REPORT
on the Free Movement of Workers in Belgium in 2010-2011

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Contents

List of Abbreviations

CCE	Conseil du contentieux des étrangers (Council for Alien Disputes)
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)
CJEU	Court of Justice of the European Union
C.J.U.E.	Cour de Justice de l'Union européenne (= CJEU)
C.T.	Cour du Travail (Industrial Court)
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
E.T.L.	European Transport Law
GOA	Governmental Office for Aliens
J.D.E.	*Journal de droit européen* (= J.T.D.E. before 2008)
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*
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*
T.T.	Tribunal du travail (Industrial Tribunal)
T.R.V.	*Tijdschrift voor rechtspersonen en vennootschap*
T.Vreemd.	*Tijdschrift vreemdelingenrecht*
R.W.	*Rechtskundig Weekblad*

Introduction and Summary of the Main Issues

PAST

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

Many established rights ('*acquis communautaire*') are not issues any longer. But this is not always the case in other Member States. Therefore, in order to make the comparison easier, established rights are reminded at the beginning of some chapters.

The above statement is not to say that everything is 'perfect' in Belgium in matters of free movement of persons, but there is nevertheless a strong experience with the '*acquis communautaire*'. However, major practical problems may still occur. For instance, several sources show that national official languages are sometimes required when not necessarily used. Even though no case-law is reported, this may lead to great difficulties in practice.

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More than in 2010, it is in 2011 and in the future that we will witness important evolutions in Belgium.

1. It should be mentioned that, since the federal parliamentary elections of June 2010, Belgium is in a crisis, with parties unable to reach a deal on a reform of the federal system in Belgium, the crux of the problems lying in which and how many competences should be devolved to the sub-federal entities. In the absence of a new government, the former government is still in place, as a caretaker government (in '*affaires courantes*'), in principle, only handling urgent matters, which implies a reduced legislative and executive activity. However, some initiatives, proposals for new laws, are put forward in Parliament.

One such initiative is the vote by Parliament of an important law, which will in time lead to ending a Belgian specificity: the assimilation of Belgians with European citizens who have exercised their right to free movement, in order to prevent reverse discrimination (Principle of Assimilation, *infra*). This law has not yet entered into force and will most probably be subject to review before the Constitutional Court. Before the vote of the law in Parliament, the Council of State had rendered a negative opinion, referring itself to the *Zambrano* case.

2. On a different note, in May 2011, the Court of Justice of the European Union rendered its judgment on the case regarding the profession of notary. Belgium, along with other Member States, was deemed to breach EU law because it reserves the profession of notary to its nationals. As yet, it is too early to assess how the profession will adapt.

3. Regarding students, the Constitutional Court has rendered its judgment following the *Bressol* judgment of the Court of Justice. For the two quantitatively (in terms of number of students) most important studies (physiotherapy and veterinary medicine), the Government, having put forward the necessary data, was able to prove the risks for the health system and the Constitutional Court accepted the measures put in place (a quota system) and dismissed the proceedings for these two curricula. Conversely, for the other curricula covered by the

controversial measures, in the absence of sufficient evidence from the Government, the Constitutional Court deemed the measures disproportionate.

Chapter I: The Worker: Entry, Residence, Departure and Remedies

SUMMARY

Acquis

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

This law has been amended more than 20 times since 1980. The law contains a section on Entry (Chapter II, Title 1. 'Access and short stay') and a section on EU citizens (Chapter I, Title 2. 'Foreigners EU citizens and members of their family and foreigners members of the family of a Belgian national'). As appears in this last section's title, there is a particularity in Belgium: in order to avoid reverse discrimination, family members of a Belgian citizen have the same rights as family members of an EU citizen (Principle of Assimilation – this could change in 2011 however, *infra*).

No specific formalities are required for an EU Member State citizen wishing to enter or reside in Belgium. The EU citizen is automatically registered. A registration card is delivered by the local administration (for a specimen of the electronic, see Alien EU card). No 'professional card' is required for employed or self-employed activities.

Family members of a Belgian or EU citizen, who are foreigners from third countries, will usually need a visa to enter. This requirement is not absolute, with respect to the *MRAX* case (Court of Justice, Judgement of 25 July 2002, *MRAX*, C-459/99).

All foreigners, EU citizens as well as third country nationals, have the right to vote and to stand as candidates in municipal elections under specific conditions related to duration of residence. This shows that, in Belgium, political rights are more closely linked to duration of residence rather than citizenship. However, there is no such link for European elections, as opposed to what applies in the UK (Court of Justice, Judgement of 12 September 2006, *Spain v. United Kingdom*, C-145/04).

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The main issue remains the limited control of the Council for Aliens Dispute (*Conseil du Contentieux des étrangers*, CCE) when faced by actions from Europeans citizens, the jurisdiction of the CCE being limited to a legality control. This situation could be subject to debate when considering the *M.S.S* case (ECHR), which made clear that the notion of effective remedy required a review of both the law and the facts. Although the case itself concerned third country nationals, this case-law could just as well be applicable to European citizens.

In the near future, Belgian law could be modified so as to reinstate the reverse discriminations that been deleted in Belgium (*infra*, Chapter II).

Texts in Force

The 2004/38/EC Directive was transposed in the Belgian legislation by a law adopted on 25 April 2007 modifying the Alien law of 15 December 1980. This law was published in the

Official Journal (*Moniteur belge*) on 10 May 2007 and entered into force on 1 June 2008. Generally speaking, the 2004/38 EC Directive was well implemented.

1. IMPLEMENTATION OF SPECIFIC PROVISIONS FOR WORKERS

As this part refers to the same articles as mentioned in the last year report, the content is still valid today:

> 'Article 7 (1a) was transposed by Article 20 of the law adopted on 25 April 2007 modifying the Alien law of 15 December 1980. This law entered into force on 1 June 2008 (annex n° 42 of the 2008 report). It is Article 40 §4, 1° of the Aliens law.
>
> Article 7 (3 a-d) was transposed by Article 27 of the same law. It is Article 42bis of the Aliens law. There is no Article 8(3a) in the 2004/38 Directive: consequently, it is assumed that Article 8 (3a) refers to Article 8 (3), 1st indent. Thus, Belgian law transposed by Article 19, §4, 1°. Article14 (4 a-b) was transposed by Articles 26, 27 and 28 of the law. It is Articles 42*bis*, 42*ter*, and 42*quater* of the Aliens law. Article 17 was transposed by Articles 29 and 30 of the same law. It is Articles 42*quinquies*, and 42*sexies* of the Aliens law. The Directive states that a 3-year period (formerly 5) is enough to receive permanent residence (Article 42*quinquies*, §1 of the Aliens law). The period of 5 years is still required for a student. This period was changed to a 3-year period for a permanent residence because a 3-year residence is enough to apply for Belgian nationality.'

This could change in the future as there are different proposals in Parliament to go back to a minimum period of 5 years of residence to apply for Belgian nationality. If one of these proposals is voted by the Parliament and if the delay to apply for Belgian nationality is extended to 5 years, most probably, the delay to apply for permanent residence will be consequently extended from 3 to 5 year also. These draft laws are parliamentary initiatives from political parties and are not coming from the government.

A draft law dated 18 November 2010 extends to 5 years the period to apply for Belgian nationality (Doc. 53, 0601-001). The same condition is required in another draft law put forward on 28 October 2010 by the NVA political party, which is the biggest Flemish party (Doc. 53, 0574-001). However, for the moment, the draft law adopted by the parliament on 26 May 2011 (Draft law adopted by the Parliament on 26 May 2011, Doc. 53, 0443/021, art.11 and 12) and relating to family reunification conditions does not modify the 3 year period after which permanent residence is achieved.

One has to bear in mind that this new law has not yet entered into force, but does modify art. 42*ter* and 42*quater* of the Aliens law. For the time being, these provisions allows the authority to withdraw the residence permit of a family member of a EU citizen within the two first years of its delivery. The new provisions adopted recently in May 2011 extend the possibility to withdraw the residence permit given to the three first years following its delivery.

Althought this change appears to be without consequence and of less importance, it is a fundamental new way of granting the Assimilation Principle (see Chapter II, Title 1.). Indeed, whereas in principle a family member of a Belgian citizen is still assimilated to a EU citizen, the conditions under which its residence permit can be withdraw are similar to the ones applicable for third country nationals family member.

Therefore, it might be said that there no longer is a Belgian specificity in practice and that the assimilation of family members of a Belgian citizen with the family members of a European citizen who has circulated in the EU does not exist. In this sense, the Assimilation Principle, which aimed at removing reverse discriminations, will probably disappear by the end of the year 2011. This situation is particularly regrettable when one considers the case-law resulting from the *Zambrano* case (see *infra*, Chapters II and IX).

Article 24 (2) of the directive has not yet been implemented.

2. SITUATION OF JOB SEEKERS

Job seekers in Belgium can receive a registration certificate as soon as they arrive in the country. The municipality delivers registration certificates with no formalities when job seekers come to register to the local administration. This first registration certificate is a 3-month provisory document, which is confirmed when job seekers bring documents attesting their job seeker status (Court of Justice, Judgement of 26 February 1991, *Antonissen*, C-292/89). This practice is confirmed by an explicative folder edited by the FOREm (Walloon Employment and Training Office) and downloadable from the following address: http://www.leforem.be/particuliers/conseils/profil/travailleurs-etrangers.html.

Art. 40, §3 and 40, §4 of the Alien law properly implemented art. 6 of the 2004/38/EC Directive on that specific point. Job seekers may request social assistance but it is not automatically granted, as the public authority for social assistance considers that they are supposed to have sufficient resources to stay on the territory. This practice seems to be in conformity with the *Ioannidis* (C-258/04) and *Collins* (C-138/02) cases. Removal from the territory cannot be an automatic consequence of a social assistance claim as said in art. 42*bis*, §3 of the Alien law. Before deciding the removal, Belgian authorities will have to take in consideration the personal situation of the job-seeker, the amount of the help given, the period of the residence and whether the help is claimed to face temporary difficulties or not.

Practically, the application of the legislation creates problems for job seekers. Even if EU citizen have the right to be registered immediately at the local or regional office for employment, and even if they have the right to start to work before the end of the registration procedure, some difficulties still remain. Indeed, it has been reported that the administrative situation of foreign job seekers incites reluctance from employers and administrations as long as the registration procedure is not definitively achieved (see Migration Report 2010, from the Centre for Equal Opportunities and Opposition to Racism – *infra* –, p. 146).

3. OTHER ISSUES OF CONCERN

3.1 Situation of Students

Some difficulties f aced by municipalities in the Brussels Region with EU students who do not register at the local administration when they arrive in Belgium are still current. This leads to problems when having to prove their identity based on an effective residence in Belgium. Some of them face problems when having to pass an exam or when requesting validation of their diploma. There is no case-law on the subject to our knowledge so far (however, see also Chapter IX, *Bressol* case).

3.2 Judicial Practice

Regarding entry, residence and departure, the CCE (*Conseil du Contentieux des étrangers,* Council for Aliens Dispute) is competent regarding residence of all foreigners, including EU citizens (it is competent for residence rights only, not for rights related to work conditions, which are the remit of industrial courts).

As mentioned in our previous Report, the CCE does not have full jurisdiction but has only a legality control on EU citizens and members of their families. This legality control is more or less similar to the Wednesbury test in the UK. In other parts of the Belgian Aliens law, namely provisions regarding refugees, the CCE has a full jurisdiction with a control over both the law and of the facts. This could raise questions under the EU non-discrimination principle (Article 12 CE/18 TFEU) regarding access to justice, even if it only concerns residence rights and not other migrant workers rights.

