

REPORT
on the Free Movement of Workers
in France in 2008-2009

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Introduction

The year 2007 was characterised by the adoption of Decree no. 2007-371, finalising the transposition process of Directive 2004/38 into French law, which had begun in 2003.

For the year 2008, the texts that were adopted within the area of the free movement of European citizens devote more attention to particular aspects or aim to add details to existing provisions, specifically:

- Decree no. 2008-1143 of 6 November 2008 on the conditions for exercising the functions of ship's captain, where compatibility with Community law still remains uncertain, particularly with regard to the principle of proportionality;
- CNAF circular no. 2008-024 of 18 June 2008, relating to the right of residence of Community nationals:

‘Community Directive no. 2004/38 of 29 April 2004, transposed into French law by Law no. 2006-911 of 24 July 2006 relating to immigration and integration and by Decree no. 2007-371 of 21 March 2007 established the conditions of the right of residence of Community nationals.

Article 95 of the Law on the financing of social security for 2008 introduced these new provisions into the Social Security Code regarding the regularity of residence of these persons: the opening up of the right to family allowances in their favour is subject to the condition of the right of residence.

Moreover, Article 122 of the Finance Law introduced specific provisions regarding the AAH and the API for this same category of beneficiaries, identical to those already applicable regarding the RMI¹.

(...) The object of this circular is to confirm the information that is now established and to supplement it with new elements, particularly concerning students. A ministerial circular should be published soon; it should stipulate in particular the current management methods for rights.’

Another event also took place in 2008 in terms of access to employment, i.e. the end of the transitional measures, with effect from 1 July 2008, concerning access to work by nationals of Member States that joined the European Union in May 2004:

- Order of 24 June 2008 relating to the issue, without the employment situation being invoked, of work permits to nationals of States of the European Union subject to transitional provisions, envisages withdrawal from the current provision of nationals ‘of Estonia, Latvia, Lithuania, Hungary, Poland, the Czech Republic, Slovakia and Slovenia’, (NOR: IMIK0814571A).

This abolition of the restrictions on free movement has not been extended to nationals of Romania or Bulgaria who, if they wish to practise an activity in France, must apply for and obtain provisional residence authorisation (See 2007 Report and Order of 8 January 2008).

¹ AAH = Allocation aux Adultes Handicapés (Handicapped Adult Benefit); API = Allocation de Parent Isolé (Single Parent Benefit); RMI = Revenu Minimum d'Insertion (Income Support).

Chapter I

Entry, Residence, Departure

1. Transposition of provisions specific to workers

- *Art. 7(1a)*: right of residence for 3 months in another Member State as a salaried employee
See 2007 Report² (page 3 ff.).
- *Art. 7 (3 a-d)*: maintaining the capacity of salaried or non-salaried employee
See 2007 Report (page 13 ff.).
- *Decree no. 2007-371*, which inserts into the CESEDA Articles R.121-6 to R.121-9 of the CESEDA, lists the situations in which the right of residence is maintained although the worker is no longer practising a professional activity.
N.B.: Although the Directive does not give elements concerning the period for which the right of residence will be maintained, French law seems to identify two cases of the right being maintained in time:
 - *Article R.121-6* of the CESEDA includes three of the cases in the Directive (a, b and d):
 - if they have been afflicted by temporary disability resulting from illness or accident;
 - if they find themselves involuntarily unemployed, duly observed after having been employed for more than one year and if they have registered as a job-seeker with the competent employment office;
 - if they undertake vocational training, which must be related to the previous professional activity provided they have been made involuntarily redundant;
 - and adds that they maintain their right of residence *for six months* for the cases envisaged under c) of the Directive:
 - if they find themselves involuntarily unemployed, duly noted at the end of their fixed-term employment contract for a period of less than one year;
 - if they are involuntarily deprived of employment within the first twelve months following the signature of their employment contract and if they are registered as a job-seeker with the competent employment office.

