REPORT
on the Free Movement of Workers in Belgium in 2009-2010

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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)
C.T.	Cour du Travail (Labour Appeal Court)
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
E.T.L.	*European Transport Law*
GOA	Governmental Office for Aliens
J.D.E.	*Journal de droit européen* (= J.T.D.E. after 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 (First Instance Labour Court)
T.R.V.	*Tijdschrift voor rechtspersonen en vennootschap*
T.Vreemd.	*Tijdschrift vreemdelingen recht*
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 more. But this is not always the case in other countries. Therefore, in order to make the comparison easier, established rights are reminded at the beginning of some chapters.

This is not to say that everything is 'perfect' in Belgium in matters of free movement of persons, but there is nevertheless a strong experience and '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.

2009

1. Generalii

It is quite difficult to receive updated information and statistics from administrations.

The last activity report done by the Governmental Office for Aliens was for 2008 (see www.dofi.ibz.be/fr/jaarverslag/2008fr.pdf) and had no special chapter or issues on EU citizens. In 2009, the Governmental Center for Equal Opportunities and Opposition to Racism (Centre pour l'égalité des chances et la lutte contre le racisme) published its annual report 'Migratio' (see www.diversite.be, in French and Dutch only, see also Vlaams Minderheden Centrum, www.vmc.be) but it contained no special issue on EU citizens.

On 19 July 2009, Governmental Instructions were given to the Department of Federal Immigration with several criteria for the regularisation of irregular migrants. Due to a lack of legal basis, those Instructions were cancelled by the Council of State on 9 December 2009 (annex n° 23). Even though the Instructions did not directly affect EU citizens, they might have been of indirect interest (Chapter II, Title 1).

2. Procedural Question (Chapter I, Title 4.2)

In 2009, the Council of State confirmed the limited power given by the Belgian law to the First Instance Jurisdiction (the Council for Alien Disputes) in cases of aliens, even regarding EU citizens. This limited control of legality being 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.

Belgian authorities could be encouraged to agree, as defendants in a case, to refer a preliminary rule to the ECJ on this point.

3. Reverse Discrimination, Belgian Assimilation Principle (Chapter II, Title 1)

In order to avoid reverse discrimination, the Aliens law states that EU law will apply to a family member of a Belgian. This is the Belgian Assimilation Principle. However, the extension of this Assimilation Principle is not clear in the case law. In a majority of cases, courts come to the conclusion that this Assimilation Principle does not apply without movement. If this is the case, the Belgian Assimilation Principle, frequently used as an example, would lose any 'effet utile'.

4. Discrimination and purely internal situation (Chapter IX, Follow up of the Flemish care insurance, case C-21/06)

Workers facing discriminations in a purely internal situation will not find help at the ECJ (Case C-21/06, *Flemish Care Insurance*). Nor will they at a national level if, like the Constitutional Court of Belgium, the national judge considers that this discrimination has to be solved by the legislator (Belgian Constitutional Court, 21 January 2009, *Flemish Care Insurance*, annex 29).

Should the worker go to Strasbourg (ECtHR) claiming *Gaygusuz* and *Koua Poirrez* cases or should the EU law and case law evolve, slowly but surely, to take into account intra-national (regional) legislation and institutions and intra-national movement?

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 will be 30 years old in 2010, but has been amended more than 20 times since 1980. The law contains a section on Entry (Chapter II, Title I: 'Access and short stay') and a section on EU citizens (Chapter I, Title II: 'Foreigners EU citizens and members of their family and foreigners members of the family of a Belgian national'). As shown in this chapter'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.

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 Alien EU card, see dofi.ibz.be/fr/1024/frame.htm). 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, in application of the *MRAX* case (C-459/99).

All foreigners, EU citizens as well as third country nationals, have the right to vote and to be elected in municipal elections under specific conditions related to duration of residence. This shows that in Belgium, political rights are more in relation with duration of residence than citizenship. However, there is no such link for European elections, as opposed to what has been created in the UK (*Spain v. United Kingdom*, C-145/04).

2009

Three amendments were made to the Aliens law in 2009 (8 March, 6 May and 7 June 2009). They are related to procedural questions and none of them concern EC citizens directly[1] (see however Chapter III, Title 2 on Access to Employment in the Public Sector)

Texts in Force

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

1 For a codification of the Aliens law, see the last text (11 May 2010) on the Department of Federal Immigration website: dofi.ibz.be.

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 transposed.

1. TRANSPOSITION OF SPECIFIC PROVISIONS FOR WORKERS

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 is a proposition to go back to a minimum period of 5 years to apply for Belgian nationality. This could be discussed by the new government after the elections in June 2010. Article 24 (2) has not yet been transposed.