The ruling of the Constitutional Court which accepted this limited control – Judgment n° 81/2008 rendered on 28 May 2008 (annex n° 43 of the 2008 report, Point B.37.3) – could be challenged on grounds of the *M.S.S v. Belgium* Judgment of the ECHR of 21 January 2011. Whether this limited control of legality is in conformity with 'an examination of the legality of the decision as well as of the facts and circumstances' as provided by Article 31.3 of the Directive 2004/38 is disputable.

As the ECHR underlined in its judgement:

> 386. The Court notes first of all that in Belgian law an appeal to the Aliens Appeals Board to set aside an expulsion order does not suspend the enforcement of the order. However, the Government pointed out that a request for a stay of execution could be lodged before the same court 'under the extremely urgent procedure' and that unlike the extremely urgent procedure that used to exist before the *Conseil d'Etat*, the procedure before the Aliens Appeals Board automatically suspended the execution of the expulsion measure by law until the Board had reached a decision, that is, for a maximum of seventy-two hours.
> 387. While agreeing that that is a sign of progress in keeping with the *Čonka* judgment, cited above (§§ 81-83, confirmed by the *Gebremedhin* judgment, cited above, §§ 66-67), the Court reiterates that it is also established in its case-law (paragraph 293 above) that any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 of the Convention requires close and rigorous scrutiny and that, subject to a certain margin of appreciation left to the States, conformity with Article 13 requires that *the competent body must be able to examine the substance of the complaint and afford proper reparation*.
> 388. In the Court's view the requirement flowing from Article 13 that execution of the impugned measure be stayed cannot be considered as a subsidiary measure, that is, without regard being had to the requirements concerning the scope of the scrutiny. The contrary would amount to allowing the States to expel the individual concerned without having examined the complaints under Article 3 as rigorously as possible.
> […]
>
> 390. The Court concludes that the procedure for applying for a stay of execution under the extremely urgent procedure does not meet the requirements of Article 13 of the Convention.'

As proposed in the 2007 and 2008 reports, the extent of the CCE control on decisions regarding EU citizens and their family members should be clarified. Belgian authorities should be encouraged to agree, as defendant in a case, to request a preliminary ruling from the CJEU. Indeed, case-law from the CCE confirms that the competence of this jurisdiction is limited to a strict legality control when challenging issue regarding visa deliverance to family members

of an EU citizen. A 2nd March 2010 Judgement regarded the Maroccan spouse of a Belgian husband and their two children claiming a family reunification visa. The refusal of the visa was challenged before the CCE, which confirmed that it does not have any competence to challenge the opportunity of an administrative decision but only its legality (CCE, 2 March 2010, Judgment n° 39.686, *R.D.E.*, 2010, pp. 34-40).

See for further developments on these questions:

J.-Y. CARLIER, 'Evolution procédurale du statut de l'étranger : constats, défis, propositions', *J.T.*, 2011, p. 117

J.-Y. CARLIER, S. SAROLEA, 'Le droit d'asile dans l'Union européenne contrôlé par la Cour européenne des droits de l'homme. A propos de l'arrêt *M.S.S c. Belgique et Grèce*', *J.T.*, 2011, p. 353

4. FREE MOVEMENT OF ROMA WORKERS

As far as Roma workers are concerned in Belgium, it would seem, according to the Center for Equal Opportunities and Opposition to Racism ('Centre pour l'égalité des chances et la lutte contre le racisme') in its annual report 2010 called 'Migration' (hereafter: Migration Report 2010), that they face one main difficulty in 'the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'. This difficulty is to satisfy the positive condition of being economically active or having sufficient resources for themselves and their family members so as not to become a burden on the social assistance system of the host Member State during their period of residence.

This issue is less a legal one than a practical one. Indeed, Roma people do face real difficulties proving to the authority competent for the issuance of the residence permit that they have sufficient resources. They also face difficulties in proving their quality of worker as many of the Roma people do not have any legal and written work contract with an employer, but do have sufficient resources coming from the family or from the Roma community's solidarity.

In access to employment, only Roma people originating from Romania and Bulgaria meet restrictions in access to employment as workers under employment contract. Belgium will apply a transitory period to citizens from Romania and Bulgaria until 31 December 2011. This restriction consists in requiring from any Romanian or Bulgarian worker a work permit delivered by a regional authority. This limitation in the access to employment is strictly applicable to employed workers as self-employed can freely work in Belgium, without any restrictions.

The Migration Report 2010 clearly points out cases of fraud, with Bulgarian and Romanian citizens registered in Belgium as false self-employed workers (p. 152). In the Ghent area, Roma people are mainly Slovakian and Bulgarian. It is alleged that 90% of the Slovakian people and 50% of the Bulgarian citizens in the Ghent area are Roma originated.

Problems with accommodation, school attendance, adults training, health and social care are reported. However, the Centre for Equal Opportunities and Opposition to Racism and the city of Ghent acknowledge that the difficulties faced by the Roma community are similar to the problems faced in their originated country. These problems are reinforced and fed by the negative prejudice largely spread amongst employers, landlords, teachers and social assistants.

Regarding removal from the territory, Belgium did not decide, as France did during the summer of 2010, to remove Roma people, individually or collectively, from the territory. No case is reported of deportation or removal from the territory of a Roma person because of his/her origin. Such a removal would prove to obviously discriminatory.

However, certain local administrations did decide to refuse Roma people, with their cars and caravan, permission to stay on the municipal territory, on the basis of a risk for public security. To our knowledge, none of these decisions has been challenged before court.

The Walloon Region did encourage the creation of a Mediation Centre for Travel people and Roma in Wallonia. This centre was created in order to offer accommodation facilities for Roma people when arriving in a municipality. It also organises meetings and reunions between Roma people and local authorities or local populations in order to harmonise and exchange good practices.

No individual decision has been challenged in front of a tribunal or a jurisdiction and relating to removal of Roma people.

Chapter II: Family Members

SUMMARY

Acquis

The position of family members was strengthened in Belgium by the rejection of reverse discrimination for family members of Belgian citizens (Principle of Assimilation – Aliens law, Article 42*quinquies*).

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The main issue lies in the future, with a law voted in Parliament in May 2011, which should enter into force late June 2011. This law reinstates reverse discriminations that had been removed in Belgium.

The law aims to limit family reunification cases resulting from marriages of Belgians of foreign origin with foreigners in their country of origin – mainly Morocco. The law was voted (and amendments made) without taking into account all elements of the Council of State's negative opinion. It is possible that the law will undergo a review before the Constitution Court. The Court could be asked to check the validity of this law with regard to the *Zambrano* case and to a general principle of standstill in the field of fundamental rights (concerning the level of protection achieved).

1. THE DEFINITION OF FAMILY MEMBERS AND THE ISSUE OF REVERSE DISCRIMINATION

Regarding reverse discrimination, one bears in mind the specificity of the Belgian Aliens law which provides for family reunification for family members of a Belgian citizen by applying the Principle of Assimilation (Aliens law, Article 40*ter*). This principle of assimilation is a specificity of the Belgian law, allowing it to exclude reverse discrimination of Belgians with regard to EU citizens.

One of the consequences of this principle applies to the necessity of sufficient resources for the non-Belgian parents of an EU or Belgian child, or the fact that a parent, direct relative, has to be 'dependent'. If the parent is not 'dependent', he or she will not receive a residence permit but an order to leave the country. The child will then have to leave with his parents if they want a family life. This is not the case for a Belgian child with Belgian parents. As mentioned last year, this does not lead to discrimination between Belgian children according to the Constitutional Court in its judgement given on 3 November 2009 (Constitutional Court, Judgment n° 174/2009).

In last year's report, we mentioned that:

> 'One has to wait for the case-law to evolve in 2010 or 2011 to see if the Belgian Assimilation Principle of a national's family members to an EU citizen's family member is a general principle, without necessity of movement for the Belgian national, or if this Assimilation Principle aimed at the suppression of

reverse discrimination lead to some other discrimination between Belgians. In the view of the EU case-law (i.e. *Shing*, C-370/90 and *Kraus*, C-19/92), it is clear that the Belgian Assimilation Principle has no 'effet utile' if it is limited to a Belgian moving to another EU Member State and coming back. This is already the case in the ECJ case-law. The 'effet utile' of this Assimilation Principle, would be to apply EU free movement law to family members of a Belgian staying in Belgium'.

The CJEU ruling in the *Zambrano* case of 8 March 2011 (C-34/09) does confirm that Article 20 TFEU precludes national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, *Rottmann*, C-135/08, paragraph 42). Consequently, a refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such a prohibited effect.

The adoption of a new draft law by the Parliament on 26 May 2011 relating to family reunification rights for non EU citizen gives the opportunity to the Council of State (*Conseil d'Etat*) to confirm that the Assimilation Principle should not be limited to a Belgian moving to another EU Member State and coming back, based on the recent *Zambrano* Judgement.

The draft law was analysed by the Council of State in April 2011. The Council of State reiterates that Article 20 TFEU precludes national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. According to the Council of State, the new draft legislation fails to satisfy this objective when it considers a Belgian as a non-EU citizen under the right of family reunification. However, the Parliament did not follow the Council of State's view.

The modification under the new draft law could appear to be light as, formally, the new draft law does not affect the Assimilation Principle. It still reaffirms that family members of a Belgian citizen are considered family members of an EU citizen. However, the main and fundamental modification relates to the conditions under which family members of a Belgian citizen will be authorised to apply for family reunification: conditions are the same to the ones applicable for family reunification with a non-EU citizen. Practically, the Assimilation Principle is reduced to a formal declaration and abolished as the conditions required of a Belgian citizen and his family members requesting family reunification are identical to the conditions for family reunification between non-EU citizens.

One should also bear in mind that cases such as the *Zambrano* case have become few in Belgium since the Nationality Code was modified in 2006. A child born in Belgium will no longer automatically become Belgian on the basis of *ius soli* if his statelessness resulted only from the fact that his parents did not voluntarily report his birth with their country's consulate, that is when a simple birth statement of the child at the consulate of the parents' country of origin (and of which they are nationals) is enough to attribute this nationality.

2. ENTRY AND RESIDENCE RIGHTS

Before the entry into force of law of 25 April 2007 implementing Directive 2004/38 of 1 June 2008, the Aliens law contained a 6-month time limit to grant a visa to a Belgian or EU citizen family member. According to Article 10.1 of Directive 2004/38,

> 'The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called 'Residence card of a family member of a Union citizen' no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.'

The Belgian provision does not contain any 'penalty' in case of violation of the 6-month time limit. The Algerian spouse of a Belgian woman lodged an action against the Belgian State before the civil tribunal in Liège to admit him to residence and to receive a family reunification visa. According to the tribunal, the provision on family reunification visas for family members of Belgian citizens contains a potential violation of the non-discrimination and equality principle. Indeed, whereas Article 12*bis* of the Aliens law establishes a time-limit of nine months and gives a residence right after this period to family members of a non-EU citizen, if no decision has been given beforehand (there is no 'penalty', but a right to reside is granted), such a solution does not exist for family members of Belgian citizens. Consequently, the civil tribunal requested a preliminary ruling from the Constitutional Court in order to deal with this potential reverse discrimination. The Constitutional Court answered on 4 November 2010 in Judgment n° 128/2010 and considered that the legislator does violate the principle of equality and non- discrimination between Belgians when it fails to provide a period in which a family reunification application introduced abroad has to be examined and answered.

