REPORT
on the Free Movement of Workers in The Netherlands in 2004

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General Remarks

1. Two issues have clearly dominated the political debate on the implementation of Community law on free movement of persons in the Netherlands in 2004: firstly, the movement of Polish workers and service providers after the accession of the ten new Member States on 1 May 2004 (see Chapter VII on Enlargement) and, secondly, the question to what extent EU nationals, Turkish nationals and their family members can be required to fulfil the conditions imposed on immigrants by the different elements of the new Dutch integration policy or have to be exempted from those new measures because they are incompatible with standstill and equal treatment clauses or other provisions of Community law (see Chapter VI on Policies of a General Nature).

2. The situation, described in our report on 2002-2003, that the implementation of EC free movement law under the Aliens Act 2000, as under its predecessor the 1965 Aliens Act, is partial, complex, poorly organized and sometimes plainly incorrect, still holds true for 2004. To a large extent the provisions of Community law on free movement of persons are implemented only in the instructions to the immigration authorities in the Aliens Circular 2000 and not in binding statutory law, as required by the constant case law of the Court of Justice. This situation is not helpful for the correct application of the relevant Community law by the national authorities and by the national judges. This applies to an even larger extent for the implementation of the rules on the residence rights of Turkish citizens and their family members under the Association Treaty EEC-Turkey. The only statutory provision on the issue is one single sentence in the Aliens Act, stating that Turkish nationals with a residence right under Association Council Decision no. 1/80 are having lawful residence in the Netherlands (Article 8, sub l Aliens Act 2000). The instructions in the Aliens Circular on this issue are incomplete and repeatedly in clear contradiction with the case law of the Court of Justice. This results in the Association rules being often disregarded or incorrectly applied by the immigration authorities and by the courts.

The obligation of the Member States to implement the provisions of Directive 2004/38/EC before 30 April 2006, offers a good opportunity to remind the Member States of the necessity to implement the EC rules on free movement of persons in statutory national law. The Commission, in our view, should consider giving some form of guidance to the Member States on this issue in 2005.

3. The relevant provisions in the Aliens Decree 2000 and the instructions in the Aliens Circular 2000 are still unclear on the issue whether and under what circumstances an EU citizen may lose his residence right automatically, i.e. without any decision of the national authorities establishing that the residence right has ended, or whether the residence right only ends after such a decision. In Chapter I(B) it is observed that a general statement that the residence right of an EU/EEA citizen normally begins *de jure* (automatically), on the basis of EC law, but as a rule does not end *de jure*, but only after a decision of the IND, has been included in the instructions of the Minister for Aliens Affairs and Integration on the application of the Dutch Nationality Act, but a similar statement is absent in the Aliens Circular. On the contrary, the Aliens Circular in its introduction on the residence rights of EU citizens bluntly states: the residence right of EU citizens begins and ends *de jure (van rechtswege)* (B11/1.8).

4. It appears that the Judicial Division of the State Council has changed its position on the role of Dutch courts in guaranteeing that the decisions of the immigration authorities are in conformity with Community law on free movement, by requiring a more active control by the national judge. Once an EU national has made a slight hint that (s)he has a residence right under Community law before the District Court, that court should check whether the immigration authorities have established whether the EU national has a residence right under Article 18(1) ECT, see Chapter I(D). Further, the Judicial Division has held repeatedly, both in 2004 and 2005, that the fact that an administrative decision establishing that a Turkish national has no residence right, does not preclude the national authorities and the judge from considering whether the Turkish national has acquired a residence right under the Association Treaty EEC-Turkey at a later date.

5. Two major new policies of the Dutch government adopted in 2004, focussing primarily on immigrants from third countries, may nevertheless have considerable effects for EU nationals: (1) the new policy on the accelerated admission of so-called knowledge migrants, highly educated and well paid migrant workers from outside the EEA, and (2) the revised integration policy. Both policies and some of the questions as to their effects for EU nationals are summarized in Chapter VI.

Chapter I
Entry, Residence, Departure and Remedies

Entry

Texts in force

The Minister for Aliens Affairs and Integration has published new instructions on the so-called Mobile Control on Aliens (*Mobiel Toezicht Vreemdelingen*, short MTV). This form of control directly behind the internal borders was instituted in 1994 as one of the compensating measures for the abolition of controls at the internal border when the Schengen Implementing Agreement became operative. Since the controls are performed by officials of the regular border guard (*Koninklijke Marechaussee*) and involve systematic observation of persons and traffic crossing the Belgium-Dutch and German-Dutch borders and selected cars and persons are being stopped and searched shortly after they have crossed the border, serious doubts have been voiced as to the compatibility of these controls with Article 2(1) of the Schengen Implementing Agreement (see Groenendijk 2003). The position of the Dutch government has been that these controls are no border controls but controls inside the country and hence allowed under Article 2(3) of the Schengen Implementing Agreement.

A critical study of the practice of the MTV controls in 2001 indicated that it was doubtful whether these controls effectively produced the intended effects. Most of the persons stopped and returned to the border were third country nationals with lawful residence in another EU country who did not have all their documents with them. The results of this study made the government decide to reorganize and intensify the MTV. One of the elements of this reorganization was the publication of new instructions to the border guards performing the MTV controls. One of the instructions to the officers is to perform random spot checks on cars with foreign identification numbers, especially from Eastern European countries, that have just past the internal border ("*Auto's met buitenlandse kentekens, in het bijzonder Oost-Europese, kunnen te allen tijde steekproefsgewijs worden gecontroleerd.*"), see Decision of the Minister for Aliens Affairs and Integration of 18 February 2004, *Staatscourant* 6 April 2004, no. 76, p. 17, Annex 1. Most probably, the large majority of cars with Eastern European number plates, crossing the Belgium-Dutch and German-Dutch borders, will be owned by nationals of the new Member States. Hence, it is difficult to see how this instruction, to specially perform checks on those cars, is compatible with Community law on free movement of persons and with the case law of the Court of Justice on controls on EU citizens crossing the internal borders of the EU.

Literature

R. Cholewinski, The Need for Effective Remedies in Matters of Immigration and Border Control, *Migrantenrecht* 2004, p. 259-262.

K. Groenendijk, New Borders Behind Old Ones: Post-Schengen Controls Behind the Internal Borders and Insides the Netherlands and Germany, in: K. Groenendijk, E. Guild and P. Minderhoud (eds.), *In Search of Europe's Borders,* The Hague 2003 (Kluwer Law International), p. 131-146.

Residence

Texts in force

Two changes with far reaching consequences have been reported elsewhere: the main changes resulting from the case law of the Court in *Baumbast*, *MRAX* and *Grzelczyck* and from the infringement procedure against the Netherlands, where the Commission issued its reasoned opinion in April 2003. Both the Court's case law and the Commission's opinion were implemented by the Aliens Circular TBV 2004/1 on Union Citizenship, which has been extensively described in our previous report; the special rules on admission of citizens of the new Member States are reported in Chapter VII on Enlargement.

Another major change was the transfer Spring 2004 of most of the decision making on residence documents from the local aliens police to the regional offices of the Immigration and Naturalisation Service (IND). The local aliens police now will only perform tasks related to the internal control and expulsion of aliens. The task of receiving applications for residence documents and the issuing of these documents has been transferred from the aliens police to the municipal authorities working under responsibility of the mayor (*burgemeester*). However, the decision to grant or withdraw residence permits is taken by the regional offices of the IND. The relevant changes in the Aliens Decree 2000 are to be found in Royal Decree of 1 April 2004, *Staatsblad* 2004, no. 140 (Annex 2) and in the corresponding changes in the Aliens Regulation and the Aliens Circular 2000 (primarily in WBV 2004/20).

This centralization also applies to the issue of residence documents to EU citizens and their family members. In practice this centralization has resulted in longer delays in the issue of residence documents and a lot of additional nuisance and problems for the persons concerned. As a result of the *Koppelingswet*, without the proper documents it is difficult for an EU national to get registered in the municipal registration, to get insurance under the statutory health insurance, to receive any public service or benefit, to open a bank account, etc.

In the Aliens Circular 2000 (B10/2.6) it has been specified that four different residence documents may be issued to persons with residence rights under the EC Treaty:

(1) a sticker with information on residence rights of the person; this sticker may be attached to the passport or on a separate paper; the sticker contains information on the right to work (different for citizens of eight new Member States and the other EU citizens) and states that a more than supplementary reliance on public funds may have consequences for the residence right of the holder, see Ministerial Regulation of 8 April 2004, *Staatscourant* 26 April 2004, no. 79, p. 12, Annex 3. This sticker is free of charge.
(2) a document confirming the residence of the persons, if the probable duration of that right is more than three months and less than one year; the application form for this document has been redesigned and is called Model M35-E (see Annex 4). The fee for this document is 28 euro.
(3) a residence card EU/EEA in principle valid for five years; the application form and the price are the same as under (2).
(4) a permanent residence permit under Dutch law; this document has to be renewed each five years; the fee for the application for this permit is 890 euro. A person may apply for this document, whilst holding an EU/EEA residence card, or vice versa.

The ministerial Circular states that it is in the interest of the EU/EEA or Swiss citizens and their family members that the mayor issues the residence document as soon as possible.

However, in practice the main problem is that the IND (the Ministry) often is late in providing the document to the municipal authorities.

In reaction to repeated complaints about long delays in issue of residence and work permits and in order to liberalize the admission of highly educated immigrants for employment, in 2004 a special office within the IND was created (*loket kennis- en arbeidsmigatie)* in order to speed up decision making, see chapter VI. Union citizens are able to use this accelerated procedure, if they fall within the definition of a so-called knowledge migrant (*kennismigrant*).

Supplementing the abovementioned changes in the Aliens Circular introduced with TBV 2004/1, the rules in the Aliens Circular have been amended, regarding the end of the residence right under Community law in case of reliance on public funds, ending a study, the end of the family relationship during the six months allowed for looking for employment and in case of actual threat to the public order, see Decision of the Minister for Aliens Affairs and Integration of 5 April 2004**,** TBV 2004/20 (see Annex 5). In some cases the circular states that the residence right only ends after the Minister has made a decision to that end, in other cases the texts of the Circular suggests that the residence right may end automatically, without any decision of the immigration authorities. It is strange that a general statement that the residence right of an EU/EEA citizen normally begins *de jure*, on the basis of EC law, but as a rule does not end *de jure*, but only after a decision of the IND, has actually been included in the instructions of the Minister on the application of the Dutch Nationality Act (see TBN in *Staatscourant* 24 December 2004, no. 249, p. 16, Annex 6), but a similar statement is absent in the Aliens Circular. On the contrary, the Aliens Circular in its introduction on the residence rights of EU citizens bluntly states: the residence right of EU citizens begins and ends *de jure* (automatically) (B11/1.8).

A series of amendments has been made in the Aliens Decree 2000 to allow for the privileged treatment of Swiss citizens and their family members under the 1999 EC-Switzerland Agreement on migration, Royal Decree of 3 August 2004, *Staatsblad* 2004, no. 393 (Annex 7), the corresponding changes have been made in the Aliens Circular as well.

