# Conformity Study for Belgium
# Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

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**ANALYSIS OF THE LEGISLATION TRANSPOSING DIRECTIVE 2004/38/EC ON FREE MOVEMENT OF UNION CITIZENS**

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## EXECUTIVE SUMMARY

### 1. Introduction

Belgium has a federal structure.

(i) Belgium has four 'language districts' (*taalgebieden*) (Article 4 Constitution): the Dutch speaking district, the French speaking district, the German speaking district and the bilingual district of Brussels.
(ii) Belgium has three 'communities' (*gemeenschappen*) (Article 2 Constitution): the Flemish community, the French community and the German community.
(iii) Belgium has also three 'regions' (*gewesten*) (Article 3 Constitution): the Flemish region, the Walloon region and the Brussels region.

The communities and regions can only exercise those competences that have been attributed in or through the Constitution. The "residual" competences are exercised at the federal level.[1]

Moreover, Belgian federalism is exclusive, *i.e.*, a competence attributed to the regional level cannot be attributed to the federal level (and *vice versa*). However, it is not always easy to maintain the complete exclusive character of certain competences: certain areas of law are said to be "shared exclusive competences", where certain elements are exclusively attributed to one authority, while other elements of the same matter are exclusively attributed to another authority.[2]

Communities are *a.o.* competent for cultural matters (Article 127, §1, 1° and Article 130, §1, first paragraph, 1° Belgian Constitution) and matters related to the person ("*matières personnalisables*") (Article 128, §1 Article 130, §1, first paragraph, 2° Belgian Constitution). These "*matières personnalisables*" are enumerated in Article 5, §1 of the Belgian special Act of 8 August 1980 '*de réformes institutionnelles*'.

Conflicts of competence between the two levels of government within the Belgian federal system are to be avoided by the intervention of the "section legislation" of the Belgian Council of State (advisory role in the drafting of legislation). Moreover, conflicts of competence can also be solved by the Belgian "Constitutional Court" (the former "*Cour d'Arbitrage*").

DOFI[3] (*Dienst Vreemdelingenzaken – Service des Etrangers*) is a part of the Ministry of Home Affairs. DOFI is responsible for the management and entry of foreigners to Belgium, their stay, their settlement and, when deemed necessary, the removal of foreigners from the Belgian territory.[4]

DOFI works closely together with other authorities, such as the police, Childfocus, Belgian communes, embassies, public prosecution services *etc*.

### 2. Introduction to the main particularities of the Belgian legal system relating to the transposition of the Directive 2004/38

Measures transposing Directive 2004/38 are adopted at the federal level.

Article 5, § 1, II, 3° '*de la loi spéciale du 8 août 1980 de réformes institutionnelle'* provides that:

> "*§ 1er. Les matières personnalisables visées à l'article 59bis, § 2bis, de la Constitution, sont:*

[1] A. ALEN and K. MUYLLE, *Compendium van het Belgisch staatsrecht*, Deel 1B, Kluwer, 2003, p. 344.
[2] A. ALEN and K. MUYLLE, *id*., pp. 348-350.
[3] Website: http://www.dofi.fgov.be
[4] S. GSIR, M. MARTINIELLO, K. MEIREMAN and J. WETS, Current Immigration Debates in Europe: A Publication of the European migration Dialogue, Report about Belgium, September 2005.

*II. En matière d'aide aux personnes:*
*3° La politique d'accueil et d'intégration des immigrés.*"

The competence related to reception and integration policies is explicitly attributed to the federated level. However, the competence concerning the entry, residence, establishment and removal of foreigners is not explicitly attributed to the federated level. The entry, residence, establishment and removal of foreigners in and out Belgium is therefore a federal matter. Neither the Belgian Constitution nor any other special federal law explicitly attributes this matter to the federated level. Therefore, it must be considered as a 'residual' federal competence.[5]

The federal basic Act is the Law of 15 December 1980 regarding the entry, residence, settlement and removal of aliens. This law has been implemented by the Royal Decree of 8 October 1981 '*sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers'*.

In 2006 the legislation on aliens was reformed. Firstly, by the Belgian Law of 15 September 2006 '*modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers'*. Secondly, by the Belgian Law of 15 September 2006 '*réformant le Conseil d'Etat et créant un Conseil du Contentieux des Etrangers*'.

In 2007 a new reform took place. The Belgian Law of 15 December 1980 was changed, this time in order to comply with the provisions of Directive 2004/38 [*la loi du 25 avril 2007 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge du 10 mai 2007)*].

The Royal Decree of 08.10.1981 concerning the access to territory, the residence, the establishment and removal of foreigners (M.B., 27.10.1981) (*"Arrêté royal sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers"*) has also been changed in order to comply with Directive 2004/38. The change was expected in the second half of 2007, but due to the Belgian political situation the Royal Decree was only changed in May 2008. On 7 May 2008 two more Royal decrees were issued. Both Royal Decrees entered into force on 1 June 2008. The first Royal decree changes the Arrêté Royal of 08.10.1981. Technically, the second one does not modify the Arrêté Royal of 08.10.1981, but contains certain provisions in order to comply with Directive 2004/38/EC.

## 3. Conclusions on the legal analysis of the transposing measures for Directive 2004/38

### a. Overview of how the requirements have been transposed

Transposition is mainly the result of one federal Act and two (federal) Royal Decrees implementing the Act. Moreover, administrative guidance in the form of a Circulaire has been sent to the competent Belgian authorities concerning the application of the transposing measures of Directive 2004/38.

These acts are:

- *la loi du 25 avril 2007 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge du 10 mai 2007) ; (« LAT »)*
- *l'arrêté royal du 7 mai 2008 modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge du 13 mai 2008) (« AR 08 ») ;*

[5] M.-C. FOBLET en S. BOUCKAERTS, *De bevoegdheidsverdeling inzake de opvang van niet-begeleide minderjarige vreemdelingen zonder stabiel verblijfsstatuut, in het bijzonder van diegene die geen asielaanvraag hebben ingediend of waarvan de asielaanvraag is afgewezen*, (Part 3 of the) Report for the Flemish Community, Brussel, Vlaams Minderhedencentrum, 2002.

- *l'arrêté royal du 7 mai 2008 fixant certaines modalités d'exécution de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge du 13 mai 2008) (« AR 08/1 »).*
- *Circulaire 'Citoyens de l'Union et membres de leurs familles' (« Circ. »).*

### b. Conformity problems and complete and accurate transposition

The requirements of Directive 2004/38 are mainly correctly transposed. Several Belgian transposing measures are even more favourable. However, the law and the administrative guidance contain several conformity issues.

These are the main conformity issues:

1. Beneficiaries

Article 3(2)(a) has not been transposed into Belgian law. Therefore, there is no obligation to facilitate entry and residence of the persons covered by Article 3(2)(a). Belgian authorities indicate that Articles 9 and 9 bis LAT should be considered as correct transposition. However, this is not the case, because firstly, these provisions do not include reference to the persons covered by Article 3(2)(a) (members of the household, persons needing special care *etc*), and do not provide for any specific facilitation of entry and residence, which is the key objective of Article 3(2)(a) of the Directive.

Article 3(2)(b) is not correctly transposed. Article 40 bis §2, 2° LAT, which states: "*Sont considérés comme membres de famille du citoyen de l'Union : 2° le partenaire auquel le citoyen de l'Union est lié par un partenariat enregistré conformément à une loi, et qui l'accompagne ou le rejoint, pour autant qu'il s'agisse d'une relation durable et stable d'au moins un an dûment établie, qu'ils soient tous deux âgés de plus de 21 ans et célibataires et n'aient pas de relation durable avec une autre personne* », goes further than the Directive. The persons falling under this definition would be covered by Article (2)(b), but Belgian law goes further and considers the persons defined in Article 40 bis, § 2, al.1, 2° LAT as family members. Article 40 bis, §2, al. 2 LAT gives the King the power to determine the stability criteria. This has been done in Article 3 AR 08/1. Moreover the same provision says that the minimum age of 21 years is lowered to 18 years if the persons concerned proof that they lived together at least one year before entering Belgium. The conformity issue arises for persons not falling under the definition of Article 40 bis, § 2, al.1, 2° LAT. For these persons Article 3.2 (b) of Directive 2004/38 continues to apply. For persons not falling under the definition of Article 40 bis, § 2, al.1, 2° LAT , Belgium has not transposed Article 3(2)(b).

Article 3(2) second subparagraph has not been transposed. Therefore, there is no specific facilitation obligation on Belgian authorities.

2. Right on entry

Article 5(2) second subparagraph has not been transposed. Article 5(4) has been incompletely transposed: the conditions "before turning them back" and "give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time" have not been included in the legislation. Only certain requirements are included. Therefore, the authorities have more discretionary powers than those foreseen by the Directive.

3. Right of residence for more than three months

Article 8(2) states that the deadline for registration may not be less than three months from the date of arrival and that a registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Belgium has used the possibility to require Union citizens to register for periods of residence longer than three months. However, several conformity issues arise, most concerning the obligation to issue a registration certificate immediately.

A Belgian registration certificate is the so-called Annex 8. The procedure to obtain an Annex 8 is described in the ToC and below, but in several hypotheses the Annex 8 is not issued 'immediately'. Since one of the objectives of the Directive is to reduce the administrative burden, this conformity issue must be particularly underlined.

Article 8(5)(e) and (f) have not been (correctly) transposed. For Article 8(5)(e) this follows logically from the non-transposition of Article 3(2)(a). Article 8(5)(f) has not been transposed to the extent that Article 3(2)(b) has not been transposed (see comments to this Article).

4. Job seekers

Job seekers are included in the transposition of Article 40 §4, al. 1, 1° LAT ("*Tout citoyen de l'Union a le droit de séjourner dans le Royaume pour une période de plus de trois mois s'il remplit la condition prévue à l'article 41, alinéa 1er et : 1° s'il est un travailleur salarié ou non salarié dans le Royaume ou s'il entre dans le Royaume pour chercher un emploi, tant qu'il est en mesure de faire la preuve qu'il continue à chercher un emploi et qu'il a des chances réelles d'être engagé* »). The Belgium legislation is not in compliance with the Directive, read in the light of the *Antonissen* jurisprudence.

First of all, job seekers should have the right of residence without any conditions or any formalities other than the requirement to hold a valid identity card or passport (within the meaning of Article 6 of the Directive) for the first six months. However, Article 40 §4, al. 1, 1° LAT imposes the additional obligation to 'provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged'.

Secondly, Article 14(4)(b), also read in the light of the *Antonissen* case law (see the 9th recital of the Directive), allows expulsion of job seekers only after six months. Only after those 6 months should it be considered whether they are an unreasonable burden and should be expelled. The LAT excludes Article 40 §4, al. 1, 1° from the cases where one can be expelled. To the extent that Article 40 §4, al. 1, 1° LAT is not a correct transposition, and the exclusion is incorrect, because it allows expulsion of job seekers after three months (if the expulsion conditions are fulfilled).

5. Protection against expulsion (Article 28 (1))

Article 28(1) provides that before making an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin. Article 45 §1 LAT states that a Royal decree has to be taken 'after an opinion of the consultative committee for foreigners'. The Belgian authorities then indicate that this committee should take into consideration the criteria of Article 28(1). First of all, this would leave too much discretion to the authorities. Secondly, and more basically, Article 28(1) contains a right which should be clearly written down in the Belgian legal order. This is not the case. Therefore transposition is not correct.

6. Procedural safeguards

In Article 30(1) the Directive states that persons concerned should be notified in writing. Article 46 §1 LAT, the Belgian transposing measures, does not explicitly contain the guarantee that this notification should be done "in writing". The condition that notification should be done "in such a way that they are able to comprehend its content and the implications for them" has not been transposed.

It must be stressed that the Directive there is no obligation to notify in the language of the person concerned by the decision. Such a provision can thus not be found in Belgium. In absence of any specific language requirement in the Directive, Article 41, al. 1 of the Royal decree of 18 July 1966

(*Arrêté Royal portant coordination des lois sur l'emploi des langues en matière administrative, M.B., 02.08.1966*) imposes the obligation to use one of the three languages – Dutch, French or German – that the person concerned has used during the procedure. One cannot claim to be notified in another language. This transposition is considered incorrect.

The condition that the persons shall be informed "precisely and in full" (Article 30(2)) has not been explicitly transposed. This non-conformity issue must be put into perspective: Articles 2 and 3 of the *Loi du 29 juillet 1991 relative à la motivation formelle des actes administratifs (M.B., 12.09.1991)* impose an obligation to indicate the facts lying at the basis of a decision.

Concerning Article 31(3), this provision is probably one of the biggest conformity issues in Belgium. The Belgian transposing measure (Article 39/2, §2 LAT) states that the Conseil *"statue en annulation, par voie d'arrêts, sur les autres recours pour violation des formes soit substantielles, soit prescrites à peine de nullité, excès ou détournement de pouvoir"*. However the Belgian transposition does not contain the guarantee that during the procedure the Conseil will have the power to examine the facts and circumstances.

Concerning Article 32(1), this provision states that persons excluded on grounds of public policy or public security may submit an application to lift the exclusion order after "a reasonable period". Belgian transposition states that those persons can only submit an application for lifting the exclusion order "after 2 years". It is clear that in certain circumstances this cannot be qualified as "a reasonable period".

Article 33(1)-(2) has not been transposed into Belgian law.

Lastly, Article 15(3), which states that the host Member State may not impose a ban on entry in the context of an expulsion decision, has not been correctly transposed into Belgian law. Article 26 LAT states that expulsion orders contain an entry ban for 10 years.

7. Continuity of residence (Article 21)

Article 21 states that continuity of residence may be attested by any means of proof in use in the host Member State, and that continuity of residence is broken by any expulsion decision duly enforced against the person concerned. This provision is incorrectly transposed by Article 42 quinquies §4 LAT, according to which a procedure before the Conseil suspends the recognition of the right of permanent residence (until there has been taken a final decision). First of all, the Article does not explicitly transpose the right that continuity of residence may be attested by any means of proof used in Belgium. This is a right, so it should be clearly written down. Secondly, and more importantly, continuity of residence can only be broken by an expulsion decision duly enforced, and not (as stated by Belgian law) during the procedure before the Conseil.

### c. Conclusions of the legal analysis of the transposing measures for Directive 2004/38/EC.

In general, Belgium has accurately transposed Directive 2004/38, although sometimes the transposing measures are complicated to read and understand (because they do not follow the same structure of the Directive). Several provisions of Belgian law grant more rights than the Directive (see ToC). Most conformity issues concern non-transposition of Directive provisions.

#### i. Summary of conformity problems

The summary of conformity problems gives a quick overview of conformity problems, with the exception of minor conformity issues.

1. Non conformity due to gaps or incomplete transposition

a. Non-transposition

- Article 3(2)(a): facilitation of the right of entry and residence for certain categories.
- Article 5(2) second subparagraph, al.2: Facilitation to obtain visas.
- Article 7(4), last sentence: Application of Article 3(2).
- Article 8(5)(e) and (f): Registration certificate for EU family members.
- Article 10(2) (e) and (f): Residence card for non EU family members.
- Article 11(2): temporary absences.
- Article 12(2) al. 3: retain right on personal basis.
- Article 13(2) al. 3: retain right on personal basis.
- Article 17(1)(c) second subparagraph: periods of employment spent in the MS in which the person is working.
- Article 27(3): period of three months.
- Article 27(4): re-enter the territory.
- Article 30(1): in writing.
- Article 30(2): precisely and in full.
- Article 33(2): expulsion more than 2 years after it was issued.

b. Incomplete transposition

- Article 3(2)(b): facilitation of entry and residence for partners.
- Article 4(1): right of exit.
- Article 5(4): reasonable opportunity to obtain necessary documents.
- Article 6(1): jobseekers.
- Article 14(2): no systematic verifications.
- Article 14(3): recourse to social assistance does not lead automatically to an expulsion measure.
- Article 15(1): procedural safeguards applying by analogy.
- Article 15(3): no ban on entry in the context of an expulsion measure to which Article 15(1) applies.
- Article 20(1): permanent residence card is renewable every 10 years.
- Article 21: continuity of residence.
- Article 27(3): ask other Member States information concerning any previous police record.
- Article 28(1): criteria in the framework of the protection against expulsion.
- Article 29(3): medical examinations may not be required as a matter of routine.
- Article 31(3): examination of the facts and circumstances.
- Article 32(1): reasonable period concerning exclusion orders.
- Article 36: no notification of the sanctions by 30 April 2006.

c. Incorrect or imprecise/ambiguous transposition

- Article 3(1): beneficiaries (Union citizens).
- Article 7(1)(a): concept of ‘worker’.
- Article 8(2): registration certificate.
- Article 8 (4): sufficient resources.
- Article 10(1): issue of residence card.
- Article 12(1): retention of the right of residence.
- Article 14(4)(b): no expulsion measure against job seekers.
- Article 16 (1): right of permanent residence for Union citizens.
- Article 16 (2): right of permanent residence for non-EU family members.
- Article 19(1) and (2): document certifying permanent residence.
- Article 20(1): permanent residence card for family members who are not nationals of a Member State.

- Article 20(3): validity of the residence card.
- Article 23: related rights.
- Article 40: delay for transposition (only on 1 June 2008).

## SUMMARY DATASHEET

### 1. Transposing legislation

The transposition is mainly the result of one federal Act and two (federal) Royal decrees implementing the Act. Moreover, administrative guidance in the form of a Circulaire has been send to the competent Belgian authorities concerning the application in practice of the transposing measures of Directive 2004/38.

