

France

REPORT
on the Free Movement of Workers
in France in 2005

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Chapter I

Entry, residence, removal

The legislative section of the Code for the entry and residence of foreigners and the right of asylum (CESEDA) in France, adopted by government edict 2004-1248 of 24 November 2004¹ entered into force on 1 March 2005. It forms the applicable ordinary text on the subject, especially in terms of the spouses of Community nationals. The regulatory section of this Code is planned to enter into force in 2006.

Entry

Current legislation

The main regulatory text to emerge in 2005 is the *Decree 2005-1332² regulating conditions for entry and residence in France by nationals of Member States of the European Community benefiting from the free movement of persons*. This text aims to make changes here and there to a certain number of the provisions of the regulations applicable in France, particularly Decree no. 94-211 of 11 March 1994 regulating the conditions for entry and residence in France by nationals of Member States of the European Community benefiting from the free movement of persons, modified by Decree no. 95-474 of 27 April 1995 and by Decree no. 98-864 of 23 September 1998.

The main part of the applicable directives regarding free movement is stamped separately from Directive 2004-38, which imposes questioning even if the stamp from previous texts is indispensable for as long as they remain in force. This omission from the 2004 Directive, which is a codification text which aims, on the one hand, to repeal the body of the directives intended by Decree 2005-1322 and, on the other hand, must be transposed into internal French law no later than 30 April 2006, obviously poses problems. It is difficult to understand the explanation for this, apart from the hypothesis of administrative negligence. In France, in fact, the main part of the text of the Directive was anticipated by the law maker when the Law of 26 November 2003, regarding immigration, was adopted. This would explain the indifference towards the French law maker, which was moreover noticeable when the draft Directive was put before the National Assembly.³ It is no less open to criticism.

The scope of decree 2005-1322 is fixed by its first article: it concerns nationals of Member States of the European Union, other States in the European Economic Area and the Swiss Confederation; taking into account the agreements signed by the European Community.

1 Government edict no. 2004-1248 of 24 November 2004 regarding the legislative section of the Code for the entry and residence of foreigners and the right of asylum, *French Official Journal* no. 274 of 25 November 2004, p. 19924.

2 Decree 2005-1332 of 24 October 2005 modifying Decree 94-211 regulating the conditions for the entry and residence in France of nationals of Member States of the European Community benefiting from the free movement of persons, *French Official Journal* no. 253 of 29 October 2005, p. 17076, see appendix.

3 In report no. 1162, filed by the delegation of the National Assembly to the European Union, M.P. Lequiller was interested in the draft directive regarding the right of citizens of the Union and members of their families to move and reside freely within the territory of the Member States (COM (2001) 257 final of 23 May 2001): "In its current state, this text no longer raises particular problems for France, since the bill regarding the control of immigration and the residence of foreigners in France has been simplified, in this respect, in a more ambitious way. The main preoccupation of the French delegation, which concerned maintaining the possibility of expelling a European citizen in cases of serious breaches of the peace, has been satisfied. The Delegation can therefore only hope for a rapid adoption of this text (which still has to undergo a second reading in the European Parliament), which will enable added content to be attributed to European citizenship in a field (the free movement of persons) which is one of the main specific contributions of European construction. The Delegation approved this proposal during its meeting of 23 October 2003".

Residence

Current legislation

Decree 2005-1332 aforementioned simplifies the residence formalities for Community nationals, thus following the intention of the law maker expressed on 26 November 2003 in the ordinary immigration legislation. Article 14 of the Law of 26 November 2003 (Article 9-1 of government edict of 9 November 1945, Article L. 121-1 of CESDA) in effect exempts *nationals of the European Union from the obligation to hold a residence permit*.

Taking into account the basic principles applicable to the free movement of persons and workers within the European Union, this was a sensible measure which allowed a relaxation of the formalities and promoted the full application of Community law, while relieving the aliens departments of prefectures of work which had become pointless in terms of monitoring foreigners. Moreover, some Community nationals could need to continue to hold a residence permit for practical reasons (for obtaining a visa to travel to a country outside the European Union, to take part in a referendum or to enable a spouse who is not a national of a European Union Member State to hold a residence permit).

The law had provided that they would be able to continue to request the issue of a residence permit if they so request. However, some prefectures refused to do so, the law having referred back to a decree enforcing the conditions for issuing these residence permits. From now on, Decree no. 2005-1332 eliminates this problem. It should however be noted that the decree provides, from the first renewal, for this residence permit to be permanent. By contrast, it would seem that, in breach of the law of 26 November 2003, some social security centres refused to register Community nationals on the pretext that they did not hold a residence permit. The precision brought by the Decree should lead to the disappearance of this abnormal practice.

The abolition of the compulsory residence permit for Community nationals is therefore confirmed in substantive law since Article 8 of the Decree provides for Community nationals to

“have the right to reside on French territory for as long as they belong to one of the categories envisaged by [Article 1 of Decree 94-211] and provided they do not pose a threat to the peace or are not suffering from one of the diseases or disabilities which could endanger law and order or public security, as mentioned on the list attached to the present Decree.

[They] are ordinarily resident in France by virtue of the document which they used to enter French territory. If they so request and are aged over eighteen, they receive a residence permit under the conditions envisaged in the present Decree.”

In addition and by virtue of the same Article 8, family members of Community nationals, nationals of the EEA or the Swiss Confederation, also benefit from the same residence conditions. It is stipulated that, for all these European citizens, “with effect from the first extension, the residence card becomes permanent.”

On the other hand, family members of a Community national who do not hold the nationality of a Member State of the European Union, of another State party to the European Economic Area agreement or of the Swiss Confederation and who, having stayed in France for more than three months, are obliged to hold a residence permit are to apply for issue of the card within a period of three months from the time of their entry into France. They apply for its extension within the last two months before expiry of the residence permit they hold. When the application is made for the issue of the first residence permit, they must submit the document which they used to enter the country, together with any document confirming their relationship to a national of a Member State of the European Union or another State belonging to the European Economic Area or the Swiss Confederation who has the right to reside in France.

These persons must be able to prove, by any means, that they are covered by the scope of this Article in order to stay in France. In this context, the Decree of 2005, in Article 1, modifies the text from 1994 solely for students, who now have to prove that they “are registered at an educational establishment and are primarily pursuing their studies.”

Jurisprudence

Although not commonplace, some questionable administrative practices have been the subject of recent condemnation by the European Court of Human Rights in the judgement passed on 17 January 2006 in the case of *Mendizabal versus France*.⁴

The plaintiff is a Spanish national, born in 1952 and residing in Tarnos (France). In 1984 she married a Spanish national, a former leader of ETA, in prison since June 1984 and extradited to Spain in 1992, with whom she had a daughter, born in 1984 and of French nationality. The plaintiff has resided in France since 1975, where she had been granted political asylum in 1976, which was withdrawn in 1979 because of a change in the political situation in Spain. Since that date and until 29 December 1989, she had been granted temporary resident residence permits for a period of one year.

On 27 December 1989, the plaintiff applied for an extension of her residence permit and the issue of a work permit, by virtue of which the town hall of her place of residence, acting for the prefecture of Landes, issued her with a receipt for an application for a residence permit valid for a period of three months. The latter was extended 15 times, each time for three months. This receipt allows the holder to work if the holder is in possession of a work permit or a permit granting access to work. The French authorities also issued her with a receipt for the application for a five-year residence permit, also valid for three months, giving her authorisation to work. Based on these facts and until December 2003, the plaintiff was issued either with receipts for applications for a residence permit and card, for a period of three months, or with notifications for withdrawal of the said receipts.

In 1994, the plaintiff requested the prefecture of Landes to issue a five-year residence card, an application which was not entertained by the administrative authority, in flagrant breach of the legal system applicable to Community nationals. In fact, since 1 January 1992 and the end of the transitional period applicable to Spanish nationals, the plaintiff was directly entitled, under Community law, to the right to reside in France and to be issued with a five-year residence card as a national of a Member State of the Economic Community. Referring to administrative jurisdiction in order to obtain a repeal of this implied denial decision, she found justice in the administrative court of Pau on 6 November 1996. Despite this ruling, she found no further satisfaction from the French administration. In December 2003, the plaintiff obtained a residence card for a period of ten years, in application of the Law of 2003 regarding immigration control, residence by foreigners and nationality which, as we saw earlier, removes the obligation for Community nationals wishing to settle in France to hold a residence permit.

Seised in the area of respect for the right to lead a normal family life, interestingly, the European Court believes that,

“Article 8 must be interpreted in this case in the light of Community law and, in particular, the obligations imposed on Member States in terms of the rights of entry and residence of Community nationals (cf. *mutatis mutandis*, for Article 10 of the Convention, *Piermont v. France*, judgement of 27 April 1995, series A no. 314 and for Article 3 of Protocol no. 1 of the Convention, *Matthews v. United Kingdom* [GC], no. 24833/94, CEDH 1999-I ; see also *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* [GC], no. 45036/98, CEDH 2005-...).” (§ 69).

Based on the repeal of substantive Community law, as it was transposed in France, on the jurisprudence of the Court of Justice in the matter, on the administrative circulars from the Minister of the Interior, the European Court of Human Rights considers that, under the present circumstances, the failure to issue a residence permit to the plaintiff for such a long period, while she had already been ordinarily resident in France for over fourteen years, undoubtedly constituted an interference into her private and family life. The judge in Strasbourg draws the consequences of this unstable and uncertain situation in which the plaintiff lived for fourteen years from the fact of the implied denial by the French administrative authorities, which undoubtedly caused her both material and moral harm. Ruling in equity, as required by Article 41 of the Convention, it allocated her EUR 50,000, all causes of harm taken into consideration.

4 Request no. 51431/99.

Removal

Current legislation

Decree 2005-1332 aforementioned also regulates the conditions for the removal of Community nationals in the broad sense. It thus stipulates, in Article 10, that

“nationals of the Member States of the European Union, of the other States belonging to the EEA and the Swiss Confederation, as well as their family members who cannot prove a right to residence in application of Article 1 [of Decree 94-211] or whose behaviour poses a threat to law and order may form the subject, depending on the case, of a decision to deny residence, to deny issue or extension of the residence card, to withdraw this card as well as a removal measure. The reasons for the decision are brought to the attention of the person in question. When this decision relates to a person mentioned in Article 1, it can only be taken following a recommendation from the Commission on the residence permit envisaged in Chapter II of Title 1 of Book III of the Code for the entry and residence of foreigners and of the right to asylum.”

Article L 312-2 of this Code, which entered into force on 1 March 2005, provides that,

“the foreigner is invited in writing at least fifteen days before the meeting of the commission which has to take place within three months of its submission to the court; he can be assisted by an adviser or by any person of his choice and be heard with the assistance of an interpreter. The foreigner may request the benefit of legal aid under the conditions envisaged by Law 91-647 of 10 July 1991 regarding legal aid, this option being mentioned in the invitation. Provisional permission for legal aid may be given by the chairman of the commission. If he does not hold a temporary residence card or if this has expired, the foreigner receives, once the commission has been informed, a receipt which serves as temporary authorisation for residence until the administrative authority has issued a ruling.”

Article 10 of Decree 2005-1332 specifies that

“the notification of the decisions referred to [above] includes an indication of the deadline given for leaving the territory. Except in emergencies, this deadline may not be less than fifteen days if the person in question has not received a residence permit and one month in other cases.”

Jurisprudence

Many judgements from 2005 concerned both extradition and the implementation of European arrest warrants. We will content ourselves here to quoting them in so far as legal assistance among Member States of the Union is scarcely pertinent from the point of view of the free movement of workers. However, these measures give the French judge the opportunity to pronounce on the state of the law in other Member States from the point of view of the guarantees of fundamental liberties and the international standards relating to human rights when these are cited (EC, 18 May 2005, Mr. Thierry X, no. 270330, EC, 30 May 2005, Mr. Paul X, no. 273066, EC, 24 October 2005, Mr. Stéphane X, no. 276685 for extraditions to Belgium; EC, 30 May 2005, Mr. Zsolt X, no. 277436, for an extradition to Hungary; EC, 11 April 2005, Mr. Joaquin X, no. 267524; EC, 11 April 2005, Ms. Josefina X, no. 266601; EC, 22 April 2005, Mr. Antonio Maria YX, no. 264589; EC, 14 December 2005, Mr. José Ramon X, no. 275185; EC, 11 April 2005, Mr. Mickaël X, no. 261621; EC, 30 May 2005, Mr. Aurelijus YX, no. 269767 for an extradition to Lithuania; EC, 1 July 2005, Mr. Ruslan X, no. 278455, EC, 27 July 2005, Mr. Adrien Félix X, no. 269924, EC, 14 December 2005, Mr. René X, no. 276589 for extraditions to Germany; EC, 14 January 2005, Mr. Angelo Cuccu, no. 262773; EC, 16 February 2005, Mr. Fernando X, no. 264409; EC, 27 July 2005, Mr. Giuseppe X, no. 266501, EC, 14 October 2005, Mr. Mohamed X, no. 280259, EC, 28 December 2005, Mr. Enrico X, no. 276663 for extraditions to Italy; EC, 18 March 2005, Mr. Cesare Battisti, no. 273714.; EC, 28 October 2005, Ms. Isabel X, no. 274943, EC, 7 December 2005, Ms. Agurtzane YX, no. 278828; EC, 18 May 2005, Mr. Charalampos X, no. 272174, for an extradition to Greece; EC, 18 May 2005, Mr. Abel X, no. 266162 for

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extradition of a Portuguese national to Switzerland, EC, 28 December 2005, Mr. Aitor X, no. 280404 for extraditions to Spain). The same is true with respect to the European arrest warrant (Court of Cassation, Criminal Chamber, 16 March 2005, 04-87795; Criminal Chamber, 30 March 2005, 05-81221; Criminal Chamber, 31 March 2005, 05-81260 for members of ETA; Criminal Chamber, 5 April 2005, 05-81513; Criminal Chamber, 19 April 2005, 05-81692; Criminal Chamber, 25 May 2005, 05-82525; Criminal Chamber, 8 June 2005, 05-81781; Criminal Chamber, 28 June 2005, 05-83393; Criminal Chamber, 21 July 2005, 05-84058; Criminal Chamber, 9 August 2005, 05-84443; Court of Cassation, Criminal Chamber, 25 January 2005, 04-86403; Court of Cassation, Criminal Chamber, 8 February 2005, 04-86754; Court of Cassation, Criminal Chamber, 1 February 2005, 04-87787; Court of Cassation, Criminal Chamber, 19 April 2005, 05-81678; Court of Cassation, Criminal Chamber, 19 April 2005, 05-81677; Court of Cassation, Criminal Chamber, 15 March 2005, 05-81107; Court of Cassation, Criminal Chamber, 16 March 2005, 05-81229 and 05-81230; Court of Cassation, Criminal Chamber, 14 September 2005, 05-84551

Doctrine

RFDA, March-April 2005, *Droits et libertés*, Etude: “Le droit au séjour en France des membres de l’ETA, à propos des jugements du TA de Pau du 23 octobre 2003 (5 espèces), 6 novembre 2003 et 20 novembre 2003 (3 espèces)” (The right of residence in France of members of ETA, with regard to the judgements of the administrative court of Pau of 23 October 2003 (5 cases), 6 November 2003 and 20 November 2003 (3 cases)), J-N Caubet-Hilloutou, p. 339.

Chapter II

Access to employment

Current legislation

Generally speaking, Article 8 of *Decree 2005-1332* aforementioned, concerning access to a job, points out the need for a statement of recruitment or of employment by the employer. This is necessary for persons “coming to France to take up paid employment under conditions other than those [set forth below]”, for persons “holding a paid post in France while maintaining their habitual residence on the territory of another Member State to which they return each day or at least once per week” and for persons “coming to France to perform a salaried activity on a temporary basis or as a seasonal worker”. The statement must indicate the planned duration of the employment. However, persons employed in the intermediate activities of business, industry and crafts are exempt from the statement.

Generally speaking, France remains behind in transposing specific directives and concern has been expressed in this respect by the parliamentary delegation to the European Union in its examination of the state of the transposition of the directives into French law. The member of parliament thus points out that some delays are particularly worrying from the point of view of the creation of the internal market: over two years’ delay for Directive 89/48/EEC of the Council of 21 December 1988 regarding a general system for recognising higher education qualifications following the completion of vocational training courses lasting at least three years and Directive 92/51/EEC of the Council of 18 June 1992 regarding a second general system for recognising vocational training courses, completing Directive 89/48/EEC.

In fact, French law has obvious reservations about transposing Directive 2001/19/EC of the European Parliament and the Council of 14 May 2001, modifying Directives 89/48/EEC and 92/51/EEC of the Council concerning the general system for recognising vocational qualifications, and Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC of the Council concerning the professions of general care nurse, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor.

The deadline for transposing this text was set at 31 December 2002. The transposition deadline – which was already excessively long – was further prolonged by the need to provide for (which has not been done) legislative measures to extend the field of recognition to Member States of the European Economic Area and to take into account the consequences of the judgement of 14 September 2000 *Hocsman* (case C-238/98) of the ECJ which states that,

“Article 52 of the EC Treaty (which became Article 43 after modification) must be interpreted in the sense that, in a situation not governed by a directive related to the mutual recognition of qualifications, when a Community national submits a request for authorisation to practise a profession to which access is – according to national legislation – conditional upon possession of a diploma or vocational qualification or upon periods of practical experience, the competent authorities in the Member State in question are obliged to take into consideration all the diplomas, certificates and other qualifications, as well as the relevant experience of the person in question, while making a comparison between, on the one hand, the skills demonstrated by these qualifications and this experience and, on the other hand, the knowledge and qualifications required by national legislation.”

Several texts attempt to implement this transposition but they do so only partially. In legislative terms, this refers particularly to *government edict no. 2004-279 of 25 March 2004 regarding simplification and adaptation of the conditions for practising certain professional activities, as well as Law no. 2004-237 of 18 March 2004 regarding the authorisation of the Government to transpose Community directives using government edicts* and to implement some provisions of Community law, and *government edict no. 2004-1174 of 4 November 2004 for the medical and paramedical professions, pharmacists, social services workers, architects and expert surveyors*. These completed the previous provisions of *government edict no. 2001-1999 of 1 March 2001*.

At regulatory level, we should mention *Decree no. 2005-541* of 25 May 2005 for specialist doctors and dental surgeons, *Decree no. 2005-626* of 30 May 2005 relating to some judicial or legal professions, *Decree no. 2005-522* relating to the insurance obligation for chartered accountants, *Decree no. 2002/883* of 3 May 2002 relating to the protection of minors during school holidays, professional leave and leisure time, as well as the *Order of 29 July 2002*, establishing the list of diplomas, certificates or qualifications.