Judicial practice

- A Portuguese citizen worked from 1964 until 1991 on board of Dutch ships, without applying for a Dutch residence document. After this employment he lived in the Netherlands and twice received a residence permit valid for six months and in November 1993 an EC residence card valid for five years (until November 1998). He has not been employed in the Netherlands after he left his last ship, but received a disability benefit (WAO) and, later on, an unemployment benefit until he became 65 years of age in June 1997 and received an old age pension (AOW). It was held that the former sailor lost his residence right under EC law automatically on a date not specified by the court but anyhow before his 65th birthday in June and, thus, notwithstanding that his EC residence card mentioned 2 November 1998 as expiration date, was not entitled to a continuation of his residence right under Regulation 1251/70, Judicial Division of the State Council, 1 November 2004, *Jurisprudentie Vreemdelingenrecht* 2005, no. 10.
- A Belgian citizen married to a Dutch national filed a complaint that the regional aliens police had not informed her of her right to an EC residence card, had issued her with a regular Dutch residence permit and made her pay the higher fee for that permit. The argument of the aliens police that she was not employed and did not have sufficient means of her own,

was rejected since her husband had sufficient income. With reference to Article 18 ECT, the judgment of the Court in *Baumbast* and the reasoned opinion of the Commission in the infringement case 1999/2029 against the Netherlands, it was held that the aliens police should have informed her of her different options, her privileged position as an EU citizen and her right to an EC residence card that would have been considerable cheaper than the Dutch residence permit, Nationale Ombudsman 7 July 2004, report 2004/ 278.
- A German national who was self-employed in the Netherlands for several years, complained that she had not been informed in 2000 of her right to a permanent residence permit under Dutch law, but had been told that she did need to apply for an extension of her EC residence card. Three years later, when she applied for supplementary benefits, this application was refused because she did not have a residence permit. It was held that the aliens police is obliged to actively inform an EU citizen about his residence rights and under current law in 2000 was also obliged to inform her about her right to a permanent residence permit under Dutch law, Nationale Ombudsman 1 November 2004, report 2004/420 (also mentioned in Chapter IX).

Miscellaneous

In February 2005, UEFA announced a proposal setting a quota for 'home-grown' players in European club competition. According to the proposal, the number of club trained players should increase over the years. Inquiries with the competent authorities and organisations in the Netherlands revealed that the Ministry of Health, Welfare and Sports does not have a position on this issue; the national football association KNVB is considering whether or not it will introduce the UEFA rules; representatives of the football clubs playing in the highest league think the new rules did not have any effect so far because they will only enter into force in July 2006 and after that date probably will have little effect, since they have a policy of club trained young players and more than half of their players have been recruited in that way.

Literature

J. Luijendijk, *Nederlandse gemeenten en het Europese personenverkeer*, Deventer 2005 (Kluwer), 516 pp.
P. Ploeger, Taken overgeheveld, menselijk maat blijven staan, *Migrantenrecht* 2004, p. 300 ff.

Departure

Texts in force

An amendment of the Aliens Act 2000 has considerably reduced the scope of judicial control on decisions of the immigration authorities to detain aliens with a view to expulsion. One of the important improvements of the Aliens Act 2000 from the perspective of civil liberties of non-citizens was the extension of the scope of judicial control of detention of aliens (*vreemdelingenbewaring*). Under the 1965 Aliens Act the decision to detain an alien was taken by the local aliens police and unless the alien took the initiative to file a *habeas corpus* motion with the District Court, that court would only review the legality of the detention after it had

been informed by the competent authorities that the detention of the alien had lasted for one month. Under the Aliens Act 2000 the IND had to inform the court within three days about the detention and the court had to hear the case within one week after it had been informed. These rules appeared to be more in conformity with the meaning of Article 5(1)(f) and 5(4) of the ECHR. However, the new rules also lead to a considerable increase of detention cases before the District Courts. In recent years, these cases represented a large share of the total caseload of the Aliens Chambers. In order to reduce this caseload, the Minister for Aliens Affairs and Integration proposed to make the judicial control less intensive again: the period of three days for informing the court was prolonged to 28 days and the court now has two weeks rather than one week to hear the case. The relevant amendments of Article 94 and Article 96 Aliens Act 2000 were enacted by the Act of 24 June 2004, *Staatsblad* 2004, 298 (Annex 8) and entered into force on 1 September 2004, see the Royal Decree in *Staatsblad* 2004, 404.

In 2004 the number of decisions of Aliens Chambers on *habeas corpus* applications of detained EU nationals was considerably lower than in the previous years. Only three judgments are known to us and reported below. All three were made in the first half of 2004. This decrease may be an indication of a sharp decrease in the use of detention of EU nationals after the judgment of the Judicial Division of the State Council of July 2003 that requires a special decision of the Minister for Aliens Affairs to end the lawful residence of an EU national and allows for detention with a view to expulsion of an EU national only after such ministerial decision has been made, see our previous report. The decrease may also partly be due to the reduction of the judicial control of detention decisions after the abovementioned amendment of the Aliens Act came into force.

Judicial practice

- An Italian national who did not have a residence right under Article 39, 43 or 49 ECT was detained with a view to deportation. Since the detention order did not mention that it has been established that the Union citizen did not have sufficient means and no full medical insurance, the person must be treated as having lawful residence and, hence, could not be detained with a view to deportation. The detention order was annulled and 760 euro for damages awarded, Aliens Chamber Zwolle of The Hague District Court 10 February 2004, LJN: AO6261.
- A Spanish national was detained with a view to expulsion after he had been stopped for joyriding and did not have an identification document with him. The police officers had consulted the computerized police database that mentioned the birth date and the Spanish nationality of the person. The Court held that a short criminal detention and the absence of an identification document are not sufficient grounds for a decision that an EU national does not have lawful residence in the Netherlands. Since it was not disputed that the detained person has Spanish nationality and it has not been established that he does not have lawful residence under Community law, he cannot be expelled. The detention is ended and 2,285 euro for damages are awarded (95 euro for each day of detention at the police station and 70 euro per day of detention at the Provisional Detention Centre (*Huis van Bewaring*), Aliens Chamber Alkmaar of The Hague District Court 17 February 2004, LJN: AO9642.
- A person who claims to be a Portuguese national living for twenty years in France on the basis of a French residence permit, was arrested for shoplifting. He is detained with a view to expulsion on the ground that he produced neither a passport nor an identity card nor docu-

ments on his medical insurance. The person stated that his passport had been stolen, probably in a coffee shop. The District Court held that immigration authorities had not complied with the instruction in the Aliens Circular that a person who claims to be an EU citizen should be granted two weeks to produce his passport or identity, that according to the person he had stayed and been registered with his passport number in several hotels and he had not been allowed to phone his parents who are living in France and only at home after office hours. The detention order was lifted by the court on the ground that it was not compatible with the two weeks rule in the Aliens Circular; decision on the damages was reserved, Aliens Chamber Utrecht of The Hague District Court 15 April 2004, LJN: AO9419.
- The last judgment was squashed in appeal by the Judicial Division of the State Council. Whilst being aware of the reference made by another Aliens Chamber was pending before the Court of Justice in the *Oulane* case, the Judicial Division held that a person who claims to be a Union citizen but is unable to prove this status by a valid passport or national identity card, in principle, has no rights under the EC Treaty, notwithstanding the two weeks rule in the Aliens Circular and the fact that the person gave this birth address in Portugal and the address of his parents in France. The Minister could order the detention with a view to expulsion, Judicial Division of the State Council 7 July 2004, *Jurisprudentie Vreemdelingenrecht* 2004, no. 335. In the meantime, the judgment of the Court in the *Oulane* case has made it clear that the judgment of the Judicial Division was clearly not in conformity with Community law as interpreted by the Court.

Literature

P.J.A.M. Baudoin, De Vreemdelingenwet gewijzigd: rechterlijke toetsing terug naar af, *Migrantenrecht* 2004, p. 225-227.

Remedies

Judicial practice

- A judge is not obliged to apply on his own initiative (*proprio motu*) policy rules, laid down in the Aliens Circular 2000 and in other circulars of the Minister for Aliens Affairs and Integration, that have not been referred to by a party before the court, since these rules are not given on the basis of an explicit rule-making statutory provision and, thus, are no law in the sense of Article 8:69(2) of the General Act on Administrative Law (*Algemene wet bestuursrecht)*, Judicial Division of the State Council 25 February 2004, *Administratiefrechtelijke Beslissingen* 2004, no. 286.
- A German national was detained with a view to expulsion. The District Court lifted the detention order on the ground the Minister had not established whether the person had a residence right in the Netherlands under Article 18 ECT. This judgment was squashed by the Judicial Division because the EU citizen himself before the District Court had not argued that he had a residence right under Community law. Referring to the case law of the Court in the judgments *Van Schijndel, Peterbroeck* and *Kraaijeveld*, it was held that, in the absence of a special procedural Community law rule on the obligation of the national judge to check whether an EU national has a residence right under Article 18(1) ECT, the general rules of national procedural rule are to be applied. Judicial Division of the State Council 2 March 2004, *Administratiefrechtelijke Beslissingen* 2004, no. 129 and 152, with extensive com-

ments by Vermeulen, Winter and Sewandono and *Jurisprudentie Vreemdelingenrecht* 2004, no. 176.
- A Belgian national appealed against the ministerial order declaring him to be an undesirable alien, involving an entry ban for the Netherlands. His appeal was rejected by the District Court. The Judicial Division squashed the judgment on the ground that the District Court in the arguments advanced by the plaintiff should have found sufficient reason to establish whether the Minister in refusing his application had properly applied Community law. EU nationals are granted a conditional right of residence by Article 18(1) ECT. The Judicial Division distinguishes the case from the one in its judgment of 2 March 2004, since in that case the Union citizen did not make any reference to his residence right under Community law before the District Court, The Judicial Division of the State Council 26 July 2004*, Jurisprudentie Vreemdelingenrecht* 2004, no. 362.

Miscellaneous

The Advisory Commission on Aliens Affairs, which has the statutory task to give its advice to the Minister of Aliens Affairs in all cases where claims of EU citizens and their family members to a free movement right under EC law have been refused and an application for administrative review has been filed, during the year 2004 gave its advice to the Minister in 25 individual cases. The outcome of these advices is unknown. In previous years this Commission in almost half of these cases advised the Minister that the original decision should be annulled since the persons concerned had a residence right under Community law.

Literature

R.J.L. van Bokhoven & A. Pahlasingh, De ambtshalve toetsing aan het Europese Gemeenschapsrecht door de bestuursrechter, *Migrantenrecht* 2004, p. 93-99.

Chapter II
Equal Treatment

Texts in force

In 2004 the financial support for classes in the languages of the countries of origin of the main migrants groups in the Netherlands has been abolished with the entry in to force of the Act of 24 May 2004, *Staatsblad* 2004, no. 253 as from the educational year 2004-2005. The relevant provisions in the legislation on primary and secondary education were deleted. On the basis of the old legislation funds were provided for the language education of the children of migrant workers from Greece, Italy, Portugal, Spain and other countries. This was in accordance with Directive 77/486 of the Council of 25 July 1977. The recent abolition is part of the new integration policy of the present government that focuses on learning of the Dutch language and perceives time and money spend on teaching children in the mother tongue of the parents as counterproductive to this aim. The ambassadors of the four Member States before mentioned, having received complaints from parents concerned, approached the Minister of Education in order to point out the special rights of migrants who are EU citizens, but to no avail. A proposal made by immigrant organisations, that the countries of origin or the parents would pay for the teachers and the Dutch government would provide localities free of charge, was turned down by the Minister on the ground that the responsibility for educational facilities had been decentralised from the ministry to the municipal authorities, see *LIZE Bulletin* June 2004, p. 1-2 and November 2004, p. 7.

The same new integration policy also resulted in the proposal in the Bill on the ratification of the Revised European Charter to exclude Article 19(12) ESC, inducing State Parties to facilitate the mother tongue teaching, from the ratification, TK 29941, no. 3, p. 28.

The only remnant of the former mother tongue education is the possibility to use the mother tongue temporarily in the teaching for newly arrived children of migrants under Article 9(8) of the Act on the Primary Education.

As reported last year, in September 2003 a bill on the withdrawal of the Remigration Act (*Remigratiewet)* Act of 22 April 1999, *Staatsblad* 1999, no. 232 was introduced into parliament. The governments' intention was to end the possibility to file new applications for remigration benefits. In 2002 only a limited number of EU citizens returned with such remigration benefits: 6 Greek, 13 Italian, 9 Portuguese and 61 Spanish citizens (*LIZE-bulletin* no. 42, November 2003, p. 7). A larger number of re-migrants, who returned in earlier years, continue to receive monthly payments on the basis of the Remigration Act. After experts had estimated that the withdrawal of the act would cost the government about 40 million euros, because of the increased reliance by retired workers on Dutch health and social security facilities, a majority in the Second Chamber opposed the bill. In October 2004 the government withdraw the bill, TK 29020, no. 10. Thus, the Remigration Act remains in force.

