Network on the Free Movement of Workers within the European Union

BELGIUM

Report 2006

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TABLE OF CONTENTS

TABLE OF ANNEXES

Annex n° 27 : D. MARTIN, " L'arrêt Mangold – Vers une hiérarchie inversée du droit à l'égalité en droit communautaire ? ", *J.T.T.*, 2006, p. 109
Annex n° 28 : P. MAVRIDIS, " Détachement des travailleurs dans l'Union européenne : le juge national, arbitre ou soumis au principe du pays d'origine ? ", *J.T.T.,* 2006, p. 225
Annex n° 29 : R. MALAGNINI, " Le placement des travailleurs en Région wallonne : la fin du monopole du service public – Analyse de l'évolution des règles internationales et du décret wallon du 13 mars 2003 ", *J.T.T.*, 2006, p. 241
Annex n° 30 : Cour d'appel de Liège, arrêt du 29 novembre 2005, *T.V.R.*, 2006, pp. 30-32
Annex n° 31 : Cour du Travail de Liège, 5ème chambre, arrêt du 26 avril 2006, *J.T.T.*, 2006, p. 398
Annex n° 32 : Arrêté royal modifiant l'article 10 de l'arrêté royal du 25 avril 2004 modifiant l'arrêté royal du 8 octobre 2001 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, *Moniteur belge*, 10 mai 2006
Annex n° 33 : Statistiques des nouveaux candidats réfugiés par pays d'origine et par mois au cours de l'année 2006
Annex n° 34 : Statistiques : nombre de nouveaux candidats réfugiés par pays d'origine et par pourcentage selon le lieu d'entrée sur le territoire belge
Annex n° 35 : Statistiques : nombre de mineurs non accompagnés recensés sur le territoire belge par pays d'origine
Annex n° 36 : Arrêté royal du 20 décembre 2006 modifiant, suite à l'adhésion de la Bulgarie et de la Roumanie à l'Union européenne, l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers et l'arrêté royal du 25 avril 2004 modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, *Moniteur belge*, 29 décembre 2006
Annex n° 37: Circulaire du 20 décembre 2006 relative au séjour et à l'établissement des ressortissants de la Roumanie et de la Bulgarie, nouveaux Etats adhérents à l'Union européenne, et des membres de leur famille, à partir du 1er janvier 2007 et notamment pendant la période transitoire prévue par le Traité d'adhésion, *Moniteur belge*, 28 décembre 2006
Annex n° 38 : Circulaire du 5 octobre 2006 relative au statut de protection subsidiaire, *Moniteur belge*, 11 octobre 2006
Annex n° 39 : Avis du 11 juillet 2006 à Mmes et MM. les Bourgmestres du Royaume concernant le cas particulier du visa de retour délivré pendant la période de vacances d'été 2006 aux étrangers qui reviennent en Belgique pour y suivre une procédure de regroupement familial, *Moniteur belge*, 11 juillet 2006
Annex n° 40 : Arrêté royal du 19 décembre 2006 modifiant, suite à l'adhésion de la Bulgarie et de la Roumanie à l'Union européenne, l'arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers, *Moniteur belge*, 29 décembre 2006
Annex n° 41 : Tribunal de Première Instance de Bruxelles (référé), jugement du 8 mai 2006
Annex n° 42 : Avis relatif à la liste établie dans le cadre de la simplification de la procédure de délivrance du permis de travail pour les ressortissants des 8 nouveaux Etats membres publié par la Région wallonne, *Moniteur belge*, 11 mai 2006
Annex n° 43 : Communication d'une décision du gouvernement de la région de Bruxelles-Capitale du 18 avril 2006 relative à la simplification de la procédure de délivrance du permis de travail B pour l'occupation de professions reconnues comme connaissant une pénurie de main d'œuvre – Liste des fonctions critiques reconnues en Région bruxelloise en vue de la simplification de la délivrance d'un permis de travail de type B, *Moniteur belge*, 16 mai 2006
Annex n° 44 : Projet de loi relatif à la transposition des directives 2003/109 et 2004/38 déposé le 7 janvier 2007, Chambre des Représentants, 5ème Session de la 51ème législature, 2006-2007
Annex n° 45 : Cour de Cassation de Belgique, arrêt du 16 janvier 2006, RG n° C.05.0057.F/1
Annex n° 46 : Cour d'arbitrage de Belgique, arrêt n° 134/2006 du 29 août 2006
Annex n° 47 : Conseil d'Etat, arrêt n° 163.679 du 17 octobre 2006
Annex n° 48 : Décret du 16 juin 2006 de la Communauté française de Belgique régulant le nombre d'étudiants dans certains cursus de premier cycle de l'enseignement supérieur, *Moniteur belge*, 6 juillet 2006

LIST OF ABBREVIATIONS

art.	article
C.D.E.	Cahiers de droit européen
C.D.S.	Chronique de droit social
CE	Conseil d'État (Council of State, Supreme administrative court in Belgium)
C.E.D.H.	Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales
C.J.C.E.	Cour de Justice des Communautés Européennes (= ECJ)
C.T.	Cour du Travail (Labour Appeal Court)
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
E.T.L.	European Transport Law
GOA	Governmental Office for Alien
J.D.J.	Journal du droit des jeunes
J.T.	Journal des tribunaux
J.T.D.E.	Journal des tribunaux-droit européen
J.T.T.	Journal des tribunaux du travail
M.B.	Moniteur Belge
R.D.E.	Revue du droit des étrangers
R.D.C.	Revue de droit commercial
R.D.S.	Revue de droit social
Rev. b. sec. soc.	Revue belge de sécurité sociale
Rec.	Recueil
Rev. not. b.	Revue du notariat belge
R.T.D.E	Revue trimestrielle de droit européen.
Rev. trim. dr. fam.	Revue trimestrielle de droit familial
Rev. trim. dr. eur.	Revue trimestrielle de droit européen
Rev. trim. D.H.	Revue trimestrielle des droits de l'homme
ss.	et suivant
T.T.	Tribunal du travail (First Instance Labour Court)
T.R.V.	Tijdschrift voor rechtspersonen en vennootschap
T.V.R.	Tijdschrift vreemdelingen recht

INTRODUCTION

Belgium has a long experience, reinforced by the presence of the European institutions in Brussels, in matters of free movement of European citizens and members of their family.

There are therefore many established rights ("acquis communautaire") that are not issues any more. This is not always the case in other countries. Therefore, to make comparison easier, some of the established rights are reminded at the beginning of the chapters.

For the year 2006, one may see that the case law is relatively poor in quantity. This does not mean that the Courts do not apply EC law on free movement of workers but, in our view, that there are fewer problems in Belgium in the application of free movement of workers.

The most important debates in 2006 are on enlargement and on students. For enlargement, Belgium did decide to extend the transitional period for 3 years vis-à-vis the EU8, but with some possibilities to find employment more easily in specified fields. For the EU2 new Member States (Bulgaria and Romania), a first transitional period of 2 years is applied.

As for students, a new Decree in the French part of the country (Communauté française de Belgique) gives possibilities to limit EU students in some studies in Belgium, particularly in paramedical fields. The proportionality of these measures is uncertain.

CHAPTER I. ENTRY, RESIDENCE, DEPARTURE

Summary

Acquis

In Belgium, entry, residence and departure are regulated by the Immigration law of 1980 (Law 15 December 1980 on access to the territory, residence, establishment and removal of foreigners).

This law has been amended more than 20 times since 1980. There is, in the law, a section on the Entry (Chapter II, Title I, "access and short stay") and a section for EU citizens (Chapter I of Title II : "Foreigners from EC Member State, members of their family and foreigners members of the family of a Belgian national"). As shown by the translation of the title of this chapter, there is one specificity in Belgium: in order to avoid reverse discrimination, family members of a Belgian have the same rights as family members of a EU citizen.

As for entry, no specific formality is required of an EU Member State citizen who wishes to enter or reside in Belgium. The EU citizen is automatically registered without taking any further step. Nor is any professional card required to exercise a self-employed activity.

Family members of a Belgian or EU citizen, who are foreigners from third countries, will normally need a visa to enter. But this request is not absolute, in application of the *MRAX* case.

All foreigners, EU citizen as well as third country nationals, have the right to vote in municipal elections under specific conditions.

2006

There is no important amendment in the law, nor case-law or new important practices in 2005 related to entry, residence and departure. The transposition of the Directives 2004/38 on free movement of citizens, and 2003/19 on long term residents, are still draft legislation at the beginning of 2007.

