REPORT
on the Free Movement of Workers in Belgium in 2002-2003

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List of abbreviations

Art.	article
C.D.E.	Cahiers de droit européen (Journals of European Law)
C.D.S.	Chronique de droit social (Chronicle of Social Law)
C.J.E.C.	Court of Justice of the European Communities
C.T.	Cour du Travail (Industrial Court).
E.C.H.R.	European Convention on Human Rights
J.T.	Journal des tribunaux (Tribunals Journal).
J.T.D.E.	Journal des tribunaux-droit européen (Tribunals/European Law Journal).
J.T.T.	Journal des tribunaux du travail (Industrial Tribunals Journal).
M.B.	Moniteur Belge (Belgian Official Gazette).
R.D.E.	Revue du droit des étrangers (Review of alien law).
R.D.C.	Revue de droit commercial (Review of commercial law).
Rev. b. sec. soc.	Revue belge de sécurité sociale (Belgian review of social security).
Rec.	Recueil (Compendium).
Rev. not. b.	Revue du notariat belge (Belgian notaries' review).
R.T.D.E	Revue trimestrielle de droit européen (Quarterly Review of European Law)
Rev. trim. dr. fam.	Revue trimestrielle de droit familial (Quarterly Review of Family Law)
Rev. trim. dr. eur.	Revue trimestrielle de droit européen (Quarterly Review of European Law).
Rev. trim. D.H.	Revue trimestrielle des droits de l'homme (Quarterly Review of Human Rights).
ff.	and following
T.T.	Tribunal du travail (Industrial Tribunal).
T.R.V.	Tijdschrift voor rechtspersonen en venootschap (Legal entities' and companies' journal).
T.V.R.	Tijdschrift vreemdelingen recht (Journal of alien law).

Introduction

1. Contents

As in previous years, the present report is based on an analysis of the legal texts, of jurisprudence and of the doctrine, as well as on a survey which was sent to several local governments. In order to maintain consistency and brevity, one single report has been compiled for 2002 and 2003.

2. Main observations

Overall, Belgium correctly applies Community law as it relates to the free circulation of people. The decisions of the C.J.E.C. are also respected by the government. The *MRAX* jurisprudence relating to family reunification is thus applied (point 16).

Two questions can be highlighted for the future.

1. Regarding equality (Ch. 2, point 10)
   The consequences of the *Garcia Avello* jurisprudence regarding the right to a double name have not yet been applied by the Belgian government, specifically because it is difficult to identify them.
2. Regarding social security (Ch. 6, point 36)
   The consequences of the *D'Hoop* jurisprudence have not yet been fully evaluated with respect to the requirement of the "real link" between the citizen and the market of the country of residence in order to enjoy social security rights (idem in *Collins*, 2004).

3. Recommendations

The Commission's attention is drawn to the following recommendations.

1. Reverse discrimination (point 16)
   It would be good to invite the Member States gradually to abolish reverse discrimination which particularly affects the family members of their nationals. The example of Belgium, applying the *MRAX* jurisprudence to the family members of the Belgian citizen, should be followed by other States.
2. Equality (point 10)
   – Do the other Member States respect the right to use a double name (*Garcia Avello* jurisprudence)?
   – Should the principle of non-discrimination applied by this jurisprudence be extended to other areas of personal status (imminent question of homosexual marriage, for example)?
3. Social security (point 36)
   In a text of derived law, should the concept of "real link" revealed by the jurisprudence for access to social security rights be specified (*D'Hoop*, *Collins*)?
4. Civil service (point 15)
   Unlike other Member States, Belgium poses no major problem for European citizens to gain access to the civil service when this does not involve participation in the public authorities. The trend is more towards expanding access to the civil service to the nationals of third-party States.

5. Enlargement (point 48)
   Belgium will apply the transition period. Two texts have been adopted: Royal Decree of 25 April 2004 (see Appendix 34bis) and a circular dated 30 April 2004 (Appendix 34ter). The texts are accurate and overall in accordance with the Treaty of Accession.
6. Statistics (Appendix 40)
   There are 570,351 European citizens in Belgium (limited to the 14 Member States in 2002-3). This figure represents a little over 59% of the foreigners in Belgium and a little under 6% of the total population. The two largest communities are from Italy (181,000) and France (117,000). See Appendix 40 for country-by-country breakdowns.

Chapter I
Entry, Residence, Removal

A. Entry and residence

a. Exemption from professional card for freelance workers

3. Royal Decree of 3 February 2003 (M.B., 4 March 2003) exempting certain categories of foreigners from having to hold a professional card in order to exercise a freelance professional activity provides for exemption from the professional card for a national of the Member States of the European Economic Area and, provided his partner comes to settle or settles with him, for his spouse, his dependents or those of his spouse for whom they are responsible with the exception of the ascendants of a student or those of his spouse, the spouse of ascendants or descendants (Appendix no. 1).

b. Instructions for local governments

4. A circular dated 22 May 2003 (M.B., 17 July 2003, Appendix no. 2) relates to residence permits for foreigners. This circular replaces the circular dated 16 October 2002 (M.B., 6 November 2002).