2. SITUATION OF JOB SEEKERS

Job seekers in Belgium can receive a registration certificate as soon as they arrive to the country. Registration certificates are delivered by the municipality without 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 (*Antonissen*, C-292/89). Art. 40, §3 and 40, §4 of the Alien Law transposed correctly art. 6 of the 2004/38/EC Directive on that specific point. They 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 of the territory cannot be an automatic consequence of a social assistance claiming request 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 jobseeker, the amount of the help given, the period of the residence and whether the help is claimed to face temporary difficulties or not.

3. OTHER ISSUES OF CONCERN

3.1. Situation of Students

Municipalities in the Brussels Region do acknowledge some difficulties with EU students who do not register at the local administration once they arrive in Belgium. This leads to problems when having to prove their identity with 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.

3.2. Judicial Practice

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

As mentioned in the 2008 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 refugee law, the CCE has a full jurisdiction with a control of the law and of the facts. This could raise questions about the EU non-discrimination principle (Article 12 CE) with access to justice even if it only concerns residence rights and not other migrant workers rights. The Constitutional Court accepted this limited control in its judgment 81/2008 given on 28 May 2008 (annex n° 43 of the 2008 report, Point B.37.3). The Constitutional Court presumes that the CCE not acting with full jurisdiction is not a discrimination and 'ne prive pas les justiciables … d'un recours effectif' (does not deprive European citizens from an effective remedy), arguing that Directive 2004/38, with Article 31, does not require more procedural safeguards. Article 31, §3 could particularly be disputable, regarding the control and procedural safeguards applied in practice by the CCE. In several decisions, the CCE reaffirms that the Council 'n'exerce son contrôle que sur la seule légalité de l'acte administratif' (makes a control of legality only). The authors of this report believe that the CCE insists on the limited powers given by the law. This point of view has been already mentioned in several judgments given in 2008 (See annexes n° 22, 25, 29, 32, 35 and 36 of the 2008 report), where the CCE did not give direct effect to Article 31.3 of the Directive. According to the CCE, this provision could not enable powers that only domestic law should give. This limited control of legality being 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.

Two decisions were challenged in front of the Council of State in an extraordinary remedy of cancellation (annexes n° 3 and n° 4). Two judgments were given on **15 May 2009** by the State Council and both decisions refused to ask preliminary rulings to the ECJ regarding the compatibility of the new Belgian law with Article 31 of the Directive 2004/38. The State Council believes that the power given to the CCE is not a control of full competence since the CCE did not receive the power to substitute its own decision from the legislator when cancelling an administrative act. The State Council reaffirms here the position expressed by the CCE and the Constitutional Court that the Council for Alien Disputes does not act with

full jurisdiction but only ‘en qualité de juge d’annulation’ (as a judge of annulment, on the legality).

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 refer a preliminary ruling to the ECJ.

Chapter II
Members of the Worker's Family

SUMMARY

Acquis

The position of family members is strengthened in Belgium by the refusal of reverse discrimination for family members of Belgian citizens (Aliens law, Article 42*quinquies*).

2009

As of last year, most of the cases reported concerned Belgian children with non-EU foreign parents. This case law raised the question of the 'effet utile' of the Belgian Assimilation Principle when it is limited to a Belgian's family members who moved within EU Member States.

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 Act which implements family reunification for family members of a Belgian citizen (Aliens Act, Article 40*ter*). This principle of assimilation is a specificity of the Belgian law, allowing it to exclude reverse discrimination. Regarding the *Chen* case, the ECJ ruled that using EU law to acquire a Member State nationality and being given a residence permit through this EU nationality is not forbidden by EU law. In the same case, the ECJ reminded that under international law, it is up to each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. Some questions may arise when applying this ruling in Belgium to the family member (third country national) of a Belgian child. In fact, Article 10 of the Belgian Nationality Code gives the Belgian nationality to a stateless child born in Belgium. This provision raises some cases in which parents, third country nationals, particularly from South America, irregular migrants in Belgium, did not declare the birth of their child born in Belgium to their Embassy. The child was therefore stateless and then Belgian on the basis of Article 10 of the Belgian Nationality Code. In 2006, the Nationality Code was amended, adding that Belgian nationality would not be given any more to a stateless child who may obtain another nationality by a declaration to the Embassy. The Constitutional Court refused in 2008 to cancel this Nationality Code amendment. However, since 2007, there are still cases where a stateless child in unable to become Belgian. Some other cases are the consequence of the Nationality Code before 2007.

One of these consequences is 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. Does this not lead to discrimination between Belgian children?

The State Council referred this question to the Constitutional Court in a decision on *2 December 2008* (annex n° 1). The case concerned several parents, direct relatives in the ascending line, from Ecuador, Bolivia and Brazil, having a Belgian child but not being 'dependent' of the child.