It seems that this distinction signals the will of the legislator to make the length of the maintenance of the right of residence dependent on the category in question and, specifically, to limit the maintenance of this right (*6 months*) in the latter two cases, which targets European citizens who find themselves ‘involuntarily’ unemployed *before completing one year of employment*.

- *CNAF Circular no. 2008-024* of 18 June 2008 regarding the right of residence of Community nationals, by the Department of Family and Social Policies, has contributed details particularly concerning the maintenance of the right of residence in cases of a ‘trial of life’ (p. 7):

² References to the pages in the 2007 Report refer to the French version (before translation).

1. MAINTAINING THE RIGHT OF RESIDENCE

A Community national or a member of his family (his spouse, cohabiting partner or PACS partner, a child under the age of 21 or dependent child) can benefit from maintenance of the right of residence in cases of a 'trial of life' (loss of employment, separation or death of spouse, termination of marital life, etc.).

Maintenance of the right of residence of the applicant or of the members of his family depends on the category to which the applicant belongs and on the event that led to his no longer fulfilling the conditions of the right of residence.

The burden of proof lies with the applicant. He must demonstrate that he has in the past fulfilled the conditions of the right of residence. He must also demonstrate that his current situation, while no longer allowing him to fulfil the conditions of the right of residence, falls within the situations mentioned above.

In order to make a ruling, it is advisable in such cases to consult those institutions that have already been able to adopt a position on the maintenance of the right of residence (CPAM, CRAM, etc.).

Duration of maintenance of the right of residence

This duration depends on the category to which the applicant belongs.

Community national who entered France as non-worker or member of his family

According to Community jurisprudence, the right of residence is maintained, as a function of the theory of the trials of life, for a period corresponding to the period for which the non-working national fulfilled the conditions of the right of residence before the trial of life.

For example: before the trial of life, the non-working national can demonstrate that he had both sufficient means and health coverage for 6 months; his right of residence is maintained for *6 months following the trial of life*.

Community national who entered France as a worker or member of his family

- In the following cases, the right of residence is maintained until acquisition of a permanent right of residence:
 - temporary disability resulting from illness or an industrial accident (demonstrated by a certificate from the CPAM);
 - involuntary unemployment after having been employed for at least 12 months (consecutive or not) (demonstrated by a certificate from the ANPE and by documents proving activity lasting more than 12 months);
 - vocational training (demonstrated by a certificate from the vocational training centre associated with previous activity).
- In the following cases, the right of residence is *maintained for 6 months*:

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- Involuntary unemployment following a fixed-term employment contract for a period of less than one year (demonstrated by a certificate from the ANPE³ and by documents proving previous activity);
- Involuntary unemployment occurring within the 12 months following signature of a permanent employment contract (demonstrated by a certificate from the ANPE and by documents proving previous activity).

Family member of a Community national who entered France as a worker

In addition to the situations envisaged in the previous paragraph, maintenance of the right of residence also applies to family members:

- who are nationals of a Member State;
 - in the event of death of the citizen of the European Union;
 - if the citizen of the Union leaves France;
 - in the event of separation, termination of a PACS, divorce or annulment of marriage.
- who are nationals of a third-party State:
 - in the event of the death or departure from France of a citizen of the EU and if the national of the third-party State has resided in France since a date at least one year before this event;
 - in the event of separation, termination of a PACS, divorce, annulment of marriage and if the marriage lasted for at least three years before the commencement of the legal divorce proceedings, at least one year of which was spent in France;
 - in the event of separation, termination of a PACS, divorce, annulment of marriage and if the care of the children of the national is his responsibility in the capacity as spouse, by agreement between the spouses or by judicial decision;
 - in the event of separation, termination of a PACS, divorce, annulment of marriage resulting from particularly difficult situations (marital violence, etc.);
 - in the event of separation, termination of a PACS, divorce, annulment of marriage and if the spouse, by agreement between the spouses or by judicial decision, enjoys visitation rights with a minor child on condition that this right be exercised in France.

