and after accession in relation to the 'old' EU Member States. These problems are rooted in different interpretations of laws, but certainly, the protection of labour markets was the major underlying reason.

First, the paper tackles upon the volume and effects of East-west migration between 2000 and 2010. Migration after the accession in 2004 and 2007 was absolutely not over-excessive in the light of push factors. Forecasts that envisaged migration between 200-300,000 migrants a year, became the realistic scenario. Migration has not nearly reached the high levels expected. It has been argued that the nature of migration has changed a lot in the last 20 years. The frequency of circular and shorter-term migration might become increasingly intense.[151]

In the receiving Western European countries the direct effect of immigration was unambiguously positive in spite of the unenthusiastic and critical (sometimes offensive) political statements. The whole post-accession era is characterised by efforts of the European Commission and research institutions to convince the 'old' Member States of the benefits of enlargement.

In Central and Eastern Europe the effect of outflow is or was at least mixed (loss of workforce, brain-drain) and in spite of this the political statements were supportive and confirmative. It was taken as obvious that Central and Eastern European states only benefited from accession. The real (small) volume of economic output and its (small) effect on the Western part and the problems of the newcomers were probably only seen by the European Commission and by a few journalists and researchers whose voice was overall very silent. The population of Western Europe was somewhat unaware of these issues and kept pointing to Eastern enlargement as a major reason of their problems.[152] It is probably not accidental that the second wave of Eastern enlargement (Romania and Bulgaria) received almost zero media attention unlike the accession ceremony in Athens in 2003.[153]

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[151] Galgóczy, Béla-Leschke, Janine-Watt, Andrew: Intra-EU labour migration: flows, effects and policy responses, ETUI Brussels, Working Paper 2009/3. p. 31. Illés Sándor – Kincses Áron (2009) Migráció és cirkuláció. Statisztikai Szemle, 87. évf. 7-8. sz. pp. 729-747.

[152] Ez mutatkozott meg az új európai alkotmány elutasításában is.

[153] Herzog, Hubert, Rules applicable to workers of Hungary, Slovakia and Romania in Austria – The working of Transitional Arrangements in practice, p. 39-49., In Julianna Traser (ed.) *A Regional Approach to Free movement of Workers: Labour Migration Between Hungary and its Neighbouring Countries*, Klebersberg Kuno University Press, Szeged, 2006., p. 39.

The paper deals with some concrete issues as well, namely the case of posting, right of residence and job-seeking. These are the key areas – in the author's view – where most problems occurred, and as it can be seen, still occur. In this regard the paper has a clear relevance for the present.

"Public opinion already seemed to have got over the "enlargement shock" and became concerned not only with figures, but also the broader context of migration. Furthermore, the fact that the EU comprises 25 Member States starts to become more natural even though there may be different perceptions in different countries and often heated debates."[154] It is, overall a positive trend, and hopefully this trend will be enhanced by the fact that in 2011 two new countries hold the presidency of the EU (first Hungary followed by Poland).

We shall not forget that EU Member States – old and new together – face economic threats not from each other but from global competition (from China, India, the US and others) and they need to adjust together.[155]

The European Commission stated, in its opinion on the applications for accession of Central and Eastern European states that "Enlargment of the European Union through the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia will help to strengthen safeguards for peace and freedom in Europe".[156] This was and shall remain the guiding principle to which achievements and challenges shall be measured.

[154] ECAS 2006, 44.
[155] Barysch (2006) p. 3.
[156] HL L 236, p. 3-4. paragraph 13.

Annexes

Annex 1. Arguments of Hungary

1. Foreigners in Hungary

According to the number of labour permits issued (data from the National Labour Centre) there were 23,485 foreign citizens working in Hungary in 1999 (up from 22,466 a year earlier) and about 27,000 (roughly the same as in 1998) Hungarian citizens working abroad. These figures represent only 0-5% and 0-7% respectively of the Hungarian total employment in 1999, indicating that this had no significant effect on the Hungarian labour market or that of any EU Member State. In the case of Austria, for example, according to the Austrian Statistical Office Hungarians accounted for 3.3% of the total number of foreign employees in January 1999, i.e. only 0-26% of the total Austrian workforce.

Half of all labour permits to foreign workers in Hungary were issued to Romanian citizens (11,462 persons) while EU citizens - and others from USA, Canada and Japan - accounted for more than one quarter (5,364 persons). The majority of Hungarians working abroad (with labour permits) work in EU Member States (roughly 22,000 persons) – mainly in Germany and Austria - the bulk of these were under bilateral intergovernmental agreements.

The stock of foreigners working in Hungary was much higher than the number of work permits, given the fact that jobs and professions not requiring labour permits are numerous and wide ranging (e.g. entrepreneurs, self-employed, top managers of foreign-owned companies, key personnel, highly qualified professionals, artists, scientists, etc. Refugees do not need work permits either). Based on the OECD SOPEMI Report of 1999, the number of foreigners working in Hungary was estimated to have been about 90-92,000 in 1997. It must be stressed that the real number of foreign employees was even higher than these estimates. because employees - even if working in jobs not requiring labour permits - were obliged to acquire a residence permit only for a period exceeding 90 days. Therefore, in order to avoid this administrative process, many foreigners working in Hungary do not acquire residence permits but rather cross the border before 90 days expire in order to "leave" and return to Hungary.

The assumption that the stock of foreign citizens living in Hungary was for various reasons underestimated is underlined by the next statistics, according to which the balance of out-migration and in-migration between EU Member States and Hungary is clearly negative beginning from the mid-90s.

Table 1: Net migration between CEECs and the EU* (1990-1997) – part of it: Hungary

Country of origin/ destination	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1990-1997**
World total	856.695	760.539	905.517	601.147	516.281	556.346	414.514	172.515	4.783.554
Hungary	**8.889**	**11.140**	**6.234**	**-1.171**	**-2.626**	**500**	**-1.506**	**-3.259**	**18.201**

10 CEECs**	329.910	124.839	147.309	-36.846	7.539	34.551	21.139	13.664	642.105

* : Without: Austria, France, Ireland, Italy, Portugal and Spain

**: Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic, Slovenia;

Source: Elmar Hoenekopp: Central and Eastern Europeans in the Member Countries of the European Union since 1990: Development and Structure of Migration, Population and Employment; Institute for Employment Research, Nuremberg, December 1999, pp 13;

2. Hungarians in other countries

There were only estimates on Hungarian citizens working abroad (no statistics are prepared on people leaving Hungary). The lowest possible estimate for Hungarian citizens working in EU Member States could be approached through the annual ceilings of bilateral intergovernmental agreements on employment.

Table 2: Quotas of existing bilateral agreements with 'old' EU Member States

Country	**Agreements**	**Quota**
Austria	Exchange of trainees	400 persons/year
	Cross-border commuters	900 persons/year
Germany	Guest workers	2000 persons/year
	Project based contractual workers	6600 persons/year
	*	c. 3500 persons/year seasonal work
Luxembourg	Exchange of trainees	20 persons/year
Ireland	Declaration	12 persons/year

Source: Ministry of Social and Family Affairs ***** Outside bilateral agreement

Based on these data and taking into account those working in Austria the lowest estimate for Hungarians working in EU Member States is around 22,000. It must be noted however that these quotas have not been used up entirely.

Similar conclusions have been drawn for the number of Hungarian citizens working in EU countries based on the Eurostat Labour Force Survey, estimating their number at around 24,000 in 1998. This figure is comparable with the Hungarian data based on the quotas of existing bilateral agreements indicating that the real number of Hungarians working in EU Member States is around 25-30.000, which is still less than 1% of the total employment in Hungary.

Table 3: Central and East European Employment in the European Union by Selected Nationalities 1992-1998 (in thousands) – part of it: Hungary

1992*	**1993***	**1994***	**1995***	**1995'**	**1996'**	**1997'**	**1998'**
44,0	44,6	40,5	32,4	38,5	27,5	21,6	24,0

* : EU-12; ' : EU without Sweden and without Ireland in 1998;

Source: Elmar Hoenekopp in "Central and Eastern Europeans in the Member Countries of the European Union since 1990"; Institute for Employment Research, Nuremberg, December 1999, pp. 20.