These acts are:

- *la loi du 25 avril 2007 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge du 10 mai 2007) ; (« LAT »)*

- *l'arrêté royal du 7 mai 2008 modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge du 13 mai 2008) (« AR 08 ») ;*

- *l'arrêté royal du 7 mai 2008 fixant certaines modalités d'exécution de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge du 13 mai 2008) (« AR 08/1 »).*

- *Circulaire 'Citoyens de l'Union et membres de leurs familles' (« Circ. »).*

The consolidated versions of the LAT and the AR 08 can easily be found through the website www.juridat.be and are also annexed.

### 2. Assessment of the transposition

The following conformity issues exist for Belgium. They are organised by conformity issue and presented in the order of the Directive's articles.

#### a) Incomplete transposition or non-transposition

i. Non-transposition

| | |
|---|---|
| Article 3(2) | Facilitation of the right of entry and residence for certain categories. |
| Article 5(2) al.2 | Facilitation to obtain visas. |
| Article 7(4), last sentence | Application of Article 3(2). |
| Article 8(5)(e) and (f) | Registration certificate for EU family members. |
| Article 10(2), (e) and (f) | Residence card for non-EU family members. |
| Article 11 (2) | Temporary absences. |
| Article 12(2) al. 3 | Retain right on personal basis. |
| Article 13(2) al. 3 | Retain right on personal basis. |
| Article 17(1)(c) al. 2 | Periods of employment spent in the MS in which the person is working. |
| Article 27 (3) | Period of three months. |
| Article 27(4) | Re-enter the territory. |
| Article 30(1) | In writing. |
| Article 30(2) | Precisely and in full. |

| | |
|---|---|
| Article 33(2) | Expulsion more than 2 years after it was issued. |

ii. Incomplete transposition

| | |
|---|---|
| Article 3(2)(b) | Facilitation of entry and residence for partners. |
| Article 4(1) | Right of exit. |
| Article 5(4) | Reasonable opportunity to obtain necessary documents. |
| Article 6(1) | Job seekers should have the right of residence without any conditions or any formalities other than the requirement to hold a valid identity card or passport for the first six months. The transposing legislation imposes the additional obligation to 'provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged'. |
| Article 14(2) | No systematic verifications. |
| Article 14(3) | Recourse to social assistance does not lead automatically to an expulsion measure. |
| Article 15(1) | Applicability of procedures of Articles 30 and 31. |
| Article 15(3) | No ban on entry in the context of an expulsion measure to which Article 15(1) applies. |
| Article 20(1) | Permanent residence card is renewable every 10 years. |
| Article 21 | Continuity of residence. |
| Article 27(3) | Ask other Member States information concerning any previous police record. |
| Article 28(1) | Criteria in the framework of the protection against expulsion. |
| Article 29(3) | Medical examinations may not be required as a matter of routine. |
| Article 31(3) | Examination of the facts and circumstances. |
| Article 32(1) | Reasonable period concerning the exclusion orders. |
| Article 36 | No notification of the sanctions by 30 April 2006. |

**b) Incorrect or imprecise/ambiguous transposition**

| | |
|---|---|
| Article 3(1) | Beneficiaries (Union citizens). |
| Article 7(1)(a) | Concept of 'worker'. |
| Article 8(2) | Registration certificate. |
| Article 8(4) | Sufficient resources. |
| Article 10(1) | Issue of residence card. |
| Article 12(1) | Retention of the right of residence. |
| Article 14(4)(b) | No expulsion measure against job seekers. |
| Article 16(1) | Right of permanent residence for Union citizens. |
| Article 16(2) | Right of permanent residence for non-EU family members. |
| Article 19(1) and (2) | Document certifying permanent residence. |
| Article 20(1) | Permanent residence card for family members who are not nationals of a Member State. |
| Article 20(3) | Validity of the permanent residence card. |
| Article 23 | Related rights. |
| Article 40 | Delay for transposition (only on 1 June 2008). |

## ABBREVIATIONS USED

- Article: Article
- Cf: confer
- Nr.: number
- ECJ: European Court of Justice
- TEC: Treaty establishing the European Community
- LAT: la loi du 25 avril 2007 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers
- AR 08 : l'arrêté royal du 7 mai 2008 modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers
- AR 08/1 : l'arrêté royal du 7 mai 2008 fixant certaines modalités d'exécution de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers
- Circ : Circulaire 'Citoyens de l'Union et membres de leurs familles'

# 1 INTRODUCTION

This conformity study analyses in detail the provisions of Directive 2004/38/EC on the free movement of EU citizens in its consolidated version, and it compares it with the legislation in place in Belgium.

Directive 2004/38/EC repealed the earlier directives on the free movement of persons (Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC) as from 30 April 2006.

EU citizenship gives every Union citizen the right to move and to reside freely within the territory of the Member States. The facilitation and promotion of this right, which is at the same time one of the fundamental freedoms of the internal market, is the objective of Directive 2004/38/EC. A second objective of Directive 2004/38/EC was to codify and review the various pieces of legislation and case law dealing with this issue.

***Free movement as a fundamental freedom of the internal market***

Free movement is one of the fundamental freedoms of the internal market and can therefore only be restricted in a limited number of pre-determined circumstances. Thus, national legislation cannot adopt more restrictive legislation than provided for in the Directive.

Directive 2004/38/EC introduces, on the one hand, a uniform approach regarding the formalities that Member States can impose upon EU citizens residing in their territory. These formalities are expressly established in the Directive and restricted in function of the duration of the stay in the Member States.

- For a stay of less than three months, the only formality a Member State can impose is the presentation of a valid passport or national identity card.

- For residence of more than three months, a Member State can only require the EU citizen to register in the population register of the place of residence. This registration needs to be validated immediately if a certain number of conditions are complied with. The Member State can only require the EU citizen to present proof that he/she is a worker, self-employed person, student or has sufficient resources not to become a burden upon the social security system of the Member State. Member States cannot lay down a fixed amount of what they consider to be "sufficient resources", but must always take into account the personal situation of the person concerned. Family members of the EU citizen will have to present an identity document and proof of the family link to an EU citizen.

- After five years of continuous residence in a Member State, an EU citizen obtains a right to permanent residence. The host Member State shall issue a document certifying permanent residence. A permanent resident has the right to be treated equally to a national of the Member State.

On the other hand, the Directive also determines and clarifies the only acceptable reasons for restriction of the free movement of citizens by Member State authorities, namely for reasons of public order, public security and public health. (For the interpretation and conditions of such exceptions, it is important to rely upon the case law of the Court of Justice.)

These measures guarantee a strong protection against expulsion for EU citizens who have been long-term residents in another Member State. Such measures need to be proportionate and shall always look at the personal conduct of the individual concerned which must represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". In addition, the Directive establishes some procedural safeguards if an expulsion decision is considered.

## 1.1 OVERVIEW OF THE LEGAL FRAMEWORK IN BELGIUM

Measures transposing Directive 2004/38 are adopted at the federal level.

Article 5, § 1, II, 3° '*de la loi spéciale du 8 août 1980 de réformes institutionnelle'* provides that:

> "*§ 1er. Les matières personnalisables visées à l'article 59bis, § 2bis, de la Constitution, sont:*
> *II. En matière d'aide aux personnes:*
> *3o La politique d'accueil et d'intégration des immigrés*".

The competence related to reception and integration policies is explicitly attributed to the federated level. However, the competence concerning entry, residence, establishment and removal of foreigners is not explicitly attributed to the federated level. The entry, residence, establishment and removal of foreigners in and out Belgium are therefore a federal matters. Neither the Belgian Constitution nor any other special federal law explicitly attributes this matter to the federated level. Therefore, it must be considered as a 'residual' federal competence.[6]

The federal basic Act is the Law of 15 December 1980 regarding the entry, residence, settlement and removal of aliens. This law has been implemented by the Royal Decree of 8 October 1981 '*sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers'*.

In 2006 this legislation on aliens was reformed. Firstly, by the Belgian Law of 15 September 2006 '*modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers'*. Secondly, by the Belgian Law of 15 September 2006 '*réformant le Conseil d'Etat et créant un Conseil du Contentieux des Etrangers*'.

In 2007 a new reform took place. The Belgian Law of 15 December 1980 was changed, this time in order to comply with the provisions of Directive 2004/38 [*la loi du 25 avril 2007 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge du 10 mai 2007)*].

The Royal Decree of 08.10.1981 concerning the access to territory, the residence, the establishment and removal of foreigners (M.B., 27.10.1981) (*"Arrêté royal sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers"*) has also been changed in order to comply with Directive 2004/38. The change was expected in the second half of 2007, but due to the Belgian political situation the Royal Decree was only changed in May 2008. On 7 May 2008, two more Royal decrees were issued. Both Royal Decrees entered into force on 1 June 2008. The first Royal decree changes the Arrêté Royal of 08.10.1981. Technically the second one does not modify the Arrêté Royal of 08.10.1981, but contains certain provisions in order to comply with Directive 2004/38/EC.

Transposition is therefore mainly the result of one federal Act and two (federal) Royal Decrees implementing the Act. Moreover, administrative guidance in the form of a Circulaire has been sent to the competent Belgian authorities concerning the application of the transposing measures of Directive 2004/38.

These acts are:

- *la loi du 25 avril 2007 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge du 10 mai 2007) ; (« LAT »)*

[6] M.-C. FOBLET en S. BOUCKAERTS, De bevoegdheidsverdeling inzake de opvang van niet-begeleide minderjarige vreemdelingen zonder stabiel verblijfsstatuut, in het bijzonder van diegene die geen asielaanvraag hebben ingediend of waarvan de asielaanvraag is afgewezen, (Part 3 of the) Report for the Flemish Community, Brussel, Vlaams Minderhedencentrum, 2002.

- *l'arrêté royal du 7 mai 2008 modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge du 13 mai 2008) (« AR 08 ») ;*

- *l'arrêté royal du 7 mai 2008 fixant certaines modalités d'exécution de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge du 13 mai 2008) (« AR 08/1 »).*

- *Circulaire 'Citoyens de l'Union et membres de leurs familles' (« Circ. »).*

## 1.2 FRAMEWORK FOR TRANSPOSITION & IMPLEMENTATION OF DIRECTIVE 2004/38/EC IN BELGIUM

### 1.2.1 Distribution of competences according to the national Constitution

Measures transposing Directive 2004/38 are adopted at the federal level.

Article 5, § 1, II, 3° '*de la loi spéciale du 8 août 1980 de réformes institutionnelle'* provides that:

> "*§ 1er. Les matières personnalisables visées à l'article 59bis, § 2bis, de la Constitution, sont:*
> *II. En matière d'aide aux personnes:*
> *3o La politique d'accueil et d'intégration des immigrés*".

The competence related to receiving and integrating policies is explicitly attributed to the federated level. However, the competence concerning entry, residence, establishment and removal of foreigners is not explicitly attributed to the federated level. The entry, residence, establishment and removal of foreigners in and out Belgium are therefore a federal matters. Neither the Belgian Constitution nor any other special federal law explicitly attributes this matter to the federated level. Therefore, it must be considered as a 'residual' federal competence.[7]

### 1.2.2 General description of organisation of national authorities implementing Directive 2004/38/EC in Belgium

Originally, the (federal) Minister of Justice was competent for the entry, residence, establishment and removal of aliens in and out Belgium. Since 1992 this competence has been transferred to the (federal) Minister of Home Affairs.[8] Moreover, the institutions dealing with the entry, residence, settlement and removal of aliens are also transferred to the Minister of Home Affairs.[9]

Article 1, 2° of the Belgian Law of 15 December 1980 regarding the entry, residence, settlement and removal of aliens specifies that every time this Act mentions 'Minister', this must be read as '*le Ministre qui a l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers dans ses compétences*', *i.e.,* the Minister of Home Affairs.

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[7] M.-C. FOBLET en S. BOUCKAERTS, *De bevoegdheidsverdeling inzake de opvang van niet-begeleide minderjarige vreemdelingen zonder stabiel verblijfsstatuut, in het bijzonder van diegene die geen asielaanvraag hebben ingediend of waarvan de asielaanvraag is afgewezen,* (Part 3 of the) Report for the Flemish Community, Brussel, Vlaams Minderhedencentrum, 2002.

[8] Belgian Policy Report on Asylum and Migration 2006. See, for example, Article. 1, 9° of the Royal decree of 20 July 1999 (Belgian Gazette 27 July 1999): *"Sont compétents en matière de: accès au territoire, séjour, établissement et éloignement et étrangers: le Ministre de l'Intérieur"*.

[9] See Article 1 of the Royal decree of 31 December 1993 *'relatif à l'organisation du Ministère de l'Intérieur et de la Fonction publique': "Les services suivants sont transférés du Ministère de la Justice au Ministère de l'Intérieur et de la Fonction publique : 1° l'Office des Etrangers; 2° le Commissariat général aux Réfugiés et aux Apatrides; 3° la Commission permanente de Recours des Réfugiés"*.

DOFI[10] (*Dienst Vreemdelingenzaken – Service des Etrangers*) is a part of the Ministry of Home Affairs. DOFI is responsible for the management and the entry of foreigners to Belgium, their stay, their settlement and, where deemed necessary, the removal of foreigners from the Belgian territory.[11] It has five mandates:

- To manage migration flows and make quick decisions on the validity of applications;
- To adapt the legislation to comply with EU law;
- To modernise the aliens office and rationalise the processes;
- To assure the repatriation policy takes into account the inevitable regularity of the forced repatriation;
- To boost the struggle against human traffickers.[12]

DOFI works closely with other authorities, such as the police, Childfocus, Belgian communes, embassies, public prosecution services etc.

# 2 LEGAL ANALYSIS OF THE TRANSPOSING MEASURES FOR DIRECTIVE 2004/38/EC

## 2.1 Definitions, family members and beneficiaries

***Definitions***

Overall the Belgian legislation has correctly transposed Article 2 and in some cases it goes beyond the scope of the Directive's provision. Article 40 §2 LAT is the transposing provision.

- **"Union citizen" (Article 2(1))**

Article 40 §2 LAT transposes the Directive's definition of Union citizen but excludes Belgian citizens. However, Article 40 ter LAT extends the scope of the legislation to family members of a Belgian citizen in order to avoid reverse discrimination. (See more details in the discussion of Article 3(1) on beneficiaries).

- **The spouse (Article 2(2)(a))**

Article 40 bis, §2, al. 1, 1° LAT states that a 'conjoint' (a spouse) will be considered as a family member of a Union citizen. Article 143 of the Code Civil gives the right to marry to two persons of the same sex.

Concerning the recognition of marriages carried out in other Member States, Article 27 of the *Loi portant le Code de droit international privé* states that foreign, authentic marriages will be recognised by all authorities if valid and established according to the *Code de droit international privé*, except in case of Article 18 (*'fraude à la loi'*) and Article 21 (public order exception).

Article 47 §1 *Code de droit international privé* states that the question of marriage formalities is determined by the law of the state where the marriage has been celebrated.

According to Article 46 al. 1 *Code de droit international privé* the validity of a marriage is determined by the law of the state the nationality of which he/she has at the time the marriage is carried out. The

[10] Website: http://www.dofi.fgov.be
[11] S. GSIR, M. MARTINIELLO, K. MEIREMAN and J. WETS, Current Immigration Debates in Europe: A Publication of the European migration Dialogue, Report about Belgium, September 2005.
[12] *Id*.

second *a linea* of Article 46 *Code de droit international privé* states that the applicable law (determined by the first *a linea*) is not applied if that law prohibits same sex marriages when one of them has the nationality or his/her usual place of residence in a state allowing same sex marriages.

- **"Registered Partnerships" (Article 2(2)(b))**

The Directive requires that Member States consider registered partnerships as family members when under the legislation of the host Member State, registered partnerships are considered as equivalent to marriage and if the registered partnership is concluded in accordance with the conditions laid down in the relevant legislation of the host Member State. This provision is correctly transposed by Article 40bis, §2, al. 1, 1° LAT, which states that the following is considered as a family member of a Union: citizen "*l'étranger avec lequel il est lié par un partenariat enregistré considéré comme équivalent à un mariage en Belgique, qui l'accompagne ou le rejoint* ».

Belgium law regulates registered partnerships under Title V bis of the Belgian Code Civil ("*de la cohabitation légale*"). The conditions for the registered partnerships are:

> "*1° ne pas être liées par un mariage ou par une autre cohabitation légale; 2° être capables de contracter conformément aux articles 1123 et 1124* » (Article 1475 §2 Civil Code).

Article 40 bis, §2, al 3 LAT indicates that a Royal Decree will establish *« les cas dans lesquels un partenariat enregistré sur la base d'une loi étrangère doit être considéré comme équivalent à un mariage en Belgique »*. To implement Article 40bis§, al. 1 1°, a Royal Decree was adopted in 2008. Article 4 of AR 08/1 lists the Member States for which registered partnerships will be considered as equivalent to marriage in Belgium. These countries are:

- Denmark
- Germany
- Finland
- Island
- Norway
- United Kingdom, and
- Sweden.

Registered partnerships concluded in these countries must be considered as equivalent to marriage for the purpose of Article 40 bis, § 2, al 1 1° LAT.

Neither LAT nor AR 08/1 explicitly state that registered partnerships from other Member States (*i.e.,* not listed in the AR 08/1) cannot be considered as equivalent to Belgian marriage. Therefore, for these registered partnerships it can - and must - still be assessed whether these are equivalent to marriage in Belgium.

- **"The direct descendants who are under the age of 21 or are dependants" Article 2(2)(c):**

The provision has been transposed in a more favourable way by Article 40 bis §2 al. 1 3°.