When answering the questions in a judgment of *3 November 2009*, the Constitutional Court did not consider any discrimination among Belgian children (annex n° 2). The Constitutional Court, quoted Article 2, §2 Directive 2004/38 referring also to the 'dependent direct relative'. Founding its decision on Article 2(2) of the Directive 2004/38 and applying the *Jia* case (C-1/05), the Constitutional Court considered the dependence condition to be legitimate and proportionate to the goal aimed.

Preliminary rulings at the ECJ were suggested by the applicants regarding the consequences of Articles 12, 17 and 18 of the EC Treaty in terms of right of residence for a national: did these Articles grant, alone or together, a right of residence to a national on the territory of the EU Member State? The Court considered the preliminary ruling as non useful considering the right of residence for an EU citizen 'may be subject to limitations and conditions'.

The Constitutional Court clearly differentiates minor and adult Belgian children of third country national parents, entitling family reunification. The dependence condition for the adult child appears to be legitimate and proportionate since the State does not have to financially support such parents. The situation for the minor child is different since parents are legally not able to fulfil the dependence condition. The Court then verifies whether the dependence condition creates a non-legitimate difference of treatment and whether or not this condition is in conformity with the right to protect private and family life. The Court decides that 'when applying to a minor Belgian child the condition that the ascendant be 'dependent' of the child must be interpreted so that the ascendant 'parent' has sufficient resources to not become a burden for the Belgian social system (the word 'unreasonable' burden is not used in the decision, as in recital 16 Directive 2004/38 but not in Article 7, §1, b Directive 2004/38) (See also: ECJ, 23 February 2010, *Ibrahim*, C-310/08).

The Court based its decision on an administrative circular raised in March 2009. According to this circular, regularisation of third country national parents of a Belgian child is considered an urgent humanitarian situation, allowing the residence permit deliverance on the Belgian territory in application of Article 9*bis* of the Aliens law. The Court also based its decision on regularisation instructions raised on 19 July 2009 by the Government which considered an alien, who has a real and effective family life with his or her Belgian child, as a humanitarian situation opening a right to regularisation. The Court presumes that the dependence condition could lead to a violation of the right to protect private and family life when not satisfied. This condition appeared to be justified since the law offered the possibility to claim a visa from the Belgian territory to third country national parents of a Belgian child through the regularisation procedure in application of Article 9*bis* of the Aliens law.

One can question the weight of this judgment since instructions raised on 19 July 2009 were quashed by the State Council on *9 December 2009* (annex n° 23).

Another question relating to family members and reverse discrimination concerns family allowances. A residence period of five years is required in order to allow the beneficiary to obtain family benefits for a Belgian child. This residence condition is justified by the link

required between the beneficiary and the Belgian territory. The Constitutional Court ruled on *25 March 2009* (annex n° 22) that such residence condition is disproportionate since the two other conditions required as Belgian citizenship of the child, i.e. effective residence of the Belgian child on the Belgian territory and residence permit of the beneficiary, seem sufficient to prove the real link between the beneficiary and the Belgian territory.

In order to comply with this judgment, a new law has been adopted on *30 December 2009* modifying the law dated 20 July 1971 on family allowances (annex n° 26). The application of this new law, dated 1 March 2009, allows the beneficiary of Regulation 1408/71, members of his or her family and nationals from a Member State which has ratified the European Social Charter to be entitled to claim family benefits regardless of the 5-year residence period.

Following this ruling, another situation was examined by the Constitutional Court. The case concerned the Rwandese mother of a Spanish child who claimed family allowances in Belgium. The Belgian administration refused, arguing that the Spanish child did not fulfil the residence period of five years in Belgium. Basing her claim on the judgment n° 62/2009 (see annex n° 22) of the Constitutional Court, the mother lodged an action in front of the Industrial Tribunal of Brussels. This Tribunal requested preliminary rulings from the Constitutional Court since discrimination in violation of Articles 12 and 17 of the EC Treaty (Articles 18 and 20 TFUE) was alleged between a third country national beneficiary, mother of a Belgian child, and a first country national beneficiary, mother of an EU child.

The Court answered on *29 April 2010* (annex n° 24) that the condition of a 5-year residence period was disproportionate. The Court reminded that in judgment n° 110/2006 ruled on 28 June 2006, the regular residence permit condition appeared to be legitimate. Then, considering the non-discrimination principle of Article 18 of the EC Treaty, the Court ruled that if the 5-year residence period was ruled illegal when the child was Belgian, Articles 18 and 20 TFUE lead to the same conclusion when the child was an EU citizen.