These nationals of third-party States must also produce a residence card envisaged in Article D. 512-1 of the Social Security Code. Now, generally speaking, they are holders of a 'residence permit of a family member of an EU citizen', not envisaged in Article D. 512-1. The ministerial services have indicated to us that this residence card was intended to be added to Article D. 512-1. However, in the current state of the texts, a refusal of a right must be notified to the persons providing this card.'

N.B.: The Circular exceeds the framework exclusively of maintenance of the right of residence for a 'salaried employee' and makes maintenance of the right of residence dependent on the theory of 'trial of life': loss of employment, separation or death of spouse, termination of marital life, etc. The regulatory text confirms that the duration of maintenance of protection is a function of the category to which the European citizen belongs.

- *Art. 8(3a)*: Administrative formalities for citizens
See 2007 Report (p. 8).

3 ANPE = Agence Nationale Pour l'Emploi (French National Employment Agency).

By virtue of Article L 121-2 of the CESEDA, citizens of the EU and members of their family wishing to establish *their habitual residence* in France ‘are to register with the mayor of the commune of residence within three months following their arrival. Nationals who have not complied with this registration obligation are assumed to have resided in France for less than three months’.

Article R.121-5 of the CESEDA (modified by Decree no. 2008-223) states that,

‘A certificate, in accordance with the model established by order of the minister responsible for immigration, is immediately awarded by the mayor to nationals complying with the registration obligation envisaged in Article L. 121-2. This certificate does not establish a right to residence. Possession of it can on no account form a precondition for the exercise of a right or the fulfilment of another administrative formality (...).’

Article R.621-1 of the CESEDA (introduced by Decree no. 2007-371), finally, envisages that failure to comply with the registration formality is punishable, ‘by a fine envisaged for fourth-class offences’ (in other words, a fine not in excess of 90 euros).

N.B.: Based on Article 8 of the Directive, these provisions aim to explain the administrative formalities to which European citizens or similar are subject when they enjoy a right of residence (of more than three months) in France, by requiring their registration with the Town Hall of their commune of residence without making it ‘a precondition’. On the other hand, if this obligation has not been fulfilled by the European citizen, he will be assumed to have resided in France for less than three months and may be required to pay a fine. Beyond the stated obligation, it seems that a European citizen who resides in another Member States has an interest in registering in order to mark the official start of his residence and therefore the duration of his residence in order to take advantage, in the longer term, of the right of permanent residence (5 years).

- Art. 14, 4 (a-b): protection from removal
See 2007 Report (page 20)

Article 14, 4 (a-b) of the Directive envisages protection from removal for citizens who enjoy a right of residence (more or less than three months) whether they are salaried employees or not (1) or if they can demonstrate that they are looking for a job (2):

- (1) *Article L.511-4 of the CESEDA* envisages categories that are protected from removal, among whom are European citizens and their family members who enjoy a right of permanent residence envisaged in Article L.122-1. *N.B.:* A national of a Member State is protected from removal, as are members of his family (including if he is a third-party national) in the host Member State after 5 years of legal and uninterrupted residence, once he has acquired a right of permanent residence in accordance with the Directive.
- (2) The case of European citizens and similar who are looking for work is taken into consideration by Article R.121-4 du CESEDA, in application of the jurisprudence of the Court of Justice and of Directive 2004/38. *N.B.:* Citizens of the EU and similar who entered France in order to look for work, cannot be removed on grounds drawn from the illegal nature of their residence *provided they are able to prove* that they are still looking for work and that they have genuine chances of being hired, in accordance with the Directive. In the absence of a report of this proof, it seems that a removal measure could be taken with regard to them in order to sanction the illegal nature of their residence.