Correctly applying the *Mrax* case, the CCE ruled (Judgement n° 44.247, dated 28 May 2010, *R.D.E.,* 2010, p. 174) that the withdrawal of a residence permit of the spouse of a Belgian citizen is only possible within two years of the application for residence permit and not within two years of its delivery. Even if parliamentary documents clearly show that the legislator's intention was to start the two years period from the delivery of the residence permit, the provisions of the 2004/38 Directive as construed in the *Mrax* case must be applicable. Consequently, the withdrawal of the residence permit which occuring after the two years period starting from the application for residence permit is illegal and has to be cancelled.

The CCE (Judgement n° 49.027, dated 2 October 2010, *R.D.E.*, 2010, p. 376) cancelled an administrative decision of removal from the territory concerning the Spanish-Moroccan husband of a Dutch citizen. This husband failed to prove his European citizenship when coming back in Belgium after holidays in Morocco. However, he had a valid passport and a declaration of theft of his residence permit. The CCE correctly applied art. 5.4 of the 2004/38 Directive when cancelling the order to leave with detention.

The same mechanism was applied by the CCE (Judgement n° 48.259, dated 20 September 2010) when a short-stay visa was refused to the Guinean spouse of a Dutch citizen by the Belgian Embassy, arguing that the genuine purpose of the travel was the establishment in Belgium. Rendering its decision on the basis of art. 5 and 6 of the 2004/38 Directive, the CCE took only in consideration the spouse's quality of family member of an EU citizen to decide that Belgium should grant her every facility to obtain a visa. The applicant had used a Communication of the Commission (COM (2009), 313) as an argument, this Communication stating that:

> 'As the right to be issued with an entry visa, is derived from the family link with the EU citizen, Member States may require only the presentation of a valid passport and evidence of the family link (...). No additional documents, such as a proof of accommodation, sufficient resources and an invitation letter or return ticket, can be required'.

M.-B. HIERNAUX, 'L'entrée des members de famille de citoyens européens', observations under CCE Judgement 49.027 dated 2 October 2010, *R.D.E.*, 2010, p. 379.

3. IMPLICATION OF THE METOCK JUDGEMENT

There is no specific comment relating to the Metock Judgment, as Belgium already applied this case-law to family members, irrespective of where the marriage was celebrated (in Belgium or abroad). A regular residence permit abroad was not required when applying for family reunification. The Government Office for Aliens (GOA) does not require, when applying the provisions of Directive 2004/38 implemented in the Belgian Aliens law, that family members of an EU citizen have a legal residence.

Consequently, a third country national in irregular stay who marries, e.a., a EU citizen can achieve family reunification with him/her as far as s/he satisfies all the conditions of the 2004/38 Directive.

4. ABUSE OF RIGHTS I.E. MARRIAGES OF CONVENIENCE AND FRAUD

As far as marriages of convenience are concerned, one has to remember of course that this problem does not only concern EU workers, but also all family members of an EU citizen, whether Belgian or non-Belgian, and goes beyond the scope of free movement in the EU. As mentioned in the 2008 report, the government will examine the possibility to introduce stronger controls on the validity of a marriage, particularly when the union was celebrated abroad.

At least six draft legislations have been introduced before Parliament related to combating marriages of convenience or cohabitation of convenience (Doc 53, 0481-001; Doc. 53, 1102-001; Doc. 53, 0890-001; Doc. 53, 0718-001; Doc. 53, 0719-001 and Doc. 53; 0891-001). So far, none of them has been voted yet. However, the law voted in Parliament in May 2011, which in practice reinstated reverse discriminations, had as a main goal the fight against marriages of convenience with Belgians.

In the Civil Code, Article 146*bis* was inserted to combat marriages of convenience or simulated marriages. According to this provision, existing since 2000, an *ex ante* control is possible by the local civil officer who is competent for celebrating marriages. This situation has to be distinguished from the recognition in Belgium of marriages celebrated abroad, for example in another Member State.

If the marriage was celebrated in another EU Member State, according to the mutual recognition principle enshrined in Regulation 44/2001 (called Bruxelles I) and according to the Belgian Private International Law Code, no control on the merits should be done as the validity of the documents presented is presumed.

5. ACCESS TO WORK

No specific remark is necessary here. However, consequently to the *Zembrano* case, an EU citizen's father, even if the EU citizen is a national of the country in which he resides, and has never exercised his right to free movement, should be entitled to receive a work permit.

6. SITUATION OF JOB SEEKER'S FAMILY MEMBERS

It would seem that, in practice also, job seeker's family members receive residence permits under the same conditions as EU citizen job seekers.

Chapter III: Access to Employment

SUMMARY

Acquis

As mentioned in previous reports, access to employment in the public sector is not a major issue in Belgium. In practice, however, it is difficult to paint a picture of the situation, as there is no specific monitoring.

2010

In 2010, there are questions related to language requirements in the local public sector and in the context of access to private housing. Also, the question of the nationality condition for the profession of notary finds an answer.

1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

1.1 Equal Treatment in Access to Employment

The Walloon Employment and Training Office ('Forem') must, since May 2010, accept to register frontier job seekers, even though they do not have an address in Belgium, if their last employment contract was related to Belgium. This decision is an implementation of Regulation 883/2004. However, the extension of the equality of treatment is limited to administrative registration in the database of the Forem and free access to 'Employment and Training Information Points' ('Carrefours Emploi-Formation'). For the remainder, frontier job seekers do not have access to individualised coaching or training itself.[1]

Though discrimination in access to employment in the private sector does not seem to be a major issue, problems could arise with regard to employment assistance and activation measures. Like many other Member States, Belgium has taken measures to promote the activation of job seekers. However, it is difficult to portray a simple picture of the existing measures, as these are numerous and because of the federal structure of Belgium.

Employment and employment-related competences are spread through various levels of power. Social security is a federal competence and the federal state is exclusively competent to set-up incentive measures linked to social security – such as a reduction of social security contributions. On the other hand, many other incentive measures, for example measures to promote young workers employment, are a regional competence. These last measures may be combined with federal aid.

The conditions attached to these activation measures are sometimes designed in a fashion that could raise questions as to their compatibility with European rules on free movement of workers. A couple of these measures are presented here.

1 Written answer of 4 May 2011 from the Forem in response to our questionnaire.

A first measure that could probably be in breach of EU rules is the 'Activa-measure' (and other similar measures), which aims at getting long-term unemployed workers back to work. This measure entails a reduction in social security contributions for the employer and a financial benefit (a 'bonus') for the worker. Although conditions vary depending on whether the worker is younger or older than 45, one condition is that the worker has to receive full unemployment benefits and be registered as unemployed for a certain period of time. Such a condition could be considered an obstacle to free movement or an indirect discrimination (on grounds of nationality) for unemployed workers from other Member States as they are not receiving the required full support from the Belgian social security system.

Another type of measure is a measure set-up for workers above 50 years old. The measure is a 'back to work complement', a monthly sum on top of the salary, payed by the National Agency for Employment ('ONEm') to unemployed workers who go back to work either as workers or as self-employed. Conditions attached to this measure are to receive full unemployment benefits and to have proof of 20 years of 'professional history'. Similarly to the Activa-measure, these conditions could be considered an obstacle to free movement or an indirect discrimination (on grounds of nationality) for unemployed workers from other Member States.

Further than the question of equal access to employment, the financial benefits received as part of the activation measures above could be considered as social advantages (under Regulation 1612/68 – see Chapter IV, Title 2.6.). This would be another argument against refusing the benefit of activation measures to EU workers.

See for a detailed analysis :

H. VERSCHUEREN, 'Werken activeringsmaatregelen over de grens wel?', *Sociaal werk(t): Ereboek Josse van Steenberge*, Bruges, die Keure, 2009, pp. 339-376.

H. VERSCHUEREN, 'Do National Activation Measures Stand the Test of European Law on the Free Movement of Workers and Job seekers?', *E.J.M.L.*, 2010, pp. 81-103.

1.2 Language Requirements

According to the Walloon Employment and Training Office ('Forem'), there are no signs of problematic language requirements, with language requirements confined to cases where the knowledge of a language is needed for the proper execution of tasks.[2] Of course, this does not mean that there is no discrimination against European citizens in practice, depending on the relative interpretation of the necessity of the knowledge of a language for the execution of tasks by employers, be it in contractual clauses.

It would seem that the issue of language requirements is more significant when touching on the topic of access to property. The 2009 report mentioned press articles referring to complaints lodged with the European Commission against a Flemish regulation on real estate policy.[3] Although there is no follow-up on these complaints so far, a judicial action has been brought before the Constitutional Court with regard to the same Flemish regulation ('Wonen in eigen streek' – 'Living in one's own Region'). Multiple legal provisions have been put forward as sources of potential violations, and one argument is based on articles 38, 43, 49

2 Written answer of 4 May 2011 from the Forem in response to our question form.

3 Flemish regulation of 27 March 2009: Decreet van 27 maart 2009 betreffende het grond- en pandenbeleid.

and 55 TEC – 44, 49, 56, 62 TFEU – and on the principles of equality and non discrimination. The plaintiffs argue that these provisions are violated by a requirement, in the Flemish regulation, to prove a '*sufficient link with the municipality*' in order to buy property. An evaluation committee decides whether a potential buyer has established this link.

The Constitutional Court has requested a preliminary ruling from the CJEU on a number of questions, of which one is relevant to this report: 'Should articles 21, 45, 49, 56 and 63 TFEU and articles 22 and 24 of Directive 2004/38 […] be interpreted as prohibiting the regime instituted by the Decree of the Flemish Region of 27 March 2009 […], entitled 'Living in one's own Region', which makes the transfer of land and buildings erected on that land conditional upon the demonstration, by the buyer or taker, of a sufficient link with the municipality, in certain target municipalities' (Constitutional Court, Judgment n° 50/2011 of 6 April 2011, *not yet published*). One may consider that this condition is, however, not so different from the concept of 'real link' used by the Court of Justice in several cases.

2. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

2.1 Nationality Condition for Access to Positions in the Public Sector

Except for the case below (regarding the profession of notary), there have been no reports of specific problems concerning nationality conditions in the public sector, whether at regional or federal level.

The judgment of the Court of Justice on the case concerning the profession of notary was rendered on 24 May 2011. In its application, the Commission had asked the Court to declare that Belgium had failed to fulfil its obligations under articles 43 and 45 EC (49 and 51 TFEU) – and under Directive 89/48 (see *infra*, Title 2.3.) – by imposing a nationality condition for access to the profession of civil-law notary (Court of Justice, Judgment of 24 May 2011, *European Commission v. Kingdom of Belgium*, C-47/08).

In its arguments, the Commission referred to settled case-law, pointing to the restrictive aspect of article 45, §1 EC: may be exceptions, activities which in themselves involve a direct and specific connection with the exercise of official authority. In the same vein, activities that are auxiliary to or cooperate with the exercise of official authority are also excluded from the scope of the first paragraph of article 45 EC. The Commission also pointed out that article 45, §1 EC refers to specific activities and not entire professions, unless the activities are inseparable from the professional activity taken as a whole. The Commission then examined to various activities of notaries, excluding them all from the scope of article 45, §1 EC.
In its judgment, the Court seeks to ascertain whether the activities of notaries involve a direct and specific connection with the exercise of official authority, in accordance with its case-law. The Court therefore looks into the nature of the various activities of notaries, only to conclude that 'the activities of notaries as defined in the current state of the Belgian legal system are not connected with the exercise of official authority within the meaning of the first paragraph of article 45 EC', making the nationality condition a 'discrimination on grounds of nationality prohibited by article 43 EC'. The Advocate-General (Cruz Villalon) had previously considered the limitation to be disproportionate and therefore incompatible with article 43 and 45, §1 EC (Opinion of the Advocate-General of 14 September 2010).