Thus the trend and the volume of Hungarian migration to the EU implicated that accession would not have any significant impact on either the Hungarian labour market or on that of EU Member States.

3. Economic Factors of potential migration

The characteristics of the labour market changed substantially in the first years of the 1990s in Hungary. The most significant changes were the reallocation of labour among sectors (away from agriculture and industry, and toward services), a decline in both employment and labour force participation rates until 1997, the increase of unemployment until 1993, and introduction of new employment policies for the labour market (wage-setting mechanisms, and active and passive labour market policies).[157] This substantial reallocation of labour that took place between 1992 and 1997 in Hungary suggested that the Hungarian Labour market adjusted well to the new economic environment. As a result of structural changes there had been large changes in the sectoral distribution of the labour force, from agriculture and industry toward services (Table 4.). By 1999, the share of the labour force in the agriculture sector had fallen to 7,1%, while it rose to nearly 60% in the service sector. The distribution of employment in the primary sectors in Hungary is similar to that of many EU Member States.

Table 4: Distribution of Employment in Hungary by Sector between 1980-1999

Year	Agriculture	Industry	Services	Total
1980	19.3%	41-6%	39-1%	100%
1990	17-5%	36-1%	46-4%	100%
1994	9-0%	32-4%	58-6%	100%
1999	7-1%	34-0%	58-9%	100%

Source: Hungarian Central Statistical Office (HCSO)

The decline in employment stabilised in 1997 and increased slightly in 1998 and quite significantly (by 3%) in 1999 reaching a level of 53% employment. Parallel to this the rate of unemployment declined to 7-8% in 1998 and it dropped further to under 7% in 1999. It is important to note that the rate of unemployment is by far the lowest of all the EU candidate countries and well below the average unemployment of the EU.

II.2.3.1. Real-wage and income differences

International studies and empirical observations confirmed that the difference in the level of wages alone did not cause migration pressure. The greatest difference in the level of wages between EU Member States was five times (between Denmark and Portugal) suggesting - using this argument - a significant influx of labour from Portugal to Denmark. However, the proportion of Portuguese nationals within the Danish labour force was in fact insignificant.Although difficult to assess their effects without taking into account all the other factors, new common regulations concerning labour law, such as the Council Directive 96/71/EC concerning the posting of workers in the framework of the provision of services greatly restrained the effects of wage differences. According to these provisions employees appointed to work abroad in another Member State by their company have to been guaranteed the same working conditions of the receiving country in respect of wages as well.

Hungary's lag behind the EU average was smaller in (relative) economic terms, than in (relative) earnings terms. Economic adjustment can be confirmed by the convergence of

[157] Laky, Teréz: Annual Report of Labour Market, Labour Research Institute, Budapest, 1999.

Hungary's GDP/capita ratio with that of the EU's average based on the Purchasing Parity Standard (PPS) (Table 5.). According to the Vienna Institute for International Economic Studies (WIIW) this ratio for Hungary was currently around 53% and would rise above 60% by 2005, exceeding Ireland's (59% in 1973) and Portugal's (53% in 1986) income at the time of their respective accessions. However the same figure is only around 30% for earnings.

Table 5: GDP growth in Hungary (1995 - 1999)

Year	1995	1996	1997	1998	1999*
GDP (current prices, euro billion)	34.1	35.6	39.6	42.4	45.7
Real GDP growth (previous year = 100%)	*101.5%*	*101.3%*	*104.6%*	*104.9%*	*104.5%*
GDP/capita, PPS'(euro)	8 297	8 613	9 231	9 830	10 424
Real average GDP growth in the EU (previous year = 100%)	*102.5%*	*101.7%*	*102.6%*	*102.7%*	*102.2%*
GDP/capita in the EU PPS'(euro)	17 699	18 175	18 907	19 286	19 671
GDP/capita, PPS'(euro) EU 15 average = 100%	*47%*	*47%*	*49%*	*51%*	*53%*

Sources: HCSO, EUROSTAT, EBRD; * 1999 data are estimations of HCSO
' Purchasing Parity Standard, current prices (euro)

Lower Hungarian earnings on the other hand are accompanied with high quality social benefits and labour standards. Hungary meets the requirements of the internationally recognised social and labour standards. Hungary has ratified the core Labour Conventions of the ILO covering the fundamental human and employees rights and recently ratified the European Social Charter. Hungary will take and apply the acquis communautaire related to the social policy by the time of accession.

II.2.3.2. Social expenditures

The current level of social protection, due to the efforts of the previous years, is not significantly lower than the EU average. The OECD Economic Surveys 1996-1997 observed: “Hungary’s social security expenditures as a share of GDP are among the highest in the OECD” (OECD Economic Surveys 1996-1997 Hungary, OECD 1997, pp. 94.) The level of benefits compared to wages is compatible with the practice of the Member States. As to the wages, it must be noted that our lag to the EU average is roughly the same as the difference between the Member States with the highest and the lowest wage level in the EU.

Table 6: Average earnings in Hungary and the EU in 1996 (Manufacturing Industry)

	Hungary (USD)	EU average (USD)	EU min. (USD)	EU max. (USD)	Hungary/ EU average (%)	Hungary/ EU min. (%)	Hungary /EU max. (%)	EU min./ EU max. (%)
Average gross earnings (PPS*)	6.716	N/A	10.573 (Portug.)	28.993 (Danish)	ca 30,0	63,5	23,2	36,7

Average net earnings (PPS*)	4.727	N/A	8.661 (Portug.)	19.892 (Lux.)	N/A	54,6	23,8	43,5
GDP per capita (PPS*)	9.875	20.546	13.912 (Greek)	33.119 (Lux.)	48,1	70,1	29,8	42,0

Source: Ministry of Economic Affairs *Purchasing Parity Standard, current prices (USD)

Hungary is a small, open and a well-functioning market economy with a competitive and thus flexible labour market already adjusted to the new economic environment. The consistently dynamic economic growth provides further opportunities for job creation thereby boosting employment and decreasing unemployment. The solid increase in the competitiveness of the economy on the other hand leaves enough room for (real) wage growth further closing the income gap between Hungary and the EU Member States.

4. Migration potential

International and Hungarian studies do not confirm the fear of some EU Member States of a massive influx of labour from Hungary.

According to the findings of the relevant Hungarian research the ratio of those who would wish to take up temporary employment abroad is as low as 3-4 per cent and stagnating while the ratio of those who would consider permanent emigration is 1-2 per cent. The 6 per cent of total migration potential covering short-term and longer-term temporary employment's aspirations as well as emigration intentions are the same for years; they remain unchanged even as the date of EU accession approaches.

Table 7: Hungarian migration potential in 1993, 1994 and 1997 (as percentage of the sample)

Year	Short-term employment	Long-term employment	Emigration	Total migration potential
1993.	4,3	2,7	1,4	6,0
1994.	3,8	2,7	1,3	5,3
1997.	3,7	2,7	1,5	5,9

Source: Endre Sík: Migration potential in today's Hungary (in) European Mirror No. 61, Budapest, 1999, pp 103

To take up employment in a foreign country is the aim of a mobile, educated group in society rather than the poorer classes; it is typical of young, highly educated men. The migration potential of Hungarians is not based on the "push" factors; it is not based on the lack of satisfaction with living standards (as it is not connected with unhappiness concerning the future and the economic and political situation).[158] Their will to migrate is not based on the "push" factors, but on taking opportunity, expecting better life or better job or study experiences; this migration is related to welfare or to career, as it is the case with labour migration in the European Union. (Research of the HHPS, but we can find the same conclusions in the research done by the International Organisation of Migration (IOM) in 1998.)

Several international research institutes (mainly German and Austrian) have indicated low level migration potential for Hungary confirming Hungarian studies.[159]

[158] Sik
[159]

(See: Hungary's Accession to the EU: the impact on selected areas of Hungarian-Austrian relations, written jointly by the Hungarian and Austrian research institutes, 1999, or OECD seminar on recent developments in migration and the labour market in Central and Eastern European in the contetxt of the EU enlargement, Bratislava, 2-3 March, 2000)

The internal mobility of Hungarian workers is rather low, even higher wages and safe job offers are not encouraging workers from the less developed eastern parts of Hungary where the unemployment rates are high compared to the western parts of Hungary.