Developments

Visa

Each year, instructions are sent to Belgian diplomatic and consulate posts in Casablanca (Morocco), Tunis (Tunisia), and Istanbul and Ankara (Turkey) to deliver a return visa, during summer holidays, to aliens who claimed family reunification as family members of a EU citizen, who went on holidays in their country of origin and who want to return to Belgium, where the family reunification application is still pending (Notice given to Mayors of the kingdom regarding particular cases of return visa delivered during the summer holidays 2006 to aliens who return to Belgium for proceeding a family reunification procedure based on articles 10 and 40 of the 15 December 1980 law, dated 11 July 2006, M.B. 11 July 206 – Annex n° 39). According to EU regulation, a D-Type Schengen visa is delivered to the spouse and dependent children under 21 years of age, of Belgian or EU citizens.

According to information received from the Tracing Service of the Belgian Red-Cross, the price for delivering a family reunification visa would rise from 90 € to 160 €. This information has not been confirmed and is in contradiction with information available from the Foreign Office website at the following link: http://www.diplomatie.be/fr/travel/visa/visumDetail.asp?TEXTID=38259.

Moreover, this website specifies the possibility to obtain the visa free of charge when applicant is spouse, children under 21 and parents of a Belgian citizen or a EU citizen. Apparently, there is an opposition between the two information.

If this practice is confirmed, it would disagree with the *MRAX* and the *Jia* cases.

Entry

Two decisions concerning liability of carriers are of importance for the interpretation of what is meant by "entry". They concern third country nationals rather than EC citizens.

One is related to the notion of "passenger". On 23 March 2006, the Court of Appeal of Antwerpen decided that a stowaway is not a passenger in the sense of Article 74/4*bis* of the Act of 15 December 1980 concerning access to the territory, residence, settlement and removal of foreigners, so that the administrative fine cannot be imposed for the involuntary transport of stowaways to Belgium. (Annex n° 18)

Another concerns the notion of excuse. The Belgian civil Supreme Court (Cour de cassation) ruled on 16 February 2006 that the judge who decides on the appeal of a carrier against a fine imposed on the basis of the Foreigner's Act (The Act of 15 December 1980 concerning access to the territory, residence, settlement and removal of foreigners) may examine to what extent the carrier is at fault but cannot remit the administrative fine for mere of expediency or fairness reasons (Annex n° 17).

Registration

In order to avoid reverse discrimination, the Belgian Aliens Act provides that family members of a Belgian citizen are assimilated to EC citizens. This specific provision (article 40 of the Aliens Act 15/12/1980) thus leads to consider third country nationals, family members of a Belgian, as EC citizens. In a case in which the Governmental Office for Aliens (GOA) took more than 6 months to register a third country national, spouse of a Belgian, the Court of Appeal of Liège ruled, on 29 November 2005 (published in *T.V.R.*, 2006, p. 30) that this delay is not compatible with European legislation according special reference to article 10 of the 2004/38 EC directive. The question raised concerned the time from which the 6-month delay to deliver documents attesting the right of establishment began (annex n° 30)

Transposition of the 2004/38/EC Directive

At the beginning of 2007, the law of transposition of Directive 2004/38 is still a draft (infra, b). But a circular was adopted on specifics issues to be in conformity with the Directive (a).

Circular

A circular was adopted on 10 May 2006 (published in *Moniteur belge*, 26 May 2006) about the non respect by Member States of the deadline to implement EC 2004/38 Directive (Annex n° 32).

The Belgian authorities chose to temporarily maintain delivery of the former "blue card" to the EU citizen but, to implement the 2004/38 Directive, the words "carte de séjour d'un ressortissant d'un Etat membre de la CEE" (residence card delivered to a citizen of a EEC Member State) will be removed from the document. The blue card will continue to be issued as a "registration certificate" admitted by article 8 of the EC 2004/38 Directive. When delivering such a blue card, an information sheet will be given to the beneficiaries.

In the future, this could be confused with another "blue card" planned by the Commission, resembling the "green card" delivered in the USA for foreign workers from third countries.

For the family members of an EU citizen, a yellow card was delivered. The new circular allows the local authorities to temporarily continue to deliver such yellow cards adding the words "document délivré à un membre de la famille d'un citoyen de l'Union" (document delivered to a EU citizen family member) in the bottom right part of the card. An information sheet will be joined at the delivery of such a card.

To implement article 16 of the EC 2004/38 Directive concerning EU students who have legally resided for a continuous period of five years in the host Member State, a blue card will

be automatically issued when applying and proving their continuous period of 5 years in Belgium.

Regarding family reunification, to comply with Directive 2004/38, the circular modified the administrative practice. From now on, the proof (la preuve) of sufficient resources will not be required anymore except for students and direct descendants who are above the age of 21.

Regarding EEE citizens who are not EU citizens (Norway, Iceland and Liechtenstein), the circular reminds that, according to the Commission, the 2004/38 Directive is not automatically applicable. In this case, an explicit decision of the EEE Committee is necessary.

Draft legislation

Recent draft legislation deemed to implement 2004/38/EC Directive has been filed at the House of Representatives on 7 January 2007(Annex n° 44). This draft legislation, or legislation at that time, will be analysed more in details in the further report concerning 2007. But, it is important to focus on articles 30 and 42*quinquies* of the Belgian draft as these provisions required only 3 years of legal residence on the territory to claim for long-term residence permit. This 3-year requirement is shorter than the 5 years of legal residence provided by the 2004/38 Directive provisions. The draft legislation confirms the Belgian choice to continue to deliver residence permit to EU citizens. It provides that these new permits will not be limited in terms of time. On that point, the draft legislation confirms the practice inaugurated with the above-mentioned circular.

Recent legal literature

J-F DELFORGE, *Le regroupement familial, articles 10 et 40 de la loi du 15/12/1980, compétences, procédure et pratique administrative*, Edition de septembre 2006, Editions VANDEN BROELE, 106 p.
J.-F. DELFORGE is a public servant at the *Office des étrangers* (Federal Public Service for foreigners). He actualised two publications mentioned in the previous report taking into consideration the EU enlargement, *MRAX* case, *Chen* case and *Commission vs Spain* case (C-503/03). These publications are refunded in a unique booklet containing guidelines to help the public servants in the local administrations.

P. HANNES & M. MUYLE, "Over verstekelingen en (on)schuldig vervoeders" (On stowaways and (not so) guilty carriers), *European Transport Law*, 2006, p. 319-337 (Annex n° 16).

CHAPTER II. ACCESS TO EMPLOYMENT

Summary

Acquis

Generally, access to employment is not a problem any more for EU citizens in Belgium (unless from 8 new Members States + Bulgaria and Romania, infra Chapter VIII). EU citizens do not need any working permit. Practices do not show many problems related to the language requirements, the recognition of diplomas and the nationality for captains of ships.

2006

There is no important new rule or practice in 2006. Last year's debate on the daily cross-border workers between France and Belgium still seems current but is not specific to Belgium as it raises a more general debate on the cross-border regions in Europe, as can be seen from the Belgian draft legislation about students (infra, Chapter XI).

Developments

Temporary and posted workers

As mentioned in the 2005 report, an administrative circular, issued on 2 December 2005, relates to the procedure in granting an ID number, called "bis number", to foreigners who come temporarily in Belgium for employment as occasional workers (Annex n° 16 of the 2005 report). All foreign workers must be registered with an ID number in the Social security system and data base in order to allow the employer to declare workers specifically in the fields of agriculture, horticulture, restaurant, hotels and bars, and interim work.

The number given should facilitate the registration of the foreign worker in the local administration since the number is the proof of the regular registration in the social security system data base even if the duration of the stay or work in Belgium is temporary.

The same system is applied for posted workers and the question raised is about the conformity of this registration with the *Commission v. Germany* case ruled on 19 January 2006 (the so-called *Van der Elst* visa). It seems that the Belgian system of registration is not incompatible with this case law as the registration is neither a condition of visa delivery nor a condition for posted workers to enter on the Belgian territory. It is not a control *e ante*, but *ex post*.

The system imposed is different for EEE citizen workers and those coming from the 10 new EU Members States (8 EU members States entered on 1st May 2004 + Bulgaria and Romania) subject to the transition period. A work permit is still compulsory for them although a single proof of work activity given by the employer (work contract, employer certificate, or job declaration) is enough for the others.

Recent legal literature

P. MAVRIDIS, "Détachement des travailleurs dans l'Union européenne : le juge national, arbitre ou soumis au principe du pays d'origine? Commentaire sur l'arrêt *Kiere* de la Cour de Justice (Secondments of workers within the European Union: the national judge, referee or subject to the country of origin principle? Comments on the ECJ *Kiere* case)*, J.T.T.*, 2006, p. 225 (Annex n° 28)

R. MALAGNINI, "Le placement des travailleurs en Région wallonne: la fin du monopole du service public, analyse de l'évolution des règles internationals et du décret wallon du 13 mars 2003 (The placement of workers in Walloon region: the end of the public service

monopole, analysis of the development of the international rules and the Walloon Decree dated 13 March 2003), *J.T.T.*, 2006, p. 241 (Annex n° 29)

CHAPTER III. EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY

Summary

Acquis

Since the ECJ case law about Moroccans in the nineties (C-18/90, *Kziber*, 1991), Belgium has had a broad application of non discrimination on the basis of nationality, even for non EU workers,). The ECHR case law also seems applied (*Gaygusuz, Koua Poirrez*).