The day of the Court's judgment, the Royal Federation of Belgian Notaries published a press release stating that: 'the judgment does not jeopardise the quality of the service a citi-

zen can expect from a notary [...] and [...] confirms that [the profession of notary] is an activity practiced in the general interest and does not question the procedure leading to obtaining the title'.

One notary indicated that this judgment could represent an opportunity for a better definition of the role of a notary, which lied between public services and liberal professions. In his eyes, the profession would be better defined as an office of general interest allowing for some proportionate derogations to the principles of free movement.

2.2 Language Requirements

In general, it would seem that there are no major issues in Belgium regarding language requirements for access to employment in the public sector.

Nonetheless, mention can be made of language requirements in the local public sector. The Commission sent, on 22 March 2010, a formal letter of notice (under EU infringement procedures) to Belgium regarding the rules applying to proof of linguistic knowledge in order to work in local public administrations. As is expected, in order to work for the local public sector, workers need to be able to speak either Dutch, French or German, depending on which region of Belgium they wish to work. However, Belgian legislation on the use of languages for administrative purposes ('loi sur l'emploi des langues en matière administrative') provides that candidates in the local public sector and who have not followed education in the Dutch, French or German language must prove their linguistic abilities in the language of the region concerned by obtaining a certificate issued after passing exams organised by the 'SELOR' (the Belgian public sector recruitment office). The Commission takes issue with the rule stating that *only* certificates issued by the SELOR are accepted as proof of language knowledge, which it considers contrary to the rules on free movement of workers of article 45 TFEU, and more specifically, the rules of Regulation 1612/68. The Commission considers the fact that it is not possible to submit proof of the required linguistic knowledge by another means – 'in particular by equivalent qualifications obtained in other Member States' – to be disproportionate and to amount to discrimination of grounds of nationality (Press release IP/11/602).

In 2009, our report made mention of a judgment of the Constitutional Court regarding a Flemish regulation of 15 December 2006 (Flemish Regulation of 15 December 2006, *M.B.*, 19 February 2007, p. 7872) which established as a condition for access to public housing the willingness to learn Dutch ('*taalbereidheid*'). The Constitutional Court considered the language requirement to be a 'best effort obligation', rather than an 'obligation of result', expected of applicants to public housing. The Court also did not consider the requirement to be discriminatory as it is applicable regardless of the applicants' nationality (Constitutional Court, Judgment n° 101/2008 of 10 July 2008, *M.B.*, 6 August 2008, p. 41032).

The 'best effort obligation' character of the language requirement does not convince all authors, however, as the language requirement sets a specific level to be reached by applicants (a level 'corresponding to value A.1 of the Common European Framework of Reference for Languages' – a relatively low level). Although the Flemish regulation itself does not provide for a test certification, which is in line with a 'best effort obligation', the Flemish Government Decree of 12 October 2007 (executing the regulation) establishes the terms of the control of the willingness to learn Dutch. This text sets out a range of probationary procedures, of which one is a test certification certifying that the applicant has reached the re-

quired level (on the basis of a document, which can be a 'title, certificate or diploma', an 'exam', etc.) – applicable to EU citizens and third country nationals. We do not have detailed information on the practical implementation of this Decree.

Further, there are questions raised as to whether this requirement does constitute an indirect discrimination on grounds of nationality, with some regretting that no preliminary ruling was requested from the Court of Justice.

N. BERNARD, 'L'arrêt *Wooncode* de la Cour constitutionnelle du 10 juin 2008: quand l'arbre (linguistique) cache la forêt', *J.T.*, 2008, pp. 689-698.

2.3 Professional Experience Recognition for Access the Public Sector

There is no specific problem to be reported on the issue of recognition of professional experience for access to the public sector.

A mention of case C-47/08 (*supra*) can be made, however (Judgment of 24 May 2011). The Commission put forward a second plea of infringement in the case, relating to the failure of Belgium to implement Directive 89/48 (on the recognition of professional qualifications – now replaced by Directive 2005/36). According tot the Commission, Belgium had failed to properly implement Directive 89/48 by excluding the profession of notary from the scope of the directive.

The Advocate-General had considered this second plea unfounded in his Opinion (of 14 September 2010). However, while the Advocate-General found the Commission's sole argument to be invalidated, he considered that the Commission 'should have raised other arguments concerning the applicability of the directive to the profession of notary'.

In order to examine whether the directive applies to the profession of notary – and the validity of the Commission second claim –, the Court considers it relevant to take into account the legislative context of the directive. The Court notes that the 12th recital in the preamble to Directive 89/48 stated that the general system of recognition of diplomas introduced by the directive is 'entirely without prejudice to the application of [article 45 EC]'. This reservation, adds the Court, reflects the legislature's intention to leave activities covered by article 45, §1 EC outside the scope of the directive. Moreover, the Court had not yet ruled on whether the activities of notaries were within the scope of article 45, §1 EC – doing so only in the case at hand. When Directive 89/48 was replaced by Directive 2005/36, the new directive contained recital 41 stating that the directive was without prejudice to the application of article 45 EC 'concerning notably notaries'. At the time of the drafting of the directive, it had be suggested that there should be a provision expressly stating that the directive did not apply to notaries, but this was left out due to the general derogation of article 45 EC for activities that involve direct and specific participation in the exercise of official authority.

Therefore, 'in view of the particular circumstances of the legislative procedure and the situation of uncertainty which resulted', the Court considers that 'it does not appear possible to conclude that […] there existed a sufficiently clear obligation for the Member States to transpose Directive 89/48 with respect to the profession of notary' – and rejects the second plea of infringement put forward by the Commission.

3. OTHER ASPECTS OF ACCESS TO EMPLOYMENT

No specific problem was reported on this point.

Chapter IV: Equality of Treatment on the Basis of Nationality

SUMMARY

Acquis

As has been written in previous reports, the equality of treatment on the basis of nationality seems to be generally well respected in Belgium.

2010

A few cases do raise the issue of equality of treatment, such as last year, in the field of social and tax advantages. For instance, the Constitutional Court considered that the condition of residence of five years before being allowed to claim child benefits to be a discrimination.

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

As in 2009, it would seem that no cases of direct or covert discrimination related to working conditions have been lodged before courts or tribunals, which of course, it not to say that no discriminations occur.

As mentioned in our 2009 report, a specific federal body exists in Belgium to monitor and fight against discrimination (of any sort): the Center for Equal Opportunities and Opposition to Racism ('Centre pour l'égalité des chances et la lutte contre le racisme'). According to their 2010 annual report, it would seem that the brunt of the problems are not so much related to nationality discrimination but rather discrimination on ethnic grounds, race or origin (Migration Report 2010, p. 190).

1.1 Specific issue of working conditions in the public sector

No specific problem reported.

1.2 Professional Experience Recognition in order to Determine Working Conditions

No specific problem reported, but see Chapter III, Title 2.3. (notary).

1.3 Taking Into Account Diplomas to Determine Working Conditions

No specific problem reported, but see Chapter III, Title 2.3. (notary).

1.4 Equal Treatment in Relation to Issues like Civil Servant Status, Trade Union Rights, etc.

No specific problem reported.

2. SOCIAL AND TAX ADVANTAGES

2.1 General Situation as Laid Down in Article 7 (2) Regulation 1612/68

As a rule, social and tax advantages are identical for EU and national workers.

2.2 Specific Issue: the Situation of Job Seekers

It seems that regarding the situation of job seekers, the issues are not based on nationality (but see *supra*, Chapter II, Title 1.1.).

2.3 Early retirement allowance and Child allowance as Social Advantages

The Antwerp industrial court has rendered a judgment on a discriminatory social advantage. The discrimination is not based on the nationality criteria, however, but residence. The Court established that a complementary allowance for early retirement provided for in a collective labour agreement ('Convention collective de travail n°17') has to be considered as a social advantage. Therefore, that this complementary allowance is dependent on residence in Belgium is a prohibited discrimination under Regulation 1642/68 (Antwerp Industrial Court, Judgment of 8 January 2010).

It should be noted that the aforementioned collective labour agreement (n°17) was modified in 2003 (Collective labour agreement n°17 *vicies sexies*) precisely in order to adapt the text to European rules. Article 4 of Collective labour agreement n°17 was amended in such a way that workers will benefit from complementary allowance if they have their residence in a Member State of the European Economic Area. (See: Note sous C. trav. Anvers (2ème ch.), 8 janvier 2010, *Chron. D.S.*, 2011, liv. 1, p. 47).

The Constitutional Court rendered a judgment on 29 April 2010 regarding child/family allowances (child benefits) that had been refused to the Rwandese mother of a Spanish child. The judgment was given in the context of a preliminary ruling requested from the Constitutional Court with regard to the compatibility of certain provisions of the law of 20 July 1971 on child benefits (Law of 20 July 1971, *M.B.*, 7 August 1971, p. 9301) with articles 10, 11 and 191 of the Constitution and articles 12 and 17 EC (18 and 20 TFEU).

The question to the Court concerned a difference of treatment between, on the one hand, children under the care of a Belgian national or under the care of a foreign national residing for more than five years in Belgium (when asking for the benefit of the child allowance) and who benefit from the child allowance, and, on the other hand, children under the care of a foreign national not fulfilling the condition of period of residence (five years) and who do not benefit from the child allowance. The question therefore was whether the condition of residence for five years before being allowed to claim child benefits is justifiable.

Belgian law sets a number of conditions in order to receive child allowances, of which are a condition of effective residence of the child in Belgium and a uninterrupted period of residence of five years for the person in charge of the child claiming child benefits (the beneficiary: parent or guardian). This last condition is not applicable to certain categories of beneficiaries, for example, persons concerned by Regulation 1408/71 of 14 June 1971 (on the application of social security schemes). In an earlier judgment of 25 March 2009, the Constitutional Court had ruled that the condition of a period of residence of five years for a potential beneficiary of child allowance, not falling under one of the exempted categories, is disproportionate when the child is Belgian.

In its judgment of 29 April 2010, the Constitutional Court considers, on the basis of articles 18 and 20 TFEU, that from the moment that the condition of a period of residence for a beneficiary taking care of a Belgian child is deemed unconstitutional, it must also be deemed contrary to the Constitution and to articles 18 and 20 TFEU when the same condition applies to a beneficiary taking care of a child who is a citizen of the European Union. The Court therefore considered the condition of residence for five years before being allowed to claim child benefits to be contrary to articles 10 and 11 of the Constitution and articles 18 and 20 TFEU, when it applies to a beneficiary taking care of a child who is a citizen of the European Union (Constitutional Court, Judgment n°48/2010 of 29 April 2010, *M.B.*, 10 June 2010).

As from 1 March 2009 (the case was brought to court before that date), the law of 20 July 1971 on child benefits was amended in order to add a category of persons exempted from the condition of a five years residence period. This category concerns beneficiaries claiming child allowance for a child who is a national of a State to which applies Regulation 1408/71 of 14 June 1971.