As mentioned above, the Belgian State Council is now competent to cancel judgment raised by the CCE. Within these powers, the State Council cancelled, on *15 May 2009*, a judgment given by the CCE. The applicant raised an argument related to the legality of the administrative decision to refuse a residence permit to the mother of a Belgian child. The applicant alleged that the GOA did not consider the applicant as an EU citizen family member. The CCE refused to examine this argument of the Assimilation Principle present in the Belgian law. The Council of State cancelled this CCE judgment considering that refusal to examine such legality regarding the Assimilation Principle decided by the Belgian law is a violation of Articles 2 and 7 of the Directive 2004/38 (See annex n° 3). Thus, in this case, the Council of State seems to say that there is no need for movement between EU States to apply EU law to family members of a Belgian national, due to the Assimilation Principle in the Belgian law.

However, *in 2009*, the Council of State confirmed, in a huge majority of the actions lodged, the validity of the interpretation given by the CCE, according to which the *Chen* case is not applicable to third country national parents of a Belgian child (annexes n° 10, 11, 12, 13 and 14).

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. *Singh*, 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.

2. ENTRY AND RESIDENCE RIGHTS

Before the entry into force of the 25 April 2007 law transposing the Directive 2004/38 on 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.'

This 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 in front of the civil tribunal in Liège in order to obtain condemnation of the Belgian State to admit him to residence and to receive a family reunification visa. According to the tribunal, a potential violation of the non-discrimination and equality principle could occur where no penalty is given in the law whereas Article 12*bis* of the Aliens law gives a residence right after nine months to family members of a non-EU citizen (annex n° 16). Consequently, the civil tribunal raised a preliminary ruling to the constitutional court in order to deal with this potential reverse discrimination (judgment of *11 December 2009*, annexes n° 16 and n° 17).

As far as marriages of convenience are concerned, one has to remember that this problem does not only concern EU workers, but also all family members of an EU citizen, whether Belgian or non-Belgian. 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. By a circular of 10 October 2009 of the collegiums of Public Attorneys (Collège des Procureurs Généraux) strong directives were given to fight against the 'phenomenon' of law abuse with marriages of convenience. In its 2009 report 'Migratio', the Center for Equal Opportunities asked for a clear analysis of this 'phenomenon' before measures, underlining that this idea of a 'phenomenon' is not based on any statistic or scientific study.

In the Civil Code, Article 146*bis* is deemed 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 which can take place in another European Member State.

If the marriage was celebrated in another EU Member State, according to the mutual recognition principle translated in the 2201/43 Regulation 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.

On the contrary, if the marriage was celebrated in a third country, for instance with an EU citizen, the above-mentioned principle of mutual recognition will not be applicable. However, the Belgian private international law code applies the same principle of recognition without *ex ante* control for the foreigner public authority documents. The case law dem-

onstrates that this principle is not applicable to the CCE when a refusal of visa deliverance is challenged in front of this jurisdiction. The CCE considers that the transcription of the marriage celebrated in a third country with a Belgian citizen in the municipality registers does not prevent the GOA from refusing to grant a visa to the spouse. Alleging that the private international law code has a provision which allow any jurisdiction to appreciate the validity of the marriage celebrated abroad, the CCE declared itself incompetent, on *28 August 2008*, since the same provision offers a possibility to lodge a specific action in front of the civil tribunal (annex n° 6).

The CCE's position was cancelled by the Council of State on *18 March 2009* (Judgment n° 191.552 - annex 30) in which the highest administrative jurisdiction declared admissible the argument of the applicant alleging a violation of the private international code by the GOA. Indeed, the Council of State considered that the argument did not concern the validity of the marriage celebrated abroad but the correct application of the private international code and the civil code by the GOA.

Accordingly, the CCE modified its position, on *4 September 2009* (n° 31.194 – annex 31), ruling that a Moroccan act of divorce should be analysed as a decision of divorce rather than an act of repudiation. This allowed the CCE to control the respect of the Belgian international private law by the GOA rather than the validity of the foreign act.

3. ACCESS TO WORK

In an administrative circular adopted on **17 December 2008** and published in 2009 (annex n° 5), the Belgian Ministry of Employment reminded that, in conformity with the Royal Decree dated 7 May 2008 (annex n° 20 of the 2008 report), the notion of 'spouse of an EU citizen' had been enlarged to the partner with whom the EU citizen has a durable relationship. Consequently, the legislation relating to access to work for third country nationals family members of EU citizens must be interpreted with this enlargement taken into consideration.

4. THE SITUATION OF FAMILY MEMBERS OF JOB SEEKERS

According to the practice analysed, job seeker's family members receive residence permits under the same conditions as EU citizen job seekers.