The objective of the circular is to promote "close cooperation between the local, regional and central authorities", in particular regarding the issue of residence permits. Special security measures have been taken in order to avoid the theft of documents within local governments (point 4).

As far as the photograph is concerned, as is the case with national identity cards, questions may be raised about women wearing headscarves. The circular stipulates that (points 6 and 7 for the E.C.).

> "The face must be photographed from the front and without a head covering. The photographs must be recent and must not have been used before. For irrefutable religious or medical reasons, a photograph in which the head is covered may be permitted provided the face is completely visible; in particular, the forehead, cheeks, eyes, nose and chin must be completely bare. The hair and ears should preferably, but not necessarily, also be visible."

According to jurisprudence by the court of Liège, this text does not permit a ban on the wearing of a headscarf in an identity photograph.

With respect to the residence card of a national of a Member State of the E.E.C. (E.U.), the circular emphasises the following points in particular (point 7):

- The same card is issued to nationals of Iceland, Norway and Liechtenstein, but the words "national of a Member State of the E.E.C.", shown in the heading of this document, must be struck out.
- Surnames and first names must be correctly transcribed "as they appear on the national identity document" (nothing is specified regarding the Greek alphabet).

5. Instructions dated 19 December 2001 concerning civil status information on documents and residence permits issued to foreigners (M.B., 20 February 2002, Appendix no. 3) contain specific details about the information given on the residence card.

Civil status (married, widowed or single) is shown and the name of the spouse is shown on the reverse of the permit for the E.C.

6. Some local governments confirm the same kinds of problem as already mentioned in previous years, including the lack of interest sometimes shown in applications made or the failure of applicants to follow up their case.

c. Voting rights

7. A circular dated 10 December 2003 relates to the registration of citizens of current or future Member States of the European Union resident in Belgium as voters and, if applicable, as candidates for election to the European Parliament on Sunday 13 June 2004 (Appendix no. 4). Attention is drawn to the voting rights of citizens of the ten new Member States who are resident in Belgium. It will be seen that the circular already makes reference to the Charter of Fundamental Rights of the European Union (Art. 39). Applications for registration on the list of voters for the elections of 13 June 2004 should be made before 1 April 2004, except for those who were already voters at the time of the previous elections (1999) who will automatically be included.

C. Removal

a. Deadline (5 months)

8. In application of the Antonissen jurisprudence, setting the deadline for residence as an E.C. job-seeker at six months, renewable once only, if the person in question can establish that he is looking for and has genuine chances of finding a job, Belgium requires the production of these items (employment contract) within a period of five months.

This five-month period seems to have been fixed by the government simply at one month fewer than six in order to carry out checking before making the decision on whether or not to extend this deadline.

In practice, it seems that if the national of the Union submits the required documents late for the residence application (later than five months), he may occasionally be invited by the government to submit a new application in order to correct the situation.

If, before the deportation order becomes effective, the person in question produces an employer's statement or proves that he is still looking for work and is likely to be recruited, the government issues him with a new registration certificate for a period of five months, with the consent of the immigration office. In practice, if the employer's statement is finally submitted after a slight delay, most local governments do show some flexibility.

If the documents are not provided, even after the deadline, an "Appendix 20" (rejection of settlement with order to leave the country) is issued, providing for the possibility of submitting a revised application.

Some local governments state that they regularly issue orders to leave the country to EC foreigners who have not provided the required documents within the legal deadline of five months. Here too, some variation between communities is observed.

b. Personal and family life (E.C.H.R.)

9. A decision by the Council of State of 9 April 2002 suspended the deportation of an Italian national and persistent offender who was born in Belgium and had always lived there (R.D.E., 2002, 400, Appendix no. 5).

The decision of the Council of State, cancelling the deportation order, is based chiefly on the unfavourable opinion which had been given by the Consultative Committee prior to the deportation order, regarding respect for the personal and family life of the person in question. This Italian national is therefore protected more by the E.C.H.R. than by European Community law. The Council of State expressly notes that the reasoning behind the deportation order which states that "the applicant's disability pension can be paid in Italy", is not "of a nature to lessen the authority's interference in personal and family life".

Doctrine

Brien, L. van, Comments on the matter, *Grzelczyck*, *C.D.S.*, 2003, p. 269.

David, Fr., La citoyenneté de l'Union, statut fondamental des ressortissants des États membres (Citizenship of the Union, fundamental status of nationals of Member States), *R.T.D.E.*, 2003, p. 56.