2.4 Tax deduction and Tax reduction as Tax Advantages

The Court of Appeals of Antwerp ruled in favour of the Belgian Tax Administration in a judgment of 2 February 2010 related to free movement of workers. The case concerned a couple, where the husband received professional income (only) in Belgium and the wife (only) in the Netherlands. According to the relevant Belgian-Dutch tax treaty, the wife's income was exempted from Belgian taxes, but taken into account with regard to progression (under the 'exemption with progression method'). The couple's issue with the Tax Administration was that it had deducted tax deductions for child care and 'service-checks'[4] on *both* incomes, thereby limiting the advantage of the deductions (the deduction on the wife's income being lost). The couple considered this to be contrary to European rules on freedom of movement (and equality and non-discrimination rules provided for in articles 10 and 11 of the Belgian Constitution).

The Antwerp Court of Appeals rejected the couple's arguments, confirming instead the Tax Administration's and Tribunal of First instance's positions. Referring to the case-law of the Court of Justice (Court of Justice, Judgement of 12 December 2002, *De Groot*, C-385/00), the Court of Appeals of Antwerp stated that it was the State of residence's duty to acknowledge such tax advantages. Only when all or most of the income comes from the

4 'Service-checks' or 'service-stamps', in French 'titres-services', are vouchers which can be bought and used to pay for certain services such as home cleaning, assistance to elders, etc. Part of the cost of 'titres-services' may be fiscally deducted.

State where the taxpayer works, must the latter take into account the worker's personal and family situation. The Court considered that by applying the tax deduction for child care and service-checks on both incomes, the Tax Administration had not acted in a way contrary to European rules (or national rules on equality). In the Court's view, the fact that such deductions are not possible in the Netherlands (where the wife's income is taxed) does not imply a breach of rules on freedom of movement, but is simply the consequence of a difference in the two State's tax legislations (Antwerp Court of Appeals, Judgment of 2 February 2010). (See: Noot Antwerpen, 2 februari 2010, *N.j.W.*, 2011, blz. 47; *A.F.T.*, 2011, blz. 29).

It should be mentioned that, in 2006, the Commission sent a formal request to Belgium – a reasoned opinion under article 226 EC (258 TFEU) – asking to amend the tax legislation leading to limited deduction of personal and family allowances, which it considered contrary to the EC Treaty (Press release IP/06/1048). The Commission referred to case C-385/00 (*De Groot*), where the Court of Justice had considered identical rules in the Netherlands contrary to articles 18, 39 and 43 EC (21, 45 and 49 TFEU). The couple in the above case made mention of this formal request – and Belgium's acknowledgment of the infringement –, to no avail (as established above). On 8 January 2007, the Commission informed Belgium of its intention to refer the situation to the Court of Justice, as Belgium had not indicated how and when it would eliminate the infringement (Press release IP/07/13). To our knowledge, there has been no case filed before the Court to this date.

In another case, the Court of Appeals of Antwerp ruled that for a Member State to refuse a tax reduction for a health insurance premium introduced by a worker who has exercised his right to free movement when such a reduction is accepted for workers who have not exercised their right is incompatible with article 39 EC (45 TFEU). Specifically, if Belgian residents may, on the basis of article 52, 8° of the Income Tax Code, deduct as professional expenses premiums paid for a complementary insurance with a recognised Belgian mutual, the same rule should apply for premiums paid for a private health insurance in the Netherlands (Antwerp Court of Appeals, Judgment of 7 September 2010).

2.5 Financial Assistance through Activation Measures as Social Advantages

As was mentioned earlier in the report, Belgium has taken measures to promote the activation of unemployed persons (particularly long-term or young job seekers). Besides the risk that these measures could be the source of direct, or mostly indirect, discrimination in the context of free movement of workers, the activation measures could also fall under the scope of Regulation 1612/68 and its provisions on social advantages. The activation measures often provide for some sort of financial benefit that could be considered as social advantages, and therefore raise questions when such activation measures are refused to EU workers (see *supra*, Chapter III, Title 1.1.).

2.6 Other Social and Tax issues regarding Frontier Workers

The Walloon Employment and Training Office referred to two reports made by the EURES Maas-Rhin partnership[5]. These reports (in French) detail a number of mobility problems that frontier workers residing in Belgium and working in Germany or the Netherlands face (in the Euregio Maas-Rhin). The questions and problems raised are very specific cases with issues in the fields of taxation, pensions, family benefits, health insurance, studies financing or interim frontier work (the reports are available at http://www.eures-emr.org/fr/accueil.html).

5 In its written answer of 4 May 2011 in response to our questionnaire.

Chapter V: Other Obstacles to Free Movement of Workers

No other obstacle than those included in 'Chapter VI: Specific Issues' is reported.

One should bear in mind that obstacles to free movement of workers may also arise from direct and indirect discrimination based on sex, gender, age ... This issue, linked to Directive 2000/43 and Directive 2000/78, goes beyond this report.

Chapter VI: Specific Issues

1. FRONTIERS WORKERS (OTHER THAN SOCIAL SECURITY ISSUES)

1.1 France

Already approved by the Belgian Parliament (Law of 7 May 2009, *M.B.*, 8 January 2010), an Amendment to the Belgian-French Convention signed on December 12th 2008 has been approved by the French Parliament on December 2nd 2009 (Law 2009-1472 of 2 December, published by the Decree 2010-38 of 11 January 2010, *J.O.*, 13 January 2010).

This Amendment contains an additional protocol specific to frontiers workers between Belgium and France. This protocol provides that salaries earned by a resident from one State working in the border area of the other State shall be taxed by the State of residence. Notwithstanding, France shall tax salaries received as from January 1st 2007 for a work performed in the French border area by persons having their permanent residence in the Belgian border area, as an exception.

According to the Ministry for Employment, 36.298 people resident in France work in Belgium as of June 30th 2009 (Answer of the Minister for Employment to a parliamentary question asked on 13 December 2010).

An action for annulment was brought before the Constitutional Court against the Belgian law approving the Amendment to the Belgian-French Convention, but it has been declared inadmissible due to lack of interest (Constitutional Court, Judgement n° 141/2010 of 16 December 2010, *M.B.*, 21 January 2011, p. 6580). Indeed, the applicant, residing in the Belgian border area, and working for the French public authority in the French border area, criticised article 10 of the Convention. Nevertheless, his fiscal regime was not governed by article 10 but article 18 of the Convention since article 10, §3 provides that the principle of taxation in the State which occupies the public official shall not apply when, as in this case, the agent resides in another state of which he is a national.

1.2 Luxembourg

The Grand Duchy of Luxembourg adopted a law concerning child benefits, the consequence of which will be the revocation of these allowances for parents living in Belgium and working in Luxembourg when their children take up higher education (Law of 26 July 2010, *Mémorial A*, n° 118 du 27 July 2010). According to the Belgian Minister for Social Affairs and Public Health, in accordance with article 102 of the Law on child benefits (Law of 20 July 1971, *M.B.*, 7 August 1971, p. 9301), the frontiers workers, living in Belgium and working in Luxembourg, who will be denied child benefits due to the modification of the Luxembourg law, would receive instead Belgian family allowances (Answer of the Minister for Social Affairs and Public Health to a parliamentary question asked by Deputy Josy Arens on 28 July 2010).

The same Luxembourgish law also imposes a condition of residence for the access to study grants. This criterion will exclude children of frontiers workers living in Belgium and working in Luxembourg from the benefit of these grants.

For a detailed analysis of the obstacles that frontiers workers might encounter (with a focus on social security issues), see the EURES reports concerning the Maas-Rhine Euroregion (available at http://www.eures-emr.org/fr/accueil.html).

2. SPORTSMEN/SPORTSWOMEN

A Regulation of the French Community (Regulation of 8 December 2006, *M.B.*, 20 February 2007, p. 8236) provides that any transfer of a sportsman from a club to another shall be free from any fee. Only a training compensation fee ('indemnité de formation') may be claimed at the time of transfer. This compensation must take into account the duration of training, the actual costs related thereto and the age category of the sportsman/woman. In the *Olympique lyonnais* case (Court of Justice, Judgement of 16 March 2010, C-325/08), the Court ruled that 'article 45 TFEU does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it'.

According to the Belgian Royal Hockey Association, there are no nationality quota or specific rules governing transfer fee for foreign hockey players. Despite our requests, other sports associations have not responded to our questions.

3. THE MARITIME SECTOR

Regarding the maritime sector, as we mentioned in last year's report:

> In principle, the command of a ship registered in Belgium could only be attributed to a person of Belgian nationality (Law of 21 December 1990, article 7, *M.B.*, 29 December 1990, p. 24481). To comply with the case-law of the Court of Justice (Court of Justice, Judgement of 30 September 2003, C-405/01 and Court of Justice, Judgement of 30 September 2003, C-47/02), a Royal Decree of 12 September 2007 amended article 51 of the Royal Decree of 4 April 1996 to provide that 'the civil servant shall exempt of the requirement of nationality under article 7 of the Law of 21 December1990 a person possessing the nationality of a Member State of the European Union who accepts a job offer as commander of a ship registered in Belgium' (Royal Decree of 12 September 2007, *M.B.*, 28 September 2007, p. 50526).

The various researches carried out have not revealed violations of this Royal Decree

4. RESEARCHERS/ARTISTS

One of the admissibility conditions to apply for a financial aid from the French Community for the writing and production of a movie is for the production company to have a headquarter or a permanent agency in Belgium (http://www.audiovisuel.cfwb.be/, see the General Conditions, art. 8, 'The applicant must be an independent production company which has its headquarters or a permanent agency in Belgium.').

In the Flemish Community, the Flanders Audiovisual Fund (VAF) determines the conditions for granting financial assistance. Corporations must have their headquarters or a permanent agency in Belgium. Individuals must be residents in a Member State of the European Union, irrespective of nationality (Vlaams Audiovisueel Fonds, Regulation for financial assistance). The conditions for granting aid are therefore more flexible in the Flemish Community.

SMart, a nonprofit association accompanying professional artists, provides European citizens with a guide outlining their rights to reside and work as an artist in Belgium (www.SMart.be, Guide 'Right of residence and right to work for foreign artists' and Guide 'Free movement of artists in the European Union').

As far as researchers are concerned, no specific issue was reported in 2010.

5. ACCESS TO STUDY GRANTS

According to the French Community website (http://www.allocations-etudes.cfwb.be/), the access to study grants for EU citizens is subjected to the conditions that they reside in Belgium and that one of their parents is/was employed in Belgium.

According to the Court of Justice's case-law, it is legitimate for a Member State to grant assistance covering maintenance costs only to students who have demonstrated a certain degree of integration into the society of that State. However, it is doubtful that the requirement of the parent's employment on the national territory would be regarded as legitimate to meet this objective.

In response to a parliamentary question, the Minister for Higher Education said he had asked the opinion of an advisory body ('le Conseil supérieur des allocations d'études pour les étudiants ressortissants de l'Union européenne') and that his administration is working on a budget estimate before taking the decision to modify the legislation (Parliament of the French Community, Committee for Higher Education, Report of the meeting of 11 May 2010).

The Regulation of the French Community of 16 June 2006 regulates the number of non-resident students in certain medical and paramedical programmes in the first two years of undergraduate studies in higher education (Regulation of 16 June 2006, *M.B.,* 6 July 2006, p. 34055). Mr Bressol and others and Ms Chaverot and others sought a review of the constitutionality of this legislation by the Belgian Constitutional Court.