Belgian transposition refers to "descendants" instead of "direct descendants". Possibly not only children can invoke this provision. Belgian pre-legislative proceedings indicate clearly: "*enfants, petits-enfants etc*.", which indicates that also would presumably also mean that descendants in the collateral line could invoke this provision.

Additionally also the descendants and the descendants of the persons covered by the different partnerships included in the Belgian provisions described above are also covered.

- **"The dependent direct relatives in the ascending line" Article 2(2)(d):**

The provision has been transposed in a more favourable way by Article 40 bis §2 al. 1 4°. Belgian transposition refers to "ascendants" instead of "direct relatives in the ascending line". Possibly not only the parents ("direct relatives in the ascending line") but also grandparents ("ascendants") are covered. Belgian pre-legislative proceedings indicate clearly: "parents, grandparents etc", which indicates that also descendants in the collateral line could invoke this provision.

Additionally, the descendants of the persons covered by the different partnerships included in the Belgian provisions described above are also covered.

***Article 3 "Beneficiaries"***

- **Article 3(1)**

Article 3(1) indicates that the Directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national and to their family members who accompany or join him.

  - Union citizens and wholly internal situations (*Surinder Sigh* jurisprudence)

Article 40 §1-2 LAT has transposed this provision correctly, since it indicates that a Union citizen is every foreigner having the nationality of a Member State residing in or coming to Belgium. As mentioned before, the LAT defines Union citizen excluding Belgian citizens.

According to the *Surinder Sigh* case, family members of Belgian citizens who exercised their right to free movements and return to Belgium should also be covered by the Directive. The Belgian provision seems at first sight in contradiction with the Directive, since it would exclude from its application family members of a Belgian citizen. However, the Belgian legislation also applies to family members of a Belgian citizen because Article 40 ter LAT explicitly provides: "*Les dispositions de ce chapitre qui sont applicables aux membres de la famille du citoyen de l'Union qu'ils accompagnent ou rejoignent, sont applicables aux membres de la famille d'un Belge qu'ils accompagnent ou rejoignent. En ce qui concerne les ascendants visés à l'article 40bis, § 2, alinéa 1er, 4°, le Belge doit démontrer qu'il dispose de moyens de subsistance stables, réguliers et suffisants pour qu'ils ne deviennent pas une charge pour les pouvoirs publics pendant leur séjour dans le Royaume, ainsi que d'une assurance maladie couvrant les risques en Belgique pour les membres de la famille visés*".

This implies that the provisions of LAT concerning Union citizens will also apply to family members of a Belgian citizen. The second paragraph of Article 40 ter LAT adds that for relatives in the ascending line (cf. transposition of Article 2(2)(d) of the Directive) the Belgian citizen must prove that he/she has sufficient, stable and regular resources to make sure that this category of family members do not become a burden for the Belgian state during their stay. The Belgian citizen must also prove that he/she has a health insurance that covers also those family members. This additional proof seems to violate *Surinder Singh* case law. Article 40, §4, 2° LAT (concerning non-economically active EU citizens) states: « *Tout citoyen de l'Union a le droit de séjourner dans le Royaume pour une période de plus de trois mois s'il remplit la condition prévue à l'article 41, alinéa 1er et : 2° ou s'il dispose pour lui-même de ressources suffisantes afin de ne pas devenir une charge pour le système d'aide sociale du Royaume au cours de son sejour, et d'une assurance maladie couvrant l'ensemble des risques dans le Royaume* ». As can be seen the conditions of Article 40, §4, 2° LAT are less restrictive than the ones listed in Article 40 ter, paragraph 2 LAT ('pouvoir public' is a larger notion than 'système d'aide sociale'). For the relatives in the ascending line of Belgians, the provisions of the Directive will only apply if the proof of the second paragraph of Article 40ter LAT is provided (and this proof is more demanding that the one asked for non-economically active EU citizens). This has been considered as a conformity issue.

- Family members

The Belgian legislation has a similar provision applying to family members. The LAT applies to them without prejudice to other more favourable provisions. In addition, the condition to accompany or join the Union citizen is transposed when transposing the definitions of family member of Article 2(2) of the Directive. Every category of family member, defined in Article 40 bis, §2, mentions the condition that he/she has to accompany or join a Union citizen. Please note also that Belgian transposition does not ask for a lawful residence in another Member State to fall under the LAT. This is in line with *Metock* jurisprudence.

- **Other family members (Article 3(2))**

According to Article 3(2), other family members do not have a right of entry and residence in the host Member State. However, the host Member State has an obligation to facilitate their entry and residence in the host Member State taking into account the personal circumstances of the case.

Those family members are: family member who in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen; and those with whom the Union citizen has a durable relation, duly attested.

This provision has been incompletely transposed by the LAT, and only certain durable relationships will be covered by the Belgian legislation.

- Members of the household or needing personal care (Article 3(2)(a))

This provision has not been transposed under the LAT. Belgian authorities indicate that those persons could invoke Article 9 and 9 bis LAT.

> **« *Article 9***. *Pour pouvoir séjourner dans le Royaume au-delà du terme fixé à l'article 6 l'étranger qui ne se trouve pas dans un des cas prévus à l'article 10 doit y être autorisé par le (Ministre) ou son délégué.*
> *Sauf dérogations prévues par un traité international, par une loi ou par un arrêté royal, cette autorisation doit être demandée par l'étranger auprès du poste diplomatique ou consulaire belge compétent pour le lieu de sa résidence ou de son séjour à l'étranger.*
>
> ***Article 9bis.*** *§ 1er. Lors de circonstances exceptionnelles et à la condition que l'étranger dispose d'un document d'identité, l'autorisation de séjour peut être demandée auprès du bourgmestre de la localité où il séjourne, qui la transmettra au ministre ou à son délégué. Quand le ministre ou son délégué accorde l'autorisation de séjour, celle-ci sera délivrée en Belgique.*
>
> *La condition que l'étranger dispose d'un document d'identité n'est pas d'application :*
> *- au demandeur d'asile dont la demande d'asile n'a pas fait l'objet d'une décision définitive ou qui a introduit un recours en cassation administrative déclaré admissible conformément à l'article 20 des lois sur le Conseil d'Etat, coordonnées le 12 janvier 1973, et ce jusqu'au moment où le recours est déclaré non admissible;*
> *- à l'étranger qui démontre valablement son impossibilité de se procurer en Belgique le document d'identité requis.*
> *§ 2. Sans préjudice des autres éléments de la demande, ne peuvent pas être retenus comme circonstances exceptionnelles et sont déclarés irrecevables :*
> *1° les éléments qui ont déjà été invoqués à l'appui d'une demande d'asile au sens des articles 50, 50bis, 50ter et 51, et qui ont été rejetés par les instances d'asile, à l'exception des éléments rejetés parce qu'ils sont étrangers aux critères de la Convention de Genève tel que déterminé à l'article 48/3 et aux critères prévus à l'article 48/4 en matière de protection subsidiaire, ou parce qu'ils ne relèvent pas de la compétence de ces instances;*
> *2° les éléments qui auraient dû être invoqués au cours de la procédure de traitement de la demande d'asile au sens de l'article 50, 50bis, 50ter et 51, dans la mesure où ils existaient et*

*étaient connus de l'étranger avant la fin de la procédure;*
*3° les éléments qui ont déjà été invoqués lors d'une demande précédente d'autorisation de séjour dans le Royaume;*
*4° les éléments qui ont été invoqués dans le cadre d'une demande d'obtention d'autorisation de séjour sur la base de l'article 9ter* ».

Belgian authorities should then take into account the criteria of Article 3(2)(a) of Directive 2004/38 when analysing whether to issue a visa or a permit. However, these Articles do not transpose the condition to "facilitate entry and residence" since the Belgian transposing measures do not introduce any kind of exception for these other family members.

However, persons falling under the definition of Article 40 bis, §2, al. 1, 3° and 4° LAT (which goes further then the Directive) will be treated as family members. The right of entry and residence for those persons is granted as a right rather than a simple facilitation.

However, for other family members that do not fall under the ascendants or descendants, the situation will be more complicated and they will have to follow the general rules.On this point the Belgian transposition is not in conformity .

- Partner – durable relationship (Article 3(2)(b))

The Directive also imposes on Member States the obligation to facilitate entry and residence of the person with whom the Union citizens has a durable relationship. The provision has been incompletely transposed under Belgian law.

First of all, Article 40 bis, §2, al.1, 2° LAT states: "*Sont considérés comme membres de famille du citoyen de l'Union : 2° le partenaire auquel le citoyen de l'Union est lié par un partenariat enregistré conformément à une loi, et qui l'accompagne ou le rejoint, pour autant qu'il s'agisse d'une relation durable et stable d'au moins un an dûment établie, qu'ils soient tous deux âgés de plus de 21 ans et célibataires et n'aient pas de relation durable avec une autre personne* ».

The persons falling under this definition would be covered by Article 3(2)(b), but Belgian law goes further and considers the persons defined in Article 40 bis, §2, al.1, 2° LAT as family members. Article 40 bis, §2, al. 2 LAT gives the King the power to determine the stability criteria. This has been done in Article 3 AR 08/1. Moreover, the same provision says that the minimum age of 21 years is lowered to 18 years if the persons concerned prove that they lived together for at least one year before entering Belgium.

Article 3 AR 08/1 established three criteria that are considered as sufficient proof for a 'durable relationship':

« *Le caractère stable de la relation est établi dans les cas suivants :*

*1° si les partenaires prouvent qu'ils ont cohabité de manière ininterrompue en Belgique ou dans un autre pays pendant au moins un an avant la demande;*
*2° si les partenaires prouvent qu'ils se connaissent depuis au moins deux ans et qu'ils fournissent la preuve qu'ils ont entretenu des contacts réguliers par téléphone, par courrier ordinaire ou électronique, qu'ils se sont rencontrés trois fois durant les deux années précédant la demande et que ces rencontres comportent au total 45 jours ou davantage;*
*3° si les partenaires ont un enfant commun* »

These criteria are not cumulative. Moreover, nothing in the text excludes other criteria from being taken into account to establish the existence of a durable relationship (the text does not say: "*est uniquement/seulement établi dans les cas suivants"*).

The conformity issue arises for persons not falling under the definition of Article 40 bis, §2, al.1, 2°

LAT. For these persons Article 3(2)(b) of Directive 2004/38 continues to apply. The same remark must be made for Article 3(2)(a) Directive 2004/38: invoking Article 9 or 9bis LAT cannot be considered as a sufficient transposition.

- Obligation to examine the personal circumstances

The obligation under Article 3(2) second subparagraph to undertake an extensive examination of the personal circumstances and to justify any denial of entry or residence has not been transposed. Article 62 LAT obliges written reasons to be given for all decisions, which could oblige the Belgian authorities to examine personal circumstances and to justify any denial of entry and residence. However, this cannot be considered as a sufficient transposition for this particular provision which creates a singular and specific regime for other family members. Most probably, Belgian law has not transposed this obligation because Article 3(2)(a) and (b) have not been transposed. Since there is no obligation to facilitate in the first place, there could hardly be any obligation to examine personal circumstances.

## 2.2 Rights of exit and entry

***(a) Right of exit (Article 4)***

- **Right of exit (Article 4(1))**

Article 4(1) concerning the right to leave the territory of a Member State to travel to another Member State is incorrectly transposed by Articles 1 and 2 of the Law of 14.08.1974. Article 2 of this Law states: "*Les étrangers peuvent entrer en Belgique moyennant le respect des dispositions de la législation sur la police des étrangers.Ils ont le droit de sortir du territoire belge, sous réserve des restrictions imposées par la loi et moyennant le respect des conditions fixées par le Roi* ». Article 2 of the Law of 14.08.1974 confirms the right for foreigners to leave the country, but this "*sous reserve des restrictions imposées par la loi et moyennant le respect des conditions fixées par le Roi*". This transposition does not state that 'all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport' can leave the country. It also seems that the King could impose other conditions that the mere holding of a valid identity card or passport.

- **No exit visa (Article 4(2))**

Article 4(2), provides that no exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies. Articles 1 and 2 of the Law 14.08.1974 do not impose such formalities, so (*a contrario*) this provision should be considered correctly transposed.

- **Passports and IDs (Articles 4(3)-(4))**

Articles 4(3)-(4) on the IDs and passports for nationals is correctly transposed by Article 6 of the Law of 19.07.1991 and Articles 5 and 6 of the Law of 14.08.1972.

***(b) Right of entry (Article 5)***

Article 5(1) providing a right of entry for Union citizens and first sub-paragraph of Article 5(2) providing a right of entry for family members of Union citizens who are not nationals of a Member State, which are the most important provisions about the right of entry, are both correctly transposed by Article 41 al. 1 and 2 LAT. Article 46 §1 AR 08 adds that the documents a Union citizen can use as an identity card or as a passport are listed in Annex 2 (annexed to this Conformity Study).However,

other provisions have been either incorrectly transposed or not transposed at all. In other cases, the transposition is made via a an *a contrario* argument.

- **No entry visa for Union citizens**

Article 5(1)2 states that no entry visa or equivalent formality may be imposed on Union citizens. These provisions must be considered to be correctly transposed into Belgian law on the basis of an a contrario argument, since Article 41 LAT states that "*le droit d'entrée est reconnu au citoyen de l'Union sur présentation d'une carte d'identité ou d'un passeport national en cours de validité, ou s'il peut faire constater ou prouver d'une autre façon sa qualité de bénéficiaire du droit de circuler et de séjourner librement* ».

- **Visas for third country family members(and exceptions) and granting facilities to obtain the necessary visas**

Article 5(2) subparagraph 1, requiring third country family members to have an entry visa, is correctly transposed into Belgian law. Although not foreseen in the Directive, Belgian law provides for a sanction. Article 41, al. 3 LAT: "*Lorsque le citoyen de l'Union n'est pas en possession d'une carte d'identité ou d'un passeport national en cours de validité, ou lorsque les membres de la famille du citoyen de l'Union, qui ne sont pas citoyens de l'Union, ne disposent pas des documents visés à l'article 2, le ministre ou son délégué peut leur infliger une amende administrative de 200 euros. Cette amende est perçue conformément à l'article 42octies*". This sanction deals only with the right of entry. The *ratio legis* indicated in the prelegislative works is « *le nouvel alinéa 4 de l'article 41 prévoit la possibilité d'imposer une amende administrative au citoyen de l'Union ou au membre de sa famille qui ne produit pas les documents requis pour l'entrée, sachant que les alinéas 1er et 2 lui permettent d'apporter la preuve de son identité et/ou de sa nationalité par d'autres moyens. Cette disposition est conforme à l'arrêt MRAX…* ».

The Belgian solution is also in line with the recent ruling of the ECJ in *Metock*. In this case, the ECJ stated (within the context of violation of immigration rules and unlawful residence) that "the Member State remains entitled to impose other penalties which do not interfere with freedom of movement and residence, such as a fine, provided they are proportionate."

Please note that the right of entry for Belgians is the following: « *Tout Belge, qui fournit la preuve de sa nationalité, a le droit d'entrer dans le Royaume, d'en sortir ou d'y rentrer, sans que la possession d'un passeport ou d'un document en tenant lieu soit requis pour l'exercice de ce droit* » (*Article 1 de la loi du 14.08.1974 relative à la délivrance des passeports*).

Article 5(2) subparagraph 2, imposing Member States the obligation to grant every facility to obtain the necessary visas, has not been transposed into Belgian law. Official authorities indicate that this provision is applied 'in practice'. This cannot be considered as a correct transposition.

- **Entry stamps**

Article 5(3) provides that the host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided they present the residence card provided for in Article 10 of the Directive. This provision is not explicitly transposed into Belgian law. However, from the directly applicable Regulation 562/2006, in its Article 10 ("*The travel documents of nationals of third countries who are members of the family of a Union citizen to whom Directive 2004/38/EC applies, but who do not present the residence card provided for in Article 10 of that Directive, shall be stamped on entry or exit. The travel documents of nationals of third countries who are members of the family of nationals of third countries enjoying the Community right of free movement, but who do not present the residence card provided for in Article 10 of Directive 2004/38/EC, shall be stamped on entry or exit*"), follows *a contrario* that

Article 5(3) is transposed. Since the Regulation is immediately and directly applicable, there is no conformity issue concerning Article 5(3).

- **Giving reasonable opportunities at borders**

Article 5(4) provides that a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence. The conditions "before returning them back" and "give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time" have not been explicitly transposed.

Articles 46 and 47 AR 08 accept '*toute autre preuve d'identité et de nationalité de l'intéressé'*. This is clearly a correct transposition of the obligation to let the persons concerned to 'corroborate or prove by other means that they are covered by the right of free movement and residence'. However, this provision does not transpose the obligation on the competent authorities to grant the persons concerned 'every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time'. It does not seem that the Belgium legislation will ensure the same guarantees as the Directive.

- **Reporting presence in the country**

Article 5(5) provides that the Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Belgium has made used of this option.

Union citizens and his/her family members joining or accompanying the Union citizen must report their presence within 10 working days from their arrival, unless excluded by the law or when they are staying in an establishment subject to the legislation on traveller controls (*e.g.,* hotels). If they do not report their presence, a sanction of 200 EUR can be imposed. For Belgians, the sanctions can be found in the Arrêté Royal of 16.07.1992 (26 à 100 FR).

The time period of 10 days has been considered reasonable, in the light of the *Messner* case law (Case C-265/88), where a period of three days was considered as not reasonable. The ECJ used as a criterion "the need of those concerned to have sufficient time to travel from the frontier to their destination and to inquire there about the competent authority and the required administrative formalities".