Martini, A., Présentation de la proposition de directive du Parlement et du Conseil relative au droit des citoyens de l'Union et des membres de leurs familles de circuler et séjourner sur le territoire des États membres (Presentation of the draft directive from the Parliament and the Council concerning the right of citizens of the Union and their family members to circulate and to reside on the territory of Member States), *R.D.E.*, 2002, 819, Appendix no. 6.

Chapter II
Equal Treatment

a. Nationality

10. When the *Garcia Avello* decision (C-148/02) was passed on 2 October 2003, the C.J.E.C. condemned the Belgian administrative practice of refusing nationals of a State such as Spain – whose nationals use both the mother's and father's names – the right to allow their dual-nationality children to use this same double name, for the reason that children in Belgium traditionally take the father's name. The Court decided that this practice conflicts with Articles 12 and 17 E.C. (Comments, J.-Y. Carlier, in *J.T.D.E.*, 2004, p. 74).

So far, the impact of the decision does not appear to have been far-reaching in practice; according to the information provided by some community governments, it seems that the Belgian children of a couple where the father is Spanish and the mother Belgian are given the father's name under Belgian law, subject to appeal by the parties in question. National jurisprudence, which does not relate to people with dual European nationality but to Belgian-Brazilians, has however also taken into account the parents' decision to use the double name (Appendix 9).

b. Gender

11. Article 10 of the Constitution has been amended to guarantee equality between men and women (*M.B.*, 21 February 2002, Appendix no. 7).

12. A parliamentary question was asked about the free circulation of people in same-sex marriages, with respect to the draft Directive of 23 May 2001 (question no. 3-244 by Mr. Dedecker of 5 September 2003, Appendix no. 10). The new Code of International Private Law, which will be adopted in 2004, deals with this question and will allow homosexual marriage not only for people of Belgian nationality but also for those whose national law or law of habitual residence permits it (Senate, Doc. 3-27/8, Sess. 2003-2004) Art. 46:

> "Subject to Article 47, the conditions of marriage validity are governed, for each of the spouses, by the law of the State whose nationality is held at the time the marriage is solemnised.
> The application of a clause in the law referred to by virtue of paragraph 1 is excluded if this clause prohibits marriage between people of the same sex if one of them is a national of a State or has his habitual residence on the territory of a State where the law allows such marriage."

Consequently, a European with his habitual residence in Belgium may enter into a homosexual marriage with a Belgian or a resident in Belgium even if the national law of origin prevents this marriage.

c. Other discrimination criteria

13. A law has been passed with a view to banning all forms of discrimination, whether direct or indirect (Law of 25 February 2003 intended to combat discrimination and

amending the law of 15 February 1993 creating a centre for equal opportunities and combating racism, M.B., 17 March 2003, Appendix no. 8). An independent body is responsible for providing assistance to the victims of discrimination.

1. Use of proportionality for direct discrimination

This law represents the adaptation of Directive 2000/43 of 29 June 2000 regarding the implementation of the principle of equal treatment between people regardless of race or ethnic origin, as well as Directive 2000/78 of 27 November 2000 creating a general framework in favour of equal treatment with respect to employment and work. This adaptation is however not yet complete, given the federal nature of the Belgian State. While questions of employment and discrimination in general are federal responsibility, the protection of special categories of people is also the responsibility of the Regions and Communities which have yet to adopt the texts. Apart from civil provisions, the law has also strengthened criminal sanctions (Art. 6 ff.).

The law has been the subject of criticism, in two areas in particular.

The adaptation by this law of directives regarding the implementation of the principle of equal treatment is subject to criticism to the extent that Article 2 provides for direct discrimination if a direct difference in treatment "lacks objective and reasonable justification", while the directives contain a narrow definition, banning all direct discrimination.

This discrepancy within Belgian law has not been overlooked during parliamentary activities. However, no remedy has been found for the grounds that the open system was necessary in order to resolve situations which, although not understood by Community directives, would be covered by the law of 25 February 25 because its broader field of application. This justification does not seem acceptable since Belgium's international obligations should not suffer from the way in which the State chooses to implement the directive.

In truth, this shift in usage of the principle of proportionality is not unique to Belgian law. It has also appeared in the jurisprudence of the C.J.E.C. regarding the free circulation of workers who, after having developed the principle of proportionality to allow the condemnation of indistinctly applicable obstacles, also used it to evaluate direct discriminatory obstacles while these could be "directly" condemned based on Article 39, § 2 E.C. The most obvious example is the *Bosman* decree (1995); after having condemned the rules relating to the transfer of professional football players by using the principle of proportionality, the Court will also condemn the nationality clauses which constitute direct discrimination based on nationality, by making use of the principle of proportionality by examining "justifications" (points 121 ff.).