In 2004 the Netherlands has ratified the 12th Protocol to European Convention on Human Rights, containing a general non-discrimination provision, Act of 13 May 2004, *Staatsblad* 2004, no. 302. The 12th Protocol entered into force on 1 April 2005 after ten State Parties had ratified the Protocol.

The nationality and residence requirements for the owners or board members of companies owing Dutch seagoing vessels in Article 311 Commercial Code (*Wetboek van Koop-*

handel), that the Court in its judgment of 14 October 2004 (case C-299/02) held to be a violation of the Articles 43 and 48 EC Treaty, are still in force.

Draft legislation

In an effort to stop the establishment of new Muslim schools, that under the present educational legislation are entitled to full government funding if the school offers education in conformity with the Dutch educational legislation, the government has announced to introduce new requirements for this funding in the educational legislation. One of the new requirements announced is that all members of the school board should have Dutch nationality. After parliamentary questions on this new condition, the Minister of Education answered that Article 39 EC Treaty and Article 1 of the 12th Protocol to the ECHR might restrict the possibility to introduce this nationality requirement, TK 29536, no. 2, p. 31.

Jurisprudence

- It has been held that the rule precluding a Dutch cross-border worker in Belgium from a specific reduction on his income tax does not violate the case law of the ECJ in the judgments *Schumacker* and *De Groot*, Hoge Raad 26 November 2004.
- A Spanish national was requested to identify herself at the occasion of taking her practice test for the Dutch driving licence. The official who conducted the test did not accept her Spanish passport as sufficient identification document, but requested that she present her residence permit to prove that she had lawful residence in the Netherlands. She had her residence permit at home. It was held that the document was requested only for the purpose of identification and not for establishing that the candidate has lawful residence in the Netherlands, since that is not a condition for performing the test. According to the relevant national rules the candidate had to present either a Dutch passport or another document mentioned in the Act on the identification obligation and a Spanish passport would not be sufficient for this purpose. However, a Union citizen on the basis of Article 17 ECT has a residence right in the Netherlands, unless the Minister for Aliens Affairs has decided otherwise. Thus, the directly applicable rules of Community law require that a passport of an EU national is accepted as sufficient identification document notwithstanding the fact that a national rule says otherwise, Nationale Ombudsman 27 October 2004, Report 2004/417.
- A Polish worker on a temporary labour contract was excluded from the private pension agreement offered by the employer to his workers with a permanent labour contract. The Equal Treatment Commission held that this difference in treatment violates the Equal Treatment Act, whilst the compensation paid by the employer to the temporary workers amounted only to a part of the pension premiums paid by the employer for his permanent workers, Commissie Gelijke Behandeling 1 July 2004, Opinion 2004-81.
- In a similar case where the employer applied a waiting period of 6 months for all workers and excluded seasonal workers from the company's pension scheme, the Commission held that this policy did not violate the Equal Treatment Act, because getting the necessary information concerning the worker and his partner, living in Poland, would create serious practical problems, Commissie Gelijke Behandeling 21 June 2004, Opinion 2004-76.

Miscellaneous

The low wages, substandard housing, long working hours, non-payment of wages and other bad labour conditions of workers from Greece, Portugal and Spain recruited for temporary work through dubious intermediary employment agencies has been the subject of repeated reports in the Dutch and the Portuguese press under headings as "Slave in Holland?" (*De Groene Amsterdammer* 28 February 2004) or "Recruitment of guest workers anno 2004, Does History Repeat Itself?" (*LIZE Bulletin*, November 2004, p. 6). A letter by an organisation of Portuguese immigrants in the Netherlands to the Minister of Social Affairs and the Minister for Aliens Affairs and Integration complaining about this situation and making recommendations to end this situation, according to the organisation, remained without reply.

Literature

E. Cremers, Wet gelijke behandeling op grond van leeftijd bij de arbeid, *PS* 2004, no. 3, p. 347-362, on the implementation of the General Equal Treatment Directive of 2000 by the Dutch legislation against age discrimination that entered into force in 2003.

S. Prechal, Equality of treatment, non-discrimination and social policy: Achievements in three themes, *Common Market Law Review* 2004, p. 533-551

P.V.S. Moons, Meestbegunstiging kan binnen de Europese fiscale rechtsorde worden toegepast, *Weekblad Fiscaal Recht* 2003, p. 1145-1153, arguing that the most favoured treatment clause in agreement with third countries can be applied in the fiscal law within the EU.

Chapter III
Employment in the Public Sector

Texts in force

As described in earlier reports, the requirement of Dutch nationality applies, generally, for appointment in posts in the judiciary, the police, the armed forces, the diplomatic service and for appointment in civil service job defined as security functions (*vertrouwensfuncties*). This last category is provided for in Article 125e of the Civil Service Act (*Ambtenarenwet*). The requirement of Dutch nationality for appointment in the judiciairy is to be found in Article 1c of the Act on the status of judicial officials (*Wet rechtspositie rechterlijke ambtenaren*), for the armed forces in Article 129 of the Act on military personnel (*Militaire ambtenarenwet*), for the diplomatic service in Article 17(4) and several other provisions of the Rules on the Foreign Service (*Reglement Buitenlandse Dienst*). Moreover, all jobs at the Ministry of Defense are qualified as security functions and thus Dutch nationality is required. The nationality requirement is mentioned on the websites for the recruitment for the armed forces. The requirement is not mentioned on the websites of the police forces. The police have the practice of accepting foreign nationals resident in the Netherlands for their training programmes, on the condition that the candidates will apply for naturalisation and thus will have Dutch nationality at the time of appointment as police officer.

Moreover, the nationality requirement still is in force for a few high state offices such as the National Ombudsman, members of the State Council, the heads of the provincial administration (*Commissaris van de Koninginin*, see Article 63 Provincial Act), for the *burgemeester*, the head of the municipal authority (Article 63 Municipal Act) and for the appointment as notary (Article 6(1) *Notariswet*) and as bailiff (Article 5(1) *Gerechtsdeurwaarderswet*).

The statutory rules on the nationality of captains on Dutch ships have been liberalized in 2003. After the amendment of Article 30 of the *Zeevaartbemanningswet* by the Act of 22 May 2003, *Staatsblad* 2003, 259, citizens of the EEA Member States are exempted from the rule that requires captains of Dutch ships to have Dutch nationality. This exemption does not apply to captains of fishing vessels.

The Dutch legislation does not provide for a system of recruitment of civil servants or employees in the public service, comparable to the system of the *concours* applied in France, which was the subject of the judgment of the Court of in the *Burbaud* case. Neither is a comparable system applied in practice.

In the Explanatory Memorandum to the Bill on the implementation of the 1999 Agreement EC-Switzerland on the free movement of persons, the government, referring to Article 10 of Annex I to that Agreement, states that there is no need to make a distinction between Swiss nationals and the non-Dutch nationals of EU Members States as to access to jobs in the public services related to the exercise of public power. Hence there is no need to amend the existing Dutch legislation on the access to jobs in the public service requiring security clearance and no need to amend the legislation on the appointment as judge, notary or bailiff, TK 29607, no. 3, p. 3.

Miscellaneous

The increased attention on the combating of terrorism and the prevention of other serious crimes (such as major robberies of valuable cargo at Schiphol Airport) may have resulted in an increase of the number of jobs designated are "security jobs" both in the public and the private sector. The total number of security checks requested from the national secret service (AIVD) was 13,000 in 2004 and is estimated at 15,500 in 2005, TK 29800 VII, no. 3, p. 73 and no. 8, p. 22. The majority of these checks are performed by third parties under the auspices of the AIVD, TK 29876, no. 3, p. 12. As explained in previous reports the security clearance required for such jobs may prove a special barrier for the employment of migrant workers, since the security clearance procedure of persons, who have lived abroad part of their life, may take considerably more time in case agencies in other countries have to be consulted. This effect was confirmed in the debate on the recent report evaluating the activities of the AIVD (TK 29843, no. 1, p. 12 and 232/24).

Chapter IV
Family members

Texts in force

In an amendment of the Aliens Circular 2000 the Minister for Aliens Affairs and Integration instructs the immigration authorities that, once the family relationship between an EU national or Swiss citizen and his family member has broken down, that family member automatically loses his or her residence right under Community law. The IND will inform the local aliens police that will then have to take back the residence document. The family member will thereafter have the opportunity to apply with the municipal authorities for a renewed check whether he or she (still) has a residence right under Community law and is entitled to a residence document. Remedies are available against the decision on that application. The circular further mentions the possibility that the family member is entitled to continued residence under Article 12 of Regulation 1612/68, making reference to the *Baumbast* judgment of the Court of Justice and to the possibility that the family member is entitled to look for employment for six months, if he or she is an EEA or Swiss national, see Aliens Circular under B10/5.4.2.

After a judgment of the Judicial Division of the State Council, the policy rule, requiring the nationals of certain third countries qualified as "problem countries" to have their documents on birth and marriage issued by the authorities of these countries not only legalized but also the content of the documents verified by the Dutch consular authorities in these countries, has been abolished. Verification of these documents, which often proved a serious barrier for third country family members desiring to reunite with an EU national living in the Netherlands, now is restricted to cases where there are serious indications that the documents are false or the facts in those documents are incorrect.

According to the Dutch Government, Directive 2003/83/EC on the right to family reunification has been implemented by the amendments of the Aliens Decree 2000 introduced by the Royal Decree of 22 September 2004, *Staatsblad* 2004, no. 496. The Minister for Aliens Affairs and Integration announced that the rules of the Directive will also be applied to Dutch nationals who have not made use of their right to free movement under Community law, see the new par. B2/1 inserted in the Aliens Circular in October 2004, *Staatscourant* 27 October 2004, no. 207, p. 10.

Judicial practice

- A Dutch national, whilst working in Spain reunited there with his wife and children, having the nationality of India. After he had returned to the Netherlands, the Dutch immigration authorities refused to admit the spouse and children without verification of the birth and marriage certificates. Making reference to the *MRAX* judgment, the District Court held that once the Spanish authorities had accepted the legalized documents concerning birth and marriage and had notified the family relationship in the Spanish residence permit, it would be contrary to Article 4(3) of Directive 68/360/EEC for the Dutch authorities to require more documents proving the family relationship, Aliens Chamber Haarlem of The Hague District Court 15 March 2004, AWB 03/54893, unpublished.
- The fact, that the exemption from the obligation to obtain a long term residence visa (*machtiging tot voorlopig verblijf*) for a third country national family member desiring to

reunite with an EU migrant living in the Netherlands does not apply to the family reunification of Dutch nationals not having used their freedom of movement (reverse discrimination), does not violate Article 26 ICCPR. The court considered that the exemption is related to Community law on free movement and that there is no obligation for the Netherlands to extend the exemption to other family members, Aliens Chamber 9 September 2004, LJN: AR3411.

Miscellaneous

After it had been reported in the press that the introduction of stricter income and age requirements for the admission of family members in the national rules had resulted in Dutch nationals moving to Belgium and applying there for family reunification under the more liberal Community law rules on free movement (*De Telegraaf* 23 September 2004), parliamentary questions were put to the Minister for Aliens Affairs and Integration. The new requirements (120% of the statutory minimum wage and the 21 years minimum age limit for spouses) apply both to third country nationals and Dutch nationals. The Minister in her reply denied that it was standard practice for municipal authorities to advise Dutch nationals to migrate to Belgium in order to obtain family reunification more speedily. According to the Minister the national Belgian immigration service did not notice an increase of applications for family reunification by Dutch nationals. However, the aliens police of Antwerp had observed an increase in such applications. The Minister explained that under Community law migrants are entitled to a far more liberal family reunification than under national Dutch rules. She announced that she would have consultation with her Belgian and other EU colleagues in order to avoid misuse of the Community law rules, *Aanhangsel Handelingen* 2004-2005, no. 334, see Annex 9 and again in TK 29700, no. 6, p. 45.