2006

The main issue at the present time in family reunification cases is the requirement of having sufficient resources to benefit from certain social benefits. This problem is analysed more in detail in Chapter V. The Belgian case law reported last year stated that the requirement of residence is not a disproportionate obstacle to free movement of workers. The *De Cuyper* case confirms the Belgian practice and case law was adopted in conformity with the EC law.

Developments

A case analysed in Chapter XI and relating to a student in a situation similar to the *Grzelczyk* case concerns the refusal of social benefits for a French student who does not prove his "situation of need".

In 2004, the Constitutional Court ruled that the Belgian law according social benefits was discriminatory where EU citizen were out of the applicable field of the law. In 2005 (published in 2006), the Labour Court of Antwerpen applied this ruling and decided that a woman, Dutch citizen, cannot be excluded from the social benefits only because she is listed in the foreigner register and not in the population register (Annex n°10). This is in conformity with the *Martinez Sala* case.

Recent legal literature

D. MARTIN, "L'arrêt *Mangold* – Vers une hiérarchie inverse du droit à l'égalité en droit communautaire? " (*Mangold* case – Towards a reverse hierarchy of the equality right in community law?), *J.T.T.*, 2006, p. 109 (Annex n° 27)

D. MARTIN, *Egalité et non discrimination dans la jurisprudence communautaire* (Equality and non-discrimination in the ECJ case law), Bruxelles, Bruylants, 2006.

CHAPTER IV. EMPLOYMENT IN THE PUBLIC SECTOR

Summary

Acquis

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

2006

It is almost impossible to have a better picture of the true employment situation for EU citizens in the public sector. Different questions have been asked last year by a Member of Parliament on that point. Answers showed that there were no precise figures available. The same statement has to be made this year as no specific statistic is available on that question.

Developments

Miscellaneous

Several verifications have been made regarding discrimination which could be applicable to the public sector. All the public job offers are published officially on the website of the public recruitment Office (SELOR). From the controls made, no language requirement is a condition for access to jobs in the public sector. If it can seem obvious that such a condition is not published officially, the case law of the Supreme administrative jurisdiction (Conseil d'Etat-State Council) was assessed on that particular aspect. Except some old cases ruled in the 80's, the recent case law does not show any cases of discrimination on basis of language requirements or on basis of refusal of recognition of professional experience.
From his professional experience as member of different commissions giving an opinion on the recruitment in the public sector, the first reporter can attest that the nationality criteria has never been used to prevent EU citizens to have access to jobs offered.

CHAPTER V. MEMBERS OF THE FAMILY

Summary

Acquis

The position of the family members is strengthened in Belgium by the refusal of reverse discrimination for family members of Belgian citizens.

2006

The transposition of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification was adopted on 15 September 2006. As it concerns third country nationals and family reunification of these nationals, and as this Chapter V only concerns family members of EU citizens, the implementation of this Directive will be analysed in Chapter VII.

The implementation of the recent *Jia* case into the judicial practice is not a problem in Belgium, as the Alien Act of 15/12/1980 did not require any residence in another member State to recognize free movement to EU citizens and to recognize the family reunification even to family members coming from a third country of origin. This ruling was obvious in Belgium, as the Alien Act contains an assimilation principle towards third country national family members of a Belgian.

Developments

For the family members of a EU citizen, a yellow card was delivered. The new circular of 10 May 2006 on non-respect of deadline to implement the EC/2004/38 Directive (see Chapter I) allows the local authorities to temporarily continue to deliver such yellow cards adding the words "document délivré à un membre de la famille d'un citoyen de l'Union" (document delivered to a EU citizen family member) in the bottom right part of the card. An information sheet will be joined at the delivery of such a card.

The draft legislation introduced on 7 January 2007 is the implementation of two EC Directives: 2003/19 and 2004/38. The main provision of this future Act is the right for EU citizens and their family members to obtain a permanent residence permit after 3 years of legal residence whereas the provisions of the Directive require 5 years of legal residence.

Judicial practice

The Constitutional Court (Cour d'arbitrage) ruled, on 22 March 2006, that there was no discrimination between a Non EC foreigner married with a non EC citizen and an EC citizen married with a non EC citizen when the Belgian law required him/her to go back in his/her country to claim for visa application when s/he wanted to remain on the Belgian territory after his/her visa expired. (Annex n° 2). This case can be connected to the *MRAX* case as it concerned the Belgian administrative practice to oblige family members of an EC citizen to go back to his/her country to introduce a visa application when his/her authorisation of stay had expired. In accepting this as a discriminatory difference of treatment that does not lead to discrimination, the Belgian Constitutional Court is in conformity with some decisions of the ECHR (*Moustaquim* and *C. vs. Belgium*).

On 21 October 2005, the Labour Court of Appeal of Liège ruled that the Belgian local social authority competent to decide to allow social benefits to a third country national married to a EU citizen, cannot use Directive 2004/38/EC to refuse to give social benefits on the sole basis that this citizen had not been a resident for more than 5 months, as required by the Directive. When refusing social benefit on this ground, the Belgian local social authority adds a condition that is not required by the Belgian law on social benefits. The assimilation

made by the Belgian law between a third country national married with a EU citizen and a EU citizen only concerns right of residence but not right to social benefits, as Directive 2004/38/EC was not yet applicable at this date (Annex n° 25).

The civil tribunal of Bruxelles decided on 8 May 2006 that a if Belgian local administration declares an application for a residence permit for a foreign parent of a Belgian child admissible, the GOA (Governmental Office for Aliens) cannot refuse to take this application into consideration. The case was lodged according to the provisory proceeding without prejudice of the merits which can be decided later. The GOA criticized the applicants for not declaring their child at their own Embassy. The judge sentenced the Belgian State to deliver a residence permit, considering that this delivery is not final but only replaces the applicants in the temporary situation they were in before the State acted illegally by refusing their application as family members of a Belgian citizen (Annex n° 41)

To understand the judgement, one must bear in mind the specificity of the Belgian Alien Act which implements family reunification for family members of a Belgian citizen. Article 40(6) of the Alien Act 15/12/1980 considers these family members as EC citizen by assimilation. Regarding the *Chen* case, the ECJ ruled that the use of EC law to acquire a nationality of a Member State and the benefit of the residence permit given through this EU nationality is not forbidden by EC law. In the same case, the ECJ reminds that under international law, it is up to each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. Applying this ruling in Belgium, article 10 of the Belgian nationality Code gives the Belgian nationality to a stateless child born in Belgium. This provision raises some cases in which parents, third country nationals, considered as EC citizen in accordance with the above-mentioned assimilation principle, should have received a residence permit in Belgium. This occurred with Equatorial parents who did not declare their child at their own Embassy in order to benefit from the Belgian assimilation principle.

The same assimilation principle raised another debate relating to social benefits, when the parents of a Belgian child, by application of article 10 of the Belgian nationality Code, are irregular on the territory. Arguing their quality of EC citizen by assimilation, they lodged several actions to obtain social benefits in Belgium. In order to avoid this kind of cases, the Parliament adopted, on 27 December 2006 (*Moniteur belge* 28/12/2006) a modification of the Belgian nationality Code. The new article 10 of this Code provides that the benefit of the Belgian nationality given to a Stateless child born in Belgium will be refused if the child could obtain another nationality by declaration to the parents' diplomatic or consulate authority in Belgium.

Recent legal literature

H. VERSCHUEREN, "De nieuwe Europese verblijfsrichtlijn 2004/38 sinds 30 april 2006 van toepassing: het Europese burgerschap op kruisnelheid, *T.V.R.*, 2006, pp. 97-127 (Annex n° 26)

Access to work

Both the Walloon Region and the Bruxelles-Capital Region advertise a list of professions in which a lack of workforce is acknowledged. This list is analysed in Chapter VIII about EU Enlargment.