Consequently, as a result of its inaction, France has been the subject of various actions for failure to fulfil obligations and, in particular, an enforcement notice dated 22 January 2002 and a reasoned opinion dated 17 October 2003 and an action for failure to fulfil obligations was brought before the Court of Justice on 8 April 2005 (case C-164/05). Moreover, and still regarding vocational qualifications, an infringement procedure was also brought against France on 15 July 2005 in the field of Directive 78/686/EC relating to the mutual recognition of dentists' qualifications, the reasoned opinion of the Commission summarising in particular the constraints resulting from the rules relating to possession of the professional dental qualification.

*Decree 2005-541 of 25 May 2005 in application of Articles L.632-13 and L.634-1 of the Education Code concerns the pursuit of studies with a view to obtaining a specialist practitioner's diploma in medicine or dental surgery.*⁵ With reference to the Community directives in force, the text governs the procedure allowing this pursuit of studies. A candidate for this type of qualification, which is not awarded in the country of origin, must submit a file applying for authentication of his training and his previous professional experience to the university in question. A jury is responsible for assessing the knowledge and skills acquired by the candidate: it examines the candidate's file, interviews him and can subject him to a real-life situation test. Following this evaluation, the jury suggests to the president of the University in question the content of the specialist training from which the latter can be exempted and the additional training that has to be fulfilled in order to obtain the desired qualification.

Directive 92/51/EEC of 18 June 1992 regarding a second general system for recognising vocational training, completing Directive 89/48/EEC, which was also the subject of a dispute before the Court because of the delay in transposing it, concerning the profession of tourist guide, since the dates for their transposition (1991 and 1994) had passed without France implementing transposition. Specifically, French legislation does not provide for a recognition procedure for qualifications, in accordance with the said directives for this profession, which led to a judgement establishing dereliction before the Court of Justice on 20 January 2005 (C-198/04).

*Decree no. 2005-791 of 12 July 2005 regarding persons qualified to guide visits to museums and historic monuments and modifying Decree no. 94-490 of 15 June 1994*⁶ was published in response to this situation. In its preamble, the latter specifically targets Directive no. 89/48/EEC of the Council of 21 December 1988 regarding a general system for recognising higher education qualifications marking successful completion of vocational training courses lasting at least three years, together with Directive no. 92/51/EEC of the Council of 18 June 1992 regarding a second general system for recognising vocational training, modified by Directive no. 2001/19/EC of the European Parliament and the Council of 14 May 2001. It creates a Chapter III entitled, "Professional skills acquired in other States enabling the issue of a professional card". In its articles, this Chapter breaks down a procedure into various stages, use of which by the Member State will require a certain level of attention.

"Article 93. - I. – The professional card referred to under II of Article 85 is obtained either for national tour guides and interpreters, without holding the national tour guide and interpreter qualification referred to in Article 89, or for national lecturing guides without fulfilling the conditions required in Article 90, by French nationals or nationals of another Member State of the European Community or of a party to the European Economic Area agreement who have successfully completed an academic cycle of at least one year or an equivalent part-time period preparing them to practise the profession at a university or higher education establishment or in another establishment of an equivalent training level, and who can prove:

- 1 A diploma, certificate or other qualification allowing the practise of an activity on a professional basis in a Member State of the European Community or a party to the European Economic Area agreement, which governs access to or the practice of the profession and awarded:

5 French Official Journal no. 122 of 27 May 2005, p. 9183.

6 OJ 164 of 16 July 2005 page 11691.

a) Either by the competent authority of this State and marking the successful completion of training acquired primarily in the European Community or European Economic Area;

b) Or by a third-party country on condition that a certificate of accreditation be provided by the competent authority in the Member State of the European Community or the party to the European Economic Area agreement which recognised the diploma, certificate or other qualification and certifying that the holder has actually practised the activity on its territory, on a professional basis, for a minimum period of three years;

- 2 Or a training qualification marking successful completion of a regulated training course, within the meaning of d bis of Article 1 of Directive 89/48/EEC of the Council of 21 December 1988, modified by Directive 2001/19/EC of the European Parliament and the Council of 14 May 2001;

- 3 Or full-time practice of the activity for at least two years during the previous ten years in a Member State of the European Economic Community or a State party to the European Economic Area agreement which does not regulate access to or the practice of this profession, on condition that this professional experience be certified by the competent authority of this Member State or the State party to the aforementioned agreement. However, in the event that the National Commission of tourist guides and interpreters and lecturing guides has established that the training provided on the basis of 1 or 2 above covers subjects that are substantially different from those featured on the national diploma programme or those covered by the national lecturing guide examination or in cases where the activity is not regulated in the Member State or the State party to the European Economic Area agreement or is regulated in a substantially different way and has verified that the knowledge acquired by the applicant during his professional experience is able to compensate, wholly or partially, for the difference in training, the Prefect – acting on the recommendation of this Commission – may require that the person in question choose either to take an aptitude test or to complete an adaptation course, the duration of which may not exceed three years and which is the subject of an evaluation.

In this case, the reasoned opinion of the Prefect states that the person in question must make known his choice between the aptitude test and the adaptation course within a period of two months.

II. – The regional tourist guide and interpreter's professional card mentioned under II of Article 85, without fulfilling the conditions required in Article 91, is issued to French nationals or nationals of another Member State of the European Community or of a State party to the European Economic Area agreement who can prove:

- 1 Possession of a diploma, certificate, other qualification or certification of competence prescribed by a Member State of the European Community or a State party to the European Economic Area agreement which regulates access to or practice of the profession;

- 2 Or qualifications obtained in another Member State or party to the aforementioned agreement, providing equivalent guarantees to those required for nationals. However, in the event that the National Commission of tourist guides and interpreters and lecturing guides has established that the person in question cannot show proof of one of the training qualifications or certificates of competence referred to under 1 and has verified that the qualifications obtained during the professional experience are able to compensate for those required to practise the activity, the Prefect – acting on the opinion of this Commission – may require that the person in question choose either to take an aptitude test or to complete an adaptation course, the duration of which may not exceed two years and which is the subject of an evaluation. In this case, the reasoned opinion of the Prefect states that the person in question must make known his choice between the aptitude test and the adaptation course within a period of two months.

III. – The professional card for lecturing guides in artistic and historical cities and countries referred to under II of Article 85 is awarded, without having successfully taken the examination referred to in Article 92, to nationals of a Member State of the European Community or a State party to the European Economic Area agreement who can prove:

- 1 Possession of a diploma, certificate, other qualification or certificate of competence prescribed by a Member State or a State party to the European Economic Area agreement granting access to this activity or permitting its practice;

- 2 Or qualifications providing guarantees equivalent to those required for nationals and obtained in another Member State or party to the aforementioned agreement. However, in the event that

the National Commission of tourist guides and interpreters and lecturing guides has established that the person in question cannot show proof of one of the training qualifications or certificates of competence or equivalent qualifications and has verified that the qualifications obtained during the professional experience are able to compensate for those required to practise the activity, the Prefect – acting on the opinion of this Commission – may require that the person in question choose either to take an aptitude test or to complete an adaptation course, the duration of which may not exceed two years and which is the subject of an evaluation. In this case, the reasoned opinion of the Prefect states that the person in question must make known his choice between the aptitude test and the adaptation course within a period of two months.

Article 94. – Persons taking advantage of the professional aptitude acquired under the conditions envisaged in the present Chapter are to submit their application for a professional card to the Prefect of the *département* of their place of residence, for those resident in France. Persons resident abroad submit their application to the Prefect of Paris. This application is accompanied by a complete file. An acknowledgement of receipt of the application is issued. The reasoned opinion of the Prefect is given no later than four months from the date of issue of the acknowledgement of receipt of the complete file, following the opinion of the National Commission for tourist guides and interpreters and lecturing guides, envisaged in Article 88. The programme and the composition of the juries referred to in Article 88, the methods of organising the aptitude test and the adaptation course and the composition of the file referred to in the previous paragraph are established by an order from the Minister of the Interior and the ministers responsible for higher education, culture and tourism.”

More specifically, an entire series of texts attempts to bring French law up to standard in terms of access to employment and equivalence.

Order of 20 January 2005 establishes the list of competitive examinations for which requests for classification of qualifications awarded in other Member States of the European Union or parties to the European Economic Area agreement are examined by a commission established at the Ministry of Youth, Sports and Social Life.⁷ These are competitive examinations to recruit sports teachers, mass education and youth counsellors, technical and higher education counsellors and youth and sports inspectors.

*Order of 27 January 2005*⁸ establishes the conditions for the exchange of licences by professional technical flying personnel in civil aeronautics awarded by the States belonging to the European Community, the European Economic Area or the Swiss Confederation. Thus, a professional technical flying personnel licence awarded by one of these States may be exchanged for a French licence of an equivalent type under the conditions established by the decree.

The conditions this licence must satisfy are as follows: the licence must have been awarded following training courses and inspections regarded by the minister responsible for civil aviation as in conformity with the joint aeronautical rules for the issue of licences to members of the piloting crew; it must be currently valid; it must have been previously accepted by the French authorities for more than one year and it must not have been issued in exchange for a licence from a third State of the EEA. In terms of the holder of the licence, he must be regularly entered on the civil aeronautics register of flying personnel; demonstrate adequate knowledge of the French language and, if necessary, the English language; be able to show proof of a medical certificate issued by one of the States in question and prepared under conditions equivalent to those in French legislation and, finally, he must be able to show proof of complete and satisfactory training.

When the French licence is issued – the application for which must be made to the minister responsible for civil aviation – the original licence is withdrawn from its holder and returned to the authorities of the State which issued it, stipulating that an exchange procedure has taken place.

Order of 11 May 2005 regarding the recognition of maritime vocational training qualifications issued by Member States of the European Union or third countries for service on board commercial and pleasure ships equipped with a muster roll⁹ is called to comply with the international agreement of 1978 regarding training standards for sailors, for the issue of patents and for surveillance and Direc-

7 *French Official Journal* no. 27 of 2 February 2005, p. 1740.

8 *French Official Journal* no. 61 of 13 March 2005, p. 4353.

9 See appendix.

tive 89/48/EC of the Council of 21 December 1988 regarding a general system for recognising higher education qualifications marking the successful completion of vocational training lasting at least three years, completed by Directive 92/51/EC of the Council of 18 June 1992 regarding a second general system for recognising vocational training, as well as Directive 2001/25/EC concerning the minimum level of training for sailors, modified by Directive 2003/103/EC of 17 November 2003. Its general principle is that maritime vocational training qualifications awarded by or under the authority of a Member State of the European Union, allowing the exercise of principal duties at support level or the exercise of particular duties other than those of radio-communications operator, or service on board certain types of ship, can be used for service on board ships, without having been the subject of a formal recognition procedure. However, in the event of doubts concerning the competence of holders of the qualifications awarded by a country, the minister responsible for the sea can temporarily suspend the recognition of these qualifications for service on board ships. On the other hand, qualifications granting access to principal duties at operational or management level or to the duties of radio-communications operator are the subject of recognition.

The controversial matter of the nationality of ships' captains has long been debated in French law. Article 5 of Law no. 2005-412 of 3 May 2005 regarding the creation of the French international register¹⁰ stipulates that,

“members of the crew of ships registered on the French international register must be nationals of a Member State of the European Union or of a State party to the European Economic Area agreement in a proportion of a minimum of 35% calculated based on the staff list. However, for ships that do not enjoy or no longer enjoy the fiscal aid system allocated based on their acquisition, this percentage is fixed at 25%. On board ships registered on the French international register, the captain and the officer responsible for his temporary replacement, who may be the chief engineer officer, who guarantee the safety of the ship, its crew, environmental protection and security, are French.”

This legislative detail corresponds to the explicit intention, as parliamentary activities demonstrate, to take into account the jurisprudence of the Court of Justice concerning the requirement of prerogatives of the public authorities to justify an offence against non-discrimination based on nationality. The law is thus targeting specific fields likely to be related to the exception acknowledged by the Court of Justice and, in other respects, drops the nationality clause, which it broadens to nationals of the Union.

*Decree 2005-626 of 30 May 2005 regarding the conditions for access to certain judicial or legal professions*¹¹ applies Directive 2001/19/EC modifying the directives concerning the general system for recognising vocational qualifications for the professions of notary, solicitor, bailiff, judicial auctioneer, commercial court registrar, lawyer, etc.. This decree likens Community nationals to nationals of the European Economic Area in terms of the recognition of qualifications.

Three Community directives are also targeted by Decree 2005-215 of 4 March 2005 regarding the High Authority to Fight Against Discrimination and For Equality:¹² Directive 200/43/EC regarding the implementation of the principle of equal treatment of persons without distinction by race or ethnic origin, Directive 2000/78/EC concerning the creation of a general framework promoting equal treatment in terms of employment and work and Directive 2000/73/EC concerning the implementation of the principle of equal treatment between men and women in terms of access to employment, training and professional promotion and working conditions. This Decree sets out the composition of the High Authority (HALDE) and the procedures that are applicable before it.

The *report to the President of the Republic*¹³ of 3 August 2005 specifies, for instance, the importance of Community context in the evolution of legislation relating to age conditions for access to public sectors:

10 *French Official Journal* no. 103 of 4 May 2005, p. 7697.

11 *French Official Journal* no. 125 of 31 May 2005, p. 9684.

12 *French Official Journal* no. 55 of 6 March 2005, p. 3862.

13 Report of the President of the Republic regarding government edict 2005-901 of 2 August 2005 regarding age conditions in the public sector and introducing a new access route to careers in the territorial public sector, the hospital public sector and the State public sector, *French Official Journal* no. 179 of 3 August 2005, p. 12718.

“Article 21 of the European Charter of Fundamental Rights [...] prohibits all discrimination, particularly that based on age. Based on this Charter, the European Ombudsman was able to achieve the abolition of age limits for access to competitive recruitment examinations within European institutions.”

Jurisprudence

Several interesting court orders attempt to guarantee the principle of equal treatment. The Court of Appeal of Paris thus recalls that, by virtue of Articles 12 and 39 of the EC Treaty and Article 7 of Regulation 1612/68 of 15 October 1968, any collective or individual agreement clause which envisages or authorises discriminatory conditions with respect to nationals of other Member States, particularly in terms of remuneration, is ipso jure null and void. These texts, which are directly applicable in the legal system of every Member State, confer individual rights upon the persons affected which the national legal systems must safeguard and which take precedence over any national standard to the contrary (Court of Appeal of Paris, 18 January 2005, Association EABJM versus Walliser, 04/36550).

Thus, an establishment that has reached an agreement with teachers who hold foreign qualifications and teach the English language cannot adopt a different salary system in France based on the nationality of its staff, while no element is cited by the employer to justify a difference in treatment based on the language taught. This agreement must therefore apply to all salaried persons who hold qualifications allowing them to teach at secondary level in their country of origin.

For the same Court of Appeal, the Court of Appeal of Paris, Article 12 of the EC Treaty prohibits generally any discrimination based on nationality. Article 48 applies the fundamental principle of non-discrimination and states that the free movement of workers within the Community implies the abolition of any discrimination based on nationality between workers in Member States in matters related to employment, remuneration and other employment conditions. Article 7 of Regulation 1612-68 stipulates that any collective or individual agreement clause or other collective regulation which envisages or authorises discriminatory conditions with respect to nationals of other Member States, particularly in terms of remuneration, is ipso jure null and void. These texts, which are directly applicable in the legal system of every Member State, confer individual rights upon the persons affected which the national legal systems must safeguard and which take precedence over any national standard to the contrary.

Thus, an employer under German law could not adopt a different salary system in France depending on the nationality of its staff. The retention, for the benefit of German salaried workers recruited before 31 March 1991, of a more favourable remuneration system than that envisaged for French salaried workers recruited before this date represents the perpetuation of banned discrimination with respect to the latter (Court of Appeal of Paris, 20 September 2005, *Lestang Seuboth versus Association Institut Goethe de Paris*).

The administrative court of law recalls the terms of Article 39 of the EC Treaty, then Article 1 of Regulation of 15 October 1968 by virtue of which,

- “1. Any national of a Member State, regardless of his place of residence, has the right to embark upon a salaried activity and to practise it on the territory of another Member State, in accordance with the legislative, regulatory and administrative provisions governing the employment of workers who are nationals of this State;
2. In particular, he enjoys the same priority on the territory of another Member State as nationals of this State in terms of access to available employment.”

The judge is then interested in French legislation in terms of the employment of handicapped persons: Article L.323-1 of the Labour Code stipulates that,

“any employer employing at least twenty salaried workers is obliged to employ, full-time or part-time, [workers recognised as handicapped] in a proportion of 6% of the total workforce of these salaried workers.”

Failing this, these employers are obliged to pay a fixed sum by way of a penalty to the Treasury, forming the subject of a collection notice issued by the administrative authority.

Applying this legislation to the case at hand, the judge will admit that the company in question, based on the [aforementioned] obligation to employ, declared Mr. X, a Dutch national residing in Belgium. Nonetheless, the director of employment for the *département* nonetheless issued, in 2000 and in 2002, two collection notices against the company for failure to comply with the obligation to employ; the said notices were justified by the circumstance that Mr. X apparently belonged to none of the recognised categories of handicapped workers.

The provisions of the Labour Code result in the penalisation of employers who do not respect the obligation to employ handicapped workers, so as to promote the access of the latter to employment. It emerges from Articles L.323-3 and L.323-10 that, “only a technical careers guidance and reclassification commission has the authority to recognise a handicapped worker.”

The results of Articles L.323-11 and D.323-3-6 are that these commissions have a territorial competence defined by the *département* where the worker resides. Consequently, only workers residing in France can enjoy this recognition. Moreover, the Company in question was reminded of this point by the deputy director for the development of work and employment at the Ministry of Employment and Solidarity.

“Consequently, the discrimination introduced by the aforementioned articles in favour of handicapped workers is incompatible with the principle of the free movement of workers within the European Community; [the aforementioned provisions of Community law] preventing a national of a Member State of the European Community from encountering discrimination in terms of access to employment in a Member State based solely on his residence in another Member State” (Administrative Court of Appeal of Douai, 3 March 2005, Ministry of Social Affairs, Labour and Solidarity versus SA Nouvelle Rizerie du Nord, no. 03DA01243).

Doctrine and information documents

Fauroux Report of July 2005, “La lutte contre les discriminations ethniques dans le domaine de l’emploi” (The battle against ethnic discrimination in the workplace).

Information Report no. 2447 of 6 July 2005 and the European Union delegation to the National Assembly of 6 July 2005 concerning the transposition of European directives, C. Philip.