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Chapter V
Influence of Recent Judgments of the Court of Justice

The case law of the Court in *Baumbast*, *Carpenter*, *MRAX* and *Grzelczyck* and the reasoned opinion of the Commission issued in April 2003 have resulted in a long Aliens Circular TBV 2004/1 on Union Citizenship, see chapter I of this report.

The change in the case law of the Judicial Division of the State Council forcing the national courts to take a more active role in supervising the correct application of Community law rules on free movement, might be partly a consequence of the judgment of the Court in *Orfanopoulos* and in a series of recent judgments of the Court interpreting the rules under the Association Agreement EEC-Turkey.

The judgment of the Court in the case C-445/03 *Commission/Luxembourg*, was met by a quick response of the Dutch government announcing in November 2004 that the Aliens Employment Act would be amended as to replace the obligation of service providers established in another Member State to have a work permit for their employees and replace it by an obligation to notify the Dutch authorities of the use of their employment before the start of the service provision, see chapter VII on Enlargement.

The 2002 judgment of the Court in the *Dreessen* case has been implemented in the Netherlands by an extensive amendment of the Act on the title of Architect, see chapter X of this report.

The follow-up on the judgments in the cases *Müller-Fauré* and *Van Riet* in the national case law and practice of the Dutch health care legislation are discussed in chapter IX.

Chapter VI
Policies of a General Nature with Possible Repercussions on the Free Movement of Union Citizens

Texts in force

In a belated effort to follow the British and German example and stimulate highly educated nationals of countries outside the EEA to come and work in the Netherlands, the government published in May 2004 a Green Paper on the admission of so-called knowledge migrants (*kennismigranten*), TK 29200 VI, no. 164. For these migrants a special accelerated admission procedure has been established. All decisions regarding the admission of these migrants are concentrated in one single office within the IND. The main elements of the accelerated procedure are:

- the decision on long-term residence visa will be made within two weeks of the application;
- the migrants are exempted from the work permit legislation;
- no legalization or verification of documents; the passport is sufficient;
- the residence permit may be granted for a period of five years at admission; after these five years the migrant may qualify for a permanent residence permit, see the amendments in Articles 3.4(1) and 3.59 of the Aliens Decree inserted by Royal Decree of 27 December 2004, *Staatsblad* 2004, no. 482, Annex 10;
- reduced fees for the residence permit for the migrant his spouse and children.

The term 'knowledge migrant' is defined in the new Article 1d of the Implementing Decree of the Aliens Employment Act, inserted by the Royal Decree of 28 September 2004, *Staatsblad* 2004, no. 481, Annex 11. The main conditions are:

(a) employment in the Netherlands on the basis of a labour contract that entitles the worker to a gross yearly income of at least 45,000 euro if (s)he is 30 years or older, or 32,600 if (s)he is younger than 30 years; for Ph.D. students employed by a university or other higher educational insitution financed mainly from public funds there is no income limit;

(b) the employer provides a written guarantee that all information provided by the immigrant in his application for the visa and the residence permit is correct, that the employer will pay the fees for the residence permits of the migrant and his family, that he will inform the IND about the end of the labour contract, and that he will pay all costs that the state or other public bodies may incur in relation with the presence of the migrant, including the costs of his expulsion, see Ministerial Regulation of 23 December 2004, amending Aliens Regulation, *Staatscourant* 28 December 2004, no. 251, p. 16 ff, Annex 12.

Three categories of jobs are explicitly excluded from this new scheme: professional football players, religious functionaries and sex-related jobs (*Bien étonné de se trouver ensemble*).

According to the Explanatory Memorandum with the last mentioned Royal Decree this accelerated procedure also applies to workers from the eight new Member States during the transitional period. Neither in the Green Paper nor in the Royal Decree mention is made of the possible negative effects for the access of highly educated workers from other EU Member States to employment in the Netherlands or of the preference of Turkish workers under

Association Council Decision 1/80 in relation to this new scheme for the admission of workers from third countries. This new scheme started to work on 1 October 2004.

Another measure aimed at stimulating the mobility of highly educated persons and promoting the "knowledge economy" in the Netherlands was the exemption of the work permit obligation of three categories of migrants:

- visiting teaching staff working at a university or other institution of higher education;
- researchers working on the basis of a scholarship granted by the European Union, by the Dutch government, by an officially recognized and subsidized research institute or under a bilateral or multilateral agreement;
- persons who have been admitted to the Netherlands for employment within the framework of an official action programme of the European Union.

This measure exempts third country nationals admitted under the Leonardo da Vinci, Socrates and Tempus programmes from the work permit obligation, Royal Decree of 22 April 2004, *Staatsblad* 2004, no. 183, Annex 13.

Draft legislation

In April 2004 the Minister for Aliens Affairs and Integration published a Green Paper on the revised integration policy of the government, TK 29543, nos. 1-2. The four main elements of the policy are:

(1) an integration test (Dutch language and basic knowledge of Dutch society) will be a new condition for admission of spouses of Dutch nationals and third country nationals; the test will be administered at the Dutch embassies in a telephone conversation with a computer in the Netherlands; only after this test has been passed a visa for family reunification will be granted;
(2) an integration test for newcomers in the Netherlands; the test should be passed within three years after admission; if this test is not passed the admitted spouses will not get an independent residence permit; passing this test will also be a new condition for a permanent residence permit;
(3) a three hours language and integration test for applicants for naturalisation;
(4) an integration test for established immigrants (so-called old-comers, *oudkomers*), irrespective of whether they have Dutch nationality or not; originally it was planned that each person born outside the EU should be obliged to go to the municipal authorities to prove his knowledge of the Dutch language and society (TK 29543, no. 2, p. 23); in a revised version this measure will only apply to persons with less than eight years of residence in the Netherlands during their schooling age (TK 29543, no. 4); the apparent intention is to exclude indigenous Dutch from this test; not passing this test within the time limit should be sanctioned with administrative fines.

Other features of the new policy are the reduction of government funds for the integration courses. The migrants are supposed to pay for the language courses and for the costs of the tests. The government may offer loans to pay part of these costs. Only for certain specific categories, such as married female old-comers, will the government continue to bear the costs of the language courses. Further, the government will, in principle, no longer take the responsibility for the organisation of sufficient Dutch language courses. The availability of these courses will be left to market forces.

So far, only the third element, the new naturalisation test, has been applied in practice. As reported in our previous report, the introduction of that test in April 2003 caused a sharp decline in the number of applicants for naturalisation. In 2003 the number of naturalisations decreased with 40% in comparison with the previous year.

The Bill proposing to amend the Aliens Act in order to introduce the integration test abroad as a new condition for the admission of spouses was introduced in 2004 and is pending before the Senate after having been approved by the Second Chamber in March 2005.

The Bill on the integration obligation for long established immigrants has been sent by the government to the State Council for its advice in March 2005.

With the exception of the new naturalisation test, all three other measures have given rise to serious questions as to their compatibility with Community law on movement of persons. EEA and Swiss nationals are explicitly excluded from the integration test abroad and the integration test for newcomers (with regard to the integration test for long established immigrants this is not yet fully clear). Nevertheless, there are still many unanswered questions, to mention a few examples:

- Will the third country family members of EU migrants in the Netherlands be required to take the integration test abroad? The Dutch government has asked the Commission for its view on this issue (TK 29700, no. 6, p. 45).
- Does Article 7 of Directive 2003/86/EC on the right to family reunification allow for an integration test abroad when the Dutch government does not guarantee the availability of appropriate language training and makes the immigrant pay for the course and the tests? Article 7 uses the words "integration measures" in most (all?) language versions, only in the Dutch language version it speaks of "integration conditions" (*integratievoorwaarden*).
- Is the new integration condition for the permanent residence permit compatible with the standstill clauses adopted under the Association Treaty EEC-Turkey, since the permanent residence permit under Dutch law grants full exemption from the work permit legislation?
- Are the equal treatment clauses in the Association Agreements concluded by the EC with third countries relevant for the introduction of integration obligations when indigenous Dutch workers are exempted?

Your rapporteur holds the view that the drafters of this new integration policies and the related bills seriously underestimated the extent to which the freedom of action of the Member States is restricted by Community rules on free movement, the provisions of Association Agreement concluded by the EC and by some of the new Directives on the status of third-country nationals adopted by the Council under Title IV ECT.

For a detailed discussion of those and other questions see Oosterom-Staples 2004, Boeles 2005 and Groenendijk 2005.

At first, the government apparently underestimated the relevance of Community law for its new policy. After repeated references to the rules under the Association EEC-Turkey in reports of the official Advisory Committee on Aliens Affairs and similar questions raised in Parliament, in 2004 the Minister commissioned an expert of the University of Tilburg to write a report on this issue, see Oosterom-Staples 2004. A summary of that long descriptive report has been published in the parliamentary documents, TK 29543, no. 4, p. 33-40, Annex 14. The author advises the Minister to ask for an opinion of the European Commission on

this issue. The Minister promised in Parliament to consult the European Commission on the matter of compatibility with Community law.

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Chapter VII
EU Enlargement

Texts in force

In our report on 2002-2003 we have mentioned that since 2001 three successive Dutch governments stated as their official policy that the Dutch labour market would be open for workers from the new Member States after accession. Only in case of serious disturbances of the labour market would the labour permit obligation be reintroduced for those workers (TK 20400 XV no. 59 and TK 28198 no. 2, p. 11). In October 2003 the present government Balkenende-II (CDA, VVD and D66) repeated the same policy at the time of the discussion on the Bill on the ratification of the Accession Treaties (TK 28972 no. 5, p. 33/34). During Autumn of 2003 in the press and in Parliament voices demanding guarantees against an expected mass immigration from Poland and other new Member States were growing.

Generally the reasoning was that, since Germany and Austria were introducing barriers to employment of workers from the new Member States during the transitional period after accession, those workers would flood the Netherlands. The Central Planning Office (*Centraal Planbureau*) was commissioned by the government to make a review of the research on migration from the new Member States. In January 2004 the office published its forecast of the expected migration from those countries to the Netherlands. In the report it was estimated that not more than 20,000 workers from Poland and the other new Member States would come to the Netherlands annually. The government announced that it would introduce a quota of 20,000 labour permits to be issued without labour market test during the first year (TK 29407, no. 1). This statement, however, did not stop the political opposition. Christian-democrat and conservative MP's asked for stricter rules during the transitional period (TK 29407, nos. 2 and 8). In April 2004 the government agreed to follow the majority in the Second Chamber that had asked to prevent labour migration from Poland. The obligation to have a labour permit would remain in place during the first phase of the transitional period. Later it was announced that the work permit and the labour market test would remain in force until 1 May 2006 (TK 29800, XV, no. 2, p. 14).

Only for certain jobs in four sectors (international road transport, inland shipping, hospitals and meat industry), where there was a clearly unmet demand for immigrant workers, an exemption from the labour market test was allowed (TK 29407, nos. 9 and 10). Three days before the accession a Dutch TV station broadcasted the results of a survey in Poland that indicated that more than 700,000 Polish citizens were considering to work in the Netherlands. At the same time, employers in agriculture and horticulture asked for more liberal rules on the employment of seasonal workers from the new Member States.

Most of the national rules on the residence status and the access to employment for nationals of the eight new Member States during the first part of the transitional period are to be found in two documents: (1) a Decision of the Minister for Aliens Affairs and Integration of 25 March 2004 (WBV 2004/25, *Staatscourant* 1 April 2004, no 64, p. 11, see Annex 15) amending the Aliens Circular (*Vreemdelingencirculaire*), and (2) a decision of the State Secretary for Social Affairs of 14 April 2004, *Staatscourant* 19 April 2004, no. 74, p. 39 (see Annex 16), inserting a new paragraph 19a in the Rules on the implementation of the Aliens Employment Act (*Wet arbeid vreemdelingen*).