Table 8: The average gross value of migration in Hungary

1970	**1980**	**1990**	**1994**	**1998**
5,89	4,48	3,82	3,00	3,57

Source: E. Valkovics - S. Illés: The possibilities of using double standardisation in the analyse of internal migration, Demográfia, 1998/2, Budapest

The comparable indicators with the numbers indicated above are 6-7 for Western Europe, while for the United States the migration index is higher than 8.

An international comparative study based on the factors of national identity and culture also indicates a low migration potential of Hungarian people. The migration potential both at internal, regional and external level is the lowest among the countries indicated in the example.

Table 9: Willingness to migrate, scale average

	Immediate vicinity	Town -City	County	Country	Continent
Russia	2.04	1.92	1.64	1.65	.
Latvia	2.11	1.87	1.67	1.72	1.53
Bulgaria	2.58	2.48	2.32	2.31	2.08
Poland	2.79	2.50	2.37	2.07	1.91
Czech Republic	2.92	2.41	2.31	1.70	1.53
Slovakia	3.06	2.72	2.54	2.16	1.90
Hungary	**2.37**	**2.10**	**1.88**	**1.53**	**1.37**
Slovenia	2.68	2.50	2.23	1.83	1.65
Austria	2.54	2.19	2.03	1.60	1.43
East-Germany	3.06	2.62	2.43	1.71	1.58
West-Germany	3.36	2.96	2.67	2.15	1.89
Netherlands	3.45	3.20	2.92	2.34	2.08
Sweden	3.30	2.79	2.60	2.42	2.16
Norway	3.41	3.01	2.51	2.12	1.88
Italy	3.16	2.69	2.47	2.00	1.82
Spain	2.89	2.75	2.52	2.03	1.92
Great-Britain	3.37	3.05	2.75	2.21	2.07
Ireland	2.60	2.35	2.16	1.81	1.67
Canada	3.68	3.27	2.86	2.43	2.30
USA	3.74	3.37	2.99	1.93	1.87
Australia	3.40	3.11	2.69	2.09	2.09
New-Zealand	3.35	2.94	2.79	2.28	2.10
Japan	2.53	2.39	2.26	1.61	1.71
Philippines	2.92	2.85	2.70	2.61	2.47

Source: Csepeli, György-Örkény, Antal: International Comparative Investigation into the National identity Sociology Review, 1998/3. pp 12.(in Hungarian)

Those who are thinking of migration would mainly like to achieve their domestic aims by temporary employment abroad. However, expectations of higher Hungarian economic growth (4.5 - 5% in 2000) than the average in the EU (3.4% in 2000), furthermore the better trends of the Hungarian labour market – decreasing unemployment (7% in 1999, which was lower than the average in the EU at 8.8% in 1999), and the growth of employment – could even reduce this temporary migration.

The "holding back" character of better economic conditions could be the same - in the case of Hungary - as experienced during the Southern enlargement of the EU. The experience of Southern enlargement alone casts some doubts on the expectations of massive immigration into the EU. The historical evidence shows that the initial inflows of workers were only a transitory phenomenon, while current experience shows that, for example Spain with quite extreme unemployment rates by EU standards does not represent any major immigration threat for the other Member States.[160]

The three Mediterranean countries have witnessed, an increase in their absolute economic welfare in the post–war period. This has led to the end of mass emigration, even though the gap in employment and income with the richer regions has not changed. In sum, the freedom of movement of workers seems to have no influence on determining migration flows in the enlarged European Community. Migration trends seem to be more connected with business cycles than with institutional opportunities. No significant change in migration trends of southern European countries occurred since they have joined the Community.[161]

Migration will not increase significantly by the time of accession since most of those who are well qualified and could take up employment in a foreign country have already found a job and started to work there. The assumption that "those who really want to work abroad are already doing that" is also underlined by the fact, that even the current quotas are not completely utilised by Hungarians. On the other hand, these well-educated people could easily find a job in Hungary offering almost the same salary and career opportunities.

To that end, we can expect that workers will move from Hungary abroad only:

1) in certain professions though basically for temporary employment, or
2) in the border regions, as is the case already with the movement of labour in the European Union.

We can expect low level and structural migration from Hungary also because the quotas - which are agreed through bilateral labour agreements with certain Western European countries - are permanently not utilised. For instance, 2000 Hungarian workers could work in Germany every year but during the last 5-6 years this was not the case; last year only 933 people worked in Germany. In Luxembourg, the quota provides for 20 workers but only 2 took up work.

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[160] Margit Kraus – Robert Schwager: EU Enlargement and Immigration, Zentrum für Europäische Wirtschaftsforschung, Mannheim, Germany, 2000.

[161] Ágnes Hárs: Labour Migration and the Eastern Enlargement of the European Union, Kopint-Datorg, Budapest, 1998.

On the other hand, the structural demands of the European labour market and the labour shortage in some sectors are well-known. The Hungarian labour force in certain cases could help to meet the labour market demands of the EU.

As an example, the German government announced in March 2000, that because of a shortage in IT experts, there is a need for 20.000 persons in this sector who could migrate from foreign countries (outside the EU) on the basis of a 5 year's employment-contract.

The labour associations announced in the Dutch Telegraph[162] that there is a need for at least 350 experts in the meat industry to be satisfied as soon as possible since the big meat processing companies are unable to handle orders because of the labour shortage. They could not find qualified workers neither in the Netherlands nor in other EU countries. (But they refused the offer of the Hungarian-Dutch job agency to send 40 qualified Hungarian butchers.)

As to the potential of cross-border migration, it is to be noted, that in Transdanubia as an area representing the potential source of migration to Austria, a significant decrease in population is expected while in the North-Eastern part of Hungary (where the chances of migration to Austria are limited due to the significant distance) the population is expected to grow. The migration pressure from the western Hungarian regions (bordering Austria) will be particularly low as they are fast developing, their demand for skilled labour is high, they are attracting a lot of foreign direct investment and their wage levels show a relatively fast approximation to the Austrian level.

As a result of development in the western counties of Hungary, the fastest approach of Hungarian wages to the Austrian level is taking place in the very region where the willingness to migrate is expected to be the highest because of the geographical proximity. Therefore the willingness to migrate from this region will be quite low by the expected time of Hungary's accession to the European Union. In spite of a decreasing availability of labour, the development of infrastructure and the comparative advantages arising from the geographical proximity of the potential (western) export markets will continue to attract investors.

Probably similar line of arguments were used by other aspirant countries as well.

[162] Issue of 1st of March 2000.

Annex 2. Europeam Union Common Position on free movement of persons (Bulgaria)

CONFERENCE ON ACCESSION TO THE EUROPEAN UNION - BULGARIA -

Brussels, 6 June 2002

CONF-BG 28/02

EUROPEAN UNION COMMON POSITION
(Replaces doc. 20692/01 CONF-BG 59/01)

Subject : Chapter 2: Freedom of Movement for Persons

This position of the European Union is based on its general position for the Accession Conference with Bulgaria (CONF-BG 2/00), and is subject to the negotiating principles endorsed by the Conference (CONF-BG 14/00), in particular:

"- any view expressed by either party on a chapter of the negotiations will in no way prejudge the position which may be taken on other chapters;

- agreements - even partial - reached during the course of the negotiations on chapters to be examined successively may not be considered as final until an overall agreement has been established".

The EU underlines the importance for Bulgaria of compliance with the Europe Agreement, as well as the Accession Partnership which constitute basic elements of the enhanced preaccession strategy. The EU notes that Bulgaria is committed, through the Accession Partnership and the National Programme for the Adoption of the *Acquis*, to take the necessary legislative and enforcement measures needed for the mutual recognition of professional qualifications and to become integrated in the EU system of co-ordination of social security systems and to align with the EU *acquis* in these areas. The EU encourages Bulgaria to continue its progressive legislative alignment with the *acquis*, as well as its efforts to ensure effective implementation.

The EU notes that Bulgaria in its positions CONF-BG 37/01 and 23/02, accepts the *acquis* under chapter 2 as in force on 31 December 2000 and that Bulgaria declares that it will be able to implement it before 1 January 2007. The EU also takes note of the additional information provided in CONF-BG 20/02.