Chapter III
Access to Employment: a) Private sector and b) Public sector

SUMMARY

Acquis

Since the *SNCB* cases in 1980 and 1982 (149/79), about access to employment in the railway transport, Belgium broadly widened access to employment in the public sector. However, statistics (see previous reports) do not show an important presence of EC workers in the public sector.

2009

About language requirements, the question in 2009 is not so much the access to employment as it is the access to private and public housing.

A. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

a.1 Equal Treatment in Access to Employment

No specific problem was reported on that point.

a.2 Language Requirements

As of last year, after specifically investigating in the Brussels district, no case was reported, by either the published case law or industrial courts magistrates concerned by this matter. This does not exclude that in practice, European citizens can be confronted to excessive and discriminatory language requirements for access to labour market. Contractual provisions could contain such obstacles.

At the moment, language requirements seem to be more important in access to property than in access to employment.

According to press reports, claims have been lodged in the Commission against the Flemish regulation relating to the possibility to buy real estate within the Flemish Region. The new regulation requires from potential buyers to demonstrate their integration to the Flemish territory and to the area where they intend to buy. No action seems to be lodged in front of the national jurisdiction so far.

B. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

b.1 Nationality Condition to Access Positions in the Public Sector

In the 6 May modification of the Aliens law in 2009, the formerly required Belgian nationality to be a member of the Consultative Commission on Aliens was withdrawn (Article 33, §3 Aliens law).

The action brought on 11 February 2008 by the case *Commission of the European Communities v. Kingdom of Belgium* is still pending. This case concerns the notary business (C-47/08).

According to information received from local administrations in the Brussels Region, it seems that no specific problem arises in access to employment in the public sector at a regional level. But this should be checked by a sociological study on the field that is not in the capacity of the reporters.

b.2 Language Requirements

No specific problems were reported in the public sector regarding access to employment. Once again, the problem seems to be more important for access to public housing than access to employment.

An action had been brought to the Constitutional Court by the Government of the French-speaking Community against the Flemish Regulation adopted on 15 December 2006. This Flemish Regulation offered administrations the possibility to control the knowledge of Flemish in order to access public housing. The Court's decision was given on 10 July 2008 (annex n° 5 of the 2008 report). One of the arguments was related to the violation of the Belgian Constitutional right to housing combined with provisions of Articles 18, 39 and 43 of the EC treaty and Articles 7 and 9 of Regulation 1612/68 (annex n° 5). The Constitutional Court rejected the argument. The court considered that language requirement was not an 'obligation of result' but only a 'best effort obligation' in charge of the applicants and that this requirement was not discriminatory since it was applicable regardless of the applicant's nationality.

b.3 Recognition of Professional Experience for Access to the Public Sector

No specific problem was reported on that point.
The administration did not give information about the follow up of the general recognition of professional qualification after the judgment against Belgium for non-transposition of Directive 2005/36/C (9 July 2009, C-469/08).

b.4 Other Aspects of Access to Employment

No specific problem was reported on that point.

Chapter IV
Equality of Treatment on the Basis of Nationality

SUMMARY

Acquis

The equality of treatment on the basis of nationality seems to be generally well respected in Belgium.

2009

Like the years before, the main concern is about reverse discrimination and about the question of Purely Internal Situation (see infra Chapter IX, follow up of case C-212/06).

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

It appears from investigations that, so far, direct and indirect discrimination in working conditions do not lead to judicial actions lodged in industrial tribunals. This does not mean that there is no discrimination in working conditions but it could mean that such discrimination is not serious enough to start legal action in front of jurisdictions or that alternative remedies offer sufficient help and satisfaction to the alleged victims of such discriminations.

On that specific point, one must bear in mind that a federal body ensures the fight against any kind of discrimination in Belgium: it is the 'Centre pour l'égalité des chances et la lutte contre le racisme' (Centre for Equal Opportunities and Opposition to Racism). This body has been interrogated specifically on equality of treatment in working conditions. According to their answers, it appears that discrimination in working conditions is mainly not based on nationality but rather on race, origin or religion (see: *Discrimination- diversité*, 2008, Annual report on discrimination, www.diversite.be).

About discrimination on ethnic criteria, since the *Feryn* case (C-54/07), no similar case was reported.

1.1 Professional Experience Recognition in order to Determine Working Conditions

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

1.2 Taking Into Account Diplomas to Determine Working Conditions

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

See: L. DEFALQUE, observations under ECJ, 29 January 2009, 'Liberté d'établissement des professions réglementées et reconnaissance mutuelle des diplômes', *J.T.*, 2009, p.227 (annex n° 35).