Union citizens and their family members reporting their presence to the commune, receive a so-called Annex 3ter (annexed to this Conformity Study) as proof. The '*déclaration de présence'* is an administrative formality, and no legal condition for the right exercised (this is explicitly confirmed in the Circ.). The '*déclaration de présence'* therefore is merely a tool that allows Belgium to control the obligation to report the presence within the territory, which is in conformity with Article 5(5) of the Directive.

## 2.3 Right of residence

### 2.3.1 Right of residence for up to three months (Article 6)

Article 6 establishing an unconditional right of residence for Union citizens and their family members is correctly transposed by Article 40§ 3 and 40bis§ 3 of LAT. Belgian transposition is even more favourable. EU citizens and their EU family members must 'hold a valid identity card or passport' according to Article 6 of the Directive. Belgian transposition offers an additional possibility for the

Union citizen ("*ou s'il peut faire constater ou prouver d'une autre façon sa qualité de bénéficiaire du droit de circuler et de séjourner librement*", *e.g.*, to prove by other means that the EU citizen is a beneficiary). This might refer to drivers licences *etc*.

However, the Belgium legislation is not in compliance with the Directive, read in the light of the *Antonissen* jurisprudence. Job seekers are included in the transposition of Article 40 §4, al. 1, 1° LAT ("*Tout citoyen de l'Union a le droit de séjourner dans le Royaume pour une période de plus de trois mois s'il remplit la condition prévue à l'article 41, alinéa 1er et : 1° s'il est un travailleur salarié ou non salarié dans le Royaume ou s'il entre dans le Royaume pour chercher un emploi, tant qu'il est en mesure de faire la preuve qu'il continue à chercher un emploi et qu'il a des chances réelles d'être engagé* »).

First of all, job seekers should have the right of residence without any conditions or any formalities other than the requirement to hold a valid identity card or passport (within the meaning of Article 6 of the Directive) for the first six months. However, Article 40 §4, al. 1, 1° LAT imposes the additional obligation to 'provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged'.

### 2.3.2 The right of residence for more than 3 months (Articles 7-13)

***(a) General conditions under Article 7***

Article 7 provides for a right of residence for more than three months. This provision is mainly correctly transposed by Article 40 §4 LAT, read together with Article 40 bis, §4, al. 1 and 2 LAT. One provision has not been transposed. Some conformity issues arise in the Circ.

- **Primary right of residence for Union citizens**

1. Article 7(1)(a): the provision concerning workers or self-employed persons is correctly transposed by Article 40, §4, al. 1, 1° LAT. However, when read in conjunction with the Circ. (under point C.1), a conformity issue arises. The Circ., concerning the transposition of Article 8(2) and (3) of the Directive, seems to introduce a Belgian definition of the notion of worker.[13] However, the latter is a notion of EC law, which can cover other persons than the ones falling under the Belgian 'guidance'.
2. Article 7(1)(b): the Belgium provision splits the reference to the family members in two, and includes the evaluation of sufficient resources according to Recital 16 of the Directive. The issue of sufficient resources will be analysed under Article 8(4) of the Directive.
3. Article 7(1)(c), second indent: has been transposed in a more favourable way into Belgian law. The Belgian legislation does not impose, as Directive 2004/38 does, a sufficient resources condition for family members.

- **Right of residence for family members**

The provisions granting the right of residence to family members of Union citizens has been correctly transposed by Article 40 bis, §4, al. 1 LAT. The Belgian legislation did not introduce separate provisions according to the nationality of the family member (except as to the conditions relating to the documents for entry and residence).

Notice however that the last sentence of Article 7(4) (imposing the obligation to facilitate entry and residence to family members of a student not covered by Article 7(4)) has not been transposed.

[13] « les travailleurs salariés. La durée du contrat de travail n'a pas d'importance. L'activité du travailleur salarié ne peut toutefois pas comporter de caractère marginal. Concrètement, un emploi d'au moins 12 heures par semaine est requis »

- **Retention of the status of worker**

Article 7(3) of the Directive lists situation in which the Union citizen is no longer active but must retain the status of worker. These provisions have been transposed by Article 40 bis, §2 LAT. The Directive imposes the retention of the status of worker or self-employed person. The Belgian text states the 'retention of the right of residence' foreseen under Article 40, § 4, al. 1, 1°, which is the right of residence for being a worker, self-employed person and job seekers (*"Un citoyen de l'Union conserve cependant le droit de séjour prévu à l'article 40, § 4, alinéa 1er, 1°")*. This transposition has been considered correct since it grants the status of worker to the persons concerned, in accordance with the Directive.

***(b) Administrative formalities for Union citizens (Article 8)***

Article 8 gives the option to Member States to require Union citizens to register when they intend to stay for more than three months. Belgium has used this possibility. There are some problems with the transposition of Article 8, especially regarding the obligation to issue the registration certificate immediately, which will be discussed in this section.

As a preliminary remark, the Belgium legislation imposes the obligation for job seekers to register for a period of residence of more than three months. This obligation is not in conformity with the Directive, read in conjunction with the *Antonissen* case law: job seekers should be able to reside freely for a period of at least 6 months, without any conditions or formalities other than the requirement to hold a valid identity card or passport (See Q 125).

- **Obligation to register**

Article 8(1) has been effectively transposed by Article 41, §§1-2 LAT. Article 41 §2 LAT states that the right of residence for more than three months of Union citizens will be registered by a *'déclaration d'inscription'*.

- **Deadline for registration and immediate issuance**

Article 8(2) states that the deadline for registration may not be less than three months from the date of arrival, and that a registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions. These provisions have been incorrectly transposed by Belgian law, *i.e.,* Article 42 §4 LAT, Article 5 AR 08/1, Article 50 §1 AR 08 and Article 51 §1, al. 1-2 1AR 08. However, most of the conformity issues arise from the administrative guidance included in the Circulaire. These problems are explained below.

*Registration at the commune*

Within three months after arrival the Union citizen must register, *i.e.,* ask for a *'déclaration d'inscription'*, at the commune where they are residing (Article 42 §4 LAT).

The Union citizen asking for such a *'déclaration d'inscription'* is immediately registered by the commune, without any control of residence, in the waiting register. However a control of their residence must still take place (Article 5 AR 08/1). The fact that the actual residence of the Union citizen on the territory of the commune is checked (usually a police officer passes by) is not an additional administrative burden for the Union citizen and therefore does not affect his right of residence. It is therefore not considered as a conformity issue.

The Union citizen that proves his Union citizenship gets an Annex 19 (See Annex to Conformity Study), called the 'demande d'attestation d'enregistrement' (Article 50 §1 al. 1 AR 08).

The citizenship must be proven by providing one of the following documents (for this, see Circ.):

- Identity card or passport (valid or not);
- Annex 10 quater (see Annex to Conformity Study);
- Declaration of presence (Annex 3 ter, annexed to Conformity Study).

If Union citizenship is proven by other means, the commune must contact the *Office des Etrangers*. The Office makes the decision to issue an Annex 19 or not (see Circ.). The conformity issue that arises is that this document is not issued on the spot (nor immediately), and therefore it is not in conformity with Article 8(2). Moreover, Annex 19 is only a *'demande d'attestation d'enregistrement'* and not in the *'attestation d'enregistrement'* (Annex 8, also annexed to the Conformity study).

*Decision about the right of residence*

After issuing an Annex 19 (the *'demande d'attestation d'enregistrement'*), the actual decision about the *'attestation d'enregistrement'* must still be taken. The *'attestation d'enregistrement'* is attested by the issuing of an Annex 8.

The issuing of an Annex 8 can involve three hypotheses (see Circ.). The actual decision about the issuance of the *'déclaration d'inscription'* is either taken by the Commune or by the Office des Etrangers. In both hypotheses there are conformity issues regarding the obligation to issue immediately a *'déclaration d'inscription'* (an Annex 8).

1. Situation 1: Decision taken by the commune

Article 51 §1, al. 1-2 AR 08 lists the cases where the commune can recognise (*'peut reconnaître'*) the right of residence. (These cases are also paraphrased in the Circ.) The wording itself can be considered as a conformity issue, since the right of residence follows directly from the Treaties and the Directive. So, if the conditions for the right of residence are fulfilled, the right must be recognised. The Commune, when taking care of the administrative formalities, cannot refuse to grant the right of residence when the conditions for the right of residence are fulfilled.

The Circ. states that the commune issues an Annex 8 "*si tous les documents requis ont été transmis immédiatement ou dans le délai prescrit*". This means that an Annex 8 is not always issued immediately. However, Article 8(3) provides: "For the registration certificate to be issued, Member States may only require that…". It seems then logical that an Annex 8 is not issued as long as the documents have not been provided. So this was not considered a conformity issue.

2. Situation 2: Decision taken by the *Office des Etrangers*

When it concerns other EU citizens than those listed in Article 51 §1 AR 08, the Commune cannot make any decision about the right of residence. The Commune must transfer the demand to the *Office des Etrangers* for registration. (The Circ. Substantiates, in a non-limited manner, the categories of EU citizens whose applications must be transferred to the *Office des Etrangers*.)

The *Office des Etrangers* must make a decision within **5 months** from the application. This is clearly a violation of Article 8(2) of the Directive (not 'immediate' or 'on the spot').

The Circ. also specifies that in case no decision is taken by the *Office des Etrangers* within 5 months, an Annex 8 must be issued by the Commune.

The Circ. specifies that the *Office des Etrangers* will examine the documentation submitted before (eventually) issuing an Annex 8. This is also a violation of the Directive. 'Immediately' means on the spot upon presentation of the relevant documents. In case of doubts this can be verified at a later stage (within the framework of Article 14 of the Directive) (see Q 119).

3. Situation 3: Refusal by the commune

The Circ. states that if no documentation or not all required documentation has been submitted within 3 months, the Commune refuses the right of residence. The Commune then issues an Annex 20 (annexed to the Conformity Study). This Annex 20 is, however, not accompanied with an order to leave the country because, as the Circ. states, it has not been possible to assess whether the person concerned fulfilled the conditions for the right of residence. The person concerned gets an additional period of one month to hand over the required documentation.

If after this additional period of one month not all required documentation has been handed over, a new Annex 20 is issued, but this time with an order to leave the country. The Circ. underlines that no Annex 20 with an order to leave the country can be issued without giving the possibility to hand over the required documentation (by issuing an Annex 20 without an order to leave the country). However, if it appears that a person shows no interest in registering (he/she does not turn up at the Commune after 3 and 4 months), the Commune can ask the *Office des Etrangers* to immediately issue an Annex 20 with an order to leave the country. This has not been considered as a conformity problem, since if the person has an obligation to register and does not prove that he/she complies with the residence conditions, Belgium can take measures to end the right of residence. Moreover, Belgium has created a reasonable framework, where, in principle, first an Annex 20 without an order to leave the country must be issued. If in the additional period of one month, the required documents are handed over, the Annex 20 is withdrawn.

- **Documents requested**

Article 8(3) lists the documents that the competent authority may require 'for the registration certificate to be required'. This list is correctly transposed in Article 42, §1 LAT, as executed by Article 50 §2 AR 08. No additional documents are requested.

- **Sufficient resources**

Article 8(4) provides that Member States may not lay down a fixed amount which they regard as 'sufficient resources', but must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State, there is no disposition provided that an authority should not lay down a fixed amount which it regards as sufficient resources. This provision is correctly transposed by Artcle 40 §4, al. 2 and 3 LAT and Article 50 §2, 4° AR 08.

Article 40 §4 LAT conforms with Article 8(4) since it clearly states that the personal situation will be taken into account, and that sufficient resources at least represent the amount under which one becomes eligible for social assistance. Moreover, Article 40 §4 LAT adds that the personal circumstances that to be taken into account will include the nature and the regularity of the resources and the number of persons one has to support.

The King has also been given the power to substantiate the notion of 'sufficient resources'. This has been done in Article 50 §2, 4° AR 08, where non-limited ("*qui peut comprendre*") elements that may be used to prove that a Union citizens has sufficient resources are listed: "*la preuve de ressources suffisantes qui peut comprendre une allocation d'invalidité, une allocation de retraite anticipée, une allocation de vieillesse ou une allocation d'accident de travail ou une assurance contre les maladies professionnelles. Tant les moyens dont le citoyen de l'Union dispose personnellement que les moyens*

*de subsistance qu'il obtient effectivement par l'intermédiaire d'une tierce personne sont pris en compte* ».

The Circ. also contains the following paragraph concerning the concept of 'sufficient resources' : *« les détenteurs de moyens de subsistance suffisants, qui prouvent qu'ils disposent de moyens suffisants grâce à une allocation d'invalidité, d'une retraite anticipée, d'une allocation de vieillesse ou d'une prestation versée dans le cadre d'une assurance accidents du travail ou une assurance maladies professionnelles ; conformément à l'article 40, § 4, alinéa 2, de la loi, ces moyens de subsistance doivent au moins atteindre le niveau de revenus en-dessous duquel une aide sociale peut être octroyée. Concrètement, ce niveau de revenus s'élevait à 698 euros au 1er janvier 2008, majoré de 232 euros par personne à charge* ».

This paragraph of the Circ. implies a fixed amount for sufficient resources. However, the Circ. also repeats and states that sufficient resources at least correspond to the amount of money under which one becomes eligible for social assistance. The latter is in conformity with the Directive. The Circ. adds that on 1 January 2008 this amount represents 698 EUR. This at least gives the impression that the Circ. (the administrative guidance) fixes an amount (although the legislative texts do not say so). For this reason, transposition has been considered ambiguous.

- **Documents requested on family members who are Union citizens**

Article 8(5) is generally correctly transposed by Article 42 §1 LAT, as executed by Article 50, §2, 6° AR 08. However, the following remarks must be made to fully understand the Belgian transposition.

Article 8(5)(c) states that, where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining can be asked for documents. Neither LAT nor AR 08 impose this burden of proof. So there is no legally binding text that imposes this condition. However, the Circ. (administrative guidance) contains a paragraph stating that EU family members can only register when they are joining a Union citizen that already has a registration certificate.

Article 8(5)(e) has not been transposed because Article 3(2)(a), to which it refers, has not been transposed. Therefore, this lack of transposition cannot be considered as a more favourable treatment.

Article 8(5)(f) states that in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen can be asked for. Article 3(2)(b) has not been transposed, but Article 40 bis, § 2, 2° LAT goes further than the Directive (see above, under Article 2(2)(b) and Article 3(2)(b)). The persons falling under this definition will be considered as family members of the Union citizen. For this category of persons the AR 08 imposes the burden of proof of '*une relation durable et stable, et, si les partenaires ne sont pas tous deux âgés de 21 ans au moins, la preuve qu'ils ont tous deux 18 ans au moins et qu'ils ont déjà cohabité pendant au moins un an avant l'arrivée dans le Royaume du citoyen de l'Union qui est rejoint*'.

***(c) Family members who are not nationals of a Member State (Articles 9-11)***

- **Administrative formalities (Article 9)**

Article 9(1) provides that a Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months. This provision is correctly transposed by Article 42 §3 LAT., which disposes that those family members shall be issued with a residence card ('*titre de séjour'*) and will be enrolled in the '*registre des étrangers'*.

The deadline for submitting the residence card application of not less than three months from the date of arrival, provided by Article 9(2) is correctly transposed by Article 42 §4 LAT, which says that they

must be asked for '*au plus tard à l'expiration de la période de trois mois suivant la date d'entree, auprès de l'administration communale du lieu de leur résidence'*.

Article 42 §4, last sentence LAT imposes a sanction for non compliance with this requirement being 200€ which is compliance with Article 9(3) of the Directive.

- **Issue of residence cards (Article 10)**

Article 10 provides that 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, that certificate of application for the residence card shall be issued immediately. The same Article concerns the documents that may be required by the Member State for the issuance of this residence card.

- Title and deadline

Article 10(1) has been incorrectly transposed in Article 42 §3 and 42 §4 al. 1 LAT and 52, §1, §4 and 53 AR 08, as interpreted in the Circ.

Transposition in AR 08, providing for a 'Residence card of a family member of a Union citizen', is correct. Conformity issues arise concerning the obligation to issue the residence card no later than six months from the date on which they submit an application and concerning the obligation to issue immediately a certificate of application.

Article 52, §4, al.2 AR 08 provides that the Commune issues such a residence card (an Annex 9, annexed to the Conformity Study) in case the Minister (read: *the Office des Etrangers*) recognises that right or in case no decision is communicated to the Commune within 5 months. The procedure is more substantially explicated in the Circ.

First, the family member has to ask for a residence card at the Commune within the three months from arrival (see Circ). Secondly, the family member has to prove first the existence of a family relationship (see Circ.). This has been considered as in conformity, since Article 10(2) of the Directive includes the obligation, stating: "For the residence card to be issued, Member States shall require…", and the list contains the proof of the existence of a family relationship or of a registered partnership. The proof has to be given as stated in Article 44 of AR 08. If the documentation cannot be submitted, proof can also be obtained by an interview with the *Office des Etrangers* or other examination (see Circ.). From the moment the family link has been proven, an Annex 19 ter is immediately issued by the Commune (annexed to the Conformity Study). However, an Annex 19 ter is only issued "*dès que la preuve du lien de parenté ou d'alliance avec le citoyen de l'Union a été apportée*" (see Circ.). The Directive imposes the obligation to issue a certificate of application immediately, *i.e.,* on the spot, after the application. The Circ. is therefore not in conformity with the Directive.