The EU considers that the information provided by Bulgaria on its legislative framework allowing for the implementation of the *acquis* under Chapter 2 is sufficient at this stage. However, the EU invites Bulgaria to ensure that all necessary practical steps are taken in order to fully respect the relevant Community rules at all levels and to report regularly on achievements in this regard. The EU will closely monitor Bulgaria's progress in this area.

Mutual recognition of qualifications

The EU notes that Bulgaria has provided texts and drafts of legislation on mutual recognition of qualifications. It notes furthermore that, in its additional information, Bulgaria has provided a detailed timetable for the transposition of the measures needed to achieve full harmonisation with the *acquis*. Details on the entry into force of this legislation, where available, are provided by Bulgaria. The EU notes that this information will need to be continually monitored and updated between now and accession and it invites Bulgaria to continue to supply updated information on a regular basis.

General system Directives

The EU takes note of the confirmation given by Bulgaria that it is undertaking all necessary measures for harmonisation of its national legislation with the *acquis* on mutual recognition of qualifications and of the details provided by Bulgaria on these measures.

The EU takes note of Bulgaria's commitment to ensure a clear distinction between academic and professional recognition and of the detailed timetable for amendments required to the Higher Education Act and the Vocational Education and Training Act.

The EU notes that amendments to date have mainly focused on providing a regulatory framework for the recognition of academic qualifications and that, according to Bulgaria, these amendments have also prepared the way for the legislative amendments and institutional and organisational changes that will be required to comply fully with the General System Directives and to develop a system of professional recognition in line with the *acquis.* The EU takes note of the details provided by Bulgaria on the measures it intends to take to establish the required administrative structures. The EU will monitor closely Bulgaria's progress in this area.

The EU takes note of Bulgaria’s confirmation that any requirements concerning residence and nationality will be removed by accession and that any requirements concerning language will be proportionate and non-discriminatory.

Sectoral Directives

The EU notes that Bulgaria will introduce provisions on simpler procedures for the provision of services through amendments to the sectoral legislation and takes note of Bulgaria´s statement that full compliance will be achieved by accession.

Lawyers

The EU notes that legislative preparations to comply with the *acquis* on lawyers have been advanced and that the necessary amendments to the Bar Act will now be adopted by mid 2002.

Architects

The EU takes note of the information provided by Bulgaria on training for architects. It also notes that professional recognition and licensing of architects will be regulated by the Bill on the Chamber of Architects and the Chamber of Engineers in Investment Design in Bulgaria,

which was approved by the Council of Ministers on 18 April 2002.

The EU takes note of the further legislative measures to be adopted by Bulgaria to ensure compliance with Directive 85/384/EEC. It takes note of Bulgaria's confirmation that the *acquis* on architects as regards establishment will also be transposed by these measures.

Health professions

The EU takes note of the information supplied by Bulgaria on the health professions. The EU notes that Bulgaria has provided, by profession, information on the current legislative framework, curriculum and length of training as well as the legislative amendments that will be required to ensure compliance, together with a timetable for their adoption. The EU furthermore welcomes Bulgaria's commitment to take the recommendations of the recent peer review on the health professions into account in ensuring that the curriculum, in terms of content and duration, complies with the *acquis*.

The EU takes note of the information supplied by Bulgaria on the ongoing reforms to the health care system. It notes the explanations provided by Bulgaria on the role of the Act on the Medical Establishment and the Public Health Act in transposing the *acquis* on mutual recognition of professional qualifications. The EU however notes that further amendments will be required to the Act on the Medical Establishment and will closely monitor the compliance of this Act with the *acquis*.

Veterinary surgeons

The EU notes that Bulgaria has provided information on the current legislative framework, curriculum and length of training as well as the legislative amendments that will be required to ensure compliance, together with a timetable for their adoption. The EU furthermore welcomes Bulgaria's commitment to take the recommendations of the recent peer review on the health professions into account in ensuring that the curriculum, in terms of content and duration, complies with the *acquis* for vets.

Administrative structures and training

In the field of professional recognition, the EU encourages Bulgaria to enhance its efforts to introduce the necessary administrative structures as well as the education and training programmes to guarantee the level of competence of the qualified professionals required by the Directives in this field.

The EU recalls that, under the sectorial Directives, professional qualifications are automatically recognised on the basis of a coordinated training. It is therefore essential that citizens can be assured that professionals have the minimum standard of qualification provided for in these Directives.

The EU recalls that it will closely monitor Bulgaria's alignment with the sectoral Directives. It will in particular monitor the situation of individuals whose professional qualifications have been obtained before harmonisation. It expects Bulgaria to take measures to ensure that all its professionals can meet the requirements laid down by the Directives and can therefore benefit from professional recognition throughout the EU from accession, in line with the procedures applied in previous accessions, thus ensuring that recognition of professionals from Bulgaria

is not subject to verification at the time of applying for recognition. The EU nevertheless notes that it is also necessary to ensure that professionals from Bulgaria are not subject to unnecessary additional training and that due account is taken of equivalent experience.

The EU reiterates that it will closely monitor the transposition of the *acquis* and the introduction of the necessary administrative structures. Throughout the monitoring process, the EU will advise Bulgaria on the measures needed in order to be fully aligned with this area of the *acquis* by accession.

Citizen rights

Gravier ruling

The EU notes that Bulgaria confirms that it will comply fully with the Gravier ruling and that, in this regard, the Higher Education Act and related secondary legislative acts will be amended by 2003.

Right of Residence

The EU takes note of the information provided by Bulgaria on existing rules on residence permits. It notes that Bulgaria has confirmed that it will fully comply with the *acquis* on this and on all other points concerning residence rights by accession. The EU furthermore takes note of the timetable provided by Bulgaria.

Voting rights

The EU notes that Bulgaria has confirmed that it will comply with the voting rights Directive by accession and it takes note of the timetable provided.

Free movement of workers

The EU takes note of Bulgaria´s confirmation that, by accession, there will be no provisions in its internal legal order in conflict with Regulation (EEC) 1612/68, other than those permitted or required under the terms of the Accession Treaty. The EU notes that Bulgaria has outlined the current practice and takes note of planned legislative amendments relating to the application of this Regulation.

The EU notes that Bulgaria will assure full compliance with Directive 68/360/EEC and Regulation (EEC) 1251/70 by amending and supplementing the Foreigners in the Republic of Bulgaria Act and by adopting secondary legislation. The EU takes note of the timetable provided.

The EU takes note of the information provided by Bulgaria on labour migration and on cross-border mobility. It encourages Bulgaria to pursue its efforts to deal with these matters.

The EU notes Bulgaria's readiness to apply the decisions of the European Court of Justice with respect to employment in the public sector from accession.

The EU stresses that freedom of movement concerns not only the economic but also the social and cultural integration of migrant workers and their families in the host Member States.

The EU recalls the political and practical importance of this area of the *acquis* and notes that there are sensitivities over the issue of mobility of workers.

The EU recalls the arrangement it has proposed in its position CONF–BG 59/01 and notes that Bulgaria accepts it (CONF-BG 20/02).

The arrangement proposed by the EU, and accepted by Bulgaria, is as follows:

- current Member States will continue to apply national measures as regards the right of Bulgarian nationals to take up work. In this context, any current Member State may introduce, under national law, greater freedom of movement of workers than at present, including full labour market access. Current bilateral agreements will continue to apply and may be further developed. The access of Bulgarian nationals to current Member State labour markets cannot be more restricted than that prevailing at the time of the signature of the Accession Treaty. In addition, current Member States will introduce a preference for Bulgarian nationals over non-EU labour ("*préférence communautaire*"). The Commission will on a regular basis closely monitor labour market developments, in particular in any Member State applying labour market restrictions;

- before the end of the second year following Bulgaria's accession a review of the functioning of the national measures shall be held, on the basis of a report from the Commission to the Council. On completion of the review and no later than at the end of the second year following Bulgaria's accession, current Member States should notify the Commission on whether they intend to continue applying national measures or whether they intend to apply the *acquis* henceforth. In the absence of such notification, the *acquis* will apply;

- one further review may be held for Bulgaria upon its request. The same procedure as above shall apply;

- five years after Bulgaria's accession a current Member State maintaining national provisions may, in case of serious disturbances of the labour market or threat thereof, prolong these for a maximum of two years, after notifying the Commission accordingly. In the absence of such notification the *acquis* will apply;

- any current Member State applying the *acquis* may invoke a safeguard clause until the end of the seventh year following Bulgaria's accession. The safeguard clause could be based on the model or a variant of former Article 20 of Regulation (EEC) 1612/68 on freedom of movement for workers within the Community. As long as safeguard measures can be invoked, Member States may, in urgent and exceptional cases, suspend full application of the *acquis*, followed by a reasoned *ex*-post notification to the Commission. Member States issuing work permits to Bulgarian nationals during this period will do so automatically;

- a declaration shall be attached to the Final Act of the Accession Treaty stating that current Member States shall endeavour to grant increased labour market access under national law, with a view to speeding up the approximation to the *acquis*.