Recent legal literature

S. GILSON, "Le droit à l'aide sociale des étrangers auteurs d'enfants belges" (Right to social benefits for foreigners parents of Belgian children), *Journal du droit des Jeunes*, 2006, n° 257, p. 13-20 (Annex n° 6);
B. VOOS and Ch. VAN ZEEBROECK, "Le droit au séjour des étrangers auteurs d'enfant belge: état des lieux et perspectives" (The right of residence for foreigners parents of a

Belgian child: situation and perspectives), *Journal du droit des Jeunes*, 2006, n° 257, p. 3-12 (Annex n° 7)

CHAPTER VI. RELEVANCE/INFLUENCE/FOLLOW-UP OF RECENT COURT OF JUSTICE JUDGEMENTS

Globally, the *Trojani* case seems correctly applied in Belgium. In 2006, the ECJ ruled the *De Cuyper* case in which it reaffirms that social rights achieved through the EU citizenship can be limited with conditions related to residence criteria. However, this new residence citizenship could raise a new debate in France when it would be obliged to apply the *Trojani* case and would allow "non-contributory" social rights on this base to Mr De Cuyper... The ECJ could be at the origin of a new form of solidarity: the residence substituting the national.

Recent legal literature

N. ACH, "La citoyenneté européenne au service d'une Europe sociale", *J.T.D.E.*, 2006, p. 129-134 (Annex n° 3).

CHAPTER VII. GENERAL TEXTS AND POLICIES

Family reunification (Dir. 2003/86)

A new law has been enacted on 15 September 2006 (published in *Moniteur belge* on 6 October 2006) implementing Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

Important modifications of the current Alien Act (15/12/1980 Act concerning access to the territory, residence, establishment and removal of foreigners) were adopted; The former version of this Act already contained some provisions related to the right to family reunification for EU citizens, since the new law adopted on 15 September 2006 has to adapt the current state of legislation to the new rights given by the 2003/86 Directive.

Globally, the implementation is correct. Belgian authorities used the faculty given by the 2003/86 Directive to extend the right to family reunification to the unmarried partner, being a third country national who is bound to the sponsor by a registered partnership in accordance with provision 5 (2) of the Directive. The Belgian law specified that, in order to be accepted, the registered partnership must be considered to be equivalent to a marriage in Belgium. The list of cases in which a registered partnership based on a foreign law can be considered as equivalent to a marriage in Belgium will be fixed in a further ministerial decision (Royal Decree to be adopted). Both partners must be over 21. However, when the matrimonial link or the registered partnership concerned already existed abroad before arrival on the Belgian territory, the age is reduced to 18 years.

In a separate provision (new art. 10, §1st, al. 1st, 5°), the Belgian authorities also extended the right to family reunification to the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship. The relationship is duly attested if the partner is in a relationship for at least one year, if the partners are both more than 21 years old and if neither has another long-term relationship with someone else. The right to family reunification is opened to the partner's children if they are under 18 years, unmarried, and if the partner can prove his or her right of custody.

The Directive opens the possibility to family reunification to adult unmarried children of the sponsor where they are objectively unable to provide for their own needs on account of their state of health. The Belgian law uses this possibility only for a handicapped adult unmarried child where it can be attested by a registered doctor by the diplomatic or consulate post that he or she is, because of his or her handicap, unable to provide for his or her own needs.

The Directive allows a Member State, in case of a polygamous marriage, to refuse family reunification to a further spouse and to limit family reunification to minor children of a further spouse and the sponsor, where the sponsor already has a spouse living with him on the territory of a Member State. Accordingly, the new law refuses the right to family reunification both to the further spouse of a polygamous marriage and to his children. This refusal does not seem to meet the directive provisions that allow Member State to limit but not refuse family reunification of minor children. Discrimination can be founded on the basis of the origin of the family link created between children of the same father.

The new law allows the introduction of the family reunification application from the Belgian territory when the foreigner is authorized to residence or to establish for more than 3 months, and when he is authorized to stay for maximum 3 months. In exceptional circumstances, when it can be proven that he or she is unable to introduce the application from his or her country of origin, he is also entitled to do it from the Belgian territory provided an empty police record, proof of identity and he or she is not suffering from one the illnesses mentioned in appendix.

Family members of students see their right to reunification regulated by several conditions such as evidence, for the sponsor, of stable, regular and sufficient resources to maintain him- or herself and the members of his or her family, without recourse to the social assistance system of the Member State concerned, acceptable accommodation for the

members of his/her family and sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family. The evaluation of the extent to which an accommodation will be considered as sufficient will be decided in a future Royal Decree.

According to article 5(4) of the Directive, the Belgian authorities shall give the person, who has submitted the application, written notification of the decision as soon as possible and in any event no later than nine months from the date on which the application was lodged. In exceptional circumstances linked to the complexity of the examination of the application, the nine-month time limit will be extended. Reasons shall be given for the decision rejecting the application. If no decision is taken by the end of the period provided, the Belgian law provides that the applicant be admitted for residence (l'admission au séjour doit être reconnue) (article 12*bis*, §2 last alinea of the new law).

The residence permit can be refused on grounds of public policy or public security, when the foreigner has given false or misleading information, false or falsified documents were used, fraud was otherwise committed or other unlawful means were used to obtain the residence permit. However Belgian authorities do not use the possibility to withdraw or to refuse to renew the family member's residence permit on grounds of public health (article 6(2) of the Directive).

The new law has been modified where past legislation does not admit family reunification for family members who claim the benefit of the family reunification right for themselves. New Article 10(3) is implemented according to article 8 of the Directive when requiring the sponsor to have remained lawfully in the territory for a period of two years, before having his/her family members joins him/her.

Concerning the right to family reunification for refugees, the condition of having a normal accommodation is not applicable to family members of a refugee as long as the application is lodged within the year following the decision giving the sponsor refugee status.

Article 14 of the Directive relating to access to education, access to the work market and access to training and professional retraining is not implemented as these matters are out of the scope of the Alien Act dated 15 December 1980.

The right given to the sponsor and/or members of his/her family to mount a legal challenge where an application for family reunification is rejected, or a residence permit is either not renewed or is withdrawn, or removal is ordered, is implemented by another law enacted on the same date of 15 September 2006 reforming the State Council (Supreme administrative jurisdiction). The case will be held in front of the Conseil du contentieux des étrangers (Alien Litigation Council = ALC) as mentioned in article 39/79(1) of the new Alien Act.

The new law is not yet entered into force. A non-official version of the new Alien Act is available from the website of the Foreign Office, the Belgian authority competent to deal with alien matters by delegation of the Home Affairs Minister at the following address: http://www.dofi.fgov.be/ fr/reglementering/belgische/wet/wet.pdf.

Refugee Law

The same law adopted on 15 September 2006 transposed the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, and the Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

A circular dated 5 October 2006 (*Moniteur belge*, 11 October 2006) relating to subsidiary protection was adopted in order to implement the EC directive. This circular recalls that Belgian authorities competent for recognition of the refugee status will be competent from 10 October 2006 to give the subsidiary protection as provided by the EC/2004/83 Directive. The circular also recalls that Belgium did already apply a sort of subsidiary protection to

aliens who were not recognized as refugees but to whom a "non-removal provision" was provided at the same time by the General Commissioner for Refugee and Stateless Persons. The final decision about delivering a residence permit to the alien who received such a provision is given to the Foreign Office considering the definition of subsidiary protection implemented by the new law dated 15 September 2006 (Annex n° 38)

Belgium is part of the European Migration Network (EMN). The Belgian contact point of the European Migration Network is Benedikt Vulsteke at Direction Générale Office des Etrangers, WTCII, Chaussée d'Anvers, n° 59B, 1000 Bruxelles, www.dofi.fgov.be; benedikt.vulsteke@ dofi.fgov.be.

Concerning this network, several publications have been published related to policies with repercussions on free movement of workers as:

- the Belgian policy report on migration and asylum: with a special focus on immigration and integration (reference period: 01/01/2003 – 31/07/2004), available at the following link: http://www.dofi.fgov.be/nl/statistieken/policy%20report%20definitieve%20Engelse%20versie.pdf.
- Illegally Resident Third Country Nationals in EU Member States: state approaches towards them, their profile and social situation, available at the following link: http://www.dofi.fgov.be/nl/statistieken/belgian%20migration%20point/14%20EMN%20Synthesis%20Report%20on%20Illegal%20Immigration.pdf
- Policy Analysis Report on Asylum and Migration: Belgium, July 2004 to December 2005, edited in March 2006 available at the following link: http://www.dofi.fgov.be/nl/statistieken/belgian%20migration%20point/punt%207%20Policy%20analysis%20report%20Belgium%202005.pdf
- Reception systems, their capacities and the social situation of asylum applicants within the reception system in the EU member States, edited in May 2006 available at the following link: http://www.dofi.fgov.be/nl/statistieken/belgian%20migration%20point/10.pdf
- Conditions of entry and residence of Third Country Highly-Skilled Workers in Belgium, edited in December 2006, available at the following link: http://www.dofi.fgov.be/nl/statistieken/belgian%20migration%20point/12%20TC%20Highly%20Skilled%20Workers%20in%20Belgium2006.pdf
- Managed Migration and the Labour Market, The Health Sector, The Belgian case, July 2006 available at the following link: http://www.dofi.fgov.be/nl/statistieken/belgian%20migration%20point/250706_Managed%20migration%20and%20the%20health%20sector%20(Belgium).pdf
- The ANNUAL POLICY REPORT 2005 produced by the European Migration Network in November 2006 is also available at the following link: http://www.dofi.fgov.be/nl/statistieken/belgian%20migration%20point/13%20EMN%20Annual%20Policy%20Report%202005.pdf