Chapter III

Equal treatment based on nationality

Legislation

*Information note DGAS/IC no. 2005-165 of 24 March 2005 regarding the right to income support for nationals of the European Union and the other States party to the European Economic Area agreement*¹⁴ issued by the Ministry of Employment, Labour and Social Cohesion undoubtedly calls for particular attention, without however being endowed with any normative value. Since confirmed by several cases of income support fraud on the part of Union nationals based in France, it displays a certain reserve. The text recalls the legal system applicable to requests for access to the right to allocation of income support made by EU nationals or nationals of other EEA Member States. It is intended for presidents of General Councils, the director of the National Family Allowance Fund and the director general of the Central Social Agricultural Mutual Insurance Fund. It includes an appendix with a methodological reference system for investigating applications (see appendix).

The award decision for the allocation or denial of income support has, since 1 January 2004, been within the competence of the president of the General Council (Article L. 262-19 of the Social Action and Families Code) or of the National Family Allowance Fund or Social Agricultural Mutual Insurance Fund when this power has been delegated to them by the *département* (Article L. 262-32). It is therefore up to these groups and bodies to determine the response that should be given to each request, taking into account the applicable national and Community standards, the provisions of the departmental welfare regulation (Articles L. 121-3 and L. 121-4), and under sole control of the competent courts (welfare jurisdictions – departmental welfare commissions and central welfare commission – and Council of State). As for the State, it is responsible to the European Union for the correct application of Community law. It is aimed at nationals of the European Union (Germany, Austria, Belgium, Cyprus, Denmark, Spain, Estonia, Greece, Finland, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, the United Kingdom, Sweden, the Czech Republic, Slovakia and Slovenia) and the other States party to the European Economic Area agreement (Iceland, Liechtenstein and Norway), as well as members of their families, whether or not they are nationals of one of these States.

By virtue of Articles 12 and 18 of the Treaty creating the European Union and the jurisprudence of the Court, the note recalls that, “income support is awarded to Community nationals and those in similar categories, as well as to members of their families regardless of their nationality, under the same conditions as applicable to persons of French nationality. In particular, to regard access to income support as reserved solely for working persons would be contrary to the principle of equal treatment between Community and country nationals, since no rule exists that is applicable to French persons which subjects the right to income support to a condition concerning professional activity.

However, this equal treatment only exists in so far as the parties in question have the right of residence on the territory. Thus, a Community national must prove that he has legally settled on the national territory in order to be able to claim income support. In this respect, three points are underlined by the administration: residence in France, right of residence and resources.

In terms of residence, no particular problems. However, in terms of right of residence, the administration appeals to the Trojani jurisprudence of the Court in the sense that it allows a restrictive approach:

“the right to reside on the territory of the Member States is directly acknowledged for every citizen of the Union in Article 19, paragraph 1 (of the Treaty creating the European Community) (...) However, this right is not unconditional (European Court of Justice, 7 September 2004, *Michel Trojani vs. Centre public d’aide sociale de Bruxelles*, § 9)”.

as the note quotes.

In this case,

14 Published in the *Official Bulletin of Health* 2005-4.

“the Treaty makes a distinction between economic migrants and non-economic migrants. Those belonging to the former category are persons who are able to provide for their subsistence through salaried or free-lance work. The latter category covers persons who do not work and are not looking for work. These two categories enjoy the right of residence, but its impact differs. In fact, the Community law maker adheres to the principle that an economic migrant will not claim a benefit in the host State, intended to provide for his basic needs. Thus, “a person can only claim right of residence as a worker if the activity (...) he exercises is of a genuine and effective nature.” (same judgement). A non-economic migrant has the financial means available to fund his own residence.”

Without focusing too much on Directive 2004/38 which is nonetheless quoted, the administration’s note drew the conclusion

“that a Community national who settles on French territory when he does not have sufficient resources does not have the right of residence.”

“Thus, remaining on the territory, even for a long period, would not enable the person in question to obtain, solely based on the effect of the passage of time, the right of residence which he did not have at the time of entry. In this case, he will be rightfully denied income support whether he applies for it upon arrival or subsequently. On the other hand, when a person who already has the right of residence applies for the award of income support, the benefit of the allowance cannot systematically be denied him, taking into account the principle of non-discrimination.”

This position therefore merits close attention with regard to the jurisprudence of the Court of Justice, both recent and past (judgement of 17 September 2002, *Baumbast and R*, C-413/99, Rec. p. I-7091, points 84 and 85; 20 September 2001, case C-184/99, *Rudy Grzelczyk vs. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, § 44; 25 July 2002, case C-459/99, *MRAX vs. Belgium*; 23 March 2006, *Commission vs. Belgium*, C-408/03).

Chapter IV

Employment in the public sector

Current legislation

*Law 2005-843 of 26 July 2005 deal with various measures for transposing Community law to the public sector*¹⁵ and characterises the year 2005 from the point of view of free movement. It follows on from various reports and studies, echoed by the previous reports.¹⁶

This law comprises three chapters: the first relates to the promotion of equality between women and men and the battle against discrimination; the second is specific to opening up the public sector to Community nationals and the mobility of officials and the third deals with the battle against insecurity.

Chapter II of the Law stipulates, specifically, that

“nationals of Member States of the European Community or of another State party to the European Economic Area agreement apart from France have access to civil service corps, levels of employment and employment, under the conditions envisaged in the General Civil Service Regulations. However, they do not have access to positions for which powers are either inseparable from the exercise of sovereignty or involve direct or indirect participation in the exercise of prerogatives of the public authorities of the State or other public groups.”

The preamble to the bill perfectly explains the apparent revolution which French law governing the public sector is undergoing on this occasion:

“briefly, the issue is the reversal of the current principle, according to which no corps is open to Community nationals without explicit measures taken by decree in the Council of State. In future, all civil servants’ corps will theoretically be open to them, with the exception of positions involving the exercise of public authority. The law will therefore take note of the reasoning by position, not by corps, which the ECJ has used since 1980.”

In other words, until now the situation in French law favoured access corps by corps, level of employment by level of employment. It required publication of a specific decree in each case. This logic was found to be in conflict with the functional logic followed by the ECJ in its interpretation of the EC Treaty and, in particular, of the principle of free movement. The law therefore proposes a wider opening up of the French public sector: from now on, only those positions which will remain closed will have to be indicated. Plainly speaking, while the principle in French law was rather that access to the public sector was denied to Community nationals, subject to exceptions envisaged by particular General Regulations, which was obviously in conflict with the jurisprudence of the Court of Justice, for which the principle is by contrast free access for all Europeans, the reasoning is now being reversed.

The former principle is therefore reversed by a simple modification to the first paragraph of Article 5 *bis* of the Law of 13 July 1983: from now on, European nationals have access to the corps, levels of employment and employment in the French administration; “however, they do not have access to positions in which powers are either inseparable from the exercise of sovereignty or involve direct or indirect participation in the exercise of prerogatives of the public authorities of the State or other public groups” by virtue of Article 10 of the Law. It is unfortunate that the French law maker preferred the traditional wording in French law of “the prerogative of the public authorities” and that he did not

15 *French Official Journal* no. 173 of 27 July 2005, p. 12183.

16 Council of State, *Public Report 2003 – Perspectives pour la fonction publique, La documentation française, Études et documents du Conseil d’État* (Perspectives for the public sector. French documentation, studies and documents of the Council of State), no. 54, 2003; Mr. Jean-Michel Lemoyne de Forges, *L’adaptation de la fonction publique française au droit communautaire, rapport au ministre de la fonction publique, de la réforme de l’État et de l’aménagement du territoire* (The adaptation of the French public sector to Community law, report to the Minister for the Public Sector, State Reform and Town and Country Planning), Dalloz, Études, 2003.

choose to adopt the Community terminology, under which the specific positions in the public administration are those that involve the exercise of public authority with a view to protecting the general interests of the State.

The consequence of this reform is to make all forms of access to the public sector open to Europeans under the same conditions as those applicable to French nationals: external competitions, internal competitions (periods of service completed in a foreign administration being regarded as equivalent to comparable periods of service in a French administration) and external tours of duty in particular. Nonetheless, it will be noticed that French nationals may find themselves in a case of genuine reverse discrimination, resulting from the fact that mobility among national public sectors within the Union may well be simpler than mobility within the same State between various public sectors (national and territorial, for example). This is demonstrated by an examination of the rules for secondment, which is sometimes prohibited under the internal law of the national public sector between certain corps and levels of employment, while it is possible for a Community national. Article 11 of the Law, in the chapter concerning the opening up of the public sector to Community nationals, stipulates that no secondment system exists that is peculiar to these nationals:

“all corps and levels of employment are accessible through secondment under the conditions envisaged by their particular General Civil Service Regulations, provided – when exercise of the relevant functions is subject to possession of a specific qualification or diploma – that this qualification or diploma has been obtained.”

Thus, the risks of disputes emerging from conflict between a particular General Regulation and Community law should be eliminated, while the administration will still be able to carry out specific monitoring, position by position, of participation or otherwise in the exercise of public authority.

Moreover, the law wanted to “provide for strict equality of access conditions for employment in the public sector for French nationals and Community nationals” by specifying the field of “regulated professions” within the meaning of Community law. This specification by the law maker obviously aims to prevent the repetition of disputes such as the *Burbaud* case (ECJ, 9 September 2003). In this judgement, the ECJ classified the corps of hospital directors, which was not open (or hardly) at the time to secondment, as a “regulated profession” and had therefore made it accessible without competition to a former Portuguese hospital director.

Decree 2005-840¹⁷ of 20 July 2005 modifies some of the provisions of the Public Health Code in order to bring them into line with Community law. It is aimed at the professions of nursing auxiliary and paediatric auxiliary. All candidates for the national competitive examination for practitioners in public health establishments must fulfil certain conditions, in particular, “be of French nationality, subject to the international commitments entered into by France, or be a national of a Member State of the European Community or party to the European Economic Area agreement or of Andorra” and must hold a qualification. The decree regards as admissible a diploma, certificate or other specialist qualification awarded by one of the States party to the European Economic Area agreement.

Moreover, the text stipulates that

“[...] students of medicine or pharmacy who are nationals of one of the Member States of the European Community or of another State party to the European Economic Area agreement can be regarded as fulfilling the position of intern if they have completed the first six years of medical studies or the first five years of pharmaceutical studies respectively in one of these States [...]”.

Decree 2005-1212¹⁸ of 21 September 2005 covering various measures concerning the hospital public sector in particular applies Decree 2004-449 regarding the admission of civil servants on secondment

17 Decree 2005-840 of 20 July 2005 regarding the sixth part (regulatory provisions) of the Public Health Code and modifying some of the provisions of this Code, *French Official Journal* no. 172 of 26 July 2005, p. 37003.

18 *French Official Journal* no. 226 of 28 September 2005.

from a Member State of the European Community or of another State party to the European Economic Area agreement other than France in the hospital public sector.

Jurisprudence

See the consequences of the *Burbaud* judgement in the section on the consequences of ECJ judgements, in particular the judgement of the Council of State, 16 March 2005, *Minister of Health versus Burbaud*, no. 268718 (see appendix) examined in Chapter VI.

The administrative cases regarding the application of these principles to the territorial public sector will also be noted. Thus, the administrative judge acts in the same way in the judgement (EC, 27 July 2005, *Ms. Ruth Weber*, no. 267979) where he draws consequences similar to the *Burbaud* judgement and the abandonment judgement from 2005 concerning the employment of a territorial music teacher.

According to him, the result of Directive 92/51/EEC of 18 June 1992 regarding a second general system for recognising vocational training courses, as it was interpreted by the judgements passed on 9 September 2003 and 7 October 2004 by the ECJ in cases C-285/01 and C-402/02, is that within the meaning of the Directive, a regulated profession is “any professional activity which, in terms of its conditions for access or exercise, is directly or indirectly governed by the legislative, regulatory or administrative provisions requiring possession of a qualification”. The Decree of 2 September 1991 subjects access to the post of territorial artistic education teacher to possession of a certificate of competence for the posts of teacher at music schools controlled by the State or of a certificate of competence for the posts of music or dance teacher at territorial music, dance or dramatic arts schools. The profession of territorial arts education teacher must therefore be regarded as a regulated profession within the meaning of the aforementioned Directive.

The result of Article 6 of the Directive of 18 June 1992, as interpreted by the ECJ, was that Member States had to adopt, before 18 June 1994, the necessary measures so that a national of another Member State wishing to exercise, on a self-employed or salaried basis, a regulated profession to which access is subject in the host State to possession of a qualification, should not be prevented from doing so by the sole fact that the qualification awarded by his State of origin is not comparable to that qualification in the host State, without assessing whether his abilities, acquired after obtaining the qualification and within the context of practical experience, adequately complement those attested to by his foreign qualification.

As of 23 December 2002, when the Commission for the Classification of European Qualifications for the Territorial Public Sector denied a German national entry to the competition for access to a post as territorial artistic education teacher (music), no measure aimed at achieving the objective of the Directive had been taken by France. Failing provision for a system enabling experience gained to be taken into account, the provisions of Article 4 of the Decree of 30 August 1994 were not compatible with the objectives of the Directive. Under these conditions, it is up to the Commission for the Classification of European Qualifications for access to the territorial public sector not only to take into account the professional experience of candidates, but also to place plaintiffs in a position to report this experience.

The same is true in 3 judgements of the Council of State of 5 December 2005 (*Miss Tania X*, no. 253704; *Ms. Lydia X*, no. 241514; *Miss Rachel X*, no. 257552) with respect to the State special needs teacher qualification.

Doctrine

Administrative law, May 2005, Comments no. 70, *L'ouverture de la fonction publique aux ressortissants communautaires* (The opening up of the public sector to Community nationals), p. 29.

Administrative Law, April 2005, Reference points, *L'ouverture européenne de la fonction publique* (The opening up of the public sector), J-B Auby, p. 3: “Le Parlement achève l'examen d'un projet de loi ‘portant diverses mesures de transposition du droit communautaire à la fonction publique’” (The Parliament completes examination of a bill ‘comprising various measures for transposing Community law to the public sector’”).

- AJDA, 5 December 2005, Legislative news, *La loi de transposition du droit communautaire à la fonction publique* (The law transposing Community law to the public sector), J-M Lemoyne de Forges, p. 2285.
- AJDA, 2005, Jurisprudence, *La reconnaissance des diplômes européens pour l'accès à la fonction publique* (The recognition of European qualifications for access to the public sector), G. Alberton.
- La semaine juridique Administrations et Collectivités territoriales no. 35, 29 August 2005, *La loi du 26 juillet 2005 ou le droit communautaire cause réelle et prétexte à une modification du droit français de la fonction publique* (The Law of 26 July 2005 or Community law, genuine cause and pretext for a modification of French public sector law), C. Ferrari-Breur, p. 1305.
- La Semaine juridique Administrations et Collectivités territoriales no. 30, 25 July 2005, *L'avenir du statut des membres du corps des tribunaux administratifs et des cours administratives d'appel au regard des exigences européennes* (The future of the status of members of the corps of the administrative courts and administrative courts of appeal with respect to European requirements), J-M Lemoyne de Forges, p. 1300.

Chapter V

Family members

*Decree 2005-1332 of 24 October 2005*¹⁹ details the conditions of entry and residence in France for family members who are third country nationals. Third country should be understood to mean countries not belonging to the European Union, the European Economic Area or the Swiss Confederation.

Thus, for these family members – the concept of family members having remained unchanged since the 1994 Decree – the validity of the residence card is limited to ten years each time it is renewed.

If they come to France for less than three months, they are legally resident under the document with which they [...] entered French territory. This document is the current passport, if necessary appended with a visa (Article 4, Decree 94-211²⁰). If they stay for more than three months and are aged over eighteen, they must be in possession of a residence card issued under the conditions envisaged by the present decree. Thus, they must apply for it to be issued within three months of entering France.

“They apply for it to be renewed during the last two months preceding expiry of the residence card which they hold.

At the time of application for the first issue of this residence permit, they must submit the document under which they entered the territory, together with any document establishing their family relationship to a national of a Member State of the European Union, another State party to the European Economic Area or the Swiss Confederation who has the right to reside in France.”

If these third country nationals have failed to apply, without a valid excuse, within the regulatory deadlines, depending on the category to which they belong, for issue or renewal of the residence card in question, they will be punished by 5th class infringement fines. The same penalties are incurred by family members who are third country nationals who have been denied the aforementioned residence card or whose card has been withdrawn and who stay on national territory without this document or who are bearers of an invalid document or acknowledgement of application in contravention of the regulatory provisions.

19 Decree 2005-1332 of 24 October 2005 modifying Decree 94-211 of 11 March 1994 governing the conditions for entry and residence in France by nationals of Member States of the European Community benefiting from the free movement of persons, *French Official Journal* no. 253 of 29 October 2005, p. 17076, see appendix.

20 Decree 94-211 of 11 March 1994 governing the conditions for entry and residence in France by nationals of Member States of the European Community benefiting from the free movement of persons, *French Official Journal* no. 61 of 13 March 1994, p. 3989.

Chapter VI

Monitoring the jurisprudence of the Court of Justice

Consequences of the Burbaud case

Apart from the intervention of the law maker in the aforementioned law adapting the French public sector to Community law, the judgement passed by the Council of State is noteworthy in this field, specifically in the Burbaud case: Council of State, 16 March 2005, Minister of Health versus Burbaud, no. 268718.²¹ The latter therefore brings to an end the exclusivity and the monopoly which the French administrative *Grandes Ecoles* claimed to exercise in terms of access to some posts in the public sector.

The French Minister responsible for the Public Sector had launched an appeal against the judgement of the Administrative Court of Appeal of Dubai, which implemented the principles isolated by the Court of Justice in the Burbaud case.²² The Council of State, judge in cassation, will reject this request, referring in particular to the jurisprudence of the ECJ and underlining its authority over “interpretation”:

“in a judgement passed on 9 September 2003, the European Court of Justice ruled that hospital management posts, which do not involve direct or indirect participation in the exercise of public authority, are not covered by the exception [provided for in § 4 of Article 48 (new Article 39) EC]; consequently, the ground that the Administrative Court had inadequately justified its decision by contenting itself with repeating, in this respect, the interpretation by the Court of Justice, must be dismissed.”

The ECJ, having ruled that “the post of director in the French hospital public sector can be classed as a regulated profession within the meaning of Directive 89/48/EEC”, “this part of the judgement, which was within the scope of the question asked by the trial judge, was imposed on the latter with the authority of the interpretation.”

Consequently, for the Council of State,

“the Administrative Court of Appeal did not make an error of law in judging that the national rules and, in particular, the decrees of 19 February 1988 and 19 January 1993, which envisaged no permanent procedure enabling nationals of other Member States holding an equivalent qualification to that of the *Ecole Nationale de Santé* in Rennes to assert their calling to join the corps of hospital management staff, were neither in accordance with the requirements of Article 48 nor compatible with the objectives of the Directive which should have been transposed no later than 4 January 1991”.