Jurisprudence

Regarding this question, the Court of Appeal of Paris has recently confirmed the legal nature of a refusal of a residence card, accompanied by an Obligation to Leave French Territory, taken with regard to a European citizen on the grounds that:

‘Considering that Mr. X maintains that his spouse could not be the subject of an Obligation to Leave French Territory since, in her capacity as Community national, she benefited from the aforementioned provisions of Article R. 121-4 of the Code for the Entry and Residence of Foreigners and the Right of Asylum; that, however, *it is not evident from the documents in the file that Ms. X, who was 4 months pregnant on the date of the disputed decision, had looked for work prior to her pregnancy nor had disposed of sufficient resources enabling her to hold a residence card* by virtue of the said provisions; that, consequently, Mr. X, who cannot usefully assert that he himself was in possession of a recruitment agreement, is not justified in maintaining that his spouse had a right of residence and that he could thus benefit from the aforementioned provisions of Article L. 121-1 of the Code for the Entry and Residence of Foreigners and the Right of Asylum;’ (Court of Appeal of Paris, 29 January 2009, no. 07PA04165).

- *Art. 17*: exceptions for workers who have ceased their activity
See 2007 Report (page 16)

Decree 2007-371 envisages two cases for the *issue of the permanent residence card before expiry of the uninterrupted period of five years*:

- the *European citizen or similar* under the conditions envisaged in Article R 122-4 of the CESEDA (early retirement, permanent disability, etc.);
- family members, whatever their nationality, who reside with the worker who is a citizen or similar, under the conditions envisaged in Article R 122-5 of the CESEDA (death, etc.).

N.B.: Article R.122-4 of the CESEDA states that the conditions of length of residence and activity envisaged under 1, 2 and 3 do not apply if the spouse of the worker is of French nationality or has lost this nationality following his marriage to this worker (on this latter point: ditto for Article R.122-5, 4 of the CESEDA).

- *Art. 24 (2)*: Equal treatment

Access to social security allowances for Community nationals⁴

- By way of reminder, all Community nationals must be covered by identical rules in terms of social protection. Bulgarians and Romanians are subject to transitional rules, only in terms of the issue of their access to employment in France. Community nationals must also enjoy equal rights to social protection alongside nationals. On the other hand, access to social security allowances for Community nationals is conditional upon the existence of a ‘right of residence’⁵ in France (except for schemes open to all foreigners without the condition of legal residence: AME⁶, social welfare in a housing centre, etc.);

4 To be distinguished from the case of a job-seeker (see §2 below).

5 The ‘right of residence’ is fixed by the provisions of Article L.121-1 of the CESEDA (see 2007 Report).

6 AME = Aide Médicale d’Etat (State Medical Assistance).

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- Article 24 of Directive 2004/38 authorises Member States to impose *restrictions* on access to welfare allowances *for non-workers* for the first three months of residence or for Community job applicants ‘who have entered in order to look for work and who are staying there in this capacity’.

France has introduced restrictions *for the following 4 welfare allowances*:

- Income Support (RMI) (Article L.262-9-2 of the Social Action and Families Code);
- Single Parent Benefit (API) (Article L.524-1 of the Social Security Code);
- Handicapped Adult Benefit (Article L.821-1 of the Social Security Code);
- Basic Universal Health Coverage (CMU) (Article L.380-3 of the Social Security Code).

The GISTI⁷ wonders about the application of these restrictions, authorised by Community law, and those that have effectively been imposed in domestic law:

- The Directive authorises restrictions only for welfare allowances. However, in a bill in 2007, the French government had envisaged extending the restrictions to all family allowances, even though they are not all welfare allowances under domestic law. Finally, an amendment submitted in the Senate limited this restriction to one single family allowance, the API.
- ‘Application to the basic CMU of restrictions authorised by the Directive is undoubtedly the most disputable since, even under domestic law, the basic CMU is regarded as an welfare allowance; unlike the supplementary CMU, this is in fact a contributory allowance awarded without being conditional upon resources and as a counterpart to compulsory contributions (...). It cannot therefore be likened to a welfare allowance’.
- Moreover, other ‘remarks made here on the RMI and the API should also apply to the RSA since the legislative provisions specific to Community nationals regarding the RMI and the API are included in their entirety and without change in this bill on the RSA’. ‘The draft bill extending the Workers Solidarity Income (RSA) and envisaging abolition of the RMI and the API in 2009 (...) and merging these two allowances into the new RSA’.⁸

The new *Workers Solidarity Income (RSA)* entered into force on *1 June 2009* in mainland France.⁹

7 GISTI = Group Providing Support and Information for Immigrants, French association specialising in aliens law: www.gisti.org.