New aliens administrative court

This new law on asylum and family reunification dated 15 September 2006 also creates a new jurisdiction that will be competent for all alien litigations: the Alien Litigation Council (ALC, *Conseil du Contentieux des étrangers*). This new jurisdiction is operational since 1st June 2007. The new law confers to this jurisdiction a full competence (opportunity and legality control) relating to asylum matters. All EC citizens, as all aliens, will be handed over to this new jurisdiction. However, EC citizens and aliens who are not asylum seekers will not have the benefit of a full competence as they only have recourse based on legality control. The new law does not delete the consulting procedure applicable before the adoption of any removal decision concerning an EC citizen. The Alien Consulting Commission will still be competent to give advice before adopting such a measure. This status quo in the protection given is, however, source of discrimination between asylum applicants and EC citizens, as

the former will have the benefit of a fully competent jurisdiction when challenging a decision and the latter will only have the benefit of a legality control without any opportunity control on a decision concerning aliens. As this new administrative jurisdiction has only competence for a control of legality, and not of opportunity for all foreigners including EC citizens, but of opportunity for asylum seekers. Even if there is a preliminary advice from an independent body and is not contrary to the case law (C-136/02, *Dör & Ünal*, 2005), it could be a question of equality of rights for EC citizens.

Judicial practice

A new judgement ruled by the Supreme Civil Court (Cour de cassation) could lead to some important debates in the future. On 16 January 2006, the Supreme Civil Court decided to reform a Court of Appeal of Liège decision (Annex n° 45). This last decision condemns the Belgian State to deliver a residence permit to the spouse of a third country national who was authorised to establish on the Belgian territory. The Alien Act provides that such a wife has a civil right to establish on the Belgian territory. The Court of Appeal of Liège considered that administration had no power of appreciation, as the law was clear and provided a right of residence directly from the law. The administration was considered in a "bound competence" to deliver the residence permit as the authority had no discretionary power. However, the Supreme Civil Court considered, on the opposite, that the Belgian authority always has power to appreciate whether the applicant is to be considered as a danger for the public policy and national security. In this view, this appreciation of the authorities proves that they are not in a situation of "bound competence" as they retain discretionary power to appreciate who is a danger and, consequently, to refuse to deliver the residence permit. The generality of the terms used by the Supreme jurisdiction could lead to the same interpretation concerning EU citizens. This restrictive interpretation would be in contradiction with ECJ case law and specifically to the *Roye*r case (C-48/75, 8 April 1975) in which the ECJ considers that the exception concerning the safeguard of public policy, public security and public health contained in articles 48 (3) and 56 (1) of the Treaty (art. 39 EC and 46 EC) must be regarded not as a condition precedent to the acquisition of the right of entry and residence but as providing the possibility, in individual cases where there is sufficient justification, of imposing restrictions on the exercise of a right derived directly from the treaty. The ECJ insisted when it considered that

> "it must therefore be concluded that this right is acquired independently of the issue of a residence permit by the competent authority of a member state" and "the grant of this permit is therefore to be regarded not as a measure giving rise to rights but as a measure by a member state serving to prove the individual position of a national of another member state with regard to provisions of community law".

Recent legal literature

A. BAILLEUX, "La Cour de Justice et les droits de l'homme : à propos de l'arrêt *Parlement c. Conseil* du 27 juin 2006" (The Court of Justice and Human Rights : about *Parliament v. Council* case of 27 June 2006), *Journal des Tribunaux*, 2006, p. 589-593 (Annex n° 1)

CHAPTER VIII. EU ENLARGEMENT

Summary

Acquis

Like some others old EU Member States, Belgium decided to impose a transitional period before the free movement of workers from the 8 new Member States. In 2004, the Belgian Government did decide on a 2 years transitional period.

2006

The Belgian authorities decided, in February 2006 to postpone the transitional arrangement decided in 2004 for 3 years. However, free movement of workers would be made easier in some activities. For workers from Bulgaria and Romania, a transitional period is also decided for Belgium.

Developments

EU 8

As the Belgian government did decide to postpone the transitional period for 3 years, no change can be found in national law and practice in Belgium since the last report.

The circular dated 10 May 2006 about the non respect of the deadline to implement the 2004/38 Directive modifies the previous circular on enlargement, as it provides to extend the transitory period for 3 years for the EU8 Member States citizens who entered on 1st May 2004. Consequently, the end of the new transitory period is set on 30 April 2009.

As the Belgian authorities have decided to postpone the end of the transitory period until 30 April 2009, the same legal regime as that existing during the first period mentioned in the previous report, is applicable to the second phase. A Royal Decree modifying Alien Act of 1980 has been adopted on 24 April 2006 to modify the Royal Decree enacted on 25 April 2004 when EU 10 entered within the EU (Annex n° 32).

According to the Employment Minister, the decision to postpone the provisional measures was taken following the conclusion of the "High Council for Employment Opinion" issued on 24 February 2006 (Contents of the 105 pages is Annex n° 32 of the last year report). The government alleges that complete free movement of workers cannot be achieved without taking complementary measures to fight foreign workers exploitation. It is also alleged that the government is working on a registration system for all foreign workers. The registration of all cases of trans-border work as a precondition should allow the authorities to have a better view on work migration.

The government also notes that the Belgian market faces a lack of workforce and a large number of vacancies for jobs in a certain number of sectors. It is planned to reinforce training and education in these sectors, and the Belgian authorities accept that workers originating from the 8 new EU Member States could be recruited in exceptional circumstances. For these jobs, workers from new EU Member States will be accepted, exempting them of requiring the work permit model B, as no study of the work market would be made in these area of work. The list of jobs for which a work permit will be automatically delivered is divided into 4: one for the Flemish Region, one for the Walloon Region, one for the Brussels Region and the last for the German speaking Community.

The Walloon Region published on 11 May 2006 a notice in the *Moniteur belge* regarding the list of professions in which a lack of workforce is acknowledged. This list contains several professions for which a simplification of the type-B work permit will be granted. This list concerns specifically workers citizen of the EU8 member States (Annex n°42). The list includes for instance: engineer, teacher, nurse, technician in different fields…

The same list has been published for the Bruxelles-Capitale Region on 16 May 2006 (Annex n° 43).

EU 2

On 20 December 2006, a Royal Decree was adopted modifying the 1981 Royal Decree relating to access to the territory, residence, establishment and removal of aliens. The Belgian government decided to put into force a two-year transitional period provided by the Entry Treaty for Bulgarian and Romanian citizens. The transitional arrangements will be applicable until 1st January 2009 (Annex n° 36).

On 20 December 2006 (published in *Moniteur belge* on 28 December 2006), the Home affairs Minister enacted a circular relating to the residence and establishment of Romanian and Bulgarian citizens and their family members from 1st January 2007, and specifically during the transitional period (Annex n° 37).

In this circular sent to all the mayors of Belgium, the Home affairs Minister recalls that the Entry Treaty provides a two years transitional period for these countries, concerning the access to labour market, and that this period does not concern self-employed workers and service providers.

The circular also recalls that the transitional arrangements adopted when the EU8 entered on 1st May 2004 will be automatically applicable to Bulgarian and Romanian citizens until 31 December 2008.

For those who were already on the Belgian territory before 1st January 2007, the measures provided by the 30 April 2004 circular, adopted when EU 8 entered, will be extended. According to this last circular, workers of the 8 new Member States (Malta and Cyprus are excluded) are still subordinated to the national regulation relating to access to the Belgian territory. They still have to produce a residence permit delivered at the Belgian Embassy or consulate in their country of origin. According to the current regulation, they must have a work permit to obtain a professional visa from the Embassy. This work permit is delivered by the competent Regional authorities based on the seat of the employer (Walloon, Flemish, or Brussels Capital Region). The work permit is delivered to an alien only if, in the relevant labour market, no Belgian citizen can be found to do the job.

The Royal Decree dated 25 April 2004 includes a facility for those workers who, at the date of 1st May 2004, are already legally employed for a non interruptive period of at least 12 months and are holder of an unlimited authorisation of stay in Belgium at the same date. Such workers are entitled to stay on the Belgian territory without being obliged to go back to their country to request a residence permit through the Embassy. The Royal Decree adopted on 20 December 2006 extends the same facility to Bulgarian and Romanian citizens.