Nor did it

“misrepresent the facts which were submitted to it in finding that the durations of the training courses provided at the National Public Health School in Lisbon and the *Ecole Nationale de la Santé Publique* in Rennes are comparable and that the subjects taught there are equivalent”.

Finally,

“the judgement challenged does not acknowledge, in favour of Ms. Burbaud, the right to be recruited to the corps of the French hospital public service; in anticipation of enactment of a national regulation in conformity with the Treaty and compatible with the objectives defined by Directive 89/48, the Minister of Health is however obliged to examine immediately whether, within the context of an adapted recruitment procedure enabling the equivalence of qualifications and diplomas held by Mrs. Burbaud to be taken into account, as well as the employment vacancies to

21 See appendix.

22 ECJ, 9 September 2003, *Burbaud*, C-285/01.

be filled by various access routes, the party in question can be incorporated into the corps of hospital management staff.

If appropriate, if it is evident that differences exist between the two public health schools regarding the durations of the training in question or between the subjects covered by them to justify it, this incorporation can be subject to the compulsory completion of an adaptation course or the sitting of an aptitude test. The recognition of the equivalence of qualifications awarded in the two Member States within the meaning of Article 3 under a) of the Directive does not, in principle, rule out differences in the subjects taught or in the durations of the courses from justifying the host Member State in subjecting the applicant to the measures provided for in Article 4 of the Directive.

The Administrative Court of Appeal, which has not made these measures compulsory, in the methods of examining the request from Ms. Burbaud as recommended to the Minister, has neither marred its judgement with contradictory reasons nor committed an error of law in the application of Article 4 of Directive 89/48/EEC of 21 December 1988 as interpreted by the Court of Justice of the European Communities.”

To summarise, if the administrative judge acknowledges his full authority under Community law and in the interpretation given to it by the Community judge, he nevertheless does not decide on automatic incorporation but on a vocation to join the public sector.

Monitoring judgements of declaration of failure to fulfil

The administrative judge repealed a decision by the Commission for the Classification of Qualifications for access to the hospital public sector from 2003, which rejected a request for classification of a qualification awarded in Belgium alongside a French qualification as a special needs teacher, in the case (EC, 15 June 2005, *Ms. Claude Lafrogne*, no. 257340).²³

According to him, the result of the provisions of Directive 92/51/EC of the Council of 18 June 1992 regarding a second general system for recognising vocational training, as interpreted by the Decree passed on 9 September 2003 by the ECJ, *Burbaud* (C-285/01), that a regulated profession within the meaning of this Directive, for which the transposition deadline expired on 18 June 1994, refers to any professional activity which, in terms of its conditions for access or exercise, is directly or indirectly governed by legislative, regulatory or administrative provisions requiring possession of a qualification. The Decree of 26 March 1993 subjects access to the level of posts of socio-educational assistants in the hospital public sector to possession of a national special needs teacher qualification. Consequently, as the ECJ judged in its judgement of failure to fulfil of 7 October 2004 (*Commission versus France*, C-402/02), the profession of special needs teacher in the hospital and territorial public sectors constitutes a regulated profession within the meaning of the 1992 Directive.

Here, the Council of State draws the consequences of the judgement of failure to fulfil of 2004 in which the ECJ judged that,

“having thus failed to envisage a system enabling experience gained to be taken into account when entering the competitive examination for the hospital public sector, the provisions of Article 5 of the Decree of 21 July 1004 were not compatible with the objectives of Directive 92-51 of the Council of 18 June 1992, regarding a second general system for recognising qualifications.”

References for preliminary ruling

In this judgement by the Court of Cassation (Civil Chamber 2, 21 June 2005, 04-30050), the judicial jurisdiction considers that the jurisprudence of the ECJ (judgement of 8 March 2001, *Jauch*, case C-215/99) describes the inclusion of a benefit in Appendix II bis as necessary but not sufficient to confer upon it the nature of a special non-contributory benefit within the meaning of Regulation 1408/71 and admits that such a benefit can be subject to examination by the Court in order to determine whether it meets the requirements of the latter text.

23 See appendix.

The French judge thus referred the following question to the ECJ:

“does Community law have to be interpreted in the sense that the disputed additional allowance, included in Appendix II bis of Regulation no. 1408/71 is of a special and non-contributory character, ruling out – in application of Articles 10 bis and 95 ter of Regulation no. 1408/71 – its allocation to a non-resident applicant who did not fulfil the age condition on 1 June 1992, or in the sense that, being analysed as a social security benefit, this allowance must, in application of Article 19 § 1 of the same Regulation, be given to the person in question in fulfilment of the allocation conditions, regardless of the Member State in which he resides?”

The provisions of government edict 2005-892 regarding the adjustment of the rules for counting the workforce in companies do not have the direct effect of ruling out the application of the provisions of the Labour Code which implement the objectives of Directives 98/59/EC concerning the harmonisation of the legal systems of the Member States regarding mass dismissals and 2002/14/EC of 11 March 2002 establishing a general framework regarding information and the consultation of workers in the European Community. Under these conditions, the Council of State believes that it must seise the ECJ of a reference for preliminary ruling in interpretation of these directives in order to respond to the grounds cited:

“1) if, taking into account the object of Directive 2002/14/EC of 11 March 2002, which is, under the terms of 1 in its first Article, to establish a general framework setting the minimum requirements for the right to information and to the consultation of workers in companies or establishments located in the Community, the referral to the Member States of the task of determining the method of calculating the thresholds of workers employed which this Directive explains must be interpreted as allowing these States to take certain categories of worker into account in different ways for the application of these thresholds; 2) to what extent can Directive 98/59/EC of 20 July 1998 be interpreted as authorising a system with the effect of exempting certain establishments usually employing more than twenty workers, albeit temporarily, from the obligation to create a structure for the representation of workers by virtue of rules for counting the workforce which exclude the inclusion of certain categories of salaried worker in application of the provisions governing this representation (Council of State, 19 October 2005, CGT, no. 283892)?

The same is true of the decision of the council of State, 23 November, 2005, CGT-FO, no. 286440. In this case, the issue is a request for summary suspension of government edict 2005-892 of 2 August 2005 regarding the adjustment of rules for counting staff numbers in companies on the grounds that it is contrary to two Community directives – Directive 98/59/EC concerning the convergence of the legislation of Member States regarding mass dismissals and Directive 2002/14/EC of 11 March 2002 establishing a general framework regarding information and consultation of workers in the European Community.

The judge responded favourably to this request for suspension: when a ground regarding the interpretation of Community law has justified a referral to the ECJ for preliminary ruling, it must be regarded by the judge in chambers to whom it is referred at the time of a request for suspension of an administrative decision as creating, for reasons similar to those which justified the referral, a serious doubt concerning the legality of this decision. In this case, since the Council of State referred to the ECJ the question of the interpretation of the provisions of the two directives for the purposes of examining a ground for their ignorance by government edict of 2 August 2005, this ground must, for the same reasons, be regarded by the judge in chambers as creating a serious doubt concerning the legality of the government edict.

Respect for the free provision of services

A recent judgement by the ECJ will undoubtedly have many consequences (10 March 2005, Laboratoires Fournier, C-39/04) (See *Revue Droit fiscal*, 18, May 2005, comm. 399, B. Boutemy, La chasse aux crédits est ouverte (The hunt for credits is open).

The research tax credit system in force in France before 1 January 2005 is incompatible with the free movement of services. The freedom to provide services, envisaged by Article 49 EC, is intended

primarily to guarantee the right – specifically called into question by French legislation on research tax credit – for Community nationals to be able to choose and use the services provided by service providers based in other Member States without being prevented or dissuaded from doing so by restrictive measures imposed by the State of residence. In this case, the Fournier pharmaceutical laboratories, based in France, sub-contracted research operations to research centres located in other Member States. The research expenses exposed on this occasion were then incorporated into the calculation of research tax credit to which the company estimated it was entitled in application of Article 244 quater B of the General Tax Code.

However, the administration disputed the existence of the tax credit thus obtained. In so doing, the tax services then strictly applied the system for granting research tax credit then in force, which provided that “only expenses corresponding to operations performed in France” could be taken into account. The Fournier laboratories then cited the existence of a challenge to the free provision of services. The Administrative Court of Lyons referred to the ECJ prejudicially.

France maintained that the legislation in question represented a product of the principle of territoriality and was not therefore part of the field covered by the free provision of services.

However, the Court followed the findings of Advocate General Jacobs: “under these conditions, we do not think that this legislation is outside the scope of Article 49 EC by virtue of the principle of fiscal territoriality”. Thus, the provisions regarding research tax credit “are based, albeit indirectly, on the place of establishment of the provider of services and are of a nature such as to impede the cross-border activities of the latter.”

The companies which, in the period 2001-2004 (claim period), have exposed research expenses in Member States other than France, can therefore start proceedings to return the research tax credit which was denied to them by the provisions of the General Tax Code.

Another judgement of the Court of Justice should have repercussions in French law (ECJ, 30 June 2005, *Tod's versus Heyraud*, C-28/04, see *Revue Communication, Commerce électronique* 9, September 2005, comm. 133, C. Caron, La Cour de Cassation désavouée par la Cour de justice (The Court of Cassation disowned by the Court of Justice)): “after having pursued several kinds of discrimination in the area of copyright and neighbouring rights”, the ECJ in this judgement describes as discrimination the ruling in Article 2 § 7 of the Berne Convention. This provision rejects the accumulation of protection of the right to drawings and models and of copyright for creations which, in their country of origin, can only be protected by the right to drawings and models. The French court of Cassation has always strictly applied this rule and refused to see any discrimination in it, even concealed (see in particular Court of Cassation, Commercial Chamber, 14 December 2004).

This position is now clearly disclaimed: in responding to a preliminary question posed by the Court of the First Instance of Paris in a judgement dated 5 December 2003, the ECJ rewrites the Berne Convention in Community order, considering that Article 12 EC, which establishes the general principle of non-discrimination based on nationality, must be interpreted in the sense that it conflicts with the admissibility of an author to claim protection in a Member State from the copyright granted by the legislation in this State being subject to a distinction criterion based on the country of origin of the work.

From now on, even if in its country of origin the creation is only protected by the right to drawings and models because accumulation is denied there, it will be possible for the holder of the rights in another country to take advantage both of the protection of the right to drawings and models and of copyright.

If each party agrees to consider that discrimination based on nationality is not direct, the Court of Justice nonetheless stipulates that discrimination does exist since it is indirect. The Community judge considers that

“the existence of a link between the country of origin of a work within the meaning of the Convention on the one hand and the nationality of this work on the other hand could be denied.” The reasoning is that works published for the first time in a Member State will, in the majority of cases, have a national of this State as author, while works published in another Member State will generally be authored by a person who is not a national of the first Member State, such that application of the article in question “risks working chiefly to the detriment of nationals of other Member States and is thus likely to lead to indirect discrimination by nationality.”

Chapter VII

General policies with repercussions for the free movement of workers

Current legislation

*Decree 2005-17 of 5 January 2005*²⁴ concerns publication of the first protocol appended to the Rome Convention of 19 June 1980 on the law applicable in terms of contractual obligations, as well as the second protocol giving certain powers to the ECJ in terms of the interpretation of the same Convention. These protocols became effective on 1 August 2004.

The first protocol grants to the Court of Cassation, the Council of State and the jurisdictions hearing appeals the possibility of asking the ECJ to decide in a preliminary ruling on a question concerning the interpretation of the said Convention. This procedure is important because some terms in the Rome Convention are worth clarification, particularly in terms of labour relations.

Thus, it is envisaged that these national jurisdictions have the option to request the ECJ to reply to a question of interpretation of the aforementioned provisions if the decisions passed by the legal systems of this State are contrary to the interpretation given either by the Court of Justice or by a decision – *res judicata* – by the jurisdiction of another State party to the Rome Convention. The objective is in fact to ensure uniform interpretation of this Convention in all contracting States.

Jurisprudence

The Administrative Court of Appeal of Lyons (28 July 2005, no. 99LY02601) took an interest in a request for compensation of injury suffered by a company as a result of the elimination of the activity of customs agents in intra-Community exchanges, with effect from 1 January 1993, after the intervention of Law 92-677 of 17 July 1992 involving implementation of the Directive of the Council 91-680 modifying Directive 77-388 with a view to eliminating border inspections.

The judiciary judge denied this request for compensation based on the binding power of Community law.

“Considering that the actions under which the authorities confine themselves – without possessing any power of discretion – to ensuring the implementation of actions taken by the instruments of the European Community are not of a nature to engage the no-fault liability of the State; Considering that the result of the preliminary investigation is that in order to modify the provisions of the Customs Code [...], the law of 17 July 1992 confined itself, without making use of any discretionary power, to implementing Directive 91-680 [...] deciding to apply the abolition of inspections for tax purposes at internal borders for all operations carried out between Member States with effect from 1 January 1993; that, consequently, the liability of the State on the grounds of the breach of citizens’ equality faced with public burdens could not be engaged because of the legislative provisions in question modifying the Customs Code.”

The judgement also specifies that, given that the State did not make use of any discretionary power in the implementation of the Directive,

“even supposing that the implementation of this Directive would be in conflict with a higher legal standard, specifically the principles of legitimate confidence and legal security or the stipulations of the [CEDH] and, for this reason vitiated with illegality, the fault thus committed would not be such as to engage the liability of the State, obliged to apply these provisions – for as long

24 Decree 2005-17 of 8 January 2005 involving publication of the first protocol concerning interpretation by the Court of Justice of the European Communities to the convention on the law applicable to the contractual obligations open to signature in Rome on 19 June 1980 and of the second protocol awarding certain powers to the Court of Justice of the European Communities in terms of interpretation of the Convention on the law applicable to contractual obligations, open to signature in Rome on 19 June 1980, done in Brussels on 19 December 1988, *French Official Journal* no. 9 of 12 January 2005, p. 501.

France

as the competent Community jurisdiction has not pronounced the invalidity of the provisions of the Directive in question – by virtue of Articles 10 and 249 of the Treaty creating the European Community.”

The plaintiff maintains that the State committed an error in not providing for a transitional or accompanying measure for registered customs agents, in order to enable them to prepare for the date of 1 January 1993. Now,

“the result of the preliminary investigation is that the French public authorities have effectively introduced, within the framework of credits emanating from the European Social Fund and funds known as Interreg, an aid programme for the companies in question which have received funds for the implementation of social plans, as well as to prepare for their restructuring.”

The judgement of the Council of State of 27 July 2005, *Ms. Giovanna X*, no. 244671, deals with the question of the applicability of Community law to nationals of Monaco. The judgement thus recalls that if Article 7 EC Treaty prohibits all discrimination based on nationality, this ban is only valid within the scope of the Treaty. The plaintiff, a national of Monaco whose situation does not involve the freedom of movement protected by the Treaty, cannot usefully cite this Article.

Moreover, former Article 67 EC and the provisions of secondary legislation confine their scope to movements of capital taking place between persons residing in the Member States and are not therefore applicable to a resident of a third State, such as Monaco.

Regarding the evolution in the rights of foreigners which could benefit nationals of third States, who are family members of a Community national, we should point out the current debate in the French parliament on voting rights and the eligibility of foreigners in local elections. A constitutional bill along these lines was tabled on 2 November 2005 in the Senate. Moreover, a working document in the same assembly, published in December 2005, concerns the voting rights of foreigners in local elections, in the series on comparative legislation (no. 154).

Information documents

National Assembly, *Information Report no. 2243* of the Delegation for the rights of women and equal opportunities between men and women of the National Assembly of 12 April 2005 concerns salary equality between women and men. In particular, it deals with the application of Community law in terms of equality of remuneration, including the 2002 Directive.

G. Gautier, *Report of activities for the year 2004-2005* on behalf of the delegation for the rights of women and equal opportunities between men and women (1) and summary of the activities of this delegation regarding the situation of women's rights in the ten new Member States of the European Union, tabled in application of Article 6 septies of government edict no. 58-1100 of 17 November 1958 regarding the functioning of the parliamentary assemblies, by Ms. Gisèle GAUTIER, Senate, 28 June 2005 no. 430.

C. Tasca, *Information Report on behalf of the delegation for the European Union on the White Paper on general interest services*, Senate, 17 March 2005 no. 205.

Senate, *Dossiers of Comparative Law, the voting rights of foreigners in the European Union*, LC 154 December 2005.

Miscellaneous

The initial evaluations of the French system regarding the integration achieved by the Minister for Social Cohesion are to be noted:

Situation on 1 June 2005 concerning the admission and integration contract

Experimentation with introducing the admission and integration contract commenced on 1 July 2003 in 12 trial *départements* and continued in 2004 in 14 additional *départements*. The admission and integration contract will be expanded to all *départements* by 2006. In total, as of 1 June 2005, almost 70,000 admission and integration contracts have been signed between new arrivals and the Prefects of the *départements*.

2003

Between July and December 2003, 8,027 contracts were signed in the 12 experimental *départements*.

2004

During the period from January to December 2004 (in 26 *départements*), 41,616 persons were offered the admission and integration contract and 37,613 contracts were signed (in other words a signature rate in 2004 of 90.4%), by 19,646 women (52.2%) and 17,967 men (47.8%).

Origins of signatories

The two countries most represented are Algeria (27.1% of signatories) and Morocco (16%), followed by Tunisia (6.9%) and Turkey (5.7%). Together with the Congo, Ivory Coast, Cameroon, Senegal and Russia, these nine countries of origin represent 70% of signatories. Although 150 nationalities are represented, from all continents and countries in widely varying situations, the weight of Africa, particularly the Maghreb, nonetheless remains dominant.

Age and profile of signatories

The signatories are young, since almost 85% of them are below 40. The share of signatories aged 65 and over represents only 0.4% of the total.

Family members of French nationals are in the majority (60.2%), spouses of French nationals alone represent 49.4% of signatories; refugees, stateless persons and their families account for 11.4%. Holders of a temporary “private and family life” residence card (other than as a spouse or family member of a refugee or stateless person) represent almost 12.9% of those admitted.

Benefits associated with signature of the contract

According to statistics from the IMO, in 2004 11,318 signatories of the admission and integration contract (30%) were prescribed linguistic training. Consequently, 66.4% of signatories of the contract were awarded the ministerial certificate of linguistic competence (AMCL) on the platform. These 30% of signatories to the contract therefore had communication problems ranging from difficult to very difficult or impossible and were directed to a supplier of recommendation and linguistic evaluation statements, tasked with identifying their linguistic level and recommending a training service adapted to their needs.