8 See GISTI Practical Note, ‘The right to social security’ (in French), October 2008.

9 *RSA* = (Nouveau) Revenu de Solidarité Active (New) Active Solidarity Income: It replaces the RMI (Income Support), the API (Single Parent Allowance) and some temporary fixed-sum types of assistance such as the return-to-work bonus. It is also paid to persons who are already working but whose incomes are limited. Its amount depends both on the family situation and in earnings from employment. It can be conditional on the obligation to undertake actions to enhance better professional and social insertion. The state and the departments are joining together to implement this new allowance, the first payment of which will be made on 6 July 2009. The RSA is paid by the Family Allowance Funds or the Social Agricultural Mutual Insurance Funds. It affects over 3 million households’; see official site: www.rsa.gouv.fr.

2. SITUATION OF JOB-SEEKERS

1) *Formalities and residence in France*

See 2007 Report and above (p. 6 and 7; p. 17): legislation and jurisprudence.

- Circular CNAF no. 2008-024 of 18 June 2008 on the right of residence of Community nationals, on the question of the formality of residence has recalled that:
‘The right of residence is assessed as a function of the category to which the Community nationals and members of their families belong at the time of the application for allowances (workers, non-workers, *job-seekers*, students).
The recognised right of residence of a Community national serves as a right of residence for all members of his family (his spouse, cohabiting partner or PACS partner, his children aged under 21 or dependent children).
Community nationals, although not legally obliged to do so (except when working in certain professional sectors), have the possibility of being issued with a residence card. In this case, simply showing this document is sufficient to demonstrate that their residence is legal.
In other cases, job-seekers will have to fulfil several conditions described further in the document.
In the absence of a residence card, *verifying the conditions of right of residence is the responsibility of the CAF*. It should be noted that the texts envisage that the CAF have the possibility of requesting the help of the Prefecture in disputed cases. Moreover, in cases where it is difficult for the CAF to make an assessment, it should be noted that the Prefectures cannot put in a plea to bar regarding the persons applying to hold a residence card.’
- Finally, it will be recalled that *Article R.121-4 of the CESEDA* provides protection from removal for European citizens and similar who have entered France in order to look for work, *provided they are able to prove that they are still looking for work and that they have genuine chances of being hired*.

Jurisprudence (Article R.121-4 of the CESEDA)

Denial of residence card accompanied by an Obligation to Leave French Territory with respect to a spouse, a European citizen, who the Court has ruled does not have the ‘right of residence’ in France within the meaning of Article L.121-1 of the CESEDA, in particular in so far as she does not provide proof that she had sought employment prior to her pregnancy (Administrative Court of Appeal of PARIS, 29 January 2009, no. 07PA04165, referred to above).

2) *Access to social security allowances*

As mentioned above, access to social security allowances by Community nationals *is conditional upon the existence of a ‘right of residence’ in France* (+ see Jurisprudences ‘Right to the RMI’ – 2007 Report, p. 17).

Article 63 of Law no. 2007-290 modified Article L 269-2-1 of the Social Action and Families Code: ‘Nationals of Member States of the European Community and of the other States party to the European Economic Area agreement, who entered France to look for work there and who remain there in this capacity, *do not enjoy income support*.’

Within the terms of Article L 380-1 of the Social Security Code, any person residing in France in a stable and legal manner is *covered by the general system* of social security if he

is not entitled in any other capacity to services in kind from a health and maternity insurance system.

Article L 380-3 of the Social Security Code stipulates that the provisions of Article L 380-1 do not apply to nationals of Member States who have entered France in order to look for work and who remain there in this capacity.