Consequently, a facility has been given to all Bulgarian and Romanian citizens authorised to stay at the date of 1st January 2007 or authorised to an unlimited stay at the same date. The provisions of the 2004 Royal Decree are extended to Bulgarian and Romanian citizens. This Decree provided that in granting of a work permit, the national labour market is not taken into consideration for those workers who, on 1st May 2004, were already legally working in Belgium and were already admitted on the national labour market for a period of 12 months or for those workers who, after 1st May 2004, are admitted on the national labour market for a period of 12 months. The same regime is applicable to the family members of the above mentioned workers considering the spouse, descendants aged less than 21 years and dependants provided they come to live with this worker.

On 19 December 2006, another Royal Decree was adopted modifying the Royal Decree dated 9 June 1999 executing the 30 April 1999 Act relating to occupation of Alien workers. Consequently to the adoption of a transitional period of 2 years regarding Bulgarian and Romanian citizens, the Employment Minister decided, in emergency, to limit access to the work market for workers originating from these 2 new EU member States. The Employment Minister argues he cannot take position without seeing the Commission follow-up report concerning the preparation level of these 2 new EU Member States, entry raised public in September 2006, without consulting the other EU Member States, in particular during the

experts committee and the free movement of workers consulting committee held on 27 and 28 October 2006 (Annex n° 40).

CHAPTER IX. STATISTICS

Summary

As last year, there are no specific statistics available. Only general statistics relating to the 2006 number of aliens on the Belgian territory classified by nationality exist on the GAO website. For other figures however, it is not possible to compare the different populations since statistics are partial, not recent enough and thus, difficult to cross. They come from different governmental bodies at different levels (federal, regional, local). An effort could be asked of the Belgian authorities in this matter.

As far as possible one can deduce from the figures that there is no important increase of work migration from the new EU Member States. For last year, Poland is the most important country of origin amongst the EU8.

Statistics given last year from the Equal Opportunity Centre studies were not updated.

No specific statistics regarding repartition by sex/branch/skills-qualifications is available. From the website of the Foreign Office, statistics concerning foreigners living in Belgium on 7 April 2006 are given at: http://www.dofi.fgov.be/fr/statistieken/statistiques_etrangers/Stat_ETRANGERS.htm.

The figures given can be synthesised as follows:

Allemagne (Rép.féd.)	37838
Autriche	2514
Bulgarie	4870
Chypre	175
Danemark	3358
Espagne	43254
Estonie	468
Finlande	3143
France	123076
Grande-Bretagne	26249
Grèce	16368
Hongrie (Rép.)	2265
Irlande /Eire/	3485
Italie	175912
Lettonie	571
Lithuanie	790
Luxembourg (Grand-Duché)	4358
Malte	205
Pays-Bas	113320
Pologne (Rép.)	19642
Portugal	28506
République Slovaque	3874
République Tchèque	1990
Roumanie	10115
Slovénie (Rép. de)	455
Suède	4530
(Tchécoslovaquie)	207

The figures are classified and thus can be sorted out by province, arrondissement, and municipality.

The figures relating to asylum applicants per month and country of origin in 2006 are also available from the website of the Foreign Office (Annex n° 33) These figures are classified by place of entering on the Belgian territory considering the frontier, the Foreign Office, and closed centres for illegals (Annex n° 34).

Statistics concerning unaccompanied minor children are also given by the Foreign Office on its website (Annex n° 35)

Recent legal literature

J. BLOMME, "De uitbreiding van de Europese Unie", *Bulletin de Documentation du SPF Finances*, p. 69-75 (Annex n° 5). It is important to notice that the figures provided in this study are coming from the Annual Macro Economic (AMECO) Data Base of the GD Economic and financial affairs dated April 2006.

CHAPTER X. SOCIAL SECURITY

Summary

Acquis

If there are problems remaining regarding social security of work migration in Belgium, they are not so important any more.

2006

Last year's problem concerning the exportation outside Belgium of social security paid by Belgium, has been ruled in the *De Cuyper* case taking into consideration the residence criteria as founded.

Developments

Medical treatment in another Member State

In a case concerning a Belgian residing in Belgium who wanted to follow, in UK, a method for detoxifying only available in UK, the Labour Court of Antwerpen ruled on 22 June 2005 that the obligation for the College of Doctors Managers (Collège des médecins directeurs) to give an approval for a medical treatment abroad is not an obstacle to free movement of patients, according to the *Decker and Kholl* cases. This approval is applicable both for the situation in which treatment concerned cannot be given in Belgium, and for the situation in which the treatment given in another Member State is more efficient than the one that can be given in Belgium (Annex n° 8). This judgement could lead to problems with regard to the *Watts* case of 2006 and the new definition of "the benefits in kind which become necessary on medical grounds taking into account the nature of the benefits and the expected length of the stay" given in article 19(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. It will depend on the practice of this college of doctors.

Care insurance (case C-212/06)

In a decision of 19 April 2006, the Constitutional Court decided to ask 4 questions to the ECJ concerning the Flemish care insurance scheme (Case C-212/06, annex n° 24). The case analysed by the Constitutional Court is quite complex and involves a new Flemish Decree modifying the right to obtain care insurance coverage, depending on the place of work and the place of residence. The example given by the applicants is about a Belgian or French worker who works in Flanders. This worker would be covered by the Flemish care insurance as long as he lives in France, in Flanders or in Brussels. However, he would lose the benefit of the insurance coverage if he moved to the Walloon Region. In a first argument, the applicants alleged the new law is in violation of art. 18, 39, 43 of EC Treaty and art. 2, 3, 13, 18, 19, 20, 25 and 28 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community. Applicants allege also that the Flemish Decree is in the application field of Regulation (EEC) 1408/71 and, further, contrary to the *Lancry* (9/08/1994) and *Elsen* cases (23/09/2000).

A second argument is about reverse discrimination. Applicants allege that in the case in which this kind of reverse discrimination could be acceptable in the matter of social security regimes pointed by Regulation 1408/71, it would be different and in violation to EC law when the concerned workers did use their free movement right. They refer to the *Maris* case ruled on 6 December 1977. For example, a national working in the Flemish Region who,

after using his or her free movement right, leaves a Member State where he lived to come back and live in Belgium, more specifically in the Walloon Region, would lose the benefit of the care insurance scheme. The new Decree would create discrimination between foreign residents and some national residents.

The first question raised is whether the care insurance scheme as established by the Flemish Decree is or is not in the field of application of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community. Whereas the Commission has considered in a communication dated 17/12/2002 (ref. 2002-2159, C(2002) 5361) that this Decree entered into this above-mentioned regulation, and whereas the Flemish Parliament followed implicitly the same position, it is still in debate in doctrine.

Indeed, according to the *Jauch* (C-215/99, Rec., 2001, p. I-1901) and *Hosse* cases (C-286/1408/ 71), this Regulation is applicable if the Flemish care insurance scheme is considered as social security benefits in the sense of article 4(1) and 4(2) of this Regulation, but is not applicable if considered as concerning special non-contributory benefits in the sense of article 4(2*ter*) of the same Regulation. Neither the text of the Regulation nor the criteria used by the ECJ can conclude with certainty that the Flemish care insurance scheme enters into the application field of the above mentioned Regulation.

If applicable, the second question raised is relating to the extension of the application field of the Flemish Decree to people working in the Flemish Region or the bilingual Brussels-Capital Region but who are not resident in both these regions. The question is: is the fact that this extension is made under the condition that these workers are not resident in Belgium it still compatible with the Regulation provisions when EC citizens who work in these two Regions but are resident in the Walloon Region and the German region are excluded of the benefit of the new Decree ?

Although the EC Treaty provisions mentioned are written in broad and general terms and susceptible to interpretation, it can not be excluded, taking into consideration the formal notice of the Commission dated 19 December 2992 and the *Elsen* case, that this regime could be considered as contrary to the EC Treaty.

If the Constitutional Court were to cancel the concerned provisions of the Flemish Decree, it would remain to be decided whether the scheme as it existed before the modification is still compatible with the same EC Treaty provisions, as the requested cancellation would induce to put into force a previous version of the Decree.

This justifies why the Constitutional Court asks the fourth question.

The 4 questions raised are:

1. Does a care insurance scheme – which (a) has been established in a Decree dated 30 March 1999 modified on 30 April 2004 adopted by an autonomous Community of a federal Member State of the European Community, (b) applies to persons who are resident in the part of the territory of that federal State for which that autonomous Community is competent, (c) provides for reimbursement, under that scheme, of the costs incurred for non-medical assistance and services to persons with serious, long-term reduced autonomy, affiliated to the scheme, in the form of a fixed contribution to the related costs, and (d) is financed by annual contributions of members and by a grant paid out of the budget for expenditure of the autonomous Community concerned – constitute a scheme falling within the scope *ratione materiae* of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as defined in Article 4 thereof?
2. If the first question referred for a preliminary ruling is to be answered in the affirmative: must the regulation cited above, in particular Articles 2, 3 and 13 thereof and, in so far as they are applicable, Articles 18, 19, 20, 25 and 28 be interpreted as precluding an autonomous Community of a federal Member State of the European Community from adopting provisions which, in the exercise of its powers, allow only persons residing in the territory for which that autonomous Community is competent and, in relation to citizens of the European Union, persons employed in the territory and who are resident

in another Member State to be insured under and covered by a social security scheme within the meaning of that regulation, to the exclusion of persons, whatever their nationality, who reside in a part of the territory of the federal State for which another autonomous Community is competent?