Moreover, beyond the provision of advice and information given individually to foreigners received on the admission platform, a formal commitment to specialist social monitoring was made with respect to the 8% of contracting parties within the context of the admission and integration contract.

2005

Over the first five months of 2005, 23,734 new contracts were signed; 91.8% of first-time arrivals received on the platforms signed the contract. The signature rate is rising compared to 2004.

Over these five months, 6,159 linguistic training courses were scheduled (26% of contract signatories), 23,208 civic training courses (97.8% of signatories) and 4,208 information days.

Chapter VIII

EU enlargement

The French situation with respect to the admission of workers from new Member States of the European Union remained unchanged throughout 2005 and, in reality, it was at the beginning of 2006, in March, that the French prime minister advertised a relaxation of the initial freeze situation.

The French government announced that it does not currently plan to make use of the third additional period of two years (1 May 2009 – 1 May 2011) during which restrictions may be maintained. Such a relaxation of the restrictions on free movement – targeted and experimental – is desirable, bearing in mind the recruitment difficulties experienced in some sectors. In any event, increased reliance on labour from third countries should not be envisaged until the free movement of salaried workers is fully underway. As it would benefit the workforce of these countries, this recourse to the workforce should itself also facilitate selected immigration to meet the genuine needs of the French economy.

Attention should therefore be drawn to the abnormal nature of this presentation of the facts with respect to the principles of the free movement of workers in the enlarged European Union. This is a fundamental right, not an adjustment knob for the needs of the national economies and it is even less reducible to a section of immigration policy known as “selected”, as the French presentation suggests.

According to a statement by the French Prime Minister, Dominique de Villepin, during the seventh Interministerial Committee on Europe on 13 March 2006, “the French authorities will implement a gradual and controlled lifting of the restrictions on the free movement of salaried workers from the eight countries which joined the European Union in 2004”. It is specified that, “the lifting of these restrictions will primarily affect certain trades experiencing recruitment problems” and that “the methods of lifting these restrictions will be discussed with the social partners.”

A statement by the Prime Minister dated 2 May 2006 states,

“the objective of this measure is also to help to reduce illegal work in these trades. Bilateral co-operation agreements will be offered to partner countries in order to ensure the correct application of the social and Community rules in the field of the movement of workers and the provision of services”,

which is far removed from the spirit of the open market to say the least.

It will be noted that these relaxations had already been generally desired by the French parliament, specifically in the National Assembly (8 June 2005, Thierry Mariani Information Report by the delegation for the European Union on the Green Paper concerning a Community approach to the management of economic migration and on the experiences of certain OECD countries regarding migration for employment purposes). The wording of the report clearly expresses the basis of the French position, which can be summarised as follows: lack of figures and statistical evaluation, allowing the reality of the problems to be identified, conclusive observation of the experiences of other Member States of the Union, refusal to adopt a general approach. This position by members of parliament is therefore presented as favourable (p. 19 and ff.):

“4) The appropriateness of experimental and targeted relaxation

France has decided not to grant free movement to workers who are nationals of the eight new Member States covered by the transitional period. Several cumulative reasons justify this decision: the uncertainty surrounding the flows of labour generated by the opening (which no study has seriously identified), the situation on the labour market and the French demographic situation, which is more favourable than that in most of our European partner countries.

However, the free provision of services by companies based in the new Member States has been authorised without restriction since 1 May 2004 (different from the situations in Germany and Austria). In principle, French labour law, the relevant minimum salary and the appropriate collective agreements apply to the service-providing company in compliance with the Directive of 16 December 1996 regarding the secondment of workers and Regulation 1408/71(18). However, the application of these texts does pose problems, particularly in the absence of effective coop-

eration from the authorities in countries of origin. According to the representatives of certain professions, false secondments and abuses are allegedly frequent, particularly in the sectors of agriculture, building and road transport, and the “social dumping” which ensues has become a major preoccupation of those concerned. Under these conditions, it is paradoxical that the free provision of services should have been authorised immediately, while a transitional period is imposed for access to the labour market. The French government has announced that it does not currently envisage making use of the third additional period of two years (1 May 2000 – 1 May 2011) during which restrictions can be maintained.

Moreover, relaxations have been introduced for young skilled workers in training aged 18 to 35 and for seasonal workers, through bilateral agreements reached with certain new Member States, such as Poland and Hungary. In social matters, workers from the new Member States authorised to work in France enjoy complete equality of treatment compared to nationals.

Reflections are underway regarding the decision that will be taken at the end of the first two-year period (i.e. 1 May 2006). A Franco-Polish working group on labour mobility was formed in December 2004 in order to study the possibilities for relaxation regarding the movement of salaried workers and particularly the appropriateness of an early opening up of sectors of the French labour market.

As an experiment, a partial lifting – confined to certain trades and certain regions – of the restrictions has been planned, provided it is accompanied by closer cooperation between the French and Polish authorities in combating illegal work (particularly in terms of workers employed by Polish service providers in France). The trades concerned would be those in which labour market tensions are the highest (builders, roofers, restaurant staff, road drivers) and the regions selected based on the same criterion. These reflections have not led to specific actions for the time being. This targeted and experimental relaxation of the restrictions on free movement is desirable, taking into account the recruitment problems felt in certain sectors. In any event, increased reliance upon labour from third countries should not be envisaged until the free movement of salaried workers has been fully achieved.

As is the case for the workforce in these countries, this reliance on the workforce should also facilitate selected immigration based on the real needs of the French economy.”

Finally, the French Minister of Labour reiterated these provisions in the form of a press release on 28 April 2006 in which he provides a detailed estimate:

“In accordance with the decision by the Prime Minister, announced at the close of the Interministerial Committee on Europe on 13 March 2006, nationals of the 8 new Member States of Central and Eastern Europe” will, with effect from 1 May 2006, have access to the French labour market for trades experiencing recruitment problems under a simplified work authorisation procedure.

Selected after consultation with the social partners, 61 trades spread over 7 sectors of activity will be involved in this move. These trades represented almost 700,000 job vacancies in 2005, an average of one third of which could not be filled because of a lack of demand.

This controlled opening of the market should help to reduce concealed labour in these trades, which remains a common practice specifically linked in part to these recruitment problems. On this basis, France will propose bilateral cooperation agreements to its European partners for the correct application of the national and Community social rules in the area of the free movement of workers and the provision of services in the internal market.

Currently, 10,000 work authorisation requests are submitted to the French authorities every year by nationals from the 8 new Member States. The flows into the authorised trades will be the subject of close scrutiny.

* This so-called “transitional” period does not apply to Malta or Cyprus, given their small populations.”

Furthermore, a detailed list of the professions in question is provided.

Current legislation

*Circular of 19 April 2005*²⁵ regarding the issue of temporary work permits to artists and to stage technicians primarily targets Directive 96/71 of 16 December 1996 concerning the secondment of workers within the framework of the provision of services. In particular, the issue is to guarantee compliance with the rules of labour law, social protection and literary and artistic property. It also involves taking into account the rules of Community law, which guarantee the freedom of establishment and the free provision of services within the European Economic Area.

“It should be remembered that, in terms of work authorisation, regardless of the sector of activity (live or recorded show), the key aspect is to identify the employer of the artists and technicians and to make sure that the employer fulfils his social security obligations, whether he is based in France or in another State.

In both cases, whether the employer is based in France or abroad, the work authorisation is required in application of Articles L.341-4 and L.341-6 of the Labour Code [Appendix III to the circular includes the form relating to nationals of the new EU member countries and to nationals of other countries benefiting from a special system in matters of work authorisation).”

Nationals of the European Union and nationals from outside Europe of lawful status who are ordinarily employed by a company based on European soil are not affected.

*Decree 2005-1332 of 24 October 2005*²⁶ aforementioned²⁷ deals with the particular situation of nationals of some new Member States.

Thus, in its Article 12, it stipulates in particular that,

“in order to practise a salaried activity in France, nationals of Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and the Czech Republic, as well as members of their family, unless entitled on another basis, must be holders of the work permit envisaged in Articles L.341-2 and R.341-1 of the Labour Code during the period of validity of the transitional measures envisaged [in the appendices to these countries’ acts of accession to the European Union].”

“This work permit is represented either by the words: “All professional activities” on the residence card, or by one of the documents referred to in Articles R.341-7 and R. 341-7-2 of the Labour Code.

Work permits issued before 1 May 2004 [to the aforementioned nationals] are valid until their expiry date.”

By way of derogation from the provisions relating to Community nationals, nationals of these new Member States aged sixteen and over, as well as members of the family who are nationals of third countries, must hold – during the period of validity of the transitional measures – a residence permit while carrying out an economic activity on French territory.

If they perform a non-salaried activity or if they are non-salaried and enjoy the right to perform services or to be recipients of services in France, these particular nationals of the European Union receive a residence card under the conditions and for the duration envisaged in the present decree for each of the categories. Members of their family receive a residence card for the same period. The issue of a residence card in application of this paragraph does not relieve the holder from compliance with the aforementioned provisions if he wishes to practise a salaried activity.

Persons authorised to practise a salaried activity in France receive a residence card for a period of ten years. The person’s spouse and descendants aged under 21 or dependent receive a residence card for the same period, bearing the words: “All professional activities”. This residence card enables them to carry out any salaried or non-salaried activity on French territory.

25 Circular DPM/DMI/2 no. 2005-194 of 19 April 2005 regarding the issue of temporary work permits to artists and stage technicians, *Official Labour Bulletin* 2005-6.

26 *Op. cit.*

27 See appendix.

Temporary workers who carry out a salaried activity for a period of less than one year but more than three months, who hold the temporary work permit issued under the conditions envisaged in Article R.341-7 of the Labour Code, receive a residence card referring to this permit and valid for the same period. The same applies to a seasonal worker who holds the contract referred to in Article R.341-7-2 of the Labour Code.

It should be pointed out that some articles of the Labour Code were modified by Law 2005-32 of 18 January 2005²⁸, particularly Article L.341-2 which now stipulates:

“In order to enter France with a view to practising a salaried profession there, a foreigner must provide, in addition to the documents and visas required by international agreements and the current regulations, an employment contract stamped by the administrative authority or a work permit and a medical certificate.

He must also demonstrate, assuming that he displays a desire to settle permanently in France, adequate knowledge of the French language as sanctioned by a validation of qualifications or undertake to acquire this knowledge after settling in France, under conditions which are established by a decree in the Council of State.”

The aforementioned regulatory articles of the Labour Code were not modified by the law of 2005. Article R.341-1 thus stipulates that,

“all foreigners, in order to practise a salaried professional activity full-time or part-time must hold a current work permit.

This permit is issued by the Prefect of the *département* in which the foreigner resides. It must be shown when required by the authorities in charge of inspecting working conditions.

Apart from the case referred to in Article R.341-7, it authorises the foreigner to practise, depending on the cases in question, one or more salaried professional activities or any salaried professional activity of his choice in one or more *départements* or throughout the metropolitan territory.

If the Prefect remains silent for more than four months in response to a request for a work permit, this shall serve as a denial decision.”

Article R.341-7 stipulates that,

“provisional work authorisation may be issued to a foreigner who cannot claim either the temporary residence card showing the word “salaried” or the resident’s card and who is required to perform, for a specific employer and for an initially envisaged period not exceeding one year, an activity of a temporary character a result of its nature or the circumstances under which it is exercised.

If the Prefect remains silent for more than four months in response to a request for a work permit, this shall serve as a denial decision.

This period of validity of this authorisation, the characteristics of which are determined by order of the minister responsible for immigrant workers, cannot exceed nine months. It can be renewed.”

Article R.371-7-2 is aimed at the seasonal worker:

“the seasonal worker’s introductory contract stamped by the office of the minister responsible for labour gives the holder the right to perform the salaried professional activity mentioned on it for the period of validity with the employer who signed this contract.

The total duration of the seasonal contract(s) of which a foreign worker can avail himself cannot exceed six months in any consecutive twelve-month period.

The same employer cannot be authorised to have recourse to one or more seasonal labour contracts referred to in paragraph 1 for a period of longer than six months in a period of twelve con-

28 Law 2005-32 of 18 January 2005 for social cohesion planning, *French Official Journal* no. 15 of 19 January 2005, p. 864.

secutive months. [...] Exceptionally, the employer may be authorised to enter into seasonal contracts of a total maximum duration of eight months in a period of twelve consecutive months under the dual condition that these contracts relate to specific agricultural production activities, for which this measure meets specific requirements and that the employer in question proves that he cannot meet this need by recruiting the labour already present on the national territory.”

Finally, the 2005 decree provides that,

“persons already admitted to the French labour market for an employment duration equal or greater than twelve months on the date of accession of the Member State of which they are nationals, as well as their spouses and descendants aged under 21 or dependent receive, upon expiry of the residence card which they hold, a residence card valid for ten years bearing the words: “All professional activities”. This residence card allows them to carry out any salaried or non-salaried activity on French territory.”

Nationals of these countries who are the spouses or widow(er)s of a French national – as well as the family members of a deceased worker who resided continuously in France for at least two years and who died following an industrial accident or occupational illness – receive a residence card for ten years bearing the words: “All professional activities”.

Unless they already resided there on a different basis, nationals of Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and the Czech Republic aged over sixteen, as well as members of their family who are third country nationals, must apply for the residence card within three months of arriving in France. If they wish to practise a non-salaried activity, they are to apply for the residence card within a maximum of one month from the date on which they commenced their activity.

If, for no valid reason, these same persons fail to apply within the regulatory deadlines, depending on the category to which they belong, for the issue or renewal of the residence card envisaged for the persons mentioned [above], will be subject to a fine for a 5th class offence.

Interministerial circular of 27 May 2005²⁹ regarding the procedures applicable to young foreigners admitted to France under bilateral agreements regarding exchanges of young professionals applies bilateral agreements between France and some new Member States of the European Union (Poland, Hungary and Slovakia) or future Member States (Bulgaria and Romania).

“For many years, France has been reaching bilateral agreements with various countries regarding the exchange of young professionals previously known as professional trainees. [...] These agreements can serve to promote the outflow of our nationals to these countries, but also to encourage the temporary flow into France of young foreigners with a view to cooperating with countries undergoing a process of economic restructuring or countries requiring professional training and refresher courses.”

These bilateral agreements, negotiated based on the principle of reciprocity,

“enable young people aged between 18 and 35, who are entering or have already entered professional life, to go to another country in order to:

- perfect their professional knowledge by working in a country, under an employment contract guaranteeing them the same employment and remuneration conditions as young nationals in the same situation, as well as social security protection;
- improve their linguistic abilities;
- further their knowledge of the society and culture of the other country. [...]

The employment contract must be of a minimum term of three months and a maximum term of twelve months. It can be the subject of one or more extensions up to a maximum of 18 months. [...]

29 Interministerial Circular DMP/DMI 3 no. 2005-253 of 27 May 2005 regarding the procedures applicable to young foreigners admitted to France under bilateral agreements relating to exchanges of young professionals, *Official Labour Bulletin* 2005-7.

France

At the end of their period of employment, the young professionals must return to their countries of origin.”

It is stipulated that other agreements are under negotiation with Estonia, Lithuania, Latvia, Slovenia and Turkey.

Jurisprudence

Currently, the key aspect concerns the problem of repatriation.

EC, 30 March 2005, *Chief of Police versus Ms. Rutowicz*, no. 256793: having regard to the entry into force of the Treaty of Athens, under which Poland joined the European Union and the Law of 21 November 2003 regarding immigration control, repatriation orders aimed at Polish nationals are no longer likely to be enforced.

EC, 9 May 2005, *Mr. Nicolae Bot*, no. 256575: judgement is deferred on the petition from the plaintiff for the ECJ to decide on the question of knowing what is to be understood by the date of first entry within the meaning of the stipulations of 1 § of Article 20 of the convention applying the Schengen Agreement and, in particular, if first entry to the territory of the States party to this agreement has to be regarded as any entry taking place after a period of 6 months which resulted in no other entry into this territory as well as, in the case of a foreigner who makes multiple entries for short-term stays, any entry immediately following the end of a period of 6 months from the date of the previous known first entry.

The case brought before the ECJ is case C-241/05.

EC, 8 July 2005, *Ms. Lacrimioara Dumitrascu*, no. 271770: although they have been exempt from the short-stay visa obligation since Romania's inclusion on the white list, nationals of this State can be repatriated if they do not comply with the stipulations of the Schengen Agreement and the government edict of 1945 (which became the Code for the entry and residence of foreigners and asylum rights on 1 March 2005). Thus, the fact of a Romanian national being questioned and in possession of a false passport legally justifies the repatriation measure.

Information documents

Senate, Activity report of the delegation for the rights of women and equal opportunities between men and women, *La situation des droits des femmes dans les dix nouveaux Etats membres de l'Union européenne* (The situation regarding women's rights in the ten new Member States of the European Union), 28 June 2005, Ms. G. Gautier.

National Assembly, 8 June 2005, *Information report* by the delegation for the European Union on the Green Paper regarding a Community approach to the management of economic migration and the experiences of some OECD countries in terms of migration for the purposes of employment, Thierry Mariani.

Chapter IX

Statistics

As indicated in the parliamentary reports, no statistics exist on the specific situation concerning nationals of the new Member State of the Union in France.

Ministry of Employment statistics site

Permanent entries by foreign nationals for all of France

Total flows (including estimates) from 2001 to 2003

	2001	2002	2003	Taux d'accroissement (en %)	
				2002/2001	2003/2002
Migrations de travail	22 650	20 850	20 750	-7,9	-0,5
Migrations familiales	84 250	99 900	111 750	18,6	11,9
Visiteurs*	18 000	18 950	18 850	5,3	-0,5
Réfugiés	7 650	9 200	11 200	20,3	21,7
Autres**	8 400	8 150	10 550	-3,0	29,4
Ensemble	140 950	157 050	173 100	11,4	10,2
Proportion de flux estimés	4,5%	4,3%	4,2%		

Sources: IMO, OFPRA and Ministry of the Interior.

* Including retired persons and persons receiving pensions who are EEA nationals.

** Beneficiaries of the regularisation operation launched in 1997, other holders of a “private and family life” card, recipients of an industrial accident allowance, sick foreigners, other holders of a residence card issued ipso jure (without medical examination).

Permanent entries by geographic origin of migrants and type of migration

Total flows (including estimates) from 2001 to 2003

	2001		2002		2003	
	EEE	Pays tiers	EEE	Pays tiers	EEE	Pays tiers
Migrations de travail	13 400	9 250	12 850	8 000	13 850	6 900
Migrations familiales	11 000	73 250	10 400	89 500	11 600	100 150
Visiteurs	9 050	8 950	8 950	10 000	11 250	7 600
Réfugiés	0	7 650	0	9 200	0	11 200
Autres	50	8 350	50	8 100	50	10 500
Ensemble	33 500	107 450	32 250	124 800	36 750	136 350
Toutes origines	140 950		157 050		173 100	

Sources: IMO, OFPRA and Ministry of the Interior.