Regarding Community nationals who come to *look for work* in France, Circular no. DSS/DACI/2007/418 of 23 November 2007 relating to the enjoyment of Universal Health Coverage indicates that *they have no right to the CMU*. It points out that this solution is the result of the possibility offered by the Directive to restrict access to social security allowances for this particular category of persons.

The result of the French scheme is that a welfare allowance can be denied:

- *to a non-worker within the first 3 months of residence*: restriction implemented in 2006 for the RMI, in 2007 for the API and the AAH. (N.B.: workers and similar – and members of their families – are excluded from this condition of 3 months of prior residence for access to these welfare allowances);
- *to a job-seeker after the first 3 months of residence*: restriction implemented in 2007 for the RMI, API, AAH and basic CMU (see above for references to texts). *CNAF Circular no. 2008-024 of 18 June 2008*, (see above), *extends this measure to all family allowances*, on the grounds that ‘their residence not being assumed to be long-term with respect to French and Community law, (they) do not fulfil their condition of residence in France’.

Regarding the latter point, it will be noted that this restriction, which is not envisaged by the law, is aimed at family allowances that are not ‘welfare allowances’ within the meaning of Article 24 of Directive 2004/38 and which had, on the contrary, been removed in 2007 from the legal system in France (see above). Finally, it is possible to wonder about the fact of considering, in the first place, that a job-seeker does not have authority to settle permanently on the national territory.¹⁰

CNAF Circular no. 2008-024 of 18 June 2008 on the right of residence of Community nationals provides details in terms of access to welfare allowances *for job-seekers*:

‘Community Directive 2004/38/EC of 29 April 2004 envisaged that social welfare allowances could be denied to a person who had entered the host State in order to look for work and who remained there in this capacity, regardless of the duration of prior residence.

This is the option retained by France, through Article 63 of Law 2007/290 of 5 March 2007 introducing the opposable right to housing which prohibits access to the CMU, the RMI, the AAH and the API by persons who entered France in order to look for work and who remain there in this capacity.

From now on, this rule is applicable to all the allowances paid by the CAF: *access to enjoyment of all the allowances paid by the CAF is prohibited for Community nationals who entered France in order to look for work and who remain there in this capacity*.

Thus, job-seekers who have never practised a professional activity in France cannot claim family allowances on the grounds that they do not fulfil the condition of residence in France, since their residence is not assumed to be permanent with regard to French and Community law.

10 ‘Now, this provision can only be read in the light of Directive 2004/38. The latter only authorises this kind of restriction for a specific and rare category of unemployed person, ‘a Community job-seeker’, as defined in its Article 14 – 4 b). This is a rarely encountered scenario’, GISTI Practical Note, *The right to social security* (in French), October 2008.

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Family allowances can be paid to them exclusively if they find a job or fall into the category of non-workers who no longer have the possibility of claiming the status of job-seeker if their chance of finding work in France no longer exists.

The genuine and serious chances of finding a job are the basis of their right of residence (Community Directive no. 2004/38/EC of 29 April 2004 and Decree 2007-371 of 21 March 2007). No explicit mention is made of the period of time at the end of which it can be supposed that the person no longer has a genuine and serious chance of finding a job. According to the jurisprudence, this period is generally 6 months of registration in France.

How to check that a person is a job-seeker

Check that he is registered with the ANPE.'

Chapter II

Access to employment

1. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT

Extract from 2007 Report (p. 28 ff.).

Nationals of the European Union, of the European Economic Area or Switzerland do not need a residence or work permit, in application of Article L 121-1 of the CESEDA, and have free access to all jobs, salaried or non-salaried, with the exception of some jobs in the public sector (see below).

The transitional system applicable to nationals of the new Member States remains subject to common law for access to salaried posts:

- 1) The 10 new Member States: 1 May 2004 to 1 May 2009;
- 2) The 2 new Member States: 1 January 2007 to 1 January 2012 (or, in the event of extension, to 1 January 2014).