In accordance with the prevailing routine of the Ministry of Justice on the implementation of the rules on free movement of Union citizens and the rules based on Association Treaties concluded by the Community, most of the rules on the free movement of the citizens of the eight new Member States were implemented not in statutory instruments but by amending the Aliens Circular (*Vreemdelingencirculaire 2000)*. In the introduction of the chapter on EU citizens, chapter B10 of the Aliens Circular, the accession of the ten new Member States was mentioned together with a reference to the rules on the transitional period that are stipulated in a new paragraph 8 of chapter B10. Further, it was mentioned that those rules on the transitional period do not apply to Polish and Czech citizens, having German nationality by descent.

At the beginning of the new paragraph 8 containing the rules on the transitional period "for nationals of Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia, Slovakia and the Czech Republic and the members of their families, irrespective of their nationality" it is mentioned that all rules on free movement of Union citizens apply to the nationals of Cyprus and Malta and that the Articles 1-6 of Regulation 1612/68/EEC do not apply to the nationals of the other eight new Member States and their family members, as long as the rules on the transitional period contained in paragraph B10/8 of the Aliens Circular will be applied to them, provisionally until 1 May 2006.

In para. B10/8.1 it is mentioned that nationals of the eight Member States have the right to look for employment for a period of six months, according to Article 3.3(1)(d) of the Aliens Decree, but that employers need a work permit before they are allowed to employ them. Hence, those persons upon request will be granted a sticker in their travel document mentioning that the person is a Union citizen but with two statements "work permitted; work permit required" and "a (more than complementary) recourse to public funds may have consequences for the right to residence".

In para. B10/8.2 of the Aliens Circular the Minister uses the discretion allowed to the old Member States under the relevant Annex to the Accession Treaties. Nationals of the eight new Member States, who on 1 May 2004 had worked already lawfully for 12 months or had been allowed access to employment for 12 months, are to be given the same treatment as citizens of the old Member States. They have free access to the Dutch labour market, but not to the labour market of other Member States that apply exceptions during the transitional period. Nationals of the eight new Member States who *after* 1 May 2004 have been allowed access to employment for 12 months, are to be granted an EEC-residence card with the statement "work allowed; work permit only required during the first 12 months".

Both categories of workers, according to the Circular, lose their rights if they voluntarily leave the labour market, unless they continue to work as a self-employed person or a service provider. However, if they take up employment after that period again, their employer will need a work permit again for the first 12 months before the worker is allowed free access to all employment (par. B10/8.2(c) and B10/8.4 of the Aliens Circular).

Nationals of the eight new Member States who *after* 1 May 2004 have been allowed access to employment for less than 12 months, are to be granted a normal residence permit valid for the expected duration of the employment and containing the statement "work permitted; work permit required".

The position of family members is dealt with in par. B10/8.3. It is acknowledged that the spouse, the registered partner and the children under 21 years or in his charge of a national of the eight new Member States who on 1 May 2004 had lawfully worked for 12 months, are entitled to residence and have free access to the labour market. Upon request

they are issued with an EEC residence card with the statement "work allowed; no work permit required". For family members admitted after accession, this free access is only granted after 18 months of residence in the Netherlands or as of 1 May 2006. However, for those family members the more favourable national rule will be applied: family members admitted under Dutch law are granted the same access to the labour market as the family who was first admitted, see par. B10/8.3(c).

Students from the new Member States are allowed to work without a labour permit if they are enrolled in a recognized educational institution and work for less than ten hours a week. The latter restriction does not apply during the months June-August. Those students are considered not to lose their status as a student once they look for work or are actually employed. Self-employed persons and service providers, according to the Circular, do lose that status if they are employed in a job that is real and effective, see B10/8.4.

In September 2004 the Minister issued a "clarification and correction" of two elements of the original version of paragraph B10/8.4 of the Aliens Circular concerning the access of the nationals wanting to work as an employee after they have been working as a self-employed person or a service provider and concerning the work permit exemption of students with a residence right under Directive 93/96/EEC, see Decision of the Minister for Aliens Affairs and Integration of 1 September 2004, WBV 2004/55, *Staatscourant* 14 September 2004, no. 176, p. 10, Annex 17. To the extent that this amendment of the Aliens Circular amounts to the introduction of new restrictions in comparison with the texts that entered into force on 1 May 2004, it can be questioned whether those amendments are a violation of the standstill rule in the provision on free movement in the Annexes to the Accession Treaties.

Nationals from the new Member States, who have privileged treatment under the transitional rule only have to pay the same reduced fee for their residence document, which is levied from nationals from the old Member States. Other nationals from the new Member States and their family members may apply for a regular residence permit. In those cases the general Dutch rules on admission of third country nationals apply and the persons will have to pay the high fees for their residence permits as provided for in Article 3.34 and 3.34a of the Aliens Regulations (430 euro for persons of 12 years of age or older and 285 euro for those under 12 years), see par. B10/8.5 and 8.6. No residence permits are granted to nationals of the new Member States whose employment, wholly or partially, aims at conducting sexual activities with third persons (par. B10/8.7).

Finally, the scope of paragraph B11/6 of the Aliens Circular on the Europe Agreements is limited to the agreements with Bulgaria and Romania.

The complexity of the rules on the transitional period caused problems not only for the citizens of the new Member States, but also for the Dutch authorities. It appeared that in The Hague, and possibly in other municipalities as well, the municipal authorities issued residence stickers with the notification "employment allowed" to citizens of the eight new Member States, who under the Dutch rules would need a work permit during the transitional period in order to perform lawful employment, but because of the residence sticker were exempted from the work permit obligation, *Aanhangsel Handelingen* TK 2003-2004, no. 1841, Annex 18.

According to Article 8(1) of the Aliens Employment Act (*Wet arbeid vreemdelingen*) a work permit has to be refused to an employer who wants to employ an alien, for whom a work permit is required, if there are other workers in the Netherlands or in the EU available for the job (labour market test) or if the vacancy has not been notified to the regional em-

ployment authorities five weeks in advance. The Minister of Social Affairs may exempt certain categories of aliens from those two requirements in the interest of the development of international trade activities, see Article 8(3) of the Act. The Minister of Social Affairs has stipulated detailed rules on the implementation of the Act in a Regulation (*Uitvoeringsregels Wet arbeid vreemdelingen*). In the abovementioned amendment of these rules by the decision of the State Secretary for Social Affairs of 14 April 2005 a new paragraph 19a was inserted in these Rules. In this new paragraph the Minister using his powers under Article 8(3) of the Act, empowered the Central organisation for work and income (CWI) to determine for a period of no longer than three months that an employer desiring to employ a worker who is a national of one of the eight new Member States, will be exempted from the statutory obligation to possess a work permit for this worker, provided the job falls within a sector or profession to be determined by the CWI. This exemption may be prolonged each time for a maximum of three months by the CWI. The decision of the CWI has to be based on the proven lack of sufficient privileged persons looking for jobs in the Netherlands and the EU (on the basis of consultation of Eures), the expectation that workers willing to perform these jobs are available in the new Member States and a prognosis on the number of privileged workers that will be available within six months.

On the basis of this new competence the CWI, in accordance with statements made by the Secretary of State in Parliament, in May 2004 amended its own policy rules (*Beleidsregels uitvoering Wet arbeid vreemdelingen*) stipulating that as of 1 May 2004 employers who wanted to employ a national of the eight new Member States in eight categories of jobs were exempted from the individual labour market test and the obligation to notify the vacancy five weeks in advance. The eight categories were: drivers in international road transport, sailor and officer in inland shipping, operation room assistant, x-ray assistant and x-ray diagnostic assistant in hospitals, boning worker and slaughter men in the meat industry (Decision of the CWI Board of 4 May 2004, *Staatscourant* 11 May 2004, no. 89, p. 16, see Annex 19).

However, two weeks before the accession date, the same Christian-democrat MP who had campaigned for a restrictive policy and MP's from other parties, in reaction to requests by a national farmers organization, asked the government to introduce an exemption from the labour market test for workers from the new Member States employed in seasonal and harvesting jobs as well (TK 29407, no. 12). After a motion had been adopted by the Second Chamber of Parliament, the government agreed with this request and the CWI, after having concluded an agreement with the agricultural employers organisation, amended its earlier implementing rules on the access to employment accordingly, a few weeks after they had entered into force (TK 29407, nos. 15 and 18). Thus, the same exemption was granted for employment in seasonal jobs in agriculture and horticulture for jobs up to two months. The exemption was not valid for jobs in greenhouses and it lasted from 1 June to 1 September 2004, Decision of the CWI Board of 7 June 2004, *Staatscourant* 10 June 2004, no. 108, p. 13, Annex 20). The exemption was explicitly discontinued at the end of August 2004 by a Decision of the CWI Board of 12 August 2004, *Staatscourant* 16 August 2004, no. 155, p. 32, Annex 21).

The exemption for the other eight categories of jobs has been extended until 1 November 2004 when the exemption for the meat industry was restricted to certain specified jobs. The exemption for this sector was deleted completely on 1 February 2005, Decisions of the CWI Board of 19 October 2004, *Staatscourant* 26 October 2004, no. 206, p. 13 and of 7 February 2005, *Staatscourant* 7 February 2005, no. 26, p. 18, see Annexes 22 and 23. Again,

the question arises whether this form of gradual de-liberalization is permitted under the standstill-clause in the relevant Annex to the Accession Treaties.

Nationals of the new Member States may be exempted from the Aliens Employment Act, and thus their employers are not obliged to have a work permit for them, on the basis of the general exemptions under this Act. This applies among others to spouses of a Dutch national or to persons holding a residence permit for self-employment.

However, the Dutch authorities require companies established in the new Member States that provide services in the Netherlands to apply for work permits for their employees, both nationals of the new Member States and third country nationals, involved in the provision of those services. This policy apparently is not in line with the jurisprudence of the Court in *Rush Portuguesa* and *VanderElst*. In the press and in public debate those (often Polish workers) were disqualified as illegal workers. They were often mentioned in relation to the pending legislation on stricter sanctions against illegal workers. The press mentioned the complaint filed by four Polish companies with the European Commission concerning this practice, *NRC-Handelsblad* 10 September 2004. After the judgment of the Court in the case C-445/03 *Commission/Luxembourg*, the government in November 2004 announced that its policy would be changed: the Aliens Employment Act would be amended as to replace the obligation of these service providers to have a work permit for their employees by an obligation to notify the Dutch authorities of the use of their employment before the start of the service provision. The introduction of the relevant Bill has been announced for the second quarter of 2005 (TK 29407, no. 20 and 25501-31, no. 65).

As explained in Chapter VI above, highly educated and well-paid workers from the eight new Member States and their Dutch employers are able to use the accelerated admission procedure for knowledge workers during the transitional period. These workers are exempted from the work permit obligation.

Draft legislation

In 2004 a Bill, amending the Aliens Employment Act, has been under discussion in Parliament. The aim is to enlarge the possibilities to enforce sanctions on illegal employers. The maximum penalty will be increased from 1,000 euro per illegally employed worker to 4,000 euro for individuals employing workers without the required work permit and to 8,000 euro for companies. This penalty can be levied directly by the administrative authorities, thus avoiding the cumbersome criminal procedure. Moreover, the number of labour inspectors will be increased in order to guarantee a more effective implementation of the work permit legislation (TK 28442, no. 10). In the debate on this Bill the need to fight illegal workers (in 2004 often a code word for Polish workers) taking away jobs of Dutch workers played a central role (TK 29407, nos. 3 and 7). The Bill was adopted by Parliament at the end of 2004 (Act of 2 December 2004, *Staatsblad* 2004, 705, *Wet bestuurlijke boete arbeid vreemdelingen*) and the amendments entered into force on 1 January 2005 (Royal Decree of 13 December 2004, *Staatsblad* 2004, 706)**.**

In 2004 the government stated its intention to extend the coverage of the legislation on the labour conditions of cross-border posted workers (*Wet arbeidsvoorwaarden grensoverschrijdende arbeid*). This Act was introduced in 1999 in order to implement Directive 96/71/EC. Until now it only applies to posted workers in the building industry. The government's intention is to extend the legislation to employment in all sectors. This extension is

apparently related to migration from the new Member States to the Netherlands after 1 May 2004 (TK 29407, nos. 14, 16, 17 and 19).