Thirdly, after all documentation has been submitted, the Commune transfers the application to the *Office des Etrangers*. The Commune does not have the power to take the decision regarding the application itself (see Circ). Article 52, §4, al.2 AR 08 provides that the Commune issues such a residence card in case the *Office des Etrangers* recognises the right or in case no decision is communicated to the Commune within the time limit of 5 months. The time limit of six months is thus respected (it is even more favorable). Please note that the Commune transfers the application for a residence card to the Minister only after the family member has produced all required documentation (Article 52, §4, al. 1 AR 08 and Circ). This means that if a family member submits an application for a residence card and submits the required documentation only after the first date, it is not excluded that a decision will take longer than six months.

Fourthly, it must be underlined that it is the *Office des Etrangers* that takes the decision regarding the application. The *Office des Etrangers* instructs the Commune to issue either an Annex 9 ("*carte de séjour de member de la famille d'un citoyen de l'Union*") or an Annex 20 (« *décision de refus de séjour de plus de trois mois »*).

- Documents requested

Article 10(2)(a) requires Member States to request a valid passport for the residence card to be issued. Belgian authorities indicate that this provision is correctly transposed by Article 40 bis §4, al. 1, second sentence LAT. This provision states that non-EU family members must fulfil the condition of Article 41 al. 2 LAT for the right of residence of more than three months. Article 41, al. 2 LAT refers to Article 2 LAT. One of the documents listed is a valid passport. All these transposing provisions concern the **conditions** for the right of residence for more than three months. This cannot be the transposition for Article 10(2)(a).

However, the Belgian transposition actually derives from Article 52 §2, 1° AR 08, which imposes the family member to prove his/her identity "*conformément à l'article 41, alinéa 2, de la loi* ». Article 41, al. 2 LAT refers to Article 2 LAT. The latter provision provides (in 2°) that a foreigner is allowed to enter the territory with a valid passport. Article 12(2)(a) is thus correctly transposed.

Article 10(2)(b) requires Member States to request a document attesting to the existence of a family relationship or of a registered partnership for the residence card to be issued. This provision has been correctly transposed by Article 52 §1 AR 08, according to which "*le membre de la famille qui n'est pas lui-meme citoyen de l'Union* ***et qui prouve son lien de parenté, son lien d'alliance ou son partenariat conformément à l'article 44****, peut demander une carte de séjour auprès de l'administration communale au moyen de l'annexe 19ter* ». Transposition can even be considered to be more favourable, since Article 44 al. 2 AR 08 foresees other ways to prove the existence of a family relationship or a registered partnership: eventually this can be proved during an interview with the *Office des Etrangers* or by another examination.

Article 10(2)(c) has not been transposed, and the situation is therefore more favourable.

Article 10(2)(d) has been effectively transposed by Article 52 §2 AR 08 and 50, § 2, 6°, d) AR 08.

Article 10(2)(e) has not been transposed since Article 3(2)(a) has not been transposed.

Article 10(2)(f) has been incompletely transposed. To the extent that Article 3(2)(b) has been incompletely transposed, this Article has also been incompletely transposed. However, since 40*bis*, § 2, al. 1er, 2° LAT goes further than the Directive (see comment in the transposition of Article 2(2)(b) and Article 3(2)(b)), the AR 08 transposes the obligation to prove the existence of a durable relationship with a Union citizen. This follows from a combined reading of Article 52 §2 AR 08 and 50, § 2, 6°, b), c), d) and e) AR 08. This is also confirmed in the Circ.

- **Validity of residence cards (Article 11)**

Article 11 provides that the residence card provided for by Article 10(1) shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years and then the validity of the residence card shall not be affected by temporary absences not exceeding six months per year, or by absences of a longer duration for compulsory military service or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

Article 11(1) has been correctly transposed by Article 42 §3 LAT, according to which "*la durée de validité du titre de séjour est égale à la durée prévue du séjour du citoyen de l'Union qu'ils*

*accompagnent ou rejoignent, et n'excède pas cinq ans à partir de la date de sa délivrance* ». Article 32 §3 AR 08 adds that this residence card is renewed by the Commune for the residence period of the Union citizen that is being joined or accompanied, and that the maximum validity is for 5 years.

Concerning the second paragraph of the Circ., as copied in the ToC (concerning the CIRE, *i.e.*, the paper version of the certificate of inscription in the foreigners register). The CIRE is valid for one year, and is replaced after one year with an electronic card that is valid for 5 years. If the CIRE is *replaced* by an electronic card with a 5 year validity, the validity is actually 6 years in total (and thus it is a more favourable treatment). If the electronic card is considered a new card, there is no conformity issue provided, it is clear that the date on which the residence starts is that of the old card.

Article 11(2) has not been transposed. However, it is interesting to note that Article 16(3) of the Directive, that contains a similar provision to Article 11(2), has been explicitly transposed in Article 42 quinquies, §3 LAT. Article 42 quinquies LAT deals with the right of permanent residence, and not with other rights. Different paragraphs should not be applied to other rights. Moreover, Belgian pre-legislative proceedings explicitly indicate that Article 42 quinquies §3 is intended to transpose Article 16(3) of the Directive.

***(d) Retention of the right of residence by family members in the event of death, departure, divorce, annulment or termination of partnership***

- **Retention of the right of residence in the event of death or departure of the Union citizen (Article 12)**

Article 12 is correctly transposed, but Article 12(2) subparagraph 3 has not been transposed. Belgian transposition of Article 12 is, however, complicated to read.

- Family members who are Union citizens

Article 12(1) has been transposed by Article 42 ter §1, al. 1-2 LAT: "*A moins que les membres de famille d'un citoyen de l'Union qui sont eux-mêmes citoyens de l'Union, bénéficient eux-mêmes d'un droit de séjour tel que visé a l'article 40, § 4, ou satisfassent à nouveau aux conditions visées à l'article 40bis, § 2" is the transposition of the phrase "Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1)"*. The transposition is assessed as ambiguous since it is not entirely clear from the text of the transposing legislation whether the residence is subject to conditions, or only the acquisition of the right of permanent residence, in line with the Directive.

Belgian transposing measures go further than Article 12(1) because:

1. If family members do not meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1), it is only during a period of 2 years that Belgium can end their right of residence on the basis of the criteria of Article 42 ter, §1 LAT;
2. Additionally, Article 42 ter, §1, al. 2., after the first period of 2 years, the right of residence of an EU family member whose affiliation with the Union citizen are broken (except for students: "*citoyen de l'Union, visé à l'article 40, § 4, alinéa 1er, 1° et 2°*") can be ended in the third year in case there are any elements of "complaisance" (appearance, fraud). For EU family members of EU students this is also the case, but only from the third to the fifth year of residence ("*Les mêmes règles s'appliquent pour les membres de la famille d'un citoyen de l'Union, visé à l'article 40, § 4, alinéa 1er, 3°, au cours de la troisième jusqu'à la cinquième annee de leur séjour*").

Although the legal text is correctly transposed, a minor conformity issue might be found in the Cir. The Circ. states that the principle is that family members lose their right of residence when the Union citizen they joined loses his right of residence, leaves the territory, dies or when their marriage or partnership ends. This is not in conformity with Article 12(1), on the basis of which the principle is

that “the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State”. In any case, the LAT is a legally binding text, issued by the Belgian federal parliament, and therefore precedes the Circ. Therefore, the conformity issue in the Circ. is considered as ‘minor’.

- Third country family members

Concerning Article 12(2) (the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death). The effective transposition follows from a combined reading of Article 42 quater, §1, al. 1, 3° LAT and Article 42 quater, §3 LAT.

- Death and departure

Concerning Article 12(3) which states that the Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment for the purpose of studying there, until the completion of their studies, is correctly transposed by Article 42 ter §2 LAT (for family members who are EU Citizens) and Article 42 quater §2 LAT (third country family members ).

- **Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership (Article 13)**

Article 13 is mainly correctly transposed, except Article 13(2) second subparagraph which has not been transposed. Belgian transposition goes further than the Directive on some points.

- Family members who are Union citizens

Concerning Article 13(1), the Belgian transposition goes further. If family members do not meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1), it is only during a period of 2 years that Belgium can end their right of residence on the basis of the criteria of Article 42 ter, §1 LAT. Additionally, on the basis of Article 42 ter, §1, al. 2, after the first period of 2 years, the right of residence of an EU family member whose affiliation with the Union citizen are broken (except for students (*“citoyen de l'Union, visé à l'article 40, § 4, alinéa 1er, 1° et 2°”*) can be ended in the third year in case there are elements of “complaisance” (appearance, fraud). For EU family members of EU students: this is also the case, but from the third to the fifth year of residence (*“Les memes règles s'appliquent pour les membres de la famille d'un citoyen de l'Union, visé à l'article 40, § 4, alinéa 1er, 3°, au cours de la troisième jusqu'à la cinquième annee de leur séjour”*).

There might be a slight conformity issue concerning the condition of ‘installation commune’(see Article 42 ter, §1, al. 1, 4° in fine LAT) The Belgian *Conseil d’Etat* made the following comments on the condition concerning the “installation commune”: (i) this condition cannot be found in Article 13(1) of the Directive, (ii) the Belgian legislator should check whether this condition conforms to the Directive, and (iii) the condition of “installation commune” can never be understood as a condition of ‘permanent cohabitation’.

As a reaction to these comments of the Belgian *Conseil d’Etat*, the Belgian legislator argues in the pre-legislative proceedings that the condition of “installation commune” is justified because Article 14(2) of the Directive refers to the conditions of Article 7 of the Directive, which provides as a condition for the right of residence for non-EU family members to ‘accompany or join’ a Union citizen. This condition to accompany or join a Union citizen justifies, according to the Belgian legislator, the condition of the “installation commune”. The Belgian legislator adds that the condition of “installation commune” must be understood as ‘accompanying or joining a Union citizen’, and not as a condition of

'permanent cohabitation'. However, these remarks do not seem to be reflected in the transposing measures.

- Third country family members

Article 13(2) provides that divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State. The structure (or logic) of the Belgian transposition is, first, to hold that during the first two years the right of residence can be ended in cases of divorce, annulment of marriage or termination of the registered partnership, but, secondly, the Belgian transposition provides for some exceptions to this rule. These exceptions are the actual transposition of Article 13(2). These are effectively transposed.

Article 13(2)(a) provides for the condition that prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted for at least three years, including one year in the host Member State, Article 42 quater, §4, al.1, 1° LAT correctly transposes both time periods.

Article 13(2)(b) provides for the condition that there is an agreement between the spouses or the partners referred to in point 2(b) of Article 2 or a court order, according to which the spouse or partner who is not a national of a Member State has custody of the Union citizen's children. Article 42 quater, §4, al.1, 2° LAT provides the condition that the spouse or partner has been allocated parental custody of the Union citizen's children by virtue of an agreement between the spouses or by a court order.

Article 13(2)(c) provides for the condition that retention of the right of residence is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership existed. Article 42 quater, §4, al. 1, 4° LAT almost literally transposes Article 13(2)(c).

Article 13(2)(d) provides the condition that by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required. This condition is correctly transposed by Artcile 42 quater, §4, al. 1, 3° LAT.

The provision that such family members shall retain their right of residence exclusively on a personal basis is not transposed into Belgian law.

### 2.3.3 Retention of the right of residence (Article 14) and Article 15(2)

***(a) General aspects***

Article 14 provides for the circumstances in which persons retain the right of residence granted by Articles 6 and 7. Article 14 regulates the situations that lead to the end of the right of residence for not meeting the conditions. Conformity issues concern Article 14(2) and (3).

- **Residence for up to three months**

Article 14(1) provides that Union citizens and their family members shall have the right of residence provided for in Article 6 (residence for up to three months), as long as they do not become an unreasonable burden on the social assistance system of the host Member State. This Article is correctly transposed by Article 41 ter §§1-2 LAT. The reference in the Belgian transposition to *"Sauf en ce qui concerne le citoyen de l'Union visé à l'article 40, § 4, alinéa 1er, 1"*, is included to take into account the transposition of Article 14(4)(a). The Circ. also refers to this provision and it is clear that it applies for residence of up to three months and for longer residence (but not in the case of permanent

residence). It is also clear that workers and self-employed persons as well as job seekers cannot be expelled for being an unreasonable burden (according to Article 14(4)).

- **Residence for more than three months**

Article 14(2) provides that Union citizens and their family Members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein and that in specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled and that this verification shall not be carried out systematically. This provision has been transposed by Articles 42 bis §1, 42 quater §1, al. 1 and 42 ter §1 al. 1 LAT. The rights of residence provided for in Articles 7, 12 and 13 are transposed in respectively Articles 40, §4, 40bis, §4 and 42bis, §2 LAT (for Article 7), Articles 42 ter, §§1-2, 42 quater, §§1-2 LAT (for Article 12), and 42 ter and 42 quater LAT (for Article 13).

- *For Union citizens.*

Article 42 bis §1 LAT foresees that '*Le ministre ou son délégué peut mettre fin au droit de séjour du citoyen de l'Union lorsqu'il ne satisfait plus aux conditions fixées à l'article 40, § 4, et à l'article 40bis, § 4, alinéa 2*'. Article 40, §4 contains the three categories of Union citizens that can obtain the right of residence for more than three months. Article 40bis, §4, al. 2 LAT contains the condition that Union citizens defined in Article 7(1)(b) (transposed in Article 40, §4, al.1, 2°) also should have sufficient resources for their family members. The only EU citizens that can lose the right of residence for becoming an unreasonable burden are those covered by Article 40, §4, *a linéa* 1er, 2° (non-economic activities according to Article 7(1)(b)) and 3° (students- Article 7(1)(c)). This is in line with the Directive.

- *For EU family members*

Article 42 ter, §1 LAT enumerates the cases where the Minister can put an end to the right of residence for EU family members. The first case ("*il est mis fin au droit de séjour du citoyen de l'Union qu'ils ont accompagné ou rejoint, sur la base de l'article 42bis, § 1er* ») and the last part of the 4th case (« *il n'y a plus d'installation commune* ») are the transposition of the application of Article 14(2) of the Directive to Article 7(1)(d) of the Directive. The remarks about the condition of "installation commune" written as a comment by the transposition of Article 12(2) of the Directive are also applicable here. The cases 2°, 3°, 4° of Article 42 ter, §1 LAT refer to the conditions of Articles 12 and 13 LAT.

- *For third country EU family members*

Article 42 quater, §1, al. 1 LAT lists the cases where the minister can put an end to the right of residence for non-EU family members. The first case ("*il est mis fin au droit de séjour du citoyen de l'Union qu'ils ont accompagné ou rejoint, sur la base de l'article 42bis, § 1er* ») and the last part of the 4th case (« *il n'y a plus d'installation commune* ») are the transposition of the application of Article 14(2) of the Directive to Article 7(2) of the Directive. The remarks about the condition of "installation commune" written as a comment by the transposition of Article 12(2) of the Directive are also applicable here.

Therefore, the approach followed is that the family member (regardless of the nationality) will lose the right of residence if the Union citizen no longer meets the conditions, including, in the case of residence based on Article 7(1)(b) and 7(1)(c) of the Directive, if the family member becomes an unreasonable burden on the system. The Belgium transposition, despite the different structure, complies with the Directive.

- **Verifications**

Article 14(2) second subparagraph has been transposed by Articles 42 bis §1 LAT (for EU citizens), 42 ter §3 LAT (for EU family members) and 42 quater §5 LAT (for non-EU family members). However, this transposition is not correct since the condition that these verifications shall not be carried out systematically is not transposed into Belgian law. The Circ. contains a paragraph stating that control on the conditions for residence of Union citizens and their family members will not be systematic. But since this requirement is not reproduced in the legislative transposition, but only in the Circ., this cannot be considered a correct transposition.

- **Recourse to social assistance**

Article 14(3) provides that an expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State. This provision has not been transposed into Belgian law. The transposing measures (for EU citizens Article 42 bis §1 LAT, for EU family members Article 42 ter §1, al. 1, 5° LAT and for non-EU family members Article 42 quater §1, al. 1, 5° LAT) do not expressly guarantee that recourse to the social assistance system will not lead to an expulsion measure.

- **Protection against expulsion to workers/self-employed persons and job seekers**

Article 14(4), provides that an expulsion measure may in no case be adopted against Union citizens who are workers, self-employed persons, or under some circumstances job seekers and their family members.

- Workers and self-employed persons

Article 14(4)(a) on workers and self-employed persons has been correctly transposed. The transposition of Article 7(1)(a) is found in Article 40 §4, al. 1, 1° LAT (workers and self-employed persons).

Article 41 ter §§1-2 LAT concerns the right to end the right of residence in case a Union citizen or becomes an unreasonable burden on the social security system (cf. transposition of Article 14(1) of the Directive). These provisions start respectively with the following introductory sentences: « *Sauf en ce qui concerne le citoyen de l'Union visé à l'article 40, § 4, alinéa 1er, 1°* » and « *Sauf en ce qui concerne le citoyen de l'Union visé à l'article 40, § 4, alinéa 1er, 1° et les membres de sa famille* ». Therefore, workers and self-employed persons are excluded from the scope of application of Article 41 ter §§1-2 LAT. This category of persons is also not listed in Article 42 bis, §1, first phrase LAT, Article 42 ter, §1, al. 1, 5° LAT and Article 42 quater, §1, al.1, 5° LAT (see concerning these Articles above: transposition of Article 14(2) of the Directive).