The specific case of commuters or frontier workers is also subject to the above arrangements and may be dealt with through national measures during the transitional arrangements.

In the context of the freedom of movement of workers, there will be no global transitional arrangements in relation to any provision of services (self-employed with a genuine legal status, service providers etc.) nor for any other categories of persons. However, as long as they apply national measures to the free movement of Bulgarian workers, Austria and Germany may, after notifying the Commission, apply flanking national measures to address serious disturbances or threat thereof, in specific sensitive service sectors on their labour markets, which could arise in certain regions from cross-border provision of services, as defined in Article 1 of Directive 96/71/EC, by companies established in Bulgaria, involving temporary movement of workers whose right to take up work in Austria and Germany is subject to national measures. Bulgaria will find annexed to this position the list of services which could be covered by the above arrangements, as provided by Austria and Germany respectively, with a view to the inclusion of an agreed list in the Accession Treaty.

Bulgaria may apply to nationals from a current Member State national measures equivalent to the measures applied by that Member State with regard to Bulgaria in the context of the above arrangement on free movement of workers and provision of services. As long as a current Member State applies national measures to nationals of a new Member State Bulgaria may resort to the safeguard provisions outlined above with regard to new Member States, with the exception of Cyprus and Malta. National measures both of a current Member State and of Bulgaria will not fall behind the current status.

Member States and Bulgaria will strive to liberalise, under national law, access to their labour market for each others' nationals already before accession.

In the context of the arrangement outlined above, Bulgarian nationals legally resident and employed in a given Member State shall enjoy treatment equal to its nationals in respect of working conditions, pay etc., but not as regards access to the labour market of another Member State. Nationals of other Member States legally resident and employed in Bulgaria shall enjoy treatment equal to Bulgarian nationals in respect of working conditions, pay etc.

In all instances where the *acquis* is suspended during the transitional arrangements, members of the family of a worker already living in a Member State or Bulgaria at the time of Accession shall have the right to install themselves with the worker, and shall have immediate access to the labour market of that Member State or Bulgaria, respectively. Members of the families of workers arriving later shall be given progressive rights, consistent with the general arrangements outlined above.

Bulgarian migrant workers and their families legally resident and working in another Member State or migrant workers from other Member States and their families legally resident and working in Bulgaria may not be treated in a more restrictive way than those from a third-country resident and working in that Member State or Bulgaria respectively. Furthermore, in application of the principle of "*préférence communautaire*", migrant workers from third countries resident and working in Bulgaria, may not have a more favourable treatment than Bulgarian nationals.

EURES

The EU takes note of the information provided by Bulgaria concerning its preparations for participation in the EURES network and it notes the detailed timetable provided. It

nevertheless notes that pre-selection of Euroadvisers by Bulgaria for training by the Commission will occur closer to accession. It notes furthermore that investments in computer infrastructure should await the development of a new database by the Commission. The EU encourages Bulgaria to follow developments closely so as to be in a position to participate in the network in due course.

Supplementary pension rights of employed and self-employed persons moving within the Community

The EU takes note of the timetable provided by Bulgaria indicating the measures to achieve full transposition of Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community into national law.

Co-ordination of social security systems

The EU notes Bulgaria's commitment to ensuring that its administrative structures will be sufficiently developed by the time of accession in order to meet the requirements for full implementation of Regulation (EEC) 1408/71 and Regulation (EEC) 574/72. It takes note of the efforts that are being made in this area, in particular the work being carried out by the working sub-group on co-ordination of social security schemes.

The EU takes note of Bulgaria´s confirmation that, by accession, it will fully apply the respective Regulations on social security co-ordination and will assume the corresponding obligations, both in terms of financial and administrative capacity.

The EU notes that an impact analysis and estimates on the financial implications of reimbursement of health care costs is being conducted, the results of which are to be available by 2003. The EU invites Bulgaria to provide the results of this study as soon as they are available.

The EU takes note of the details supplied by Bulgaria regarding bilateral agreements concluded and under discussion. It encourages Bulgaria to continue to conclude further bilateral agreements with Member States between now and accession.

The EU recalls that for the application of the specific provisions of Regulations (EEC) 1408/71 and (EEC)574/72 special procedures in relation to Bulgarian legislation might be needed. The EU notes that Bulgaria has already presented a first draft of its requests for specific entries in the Annexes of these Regulations. It informs Bulgaria that further information will be required to enable the EU to evaluate the need for their entry in the Annex. The EU confirms that preparation of this matter will take place in the Administrative Commission on Social Security for Migrant Workers, with the results reached to be included in the negotiation process at a latter stage.

* * *

The EU notes that, at this stage, and considering Bulgaria's agreement on the arrangement set out above on the free movement of workers, this chapter does not require further negotiation. Monitoring of progress in the adoption and implementation of the *acquis* will continue throughout the negotiations, in particular as regards adherence to the planned legislative schedule and further measures aimed at ensuring effective enforcement. With respect to

mutual recognition of qualifications, the EU will closely monitor Bulgaria's alignment with the sectoral Directives. It will in particular monitor the situation of individuals whose professional qualifications have been obtained before harmonisation. It expects Bulgaria to take measures to ensure that all its professionals can meet the requirements laid down by the Directives and can therefore benefit from professional recognition throughout the EU from accession. A final assessment of conformity of Bulgaria's legislation and policies with the *acquis* and of its effective implementation can only be made after the adoption of the new legislation and at a later stage of negotiations. Particular consideration needs to be given to the links with other negotiating chapters, in particular those chapters dealing with the other freedoms, Free Movement of Goods, Freedom to Provide Services and Free Movement of Capital as well as with the chapters on Transport Policy, Social Policy and Employment and Cooperation in the Fields of Justice and Home Affairs. In addition to all the information the EU may require for the negotiations on this chapter and which is to be provided to the Conference, the EU invites Bulgaria to provide regularly detailed, written information to the Association Council on progress in the adoption and implementation of the *acquis*.

In view of the above considerations, the EU may return to this chapter at an appropriate moment.

Furthermore, the EU recalls that there may be new *acquis* between 1 January 2001 and the conclusion of the negotiations.

ANNEX

Austria

Sector	
Construction, including related branches	45. 1-4 NACE, branches related to construction of the annex of the posting of workers Directive (96/71/EC) 26.7 Cutting, shaping and finishing of stone 28.11. Manufacture of metal structures and parts of structures
	01.41.01 Horticultural service activites
Cleaning Services	74.70 Industrial cleaning
Social Work	85.32 Social work and activities without accommodations and 85.14.02 Home nursing
Other Services	74.60.01 Security activities

Germany

Sector	
Construction	Activities as listed in the annex to the Directive concerning the posting of workers in the framework of the provision of services (96/71/EC) and Activities as described in 45.1 to 4 (NACE): Construction, including related branches
Cleaning Services	74.70 (NACE) Industrial cleaning
Other Services	74.84 (NACE) Only activities of interior decorators

NACE: Commission Regulation (EC) 761/93 on statistical classification of economic activities in the European Community.

Annex 3. Annex X. point 1. of the Treaty of Accession (Hungary)

"List referred to in Article 24 of the Act of Accession: Hungary

1. FREEDOM OF MOVEMENT FOR PERSONS

Treaty establishing the European Community;

31968 L 0360: Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ L 257, 19.10.1968, p. 13), as last amended by:

– 11994 N: Act concerning the conditions of accession and the adjustments to the Treaties – Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ C 241, 29.8.1994, p. 21);

31968 R 1612: Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ L 257, 19.10.1968, p. 2), as last amended by:

– 31992 R 2434: Council Regulation (EEC) No 2434/92 of 27.7.1992 (OJ L 245, 26.8.1992, p. 1);

31996 L 0071: Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997, p. 1).

1. Article 39 and the first paragraph of Article 49 of the EC Treaty shall fully apply only, in relation to the freedom of movement of workers and the freedom to provide services involving temporary movement of workers as defined in Article 1 of Directive 96/71/EC between Hungary on the one hand, and Belgium, the Czech Republic, Denmark, Germany, Estonia, Greece, Spain, France, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Austria, Poland, Portugal, Slovenia, Slovakia, Finland, Sweden and the United Kingdom on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 14.