3. Must Articles 18 EC, 39 EC and 43 EC be interpreted as precluding an autonomous Community of a federal Member State of the European Community from adopting provisions which, in the exercise of its powers, allow only persons residing in the territory for which that autonomous Community is competent and, in relation to citizens of the European Union, persons employed in that territory and who are resident in another Member State to be insured under and covered by a social security scheme within the meaning of that regulation, to the exclusion of persons, whatever their nationality, who reside in a part of the territory of the federal State for which another autonomous Community is competent?
4. Must Articles 18 EC, 39 EC and 43 EC be interpreted as not permitting the scope of such a system to be limited to persons who are resident in the territorial components of a federal Member State of the European Community which are covered by that system?

In a particularly interesting view, the third and fourth questions refer to article 18 EC. However, the Constitutional Court seems to limit the debate to the material field of application of Regulation 1408/71 and does not seem to induce all the consequences. Indeed, if the concerned care insurance scheme is to be considered as a social assistance regime and does not enter into the application field of Regulation 1408/17, it could raise a problem of non discrimination towards a citizen contrary to article 18 EC with regard to the more and more important notion of residence citizenship, using the criteria of the "real link" (*Trojani*, 2004 and *De Cuyper*, 2006).

Recent national reports, legal literature

H. VERSCHUEREN, "Sécurité sociale et détachement au sein de l'Union européenne. L'affaire *Herbosch Kiere*: une occasion manquée dans la lutte contre le dumping social transfrontalier et la fraude sociale" (Social security and secondments within the EU. *Herbosch Kiere* case: a lost opportunity in the fight against international social dumping and social fraud), *Revue belge de sécurité sociale*, 2006, pp. 406-450 (Annex n° 23)

H. VERSCHUEREN, "Europese en internationale sociale zekerheid", in Van Regenmortel, A. (ed.), *Overzicht rechtspraak en rechtsleer sociale zekerheid, Deel I, algemeen Deel*, Brugge, Die Keure, 2006, to be published.

J. JACQUMAIN, observations under ECJ *Sarkatzis* case, "15 ans après *Dekker*" (15 years after *Dekker* case), in *Chronique de droit social*, 2006, p. 366-367 (Annex n° 9).

J. JACQUMAIN, observations under ECJ *North Western Health Board (Ireland)* case, "le saut à l'élastique comme traitement des grossesses difficiles", *Chroniques de droit social*, 2006, p.183-184 (Annex n°11).

P. SCHOUKENS, "Europees Burgerschap : toegang tot de gezondheidszorg voor EU-burgers op basis van maatschappelijke dienstverlening", *T.Gez./Rev. Dr. Santé*, 2006-2007, p.11-28 (Annex n° 13)

F. VAN OVERMEIREN, "De dienstenrichtlijn en gezondheidszorg: de gevolgen van de interne markt zwart op wit" (The Services Directive and health care: consequences of the internal market black on white), *T.S.R./Rev. Dr. Soc.*, 2006, p. 171-217 (Annex n°

M. COUCHIER, "Naar een codificatie van de rechtspraak van het Hof van Justitie inzake patientmobiliteit" (Towards a codification of the ECJ case law relating to patient mobility), *T.S.R./Rev. Dr. Soc.*, 2006, p. 65-170 (Annex n° 21)

CHAPTER XI. ESTABLISHMENT, PROVISION OF SERVICES, STUDENTS

Summary

Acquis

Free movement of students and application of the non-discrimination principle is an "acquis" in Belgian law since the *Gravier* case (C-293/83, 1985)

2006

However this could be challenged again as, in the French-speaking part of Belgium, the authorities are confronted with more and more French students, representing more than 30% to 50 % of the students in some studies, mainly paramedical. In fact, France is applying a *numerus clausus* in those studies and Belgium is not. A Decree which limits at 30% the part of students non resident in Belgium for at least 3 years before studying in the country was adopted on 16 June 2006.

Developments

On 26 January 2006, the French Community of Belgium adopted a Decree blocking the registration of students in studies leading to the professions of obstetrician, occupational therapist, speech therapist, chiropodist, physical therapist and veterinarian. This regulation was adopted before a decree dated 16 June 2006 came into application for the academic year 2006, which limits to 30 % in the sectors of studies mentioned above, the number of non-Belgian students who are not resident for at least 3 years. In February 2006 this Decree faced opposition from the students, some schools mainly at the French border and some trade-unions. Like in the eighties, with the *Gravier* case (C-293/83), it could be in contradiction with EC law, namely the non-discrimination principle (Annex n° 48, Decree regulating the number of students in some first degree courses in superior education). As in the case *Commission v. Austria*, about the German students in medicine in Austria, the question will be to know if the measure applied by the Belgian authorities (namely a quota of 30%) is proportionate to the aim that seems legitimate (namely the quality of the education).

Two judicial cases were decided in Belgium. One (a) did refuse to suspend the Decree. A second (b) did accept to suspend a decision in a particular case.

a) The suspension of the new Decree was requested from the Constitutional Court (Cour d'Arbitrage). It ruled that conditions of highly difficult damages could not be found amongst the applicants, as the action was dismissed on procedural grounds (Annex n° 46).
b) A French student wanted to study physical therapy in a Higher School of Charleroi. He was refused in this section as the number of students already registered was reached. He began to study in Belgium in September 2005 in the occupational therapy section with the clear intention to register again for the next academic year. In September 2006, the same French student was refused by application of the new Decree dated 16 June 2006 regulating the number of students. He decided to challenge the new refusal decision before an internal Appeal Commission which rejected the appeal. Then, he lodged an action to the State Council to suspend this confirming decision of the Appeal Commission. In the judgement given on 17 October 2006, the State Council decided to suspend this refusal decision (Annex n° 47).

Chapter I referred to the circular dated 10 May 2006 related to the non respect of the deadline imposed to implement Directive EC/2004/38. More specifically, to implement article 16 of the EC 2004/38 Directive concerning EU students who have resided legally for a continuous period of five years in the host Member State, the circular provides that a blue card will be automatically issued when applying and proving their continuous period of 5 years in Belgium.

Grzelczyk case

On 26 April 2006, the Labour Court of Liège confirmed a judgement given by the Labour Tribunal which refused social benefits to a French student, taking into consideration the fact that he did not prove his "situation of need" as he has the possibility to live with his parents. The Court applied the social benefits Act in reference to the *Grzelczyk* case, as the Arbitration Court cancelled the provision which maintains the nationality condition for EU citizen in 2004 (Annex n° 31)

Recent legal literature

W. RAUWS, "Discriminatie in het onderwijs" (Discrimination in the studies), *Rechtskundig Weekblad*, 2006-2007, p. 310-322 (Annex n° 14); this special issue is dedicated to "discrimination in law" and contained articles written for the 42nd scientific congress organised on 20 October 2006 in Gent by the Flemish Association of Lawyers.

M-C. FLOBETS and J. VELAERS, "De hoofdoek, het onderwijs, en de antidiscriminatiewet" (Headscarf, the studies and the anti-discrimination law), *Rechtskundig Weekblad*, 2006-2007, pp. 122-132. (Annex n° 15).

CHAPTER XII. MISCELLANEOUS

Studies, seminars, reports, legal literature

P. VANDERNOOT, "La qualité de la législation communautaire, sa mise en œuvre et son application dans l'ordre juridique national", rapport du Conseil d'Etat de Belgique au colloque des 14 et 15 juin 2004 de l'association des Conseils d'Etat et des juridictions administratives suprêmes de l'Union européenne (The quality of the EC legislation, its implementation and its applicability in the Members States, report of the Belgian State Council for the congress held on 14 and 15 June 2004 organised by the Association of the EU States Councils and Administrative Supreme Jurisdictions.), Administration Publique, 2006, p. 79-152 (Annex n° 12).

M. CANDELA SORIANO, "L'Europe, terre d'accueil?: panorama juridique actuel de la politique européenne d'immigration légale" (Europe, welcome land?: current legal overview of the legal European immigration policy), *Revue de la faculté de droit de l'Université de Liège*, 2006, p. 43-60 (Annex n° 22).