Therefore the only reasons for expulsion are when a person is no longer workers/self-employed (*i.e.*, not meeting the conditions), or a job seeker (see transposition of Article 14(4)(b) below) or for reasons of public order and public security. Workers and self-employed persons cannot become an unreasonable burden in any circumstance (residence for less than 3 months- Article 40.3 and for more than three months- Article 40.4).

- Job seekers (Article 14(4)(b))

Job seekers are included in the transposition of Article 40 §4, al. 1, 1° LAT (“*Tout citoyen de l'Union a le droit de séjourner dans le Royaume pour une période de plus de trois mois s'il remplit la condition prévue à l'article 41, alinéa 1er et : 1° s'il est un travailleur salarié ou non salarié dans le Royaume ou s'il entre dans le Royaume pour chercher un emploi, tant qu'il est en mesure de faire la preuve qu'il continue à chercher un emploi et qu'il a des chances réelles d'être engagé* »). The Belgium legislation is not in compliance with the Directive, read in the light of the *Antonissen* case law.

First of all, job seekers should have the right of residence without any conditions or any formalities other than the requirement to hold a valid identity card or passport (within the meaning of Article 6) for the first six months. However, Article 40 §4, al. 1, 1° LAT imposes the additional obligation to 'provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged'.

Secondly, Article 14(4)(b), also read in the light of the *Antonissen* case law (see the 9th recital of the Directive), should allow expulsion of job seekers only after six months. Only after those 6 months should it be considered whether they have a chance of being engaged to determine whether they are an unreasonable burden. The LAT excludes Article 40 §4, al. 1, 1° from the cases where one can be expelled (either explicitly or implicitly). To the extent that Article 40 §4, al. 1, 1° LAT is not a correct transposition, the exclusion is also incorrect because it allows expulsion of job seekers after three months (if the conditions for expulsion are fulfilled).

***(b) Article 15(2)-(3) expiry of document not a ground for expulsion***

While Article 15(2) is correctly transposed, this is not the case for Article 15(3).

Article 15(2) provides that expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State. This provision is correctly transposed by Article 43, al. 1, 3° LAT.

Article 15(3) provides that the host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies. Belgian authorities indicate that Article 26 LAT, according to which "*les arrêtés de renvoi ou d'expulsion comportent interdiction d'entrer dans le Royaume pendant une durée de dix ans, à moins qu'ils ne soient suspendus ou rapportés* » should be an effective transposition, using an *a contrario* argument. This is not the case. The transposition is incorrect.

The cases in which a decision of *'renvoi'* can be taken are enumerated in Article 20, paragraph 1 LAT. A *renvoi* decision can only be taken vis-à-vis a foreigner who has not established him/herself in Belgium (*"l'étranger qui n'est pas établi dans le Royaume"*). This concerns the cases foreseen in Articles 9, 10 and 49 LAT. A *renvoi* is possible in the following cases: *"lorsqu'il a porté atteinte à l'ordre public ou à la sécurité nationale ou n'a pas respecté les conditions mises à son séjour, telles que prévues par la loi »*. The reference to *« telles que prévues par la loi »* implies that no other residence conditions can be imposed than the ones foreseen in the LAT.

The cases in which a decision of 'expulsion' can be taken are set out in Article 20, paragraph 2 LAT. Article 45 LAT sets out the cases in which an 'expulsion decision' can be taken against Union citizens (see Article 45 LAT). Only union citizens and their family members who have held the right of residence for more than one year can be expelled.

Moreover, Article 21 LAT sets out several categories of foreigners who can not be expelled.

## 2.4 Right of permanent residence

### 2.4.1 General rule for Union citizens and their family members (Article 16: eligibility)

Article 16(1) provides that Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence. These provisions have been incorrectly transposed by Articles 42 quinquies §§1-2 LAT.

From one perspective, Belgian law goes further then the Directive. Workers or self-employed persons and non-active Union citizens can obtain the right permanent residence after only **3** years. For students and their family members this period is 5 years.

Transposition is, however, not correct from the following perspective. Belgian transposition in Article 42 quinquies, §1, al. 1 LAT states that the permanent right of residence will be recognised when they have resided in Belgium for three years "on the basis of the present chapter" (*i.e., Etrangers, citoyens de l'Union et membres de leur famille et étrangers, membres de la famille d'un Belge*) (*i.e.,* the chapter transposing Directive 2004/38). The term 'legally' in Article 16(1) means 'that the person concerned complied with the requirements of the Directive during the period of residence, which is something different than 'on the basis of the national transposing measures', which could be incorrect, not sufficient etc. For this reason, transposition of Article 16(1) of the Directive is not correct.

As already said, the term 'legally' in Article 16(1) means that the person concerned complied with the requirements of the Directive during the period of residence. And Article 21 of the Directive states that continuity of residence is broken by any expulsion decision duly enforced against the person concerned. Article 39/79 concerns an appeal against the decision not to recognise the right of residence or the decision putting an end to the right of residence. No expulsion decision can be taken during the time span during which one can lodge an appeal against such decisions. When such a procedure is running, it is not yet clear whether a person resided legally on the Belgian territory and whether that period was continuous. The phrase "*pour autant qu'il n'y ait pas de procédure en cours auprès du Conseil du Contentieux des étrangers conformément a l'article 39/79* » is therefore in conformity with Article 16(1) of the Directive.

The last sentence of Article 16(1) has not been explicitly transposed, but the conditions to be fulfilled to obtain the right of permanent residence are to be found in Article 42 quinquies LAT. The latter transposes the conditions to be fulfilled in order to obtain the right of permanent residence (and only those conditions). From the structure of the Belgian transposition it follows that the last sentence did not have to be transposed because no reference is found in the conditions for the right of residence.

Article 16(2) provides that non-EU family members who have resided legally with the Union citizen in the host Member State for a continuous period of 5 years shall have the right of permanent residence. These provisions have been incorrectly transposed by Articles 42 quinquies §§1-2 LAT. The incorrect transposition follows from the requirement to reside 'on the basis of the present chapter', for the same reason as stated under the comment of Article 16(1).

Article 16(3) provides that continuity of residence shall not be affected by temporary absences not exceeding a total of six months per year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country. This provision is literally transposed by Article 42 quinquies §3 LAT.

Article 16(4) provides that once acquired, the right of permanent residence shall only be lost through an absence from the host Member State for a period exceeding two consecutive years. This provision is literally transposed by Article 42 quinquies §7 LAT.

### 2.4.2 Acquisition of the right of permanent residence for workers/self employed persons and their family members (Article 17)

Article 17 has been transposed taking into account the Belgian legislator's choice to grant the right of permanent residence after 3 years in certain cases (see above). However, this transposition is not always correct.

- **Workers' and self-employed persons' right to permanent residence (Article 17(1)-(2))**

Article 17(1) describes the situations under which workers and self employed persons can acquire the right of permanent residence and then under Article 17(2) the Directive exceptions are established on the length of residence and employment for some of the situations described when the worker's or self-employed person's spouse is a national of the host Member State or has lost nationality of that Member State upon marriage to that worker or self-employed person.

- The worker or self employed stopped working and had reached the old age pension, and cases of early retirement (Article 17(1)(a))

Article 17(1)(a) provides that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years. This provision has been correctly transposed by Article 42 sexies §1, 2° LAT. Since workers or self-employed persons obtain the right of permanent residence after three years (see Article 42 quinquies, §1, al.1 LAT), there was no need to transpose Article 17(1)(a). However, in the situation described in Article 17(2) the conditions of length of residence and employment do not apply, so this situation had to be transposed.

There is no need to transpose Article 17(1)(a) second subparagraph since Belgian law gives an old age pension to self-employed persons.

- Permanent incapacity to work (Article 17(1)(b))

Article 17(1)(b), provides that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work, and that if such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence. This provision is correctly transposed by Article 42 sexies §1, 1° LAT.

- Frontier workers (Article 17(1)(c))

Article 17(1)(c) provides that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week. This provision has not been transposed, but this is still in conformity with the Directive since Belgian law grants the right of permanent residence after three years. However, Article 17(1)(c) second subparagraph has not been transposed.

- Evaluating periods of employment (Article 17(1) last subparagraph)

Article 17(1) last subparagraph has been literally transposed by Article 42 sexies §1, al. 2 LAT.

- Exemptions to the conditions of length and residence

Article 17(2), provides that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by the worker's or the self-employed person's spouse or partner as referred to in point 2(b) of Article 2 if this spouse or partner is a national of the host Member State or has lost the nationality of that Member State by marriage to that

worker or self-employed person. The provision related to the situation 'if this spouse or partner is a national of the host Member Sate' is correctly transposed by Article 42 sexies §1, 1° LAT. The other situation (losing nationality by marriage) has not been transposed, but there is no conformity issue there. Belgian pre-legislative proceedings indicate that the situation that a spouse or partner "has lost the nationality of that Member State by marriage to that worker or self-employed person" is not transposed because Belgian legislation regarding nationality indicating the cases leading automatically to the loss of nationality have been repealed (by an Act of 28 June 1984, transposing the UN Convention of 29 January 1957 on the nationality of married women).

- **Acquisition of the right of permanent residence by family members (Article 17(3))**

Article 17(3) provides that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by the family members of a worker or a self-employed person who are residing with the Union citizen in the territory of the host Member State, if the worker or self-employed person has acquired the right of permanent residence in that Member State. This provision is correctly transposed by Article 42 sexies §2 LAT.

- **Acquisition of the right of permanent residence by family members in the case of death (Article 17(4))**

Article 17(4) provides that if the worker or self-employed person dies while still working, but before acquiring permanent residence status in the host Member State on the basis of paragraph 1, his family members who are residing with him in the host Member State shall acquire the right of permanent residence there, on condition that the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years; or the death resulted from an accident at work or an occupational disease; or the surviving spouse lost the nationality of that Member State following marriage to the worker or self-employed person. Both hypotheses are correctly transposed by Article 42 sexies §3, 1° and 2° LAT respectively.

Article 17(4)(c) has not been transposed into Belgian law, but this does not constitute a case of non-conformity. Same comment as concerning transposition of Article 17(2): no need to transpose because Belgian legislation regarding nationality indicating the cases leading automatically to the loss of nationality has been repealed

### 2.4.3 Acquisition of the right of permanent residence by certain family members who are not nationals of a MS (Article 18)

Article 18 provides that the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State. This provision has been incorrectly transposed by the second sentence of Article 42 quinquies §1, al. 2 LAT. Articles 12(2) and 13(2) have been respectively transposed by Article 42 quater, §3 and Article 42 quater, §4 LAT.[14]

The condition of residing with the Union citizens obviously cannot apply in the case of family members under Article 12 and 13. For this reason, the Belgian legislation excludes such a condition. Therefore, in these cases, the family members acquire the right of permanent residence after 3 years.

However, to the extent that Article 16(1) and (2) have been incorrectly transposed (see comments above concerning the concept of 'legally') by Article 42 quinquies §1, al. 1 LAT – to which Article 42 quinquies, §1, al. 2 LAT refers –this transposition must also be considered incorrect.

[14] Article 42 quater, §1, al. 2 concerns the more favourable Belgian transposition of Article 12(1) of the Directive (see comment above) and has been included in the transposing measure.

### 2.4.4 Documents certifying permanent residence for Union citizens (Article 19)

Article 19 deals with the obligation for the Member States to issue a document certifying permanent residence of Union citizens upon application and as soon as possible.

Article 19(1) has been transposed by Article 42 quinquies §5 LAT and Article 55, al. 5 AR 08. These provisions are correct transpositions of the Directive. However, conformity issues arise from the administrative guidance given in the Circ.

The 'document certifying permanent residence' is an Annex 8bis (annexed to this Conformity Study). One has to request an Annex 8 bis. This demand is registered by issuing an Annex 22 ("*demande de séjour permanent*", also annexed to the Conformity Study). The Annex 22 does not impose a burden to hand over specific elements of proof.

Annex 22 contains the following paragraphs:

> « *L'intéressé(e) séjourne légalement dans le Royaume sur la base des dispositions du titre II, chapitre I, de l'arrêté royal du van 8 octobre 1981 précité, depuis le ....*
> *L'intéressé(e) a produit les documents suivants pour appuyer sa demande : …*
> *La décision relative à cette demande est prise au plus tard dans les cinq mois qui suivent.*
> *Le présent document ne constitue en aucune façon un titre d'identité ou un titre de nationalité* ».

The Commune will not make a decision to recognise the permanent residence. The Commune has to transfer the file to the *Office des Etrangers* who must make a decision within **5 months** (see Circ). The time limit has been considered as a conformity issue since Article 19(2) states that the document certifying permanent residence shall be issued as soon as possible.

Another conformity issue is the way the residence of three years is calculated. The Circ. states that the starting point for the calculation is 'the moment the Union citizen first presents him/herself at the commune to ask for the right of residence'. This is not in conformity with the Directive: the calculation should start from the moment one entered the Belgian territory. Moreover, in case someone did not present him/herself at the commune, then he/she would be deprived of the right of permanent residence.

In case the conditions for permanent residence are not fulfilled, an Annex 24 is issued (annexed to the Conformity Study). The Circ. underlines that, in principle, this does not affect the right of residence for more than three months.

The requirement that the document certifying permanent residence 'shall be issued as soon as possible, (Article 19(2)) is incorrectly transposed into Belgian law by Article 55 al. 5 AR 08. This provision indicates that the document certifying permanent residence must be issued at the latest after 5 months. It is arguable whether this corresponds to the Directive.

### 2.4.5 Permanent residence card for family members who are not nationals of a MS (Article 20)

Similarly, Article 20 of the Directive requires Member States to issue family members of Union citizen with a permanent residence card which will be automatically renewed every 10 years. The application is to be submitted before the residence card expires. Interruption in residence not exceeding 2 years will not affect the validity of the card. Member States can impose sanctions for failure to comply with this requirement.

Article 20(1) provides for the obligation to issue family members who are not nationals of a Member State entitled to permanent residence with a permanent residence card within six months of the

submission of the application. This provision is transposed by Article 42 quinquies §6, al. 1 and 2 LAT and Article 56, al. 1 and 3 AR 08, as interpreted by the Circ. This transposition is incorrect.

The '*carte de séjour permanent de member de la famille d'un citoyen de l'Union'* is an Annex 9 bis (annexed to this Conformity Study). The family member must ask for such a residence card. Proof that he/she has asked for a residence card is given by issuing an Annex 22 (annexed to this Conformity Study). Annex 22 contains the following paragraphs:

> « L'intéressé(e) séjourne légalement dans le Royaume sur la base des dispositions du titre II, chapitre I, de l'arrêté royal du van 8 octobre 1981 précité, depuis le ....
> L'intéressé(e) a produit les documents suivants pour appuyer sa demande : ...
> La décision relative à cette demande est prise au plus tard dans les cinq mois qui suivent.
> Le présent document ne constitue en aucune façon un titre d'identité ou un titre de nationalité ».

So, no specific documents are requested.

A conformity issue is the way the residence of three years is calculated. The Circ. states that the starting point for the calculation is 'the moment the family member first presents him/herself at the commune to ask for the right of residence as a family member'. This is not in conformity with the Directive: the calculation should start from the moment one entered the Belgian territory. Moreover, in case someone did not present him/herself at the Commune, then he/she would be deprived of the right of permanent residence.

Another conformity issue concerns the fact that the residence card must be renewable every ten years. The Circ. states however that an Annex is only valid for 5 years. This is a clear case of non-conformity.

Article 20(2) concerns the obligation for family members to submit the application before the residence card expires and the possibility to envisage sanctions for the failure to the requirement to apply for a permanent residence card. This provision is correctly transposed by Article 42 quinquies §6, al. 3 LAT. The sanction is 200€.

Article 20(3) provides that interruption in residence not exceeding two consecutive years shall not affect the validity of the permanent residence card. This provision is correctly transposed by Article 42 quinquies §7 LAT.

#### 2.4.6 Continuity of residence (Article 21)

Article 21 provides that for the purposes of this Directive continuity of residence may be attested by any means of proof in use in the host Member State and that continuity of residence is broken by any expulsion decision duly enforced against the person concerned.

This provision is not transposed into Belgian law.

### 2.5 Common provisions (Articles 22-26)

#### 2.5.1 Article 22 territorial scope

Article 22(1) concerns the territorial scope of the Directive. This provision is correctly transposed. The transposition follows implicitly from Article 40 §3 and §4 LAT ("*le droit de séjourner dans le Royaume pour une période de trois mois au maximum »*). The right of residence concerns the Belgian territory.

Article 22(2) is not transposed in the LAT. Not explicitly provided for in LAT.

In certain cases Belgian allows restriction of the right to freely circulate on the Belgian territory. Although the experts did not check every law restricting the right to freely circulate, their experience is that such restrictions apply to Belgians and to foreigners. For this reason, transposition has been considered as correct.

An example can be found in the Belgian Law of 20.07.1990 *relative à la détention préventive* (M.B., 14.08.1990), which contains a chapter on the liberty under conditions and conditional liberation. These can include an interdiction to enter certain places without permission, interdiction to contact a person etc. These restrictions apply to Belgian citizens and foreigners equally.

### 2.5.2 Article 23 Related rights

Article 23 about the right to take up employment or self-employment in the host Member State is not correctly transposed in Belgium. Two federal laws (and two royal decrees executing the respective federal laws) regulate the issue of work permits in Belgium but they have not fully integrated the requirements under Article 23 of the Directive.