1.3 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

EU workers enjoy the same social and tax advantages as national workers. No specific new problem was reported for 2009. Most of the past problems on this issue in Belgium concerned tax advantages.
See: E. TRAVERSA, 'Chronique de droit fiscal communautaire', *J.D.E.*, 2009, pp. 175-180.

2.2 Specific Issue: the Situation of Job Seekers

No specific new problem was reported in 2009.

2.3 Tax on Legacy

In order to avoid discrimination based on the nationality criteria, the Antwerp court of appeal decided that Article 60 of inheritance code must be ruled out when granting a reduced rate to Belgian organisms and institutions only. Consequently, a reduced rate is also applicable to legacy dedicated to British organisms (judgment of *18 November 2008*, published in 2009, annex n° 18).

2.4 Company Administrator

In the same objective, the Brussels Industrial Court decided that in order to avoid discrimination based on nationality, forbidden by Article 32, §2 EC, it is not required to submit a French administrator of a Belgian company to the Belgian social benefit system where a Belgian administrator of such company would be exempted of such submission in appliance of a Belgian-American convention of social benefit. Such submission would be a violation of the non-discrimination principle (judgment of *11 July 2008*, published in 2009, annex n° 19).

Chapter V
Other Obstacles to Free Movement of Workers

A survey of other obstacles is included in Chapter VI: Specific Issues.

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.

Literature

J. JACQMAIN, 'Egalité de traitement entre travailleurs féminins et masculins – Autres discriminations 'Article 13 CE'', *Journal du droit européen*, 2009, pp. 310-313.

Chapter VI
Specific Issues

1. FRONTIER WORKERS

Some Belgian and French border residents employed in the French border region and working at least one day out of the French border region lost their status of frontier workers. Consequently, they were subject to French taxes. Several French and Belgian frontier workers were admitted as 'anticipately retired' before they reached 65 years old, the legal age of pension. Discrimination was applicable, on one hand, between French and Belgian retired frontier workers and other nationals retired frontier workers and, on the other hand, between French and Belgian retired frontier workers and Belgian retired workers who are beneficiaries of a different tax system and have a better complementary pension scheme.

Vice-Prime Minister and Minister of Finances answered on *10 July 2009* that this situation would be fully effective until the French Parliament ratified the Amendment to the Belgian-French convention dated 10 March 1964 which was signed on 12 December 2008. The previous Amendment applicable was signed on 13 December 2007. In Belgium, according to this answer given to a deputy, the Amendment was ratified by the Senate on *5 March 2009* and by the Chamber on *26 March 2009*. In France, a draft law was submitted to the Senate on *3 June 2009*. According to the Minister of Finances, no discrimination should remain since the concept of 'retired frontier worker' does not exist. A person is either a frontier worker or retired, but income is under the provisions of Articles 11 and 12 of the Convention, preventing a double tax application (annex n° 15).

A request for cancellation of the law approving the Amendment signed on 12 December 2008 has been introduced in front of the Constitutional Court. At the time being, the case is still pending. The action has been brought on *14 January 2010* and concerns a family living in Mouscron near the French border (annex n° 25).

This amendment can cause, according to a Parliamentary question raised on *21 April 2009* (annex n° 37), a discriminatory situation. The amendment does not concern retired French frontier workers living in Belgium who still pay taxes in Belgium, since France requires taxes to be paid in the country of residence. These workers will be discriminated against in comparison to other frontier workers from Germany, the Netherlands or Luxembourg. According to the answer given by the Vice-Prime Minister and Minister of Finances on *26 May 2009*, it is not discriminatory for retired French frontier workers living in Belgium to pay taxes in Belgium. The explanation is based on the judgment raised by the Constitutional Court (then, Arbitration Court) on 4 February 2004 (judgment n° 20/2004). The Constitutional Court said that the situation was not similar since no discrimination could be found when workers are submitted to different conventions.

In Belgium, an inhabitant receiving income from abroad can be tax-exempt if he or she is applicable to an international convention preventing double tax application. However, this income is subject to local and municipal taxes, if allowed by the International Convention, as if the income was perceived in Belgium (Article 466*bis* of the 1992 Income Tax code). In this context, a Belgian inhabitant working in the Netherlands has to pay local and municipal income taxes even though he or she is exempted of taxes in Belgium by a bilateral convention preventing double tax application between Belgium and the Netherlands dated 5 June

2001. Alleging that the application of Article 466*bis* is a violation of Article 39 of the EC Treaty, a Belgian working in the Netherlands lodged an action in front of the Tribunal of Antwerp who decided to ask for preliminary rulings to the Constitutional Court. Answering the question on *5 February 2009* (annex n° 28), the Constitutional Court acknowledged that the legislator could not decide unilaterally in transnational matters.