2. Exception for professional requirements

Article 2 § 5 of the law stipulates that, in the field of professional relationships, an objective and reasonable difference in treatment must be confined to "essential and defining professional requirements". This would seem to concur with the "framework" Directive 2000/78 which envisages, under the same terms, an exception in the area of employment (Art. 4). Nonetheless, some authors have criticised Belgian law which dele-

gates to private players – acting under the control of the judge – the responsibility to discern "objective and reasonable justification" likely to justify a difference in treatment, while the community legislator has given the possibility exclusively to the national legislator of introducing measures which could justify different treatment and are needed in order to achieve clearly-defined objectives.

Recommendations

14. Article 2 of the law of 25 February 2003 should be amended in order to guarantee conformity with Directive 2000/43. In the mean time, the Belgian judge should interpret the law in accordance with the Directive in not permitting the existence of objective and reasonable justification for direct forms of discrimination and by strictly interpreting the essential professional requirement in matters regarding employment.

Doctrine

Berthou, K. and Masselot, A., Le mariage, les partenariats et la Cour de justice des Communautés européennes : ménage à trois (Marriage, partnerships and the Court of Justice of the European Communities: ménage à trois), *C.D.E.*, 2002, p. 679.

Dollat, P., Vers la reconnaissance généralisée du principe de l'égalité de traitement entre les personnes de l'Union européenne (Towards the generalised recognition of the principle of equal treatment between people in the European Union), *J.T.D.E.*, 2002, p 57, Appendix no. 11.

Fallon, M., Plurinationalité : vers l'abandon d'une préférence inconditionnelle pour la nationalité belge? (Multinationality: towards the withdrawal of unconditional preference for Belgian nationality?), *Rev. trim. dr. fam.*, 2003, p. 786, Appendix 9.

Touboul, F., "Le principe de non discrimination et les travailleurs frontaliers" (The principle of non-discrimination and cross-border workers), *Review of the common market and the European Union*, 2002, 619.

Although produced in 2004, it is already worthwhile pointing out here that:

– A symposium was held in April 2004 in Louvain-la-Neuve on the subject of discrimination against forms of handicap. Proceedings will be published by Bruylant. Documents can be accessed at www.drt.ucl.ac.be/DH;
– Regarding the proportionality criterion applied to direct discriminatory barriers, I have presented some points of view, in *La condition des personnes dans l'Union européenne* (The condition of people in the European Union), pp. 69 to 73, accessible at www.drt.ucl.ac.be/DH;
- Schutter, O. de & Nihoul, P. (eds.), *Une constitution pour l'Europe* (A constitution for Europe), Brussels, Larcier, 2004, pp. 151-154.

Chapter III
Employment in the Public Sector

15. It seems that European citizens no longer have any major problem accessing jobs in the civil service which do not involve the exercise of public authority. The debate would therefore be more about access to these jobs by non-European foreigners. The French Community could thus expand access to jobs in the civil service within its governmental departments to foreigners who are not European citizens.

A draft decree by the French Community dated 10 October 2003 provides for access to the civil service for non-Belgian citizens whether or not they come originally from one of the Member States of the Union (Appendix no. 12).

Chapter IV
Family Members

16. The previous report had already explained the *MRAX* decision and its consequences in Belgium, in a circular dated 21 October 2002 (point 41). In response to a parliamentary question on 27 September 2002 (question no. 2420 by Mrs. Nyssens, Appendix no. 13), the minister had already stated that his administration was observing the Court's broad interpretation and that even if the decision made was primarily applicable to the Council of State, concerning prejudicial questions, new applications and pending files would be examined in the light of the interpretation given by the Court, both for foreign members of the family of a European citizen and for foreign members of the family of a Belgian, taking into account the assimilation made by Belgian law to avoid reverse discrimination.

17. Generally speaking, the administrations say that they apply the *MRAX* circular dated 21 October 2002.

18. According to information provided by the communes, the formalities surrounding family reunification have been simplified in the wake of the *MRAX* decision. The current requirements are an identity document, even if expired, and a document establishing the family tie (birth or marriage certificate, etc.). This document must however be authenticated in the country of origin.

Since 1 July 2003 double authentication by the Belgian consulate and the public federal foreign affairs office has been abolished and replaced by a single piece of legislation performed by the Belgian diplomatic or consular representatives in the form of the "*legalinet*" seal. The civil status documents or certificates produced by foreign diplomatic or consular representatives in Belgium would not be accepted as proof of family or marriage ties. In view of the many difficulties that can arise for some foreigners with respect to producing civil status documents, the immigration office accepts the results of a genetic examination, performed by a recognised hospital, as proof of relationship. Although this expensive medical examination cannot be made compulsory, sometimes it may provide the ideal solution, culminating in a request for family reunification.