**Workers:** The law of 30 April 1999 '*relative à l'occupation des travailleurs étrangers'* (M.B., 21.05.1999) obliges the foreign workers, *i.e.*, workers without Belgian nationality, to obtain a work permit. However, the King has been given the power to exclude foreign workers from this obligation. The King has exercised this power in the *Arrêté Royal* of 09.06.1999 (M.B., 26.06.1999), which states:

> **"***Sont dispensés de l'obligation d'obtenir un permis de travail :*
> *1° le ressortissant d'un Etat membre de l'Espace Economique Européen et, à condition qu'ils viennent s'installer ou s'installent avec lui :*
> ***a) <u>son conjoint</u>;***
> *b) ses descendants ou ceux de son conjoint âgés de moins de 21 ans ou qui sont à leur charge;*
> *c) ses ascendants ou ceux de son conjoint qui sont à leur charge, à l'exception des ascendants d'un étudiant ou de ceux de son conjoint;*
> *d) le conjoint des personnes visées aux b) et c)* ».

The 'conjoint' (spouse) does not include the registered partnership of Article 2(2)(b) of the Directive. Transposition is therefore incorrect.

**Self-employed persons:** The federal law of 19 February 1965 '*relative à l'exercice, par les étrangers, des activités professionnelles indépendantes*' (M.B., 26.02.1965) obliges all foreigners exercising self-employed activities on the Belgian territory to obtain a 'professional card'. However, the King has been given the power to exclude from this obligation the categories of persons he will determine. The King has exercised this power in the *Arrêté Royal* of 03.02.2003 *'dispensant certaines catégories d'étrangers de l'obligation d'être titulaires d'une carte professionnelle pour l'exercice d'une activité professionnelle indépendante'* (M.B., 04.03.2003). Article 1 of this *Arrêté Royal* states:

> « Sont dispensés de l'obligation d'être titulaires d'une carte professionnelle pour exercer une activité professionnelle indépendante en Belgique :
> 1° le ressortissant d'un Etat membre de l'Espace économique européen et, à condition qu'ils viennent s'installer ou s'installent avec lui :
> a) son **conjoint**;
> b) ses descendants ou ceux de son conjoint, âgés de moins de 21 ans ou qui sont à leur charge;
> c) ses ascendants ou ceux de son conjoint, qui sont à leur charge, à l'exception des ascendants d'un étudiant ou de ceux de son conjoint;
> d) le conjoint des personnes visées aux b) et c) ».

As in the case of workers, the 'conjoint' (spouse) does not include the registered partnership of Article 2(2)(b) of the Directive. Transposition is therefore incorrect.

Conclusion for both *Arrêtés Royaux*: the exemptions only cover 'conjoint' (spouses) and not 'registered partnerships' in the sense of Directive 2004/38. Therefore, this category of persons is not exempted and therefore the transposition is incorrect.

### 2.5.3 Article 24: equal treatment

***(a) General principle***

Article 24(1) of the Directive grants the right of equal treatment to Union citizens and their family members (including third country family)

This provision is not specifically transposed into Belgian law. However, transposition must be considered to be correct on the basis of the Belgian Constitution and the case law of the Belgian Constitutional Court (now the *Cour constitutionnelle*, the former *Cour d'Arbitrage*).

Article 191 of the Belgian Constitution says that '*Tout étranger qui se trouve sur le territoire de la Belgique jouit de la protection accordée aux personnes et aux biens, sauf les exceptions établies par la loi*'. Article 191 of the Belgian Constitution does not only guarantee the power for the Belgian legislator ("*sauf les exceptions établies par la loi"*), but also expresses the principle of non-discrimination for foreigners. The Belgian *Cour d'Arbitrage* has ruled:

> "*une difference de traitement qui défavorise un étranger ne peut être établie que par le législateur. L'article 191 n'a pas pour objet d'habiliter le législateur à se dispenser, lorsqu'il établit une telle différence, d'avoir égard aux principes fondamentaux consacrés par la Constitution. Il le rappelle d'ailleurs expressément en commençant par poser en règle que l'étranger qui se trouve sur le territoire "jouit de la protection accordée aux personnes et aux biens". Il ne résulte donc en aucune façon de l'article 191 que le législateur puisse, lorsqu'il établit une différence de traitement au détriment d'étrangers, ne pas veiller à ce que cette différence ne soit pas discriminatoire, quelle que soit la nature des principes en cause*" (Cour d'Arbitrage, arrêt 61/94, 14.07.1994).

The Belgian legislator must therefore take into account that the principle of non-discrimination is respected.

In 2003, the '*Loi spéciale de 6 janvier 1989 sur la Cour d'Arbitrage'* (M.B., 07.01.1989) was changed in order to explicitly provide for the Constitutional Court's competence to assess the compatibility of Belgian legislation with Article 191 of the Constitution. Article 1 now reads: "*La Cour d'arbitrage statue, par voie d'arrêt, sur les recours en annulation, en tout ou en partie, d'une loi, d'un décret ou d'une règle visée à (l'article 134 de la Constitution) pour cause de violation : 1° des règles qui sont établies par la Constitution ou en vertu de celle-ci pour déterminer les compétences respectives de l'Etat, des Communautés et des Régions; ou 2° des articles du titre II " Des Belges et de leurs droits ", et des articles 170, 172 et* ***191*** *de la Constitution* ».

However, it must also be underlined that commentators indicate that even before 2003 the Constitutional Court assessed in practice the compatibility of Belgian legislation with Article 191: from this point of view, the 2003 modification was nothing more than the legal confirmation of an already existing competence (see J. VELAERS, *"Het Arbitragehof 'derde fase': de bijzondere wet van 9 maart 2003", R.W.*, 2003-04, 1401).

The Constitutional Court has developed important case law dealing with the compatibility of Belgian legislation with the Belgian Constitution (including Article 191) and other fundamental rights. This case law deals mainly with Belgian immigration legislation and social legislation (for an overview, see, for example, D. VANHEULE, S. BOUCKAERT and M.-C. FOBLETS, "*Grondrechten van*

*vreemdelingen: de toepassing van artikel 191 van de Grondwet door het Arbitragehof", T.B.P.*, 2005, 319).

The competence to check the compatibility of Belgian legislation with Article 191 of the Constitution is not systematic, but depends on whether the case is brought before the Constitutional Court. The assessment is therefore necessarily only a case-by-case assessment.

Belgium listed the 17 acts as 'transposing measures' of Article 24(1) of the Directive. It is difficult to assess whether such a piecemeal approach effectively guarantees the correct transposition of Article 24(1). Moreover, some of the acts listed have not been modified after the entry into force of Directive 2004/38. For example, five of these notified acts concern the French '*décret réglant, pour la Communauté française, les allocations et prêts d'études*' (these acts are : Décret du 8 mai 2003 *modifiant le décret réglant, pour la Communauté française, les allocations et prêts d'études, coordonné le 7 novembre 1983 ; Décret du 7 novembre 1983 réglant, pour la Communauté française, les allocations et prêts d'études ; Décret du 27 mars 1985 modifiant le décret réglant, pour la Communauté française, les allocations et prêts d'études, coordonné le 7 novembre 1983 ; Décret du 27 mars 1986 modifiant le décret réglant, pour la Communauté française, les allocations et prêts d'études, coordonné le 7 novembre 1983 ; Décret du 17 juillet 1987 modifiant le décret réglant, pour la Communauté française, les allocations et les prêts d'études, coordonné le 7 novembre 1983*). These modifications all pre-date Directive 2004/38.

In any case, since the 2003 modification of the Law of 06.01.1989 the Constitutional Court has a mechanism by which it can assess the compatibility of Belgian legislation ("*d'une loi, d'un décret ou d'une règle visée à (l'article 134 de la Constitution")* with Article 191 of the Constitution. Moreover, the Constitutional Court has interpreted Article 191 of the Consititution as establishing a general principle of non-discrimination between foreigners and Belgium citizens, and all the legislative acts will have to be applied and interpreted in the light of this Article. The Constitutional Court can then address any area where a problem might arise in that regard (provided the question is brought before the Constitutional Court).

For this reason, transposition is considered correct.

Recent case law of the Belgian Constitutional Court (Case 101/2008 of 10 July 2008) concerned an action for annulment, initiated by the government of the French Community (*gouvernement de la communauté française*), the ASBL *"Liga voor Mensenrechten"* and the ASBL *"Vlaams Overleg Bewonersbelangen"*, against several Articles of the Flemish *'Code de logement' (décret de la Région flamande du 15 décembre 2006 portant modification du décret du 15 juillet 1997 contenant le Code flamand du Logement).* This modification of the Flemish *'Code de logement'* imposed a.o. the obligation to renters and prospective renters to prove that thay are willing to learn Dutch. The Constitutional Court resumes this issue as follows : *« L'article 92, § 3, alinéa 1er, 6° et 7°, l'article 93, § 1er, alinéa 1er, 2° et 3°, et l'article 95, § 1er, 2° et 3°, du Code flamand du Logement, insérés par les articles 6, 7 et 8 du décret du 15 décembre 2006, imposent aux candidats-locataires et aux locataires d'une habitation sociale une nouvelle obligation qui consiste à « avoir la volonté d'apprendre le néerlandais ». Cette condition s'applique lors de l'inscription en tant que candidat à la location d'une habitation sociale (article 93, § 1er) et lors de l'octroi de l'accès au logement (article 95, § 1er). Elle figure également parmi les obligations du locataire (article 92, § 3) ».*

The Constitutional Court examines whether these conditions are incompatible with the non-discrimination principle, as enshrined in Articles 10 and 11 of the Belgian Constitution. Taking into account the objectives pursued by the Flemish legislature and the regulatory context, the Constitutional Court comes to the following conclusion: *« Sous réserve que les sanctions éventuelles du refus d'apprendre le néerlandais ou de suivre le parcours d'intégration civique soient proportionnées aux nuisances ou dégradations causées par ces refus et qu'elles ne puissent justifier la résiliation du bail que moyennant un contrôle judiciaire préalable, ces conditions imposées aux candidats-locataires et aux locataires d'un logement social ne sont pas incompatibles avec l'article 23*

*de la Constitution, lu isolément ou combiné avec les dispositions conventionnelles mentionnées aux moyens et elles n'établissent pas de différences de traitement incompatibles avec les articles 10 et 11 de la Constitution »* (point B.35).

***(b) Exemptions***

Article 24(2), concerns the possible exemptions to the principle of equal treatment that a Member State can establish for the entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), or the exemptions prior to acquisition of the right of permanent residence, on the possibility to grant maintenance aid for studies, including vocational training, consisting of student grants or loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

This provision must be considered as correctly transposed by Article 1 of the Law of 8 July 1976, according to which '*Toute personne a droit à l'aide sociale. Celle-ci a pour but de permettre à chacun de mener une vie conforme à la dignité humaine*'. Social assistance is everyone's right. Exceptions concern those persons that reside illegally in Belgium (*e.g.*, limited right to social assistance).

Moreover, Article 3, 3rd indent of the Law of 26 May 2002 concerning the right to social integration has been changed by the Law of 27 December 2006 (M.B., 28.12.2006). This modification states that every Union citizen and every family member joining or accompanying the Union citizen who enjoys the right of residence for more then three months (on the basis of the LAT) can benefit from the right to social integration.

### 2.5.4 Article 25: general provisions concerning residence documents

Article 25(1) provides that possession of residence documents may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof. This provision is not explicitly transposed into Belgian law. On the basis of an *a contrario* reasoning, this provision must be considered to be effectively transposed: no Belgian provision imposes the obligation to possess residence documents as a precondition for the exercise of a right.

However, Belgian law sometimes asks for registration (consisting out of a *'registre de la population'* and a *'registre des étrangers'*) in order to be able to exercise a right. The Royal Decree of 16.07.1992 gives every person the right to obtain a communication of all information mentioned in the population register, without the need to justify such a demand. This is something different than "possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card" in order to be able to exercise a right.

Article 25(2) provides that all documents mentioned in paragraph 1of the same Article shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents. On a general level, this provision must be considered as correctly transposed by Article 2 '*de la Loi du 14 mars 1968 abrogeant les lois relatives aux taxes de séjour des étrangers, coordonnées le 12 octobre 1953*' (M.B., 5 April 1968), according to which communes can only ask for such an amount of money that covers the administrative costs when they deliver or renew documents concerning foreigners. Moreover, several provisions of the LAT either confirm that they can be obtained free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.

### 2.5.5 Article 26 checks

Article 26 deals with the possibility for Member States to carry out checks on compliance with any requirement deriving from their national legislation for non-nationals to always carry their registration

certificate or residence card, provided that the same requirement apply to their own nationals as regards their identity card.

This provision is correctly transposed into national law on the basis of a combined reading of Article 79, 2° and Article 2 LAT. These Articles allow the authorities to sanction the foreigners who do not carry the documents mentioned in Article 2 LAT.

This is equivalent with the obligation for Belgians (being over 15 years) to hold their identity cards. The sanction is the same in both cases: 26 to 500 francs.

## 2.6 Restrictions on the right of entry and residence on grounds of public policy, public security and public health

### 2.6.1 General principles (Article 27)

Article 27 of the Directive laid down the general principles to be respected in the adoption of measures based on public order, public security and public health. With the exception of Article 27(4) and 27(5) this provision has been correctly transposed.

Article 27(1) and (2) are correctly transposed into Belgian law. However, neither Article 27(3) nor Article 27(4) can be considered as correctly transposed.

- **Restrictions on the basis of the public order public security and public health and the interdiction to serve economic ends (Article 27(1))**

Article 27 (1) states that Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health, and adds that these grounds cannot be invoked to serve economic ends. This provision is correctly transposed by Article 43, al. 1, 1° LAT. Regarding examples of situations that may be considered against public order and public policy, see the case law of the *Conseil d'Etat* below.

- **Proportionality and personal conduct of the individual concerned (Article 27(2))**

Article 27(2) provides that measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Moreover, the same Article holds that previous criminal convictions cannot in themselves constitute grounds for taking such measures. This provision is literally (and therefore correctly) transposed by Article 43, al. 1, 2° LAT.

Within the framework of previous expulsion decisions (based on the LAT), the *Conseil d'Etat* has underlined the importance of the principle of proportionality as a limit to the decision-making power of the administrative authority making an expulsion decisions.

> Conseil d'Etat, case 88.872, 11 July 2000: "*Considérant que l'article 8 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales n'interdît nullement aux Etats contractants de décider l'éloignement d'un étranger; que cette décision va nécessairement toucher au droit de cet étranger au respect de sa vie privée et familiale; que cette ingérence n'est toutefois permise que pour autant qu'elle soit prévue par la loi et qu'elle constitue une mesure qui, dans une société démocratique, est nécessaire, notamment, à la défense de l'ordre et à la prévention des infractions pénales; que l'article 20 de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers prévoit que l'étranger établi dans le Royaume peut lorsqu'il a*

*gravement porté atteinte à l'ordre public ou à la sécurité nationale, être expulsé par le Roi, après avis de la Commission consultative des étrangers; que le critère de nécessité implique, quant à lui, que l'ingérence soit fondée sur un besoin social impérieux et soit notamment proportionné au but légitime recherché; qu'il incombe à l'autorité de montrer qu'elle a eu le souci de ménager un juste équilibre entre le but visé et la gravité de l'atteinte au droit du requérant au respect de sa vie privée et familiale*". [Emphasis added]

Conseil d'Etat, case 105.428, 9 April 2002 : « *Considérant que l'article 8 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales n'interdit pas à l'autorité de prendre une mesure qui, comme celle qui fait l'objet du recours, a pour effet d'entraîner l'expulsion d'un étranger du territoire; que, toutefois, lorsque, comme en l'espèce, l'éloignement constitue une ingérence dans la vie privée et familiale de l'intéressée, celle-ci n'est possible que pour autant qu'elle soit prévue par la loi et qu'elle constitue une mesure qui, dans une société démocratique, est nécessaire, entre autres, à la défense de l'ordre public, à la prévention des infractions pénales et, notamment lorsque l'étranger s'est rendu coupable d'infractions telles que celles qui sont en rapport avec le trafic de stupéfiants, à la protection de la santé ou de la morale ou à la protection des droits et libertés d'autrui; que ce critère de nécessité implique que l'ingérence soit fondée sur un besoin social impérieux et proportionné au but légitime recherché; qu'il incombe à l'autorité de montrer dans la motivation formelle de la décision d'expulsion qu'elle a eu le souci de ménager un juste équilibre entre le but visé et la gravité de l'atteinte au droit de la requérante au respect de sa vie privée et familiale* ». [Emphasis added]

Article 27(2) second subparagraph provides that the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. This provision is literally (and therefore correctly) transposed by Article 43, al. 1, 2° LAT.

- **Contacts with other Member States (Article 27(3))**

Article 27(3) deals with the possibility to request the Member State of origin and, if need be, other Member States information concerning any previous police record the person concerned may have. This provision is transposed by Article 43, al. 2 LAT, but the transposition is incorrect.

First of all, the requirement that it cannot not be requested later than three months has not been transposed. Secondly, the Directive states "essential" ("the host Member State may, should it consider this essential"), which is stronger than the condition "*nécessaire*", as used in the Belgian transposition (French version of the Directive states "*s'il le juge indispensable* »). Thirdly, the last two sentences are not transposed into Belgian law.

- **Obligation to accept a citizen expelled from other Member State (Article 27(4))**

Article 27(4) concerns the obligation to allow any person to which Belgium has issued a passport or identity card that is expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute. This provision has not been transposed into Belgian law.

The Belgian authorities state that transposition flows from the application of Article 27(4) 'in practice' and adds that Belgium 'always takes back its own citizens'. The application in practice cannot be considered as a correct transposition. Article 27(4) contains a right which must be provided explicitly in Belgian law. The Belgian *Conseil d'Etat* has also commented that it is not clear which provision of the LAT transposes Article 27(4) of the Directive.