Judicial practice

After two references by Dutch courts of questions on the interpretation of the Europe Agreements, especially concerning the competence of the Dutch authorities to require nationals of the CEEC states, wishing to use their freedom of establishment in the Netherlands, to obtain a long-term visa before entry in the country, the handling of most of the similar cases in the Aliens Chamber of the District Courts was suspended.
- A Lithuanian national was admitted for reunion with her partner living in the Netherlands and was lawfully employed. After the relationship came to an end, she applied for a residence permit in order to live with her new partner. The requirement of the Dutch immigration authorities that she would first return to Lithuania and apply for a long term residence visa (*mvv*) was held to serve no reasonable purpose and, since she was lawfully employed at that time, was held to be a discrimination prohibited by Article 37(1) Association Agreement EC-Lithuania, Aliens Chamber Rotterdam of the District Court of The Hague 31.3.2004, *Migrantenrecht* 2004, 52.
- Fifteen Polish workers, who were employed without a work permit were summoned by the Intervention Team Illegal Labour of the Ministry of Social Affairs to stop working under threat of detention and deportation, in September 2004 asked for an injunction against this action; the court held that it did not have the competence to deal with this request since the complained action was not a decision but only a control activity (from the judgment it is unclear why the Polish workers considered that they did not need a work permit), Aliens Chamber Den Bosch of the District Court of The Hague 17 November 2004, Migratieweb.
- Twelve Polish workers who claimed to have a permanent labour contract with a Polish company providing service in the Netherlands, were stopped by the Intervention Team Illegal Labour of the Ministry of Social Affairs while working in the fields without a labour permit. Since the workers were unable to document their claim that they were working for a Polish service provider, the control activities that interfered with their work, were not in violation of Article 49 EC Treaty, District Court of The Hague 21 December 2004, KG 04/1155, unpublished.

Miscellaneous

A detailed description and analysis of the various legal constructions used for the employment of Polish workers or Polish self-employed persons and the relative costs and advantages of employment of these workers, see H.M. ter Beek a.o. 2004 and TK 29407, no. 17.

From the data on work permits issued and from the official migration statistics it is clear that the large majority of workers from the ten new Member States that actually were employed in the Netherlands in 2004 were nationals of Poland. From the data presented in chapter VIII it is clear that the number of work permits issued to Polish workers was considerably higher in 2004 compared to the previous year. This does not necessarily indicate a comparable increase in the labour migration. Part of the work permits may have been granted to Polish workers that performed the same or similar jobs without documents in 2003. This part of the increase merely indicates a regularisation of formerly illegal employment. This regularisation effect of the accession of Poland to the EU may also be visible in the peak in

applications for a social-fiscal number in the first three month after the accession: half of the 31,000 social-fiscal numbers issued to persons with an address in Poland in the year 2004 were issued in May-July 2004.

The total number of work permits granted to nationals of the eight new Member States during the first nine months of 2004 was little over 25,700. Considering that more than one short-term work permit may have been granted for the same worker during that period, the estimation of the expected number of workers by the Central Planning Office published in January 2004 (20,000) appears to be far nearer to reality than the high numbers mentioned in the press and by certain politicians.

It is generally understood that a considerable number of workers from Poland hold Polish and German nationality. For the application of the immigration and work permit legislation these "German Poles" are treated as German nationals and, thus, their employment is work permit free, see Aliens Circular B10/1.3 as amended on 25 March 2004. Thus, these workers are not included in the work permit statistics. It is estimated that between 10,000 and 15,000 of these Polish workers with dual nationality have been employed in the Netherlands in 2004.

From a comparison of the number of social-fiscal numbers issued by the Dutch tax authorities in 2004 to persons with an address in Poland (more than 31,000), with the total number of work permits issued to Polish workers (January-October: 21,000) and the number of Polish nationals that registered themselves with the municipal authorities in 2004 and thus are counted as immigrants in the population statistics (4,855), it appears that most Polish workers primarily perform temporary jobs lasting several weeks or months and then return to Poland. Often they come back for another period of employment after a short or longer stay in Poland. The relevant data are presented in chapter VIII.

The data on work permits issued indicate that three quarters of the almost 21,000 permits issued from January to October were issued for seasonal employment in agriculture and horticulture, were the exemption from the labour market test applies. Although Polish workers are reputed for working in construction, the number of work permits issued for employment in construction was minimal (174). This may indicate that in that sector most workers are either "German Poles" or are employed by Polish service providers, are employed under other legal constructions or work without the required documents.

It appears that a considerable number of Polish sailors were working aboard Dutch seagoing vessels before the accession of Poland to the EU. Those sailors, and possibly nationals of other new Member States, apparently were employed under a special collective labour agreement, providing that the labour contract was not governed by Dutch labour and social security law. Probably the wages paid to those sailors were lower than the wages paid to sailors who are nationals of the old Member States.

There is a long tradition in the Dutch merchant navy of differentiation of pay and other employment conditions on the basis of the nationality or the place of residence of the sailor. The general collective labour agreement adopted in 2000 explicitly provides in Article 3(1) for local labour conditions to be applicable to labour contracts of sailors with residence in Indonesia or the Philippines (Annex 24). The collective agreement of 2003 on the employment of non-EU officers aboard Dutch seagoing ships provides for differences in treatment between EU and non-EU-officers (Annex 25). Polish sailors were paid according to a special collective labour agreement for non-EU-officers concluded by the Netherlands Maritime Employers Association (Nemea), a branch of the Dutch Ship-owners Association (KVNR), with the Dutch sailors' trade union FWZ. The sailors were paid lower wages than Dutch

officers, the difference being justified with the lower costs of living in the country of residence of the officers. Moreover, these sailors were insured on the basis of the social security of their country of residence. In our opinion it is questionable whether these arrangements were compatible with the provision on non-discrimination in labour conditions in the Europe Agreements.

According to a press notice on the website of the KVNR, in September 2004 the Nemea, the FWZ and two Polish trade unions (Solidarnosc and S&FTUP in Szczecin) concluded an agreement on the wages, labour conditions and the social security of Polish sailors working on ships under Dutch flag. It was agreed to ask the Dutch Ministry of Social Affairs to conclude an agreement with the Polish authorities providing that these sailors will continue to be covered under Polish social security law. The agreement should be modelled after a similar agreement concluded between the Norwegian and Polish authorities on the social security law applicable to Polish sailors aboard Norwegian ships. A special collective labour agreement for Polish sailors aboard Dutch ships will be developed. According to the press notice of the Ship Owners Association KNRV, the agreement with the trade unions guarantees "that the employment of Polish sailors aboard Dutch ships can be continued under reasonable costs". It is the intention of the KNRV to conclude similar agreements concerning the employment of sailors from other new Member States. The Ministry of Social Affairs will be asked to conclude an agreement on the social security rights of these Polish sailors with the Polish authorities.

Since the Aliens Employment Act does not apply to employment aboard seagoing vessels, no work permit is required for the sailors and, thus, the number of Polish sailors concerned cannot be found in the work permit statistics. It is unknown whether Polish sailors have been dismissed and replaced by sailors from countries outside the EU, because their employers were no longer free to pay Polish sailors lower wages than Dutch sailors after the Enlargement.

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Chapter VIII
Statistics

Immigration from and Emigration to other Member States

The total registered immigration to the Netherlands of persons born in one of the 14 old Member States in 2004 amounted to 17,500 persons. The registered emigration of persons born in other Member States in 2004 was 18,100. Among those numbers are also some Dutch nationals, born in one of the other Member States. However these data give a fair picture of the movement to and from the Netherlands within the EU. The main countries of origin and destination are Germany, the UK, Belgium, France, Spain, Portugal and Italy.

Table 1. Migration to and from the old 14 Member States in 2004

	Immigration	Emigration	Surplus
Germany	4,918	4,616	302
United Kingdom	3,384	4,097	-713
Belgium	1,774	1,661	113
France	1,599	1,714	115
Spain	1,285	1,509	224
Portugal	992	870	-122
Italy	1,137	n.a.	
Total 14 MS	17,502	18,119	-617

Source: CBS, Stateline 2005.

It appears that in 2004 immigration from the other 14 Member States was lower and emigration considerably higher than in 2003. Thus the positive migration surplus of 2,176 in 2003 turned into a negative balance of 617 in 2004.

Data on the migration to and from the ten new Member States are not available for the year 2004 yet. However, the data on the migration to and from Poland are available already.

Table 2. Registered immigration and emigration of persons born in Poland (2004)

	Immigration	Emigration	Surplus
January-March	429	326	103
April-June	1,329	298	1,031
July-September	1,716	306	1,410
October-December	1,381	296	1,085
Total 2004	4,855	1,226	3,629

Source: CBS.

Resident EU citizens

On January 1, 2003, the total number of EU citizens from the other 14 Member States registered as residents in the Netherlands was little over 211,000. The size of the group has been slowly but steadily increasing since 1997.

Table 3. Total number of resident nationals of 14 Member States

1996	191,100
1997	188,300
1998	190,200
1999	192,200
2000	195,900
2001	201,600
2002	207,900
2003	210,600
2004	211,009

Source: CBS, Stateline.

A steady increase occurred during the last three decades. The number of nationals of the 14 Member States increased from 137,000 in 1971, to 160,000 in 178,000 in 1991, and 202,000 in 2001 (Statistics Netherlands, *The virtual Dutch Census of 2001*, Voorburg 2003, p. 130).

The number of EU-citizens registered as residents on 1 January in the years 2002-2004 is specified in Table 4.

From these figures it appears firstly that the number of nationals of the other Member States has been surprisingly constant over the last three years, and secondly, that apart from Poland, the number of nationals of the new Member States officially registered in the Netherlands on 1 January 2004 was relatively small.

According to the website of the Immigration and Nationality Service of the Ministry of Justice a total of 15,200 EC/EEA residence cards have been issued in 2004.

Table 4. Registered residents of the 24 other Member States on January 1 (2002-2004)

	2002	2003	2004
UK	43,500	44,000	43,700
Germany	55,000	56,000	56,500
Belgium	26,000	26,500	26,200
Italy	18,000	19,000	18,500
Spain	17,500	17,500	17,400
France	14,100	14,500	14,500
Portugal	10,500	11,300	11,800
Poland	6,300	6,900	7,400
Greece	6,015	6,200	6,300
Ireland	4,100	4,200	4,200
Austria	3,500	3,500	3,600
Sweden	3,100	3,100	3,100
Denmark	2,700	2,600	2,700
Finland	2,100	2,100	2,100
Hungary	1,700	1,800	1,900
Czech	1,300	1,300	1,500
Slovakia	900	900	1,000
Lithuania	400	500	600
Latvia	200	200	300
Luxembourg	300	300	300
Slovenia	200	200	250
Estonia	150	150	200
Malta	100	100	100
Cyprus	50	50	50

Source: CBS, Stateline.

Naturalisation and dual nationality

Persons who have both Dutch nationality and the nationality of another Member State, are not included in tables 2-4. In the official statistics these dual nationals are counted as Dutch nationals. On 1 January 2004 the total number of residents in the Netherlands having both Dutch nationality and one or more other nationalities was 925,000 (in 1995: 394,000; in 2003: 880,000). The number of Dutch residents also having the nationality of another Member State is published for some Member States.