France

Other statistics³⁰ D2: Immigration by nationality and sex (nationality in decreasing order) Year of admission for legal residence: 2002

		Ensemble	Sexe	
			Féminin	Masculin
Continent	Pays de nationalités			
Europe	Royaume-Uni	9444	4742	4702
	Turquie	7706	3122	4584
	Allemagne	6647	3684	2964
	Portugal	6601	2582	4019
	Italie	4876	2318	2558
	Belgique	4762	2308	2454
	Espagne	4031	2341	1690
	Pologne	2510	1695	816
	Russie	2495	1786	709
	Roumanie	2494	1506	988
	Pays-Bas	2126	1032	1094
	Suisse	1916	1045	872
	Yougoslavie	1572	785	787
	Bulgarie	1014	686	328
	Suède	949	582	367
	Ukraine	894	677	217
	Irlande	722	416	306
	Danemark	627	340	287
	Bosnie-Herzégovine	577	289	288
	Hongrie	506	269	237
	République Tchèque	462	295	167
	Autriche	460	262	198
	Norvège	423	267	156
	Grèce	414	229	185
	Finlande	413	279	134
	Slovaquie	309	211	98
	Biélorussie	305	244	62
	Moldavie	299	186	112
	Albanie	293	174	119
	Croatie	235	98	137
	Luxembourg	204	88	116
	Macédoine	146	74	71
	Lituanie	145	111	34
	Lettonie	92	77	15
	Estonie	83	77	7
	Tchécoslovaquie	72	46	26
	Slovénie	58	35	24
	Islande	45	29	16
	Chypre	36	25	11
	Malte	14	8	6
	Liechtenstein	1	0	1
	Autres nationalités d'Europe	2	2	0
	Total	66980	35018	31961

30 Sources: INED, Statistiques des flux d'immigration en France - année 2002 (Immigration flows statistics in France – year 2002), updated in 2005.

Immigration in France: comparison with the United Kingdom

Table 1 – Legal long-term immigration by year of admission for residence in France

L'IMMIGRATION EN FRANCE. COMPARAISON AVEC LE ROYAUME-UNI

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TABLEAU 1. – IMMIGRATION RÉGULIÈRE DE LONG TERME PAR ANNÉE
D'ADMISSION AU SÉJOUR EN FRANCE

	Ensemble (majeurs et mineurs)	Variations relatives (par rapport à l'année précédente)			
		Majeurs et mineurs	Majeurs		
			Total	dont ressortissants des pays de l'EEE	dont ressortissants des pays tiers
1994	119 563	–	–	–	–
1995	106 180	– 11,2 %	– 8,6 %	– 6,3 %	– 10,2 %
1996	105 986	– 0,2 %	+ 0,5 %	– 2,5 %	+ 2,9 %
1997	127 431	+ 20,2 %	+ 22,3 %	– 4,0 %	+ 41,2 %
1998	155 879	+ 22,3 %	+ 19,3 %	+ 4,2 %	+ 26,7 %
1999	145 120	– 6,9 %	– 7,1 %	– 0,1 %	– 10,0 %
2000	160 428	+ 10,5 %	+ 12,2 %	+ 0,7 %	+ 17,4 %
2001	182 694	+ 13,9 %	+ 14,5 %	– 2,3 %	+ 20,9 %
2002	205 707	+ 12,6 %	+ 12,6 %	+ 0,8 %	+ 16,7 %

TABLEAU A1. – IMMIGRATION RÉGULIÈRE DE LONG TERME SELON QUE LES ÉTRANGERS SONT RESSORTISSANTS D'UN PAYS MEMBRE
DE L'ESPACE ÉCONOMIQUE EUROPÉEN OU D'UN PAYS TIERS ET SELON QUE LES ÉTRANGERS SONT ARRIVÉS MINEURS OU MAJEURS
(FRANCE MÉTROPOLITAINE)

	Année d'admission au séjour								
	1994	1995	1996	1997	1998	1999	2000	2001	2002
Total des admissions au séjour de l'année, toutes nationalités	119 563	106 180	105 986	127 431	155 879	145 120	160 428	182 694	205 707
Total mineurs (2 et 3)	15 406	10 939	10 228	10 326	16 149	15 358	14 840	16 001	17 442
Total majeurs (1)	104 157	95 241	95 758	117 105	139 730	129 762	145 588	166 693	188 265
Étrangers bénéficiant de la libre circulation (EEE)*	47 697	44 423	43 258	41 306	43 033	42 791	43 282	42 552	42 744
Entrants mineurs (3)	3 812	3 305	3 176	2 821	2 941	2 727	2 957	3 146	3 015
Entrants majeurs (1)	43 885	41 118	40 082	38 485	40 092	40 064	40 325	39 406	39 729
Étrangers ressortissants d'un pays tiers	71 866	61 757	62 728	86 125	112 846	102 329	117 146	140 142	162 963
Entrants mineurs (2)	11 594	7 634	7 052	7 505	13 208	12 631	11 883	12 855	14 427
Entrants majeurs (1)	60 272	54 123	55 676	78 620	99 638	89 698	105 263	127 287	148 536
Dont étrangers (toutes nationalités) arrivés effectivement au cours de l'année (majeurs et mineurs)	85 322	78 874	76 685	81 093	90 703	101 485	113 027	128 099	134 267
Ressortissants EEE (1 et 3)	39 370	36 589	35 198	34 161	35 983	35 242	35 071	33 890	32 667
Ressortissants pays tiers (1 et 2)	45 952	42 285	41 487	46 932	54 720	66 243	77 956	94 209	101 600

* L'Espace économique européen (EEE) comprend les 15 États membres de l'Union européenne, l'Islande, le Liechtenstein et la Norvège.

Sources :

(1) Premiers titres de séjour d'une durée de validité d'au moins un an délivrés à des étrangers arrivés majeurs : ministère de l'Intérieur, AGDREF (élaboration par l'Ined);

(2) Admissions au regroupement familial prononcées à l'égard de mineurs ressortissants de pays tiers : Omi; enfants de réfugiés : ministère de l'Intérieur (AGDREF);

(3) Entrées non contrôlées de mineurs ressortissants de pays de l'EEE : nombre d'enfants déclarés lors de la remise d'un premier titre à une femme non conjointe de Français, ministère de l'Intérieur (AGDREF), élaboration par l'Ined.

TABLEAU 3. – IMMIGRATION RÉGULIÈRE DE LONG TERME SELON LE STATUT D'ENREGISTREMENT

	Année d'admission au séjour									
	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Étrangers bénéficiant de la libre circulation (EEE)*	47 697	44 423	43 258	41 306	43 033	42 791	43 282	42 552	42 744	42 085
Entrants mineurs (3)	3 812	3 305	3 176	2 821	2 941	2 727	2 957	3 146	3 015	3 073
Entrants majeurs (1)	43 885	41 118	40 082	38 485	40 092	40 064	40 325	39 406	39 729	39 012
Étrangers ressortissants d'un pays tiers	71 866	61 757	62 728	86 125	112 846	102 329	117 146	140 142	162 963	173 312
Entrants mineurs (2)	11 594	7 634	7 052	7 505	13 208	12 631	11 883	12 855	14 427	14 808
Entrants majeurs (1)	60 272	54 123	55 676	78 620	99 638	89 698	105 263	127 287	148 536	158 504
Total des admissions au séjour de l'année, toutes nationalités	119 563	106 180	105 986	127 431	155 879	145 120	160 428	182 694	205 707	215 397
Total mineurs (2 et 3)	15 406	10 939	10 228	10 326	16 149	15 358	14 840	16 001	17 442	17 881
Total majeurs (1)	104 157	95 241	95 758	117 105	139 730	129 762	145 588	166 693	188 265	197 516
<i>dont étrangers arrivés effectivement au cours de l'année (majeurs et mineurs)</i>	83 322	78 874	76 685	81 093	90 703	101 485	113 027	128 099	134 267	126 918
<i>Ressortissants EEE (1 et 3)</i>	59 370	36 589	35 198	34 161	35 983	35 242	35 071	33 890	32 667	30 365
<i>Ressortissants pays tiers (1 et 2)</i>	45 952	42 285	41 487	46 932	54 720	66 243	77 956	94 209	101 600	96 553

* L'Espace économique européen (EEE) comprend les 15 États membres de l'Union européenne, l'Islande, le Liechtenstein et la Norvège.

Sources : tableau élaboré par X. Thiery (INED) à partir des sources suivantes :
 (1) Premiers titres de séjour d'une durée de validité d'au moins un an délivrés à des étrangers arrivés majeurs, y compris aux étudiants (52 737 en 2003) : ministère de l'Intérieur (AGDREF);
 (2) Admissions au regroupement familial d'enfants prononcées à l'égard de mineurs ressortissants de pays tiers : Omi; enfants de réfugiés : ministère de l'Intérieur (AGDREF);
 (3) Entrées non contrôlées de mineurs ressortissants de pays de l'EEE : nombre d'enfants déclarés lors de la remise d'un premier titre à une femme non conjointe de Français, ministère de l'Intérieur (AGDREF).

Table 3 – Long-term legal immigration by registration status

* The European Economic Area (EEA) comprises the 15 Member States of the European Union, Iceland, Liechtenstein and Norway.

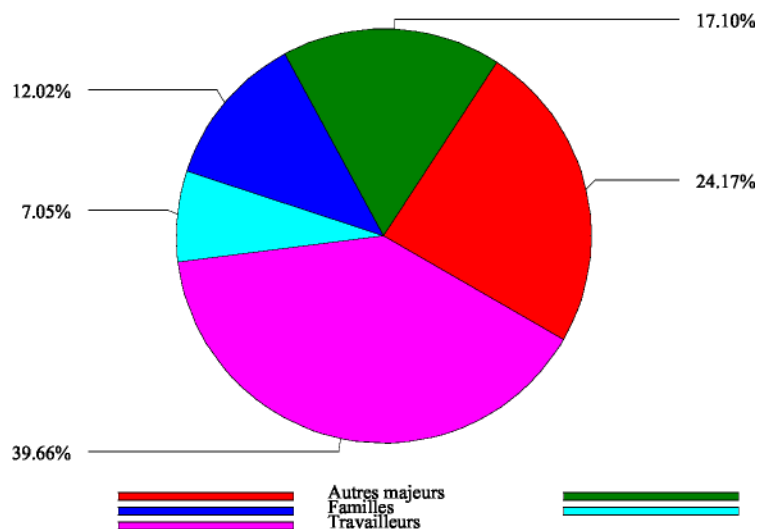
Sources: table prepared by X. Thiery (INED) from the following sources:

- (1) First residence permits valid for at least one year, issued to foreigners arriving as adults, including to students (52,737 in 2003): Ministry of the Interior (AGDREF);
- (2) Admissions of children for family reunification delivered with regard to minors from third countries: IMO, children of refugees: Ministry of the Interior (AGDREF);
- (3) Non-inspected entries by minors from EEA countries: number of declared children at the time of issue of a first permit to a woman not married to a Frenchman, Ministry of the Interior (AGDREF).

See also INED Statistics

France

Distribution of immigrants from the EEA by reason for admission, year of admission for legal residence: 2002



*G3: Distribution of immigrants from third countries and the EEA
Year of admission for legal residence: 2002*

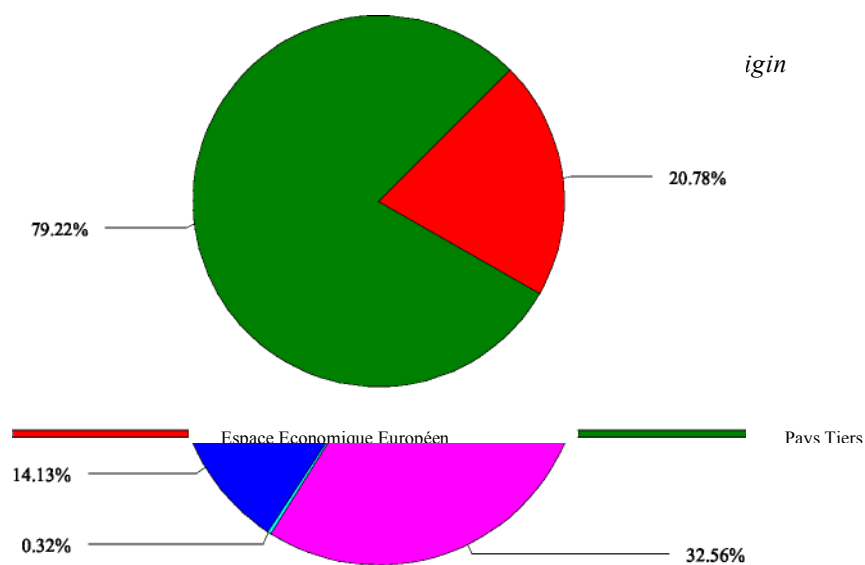


Table A.7 Permanent immigration in 2001
EEA nationals

Tableau A.7 Immigration à caractère permanent en 2001
Ressortissants EEE

	Migrations de travail		Migrations familiales		Retraités et pensionnés	Visiteurs	Anciens***	Motif non déterminé	Total
	Actifs salariés	Actifs non salariés	Mb de famille*	Mb famille de Frçs**					
Allemagne	1 266	73	523	337	244	1 806	4	2	4 255
Autriche	119	3	26	15	3	31	1	0	198
Belgique	1 351	104	620	336	499	965	1	3	3 879
Danemark	172	9	57	24	79	103	1	0	445
Espagne	1 068	23	290	199	83	409	3	2	2 077
Finlande	96	3	36	13	13	30	1	0	192
Grèce	113	5	28	28	8	36	0	0	218
Irlande	203	8	40	36	14	57	1	0	359
Islande	5	0	5	2	0	4	0	0	16
Italie	1 740	65	441	305	189	593	2	3	3 338
Liechtenstein	0	0	0	0	0	0	0	0	0
Luxembourg	36	0	19	18	11	35	0	0	119
Norvège	63	5	25	19	15	44	0	0	171
Pays-Bas	523	72	275	95	312	396	1	1	1 675
Portugal	3 937	21	2 087	261	209	361	8	10	6 894
Royaume-Uni	1 903	121	856	405	1 218	1 095	6	0	5 604
Suède	225	13	84	29	53	123	1	1	529
Pays tiers	47	0	1 005	0	0	0	0	0	1 052
ENSEMBLE	12 867	525	6 417	2 122	2 950	6 088	30	22	31 021

Source : ministère de l'intérieur.

* Équivalent des ressortissants de pays tiers bénéficiaires du regroupement familial.

** Équivalent des ressortissants de pays tiers membres de famille y compris les membres de famille de réfugiés et apatrides.

*** Malgré leur nationalité, ces anciens combattants sont titulaires d'un titre de droit commun et non d'un titre UE ou EEE.

Source: Ministry of the Interior

* Equivalent of nationals of third countries benefiting from family reunification

** Equivalent of family member nationals of third countries including family members of refugees and stateless persons.

*** Despite their nationality, these former servicemen are holders of a general entitlement, rather than an EU or EEA entitlement.

Table A.8 Permanent immigration in 2002
EEA nationals

Tableau A.8 Immigration à caractère permanent en 2002
Ressortissants EEE

	Migrations de travail		Migrations familiales		Retraités et pensionnés	Visiteurs	Anciens***	Motif non déterminé	Total
	Actifs salariés	Actifs non salariés	Mb de famille*	Mb famille de Frçs**					
Allemagne	1 227	73	486	315	237	1 303	7	1	3 649
Autriche	94	6	26	18	4	35	0	0	183
Belgique	1 313	106	595	297	541	798	1	0	3 651
Danemark	151	7	69	23	98	90	0	0	438
Espagne	1 253	15	245	189	85	340	2	2	2 131
Finlande	74	2	26	8	12	25	0	0	147
Grèce	99	6	15	24	5	26	0	0	175
Irlande	176	5	39	31	18	56	0	0	325
Islande	4	1	1	1	0	0	0	0	7
Italie	1 652	51	386	260	187	531	1	0	3 068
Liechtenstein	1	0	0	0	0	0	0	0	1
Luxembourg	19	1	22	13	11	40	0	0	106
Norvège	55	3	18	18	15	32	2	0	143
Pays-Bas	519	65	276	89	334	349	0	0	1 632
Portugal	3 763	24	1 848	227	167	325	7	9	6 370
Royaume-Uni	1 736	134	924	388	1 669	1 466	8	1	6 326
Suède	189	10	78	24	79	79	2	0	461
Pays tiers	45	0	1 034	0	0	0	0	0	1 079
ENSEMBLE	112 370	509	6 088	1 925	3 462	5 495	30	13	29 892

Source : ministère de l'intérieur.

* Équivalent des ressortissants de pays tiers bénéficiaires du regroupement familial.

** Équivalent des ressortissants de pays tiers membres de famille y compris les membres de famille de réfugiés et apatrides.

*** Malgré leur nationalité, ces anciens combattants sont titulaires d'un titre de droit commun et non d'un titre UE ou EEE.

Source: Ministry of the Interior

* Equivalent of nationals of third countries benefiting from family reunification

** Equivalent of family member nationals of third countries including family members of refugees and stateless persons.

*** Despite their nationality, these former servicemen are holders of a general entitlement, rather than an EU or EEA entitlement.

Table A.9 Permanent immigration in 2003
EEA nationals

Tableau A.9 Immigration à caractère permanent en 2003
Ressortissants EEE

	Migrations de travail		Migrations familiales		Retraités et pensionnés	Visiteurs	Anciens***	Motif non déterminé	Total
	Actifs salariés	Actifs non salariés	Mb de famille*	Mb famille de Frçs**					
Allemagne	1 220	57	358	493	256	1 643	2	0	4 029
Autriche	98	5	24	16	6	43	1	0	193
Belgique	1 361	118	293	604	505	817	2	0	3 700
Danemark	98	7	24	51	90	91	0	0	361
Espagne	1 218	23	188	244	76	329	5	0	2 083
Finlande	59	2	11	25	8	19	1	0	125
Grèce	137	5	23	33	4	27	0	0	229
Irlande	154	10	45	53	27	67	0	0	356
Islande	10	1	0	2	179	2	0	0	194
Italie	1 443	51	244	397	1	510	2	1	2 649
Liechtenstein	0	0	0	0	0	2	0	0	2
Luxembourg	20	2	18	18	8	63	0	0	129
Norvège	56	2	12	30	17	41	0	0	158
Pays-Bas	539	80	79	275	366	394	1	0	1 734
Portugal	4 788	30	252	2 182	187	389	6	0	7 834
Royaume-Uni	1 819	236	415	1 111	2 517	2 364	3	2	8 467
Suède	177	6	33	52	84	110	0	0	462
Pays tiers	2	0	1 123	0	0	0	0	0	1 125
ENSEMBLE	13 199	635	6 709	2 019	4 331	6 911	23	3	33 830

Source : ministère de l'intérieur.