This jurisdiction referred some questions to the Court of Justice for a preliminary ruling. The Court ruled that articles 18 and 21 TFEU preclude national legislation, which limits the number of students not regarded as resident in Belgium who may enrol for the first time in medical and paramedical courses at higher education establishments, unless the referring court, having assessed all the relevant evidence submitted by the competent authorities, finds that that legislation is justified in the light of the objective of protection of public health (Court of Justice, Judgement of 13 April 2010, *Bressol and Chaverot*, C-73/08).

On 31 May 2011, the Constitutional Court rendered its judgment (Constitutional Court, Judgment 89/2011, 31 May 2011, *not yet published*).

Regarding the studies of physiotherapy and veterinary medicine, the Constitutional Court considers that the unequal treatment between resident and non-resident students is justified by the objective of protecting public health and that the enrolment limitation for non-

residents is an adequate and proportionate measure. The Court therefore dismisses the proceedings for these two curricula.

In contrast, regarding the other curricula (*infra*) covered by the Regulation, the Court considers that the Government of the French Community has not provided sufficient evidence establishing that the unequal treatment is justified. The Court therefore partially repeals the Regulation at hand, as it applies to the curricula of midwife, occupational therapy, speech therapy, podotherapy, audiology and specialized educator.

A non-official translation of extensive extracts of the Constitutional Court's ruling is reproduced below:

'B.1.2. As the Court noted in its decision n°12/2008 of 14 February 2008 (B.11.6.2), although the criterion for distinguishing between these two categories of students [residents and non-residents] is not the nationality, the contested provisions are more likely to affect the citizens of the European Union who are not Belgian nationals than those who have this nationality, since a residence condition is more easily satisfied by the latter.
[…]

B.4.1. In its judgment, the Court of Justice recalls that the Member States are thus free to opt for an education system based on free access – without restriction on the number of students who may register – or for a system based on controlled access in which the students are selected. However, where they opt for one of those systems or for a combination of them, the rules of the chosen system must comply with European Union law and, in particular, the principle of non-discrimination on grounds of nationality (§ 29).
B.4.2. According to settled case-law of the Court of Justice, it is for national authorities, where they adopt a measure derogating from a principle enshrined by European Union Law, to show in each individual case that that measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments (see, to that effect, ECJ, 13 November 2003, *Lindman*, C-42/02, § 25; ECJ, 18 March 2004, *Leichtle*, C-8/02, § 45; ECJ, 7 July 2005, *Commission v. Austria*, § 63). The Court thus imposes a special and accurate burden of proof to the authority claiming exceptions to the principle of free movement.
[…]

B.4.4. It emerges from this judgment that 'the fear of an excessive burden on the financing of higher education cannot justify the unequal treatment of resident students and non-resident students' (§ 46 to 51). The Court of Justice refers to the observation that, 'according to the explanations of the French Community as they appear from the order for reference, the financial burden is not an essential reason which justified the adoption of the Regulation of 16 June 2006' and, according to those explanations, that 'the financing of education is organised through a 'closed envelope' system in which the overall allocation does not vary depending on the total number of students' (§ 50).
B.4.5. The Court is compelled to note that it stated, in its order for reference, that the situation effectively 'threats' to endanger the public finances. If the French Community is faced with a significant increase in the number of foreign students in the courses mentioned and it does not restrict access to education, either the quality of education will decline, or an increase of funding will be needed.
Having emphasized the importance, for the development of the Union, of freedom of movement for students based on equality, Advocate General Sharpston recognized, in a final remark, that 'the EU must not ignore the very real problems that may arise for Member States that host many students from other Member States' (Opinion of the Advocate General, § 151). She considered that 'where linguistic patterns and differing national policies on access to higher education encourage particularly high volumes of student mobility that cause real difficulties for the host Member State, it is surely incumbent on both the host Member State *and* the home Member State actively to seek a negotiated solution that complies with the Treaty'.

The judgment of the Court of Justice however does not contain any element, which would be likely to encourage the home Member State of non-resident students to seek a negotiated solution. When a Member State is confronted – by the effect of differences in national policies – to the considerable mobility of students from another Member State, with which it shares a common language, the Treaty does not appear to provide any protection. It appears to be even more true when it comes to mobility from a large Member State to a small one or, as here, to an autonomous community of a small Member State; a situation in which the smaller Member State manifestly is in an unequal position compared to the larger one.

B.4.6. Regarding the justification based on the homogeneity of the education system, the Court of Justice admits that it cannot be excluded from the outset that the prevention of a risk to the existence of a national education system and to its homogeneity may justify a difference in treatment between some students (§ 53).

B.4.7. However, the Court of Justice considers that the matters put forward as justification in that regard are the same as those linked to the protection of public health, since all the courses concerned fall within that field. They must, therefore, be examined only in the light of the justifications relating to the safeguarding of public health (§ 54).

B.4.8. The aforementioned difference in treatment may be justified 'by the objective of maintaining a balanced high-quality medical service open to all, in so far as it contributes to achieving a high level of protection of health', having understood that this difference in treatment is 'appropriate for securing the attainment of that legitimate objective' and does not go 'beyond what is necessary to attain it' (§ 62-63).

[…]

Regarding the curriculum of 'Bachelor in Physiotherapy and Rehabilitation' and 'Bachelor in Physiotherapy'

B.8.1. Regarding the risk to public health in the field of physiotherapy, documents provided by the Government of the French Community establish that there is an actual risk in this area for public health. The Government refers primarily to the 'French-speaking list of studies that prepare for a profession for which there is a significant shortage of manpower', prepared by the National Office for Employment for the 2010-2011 academic year (…). This list includes 'physiotherapy' both under the 'professionalising higher education' category as under the 'Higher Education: bachelor's and master (two cycles)' category. The Walloon Employment and Training Office (FOREM) came to the same conclusion in June 2010: physiotherapists are among the critical professions, and this since 2006.

B.8.2. In addition, the Government argues that the aging of physiotherapists available, the current aspirations of professionals (reduction of working time, part time), the feminization of the profession and the increasing number of employees require that a significant larger number of physical therapists are licensed by the Federal Public Service 'Health, Food Chain Safety and Environment' to perform acts which are partially supported by social security. Finally, the Union of French-speaking and German-speaking physiotherapists of Belgium noted, in this regard, that the physical therapists from the 'baby boom' generation reach the retirement age.

B.8.3. It follows from calculations by the Centre for Higher Education that the ideal number of graduates in physical therapy to establish themselves annually to ensure adequate availability of services amounts to 323.

B.8.4.1. A risk to public health being established, it is necessary to assess whether the contested provisions are aimed at ensuring the protection of public health. It therefore matters to verify that limiting the number of non-resident students will increase the number of therapists to address the shortage, or at least potential shortage, in the French Community.

B.8.4.2. According to documents submitted by the Government, the number of students in physiotherapy in the High Schools remained fairly stable (ranging between 1000 and 1200), but that stability is characterized by a significant decrease of non-residents, offset by a steady increase of resident students. Before the Regulation, in 2005-2006, the number of residents was 334 and that of non-residents 880; after the Regulation, in 2008 -2009, the number of residents had increased to 734 and that of non-residents was only 366.

The number of students in physiotherapy in Universities has declined by 40 percent, while the number of resident students has increased steadily since 2004-2005: the number of non-resident students decreased from just over 220 to about 60 in 2008-2009, while the number of resident students increased from approximately 130 in 2004-2005 to about 210 in 2008-2009.
Furthermore, the number of students enrolled in the drawing of lots created by the contested Regulation has increased from 457 in 2006-2007 to 611 in 2010-2011 for Universities and, at the same periods, from 819 to 1860 for High Schools. If the limitation did not exist, the quality and even the ability to organize education would be seriously affected.
In this regard, it should be noted that in its September 2009 report on the evaluation of the curriculum of physical therapy, the Agency for Quality Assessment of Higher Education notes that there is an insufficient number of clinical internship opportunities compared to the number of students in some institutions (hence an increase of less efficient internships to meet the minimum standard for practical hours). For the Government, 'even more than the capacity of institutions or the availability of teachers and staff, the possibilities of practical experience, yet critical for a quality education, are not unlimited'. It continued by stressing 'this practice requires not only to find adequate training places, but also supervision for these internships' and is therefore directly related to professional activity in the sector of physical therapy.
B.8.5. With regard to the indications mentioned in paragraph 73 of the Judgement of the Court of Justice, it should be noted that there is not any statistics – neither at the Community nor at the Federal level - to distinguish, per courses of study, graduates who establish themselves in Belgium or abroad. However, a study of the Université Libre of Brussels, entitled 'Cadastre of Graduates', provides very plausible information on the issue. This study focuses on the whole higher education. Assuming that a student of foreign nationality who is not found in the Crossroads Bank for Social Security (Banque-carrefour de la sécurité sociale) during the 25 months (for the Class of 1999) or 13 months (for the Class of 2002) following his exit from higher education had left Belgium (hence the French Community) when he entered active working life, we find that:
a) for the Class of 1999, 72 per cent of students from High Schools and 61 per cent from Universities who are nationals of a Member State of the Union did not stay in Belgium after their studies (for the French only, the proportions are 78 pc and 64 pc);
b) for the Class of 2002, 77 per cent of students from High Schools and 70 per cent from Universities who are nationals of a Member State of the Union did not stay in Belgium after their studies (for the French only, the proportions are 82 pc and 69 pc).
The Government points out that these data are necessarily underestimated since a foreigner who worked a few months in Belgium before returning to his country or going elsewhere is not taken into account, this student appearing in the Crossroads Bank.
In addition, the probability that the rate is significantly higher in physiotherapy is high since the main motivation for these students is to circumvent the quota system carried out in their country.
Furthermore, regarding the graduates who settle abroad, Belgians or not, it would require data from foreign entities that are not obliged to answer requests for information from the French Community; contacts were taken with France, especially with the Ministry of Health, without giving any results.
Finally, it should be noted that the student, after graduation, is free to exercise his professional activity wherever he wants and he is not accountable in this regard to the French Community.
B.8.6. Regarding the last indication mentioned in paragraph 73, last sentence, of the judgment of the Court of Justice, about the number of people who settle in the French Community as therapists with a diploma issued abroad, it should also be noted that these data depend on entities that do not fall under the jurisdiction of the French Community.
For students who graduated within the European Economic Area or Switzerland, certification depends on the Federal Public Service (FPS) 'Health, Food Chain Safety and Environment' and is submitted to Directive 2005/36/EC. Following a request for information from the French Community, the said FPS informed it on August 17, 2010 that the statistics for physiotherapists (and other professions covered by the Regulation contested) have not been established yet.
B.8.7. It follows from the foregoing that, despite the statistical gap that has been established, the legislation at issue is appropriate to ensure the achievement of the objective of protecting public health in physiotherapy. From the figures mentioned above, it appears that the limitation of non-resident stu-

dents was accompanied by a significant increase in the number of resident students prepared in the future to ensure the availability of the service of physiotherapy in the French Community. This increase is probably due in part to the announcement of an impending shortage of physiotherapists and it could not have happened without the restriction which, if it had not been established, would have led to an inability to organize viable studies in physical therapy, given the very high number of non-resident students (1860) in this field wishing to pursue studies in institutions of the French Community, as mentioned in B.8.4 .2.

B.8.8.1. It is now necessary to assess, following the instructions mentioned in paragraphs 77 to 81 of the Judgement of the Court of Justice, 'whether the legislation at issue in the main proceedings goes beyond what is necessary to attain the stated objective, that is whether it could be attained by less restrictive measures'.