19. Some administrations specify that the right to family reunification is subject to a police investigation regarding the actual cohabitation situation.

20. A symposium was held on 15 October 2003 in Brussels on the subject of "Family reunification – at the crossroads of Belgian and European law", (Appendix no. 14). The proceedings of this symposium have been published in the *Review of Alien Law* (special issue 125, 2003, pp. 513 to 575).

Recommendations

21. The initiative of the Belgian authorities in broadly applying the *MRAX* jurisprudence by extending it to members of the family of a Belgian must be underlined, since it can represent an example to be followed by other Member States.

22 – If Directive 2003/86 is not abolished, Belgium will have to make sure that it is adapted by reinforcing the right to family reunification. In this respect, we refer to the conclusions of the symposium of 15 October 2003 above (R.D.E., 2003, 575 Appendix 14).

Doctrine

Lardinois, P., De la logique de l'idée aux principes du droit (From the logic of the idea to the principles of the law), note under C.J.E.C. of 25/07/02, *R.D.E.*, 2002, 448, Appendix no. 16.

Rodier, C., Regroupement familial, une directive contre le droit de vivre en famille (Family reunification, a directive against the right to live as a family), *Nouvelle tribune*, no. 34, 2003, 9.

Le regroupement familial (Family Reunification), *R.D.E.*, special issue, 125, 15 October 2003 (Appendix 14).

Viron, I. de, Le regroupement familial (Family Reunification), *R.D.E.*, 2002, 823, Appendix 15.

Chapter V
Establishment, Provision of Services, Students

A. Establishment

1. Aviation

23. In a decision of 5 November 2002 (C-471/98, *Commission/Belgium*), the Court of Justice specifies that freedom of establishment applies in the area of air transport. In this case, the Court decides that Belgium has breached former Article 52 by stating that Community companies can be excluded from the benefiting from the air transport agreement linking Belgium and the United States, while these benefits are granted to Belgian companies.

2. Architect

24. The *Dreessen* case (C-31/00), having given rise to a judgement dated 22 January 2002, concerned a Belgian national who had qualified as an engineer in Germany and who was applying for registration with the Order of Architects in Belgium. The Belgian Court of Cassation had asked whether, if the qualification was not referred to in Article 11 of Directive 85/384 regarding architects, a comparison would have to be made between the skills certified by this qualification and those required under Belgian regulations. The Court of Justice responded positively on the basis of Article 43, recalling the *Vlassopoulou* jurisprudence. According to the Court, the above Directive can only serve to facilitate the mutual recognition of qualifications, not make it more difficult.

3. Lawyer

25. A regulation dated 24 February 2003 ratifies the lawyers' code of ethics for the European Union, adopted at the plenary session of the CCBE (Council of the Bars and Law Societies of the European Community) held on 28 October 1988 and amended during the sessions of 28 November 1988 and 6 December 2002.

4. Social security

26. Some communes indicate that they no longer require proof of affiliation to a social security office for people wishing to start a freelance business, by virtue of Directive 73/148/EC.

B. Provision of services

27. Royal Decree of 29 March 2002 defines the implementation methods for the simplified establishment and control system for social security documents for companies that second workers to Belgium and defining the activities in the field of construction referred to in Article 6 paragraph 2 of the law of 5 March 2002, adapting Directive 96/71/EC of the Parliament and of the Council dated 16 December 1996 regarding the secondment of workers within the framework of the provision of services and introduc-

ing a simplified social security document control system for contractors who send workers to Belgium (*M.B.*, 17 April 2002, Appendix no. 17).

28. The previous report recalled the *Van Lent* case concerning vehicle registration. In its decision of 2 October 2003 (C-232/01), the Court decides that Belgian regulations preventing a worker residing in Belgium from using a vehicle in this country which is registered in Luxembourg, belonging to a leasing company established in this State and provided by the employer established in Luxembourg, is contrary to the principle of free circulation. See also the reply which was given during the year 2002 to a parliamentary question asked regarding the registration of vehicles (question no. 650 by Mr. Bruno van Grootenbrulle of 19 April 2002, Appendix no. 18).

29. In its decision of 29 November 2001, the Court of Justice sanctioned the annual tax introduced by the Brussels Capital Region on parabolic aerials by deciding that it was contrary to the principle of the free provision of services (*C.J.E.C.*, 29 November 2001, *De Coster*, C-17/00, Rec., p. I-4445).