Basing its judgment on the *Government of the French Community and Walloon Government v. Flemish Government* case (C/212/06, see *infra*, Chapter IX), the Belgian 'Cour Constitutionelle' reminded that 'the provisions of the Treaty on freedom of movement for persons preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State' and that 'Articles 39 EC and 43 EC militate against any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by Community nationals of the fundamental freedoms guaranteed by the Treaty'. The Court refers to cases *Gilly* (C-336/96), *de Groot* (C-385/00) and *Renneberg* (C-527/06).

The Court stated that, without necessity to see if these local taxes are an obstacle to free movement, it is enough to note that the litigated tax is applied without consideration of the inhabitant's nationality and aims to allow local inhabitants to financially contribute to support their local municipality. This goal is of public interest and the means does not appear to be disproportionate.

According to a Parliamentary question asked on *13 February 2009* (annex n° 38), there were 6,348 French frontier workers in Belgium (Flemish and Walloon Regions) in 1990. This number raised up to 25,665 in 2005. This rise is explained in part by the high level of unemployment in the North of France and higher salaries in Belgium. However, it seems that some of them face administrative difficulties. Vice-Prime Minister, Minister of Employment and Equal Opportunities presented figures regarding the situation on 30 June 2007 (annex n° 39). On this occasion, the competent Minister recalled the non-discrimination principle applicable to that kind of situation without any consideration for the worker's nationality.

1.1 Posted Workers from Neighbour Countries

The interpretation of posted workers seems to be different from an EU Member State to another. A Parliamentary question raised on *11 March 2009* (annex n° 40) mentioned the case of the Netherlands where one worker's single day would be sufficient to allow the employer to post that worker during a whole year in another EU Member State even if this worker lived in this other country and was covered by social security. Other Member State such as Luxembourg would go further in accepting posted worker without any condition of residence on its territory. Such differing interpretations lead the working country principle to be replaced by the employer domicile principle. ('principe du siège'). This would allow companies to 'shop' for the EU Member State with the least expensive insurance. The Vice-Prime Minister in charge of Social Affairs acknowledged in his answer that the problem was resulting from Article 14, 1a of the 1408/71 Regulation which does not require a previous minimum insurance period in the sending country for the posted worker. The *ratio legis* of this provision should plea for such a requirement. The aim of the provision was to avoid administrative formalities when a temporary modification of the insurance regime occurred. The real period of insurance required by the competent administration is clearly different

from one country to another. In Belgium, the competent administration is called ONSS (Office National de Sécurité Sociale) and requires a minimum of 30 days of first insurance period before the post happens. However, one can notice that the lower the required first insurance period before the post, the higher the risk of avoiding social security payment.

One learns from this answer that the Belgian representation at the Administrative Commission of Migrant Workers had deposed a note setting the required first insurance period to 30 days. Since 1 April 2007, a previous compulsory declaration is required for foreign workers, self-employed workers and trainees coming from abroad for a temporary or a part-time job in Belgium (Limosa Declaration).

2. SPORTSMEN/SPORTSWOMEN

According to the Belgian Football Union (URBSFA, Union belge des Sociétés de Football Association) Regulation available, no nationality clause appears in the football regulation. There is no limitation for EU or non-EU citizens to access the national championship competition.

Only the Royal Decree of 9 June 1999 executing a Belgian law dated 30 April 1999 can be interpreted as a limitation for non-EU citizens. Articles 8 and 9 of this Royal Decree require the employer to pay the equivalent of eight salaries to a professional sportsman by Article 2, §1 of the law dated 24 February 1978 relating to work contract for paid sportsman. This requirement appears to be an obstacle to access Belgian championship for a non-EU citizen who has to prove his salary is the equivalent of eight times the ordinary pay for a sportsman.

Outside the scope of EU law, but of interest is the case of an Ukrainian swimmer. A 14-year-old Ukrainian boy brought an action in front of the civil tribunal, first in Charleroi, then at the Mons Court of appeal against the Royal Belgian Swimming Federation. The Federation prevented this boy from participating in his club arguing the fact that he is not the beneficiary of a residence permit. In a interim ruling (référés), the Court considered on *16 December 2009* that this behaviour was a discrimination based on the legal status of his parents, which appeared to be disproportionate when the youth is not allowed to play sports in his club affiliated to the Federation (annex n° 21). The case is interesting since the Court admits that treating nationals and foreigners differently is not prohibited as it is based on objective and reasonable considerations. Only arbitrary behaviour in the decision-making is prohibited. The Court also bases its interpretation of such discrimination prohibition on a judgment of the Constitutional Court raised in 2003 (judgment 106/2003 dated 22 July 2003) according to which a difference of treatment can only be established by the law. In this case, the Royal Belgian Swimming Federation alleged that the difference of treatment was based on public order reasons. The Court did not consider this argument and stated that the sport regulation creates a strong discrimination based on the parents or player's residence regularity. The Court reaffirmed that, as a result of this regulation and its effects, a young player suffers from his parents' administrative status. This appears to be disproportionate in regard with the public order alleged by the sport Federation. The Court also referred to the International Convention on the Right of the Child (1989).