B.8.8.2. The Court of Justice (paragraph 78 of its Judgement) asked the Court to determine whether the overall objective of public health could be achieved through the adoption of measures to encourage students who undertake studies in physiotherapy in the French Community to establish themselves there after completing their studies or through the adoption of incentives for professionals educated outside the French community to settle within it.

In the current state of the division of powers between the federal authority, Communities and Regions, the French Community is not competent for the adoption of such measures. These fall under the jurisdiction of the federal authority. Assuming, however, that such measures are taken at the federal level, they could not target only non-resident students without being discriminatory under European Union law or the articles 10 and 11 of the Constitution. Such measures would impose a double burden on the Belgian government, which would be forced to widely fund the training of non-residents and also to financially help some of these students to practice their profession in the French Community. The cheapest solution would be to limit itself to the second measure: financial incentives for foreign-trained professionals and drastic limitation of the number of students in physiotherapy, irrespective of residence, with the risk of impoverishing the general level of education and care both within the French Community and within the European Union as a whole.

B.8.8.3. Under paragraph 79 of the Judgement of the Court of Justice, the Court should examine whether the competent authorities have reconciled, in an appropriate way, the attainment of the objective of protection of public health with the requirements of European Union law and, in particular, with the opportunity for students coming from other Member States to gain access to higher education, an opportunity which constitutes the very essence of the principle of freedom of movement for students ; the restrictions on access to such education, introduced by a Member State, must therefore be limited to what is necessary in order to obtain the objectives pursued and must allow sufficiently wide access by those students to higher education.

A wide access to higher education is guaranteed to students from other Member States for courses covered by the legislation at issue. On average, in the French Community, higher education is attended by 10 pc of foreign students.

Access by non-residents is limited only to the undergraduate curricula, in which the rate of these students was abnormally high (40 to 80 pc). The limit is fixed at 30 per cent of the number of students enrolled for the first time in the relevant programme, per institution, during the previous year. This limitation is adaptable to reflect in all circumstances at least three times the European average, which is currently 2 pc. The access to the relevant curricula, notably in physiotherapy, is three times the average rate in the French Community and fifteen times the average rate in the European Union.

It is therefore obvious that the limitation does not prevent a very broad access to education in physical therapy for students from other Member States. The restriction is not disproportionate to the aim pursued.

B.8.8.4. It remains to consider whether the selection process for non-resident students - a drawing of lots, which is based on chance and does not constitute a mode of selection based on the aptitude of the candidates - may be considered necessary to attain the objectives.

The system adopted in the initial project was the 'first-come, first-enrolled' one which was strongly criticized by the Legislation Section of Council of State. It was dropped, partly because its implementation was problematic.

Selection on the basis of diploma results in great difficulties since it requires comparison of diplomas obtained in very different education systems. The organization of an entrance examination for non-resident students would lead to human resources' and budgetary implications, especially with respect to the 1860 candidates in 2010-2011.
The choice of the French Community legislator is a social policy consistent with the objectives of democratization, freedom of choice and wide access to higher education. The Minister for Higher Education stated during the *travaux préparatoires*:
'In a drawing of lots, the rich, the less rich and the poor are placed on equal footing. [...] All non-resident students who meet the conditions of access - and we are forced to reduce their number - will be treated equally, under the supervision of a bailiff' (Parliament of the French Community, June 13, 2006, No. 17, p. 34).
The system of drawing of lots is the less controversial and may be considered necessary to attain the objective pursued.
B.8.8.5. In conclusion, applied to the curricula listed in article 3, 1° of the Regulation of 16 June 2006, articles 4 and 8 of this Regulation do not violate articles 10 and 11 of the Constitution, read in conjunction with articles 18 §1 and 21 §1 TFEU.

To this extent, the second and third grounds are unfounded.

Regarding the curriculum 'Bachelor in Veterinary Medicine'
B.9.1.1. The factual circumstances are different in the field of veterinary medicine.
The Government of the French Community does not support that it existed - when the Regulation of 16 June 2006 was adopted - or that it exists - at present - a shortage of veterinarians in this Community.
In addition, data and pieces produced do not indicate that the protection of public health could be truly jeopardized in the future by a shortage of veterinarians. However, such a risk would come from an influx of foreign students coupled with a reduced number of Belgian students, a phenomenon which would reduce the number of veterinarians willing to settle in the French Community to exercise their profession.
B.9.1.2. The Government contends, however, that the increase of foreign students enrolled in the curriculum of 'Bachelor in Veterinary Medicine' constituted, before the adoption of the legislation at issue, a genuine risk to public health.
The Government states that, according to the 'Report on the plethora of veterinary students' signed on 8 January 2010 by the deans of the four universities organizing education in veterinary medicine in the French Community, the maximum number of students that can be enrolled in each year of studies leading to the issuance of the academic degree of 'veterinary medicine ' in compliance with European quality standards is 250.
According to the findings of the report of the 'European Association of Establishments for Veterinary Education' (EAEVE) written after a visit in December 2000 at the Faculty of Veterinary Medicine, University of Liege, the structures, the number of teachers and the number of clinical cases available in the environment of the university were not suitable for the formation of a large number of students and were likely to affect the quality of the education. This document also stated that the enrolment in the Faculty was considerably higher than the enrolment generally considered optimal for ensuring adequate and efficient education.
This report allows us to consider that it existed, when the contested legislation was adopted, a genuine risk to public health.
B.9.2.1. It must therefore be assessed whether the contested Regulation is appropriate for ensuring the protection to public health.
It must be verified, in particular, that the limitation of the number of non-residents improves the quality of education by reducing the number of students enrolled in the curriculum of 'Bachelor in Veterinary Medicine'.
B.9.2.2. Limiting the number of non-resident students in the years of bachelor necessarily has the effect of limiting, or at least not to increase, the number of students in the years of master, which is important to eliminate the risk to the protection of public health due to the plethora of students in this curriculum and the corresponding inadequate training.

It is clear from the statistics of the Observatory of Higher Education provided by the Government of the French Community that for the first year (2008-2009) following the introduction of the limited enrolment at issue - the only one available at the time -, the objectives were attained since the number of bachelor's degrees in veterinary medicine was 197, of which 116 were issued to students domiciled in Belgium. The same statistical analysis shows that the number of graduates residing in Belgium has doubled compared to the number of graduates who were admitted through the entrance examination organized in the years preceding the adoption of the legislation at issue, an entrance examination that could ultimately result in a shortage of practitioners (67 Belgian graduates in 2006-2007 and 51 in 2007-2008). Indeed, according to the report of the deans cited above, the ideal number of students to graduate in veterinary medicine is at least 69 to meet the needs of the veterinary practice and other sectors such as security of the food chain, research, sustainable development and international exchange agreements and cooperation.

B.9.3.1. It is now necessary to assess, following the instructions mentioned in paragraphs 77 to 81 of the Judgement of the Court of Justice, 'whether the legislation at issue in the main proceedings goes beyond what is necessary to attain the stated objective, that is whether it could be attained by less restrictive measures'.

B.9.3.2. The Court of Justice (paragraph 78 of its Judgement) asked the Court to determine whether the overall objective of public health could be achieved through the adoption of measures to encourage students who undertake studies in veterinary medicine in the French Community to establish themselves there after completing their studies or through the adoption of incentives for professionals educated outside the French community to settle within it.

With regard to studies in veterinary medicine, this solution is irrelevant, since for this curriculum, the risk to public health does not lie in the shortage of practitioners but in the plethora of students that endangers the quality of the formation.

B.9.3.3. Under paragraph 79 of the Judgement of the Court of Justice, the Court should examine whether the competent authorities have reconciled, in an appropriate way, the attainment of the objective of protection of public health with the requirements of European Union law and, in particular, with the opportunity for students coming from other Member States to gain access to higher education, an opportunity which constitutes the very essence of the principle of freedom of movement for students ; the restrictions on access to such education, introduced by a Member State, must therefore be limited to what is necessary in order to obtain the objectives pursued and must allow sufficiently wide access by those students to higher education.

A wide access to higher education is guaranteed to students from other Member States for courses covered by the legislation at issue. On average, in the French Community, higher education is attended by 10 pc of foreign students.

Access by non-residents is limited only to the undergraduate curriculum in which the rate of these students was abnormally high (40 to 80 pc). The limit is fixed at 30 per cent of the number of students enrolled for the first time in the relevant programme, per institution, during the previous year. This limitation is adaptable to reflect in all circumstances at least three times the European average, which is currently 2 pc. The access to the relevant curricula, notably in veterinary medicine, is three times the average rate in the French Community and fifteen times the average in the European Union.

It is therefore obvious that the limitation does not prevent a very broad access to education in veterinary medicine for students from other Member States. The restriction is not disproportionate to the aim pursued.

B.9.3.4. It remains to consider whether the selection process for non-resident students - a drawing of lots, which is based on chance and does not constitute a mode of selection based on the aptitude of the candidates - may be considered necessary to attain the objectives.

The system adopted in the initial project was the 'first-come, first-enrolled' one, which was strongly criticized by the Legislation Section of Council of State. It was dropped, partly because its implementation was problematic.

Selection on the basis of diploma results in great difficulties, since it requires comparison of diplomas obtained in very different education systems. The organization of an entrance examination for non-resident students would lead to human resources' and budgetary implications, especially with respect to the 767 candidates in 2010-2011.

The French Community legislator's choice is a social policy consistent with the objectives of democratization, freedom of choice and wide access to higher education. The Minister for Higher Education stated during the *travaux préparatoires*:
'In a drawing of lots, the rich, the less rich and the poor are placed on equal footing. [...] All non-resident students who meet the conditions of access, and we are forced to reduce their number, will be treated equally, under the supervision of a bailiff '(Parliament of the French Community, June 13, 2006, No. 17, p. 34).
The system of drawing of lots is the less controversial and may be considered necessary to attain the objective pursued.
B.9.3.5. In conclusion, applied to the curriculum listed in article 3, 2° of the Regulation of 16 June 2006, articles 4 and 8 of this Regulation do not violate articles 10 and 11 of the Constitution, read in conjunction with articles 18 §1 and 21 §1 TFEU.

To this extent, the second and third grounds are unfounded.

Regarding the curricula of 'Bachelor in Midwife', 'Bachelor in Occupational Therapy', 'Bachelor in Speech Therapy', 'Bachelor in Chiropody and Podotherapy', 'Bachelor in Audiology' and 'Bachelor in Specialized Educator'.
[…]

B.11.1. The Government of the French Community does not produce precise data revealing a decline in the quality of education in the curricula leading to the granting of the academic degrees of 'Bachelor in Midwife', 'Bachelor in Occupational Therapy', 'Bachelor in Speech Therapy', 'Bachelor in Chiropody and Podotherapy', 'Bachelor in Audiology' and 'Bachelor in Specialized Educator' during the academic years preceding the entry into force of the Regulation of 16 June 2006.
The Government of the French Community does not provide any information either about the maximum number of students that can be educated simultaneously in each of these courses in the French Community.
The Court therefore has no data to verify that, in accordance with the instructions given by the Court of Justice of the European Union, a potential decline in the quality of education in these curricula constituted or constitutes a genuine risk for public health.
B.11.2. The Government of the French Community does not support that it existed - when the Regulation of 16 June 2006 was adopted - or that it exists - at present - a shortage of holders of the aforementioned diplomas in this Community.
Besides, it does not produce any documentation indicating that the protection of public health could be truly jeopardized, in the future, by such a shortage.
The Court therefore has no data to verify that, in accordance with the instructions given by the Court of Justice of the European Union, a shortage of these graduates constituted or constitutes a genuine risk for public health.
B.11.3. In conclusion, applied to the curricula listed in article 7, 1°, 2°, 3°, 4°, 6° and 7° of the Regulation of 16 June 2006, article 8 of this Regulation violates articles 10 and 11 of the Constitution, read in conjunction with articles 18 §1 and 21 §1 TFEU.