C. Students

30. As far as the problem of waiting allowances is concerned, see Chapter 6 below (point 36).

Recommendations

31. Concerning establishment, the doctrine emphasised that the *Uberseering* judgement of 5 November 2002 did not question the increasing usefulness of a directive allowing for harmonisation of the system of transfers of cross-border head offices. In this judgement, the Court indicated that the law of the country of incorporation – not the law governing the actual head office – was decisive in assessing the existence of the company. Belgian law, favouring the actual head office, should be adapted to this new Court jurisprudence. From now on, Article 56 of the Companies' Code, under which "a company which has its actual head office in Belgium is subjected to Belgian law, although the deed of formation has been executed in a foreign country" will have to be interpreted in the light of this European jurisprudence. Authors have raised the matter of possible legislative amendment while emphasising that some of the doctrine was already in favour of adopting the theory of incorporation into Belgian law (which, unlike the theory of the actual head office, does not claim to extend its effects to the recognition of companies) and that the Court's judgement could encourage the legislator to follow this trend (see Appendix no. 20).

Doctrine

Defalque, L., Liberté d'établissement et libre prestation de services (Freedom of establishment and free provision of services) (1/1/2001-31/12/2002), *J.T.D.E.*, 2003, 204, Appendix no. 19.

Demaret, P., L'accès au marché des services réglementés : la libéralisation du commerce des services dans le cadre du traité CE (Access to the market for regulated services: the deregulation of the services industry within the context of the EC treaty), *R.T.D.E.*, 2002, 259.

Dewulf, H., La liberté d'établissement implique-t-elle la fin de la doctrine du siège effectif ? (Does freedom of establishment imply the end of the doctrine of the actual head office?), *R.D.C.*, 2003, 96-97.

Hugloy, J.C., Liberté d'établissement et libre prestation de services (Freedom of establishment and free provision of services), *R.T.D.E.*, 2001, 743.

Jonet, J., Sociétés commerciales. La théorie du siège réelle à l'épreuve de la liberté d'établissement. Autour de l'arrêt Uberseering (Business companies. The theory of the actual head office put to the test of freedom of establishment. Concerning the Uberseering judgement), *J.T.D.E.*, 2003, 33, Appendix no. 20.

Meeusen, J., De werkelijke zetel-leer en de communautaire vestigingsvrijheid van vennootschappen. Analyse van het arrest Uberseering van het Hof van Justitie (The actual head office doctrine and community freedom of establishment for companies. Analysis of the Uberseering judgement by the Court of Justice), *T.R.V.*, 2003, 95.

Chapter VI
Social Security

General

32. The Court of Arbitration has not condemned differences in treatment based on nationality in non-contributory social security systems when the foreigner can demonstrate adequate links with the country of residence (judgement no. 75/2003 of 28 May 2003) (Appendix 21).

This judgement can be compared to the Koua Poirrez jurisprudence of the European Court of Human Rights, which came later (30 September 2003) and which, on the contrary, condemned these differences in treatment.

33. In a judgement of 19 March 2002 (C-393/99 and C-394/99, *Inasti et Hervein*, *Hervillier sa*, *Lorthiois*, *Comtexbel sa*), the Court recalls the principle of simple coordination of social security systems and the difficulties arising as a result, in particular when the party in question holds several jobs in different countries, classified as both freelance work and salaried work.

34. It was judged by the Industrial Court of Brussels that a framework agreement which makes a difference in treatment not on the basis of nationality but based on the law applicable to the contract is not contrary to Article 39 of the Treaty (C.T. Brussels, 14 September 2001, *J.T.T.*, 2001, 501, Appendix no. 22).

35. The law of 26 June 2003 gives approval to the additional protocol to the European Social Charter, which envisages a system of joint claims, passed in Strasbourg on 9 November 1995 (*M.B.*, 24 July 2003).

A. Unemployment

36. Point 68 of the previous report (2000-2001) raised the problem of Belgian regulations in matters of waiting allowances.

The case between Ms. D'Hoop and the Belgian National Employment Office has been referred to the Court of Justice. She is a Belgian national who completed her secondary education in France and studied at a Belgian university. The National Employment Office refused to grant waiting allowances to this person based on Article 36 paragraph 1, first section of Royal Decree of 25 November 1991 regarding unemployment regulations, which stipulates:

> In order to receive waiting allowances, the young worker must meet the following requirements:
> 1. he must no longer be in compulsory education;
> 2. a) or he must have completed full-time higher secondary education or lower secondary technical or vocational training in an educational establishment organised, subsidised or recognised by a Community.

In this case, the Court details the rights of Ms. D'Hoop in her capacity as European citizen and decides that Community law is in conflict with a Member State refusing to grant one of its nationals, a student looking for his or her first job, waiting allowances for the sole reason that this student completed his secondary education in another Member State, in this case France. The Court reiterates the "Grzelczyk formula", under to which "the status of citizen of the Union has authority to be the basic status" (point 28). However, the Court also admits the requirement for a "real link" between the citizen and the country in question (point 38). If, in this case, this real link is adequate, it may not be in other cases, such as in the *Collins* case (2004). The National Employment Office has adapted to the new jurisprudence. The real link is however translated nowadays by the requirement of a certain length of study in Belgium (*C.J.E.C.*, 1 July 2002, *D'Hoop*, C-224/98, for commentary on this judgement, see Appendices nos. 31 and 32).