### 2.6.2 Protection against expulsion Article 28

Article 28 of the Directive lays down specific measures for protection against expulsion. While Article 28(3) has been transposed more favourably and Article 28(2) correctly into national law, Article 28(1) is not correctly transposed.

- **Criteria to evaluate the decisions (Article 28(1))**

Article 28(1) provides that before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin. Article 45 §1 LAT states that a Royal Decree has to be taken, 'after an opinion of the consultative committee for foreigners'. The Belgian authorities then indicate that this committee should take into consideration the criteria of Article 28(1).

This leaves too much discretion to the authorities. In addition, and more fundamental, Article 28(1) contains a right which should be clearly written down in the Belgian legal order. This is not the case. Therefore transposition is incorrect.

- **Expulsion of permanent residents (Article 28(2))**

Article 28(2) provides that an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, is only possible on serious grounds of public policy or public security. This provision is effectively transposed by Article 45 §2 LAT.

The experts did not find any information as to which cases will be considered as falling under the concept 'serious grounds of public policy or public security'. The pre-existing case law on these matters could possibly change because the provisions of the LAT transposing the Directive create a new legal framework.

- **Expulsion of persons living in Belgium for 10 years and minors (Article 28(3))**

Article 28(3) provides that an expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they have resided in the host Member State for the previous 10 years, or are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989. This provision is effectively transposed by Article 45 §3 LAT.

Transposition is even more favourable since the protection flowing from the Directive is not only given to Union citizens, but also their family members. Also note that the concept "*sécurité nationale*" used in the Belgian transposition is not a literal ttranslation of "public security (the French version of the Directive states "*des motifs graves de sécurité publique définis par les États membres* »).

The experts did not find any information about which cases will be considered as falling under the concept 'imperative grounds of public security'. The pre-existing case law on these matters could possibly change because the provisions of the LAT transposing the Directive create a new legal framework.

### 2.6.3 Public health (Article 29)

Article 29(1) states that the only diseases justifying measures restricting the freedom of movement shall be diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State. This provision has been correctly transposed by Article 43, al. 1, 4° LAT and the Annex of the LAT.

Article 29(2) has been literally transposed into Belgian law by Article 43, al. 1, 4°, second sentence LAT.

Article 29(3) has been incompletely transposed. The last sentence ("Such medical examinations may not be required as a matter of routine") has not been explicitly included in the Belgian transposing measure. The first paragraph of Article 29(3) has been correctly transposed by Article 43 al. 3 LAT.

### 2.6.4 Expulsion as a penalty or legal consequence (Article 33)

Article 33(1) is not explicitly transposed into the LAT. However, it seems that an expulsion based on a criminal conviction is not an automatic consequence, but it will be assessed whether the person severly violated the public order or the national security (see above, Article 20 para 2 LAT, concerning the transposition of Article 15.3 LAT). For this reason, transposition has been considered as correct.

One commentator has observed: "*A l'encontre des mesures d'expulsion et de renvoi, il fut à de nombreuses reprises soutenu que ces mesures constituaient une sanction supplémentaire pour les faits commis ou un traitement inhumain ou dégradant, contraire à l'article 3 de la Convention européenne de sauvegarde des droits de l'homme. A chaque reprise, le Conseil d'Etat a rejeté cette thèse en estimant qu'une mesure d'éloignement prise sur base d'un comportement ayant donné lieu entre autres à une condamnation pénale ne constitue pas une deuxième condamnation pour les mêmes faits et n'est pas incompatible avec l'autorité de la chose jugée du jugement prononçant cette condamnation, le juge pénal réprimant le délit et le ministre tirant les conséquences de cette condamnation par la mesure administrative que constitue l'éloignement du territoire (Cons. Etat, 3e ch., 20 mars 1981, arrêt n° 21.050, Rec. Arr. Cons. Etat, p. 430 ; Cons. Etat, 3e ch., 22 févr. 1985, arrêt n° 25.060 ; Cons. Etat, 3e ch., 7 mai 1986, arrêt n° 26.525)* » (D. VANDERMEERSCH, Chronique de jurisprudence – L'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (1981-1986) », J.T., 1987, p. 585, nr. 28).

The experts also want to highlight parliamentary question number 843 of 09.01.2006 (G. TASTENHOYE).

> Question : « *Etrangers séjournant légalement en Belgique. — Expulsion forcée après un délit.*
> *Aux Pays-Bas, le gouvernement Balkenende entend faire adopter un projet de loi qui permettrait d'expulser des étrangers séjournant légalement aux Pays-Bas s'ils commettent un délit punissable d'une peine d'emprisonnement au cours d'une période de trois ans après leur arrivée aux Pays-Bas.*
> *Il en irait de même pour les étrangers condamnés à plusieurs reprises à des peines d'emprisonnement de courte durée et donc considérés comme des multirécidivistes.*
> *Des exceptions resteront possibles, chaque expulsion demeurant une décision individuelle. Une fois ce plan coulé en textes de loi, les étrangers disposant d'un permis de séjour dans le cadre du regroupement familial, d'études ou d'un emploi pourront être expulsés après avoir purgé leur peine dans des prisons néerlandaises. Actuellement, aux Pays-Bas, seuls les étrangers ayant commis un délit grave peuvent être expulsés mais ceux qui ne se sont rendus coupables que d'infractions légères ne peuvent pas (encore) l'être.*
> *1. Avez-vous déjà pris ou préparé des mesures pour instaurer également en Belgique le nouveau système néerlandais ?*
> *2.*
> *a) Dans l'affirmative, pourquoi ?*
> *b) Dans la négative, pourquoi pas ?* »

The answer was:

> *"Comme prévu dans les articles 20 et suivants de la loi sur les étrangers du 15 décembre 1980, en Belgique, il est déjà possible d'expulser un étranger en séjour légal, avec une interdiction d'entrer dans le pays pour 10 ans, lorsqu'il a porté atteinte à l'ordre public ou à la sécurité nationale ou lorsqu'il n'a pas respecté les conditions mises à son séjour telles que prévues par la loi.*
> *Ce critère permet d'examiner si une expulsion s'impose pour tout étranger qui a purgé une peine de prison. C'est également possible pour les étrangers qui séjournent depuis déjà plus de trois ans en Belgique. Pour ce faire, il faut toujours tenir compte de la jurisprudence de la Cour européenne des Droits de l'Homme, qui édicte que l'expulsion visant à protéger l'ordre public ne peut pas porter une atteinte de manière disproportionnée au droit à la vie privée et familiale, tel que le prévoit l'article 8 de la CEDH. Il faut examiner au cas par cas la gravité de l'infraction et la situation personnelle de l'intéressé (durée du séjour en Belgique, liens familiaux solides en Belgique, etc.) ».*

Article 33(2) is not transposed into Belgian law

## 2.7 Procedural safeguards against decisions restricting free movement (Article 15, and Articles 30-31)

Articles 30-31 of the Directive include a range of procedural guarantees that need to respected in the application of expulsion measures as well as in the adoption of decisions to restrict free movement not based on public order, public security and public health (Article 15 RD 240/2007).

### 2.7.1 Notification of decisions (Article 30)

Article 30 includes the obligation to notify the person concerned in writing of any measure taken restricting free movement in such a way that they are able to comprehend its content and the implication for them (Article 30(1)), and be informed precisely and in full of the grounds on which the decision is taken unless contrary to the interests of the State security (Article 30(2)). The court or administrative authority competent for appeal must also be specified, along with the time limit for appeal, and where applicable, the time allowed to leave the territory of the State which cannot be less than a month save in duly substantiated cases or urgency.

Article 30(1) and (2) have been incompletely transposed into Belgian law. Article 30(3) has been correctly transposed.

- **Notification in writing and comprehension**

Article 30(1) is not correctly transposed by Article 46 §1 LAT, since it lacks the explicit guarantee that the notifications will take place "in writing".

Concerning the condition that one has to be notified "in such a way that (he/she is) able to comprehend its content and the implications for (him/her)", the Directive does not oblige the authority to notify the person concerned in their own language. Article 41, al. 1 of the Royal Decree of 18 July 1966 *(Arrêté Royal portant coordination des lois sur l'emploi des langues en matière administrative, M.B., 02.08.1966*) imposes an obligation to use one of the three languages – Dutch, French or German – that the person concerned has used during the procedure. One can not claim to be notified in another language. It could be argued that this is also a violation of the obligation to notify 'in such a way that they are able to comprehend its content and the implications for them'.

- **To be informed precisely and in full of the grounds**

Article 30(2) is not correctly transposed by Article 46 §1 LAT, since it does not contain the guarantee that persons shall be informed "precisely and in full". However, this must be nuanced since Articles 2 and 3 of the *Loi du 29 juillet 1991 relative à la motivation formelle des actes administratifs* (M.B., 12.09.1991) impose an obligation to indicate the facts lying at the basis of a decision, which surely enhances the comprehension of the decision.

- **Information on appeal procedures and time limit to leave the country**

Article 30(3) has been correctly transposed by Article 46, §3 and §4 LAT. The guarantee that wants to offer Article 30(3) can also be found in Article 2, 4° of the Law of 11.04.1994.

### 2.7.2 Procedural safeguards under Article 31

Article 31(1) and (2) are correctly transposed. However, the transposition of Article 31(3) cannot be considered correct.

- **Access to judicial and administrative appeal (Article 31(1))**

Article 31(1) provides for the right of access to judicial and where appropriate administrative redress procedures. This provision is correctly transposed by Article 39/1 §1 and 39/2 §2 LAT. These provisions establish a '*Conseil du Contentieux des Etrangers'*. This Conseil has an administrative jurisdiction, and has the exclusive competence to judge appeals against individual decisions that have been taken on the basis of the LAT.

- **Suspension of the order of expulsion (Article 31(2))**

Article 31(2) provides a possibility to apply for an interim order to suspend enforcement of the decision restricting the right of free movement. This provision has been correctly transposed by Article 39/79, §1, al. 1 and al. 2, 7° and 8° LAT. Belgian law goes even further than required because an appeal before the 'Conseil' has the effect of suspending enforcement.

- **Revision of facts and law in the redress procedure (Article 31(3))**

Article 31(3) concerns the obligation to guarantee that the redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based and that they shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28. This provision cannot be considered correctly transposed into Belgian law.

Article 39/2, §2 LAT states that the Conseil will state that "*en annulation, par voie d'arrêts, sur les autres recours pour violation des formes soit substantielles, soit prescrites à peine de nullité, excès ou détournement de pouvoir* ». The guarantees provided for by Article 31(3) are not transposed. Moreover, it remains to be seen whether the Belgian 'Conseil' will also (be able to) examine the facts and circumstances.

Please note that the case law of the *Conseil d'Etat* takes into account the principle of proportionality, also in the context of expulsion decisions. For example, in case 88.872 of 11 July 2000, the *Conseil d'Etat* wrote: "*Considérant que l'article 8 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales n'interdît nullement aux Etats contractants de décider l'éloignement d'un étranger; que cette décision va nécessairement toucher au droit de cet étranger au respect de sa vie privée et familiale; que cette ingérence n'est toutefois permise que pour autant qu'elle soit prévue par la loi et qu'elle constitue une mesure qui, dans une société démocratique, est nécessaire, notamment, à la défense de l'ordre et à la prévention des infractions pénales; que l'article 20 de la loi du 15*

*décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers prévoit que l'étranger établi dans le Royaume peut lorsqu'il a gravement porté atteinte à l'ordre public ou à la sécurité nationale, être expulsé par le Roi, après avis de la Commission consultative des étrangers; que le critère de nécessité implique, quant à lui, que l'ingérence soit fondée sur un besoin social impérieux et soit notamment* ***proportionné au but légitime recherché****; qu'il incombe à l'autorité de montrer qu'elle a eu le souci de ménager un juste équilibre entre le but visé et la gravité de l'atteinte au droit du requérant au respect de sa vie privée et familiale*". Decisions must be proportionate. However, this guarantee is not explicitly transposed in the LAT as the Directive requires.

- **Exclusion of the individual concerned (Article 31(4))**

Article 31(4) concerns the right for any excluded person to submit his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory. This provision has been correctly transposed by Article 39/79 LAT.

### 2.7.3 Exclusion orders (Article 32)

Article 32 concerns the duration of exclusion orders. Article 32(1) is not correctly transposed. Article 32(2) is correctly transposed.

Article 32(1) of the Directive provides that the persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which has been validly adopted in accordance with Community law. This is achieved by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.

This provision is not correctly transposed by Article 46 bis, §1 LAT. The Belgian transposition states that only after a period of 2 years one can ask to suspend or lift the exclusion order. In certain circumstances it is possible that the period of 2 years is not a "reasonable period" within the meaning of the Directive. The transposing legislation should also allow for less than 2 years.

Article 32(1) second subparagraph and Article 31(2) are correctly transposed by Artcile 46 bis, §2 LAT.

## 2.8 Final provisions (Chapter VII)

### 2.8.1 Article 34: publicity

Article 34 of the Directive imposes on Member States the obligation to disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication.

The experts did not find any information about Belgian publicity measures. The website www.vreemdelingenrecht.be gives an overview of the Belgian transposition of the Directive.

### 2.8.2 Abuse of rights (Article 35)

Article 35 allows Member States to adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of

convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

Article 35 is correctly transposed by Article 42 septies LAT. The latter states: "*Le ministre ou son délégué peut mettre fin au droit de séjour du citoyen de l'Union ou des membres de sa famille lorsque celui-ci ou ceux-ci ont utilisé des informations fausses ou trompeuses ou des documents faux ou falsifiés, ou ont recouru à la fraude ou à d'autres moyens illégaux, qui ont été déterminants pour la reconnaissance de ce droit* ».

The reference to 'abuse of rights or fraud' in the Directive has been transposed into Belgian law as meaning 'used false or deceiving information or used false or deceiving documents, or having used fraudulent or other illegal means'. The Belgian transposition is more specific than the reference of the Directive to 'abuse of rights or fraud', but does not extend the scope of this provision of the Directive.

### 2.8.3 Sanctions (Article 36)

Article 36 concerns the possibility for Member States to lay down provisions on the sanctions applicable to breaches of national rules adopted for the implementation of the Directive. This provision is not correctly transposed into Belgian law because these have not been notified to the Commission.

Note that the legal guarantees of Article 42 octies LAT apply, which enhances the proportional character of the sanctions. Sanctions are foreseen in the following cases:

- Article 41, al. 4 LAT ("*amende administrative de 200 euros"*) for failure to possess a valid passport, ID or visa when crossing the borders (entry);
- Article 41 bis, al. 2, last sentence LAT ("*amende administrative de 200 euros"*) for failure to report presence;
- Article 42 §4, last sentence LAT ("*amende administrative de 200 euros"*) for failure to register;
- Article 42 quinquies §6, al. 2-3 LAT ("*amende administrative de 200 euros"*): failure to request permanent residence card.

### 2.8.4 More favourable provisions (Article 37)

Article 37 is correctly transposed by the introductory sentences of Article 40 §1 LAT and Article 40 bis, §1 LAT. Moreover, Belgian transposition is more favourable than the Directive on several points (those more favourable are indicated above).

### 2.8.5 Transposition

The Directive was transposed into Belgian law by the LAT, AR 08/1 and AR/08. These Acts entered into force on 1 June 2008.

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## ANNEX I: Table of concordance for Directive 2004/38/EC

## ANNEX II: List of relevant national legislation and administrative acts

All the following texts can be found hrough the following website www.juridat.be

- la loi du 25 avril 2007 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge du 10 mai 2007) ; (« LAT »)

- l'arrêté royal du 7 mai 2008 modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge du 13 mai 2008) (« AR 08 »)

- l'arrêté royal du 7 mai 2008 fixant certaines modalités d'exécution de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge du 13 mai 2008) (« AR 08/1 »).

- Circulaire 'Citoyens de l'Union et membres de leurs familles' (« Circ.).

- Loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers (M.B., 21.05.1999)

- Arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers (M.B., 26.06.1999)

- Loi du 19 février 1965 relative à l'exercice, par les étrangers, des activités professionnelles indépendantes (M.B., 26.02.1965)

- Arrêté royal du 3 février 2003 dispensant certaines catégories d'étrangers de l'obligation d'être titulaires d'une carte professionnelle pour l'exercice d'une activité professionnelle indépendante (M.B., 04.03.2003)

- Article 2 de la Loi du 14 mars 1968 abrogeant les lois relatives aux taxes de séjour des étrangers, coordonnées le 12 octobre 1953. (M.B.,. 5 avril 1968)

- Article 5 de la Loi du 19 juillet 1991 relative aux [registres de la population, aux cartes d'identité, aux cartes d'étranger et aux documents de séjour] et modifiant la loi du 8 août 1983 organisant un Registre national des personnes physiques (M.B., 03.09.1991)

- Article 41, §1 des lois sur l'emploi des langues en matière administrative, coordinated by the Royal decree of 18 July 1966 (M.B., 2 Augus 1966)

- Arts. 2 and 3 of the Loi du 29 juillet 1991 relative à la motivation formelle des actes administratifs (M.B., 12.09.1991)

-Loi du 16 juillet 2004 portant le Code de droit international privé (M.B., 27.07.2004)

-Loi du 26 mai 2002 concernant le droit à l'intégration sociale (M.B., 31.07.2002)

## ANNEX III: Selected national case law

Conseil d'Etat, case 88.872, 11 July 2000

Conseil d'Etat, case 105.428, 9 April 2002

Cour d'Arbitrage, case 101/2008, 10 July 2008