* Équivalent des ressortissants de pays tiers bénéficiaires du regroupement familial.

** Équivalent des ressortissants de pays tiers membres de famille y compris les membres de famille de réfugiés et apatrides.

*** Malgré leur nationalité, ces anciens combattants sont titulaires d'un titre de droit commun et non d'un titre UE ou EEE.

Source: Ministry of the Interior

* Equivalent of nationals of third countries benefiting from family reunification

** Equivalent of family member nationals of third countries including family members of refugees and stateless persons.

*** Despite their nationality, these former servicemen are holders of a general entitlement, rather than an EU or EEA entitlement.

Bibliography

Population and Migration Department, *Immigration in France in 2002*, Ministry of Employment site.
26 January 2005, DORIES Report: *Conditions d'emploi des salariés ressortissants des pays tiers travaillant en France dans le cadre d'une prestation de service internationale* (Employment conditions of salaried workers who are nationals of third countries working in France within the framework of an international service provision).

References to INSEE statistical documents.

September 2005, INSEE Première 1042, *Les immigrés en France, une situation qui évolue* (Immigrants in France – a developing situation).

22 September 2005, INSEE References, *Les immigrés en France – édition 2005* (Immigrants in France – 2005 edition) (not available on-line).

References to INED statistical documents.

INED, *Statistiques des flux d'immigration en France - année 2002* (Statistics for immigration flows in France, 2002), updated in 2005

2004, *Recent evaluation of immigration in France and elements of comparison with the United Kingdom*, X. Thierry, INED, population no. 5, p. 725.

2005, *Recent demographic evolution in metropolitan France*, France Prioux, INED, population no. 4, p. 487.

Chapter X

Social security

The key feature of the current legal situation in terms of social security is of a jurisprudential nature.

The Court of Cassation (Civil Chamber 2, 8 March 2005, 03-30700) judged that the solidarity social security contribution (CSS) as well as the contribution to refund of the social debt (CRDS) introduced by Articles L.136-1 of the Social Security Code and 14 of government edict 96-50 of 24 January 1996 respectively, as a result of their exclusive allocation to the financing of various social security systems, assume the nature of collected social security contributions, in application of Article 13 of Regulation EEC 1408/71, according to the legislation of the Member State in which the worker, whether salaried or not, performs his activity, even if he resides in another Member State.

Nationals of a Member State of the European Union who practise their salaried or non-salaried activity in France and reside in another Member State are subject to the CSS and to the CRDS, unless they are affiliated members in another Member State in application of Articles 14 to 17 of Regulation 1408/71.

The Court of Appeal, which notes that neither the chairman and managing director nor the salaried workers in question working for a company based in France were members of a social security scheme in Belgium, where they had established their domicile, maintains with good reason that the deductions relating to the aforementioned contributions should be withheld from the remunerations that were paid to them for activities carried out in France.

The Court of Cassation (Civil Chamber 2, 8 March 2005, 03-30324) also judges that, “in application of Article 13 paragraph 2 of Regulation EC no. 14078/71 of 14 December 1971, a person practising a salaried activity on the territory of a Member State is subject to the legislation of this State, even if that person resides on the territory of another Member State or if the company or the employer who employs the person has its head office or domicile on the territory of another member State”, “the judgement notes that, although seconded by the [American] company Otis Engineering Corporation, Messrs. X and Y, nationals of Member States of the European Union, were unable to produce the form proving that they benefited from the American social security system.” Thus, “the Court of Appeal accurately deduced, without incurring [cassation], that the principle prohibiting any discrimination among workers based on nationality was not in question, so that its infringement could not be cited.”

The Court of Cassation (Social Chamber, 17 May 2005, *Van der Sande versus Société emballages Keyes*, 03-44856)³¹ judges that Articles 3, § 1, 45 and 49 of Regulation EEC 1408/71 of the Council of 14 June 1971, as modified by Regulation 118/97 of 2 December 1996, do not prevent, when the entitlement to an old-age pension is open from the age of 60 in the basic legal system of a first Member State to a worker aged below 65 who has completed periods of activity in this State and in another State where the pension entitlement is not open before the age of 65, periods completed in this latter State from being taken into account to determine both the conditions for opening up the entitlement to benefits liable to be paid to him and the level of the pension liable to be immediately paid by the institution of the former State.

The plaintiff had been made to take compulsory retirement with three months' notice by a decision by the employer on 13 July 2001, on the grounds that he could prove a sufficient number of periods of contribution, in France and in the Netherlands, where he had previously practised professional activities, to enable him to benefit under French law from a full pension on a pro rata basis for the number of periods contributed in France. Maintaining that this compulsory retirement, before payment of the additional pension by the Dutch authorities, represented a dismissal, he had brought his case before the commercial jurisdiction by asserting that the benefits acquired under Dutch legislation could not be paid to him according to this legislation before the age of 65 and that he had to be satisfied with a reduced pension until he reached this age.

The Court of Cassation responds that, “persons who reside on the territory of one of the Member States are subject to the obligations and accorded the benefits of the legislation of any member State under the same conditions as nationals of that State; that, in deciding that unlike a non-migrant sala-

31 See appendix.

ried worker placed in the situation of Mr. Y... Z... X..., for whom the period of contribution corresponds to the pension paid, this person, because he was a migrant worker, could be compulsorily retired by his employer taking into account all of the periods of contribution, including those in the Netherlands, without taking into account the fact that he could not receive the benefits acquired in the Netherlands before reaching the age set by this legislation, i.e. 65, the Court of Appeal practised blatant discrimination in violation of Articles L. 122-14-13 of the Labour Code, L.351-1 and R.351-27-1 of the Social Security Code, 39 and 42 of the EEC Treaty and Article 3 paragraph 1 of Regulation no. 1408/71 reiterated by Regulation no. 118/97 of 2 December 1996.”

However, it adds that “Articles 3, paragraph 1, 45 and 49 of Regulation (EEC) no. 1408/71 of the Council of 14 June 1971, as modified and updated by Regulation (EC) no. 118/97 of 2 December 1996, do not prevent, when the entitlement to an old-age pension is open from the age of 60 in the basic legal system of a first Member State to a worker aged below 65 who has completed periods of activity in this State and in another Member State where the pension entitlement is not open before the age of 65, periods completed in this latter State from being taken into account to determine both the conditions for opening up the entitlement to benefits liable to be paid to him and the level of the pension liable to be immediately paid by the institution of the former State” and that, “the Court of Appeal, which maintained that Mr. Y.. Z.. X had been compulsorily retired in his 63rd year and that he had a total of 187 periods of insurance, French and Dutch old-age insurance systems taken together, on the date of termination of his employment contract, accurately decided that this retirement did not constitute a dismissal.”

To the court, therefore, “Articles 3, paragraph 1, 45 and 49 of Regulation (EEC) no. 1408/71 of the Council of 14 June 1971, as modified and updated by Regulation (EC) no. 118/97 of 2 December 1996, do not prevent, when the entitlement to an old-age pension is open from the age of sixty in the basic legal system of a first Member State to a worker aged below sixty-five who has completed periods of activity in this State and in another Member State where the pension entitlement is not open before the age of sixty-five, periods completed in this latter State from being taken into account to determine both the conditions for opening up the entitlement to benefits liable to be paid to him and the level of the pension liable to be immediately paid by the institution of the former State”

The Court of Cassation (Civil Chamber 2, 21 June 2005, 04-30050) judges that the plaintiff, of Spanish nationality and now resident in Spain, who had worked in France between 1957 and 1964 and on this basis had received old-age pensions from the French social security system since 1 November 1991, poses a problem which justifies a request for a preliminary ruling to the Court of Justice. The plaintiff had also requested payment of the additional allowance from the National Solidarity Fund, which she was denied in 1999. The Court of Appeal had rejected the appeal from the plaintiff on the grounds that the allowance claimed, referred to explicitly in Appendix II of Regulation 1408/71, constituted a particular category of benefits known as “special non-contributory benefits” which, covered by Article 10 bis of the same Regulation, could no longer be exported with effect from 1 June 1992, on which date the party in question did not meet the age condition set by the Social Security Code.

The judicial judge finds that the jurisprudence of the ECJ (judgement of 8 March 2001, Jauch, case C-215/99) regards the inclusion of a benefit in Appendix II as necessary but not sufficient to confer upon it the nature of a special non-contributory benefit within the meaning of Regulation 1408/71 and he admits that this benefit can be subject to examination by the Court in order to determine whether it meets the requirements of the latter text. The French judge thus referred the following question back to the ECJ: “does Community law have to be interpreted in the sense that the disputed additional allowance, included in Appendix II of Regulation 1408/71, is of a special and non-contributory nature ruling out, in application of Articles 10 bis and 95 ter of Regulation no. 1408/71, its allocation to a non-resident applicant who did not fulfil the age condition as of 1 June 1992 or in the sense that, being regarded as a social security benefit, this allowance must, in application of Article 19 § 1 of the same Regulation, be paid to the person in question who fulfils the allocation conditions, regardless of the Member State in which he resides?”

The Court of Cassation (Civil Chamber 2, 13 December 2005, 04-30092) judges that the plaintiff, of British nationality, who had practised successive professional activities in Great Britain, France, Italy and Belgium and who had made a request for the allocation of a disability pension in the last country, which was denied after transmission by the Belgian institution, by the National Health Insurance Fund on medical grounds, is not entitled to make a valid claim to a pension in France. The Court of Appeal had dismissed his request aimed at repealing the denial.

France

The judge in cassation rejected his appeal thus, “the Court of Appeal, before which Mr. X admitted that his administrative rights to disability had not been recognised in Belgium, Italy or Great Britain so that it was up to the competent French authorities to pass judgement on his disability status in application [of Regulation EEC 574/72 of 21 March 1972] found that, in accordance with [this Regulation], the preliminary investigation of the requests for disability benefits by all the institutions involved, upon transmission of the request by the investigating institution, was made simultaneously and immediately by each of these institutions.” It thus correctly deduced that “the decision by the Fund based on the opinion of its consulting physician, according to which the party in question had a disability status of below 66.66% on the date of his request, was lawful, although it was prior to the negative decisions of the other institutions.” Thus, the plaintiff could not claim a disability pension in France.

Doctrine

See *Liaisons sociales Europe* no. 135, dated 15 to 28 September 2005, *France, Mise à la retraite d'un salarié ayant accompli une carrière européenne* (France, compulsory retirement of a salaried worker at the end of a European career), J-P Lhernould.

Chapter XI

Freedom of establishment, free provision of services, students

Students

Texts

A series of studies and reports dealing with the position of students, without discrimination in terms of origin, was published throughout 2005. This contains items of information on the matter. In this respect, see:

Report 2005-23 by the General Administration Inspectorate for National Education and Research, submitted to the Minister for National Education, Higher Education and Research in June 2005: *Registration and admission conditions for foreign students in universities.*

Information Report by the Senate dated 30 June 2005 on admitting foreign students to France, Ms. M. Cerisier-ben Guiga and Mr. J. Blanc.

Report by the General Planning Commissioner, Mohamed Harfi, of 28 September 2005: *Towards a strategic policy of international mobility and appeal.*

Opinion of the Economic and Social Council, 25 October 2005, International comparison of admission policies for foreign students: what are the aims? What are the means? Mr. G. Vuilleret.

Jurisprudence

The French Council of State repeals (EC, 2 February 2005, Docquier, no. 257984)³² a circular from the Minister for Youth, National Education and Research concerning the methods for awarding higher education grants based on social criteria. The judge will censure the provisions of the circular relating to conditions for awarding grants to students of foreign nationality, holding the nationality of a Member State of the European Union. The Minister for Youth, National Education and Research could not, without ignoring the principle of equal treatment among persons fulfilling the Community definition of a migrant worker or child of a migrant worker, exclude nationals of Member States of the European Union other than France, even though they might meet the Community definition of a migrant worker or child of a migrant worker and might fulfil the conditions required of French students in the sixth paragraph of B of Title VI and under 2) of Chapter 2 of Title VIII of the circular of 23 April 2003, from payment of the study allowance or from the fourth instalment of the higher education grant based on social criteria.

For the administrative judge, higher education grants based on social criteria must be regarded as a social advantage within the meaning of the provisions of Article 7 of the Regulation of 15 October 1968, if they are paid to a worker receiving vocational training or to his children who are receiving training. Thus, the Minister for National Education could not exclude from the benefit of the higher education grants based on social criteria persons satisfying the Community definition of migrant worker or child of a migrant worker. This definition, while it stipulates that the salaried activity practised must be genuine and effective and excludes activities reduced to such an extent that they appear purely marginal and incidental, does not however include any condition associated with the permanent nature of the post held. The Minister could not therefore legally subject the benefit of the grants in question, for students of foreign nationality holding the nationality of a Member State of the European Union, to the additional condition that they hold a permanent position in France during the reference year.

Moreover, “the Minister for National Education and Research could not, without ignoring the principle of equal treatment among persons satisfying the Community definition of migrant worker or child of a migrant worker, exclude nationals of other Member States of the European Union, even though they might satisfy the Community definition of migrant worker or child of a migrant worker and might fulfil the conditions required of French students” for the payment of the study allowance or the higher education grant based on social criteria.

32 See appendix.

Free provision of services, freedom of establishment

Current legislation

*Instruction of 21 February 2005*³³ to the inspection services for application of Law 94-665 of 4 August 1994 regarding the use of the French language.

“Article 2 of Law 64-665 of 4 August 1994 regarding the use of the French language provides for the compulsory but not exclusive use of the French language in the naming, offering and presentation of goods, products or services sold in France.”

However, national legislation can only be applied in strict conformity with the requirements of Community law as interpreted by the ECJ, specifically in its judgements of 18 June 1991, *Piageme* (C-369/89), 14 July 1998, *Goerres* (C-385/96), 3 June 1999, *Colim* (C-33/97), 13 September 2001, *Schwarzkopff* (C-169/99) and 12 September 2000, *Geoffroy* (C-366/98).

Community jurisprudence makes a distinction between comments which have become compulsory as a result of the regulations and those brought to the attention of the purchaser or the end consumer under the responsibility of the professional who is responsible for marketing. This instruction therefore implements Community jurisprudence.

*Law 2005-882*³⁴ of 2 August 2005 in favour of small and medium-sized enterprises is aimed in particular at imposing observance of the directions – regarded as a minimum hard core – of French labour law on companies established in France which second one of their salaried workers to carry out duties on French territory.

Thus, some of the binding rules of the law of the country where the work is performed must take precedence over the corresponding provisions of the law of the country of origin. Articles L.342-1 to L.342-6 of the Labour Code are called to govern from now on the transnational secondment of workers. In investing the legislative section of the Code, the transnational secondment of workers acquires increased legibility, particularly with respect to foreign companies.

(See *La semaine juridique social*, no. 18, 25 October 2005, *Le détachement transnational de travailleurs, passager clandestin de la loi PME du 2 août 2005* (The transnational secondment of workers, stowaway on the SME law of 2 August 2005), C. Neau-Leduc, p.1292).

Law 2005-1564 of 15 December 2005³⁵ includes various provisions for adaptation to Community law in the field of insurance.

The purpose of this law³⁶ is to transpose Directive 2002/92/EC regarding intermediation in insurance and harmonisation with European directives of the information conditions for insurance policyholders.

Directive 2002/92/EC sets forth the principle of equal treatment among the various types of actor in the distribution of insurance products in order to facilitate the practice of freedom of establishment or the free provision of services in all European Union countries in this area.

Among the most important modifications is the obligation for all insurance and reinsurance agents to be registered on a national register and to set up a one-stop shop allowing insured parties to check whether the agent whose services they are using does actually fulfil all the conditions for the exercise of that activity. The inclusion of the agents on this national register is subject to the strict compliance with the professional requirements regarding their competence, worthiness, coverage by a professional civil liability insurance and their financial capacity.

The law inserts a Chapter V into Book V of the Insurance Code, entitled: “Special provisions concerning the freedom of establishment and the free provision of services.” Article L.515-1 stipulates, “any agent registered in France who plans to exercise an activity for the first time in one or more Member States of the European Community or other State party to the European Economic Area agreement under the system of the free provision of services or freedom of establishment is to inform the institution which maintains the [national] register.

33 BOCCRF of 26 April 2005, p. 315.

34 *French Official Journal* no. 179 of 3 August 2005, p. 12639.

35 *French Official Journal* no. 292 of 16 December 2005, p. 19348.

36 See preamble to the bill.

Within a period of one month following this notification, this institution communicates to the competent authorities in the host Member States which have expressed such a desire, the intent of the insurance or reinsurance agent and concomitantly informs the agent in question.

The insurance or reinsurance agent can commence his activity one month after the date on which he was informed by the institution referred to in the first paragraph [...]. However, this agent can commence his activity immediately if the host Member State does not wish to be informed.”

Article L.515-2 provides that, “when an agent registered in a Member State of the European Community or in another State party to the European Economic Area wishes to exercise, under the free provision of services or the freedom of establishment in France, the competent institution in the State of origin is to inform the competent institution in the State of origin and the institution which maintains the [French] register.”

Finally, Article L.515-3 makes it compulsory for the French institution responsible for maintaining the register to alert its counterparts in the other Member States of the European Community when it strikes off an agent who is a national of one of these States.

*Decree 2005-386 of 29 April 2005*³⁷ specifies the methods of coverage for care received abroad. Before adopting this decree, the prior consent of the medical insurer had to be obtained in order to be reimbursed for the care received outside France within the European Union. Now, Articles R.332-2 to R.332-6 of the Social Security Code form a section entitled, “Care provided outside France” and bring French law closer to Community law. Thus, a distinction exists today within care provided abroad between care obtained outside a Member State of the European Union or the European Economic Area and care obtained in one of these States. According to J-P Lhernould,³⁸ “this should be the end of a confused jurisprudence which led the French courts to apply former Article R.332-2 to situations covered by Community law, even though it was unsuitable (e.g. 2nd Civil Chamber 15 February 2005, *Matheys vs. CPAM Eure-et-Loir and Drass Rouen* (see below))”.