2. By way of derogation from Articles 1 to 6 of Regulation (EEC) No 1612/68 and until the end of the two year period following the date of accession, the present Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Hungarian nationals. The present Member States may continue to apply such measures until the end of the five year period following the date of accession.

Hungarian nationals legally working in a present Member State at the date of accession and admitted to the labour market of that Member State for an uninterrupted period of 12 months or longer will enjoy access to the labour market of that Member State but not to the labour market of other Member States applying national measures.

Hungarian nationals admitted to the labour market of a present Member State following accession for an uninterrupted period of 12 months or longer shall also enjoy the same rights.

The Hungarian nationals mentioned in the second and third subparagraphs above shall cease to enjoy the rights contained in those subparagraphs if they voluntarily leave the labour market of the present Member State in question.

Hungarian nationals legally working in a present Member State at the date of accession, or during a period when national measures are applied, and who were admitted to the labour market of that Member State for a period of less than 12 months shall not enjoy these rights.

3. Before the end of the two year period following the date of accession, the Council shall review the functioning of the transitional provisions laid down in paragraph 2, on the basis of a report from the Commission.

On completion of this review, and no later than at the end of the two year period following the date of accession, the present Member States shall notify the Commission whether they will continue applying national measures or measures resulting from bilateral agreements, or whether they will apply Articles 1 to 6 of Regulation (EEC) No 1612/68 henceforth. In the absence of such notification, Articles 1 to 6 of Regulation (EEC) No 1612/68 shall apply.

4. Upon Hungary's request, one further review may be held. The procedure referred to in paragraph 3 shall apply and shall be completed within six months of receipt of Hungary's request.

5. A Member State maintaining national measures or measures resulting from bilateral agreements at the end of the five year period indicated in paragraph 2 may, in case of serious disturbances of its labour market or threat thereof and after notifying the Commission, continue to apply these measures until the end of the seven year period following the date of accession. In the absence of such notification, Articles 1 to 6 of Regulation (EEC) No 1612/68 shall apply.

6. During the seven year period following the date of accession, those Member States in which, by virtue of paragraphs 3, 4 or 5, Articles 1 to 6 of Regulation (EEC) No 1612/68 apply as regards Hungarian nationals, and which are issuing work permits to nationals of Hungary for monitoring purposes during this period, will do so automatically.

7. Those Member States in which, by virtue of paragraphs 3, 4 or 5, Articles 1 to 6 of Regulation (EEC) No 1612/68 apply as regards Hungarian nationals, may resort to the procedures set out in the subparagraphs below until the end of the seven year period following the date of accession.

When a Member State referred to in the first subparagraph undergoes or foresees disturbances on its labour market which could seriously threaten the standard of living or level of employment in a given region or occupation, that Member State shall inform the Commission and the other Member States thereof and shall supply them with all relevant particulars. On the basis of this information, the Member State may request the Commission to state that the application of Articles 1 to 6 of Regulation (EEC) No 1612/68 be wholly or partially suspended in order to restore to normal the situation in that region or occupation. The Commission shall decide on the suspension and on the duration and scope thereof not later

than two weeks after receiving such a request and shall notify the Council of such a decision. Any Member State may, within two weeks from the date of the Commission's Decision, request the Council to annul or amend the Decision. The Council shall act on such a request within two weeks, by qualified majority.

A Member State referred to in the first subparagraph may, in urgent and exceptional cases, suspend the application of Articles 1 to 6 of Regulation (EEC) No 1612/68, followed by a reasoned *ex-post* notification to the Commission.

8. As long as the application of Articles 1 to 6 of Regulation (EEC) No 1612/68 is suspended by virtue of paragraphs 2 to 5 and 7 above, Article 11 of the Regulation shall apply in Hungary with regard to nationals of the present Member States, and in the present Member States with regard to Hungarian nationals under the following conditions:

– the members of a worker's family referred to in Article 10(1)(a) of the Regulation, legally residing with the worker in the territory of a Member State at the date of accession, shall have, upon accession, immediate access to the labour market of that Member State. This does not apply to family members of a worker legally admitted to the labour market of that Member State for a period of less than 12 months;

– the members of a worker's family referred to in Article 10(1)(a) of the Regulation, legally residing with the worker in the territory of a Member State from a date later than the date of accession, but during the period of application of the transitional provisions laid down above, shall have access to the labour market of the Member State concerned once they have been resident in the Member State concerned for at least eighteen months or from the third year following the date of accession, whichever is the earlier.

These provisions shall be without prejudice to more favourable measures whether national or resulting from bilateral agreements.

9. Insofar as certain provisions of Directive 68/360/EEC may not be dissociated from those of Regulation (EEC) No 1612/68 whose application is deferred pursuant to paragraphs 2 to 5 and 7 and 8, Hungary and the present Member States may derogate from those provisions to the extent necessary for the application of paragraphs 2 to 5 and 7 and 8.

10. Whenever national measures, or those resulting from bilateral agreements, are applied by the present Member States by virtue of the transitional provisions laid down above, Hungary may maintain in force equivalent measures with regard to the nationals of the Member State or States in question.

11. If the application of Articles 1 to 6 of Regulation (EEC) No 1612/68 is suspended by any of the present Member States, Hungary may resort to the procedures laid down in paragraph 7 with respect to the Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovenia or Slovakia. During any such period work permits issued by Hungary for monitoring purposes to nationals of the Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovenia or Slovakia shall be issued automatically.

12. Any present Member State applying national measures in accordance with paragraphs 2 to 5 and 7 to 9, may introduce, under national law, greater freedom of movement than that existing at the date of accession, including full labour market access. From the third year

following the date of accession, any present Member State applying national measures may at any time decide to apply Articles 1 to 6 of Regulation (EEC) No 1612/68 instead. The Commission shall be informed of any such decision.

13. In order to address serious disturbances or the threat thereof in specific sensitive service sectors on their labour markets, which could arise in certain regions from the transnational provision of services, as defined in Article 1 of Directive 96/71/EC, and as long as they apply, by virtue of the transitional provisions laid down above, national measures or those resulting from bilateral agreements to the free movement of Hungarian workers, Germany and Austria may, after notifying the Commission, derogate from the first paragraph of Article 49 of the EC Treaty with a view to limit in the context of the provision of services by companies established in Hungary, the temporary movement of workers whose right to take up work in Germany and Austria is subject to national measures.

The list of service sectors which may be covered by this derogation is as follows:

– in Germany:

Sector	NACE (*) code, unless otherwise specified
Construction, including related branches	45.1 to 4; Activities listed in the Annex to Directive 96/71/EC
Industrial cleaning	74.70 Industrial cleaning
Other Services	74.87 Only activities of interior decorators

– in Austria:

Sector	NACE (*) code, unless otherwise specified
Horticultural service activities	01.41
Cutting, shaping and finishing of stone	26.7
Manufacture of metal structures and parts of structures	28.11
Construction, including related branches	45.1 to 4; Activities listed in the Annex to Directive 96/71/EC
Security activities	74.60
Industrial cleaning	74.70
Home nursing	85.14
Social work activities without accommodation	85.32

(*) NACE: see 31990 R 3037: Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community (OJ L 293, 24.10.1990, p. 1), as last amended by 32002 R 0029: Commission Regulation (EC) No 29/2002 of 19.12.2001 (OJ L 6, 10.1.2002, p. 3)

To the extent that Germany or Austria derogate from the first paragraph of Article 49 of the EC Treaty in accordance with the preceding subparagraphs, Hungary may, after notifying the Commission, take equivalent measures.

The effect of the application of this paragraph shall not result in conditions for the temporary movement of workers in the context of the transnational provision of services between Germany or Austria and Hungary which are more restrictive than those prevailing on the date of signature of the Treaty of Accession.