Article L.121-2 of the CESEDA provides that,

‘citizens of the European Union *wishing to practise a professional activity in France* are still required to hold a residence card *during the period of validity of the transitional measures* possibly envisaged on the subject by the accession treaty of the country of which they are nationals and unless this treaty stipulates otherwise’.

If the citizens mentioned in the previous paragraph wish to practise a salaried activity in a trade characterised by recruitment difficulties and mentioned on a list established at national level by the administrative authority, they cannot be affected by the employment situation on the basis of Article L. 341-2 of the Labour Code. (...)

The Order of 24 June 2008 regarding the issue, regardless of the employment situation, of work permits to nationals of States of the European Union subject to transitional measures provides for the withdrawal from the current system of nationals ‘of Estonia, Latvia, Lithuania, Hungary, Poland, the Czech Republic, Slovakia and Slovenia’.

This text therefore marks the *end of the transitional measures*, with effect from 1 July 2008, for access to work by nationals of Member States that joined the European Union in May 2004.

This abolition of restrictions on free movement has not been extended to nationals of Romania or Bulgaria who, if they wish to practise an activity in France, must apply for and obtain a provisional residence permit (Article R.121-16 of the CESEDA; Order of 8 January 2008).

Consequently, *Romanian and Bulgarian nationals* remain subject, as are nationals of third-party countries, to the acquisition of an initial work permit. If they succeed in obtaining this work permit (procedure: Opinion of the Departmental Directorate of Work, Employment and Vocational Training – DDTEFP – then Prefectural decision, see 2007 Report), they receive a residence card bearing the words, ‘EC – all professional activities’ without geographical restriction in mainland France, or professional restriction. This is a residence card of a duration limited to the duration of the employment contract (maximum of five years).

The renewal of an initial residence card, ‘EC – all professional activities’, obtained based on a contract of less than one year, is examined on the same criteria as a residence card bearing the words ‘temporary worker’ in France.

N.B.: However, according to Annexes VI and VII of the accession treaties of Bulgaria and Romania to the EU, if one of their nationals is admitted to the labour market of a Member State for an uninterrupted period equal or superior to twelve months, he continues to enjoy access to the labour market (unless he leaves it voluntarily). Thus, if he has been holder of a residence permit, ‘EC – all professional activities’, issued based on an employment contract of at least one year or if he was holder of a temporary residence permit granting the right to work for a period equal or superior to one year on the date of accession, the *Romanian or Bulgarian is in a more favourable situation* than the holder of a ‘salaried employee’ residence permit. He has in fact acquired *the same rights to salaried work as another Community national*.¹¹

By way of reminder, *in the event of failure to observe the formalities* intended for applying for a residence permit or work permit, nationals of the Member States affected by the transitional measures can find themselves removed from the national territory (Article L.121-4 of the CESEDA; see 2007 Report).

Decree no. 2008-244 of 7 March 2008 introduced the new regulatory part of the Labour Code (introduced by Government Edict no. 2007-329, French Official Journal of 13 March 2007, and ratified by Law no. 2008-67 of 21 January 2008). The new articles of the regulatory part of the Labour Code are the subject of an annex published separately on the same day as that of publication of Decree 2008-244. The recodification operation is significant in terms of volume (461 pages).

The modifications are implemented *on the basis of established law and concern the form* (general renumbering of the articles and codification of decrees). This decree entered into force on 1 May 2008. A circular from the Ministry of Labour of 8 April 2008 details the consequences of the entry into force of the new Labour Code (Circular DGT 2008/05).

2. LANGUAGE REQUIREMENT

Government Edict no. 008-507 of 30 May 2008 transposes Directive no. 2005/36/EC into French law, relating to the recognition of vocational qualifications. It implements the principle of ‘mutual recognition’ by virtue of which a Member State that makes access to a regulated profession or its practice conditional upon the possession of vocational qualifications recognises, for access to this profession or its practice, the vocational qualifications obtained in another State of the European Union.