Table 5. Dutch nationals having the nationality of another Member State in 1986 and 2003

	1986	2003
Belgium	26,300	28,900
France	11,800	14,300
Germany	37,700	44,200
Great-Britain	38,300	41,900
Italy	14,059	17,500
Poland	10,700	15,000

Source: CBS, Stateline 2004.

The number of persons with multiple nationality has increased considerably over the last years. From the figures in table 5 it appears that the total number of residents of the Netherlands originating from other Member States is far greater than the number of EU citizens mentioned earlier in this paragraph. If one compares the figures of the tables 3 and 4, it appears that the total number of nationals from Belgium, Germany, Great-Britain and Italy resident in the Netherlands, is two times the number mentioned in table 3. Half of the nationals of those four Member States, residing in the Netherlands, also have Dutch nationality and, thus, are counted only as Dutch nationals in the official Dutch statistics. This may imply that the size of the migration between the Member States is considerably larger than is usually concluded on the basis of the official population statistics of the Member States. It also implies that a considerable number of EU citizens living in the country of their nationality are actually migrants, who used their freedom of movement within the EU or are descendants of those migrants, and thus have certain rights under Community law on free movement, e.g. the right to family reunification. Finally, it implies that the policy of reverse discrimination, practised by certain Member States including the Netherlands, deserves critical consideration by the Commission, since this policy may well result in discrimination against EU migrants who also have the nationality of their Member State of residence.

Generally, the propensity of resident EEA citizens to apply for Dutch nationality is relatively low. In 2001 almost 7% of all non-Dutch residents, but only 0.9% of the resident EEA nationals were naturalized. Most of the EEA nationals, who apply for naturalisation, do so after much longer residence in the Netherlands (ten years or more) than the residents of third countries. From the table below it appears that, generally, nationals of the Southern Member States, especially Italy and Greece have a bit higher inclination to apply for naturalization than nationals from the Northern Member States. The naturalisation rate of Polish nationals in 2003 was considerably higher than that of nationals of the old Member States. The percentage was close to the general averages for all nationalities. The high propensity to apply for naturalisation may be related to the relatively high number of Polish nationals in the Netherlands married to Dutch nationals.

Table 6. Number of naturalisations and naturalisation propensity of EEA nationals in 2001 and 2003

nationality	2001 number of naturalisations	percentage naturalized	2003 number of naturalisations	%
Swedish	8	0.3	34	1.0
Danish	9	0.3	11	0.4
Irish	16	0.4	25	0.6
Finnish	8	0.4	11	0.5
Norwegian	9	0.4	7	n.a.
Spanish	98	0.6	84	0.5
Belgian	189	0.7	250	0.9
British	356	0.9	294	0.7
French	123	0.9	100	0.7
German	573	1.0	445	0.8
Austria	38	1.1	25	0.7
Italian	211	1.2	206	1.1
Portuguese	129	1.3	71	0.6
Greek	26	2.2	64	1.0
Total EEA	1,893	0.9		
Polish		n.a.	318	5.0

Source: CBS and author's computation.

Labour migration from new Member States

Considering the number of labour permits granted to citizens of the four larger new Member States (then candidate Member States) in the years 1996-2003, the lawful employment by citizens of those states in the Netherlands has increased considerably over the years before their accession to the EU. From table 7 it appears that the number of permits granted to Polish workers increased sharply between 2001 and 2003, whilst the number of permits granted to workers from the other three countries decreased considerably. The number of permits granted to Polish workers almost tripled in the accession year.

Probably the rise in employment of workers from the new Member States has reduced the employment of workers from countries outside the EEA. In 2004 a total of 44,100 work permits were issued, that is 6,000 more than in 2003. The number of permits issued to nationals of the eight new Member States in 2004 increased with approximately 12,000 (Secretary of State for Social Affairs in *Aanhangsel Handelingen*, TK 2004-2005, no. 650).

Table 7. Number of labour permits granted to citizens of four CEEC states (1996-2002)

	Poland	Hungary	Czech Rep	Slovakia
1996	735	275	127	47
1997	928	349	181	75
1998	1,184	502	157	125
1999	1,501	662	405	201
2000	2,497	718	625	433
2001	2,831	1,063	992	681
2002	6,572	1,000	880	609
2003	9,510	953	971	681
2004	20,190	1,080	1,455	1,234

Source: Sopemi 2002 and CWI.

Table 8. Number of new social-fiscal numbers issued to persons with an address in Poland (2002-2004)

Year	*Month*	*Number of new numbers issued*
2002	12 months	18,253
2003	12 months	16.957
2004	January	741
	February	636
	March	1,213
	April	1,190
	May	6,642
	June	4,501
	July	5,087
	August	3,261
	September	3,913
	October	2,149
	November	1,608
	December (until 8 Dec)	228
2004	total (almost 12 months)	31,169

Source: H.M. ter Beek a.o. 2004, p. 27.

Table 9. Number of work permits issued to Polish nationals per sector (January-October 2004)

Sector	Number of work permits
Meat	1,706
Construction	174
Agriculture + Horticulture	15,759
Other sectors	1,880
All sectors	19,519

Source: Ter Beek a.o. 2004, p. 91.

Cross-border employment

The following data indicate the size of the cross-border employment between Belgium and the Netherlands.

Table 10. Employment across Belgian-Dutch border (1999-2004)

	From Belgium to NL	From NL to Belgium
1999	16,145	6,155
2000	16,740	6,200
2001	17,505	6,170
2002	18,870	6,110
2003	19,780	5,755
2004	20,365	5,865

Source: Centraal Bureau voor de Statistiek, Stateline 2005.

From these data it is clear that the cross-border employment from Belgium to the Netherlands continues to outnumber the cross-border employment in the opposite direction. The number of persons performing cross-border employment in Belgium is stable or slightly decreasing, while the number of persons living in Belgium and working across the border in the Netherlands gradually increased over the last five years. A similar development occurs across the German-Dutch border: the number of workers living in Germany and working in the Netherlands increased four times after 1999, whilst the amount of cross-border workers in Germany is clearly decreasing. From the statistics the nationality of the cross-border

workers is not clear. The increasing cross-border employment from Germany to the Netherlands may be partly due to an increasing number of Dutch citizens who decided to go and live in Germany and remain working in the Netherlands.

Chapter IX
Social Security

Texts in force

The Dutch government has officially denounced ILO Convention 118, concerning equality of treatment in social security (*Staatsblad* 2004, 715). This denouncement will enter into force on 20 December 2005 (i.e. a year after inscribing the denouncement at the International Labour Office of the ILO).

In the 2002-2003 report it was mentioned that in Parliament a Bill was pending regarding the approval of two new bilateral Social Security Treaties between The Netherlands and Morocco and between The Netherlands and Tunisia (TK 29005). The discussion in Parliament raised some questions regarding the conformity with Community law. In these new Treaties a provision was incorporated that gave the Dutch authorities the competence to suspend, refuse or withdraw Dutch disability-, survivor- or old-age-pensions of beneficiaries living in Morocco or Tunisia when the authorities or social security agencies in those countries did not supply information requested by the Dutch authorities within three months. This provision created the opportunity to suspend, refuse and withdraw a benefit in a situation which could not be influenced by the beneficiary himself. The Council of State stated in its opinion on the Bill that this provision would constitute a violation of the non-discrimination clauses of Articles 65(1) Euro-Mediterranean Association Agreement EC-Morocco and Tunisia. The concluding of a bilateral agreement that deviates from these Association Agreements is not in line with Article 300(7) EC Treaty, according to the Council of State. According to the Council of State, it is also a violation of Articles 10(1) and 84 Regulation 1408/71. The provision would also be a violation of Article 65(4) of the same Association Agreements, which prohibits the restriction of export of the benefits in question and which has direct effect.

By Act of 30 June 2004 (*Staatsblad* 2004, 342) the new bilateral Social Security Treaties have been approved. The provisions regarding suspension, refusal and withdrawal of social security benefits are still incorporated in the Treaties but will not be applied by the Dutch authorities.

The Board of Health Care Insurances (*College voor zorgverzekeringen*) informed the health care insurances companies by a circular of the consequences of the EU Enlargement. Regulation 1408/71 and 574/72 apply to nationals of the new Member States from 1 May 2004 and the various health care E- forms have to be used for these Member States as well (Circular 04/22).

The Board of Health Care Insurances issued in 2004 two circulars regarding the consequences of the judgments of the ECJ in the *Müller-Fauré* and *Van Riet* case (C-385/99) (see circular 04/07 and 04/45, to be found via www.cvz.nl). The second circular is also a result of three judgments of the Central Appeals Tribunal of 18 June 2004 (see under c) in which the cases of *Müller-Fauré* and *Van Riet* on the national level were settled.

According to this circular, an insurance company has to reimburse the full costs of extramural treatment abroad as long as the Dutch health care legislation has not formulated explicit rules on this. Regarding intramural treatment, the insurance company can only refuse permission of treatment in another Member State if the patient can have the necessary medical treatment within the period of time fixed for that treatment in the Netherlands. An insured person cannot be forbidden to start the treatment before the national procedures have

been ended. Although he runs the risk that the costs for intramural treatment will not be reimbursed if the permission is not granted in the end. Based on the judgments of the Central Appeals Tribunal, the circular clarifies the difference between intramural and extramural health care. Intramural health care is health care in an institution with at least an overnight stay necessary according to international medical standards.

From 1 January 2004, the rules on payment of wages during sickness have been changed. The employer has the obligation to pay the employee his wages during 24 months of sickness in stead of 12 months. A consequence of this change is that the entitlement to a disability benefit also only starts after 24 months. As a result of this change the problem occurs of frontier workers living in Germany with a labour history in both countries. When they are insured according to German law and get sick or disabled, they receive a German *pro rata* disability benefit after 18 months and have to wait another 6 months for the Dutch *pro rata* disability benefit.

Judicial practice

- According to the District Court of Amsterdam the export restriction of the Supplementary Benefit for Turkish persons is a violation of Article 5 of ILO Convention 118, even after the Dutch government had placed this benefit on an annex to the Convention, which should provide an exemption to the obligation to export. The importance of this judgment is that the court states in a kind of *obiter dictum* that the denouncement of the Convention (see under Texts in force) will be of no help in this situation, because the export restriction is also prohibited by Article 6 Decision 3/80 of the EEC-Turkey Association Treaty. This is the first time in Dutch case law, and probably in any case law, that a national court gives direct effect to this Article and applies it in this way. The Dutch authorities have lodged an appeal. (District Court Amsterdam 19 March 2004, *Migrantenrecht* 2004, p. 119, with annotation by P. Minderhoud).
- In three judgments on the same day the Central Appeals Tribunal has settled the health care issues of *Müller-Fauré* (97/8115 ZFW) and *Van Riet* (97/10642) on a national level, together with a case of the reimbursement of a hip surgery in Belgium. In the (national) *Van Riet* judgment the Tribunal refers to the ECJ judgment in *Leichtle* (C-8/02), prohibiting the condition of asking prior permission for medical treatment. The most important rulings of these judgments have been incorporated in the circular of the CVZ, mentioned above (Central Appeals Tribunal 18 June 2004, *Rechtshulp* 2004, no. 8/9, p 12-22, with annotation by Vermaat).
- A German couple work as self-employed persons in The Netherlands. From 1995 to 2000 they had a residence permit as 'privileged EC citizens', but they did not renew it because of incomplete information given by the Aliens Police. In 2002 their business is running bad and they ask for a social assistance benefit. This is refused because the couple has no residence permit any more, according to the municipality. The couple filed a complaint against the Aliens Police at the National Ombudsman for giving incomplete information. The Ombudsman qualified the complaint as well-founded because the Aliens Police had neglected to inform the couple in a right way. In 2000 the couple could already have applied for a permanent residence permit (*vestigingsvergunning*), which would have entitled them to a social assistance benefit (National Ombudsman 1 November 2004, no. 2004/420).
- An Italian citizen who was declared to be an undesirable alien after being prison sentenced and had to leave the Netherlands, was refused a social assistance benefit, because he was not

staying lawfully in the Netherlands any more. With reference to the judgment of the ECJ in *Orfanopoulos* the Central Appeals Tribunal stated that there is no unconditional right for citizens of a Member State to travel or stay in another Member State. Referring to *Baumbast* and *Trojani*, the Tribunal concludes that there is in this case no right to stay under Article 18 EC because the Italian person did not have any sufficient means. As he is not residing lawfully, he can also not apply to the principle of equal treatment, laid down in Article 12 EC (Central Appeals Tribunal 21 December 2004, 01/3262 NABW, LJN: AS2100).