J.-Y. CARLIER, "Le devenir de la libre circulation des personnes dans l'Union européenne : regard sur la directive 2004/38" (the future of the free movement of people within the EU : an eye on the 2004/38 Directive), *Cahiers de droit européen*, 2006, pp. 13-34 (Annex n°19)

J.-Y. CARLIER, "Libre circulation des personnes dans l'Union européenne (1er janvier – 31 décembre 2005)" (Free movement of persons in the European Union (1 January - 31 December 2004), *Journal des Tribunaux de Droit Européen*, March 2006, p. 75. (Annex n° 4). The same case-law study from 1st January to 31 December 2006 will be published in *Journal des Tribunaux de Droit Européen* of March 2007.

Answers to the comments of the Commission on the Belgium national report 2006

Chapter I:

There is no reference to job-seekers in Chapter I since, under the covered period the practice does not show any difficulty for job-seekers who seek to enter on the Belgian territory. One could not find in the case law under review any decision where an EU citizen lodge an action against the Belgian authorities which would refuse him a residence permit as job-seeker.

As for entry, no specific formality is required of an EU Member State citizen who wishes to enter or reside in Belgium. The EU citizen is automatically registered without taking any further step. Nor is any professional card required to exercise a self-employed activity. This single procedure partly explains the reason why order to leave delivered to an EU Member State citizen after the 6 months delay as required by the ECJ case law (*Antonissen*) is not litigate when issued.

Chapter II:

The three issues mentioned in the Commission's format are targeted in the standard introduction to this chapter (see p. 12).

Regarding transposition of Directive 2005/36/EC, according to the GOA's information, the government decided on 10 March 2006 that a "mixed" method of transposition will implement this Directive. On the one hand, a "horizontal" transposition will be used through a basic law and, on the other hand, a "vertical" transposition will be used as soon as concerned authorities will be entitled to adopt enforcement measures of execution for regulated professions for which they are competent. The future "horizontal" law of transposition will be a subsidiary law as it will be applicable only when no "vertical transposition" has been adopted by the different above mentioned competent authorities.

An "ad hoc" working group has been set up including all the federal departments concerned (Regions and Communities added as non federal authorities) under the direction of the Federal administration of Scientific Policy. Meetings of this working group have already raised a first draft of the future basic law. According to the GOA's information, the adoption of this draft basic law should be a priority at the beginning of the new Parliamentary session as the delay to implement the Directive 2005/36 is scheduled on 20 October 2007.

Practices do not show many problems related to the language requirements, the recognition of diplomas and the nationality for captains of ships. As three national languages are existing in Belgium, one could not be surprised to mention so few problems related to the language requirements in access to employment.

Chapter III:

In the 2005 Report, it was mentioned that:
"A Member of Parliament questioned the Minister for Employment about French Nationals who cross the border every day to work in Belgium. It seems, according to this MP's information, that they earn better salaries than Belgian workers because of advantageous tax system and social security contributions, which are lower in Belgium than in France. The Employment Minister gave figures coming from the National Insurance for Illness and dis-

ability services. They reveal that between 1999 and 2004, the number of French workers who cross the border increased by 50% from 16.364 to 24.536. This seems to confirm the trends of one-way border crossing of workers between France and Belgium."
Since this information was collected, no new document were found in 2006 on that point. The 2005 trends deems to prove that no specific obstacle prevent French worker to cross the border and work in Belgium. As previously mentioned in the 2005 report, it would be interesting to compare with the French situation if the same phenomenon is observed.

Chapter IV:

First of all, it has to be reminded that Belgium has a lack of useful statistics on EU workers on the national territory. It was already denounced in the 2005 Report regarding statistics as Belgian authorities referred to European statistics as EUROSTAT to give national information. On that point, the information which shows a low rate of non-Belgians in the public sector has to be checked with pertinent statistics.

The high rate of EU Member State citizen in Belgium can be explained by the presence of the EU institutions in Bruxelles and not because of a high number of EU citizen coming in Belgium to work in specific sector where a lack of workforce exist as it was in the past with Italian.

All the public job offers are published officially on the website of the public recruitment Office (SELOR). From the controls made, no language requirement is a condition for access to jobs in the public sector. It refers to the booklet relating to employment in the public sector published by the Federal Public Administration available t the following link:
http://www.belgium.be/eportal/ShowDoc/personnel/imported_content/pdf/PO_FRemploi_admin_federale.pdf?contentHome=entapp.BEA_personalization.eGovWebCacheDocumentManager.fr

The annual report of the Federal administration dealing with civil servants (Human resources and Organisation) is also clear on that point. This report is accessible from the following link:
http://www.belgium.be/eportal/ShowDoc/personnel/imported_content/pdf/PO_rapport_annuel_2006_sensations_FR.pdf?contentHome=entapp.BEA_personalization.eGovWebCacheDocumentManager.fr

As language requirements, the knowing of both national languages (Dutch and French) is not an absolute condition but it is clear that people who speak both languages have a valuable advantage. This affirmation does not only concern EU Member State citizen as the same advantage is recognized to national citizen. On that point, the fact that more Dutch speakers are occupied as civil servants in the public sector than French speaker is lighting prove.

As mentioned in the report, from the personal experience of the first reporter, it can attest that the nationality criteria has never been used to prevent EU citizens to have access to jobs offered. In the education sector as the University, several jobs are offered to EU Member State citizen.

Chapter V:

The chapter has been completed as requested.

Chapter VI:

The case law mentioned and requested by the Commission did not occur to any specific case law in front of the national jurisdictions. At the day of the final report, Belgian authorities have been questioned on the follow-up through the Governmental Office for Aliens and answer has not been recorded yet.

Chapter VII:

The chapter has been completed as requested.

New aliens administrative court

This new law on asylum and family reunification dated 15 September 2006 also creates a new jurisdiction that will be competent for all alien litigations: the Alien Litigation Council (ALC, *Conseil du Contentieux des étrangers*). This new jurisdiction is operational since 1st June 2007. The new law confers to this jurisdiction a full competence (opportunity and legality control) relating to asylum matters. All EC citizens, as all aliens, will be handed over to this new jurisdiction. However, EC citizens and aliens who are not asylum seekers will not have the benefit of a full competence as they only have recourse based on legality control. The new law does not delete the consulting procedure applicable before the adoption of any removal decision concerning an EC citizen. The Alien Consulting Commission will still be competent to give advice before adopting such a measure. This status quo in the protection given is, however, source of discrimination between asylum applicants and EC citizens, as the former will have the benefit of a fully competent jurisdiction when challenging a decision and the latter will only have the benefit of a legality control without any opportunity control on a decision concerning aliens. As this new administrative jurisdiction has only competence for a control of legality, and not of opportunity for all foreigners including EC citizens, but of opportunity for asylum seekers. Even if there is a preliminary advice from an independent body and is not contrary to the case law (C-136/02, *Dör & Ünal*, 2005), it could be a question of equality of rights for EC citizens.
After questioning GAO on that matter, the answer given is not the same as the reporters had after analysing of the new legislation. According to the GOA, the former Alien Consulting Commission is still competent to give advice before adopting measures of expelling a alien who is considered able to compromise the Belgian international relations, before adopting an order to leave concerning an Alien who is neither authorised nor admitted to stay more than 3 months or to establish in Belgium, before a ministerial decision of return or a Royal Decree of expulsion.
The GOA also gives some precisions about the extent of the appeal offered to EC citizens. According to GOA, EC citizens and members of their family can lodge an action at the ALC. Once introduced, this appeal has automatically a suspensive effect, as it is a judicial resort. The control allowed on the decision will be either a control of the legality of the decision as a control of the facts and circumstances on which the decision is taken, and the proportionality of the decision. These 3 kinds of controls on the administrative act are closer to a control of full competence than a formal control of legality. This assertion seems to be in opposition with what has been written in the report. The extent of the control of the ALC on the decisions regarding EC citizens and their family members is so important that reporters suggest to ask for a clarification from the Belgian authorities on that specific point.

Chapter IX:

The chapter has not been completed as requested. Indeed, no statistics on the numbers of EU nationals residents in Belgium was given as such statistics was not available.

In 2006, the GOA presents some statistics available from its website at the following link: http://www.dofi.fgov.be/fr/1024/frame.htm
The website is linked with another webpage were statistics related to foreign population resident in Belgium (http://www.dofi.fgov.be/fr/statistieken/statistiques_etrangers/Stat_ETRANGERS.htm).
Reporters have already specified these statistics by Member State of origin in the 2006 report. Unfortunately, these statistics were not available in2005 as reporters could not make any comparison. For the following report, such comparison will be made taking into consideration figures mentioned in the 2006 Report.
The same website sends the reader to the Economy Administration and the Belgian Institute of Statistics (Statbel) available at the following link:
http://statbel.fgov.be/press/population_fr.asp
Here again, the information mentioned is neither accurate nor recent.