14. The effect of the application of paragraphs 2 to 5 and 7 to 12 shall not result in conditions for access of Hungarian nationals to the labour markets of the present Member States which are more restrictive than those prevailing on the date of signature of the Treaty of Accession.

Notwithstanding the application of the provisions laid down in paragraphs 1 to 13, the present Member States shall, during any period when national measures or those resulting from bilateral agreements are applied, give preference to workers who are nationals of the Member States over workers who are nationals of third countries as regards access to their labour market.

Hungarian migrant workers and their families legally resident and working in another Member State or migrant workers from other Member States and their families legally resident and working in Hungary shall not be treated in a more restrictive way than those from third countries resident and working in that Member State or Hungary respectively. Furthermore, in application of the principle of Community preference, migrant workers from third countries resident and working in Hungary shall not be treated more favourably than nationals of Hungary.

Annex 4. Summary table on transitional arrangments

Member State		Workers from the EU-8/EU-15	Workers from BG and RO/EU-25
EU-15	Belgium	Free access (1 May 2009)	Restrictions with simplifications
	Denmark	Free access (1 May 2009)	Free access (1 May 2009)
	Germany	Restrictions with simplifications*	Restrictions with simplifications*
	Ireland	Free access (1 May 2004)	Restrictions
	Greece	Free access (1 May 2006)	Free access (1 January 2009)
	Spain	Free access (1 May 2006)	Free access (1 January 2009)
	France	Free access (1 July 2008)	Restrictions with simplifications
	Italy	Free access (27 July 2006)	Restrictions with simplifications
	Netherlands	Free access (1 May 2007)	Restrictions with simplifications
	Luxembourg	Free access (1 November 2007)	Restrictions with simplifications
	Austria	Restrictions with simplifications*	Restrictions with simplifications*
	Portugal	Free access (1 May 2006)	Free access (1 January 2009)
	Finland	Free access (1 May 2006)	Free access (1 January 2007)
	Sweden	Free access (1 May 2004)	Free access (1 January 2007)
	United Kingdom	Access-mandatory workers registration scheme (1 May 2004)	Restrictions with simplifications
EU-10	Czech Republic	No reciprocal measures	Free access-national law (1 January 2007)
	Cyprus	-	Free access (1 January 2007)
	Estonia	No reciprocal measures	Free access (1 January 2007)
	Latvia	No reciprocal measures	Free access (1 January 2007)
	Lithuania	No reciprocal measures	Free access (1 January 2007)
	Hungary	No reciprocal measures (1 January 2009)	Free access (1 January 2009)
	Malta	-	Restrictions
	Poland	No reciprocal measures (17 January 2007)	Free access (1 January 2007)
	Slovenia	No reciprocal measures (25 May 2006)	Free access (1 January 2007)
	Slovakia	No reciprocal measures	Free access (1 January 2007)
EU-2	Bulgaria	-	No reciprocal measures
	Romania	-	No reciprocal measures

Annex 5. Parliamentary question to the Commission on the SOKO actions

Parliamentary question, 18 July 2005

WRITTEN QUESTION by Etelka Barsi-Pataky (PPE-DE) , Zsolt Becsey (PPE-DE) , Alexandra Dobolyi (PSE) , Kinga Gál (PPE-DE) , Béla Glattfelder (PPE-DE) , Zita Gurmai (PSE) , András Gyürk (PPE-DE) , Gábor Harangozó (PSE) , Gyula Hegyi (PSE) , Edit Herczog (PSE) , Lívia Járóka (PPE-DE) , Magda Kósáné Kovács (PSE) , Katalin Lévai (PSE) , Viktória Mohácsi (ALDE) , Péter Olajos (PPE-DE) , Csaba Őry (PPE-DE) , István Pálfi (PPE-DE) , Pál Schmitt (PPE-DE) , György Schöpflin (PPE-DE) , László Surján (PPE-DE) , József Szájer (PPE-DE) , István Szent-Iványi (ALDE) and Csaba Tabajdi (PSE) to the Commission.

Subject: Illegal harassment of Hungarian/EU businesses providing services in Germany

Pursuant to an inter-state agreement signed in 1998, Hungarian firms are permitted to employ six or seven thousand workers in Germany: in practice, the provisions of this agreement operated virtually flawlessly until 2001. However, since 2001 the German authorities have been almost constantly harassing Hungarian businesspeople with baseless accusations, and in the process have even — without cause — enlisted the assistance of armed units.

In April 2004, as part of an operation codenamed ‘SoKo Pannonia’, 1200 German commandos, armed to the teeth, raided 23 Hungarian businesses' offices in Germany. After this, the German authorities searched the premises of a number of Hungarian — i.e. EU — businesses, seized documents and froze bank accounts, thus making it impossible for the businesses to operate. In the meanwhile, the only thing that the Hungarian authorities can do is to continuously remind Hungarian businesses of their right of complaint, but they are unable to exercise it because the cases have not yet been closed. Since the ordering of the SoKo Pannonia raids, [Hungary's] Ministry of the Interior, Ministry of Economic Affairs, Ministry of Justice, National Health Fund and representations of the interests of businesses have repeatedly requested an explanation for the operation at the highest (minister and under-secretary of state) level. The Ministry of Foreign Affairs has twice addressed verbal notes to the German Ambassador. As long ago as June 2004, a group of Hungarian firms operating in Germany requested the assistance of the EU's DG Internal Market through the intermediary of a German lawyer (letter in reply: ref. MARKT/E1/MaF/se D(2004)9196).

Despite the protests, the German authorities are continuing their actions against Hungarian businesses. On 26 April 2005 they again raided Hungarian businesses in many places, this time under the codename SoKo Bunda, and on 20 June 2005 in Munich they halted work at a meat plant.

What measures is the Commission considering in order to put an end to this situation, which is seriously discriminatory and violates the EC Treaty? Is it planning to address to the German authorities a call or any kind of statement drawing their attention to the above problems in order to defend the interests of Hungarian (EU) businesses which provide services in Germany in accordance with EU law?

Annex 6. Infringment procedure against Greece and the Netherlands

Posting of workers: the Commission asks Greece and the Netherlands to end unjustified restrictions
Reference: IP/05/337 Date: 18/03/2005

Netherlands – discrimination against businesses from eight new Member States that post workers to the Netherlands

Despite being established in one of the Member States of the EU, businesses in eight new Member States (i.e. all except Cyprus and Malta) wishing to post staff to the Netherlands on a temporary basis in order to provide services are still required to first obtain work permits. This requirement discriminates against businesses in these new Member States, which – unlike their competitors in what used to be the Fifteen – cannot move freely with their staff in order to provide services in the Netherlands.

The discriminatory effects of this requirement are all the more obvious if one considers that several weeks may elapse before the Dutch authorities issue the requested permit, which may prevent businesses from winning contracts in the Netherlands. If the workers in question are on the permanent staff of the business, a work permit may not be refused, but in order to be part of the permanent staff a worker must have been employed by the business for more than a year. This requirement is difficult to meet in sectors where frequent changes of employer and fixed-term contracts are typical. In certain cases, the Dutch authorities may refuse to grant a work permit and check whether the posts in question could be occupied by workers entitled to preferential treatment before issuing the permit.

By laying down a requirement of this kind, the Netherlands is giving the same treatment to workers who are sent on a temporary basis by their employer and will return to the country of establishment once the contract has been performed as it gives to workers or job-seekers trying to gain access to the Dutch labour market.

The Commission launched this infringement procedure after receiving several complaints from businesses in one of the new Member States. The European Parliament has also drawn the Commission's attention to the difficulties more generally encountered by businesses from the new Member States wishing to extend their activities to the various countries of the Union. The Commission considers that it is vital for businesses from the new Member States to be able to enjoy the same fundamental rights as their competitors established in the "old" Member States, and particularly the right to provide services.

The Netherlands has not been granted any derogation under the Accession Treaty from the freedom to provide services. The possibilities for derogations from the EC Treaty concern only the free movement of workers (Article 39 of the EC Treaty) and not the posting of workers for the provision of services (Article 49 of the EC Treaty).

Source:
http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/337&format=HTML&aged=1&language=EN&guiLanguage=en (Download: 29.10.2010.)