Miscellaneous

The Dutch government has succeeded in realizing its aim to restrict the export of the Dutch Supplementary Benefits Act (*Toeslagenwet*) also for EU/EEA-citizens, by inscribing this Supplementary Benefits Act on Appendix II*bis* of Regulation 1408/71. This will allow the Netherlands not to export this benefit any more. According to a transitional arrangement, the supplement will be gradually scaled down for existing cases. Recipients will receive the whole supplement during the first year and it will be reduced by a third annually during the subsequent three years. This transitional arrangement is expected to go into effect in the second quarter of 2005, pending a European ruling enabling the abolition of the supplement.

In November 2004 the Dutch government has published a memorandum under the title 'labour migration and social security' (TK 29861, no. 1). This memorandum provides among other things a general overview of the rights of aliens (divided by EU/EER citizens and other aliens) to social security and social assistance benefits. This memorandum is written in view of searching for possibilities to restrict immigrants' access to social security and social assistance in the near future.

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Chapter X
Establishment, Provision of Services and Students

Texts in force

On 2 December 2004 the Act implementing the 1999 Agreement between the EC and Switzerland on free movement of persons entered into force, *Staatsblad* 2004, no. 712, Annex 26. The Act has retroactive effect as of 1 July 2002, see Article 11. The Act amends a series of other acts that are implementing the existing EC law on the freedom of establishment, the provision of services and the recognition of diplomas. It extends the effect of those rules to persons to Swiss citizens and the members of their families enjoying freedom of movement under the 1999 Agreement EC-Switzerland and it extends the exemption of EEA citizens from the statutory nationality requirement to those persons. The Acts amended are the *Advocatenwet, Algemene wet erkenning EG-hoger-onderwijsdiploma's, Zeevaartbemanningswet, Wegenverkeerswet, Spoorwegwet, Vestigingswet bedrijven 1954, Wet op de beroepen in de individuele gezondheidszorg, Wet op de toegang tot ziektekostenverzekeringen 1998*. In the Explanatory Memorandum to the Act the government stated that there was no need to amend the two Acts on the profession of accountants, since the 1999 Agreement refers to Directive 89/84/EEC, but not to the Eighth Directive of 10 April 1984 on the admission of persons commissioned with the statutory control on bookkeeping. Hence, according to the Dutch government, it is not clear whether the Swiss accounting diplomas are up to the level of the latter directive. The result is that a Swiss citizen who acquired an accounting diploma in an EEA Member State will have the required diploma, whilst a Swiss citizen with a Swiss accounting diploma will have to be tested by the examination board, TK 29607, no. 3, p. 3.

Further, the Act of 2 December 2004 amended the Act on the title of architect (*Wet op de architectentitel*) in order to implement the consequences of the judgment of the Court of Justice of 22 January 2002 in the case C-31/00 (*Nicolas Dreessen*).

The debate on the legislation applicable to access of service providers from the new Member States and their right to make use of their own employees in providing services in the Netherlands has been discussed in Chapter VII on Enlargement of this report.

Draft legislation

In August 2004 a Bill has been introduced in Parliament proposing to amend the legislation study grants (*Wet op de studiefinanciering*) in order to extend the possibilities for students in professional education to continue to receive a study grant while studying abroad, TK 29719, nos. 1-3. This Bill is part of a more general policy to enhance student mobility across borders. In the Explanatory Memorandum to the Bill and during the parliamentary debate repeated references were made to influence the case law of the Court of Justice restricting the liberty of Member States in drafting their legislation on study grants. The government stated that under Community law equal treatment in the application of the national legislation on study grants extends to nationals of the EEA countries, Swiss nationals, nationals of the countries having concluded a Europe Agreement and Turkish nationals with residence rights under Decision 1/80 of the Association Council EEC-Turkey. The government specified that Turkish workers and their children are only entitled to equal treatment in this area if they have residence in the Netherlands, TK 29719, no. 17, p. 8.

Judicial practice

- A Danish nurse with a Danish nursing diploma in May 2001 received a permanent labour contract from a Dutch medical clinic, but it was agreed that she could only start to work after she had received the official BIG registration of her diploma by the Ministry of Health. The nurse immediately applied with the Ministry for a declaration on her professional qualifications and after it became clear that she did not need such a declaration but only the registration of her Danish diploma, she applied for that registration in June 2001. In October 2001 the Ministry granted the request, but in the meantime the clinic had told her in August it did not want to wait any longer. Finally, the nurse was employed by the clinic as of 1 December 2001. Her claim for damages resulting of the late registration of her diploma was rejected by the Ministry and her appeal was rejected both by the District Court and by the Judicial Division of the State Council because the nurse did not prove the causal relation between the late registration by the Ministry and her loss of income, Judicial Division of the State Council 21 July 2004, *Administratiefrechtelijke Beslissingen*, 2005, no. 14 with extensive comments by HBr.
- There have been several judgments on the policy of the Study Grants Office (*Informatie Beheer Groep*) to grant a full study grant to students who are nationals of another EU Member State only if they were working for a minimum of 32 hours per month. Moreover, the office would check whether this requirement was met for each month. In case the student had worked less than 32 hours in a certain month, he would be paid only a reduced grant for that month. Referring to the judgments of the Court of Justice in *Levin* and *Raulin,* it was held that to apply such a strict rule in order to establish whether the student was a worker and to make the test for each month rather than looking at the student's employment record over a longer period was a violation of Article 7 of Regulation 1612/68. The decision to grant only a limited study grant to a Belgian student was annulled, District Court of Arnhem 8 November 2004, LJN: AR5364.
- A similar judgment was made with regard to a German student by another court that explicitly overruled its previous case law, District Court of Alkmaar 23 August 2004, LJN: AQ7624.
- Making use of a new provision in the Act on Higher Education, the University of Groningen adopted a regulation that a student of 30 years or older with the nationality of a non-EEA state should pay an enrolment fee of 5,000 euro rather than the normal fee of 1,940 euro levied from EEA students. The university withdrew its initial justification for the difference in treatment that non-EEA students had contributed less to Dutch public funds. The second justification, that special facilities were provided to foreign students, was held to be not sufficient, because the higher fees were levied from non-EEA students independent of whether those extra services were actually provided to the student or not. The university's fee regulation was held to be a violation of the General Equal Treatment Act, Commissie Gelijke Behandeling 14 October 2004, Opinion 2004-134.

Miscellaneous

The question under which conditions students from other Member States are entitled to the full study grant under the Dutch legislation has been the issue of parliamentary questions (TK 2004-2005, no. 785), of a petition by a German student to the Second Chamber of Parliament (TK 29235, no. 56) and of a letter by the Secretary of State for Education to the Sec-

ond Chamber of 11 August 2004 (TK 24724, no. 66). In response to the question related to the opinion of AG Geelhoed in the *Bidar* case, the government stated that it did not agree with the AG that Union citizenship could be the basis for equal treatment of EU students with regard to study grants. The government repeated its position that under the case law of the Court only if a national of another Member State was or had been a worker in the Netherlands or if one of his parents was a (former) worker, the student would be entitled to the full student grant. The government added that under the new Directive 2004/38 only after a national of another Member State had acquired the permanent residence right (after five years of residence) he would be entitled to the full equal treatment with regard to study grants. Moreover, it was stated that this would not leave students empty-handed, since often they would be entitled to full grants in another Member State, because they or their parents had worked in that Member State. This would apply especially to many cross-border workers. The possibility of a student being entitled to study grants under the legislation of more than one Member State, according to the government was a ground for being restrictive on this point (TK 24724, no. 66, Annex 27).

The international mobility of students has been the repeated subject of parliamentary discussion in 2004. In November 2004 the Secretary of State for Education published a policy document on the internationalisation of higher education, TK 29800 VIII, no. 72. The slightly increasing number of Dutch students making use of the Socrates program (5,222 in 1999 and 5,620 in 2003) was repeatedly mentioned, TK 28248, no. 64, p. 5 and 29540, no. 16, p. 172. On the other hand, two practical barriers to international student mobility were mentioned in parliament as well: the long delays of the Immigration and Naturalisation Service in providing residence documents (often the documents are provided only just before the semester is finished, Parl. Questions 2003-2004, no. 2007), and the high fees for a residence permit required from students who are not nationals of an EEA state; during 2004 these fees have been reduced (!) to 424 euro, TK 29800 VI, no. 31, p. 17-21. The sum of 424 euro is a lot of money for a student. The effect of those barriers is that many foreign students either avoid coming to the Netherlands or come and do not apply for a residence permit.

The presence of a boat, operated by the Dutch organisation Women on Waves that offers to perform abortion free of charge, in the territorial waters of Portugal gave rise to a debate in the Dutch Parliament on the question whether the activities of the organisation could be qualified as provision of services within the meaning to the EC Treaty, TK 1 September 2004, p. 6027.

Chapter XI
Miscellaneous

A parliamentary question drew attention to the situation that the exemption of EU nationals and their family members from the obligations under the current integration legislation (*Wet inburgering nieuwkomers*), that provides Dutch language courses free of charge, has the effect that EU nationals have no possibility to obtain the exemption from the new strict naturalisation test (see Chapter VI) on the basis of having passed the exam at the end of that language course, *Aanhangsel Handelingen* 2004-2005, no. 428, Annex 28.

The Minister of Social Affairs in June 2004 in a letter to the Second Chamber mentioned the five reasons why the Netherlands does not ratify the 1975 ILO Convention no. 143 on migrant workers: the convention allows the migrant worker free choice of employment after two years and equal treatment in case of unemployment, whilst in Dutch legislation such rights are granted only after three years; the obligation to grant illegal workers and their family members equal treatment in social security is contrary to the principle of the *Koppelingswet*; the Convention forbids to make the expelled person pay the costs of his expulsion; the obligation to assist migrant workers in preserving their own culture and cultural ties with their countries of origin is contrary to the current integration policy of the Netherlands, TK 29427, no. 2, Annex 29.

The Dutch Parliament approved the ratification of the 1995 Council of Europe Convention on the protection of national minorities, see Act of 2 December 2004, *Staatsblad* 2004, no. 681. Originally, the government proposed to have all target groups of the former minorities policy of the government included in its definition of national minorities. This would have included migrant workers from the Southern European EU Member States and their family members. After a long debate the Dutch definition of national minorities was restricted to the Frisian minority. Pleas to include Roma and Sinti in the definition and thus bring them under the protection of the Convention were rejected by the government.

In March 2004 the first elections for the twelve members of the representative council of Italian residents in the Netherlands (*Comitati degli Italiani allí Estero*) took place on the basis of the 2003 Italian Act on the representation of Italians living abroad (legge n 286 di riforma dei Comites), *LIZE Bulletin* November 2004, p. 2.

Judicial practice

- It was held that Article 7 of the European Convention on Nationality restricts the possibility of loss of nationality to the cases mentioned in that Article and Article 7 has direct effect and thus can be invoked by an individual concerned before a Dutch court and that court should not apply Dutch legislation that is not compatible with Article 7 ECN, Judicial Division of the State Council 18 August 2004, *Administratiefrechtelijke Beslissingen* 2004, no. 35.

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