B. Old age

37. Two cases concern the anti-accumulation pension rules, regarding careers in Belgium and in Italy. An initial case had already been mentioned in the previous report (see point 63), referring to a judgement of 22 February 2001 by the Court of Justice. A judgement by the Industrial Court of Liège was passed on 26 February 2002, following the responses to prejudicial questions (*J.T.T.*, 2002, 263, Appendix no. 23). At issue was the provisional implementation of amendments to Community law and the forms and deadlines to be observed for a revision request. The C.J.E.C. has left a wide margin of assessment to the national judge to decide if the request for revision could be introduced into the proceedings (pleadings) by way of extension of the request and if they should observe the two-year deadline established in Community law for an administrative request. The national judge uses his margin of assessment in favour of the person paying the social security contributions: yes, the request can be made during the proceedings; no, the two-year deadline does not have to be observed. In so doing, the Industrial Court decides in this case that the provisions of municipal law must be observed, which do not require observance of a predetermined deadline and are consequently more favourable than the Community provisions, particularly in so far as the national pension fund had not drawn the attention of the person paying the contributions to this two-year deadline.

38. A second case gave arise to a judgement dated 7 March 2002 (C107/00, *Insalaca/ONP*). The Court of Justice is responding to a prejudicial question from the Industrial Tribunal of Mons in specifying that Articles 46 bis and ter of regulation 1408/71 are in conflict with application of the Belgian regulations containing an anti-accumulation clause, according to which a survivor's pension received in Belgium must be reduced because a pension is acquired under Italian legislation, since the benefits due in application of these rules are less favourable than those determined by virtue of Article 46 of the regulation.

39. A third case, *Kauer*, involved an Austrian woman who had worked in Belgium and in Austria. In calculating her pension scheme, similar periods spent bring up her children in Austria were taken into account but not those spent in Belgium on the grounds that this period was before the entry into force of regulation 1408 in Austria and that, in accordance with Austrian law, Ms. Kauer did not receive maternity allowances. The Court sees this an a barrier to the right to free circulation (*C.J.E.C.*, 7 February 2002, C-28/00, *Kauer*).

C. Health care

40. The free circulation of services and, chiefly, of those for whom they are intended, is emphasised in the area of health care, particularly in the wake of the *Smits-Peerbooms* jurisprudence (C-157/99).

Several parliamentary questions have been asked regarding admission to Belgian hospitals of European patients, in particular British patients: question no. 393 by Mr. Willy Cortois of 21 September 2001 (Appendix no. 24); question no. 563 by Mr. Willy Cortois of 14 February 2003 (Appendix no. 25); question no. 392 by Ms. Yolande Avontroodt of 21 September 2001 (Appendix no. 26) and no. 602 of 4 February 2003 (Appendix no. 27); question no. 459 by Mr. Jozef Van Eetvelt of 1 March 2002 (Appendix no. 28).

A bilateral framework agreement was signed on 3 February 2003 between Belgium and the UK (see Appendix 25).

D. Social security benefits

41. A decision by the Industrial Tribunal of Brussels declares unfounded the refusal to grant social security benefits to a citizen of the Union and states that a European citizen looking for work can claim equal treatment in terms of social security benefits in so far as he has previously performed salaried work on the territory of a Member State (T.T. Brussels, 27 March 2002, *C.D.S.*, 2002, 415, Appendix no. 29).

E. Part-time work

42. Royal Decree of 28 January 2002 (*M.B.*, 13 February 2002, 4860) presents various measures for adapting the agreement on the European Economic Area and Directive 97/81/EC of the Council of 15 December 1997 concerning the framework agreement on part-time work.

F. Cross-border workers

43. Regarding cross-border workers receiving a benefit granted by the Netherlands, details were given following a parliamentary question (question no. 293 by Mr. Brouns of 22 October 2001, Appendix no. 30).

44. Royal Decree of 13 January 2003 (*M.B.*, 28 January 2003) fixes the amount of the lump sum and fictitious payment pertaining to the year 2001 to be taken into consideration in calculating the retirement pension of cross-border and seasonal workers and the survivor's pension for their surviving spouses.