Annex 7. Judgment in a "Soko" case (in Hungarian)

Másolat

2 Js 15355/03 Ügyészség Fulda

FULDAI TARTOMÁNYI BÍRÓSÁG

HATÁROZAT

Tóth Boldizsár
Született: 1946.08.04. Mezőtúr/Magyarország, lakik
Vas Gereben u. 15. 1044 Budapest
Wiesbaden, nős,
Állampolgársága: magyar

Védő: Friedrich Steinmetz ügyvéd, Fulda

Dolgozói társadalombiztosítási járulékok visszatartása stb. miatti büntetőeljárásban, itt: a főtárgyalás megnyitása tárgyában
a Fuldai Tartományi Bíróság 2. büntető tanácsa, mint gazdasági bíróság 2007.06.13-án az alábbi határozatot hozta:

A főtárgyalás megnyitását a gyanúsítottal szemben jogi okokból elutasítjuk.

Az ügyészség 2007.03.23-i letartóztatási parancs kiadására vonatkozó kérvényét visszautasítjuk.

Az eljárás költségeit és a gyanúsított szükséges eljárási költségeit az államkassza viseli.

<u>Indoklás</u>

Amennyiben a gyanúsítottnak felróják, hogy társadalombiztosítási járulékokat tartott vissza, akkor a gyanúsított viselkedése, még ha az ügyészség feltételezését vesszük alapul, nem meríti ki a BTK 266§a pontját.

A BTK 266§a pontja szerint egy járulék bűntett tárgya olyan esedékes dolgozói járulékösszeg, amelyet egy biztosítás köteles foglalkoztatás alapján a társadalombiztosítási törvénykönyv szerint fizetni kell. A külföldi vonatkozású esetekben elsőrendű jelentőségű, hogy az érintett munkavállalóra a belföldi társadalombiztosítási kötelezettség vonatkozik, vagy mentes ez alól. A BTK 266§a pontja itt nemcsak a német társadalombiztosítási törvényekhez kapcsolódik, hanem az államközi vagy államok feletti rendelkezésekhez, amennyiben ezek Németországban is érvényesek és meghatározzák az alkalmazandó társadalombiztosítási jogot.

Ebből kiindulva nincs szó büntethetőségről a német Legfelső Bíróság vonatkozó ítéletet szerint akkor, ha a munkavállalók rendelkeznek E 101 európai országokra vonatkozó igazolással, amely itt kizárja a büntethetőséget 2004.05.01 után.

Az Európai Bíróság több döntésében, amelyek a tagországok munka-, vagy szociális jogi eljárásainak kérdésével foglalkoztak, kijelentette az E 101 igazolás hatályát, miszerint a vendéglátó ország nemzeti hatóságai és bíróságai számára kötelező jellegű a kiküldő ország társadalombiztosítási jogának alkalmazása.

A kötelező hatállyal kapcsolatban az Európai Bíróság kijelentette, hogy egy E 101 igazolásnak szükségszerű következménye, hogy egy másik tagország szociális biztosítási rendszerét nem kell használni. Ez kötelező a nemzeti bíróságok számára is.

Ebből kiindulva nem lehet kétség afelől, hogy egy belső nemzeti büntető eljárásban érintett hatóságok és bíróságok számára is kötelező jellegű egy külföldi társadalombiztosító által kiállított E 101 igazolás, amennyiben az eljárás a munkaadó járulékfizetési kötelezettségének megsértésére vonatkozik.

Ezen tényállás alól akkor sincs kivétel, ha a szóban forgó igazolást esetleg helytelen adatok alapján szerezték meg a külföldi hatóságtól.

Ha ugyanis a manipuláció felmerülő gyanúja alapján a vendéglátó ország hatóságain és bíróságain keresztül a kiküldetés tényállásának felülvizsgálatát kezdeményezné, ez mindenképp a rendelkezések által célzott és a bíróság ítéletében fontos célkitűzésként hangsúlyozott egyértelmű jogi rendelkezés alá tartozna, mivel egy a visszaélés gyanújára támaszkodó nyomozati és beavatkozási jogkör nem mutat élesen elhatárolható körvonalakat és mindkét tagország biztosítói között konfliktusokra adhatna alkalmat.

De a 2004.05.01. előtti esteknél sem beszélhetünk itt büntethetőségről. Ez időpont előtt is érvényben voltak Németország és Magyarország között az D/H 101 igazolások, amelyekkel az érintett munkavállalók rendelkeztek. Ezek az igazolások is kizárják a gyanúsított büntethetőségét a BTK 266§a pontja szerint. A bíróság továbbá csatlakozik a Landshuti Tartományi Bíróság 2006.12.24-i (3 KLs 52 Js 3295/04) döntése szerinti felfogásához. Az igazolások különböző jogi természete –egyrészről azonnali érvényességgel felruházott EU rendelkezés, másrészről államközi megállapodás – nem téveszthet meg senkit, az igazolások lényegében azonos tartalmúak és célúak. Mindkét esetben az igazolások elsősorban a jogi biztonságot szolgálják. A belföldi és külföldi érintett hatóságok számára az illetékességi területek behatárolása is kötelező jellegű. Továbbiakban hivatkozunk a Landshuti Tartományi Bíróság fent nevezett ítéletére. Ezt a helyénvaló jogértelmezést a Szövetségi Államügyész is képviselte 2007.04.23-i állásfoglalásában.

Ezeknek a tényeknek megállapítása alapján semmi alap nem marad arra, hogy manipulációs eseteken felülvizsgálati lehetőséget teremtsünk. Eszerint a Legfelső Bíróság 2006.10.24-i határozata teljes mértékben alkalmazható erre az esetre.

II.

A gyanúsított nem követett el bűntettet a külföldiekre vonatkozó törvény 92. § 2. bekezdés 2. és a tartózkodásra vonatkozó törvény 95 § 2. bekezdés 2. szerint. Ez ugyanis feltételezné, hogy a gyanúsított a vízum ill. tartózkodási kérelem kérvényezésénél helytelen adatokat adott

meg. Egyik sem forog fenn. A helytelen nyilatkozatokat ugyanis egy hatósággal szemben kellett volna megtenni, amely a külföldiekre és a tartózkodásra vonatkozó törvények végrehajtására kötelezett.

Azonban nem felismerhető, hogy egy ilyen hivatal részére helytelen adatokat adtak volna meg. Ezeknek a hivataloknak sokkal inkább csak A D/H 101 igazolásokat és tartományi munkaügyi hivatal biztosító igazolását mutatták be. Nincsen kiindulópont arra vonatkozóan, hogy itt további kérdéseket tettek volna fel vagy helytelen adatokat adtak volna meg.

III.

A munkaerő átengedésre vonatkozó törvény 15. § alapján sem jöhet szóba a gyanúsított büntethetősége. Eszerint nem bizonyítható, hogy a munkavállalók vállalkozási szerződés keretében vagy munkaerő átengedés keretében dolgoztak, de a munkavállalók minden esetben rendelkeztek az illetékes hatóságok szükséges engedélyeivel. Arra nézve nincs bizonyíték, hogy ezek az engedélyek nem voltak érvényesek. Egyedül ezeknek az engedélyeknek a megléte kizárja a büntethetőséget, még pedig függetlenül attól, hogy az engedélyeket jogtalanul adták-e ki. Eszerint érvényesül a büntetőjog államigazgatási járulékossága. Ilyen háttér mellett a BTK §§ 406, 407 és a fekete munka leküzdésére vonatkozó törvény §§10,11 szerinti büntethetőség sem jöhet szóba.

IV.

Eszerint a gyanúsított büntethetősége nem adott, úgy hogy a főtárgyalás megnyitását a PTK § 204. 1. bek. 1 szerint el kellett utasítani.

V.

Vissza kellett utasítani az elfogató parancs kiadására vonatkozó kérvényt, mivel a PTK § 112 szerint legalább szükséges sürgős gyanú a fenti kifejtés alapján nem áll fenn.

VI.

A költségekre vonatkozó döntés a PTK § 467 1. bek. 1 szerint történt

Richter	Strauch	Dr. Gescher
Bíró	bírónő	tartományi bíró
Mint elnök		

Készült:
Fulda, 2007.06.14.
A tartományi bíróság írnoka

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