3. THE MARITIME SECTOR

No specific regulation or practice has been noticed relating to employment and working conditions and, in particular, pay to seafarers, whether EU citizens or not.

As mentioned in the 2007 report, with the adoption of the Royal Decree on 12 September 2007 (annex n° 50 of the 2007 report), the Belgian nationality condition for achieving a commander function on a ship is not required any more, as the new royal Decree allows Belgian authorities to accept any EU citizen applying to become commander.

4. RESEARCHERS/ARTISTS

No specific issue was reported in 2009.

5. ACCESS TO STUDY GRANTS

According to the website of the French Community, which is the regional authority competent in education in the Belgian federal State, residence condition is still applicable for study grants. Another condition is relating to the job: one of the applicant's parents must be employed or must have been employed on the Belgian territory (annex n° 26). These conditions could raise problems regarding *Bidar* (C-209/03) and *Förster* (C-158/07) cases.

The required conditions are linked more to the work status of the parents. Study grants would be interpreted as a social advantage for the working parents rather than an autonomous right for the student as an EU citizen with a real link to the territory through his or her own period of residence on this territory.

On the more general topic of Access to Study, the question is still disputed between France and Belgium, particularly regarding access to medical and paramedical studies for French students (refused in France because of the *numerus clausus*) in the south of Belgium (French Community). For the future, one should look at the consequences of the *Bressol* case (C-73/08, judgment 13 April 2010).

Basically, the Court asked Belgium, in *Bressol* 'a prospective analysis which will have to extrapolate on the basis of a number of contingent and uncertain factors and take into account the future development of the health sector concerned (...) Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to public health' (points 69 and 71).

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 (Migratio Report, *op. cit.*, p. 164).

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 provided 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). 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. In 2007 and 2008, 20% of work permits were granted to Bulgarian and Romanians (Migratio Report, *op. cit.*, p. 165).

A Bulgarian citizen lodged an action in front of the State Council in order to obtain the suspension of the effect of the December 2008 Royal Decree alleging that the new legislation illegally prevented her from finding a job and living decently in Belgium. The Council of State rejected her action, considering that the effects of the Royal Decree did not cause a real and serious prejudice. The legislation applicable to Bulgarian citizens during the transitional period allows them to apply for a work permit, and in the appreciation of the application, the authorities do not consider the situation of the labour market in the field concerned (annex n° 8).

Chapter VIII
Miscellaneous

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

1.1 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 2009.

See for a detailed analysis: H. VERSCHUEREN, 'Do National Activation Measures Stand the Test of European Law on the Free Movement of Workers and Job seekers?', *EJML*, 2010, p. 81-103 (annex 32).

1.2 Invalidity Benefits

In the Belgian law, conditions for the acquisition of invalidity benefits, such as a period of primary incapacity of one year, may be conform to Regulation 1408/71, but in contradiction with Article 45 TFUE (39 CE) when this leads to a disadvantage by comparison to a non-migrant worker. This was the subject of the *Leyman c. Inami* case (C-3/08, judgment 1 October 2009, p. 420). It is too early to know about the follow up of this case in Belgium (Annex 20).

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

See *supra*, 1.

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

3.1 Integration Measures

See *supra*, Chapter III, about language requirements, particularly in the Flemish Region.

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

See *supra* Chapter I, about family life.

3.3 Return of Nationals to New EU Member States

On the Governmental Office for Aliens website is a document 'Belgium encourages the return of illegal migrants' (www.dofi.fgov.be). There is no mention of EU citizens in this document.

In the context of 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 2009, 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% - see annex n° 7).

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

J.-Y. CARLIER, 'La circulation des personnes dans l'Union européenne', *J.D.E.*, March 2010, pp. 79-84.

G. DEBERSAQUES, D. VANHEULE, and M.-Cl. FOBLETS (ed.), *Vreemdelingenrecht geannoteerd*, Brugge: Die Keure, 2009, 889 p.

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

L. DEFALQUE and P. NIHOUL, Chronique de droit communautaire, *J.T.*, 2009, p. 313 (annex 34).

S. DE LA ROSA, 'La citoyenneté européenne à la mesure des intérêts nationaux, à propos de l'arrêt *Förster*', *C.D.E.*, 2009, p. 549 (annex 36).