Recommendations

45. In the area of unemployment, it would be appropriate to amend the regulations concerning provisional or waiting allowances. These contain indirect discrimination against students who have studied in another Member State by providing for allowances to be granted in so far as the young person has completed his full-time studies in an educational establishment organised, subsidised or recognised by a Community (Article 35 of Royal Decree of 25 November 1991). The regulations also discriminate between young Belgians and young people from other Member States in that they stipulate that the studies required for the waiting allowances to be granted may have been completed in a different Member State as long as equivalence is granted and, when the request is made, the young person is responsible for his immigrant working parents within the meaning of Article 48 of the Treaty (Article 36, § 1, 2 of the aforementioned Royal Decree). The Centre for Equal Opportunities has issued recommendations with a view to adapting these regulations (see annual report of the Centre for 2001 and the report 1993-2003). These regulations are obviously imposed in the wake of the *D'Hoop* jurisprudence by the Court, which could give rise, if necessary, to an action for failure to fulfil obligations. In anticipation of the change to the regulations, the Belgian courts will have the prerogative of dismissing them since they are contrary to Community law.

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Chapter VII
Texts, Doctrine and Jurisprudence of a General Nature

46. A decree of 25 April 2002 and 30 May 2002 and an ordinance of 13 June 2002 concern approval of the Treaty of Nice.

47. A symposium was held on 23 and 24 October 2002 in order to assess the situation twenty years after the law relating to foreigners on the following subject: "The law of 15 December 1980, assessment and prospects", (for the proceedings, see R.D.E., 2002, 755 ff. and extracts from this symposium in Appendices nos. 6 and 15).

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Chapter VIII
EU Enlargement

48. The enlargement of the European Union by ten new countries on 1 May 2004 did not give rise to particular measures being taken in Belgium from the point of view of the free circulation of people during the two years covered by this report (2002-2003).

Some members of parliament, mainly on the far right, were worried about this lack of measures which, according to them, could lead to huge influxes of immigrants (Question no. 348 by Mr. Guido Tartenboye, 3 November 2003, Appendix 33). On the other hand, other members of parliament had thought that the freedom of movement, specifically without a passport but with a simple identity card, should have been granted more quickly to nationals of the new future member countries, such as Poland (Question no. 305 by Mr. Geert Bourgeois, 7 January 2003, Appendix 34).

49. Measures will be introduced in 2004 and will be analysed in the next report. We would point out here that while the government had initially announced that there was no reason to fear an influx of immigrants (see reply to the question of 3 November 2003, Appendix 34bis), Belgium decided – like other European countries – to apply the transition period envisaged by the Treaty of Accession in the area of the free circulation of people. The Belgian legislation was consequently adopted by Royal Decree of 25 April 2004 (already reproduced here in Appendix 35 by way of information). In accordance with the Treaty, these transition measures do not affect Malta or Cyprus. Subject to any new text, they will cease to be effective on 30 April 2006. A circular on the same subject dated 30 April 2004 has been adopted (Appendix 34ter).

A study day was held in Brussels on this matter, organised by the Association for Alien Law, on 25 May 2004.

Chapter IX
Miscellaneous

A. Nationality

50. A parliamentary question was asked about the automatic loss of Belgian nationality if another nationality is acquired, in particular when compared to the rules applicable in other Member States (question no. 489 by Mr. Decroly of 23 November 2001, Appendix no. 35).

B. Haulage

51. A parliamentary question concerned the consequences of the judgment of 19 March 2002 by the Court in the *Commission/Italy* case. The reply was that this judgement would not have a significant effect on the possibility of immediately collecting the fines imposed on foreigners regarding haulage, but that changes could be made with respect to the amounts to be paid in deposit if the culprit does not immediately pay the suggested sum (question no. 587 by Mr. Martial Lahaye of 25 March 2002, Appendix no. 36).

C. Switzerland

52. A decree dated 21 December 2001 (*M.B.*, 24 January 2002) and a law dated 30 January 2002 (*M.B.*, 17 September 2002) concern approval of the agreement between the European Community and its Member States on the one hand and the Swiss Confederation on the other hand regarding the free circulation of people, of Appendices I, II and III, of the protocols and the final document, passed in Luxembourg on 21 June 1999.

A circular dated 11 July 2002 concerns the conditions of residence for Swiss nationals and their family members (*M.B.*, 9 August 2002).

D. Cooperation and association agreements

Morocco

53. In a judgement dated 4 March 2002, following responses from the C.J.E.C. (*Mesbah* case, C-179/98), the Industrial Court of Brussels, broadly applying European jurisprudence, recognised the right of the Moroccan mother-in-law of a Belgian-Moroccan to claim a handicapped benefit based on the EEC-Morocco cooperation agreement. The Court decides to dismiss the Belgian nationality of the son-in-law in order to retain the "functional" nationality (Appendix 37).

Turkey

There are no new elements in 2003 relating to application of the agreement with Turkey.

E. Citizenship

54. Regarding the problem of surname, refer to Chapter 2 (*Garcia Avello* case).

Doctrine

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