The principle put forward in Article R.332-3 is that, “the medical insurance funds make reimbursements of the expenses for care provided to those insured under the national insurance scheme and their beneficiaries in a Member State of the EU or party to the EEA agreement, under the same conditions as if the care had been received in France, without the amount of the reimbursement being able to exceed the amount of the expenses incurred by the insured.” Adaptations are envisaged in the following articles and it can be concluded that this Article applies to non-hospital care, whether or not the period spent in another Member State was motivated by this care. This reasoning is directly inspired by the jurisprudence of the Court of Justice, which regards the requirement of prior authorisation for non-hospital care as a challenge to the free provision of services. This is why prior authorisation for coverage is no longer required for this care.

Article R.332-4 specifies that,

“beyond the hypothesis of unexpected care, the health insurance funds can only make reimbursement with prior authorisation for the expenses for hospital care or requiring the use of heavy physical equipment [...].

This authorisation can only be denied on one of the following two conditions:

1. The care envisaged is not among the types of care for which coverage is provided for by the French legislation;
2. An identical treatment or one presenting the same degree of effectiveness can be obtained in a timely manner in France, taking into account the condition of the patient and the probable development of his condition.”

This wording reiterates Article 22 § 2 of Regulation 1408/71. The regulatory text does not define the scope of the hospital care and, in subjecting the heavy equipment to the system of hospital care, takes an initiative which will have to be confirmed at Community level.

The procedure for prior authorisation is clarified in the same Article:

37 Decree 2005-386 of 19 April 2005 regarding the coverage of care received outside France and modifying the Social Security Code, *French Official Journal* no. 98 of 27 April 2005, p. 7321.

38 See *Liaisons sociales Europe* no. 129, of 26 May to 8 June 2005, France, “un décret réaménage la prise en charge des soins à l'étranger” (a decree reorganises the coverage of care abroad), J-P Lhernould, p. 2.

“the party insured under the national health insurance system submits the authorisation request to the fund of which he is a member. The decision is taken by the medical inspection. It must be notified within a deadline compatible with the level of urgency and availability of the care envisaged and no later than two weeks from receipt of the request. In the absence of a response upon expiry of this deadline, the authorisation is regarded as granted. Denial decisions are duly justified and liable to appeal under the general conditions before the competent Court of Health and Social Affairs.

The jurisprudence of the Court of Justice obviously inspires the governmental authorities in this case (ECJ of 23 October 2003 *Inizan versus CPAM*³⁹). In fact, the Community judge requires that the prior authorisation system be “based on objective criteria that are non-discriminatory and known in advance” and “on an easily accessible procedural system and one that is able to guarantee to those concerned that their request will be processed within a reasonable period as well as with objectivity and impartiality, and that any denials of authorisation can be argued within the framework of a jurisdictional appeal.”

Article R.332-5 provides that,

“agreements reached between the social security institutions and some care establishments based in a Member State of the European Union or party to the EEA agreement may, following joint authorisation from the Minister responsible for social security and the Minister responsible for health, provide for residence conditions in these establishments for officially insured patients or their beneficiaries who cannot receive the appropriate care for their condition in France, as well as the methods for reimbursing the care provided.

Officially insured persons who benefit from these agreements are exempt, when hospital care is provided, from prior authorisation.”

Finally, Article R.332-6 stipulates that,

“laboratory analysis and examination expenses incurred by a medical biology analysis laboratory based on the territory of another Member State of the EU or party to the EEA agreement are reimbursed provided this laboratory has been authorised to practise its activity on behalf of persons insured under a French system under the conditions envisaged [by the Public Health Code].”

Thus, when these conditions are fulfilled, the insured persons are reimbursed under the same conditions as if the health services had been provided in France.

*Order of 13 October 2005*⁴⁰ establishes the content of the file to be provided to the competent commission for examining requests made by the persons mentioned in Articles L.4111-2 (III) and L.4221-14-2 of the Public Health Code with a view to practising the professions of doctor, dental surgeon, midwife and pharmacist in France.

The file must include, in particular, a document demonstrating the status of the Community national, the recognition of the basic qualification established by the authorities in the European Union in question, a copy of the qualifications, a copy of the certificates from the competent university authorities, specifying for each year the breakdown and the hourly volume of the teaching, the validated training placements and the certificates justifying all the professional activities, indicating the duration and the functions performed within the various departments, excluding compulsory placements within the context of training and including the comments by the head of department.

Jurisprudence

The Commercial Chamber of the Court of Cassation was led to ask a preliminary question of the Court of Justice, on 13 December 2005, in its decision regarding *Société Elisa*, 02-10359. Faced with

39 Case C-56/01.

40 *French Official Journal* no. 255 of 1 November 2005, p. 17252.

a company under Luxembourg law in a dispute with the tax administration, the Court firstly recalls that, by virtue of established case law of the ECJ,

“if direct taxation falls within the competence of the Member States, the latter must however exercise this competence in observance of Community law and, consequently, refrain from any obvious or hidden discrimination based on nationality; [...] that, in particular, the rules guaranteeing respect for the principles of freedom of establishment and the free movement of capital must be observed.”

Subsequently, it emphasises that Article 43 regarding the freedom of establishment of nationals of another Member State, “includes, for them, access to non-salaried activities and the exercise of them under the same conditions as those defined by the legislation of the Member State of establishment for its own nationals.” Established case law of the ECJ includes, in accordance with Article 48 EC, for companies formed in accordance with the legislation of a Member State and having their registered office, central administration or main location within the Community, the right to practise their activity in the Member State in question through a branch or agency. “Admitting that the Member State of establishment can freely apply different treatment for the sole reason that the head office of a company is located in another Member State would therefore void this provision of its content.”

“The Court of Justice also stipulated, in terms of direct taxation, in cases relating to the taxation of the incomes of natural persons, that when a tax advantage exists which would be denied to non-residents, a difference in treatment between these two categories of taxpayer could be described as discrimination within the meaning of the Treaty since no objective difference in situations existed to justify a difference in treatment on this matter between the two categories of taxpayer. [...]

In matters of the free movement of capital, the result of the jurisprudence of the Court of Justice is that Article 73 B (now Article 56 EC) prohibits restrictions on the movements of capital subject to the provisions of Article 73 D (now Article 58 EC) and that the result of paragraphs 1 and 3 of this latter provision is that the Member States can, within their tax legislation, make a distinction between resident taxpayers and non-resident taxpayers in so far as this distinction does not constitute either a means of arbitrary discrimination or a hidden restriction of the free movement of capital. [...]

Under some conditions, the disputed tax is not applicable to legal entities with their head office in France and, among those which have their head office in another State, to legal entities whose State is linked to France by an administrative assistance agreement with a view to combating fraud and tax evasion or those benefiting from a system of equal treatment in fiscal matters introduced by a treaty reached between France and this State; on the other hand, the tax is applicable to other legal entities whose head office is not located in France, even though they may be located on the territory of another Member State of the European Union, since they are not eligible to benefit from one of these exemptions;

Consequently, it should be ascertained whether legislation such as the French law, which introduced a tax on the monetary value of the property owned in France by legal entities constitutes a restriction on the freedom of establishment or the freedom of movement of capital within the meaning of Articles 52 and 73 B, aforementioned.”

After having thus recalled the content of Community law, the judge will ask 4 preliminary questions of the Court:

“1) Are Articles 52 and following and 73 B and following of the EC Treaty in conflict with the legislation as provided for by Articles 990 D and following of the General Tax Code which grants legal entities which have their effective management head office in France the option of benefiting from the exemption from the tax on the monetary value of property owned in France and which subordinates this option, in terms of legal entities which have their effective management head office on the territory of another country, even though this might involve a Member State of the European Union, to the existence of an administrative assistance agreement reached between France and this State with a view to combating tax fraud and evasion, or to the circum-

stance where, by application of a treaty including a non-discrimination clause based on nationality, these legal entities must not be subjected to taxation greater than that to which legal entities with their effective management head office in France are subjected?

2) Does a tax such as the disputed tax constitute a wealth tax within the meaning of Article 1 of the Directive of the Council of 19 December 1977 concerning mutual assistance by the competent authorities in the Member States in the area of direct and indirect taxation?

3) If so, do the obligations imposed on the Member States in terms of mutual fiscal assistance by the aforementioned Directive dated 19 December 1977 conflict with application by the Member States, by virtue of a bilateral fiscal administrative assistance agreement, of obligations of the same nature excluding a category of taxpayers such as Luxembourg holding companies?

4) Do Articles 52 and following and 73 B and following of the EC Treaty force a Member State which has reached an agreement with another country, whether or not the latter is a member of the European Union, which includes a non-discrimination clause in fiscal matters, to grant to the legal entity which has its effective management head office on the territory of another Member State, when this legal entity owns one or more buildings on the territory of the former Member State and the latter Member State is not linked to the former by an equivalent clause, the same benefits as those envisaged by this clause?"

The Court of Cassation also took cognisance of the classic problem of the reimbursement of hospital care provided in another Member State in its judgement pronounced by Civil Chamber 2 on 15 February 2005 (*Matheys versus CPAM Eure-et-Loir*, 03-15569). It responds that,

"given that Articles 49 and 50 of the Treaty creating the European Community, as interpreted by the Court of Justice of the European Communities, are not in conflict with the legislation of a Member State which, on the one hand, makes the reimbursement of hospital care provided in a Member State other than that where the health insurance fund covering the officially insured person is established subject to acquisition of prior authorisation issued by this fund and, on the other hand, subjects this authorisation to the condition that it is established that the person in question could not receive appropriate care for his condition on the territory of this latter Member State;

That consequently these texts are not in conflict with the second and third paragraphs of Article R.332-2 of the Social Security Code which, after having established the conditions under which the prior authorisation to receive hospital treatment abroad can be issued in cases where the party in question or his beneficiaries cannot receive appropriate care for their condition in France, gives to the national health insurance funds the option of making a flat-rate reimbursement for the care received without prior authorisation if the insured party has established that he himself or his beneficiary could not receive the appropriate care for their condition on French territory;

That the Court of Appeal, which found that the request for authorisation was submitted by Ms. X to the National Health Authority only six days before the planned procedure, such that the Authority was not in a position to make a decision in a timely manner, rightfully maintained that the authorisation was only an option for it; that on these grounds alone it legally justified its decision."

The same jurisdiction (Court of Cassation, Civil Chamber 2, 11 July 2005, *Ms. X versus CPAM*, 04-13869) broaches the same problem regarding a denial of authorisation. On 2 April 2001, the plaintiff had requested authorisation to take advantage of a surgical operation in Italy; this operation took place on 5 April 2001 and on 26 April 2001 the CPAM issued a denial of authorisation justified by an unfavourable opinion from the consulting physician.

The Court of Cassation classically emphasised that Articles 49 and 50 EC

"are not in conflict with the legislation of a Member State which subjects the reimbursement for hospital care provided in another Member State to acquisition of prior authorisation issued by the health insurance fund of which the insured is a member and which subjects this authorisation to the condition of establishing that the person in question cannot receive the appropriate care for his condition in France."

The appeal is thus rejected:

“given that the judgement finds that the denial of authorisation of the National Health Authority was based on the unfavourable opinion of the national consulting physician, according to whom the care required for treatment of the condition from which Ms. X was suffering could be given in France; that, assessing the scope of the elements of proof submitted to it, the Court of Appeal believed that the medical certificates submitted by the person in question did not demonstrate in what capacity the condition from which she suffered, which is frequently treated in France, was of a particular character as to require recourse to a foreign specialist, such that Ms. X did not establish that she could not receive the appropriate care for her condition in France; that it correctly inferred that the refusal to cover the disputed operation was justified.”

Chapter XII

Miscellaneous

Community law adaptation legislation

Law 2005-1319 of 27 October 2005 concerning⁴¹ various provisions for adaptation to Community law within the field of the environment transposes various Community directives: Directive 2003/4/EC of the European Parliament and the Council of 28 January 2003 regarding access to public information on environmental matters, Directive 2002/49/EC of the European Parliament and the Council of 25 June 2002 regarding the evaluation and management of noise in the environment, Directive 1999/31/EC of the Council of 26 April 1999 concerning the dumping of waste and Directive 2004/101/EC of the European Parliament and the Council of 27 October 2004, modifying Directive 2003/87/EC establishing a system of exchange for greenhouse gas emission quotas within the Community, as part of the project mechanisms of the Kyoto Protocol.

Bilateral agreements

*Decree 2005-1101 of 2 September 2005*⁴² concerns publication of the agreement between France and Germany regarding the readmission and transit of illegal persons, effective from 27 May 2005.

Section I of the agreement concerns the readmission of nationals of the contracting parties. The principle is that “each contracting party readmits to its territory, without formalities, a person who does not fulfil or no longer fulfils the conditions for entry or residence applicable on the territory of the petitioning contracting party provided it is established that the party holds the nationality of the required contracting party.” Section II establishes the methods for readmitting nationals of third States or stateless persons in the event of unlawful entry and residence. It is specified that the obligation to readmit envisaged in the agreement does not exist with respect to persons holding the status of refugee and stateless person, nationals of third States to whom the Dublin Convention of 1990⁴³ applies and the regulation replacing it and, finally, with respect to nationals of third States who hold a residence permit or a current temporary residence authorisation issued by another State party to the Schengen Agreement of 1990.⁴⁴

Section III deals with the transit authorisation for nationals of third States on the territory of a party to the request by the other contracting party. Finally, the last sections govern in particular the methods of paying the expenses for readmission and the protection of personal data.

Jurisprudence

The question of the applicability of Community law to nationals of Monaco: the judgement of the Council of State of 27 July 2005, Ms. Giovanna X, no. 244671, deals with the question of the applicability of Community law to nationals of Monaco. The judgement thus recalls that if Article 7 EC Treaty prohibits all discrimination based on nationality, this ban is only valid within the scope of the Treaty. The plaintiff, a national of Monaco, whose situation does not involve the freedom of movement protected by the Treaty, cannot usefully cite this Article.

Moreover, former Article 67 EC and the provisions of secondary legislation confine their scope to movements of capital taking place between persons residing in the Member States and are not therefore applicable to a resident of a third State, such as Monaco.

41 *French Official Journal* no. 251 of 27 October 2005, p. 16929.

42 Decree 2005-1101 of 2 September 2005 involving publication of the agreement between the government of the French Republic and the government of the Federal Republic of Germany regarding the readmission and transit of illegal persons, signed in Kehl on 10 February 2003, *French Official Journal* no. 207 of 6 September 2005, p. 14418.

43 Agreement regarding determination of the State responsible for examining a request for asylum submitted to one of the Member States of the European Communities, signed in Dublin on 15 June 1990.

44 Convention applying the Schengen Agreement of 14 June 1985 between the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic regarding the gradual elimination of inspections at shared borders, signed in Schengen on 19 June 1990.

Additions in answer to comments of the Commission:

Chapter VII

4. Divers

On notera les premières évaluations du dispositif français relatif à l'intégration faite par le ministère de la cohésion sociale. Ce contrat a reçu un fondement législatif avec la loi de programmation pour la cohésion sociale du 18 janvier 2005.

L'article 146 de la loi précitée prévoit en effet que le contrat d'accueil et d'intégration est "proposé, dans une langue qu'il comprend, à tout étranger admis pour la première fois au séjour en France en vue d'une installation durable". Il s'adresse a priori aux ressortissants de pays tiers à l'Union européenne, il peut également concerner des membres de la famille de ressortissants français (plus de la moitié des contrats) que de membres de la famille de ressortissants communautaires. Ce contrat est conclu entre l'Etat, représenté par le préfet du département, et le primo-arrivant, il s'inscrit dans une logique d'engagements réciproques. La signature du contrat concrétise la volonté du primo-arrivant d'entamer une démarche positive d'intégration et d'adhérer aux valeurs et aux principes fondamentaux de la société française ; l'Etat prescrit au signataire des prestations adaptées à sa situation, qu'il doit respecter (formation civique, formation linguistique éventuelles, informations diverses).

Chapter VIII

La mise en œuvre du dispositif par le ministère des affaires sociales a été précisée par une circulaire en date du 29 avril 2006⁴⁵ dont le texte figure en annexe et dont il sera fait le commentaire détaillé dans le rapport 2006.

Par ailleurs, une liste détaillée des professions concernées est fournie et elle concerne :

- le bâtiment et les travaux publics,
- l'hôtellerie, la restauration et l'alimentation,
- l'agriculture,
- la mécanique et le travail des métaux,
- les industries de process,
- le commerce et la vente,
- la propreté.

Chapter XI

La question de *la taxation des voitures d'entreprises* résulte de la mesure suivante.

Une taxe différentielle sur les véhicules à moteur est perçue au profit des départements et des collectivités territoriales. Elle est due chaque année avant le 1er décembre à raison de la plupart des véhicules d'un poids total autorisé en charge excédant 3,5 tonnes, quel que soit le propriétaire, ainsi que par certaines personnes morales ayant plus de trois véhicules, par période d'imposition, d'un poids total autorisé en charge n'excédant pas 3,5 tonnes.

Les sociétés acquittent également une taxe annuelle, fixée à 1 130 euros pour les voitures de moins de 7 CV et 2 240 euros pour les autres véhicules, à raison des voitures particulières immatriculées en France que ces sociétés possèdent ou utilisent. Jusqu'au 31 décembre 2005, la taxe sur les véhicules de société (TVS) était de 1 130 euros si la puissance fiscale n'excédait pas 7 CV, 2 440 euros au-delà. Cette taxe n'est pas déductible au titre de l'impôt sur les sociétés. Désormais, son montant est calculé selon un barème basé soit sur la puissance fiscale, soit sur le taux d'émission de dioxyde de carbone, en grammes par kilomètre. Ce second barème s'applique aux véhicules ayant fait

45 Circulaire DPM/DMI2/2006/200 du 29 avril 2006 relative aux autorisations de travail délivrées aux ressortissants des nouveaux Etats membres de l'Union européenne pendant la période transitoire.

France

l'objet d'une réception communautaire, dont la date de première mise en circulation est postérieure au 1^{er} juin 2004 et qui n'étaient pas possédés ou utilisés par la société avant le 1^{er} janvier 2006

Afin de neutraliser la pratique de la location transfrontalière, le champ d'application de la taxe sur les véhicules de société est également étendu aux véhicules immatriculés dans un autre Etat possédés ou utilisés par une société ayant son siège social ou un établissement en France.

L'article 1010 du Code général des Impôts indique ainsi que "les sociétés sont soumises à une taxe annuelle en raison des véhicules qu'elles utilisent en France quel que soit l'Etat dans lequel ils sont immatriculés ou qu'elles possèdent et qui sont immatriculés en France...."

Les dispositions relatives à la taxe sur les véhicules de sociétés s'appliquent aux périodes d'imposition ouvertes à compter du 1^{er} octobre 2005 (paiement en octobre 2006).