To this extent, the second and third grounds are founded.

On those grounds,

the Court

- Repeals article 8 of the Regulation of the French Community of 16 June 2006 regulating the number of students in some undergraduate curricula in higher education, except as it applies to article 7, 5°;
- Dismisses the action as to the remainder.'

The quota system instituted by the Regulation of 6 June 2006 is thus maintained for the two most important curricula in terms of number of students (physiotherapy and veterinary medicine). Specifically, according to the websites of high schools offering these courses, for the academic year 2011-2012, non-residents are invited to submit their applications in person at the establishments where they wish to register between August 30th and September 1st. If the number of non-resident applicants exceeds the threshold set by the Regulation of the French Community, there will be a drawing of lots.

6. YOUNG WORKERS

There are quite a number of different programmes set up in Belgium in order to help young workers into employment. Moreover, Federal and Regional levels are both competent (in various ways) to create incentives measures (see, *supra*, Chapter III, Title 1. 'Access to Employment in the Private Sector').

As mentioned in the thematic report on young workers (2010), equality of treatment on the basis of nationality does not seem to be a major issue in Belgium. Nevertheless, covert discrimination may arise when financial assistance is conditional to being fully supported by the Belgian social security system (see 'Activa': a condition is to receive full unemployment benefits) or subject to a residence condition (see 'APE': Assistance to the Promotion of Employment of Workers under 25).

For more details and an analysis of six measures stimulating the access of young workers to the labour market that might operate as an obstacle for young EU workers, see the Belgian thematic report on young workers (available at www.ru.nl/law/cmr/free-movement/).

Chapter VII: Application of Transitional Measures

1. TRANSITIONAL MEASURES IMPOSED ON EU-8 MEMBER STATES BY EU-15 MEMBER STATES AND SITUATION IN MALTA AND CYPRUS

In 2006, the Belgian government decided to postpone the transitional period for three years. Consequently, the end of this new transitory period was set on 30 April 2009. In March 2009, the Minister of Foreign Affairs announced that Belgium would stop the transitional measures on 30 April 2009. They were cancelled in 2009 for EU-8 Member States.

Statistics show an increasing number of working permits granted to Europeans due to the enlargement in 2004-2008. In particular, work permits for Polish workers raised from 1,046 in 2004 to 12,320 in 2008 (Migration Report 2009, *op. cit.*, p. 164). The new Migration Report does not mention different figures for the year 2010. Prudence is however required as from 1st January 2011, EU citizens (except Romanians and Bulgarians) could be pulled out of the statistics figures relating to work permit.

The number of work permit decreased drastically by 48% between 2008 and 2009, with a similar reduction concerning the group of EU-10 Member States which entered in 2004. The main reason for this reduction is the high proportion that Polish workers represented in this group and a very high diminution of work permits delivered to Polish citizens, as the number went from 12.320 to 1.943 work permits delivered (Migration Report 2010, p. 142).

The 2010 Migration Report shows similar trends for self-employed workers. The numbers of self-employed workers increased mainly in 2003 (+35%) but also between 2007 and 2008 (+12% in a year). The conclusion is that, since 2003, self-employed work by foreigners intensifies mainly under the impulse of new EU citizens (Migration Report 2010, p.141).

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

Transitional measures are still applicable to Romanians and Bulgarians. On 20 December 2006, a Royal Decree was adopted, modifying the 1981 Royal Decree relating to Access to Territory, Residence, Establishment and Removal of Aliens. The Belgian government decided to put into force a two-year transitional period allowed by the Accession Treaty for Bulgarian and Romanian citizens. The transitional arrangements were applicable until 1 January 2009 (annex n° 36 of the 2006 Report). On 24 December 2008, a new Royal Decree was adopted, extending the transitional period for Bulgaria and Romania to 31 December 2011 (annex n° 9 of the 2009 Report). Consequently, Belgian authorities adopted a Royal Decree on 18 December 2008, which modified art. 38*sexies* of the Royal Decree of 9 June 1999, executing the law relating to Occupation of Foreign Workers. This Royal Decree of December 2008 extended the effect of the transitional period to Bulgarian and Romanian citizens provided that they need a work permit to access the Belgian labour market.

The Migration Report 2010 focuses on the fact that work permits delivered to Romanians rose between 2008 and 2009 while there was a stagnation of the number of work permits delivered to Bulgarian during the same period (p. 142).

Chapter VIII: Miscellaneous

1. RELATION BETWEEN REGULATION 1408/71-883/04 AND ART 45 TFUE AND REGULATION 1612/68

Activation Measures

Like other Member States, Belgium took measures to promote the activation of job seekers, such as reduction of social security contributions, employment benefits, measures for older job seekers, reimbursement of outplacement costs, measures for part-time workers, measures for handicapped persons... Some of those measures may not fall into the scope of Regulation 1408/70 (or 883/2004) as social security, but could fall into the scope of Article 45 TFUE, and Directive 1612/68, or into citizenship and Directive 2004/38.

No specific issue on this question was reported in Belgium in 2010 (however, see *supra*, Chapter III, Title 1.1.).

2. RELATION BETWEEN THE RULES OF DIRECTIVE 2004/38 AND REGULATION 1612/68 FOR FRONTIER WORKERS

See *supra*, Title 1.

3. EXISTING POLICIES, LEGISLATION AND PRACTICES OF A GENERAL NATURE THAT HAVE A CLEAR IMPACT ON FREE MOVEMENT OF EU WORKERS

Taking into consideration the absence of a federal government in Belgium since the elections of June 2010, no general policy exists which could have a clear impact on free movement of EU workers.

However, in the absence of a full-fledged government, the Parliament has taken an initiative leading to the vote of a law in May 2011 that reveals a wish to limit the rights of residence on the basis of family reunification, particularly for members of the family of a Belgian national, thus reinstating reverse discriminations.

3.1 Integration Measures

Although no specific measure has been adopted on the federal level, some specific measures have been created at the regional level such as incentive measures, which could lead to some discrimination in access to employment in the private sector (see *supra*, Chapter III, Title 1.1.).

3.2 Immigration Policies for Third Country Nationals and the Union Preference Principle

In the law adopted by the Parliament on 26 May 2011, (Doc. 53, 0443/021, art. 11 and 12) and relating to family reunification conditions, the new conditions will lead to reverse discriminations. In this situation, the preference principle will become a strictly European one.

The paradox is that Belgium will create a reverse discrimination as a result of a purely internal situation, when the *Zambrano* case reminds us that Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.

3.3 Return of Nationals to New EU Member States

On the Governmental Office for Aliens' website, the 2009 document 'Belgium encourages the return of illegal migrants' is still available. This document is available in French and in English as from this year. There is no mention of EU citizens in this document.

In the context of a parliamentary debate, a question arose about how many forced departures were organised from the Belgian territory and to which countries. Even if the figures that were given do not concern 2010, it appears that for the period between 2004 and 2007, regarding indirect departures, 3 of the top 5 countries of removal are EU Members (Romania 11%, Poland 7% and Slovakia 6%). Regarding direct departures, the figures show that within the top 5 countries, here again, 3 are EU members (Romania (24%), Bulgaria (21%) and Poland 18%).

4. NATIONAL ORGANIZATIONS OR NON-JUDICIAL BODIES TO WHICH COMMUNITY LAW VIOLATION COMPLAINTS CAN BE LAUNCHED

- General website for all mediators in Belgium (www.ombudsman.be)
- The Centre for Equal Opportunities and Opposition to Racism (www.diversite.be)
- Federal mediator (www.federaalombudsman.be)
- French Community mediator (www.mediateurcf.be)
- Walloon Regional mediator (www.mediateur.wallonie.be)

5. SEMINARS, REPORTS AND ARTICLES

5.1 Seminars

During the course of 2010, on the occasion of the 30 years of the Belgian Aliens law (of 15 December 1980), several seminars were organised. In particular, seminars were organised by the Université catholique de Louvain (UCL) and the Katholieke Universiteit Leuven (KUL). The proceedings are yet to be published.

5.2 Reports

Reference was made in this FMOW report to two reports (in French) made by the EURES Maas-Rhin partnership and regarding mobility issues that frontier workers residing in Belgium and working in Germany or the Netherlands face. These reports are available at http://www.eures-emr.org/fr/accueil.html.

The annual report on migration from the Center for Equal Opportunities and Opposition to Racism was also used: Migration Report 2010.

5.3 Articles

A. BAILLEUX, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire. Essai sur la figure du juge traducteur*, Publications des facultés universitaires Saint-Louis, 2009, 750 p.

N. CARIAT, 'Le retrait de nationalité au regard du droit européen et international', *J.D.E.*, 2010, p. 245.

J.-Y. CARLIER (dir.), *L'étranger face au droit*, XXe Journées Juridiques Jean Dabin, (November 2008), Bruxelles, Bruylant, 2010, 638 p.

J.-Y. CARLIER, 'La circulation des personnes dans et vers l'Union européenne', *J.D.E.*, March 2010, p. 79.

J.-Y. CARLIER, 'La circulation des personnes dans et vers l'Union européenne', *J.D.E.*, March 2011, p. 75.

J.-Y. CARLIER, 'Evolution procédurale du statut de l'étranger : constats, défis, propositions', *J.T.*, 2011, p. 117.

J.-Y. CARLIER, S. SAROLEA, 'Le droit d'asile dans l'Union européenne contrôlé par la Cour européenne des droits de l'homme. A propos de l'arrêt M.S.S c. Belgique et Grèce', *J.T.*, 2011, p. 353.

P. DE BRUYCKER, 'Chronique de jurisprudence consacrée à l'espace de liberté, de sécurité et de justice. Jurisprudence de la Cour de Justice au sujet des politiques relatives aux contrôles aux frontières, à l'asile et à l'immigration (2006-2009)', *C.D.E.*, 2010, p. 137.

O. DE SCHUTTER, 'Les droits fondamentaux dans l'Union européenne', *J.D.E.*, 2010, p. 120.

L. DEFALQUE et P. NIHOUL, 'Chronique de jurisprudence européenne', *J.T.*, 2010, p. 429-437.

J.-F. DELFORGE, *Le regroupement familial, article 10 et 40 de la loi du 15/12/1980, compétences, procédure et pratique administrative*, January 2011, Brugge: Editions Vanden Broele 2011, 192 p.

S. LECLERC (éd.), *La libre circulation des personnes dans l'Union européenne*, Bruxelles: Bruylant 2009, 170 p.

K. LENAERTS, 'Le traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l'Union', *C.D.E.*, 2009, n° 5-9, p. 711.

H. VERSCHUEREN, 'Werken activeringsmaatregelen over de grens wel?', in: *Sociaal werk(t): Ereboek Josse van Steenberge*, Bruges: die Keure 2009, p. 339-376.

H. VERSCHUEREN, 'Do National Activation Measures Stand the Test of European Law on the Free Movement of Workers and Job seekers?', *E.J.M.L.*, 2010, pp. 81-103.