Article 1 of the government edict introduces a general provision relating to linguistic knowledge:

‘A national of a Member State of the European Community or of another State party to the European Economic Area agreement who benefits from the recognition of his vocational qualifications *must have the linguistic knowledge necessary to practise the intended profession in France*’.

¹¹ See GISTI Practical Note, *Salaried employment authorisation* (in French), October 2008.

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Moreover, Articles 10 and 12-1 of *Decree no. 2008-1441*, relating to use of the title of osteopath and the practice of this activity, states that,

‘The osteopath must possess *the linguistic knowledge necessary to fulfil the provision of services in France*. In the event of doubt, the Prefect of the *département* checks, at the request of the regional Prefect, the satisfactory nature of his command of the French language. A new check may be conducted at the request of the party in question by the regional Prefect’.

Chapter III

Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS (DIRECT, INDIRECT DISCRIMINATION)

See 2007 Report (page 39 ff.) for details.

A job vacancy was referred to *the French Equal Opportunities and Anti-Discrimination Commission (HALDE)* that subjected access to the position of bus driver/conductor to the condition of holding French nationality. The employer (a company that manages urban transport, buses, trams, metro) justifies its practice by claiming that drivers/conductors may be called upon, within the framework of the versatility of functions, to exercise the function of ticket inspector which, according to the employer, requires the possession of French nationality. According to the company, the fact of being officially competent to draw up official reports for failure to hold a ticket and/or for parking violations justifies possession of French nationality. In the case in question, the HALDE believes that no texts exist that require the condition of French nationality in order to exercise these functions. It emphasises that, in a scenario where the regulations might envisage this condition, this would be regarded as incompatible with Article 39 paragraph 4 of the EC Treaty, which authorises the States to implement discrimination based on nationality only for posts ‘in the public sector’ (*Resolution no. 2008-189 of 15 September 2008*).

2. SOCIAL AND TAX ADVANTAGES

See 2007 Report (page 39 ff.) for details.

Law no. 2007-1786 on financing social security for 2008 modifies Article L 512-2 of the Social Security Code. The latter states,

‘Nationals of Member States of the European Community, of the other States party to the European Economic Agreement and of the Swiss Confederation who fulfil the conditions required for regular residence in France receive family allowances ipso jure under the conditions established in the present document, provided residence has been assessed under the conditions established for application of Article L. 512-1’.¹²

Circular no. 2008-024 of 18 June 2008 by the Department of Family and Social Policies details the conditions for *access to the right to family allowances* (see above):

- The award of family allowances is subject to the regular residence of nationals of the other Member States.
- For all applicants who do not belong to the category of ‘worker’ or ‘former worker’, access to the rights to Handicapped Adult Benefit, Single Parent Benefit and Income Support is conditional upon being able to prove a minimum duration of residence of three months (regarding the API, this requirement is reiterated in a circular of 22 July 2008, Circular DSS/2A/2B/3A no. 2008-245 of 22 July 2008 regarding the methods of

¹² According to Article L 512-1 of the Social Security Code, all French or foreign persons resident in France with one or more dependent children residing in France receive family allowances for these children.

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checking the residence condition in order to benefit from certain social security allowances (NOR: SJSS0830642C), *Official Journal of the Ministry of Health* no. 2008/8, 15 September 2008). Moreover, applicants who entered France in order to look for work and who remain there in this capacity cannot claim these allowances.

- For those practising a professional activity (or in a similar situation) allowing membership of a health insurance scheme, the conditions of right of residence are automatically fulfilled.
- For non-workers, the circular explains the conditions relating to residence (sufficient resources and health coverage, not becoming a burden on the social security system). If the applicant fulfils all these conditions, the right may be open with effect from the months following entry into France. However, if the Community national receives State Medical Assistance, he cannot have the right to family allowances. If the applicant is not receiving State Medical Assistance, he is to be required to produce all documents proving that he possesses both sufficient resources and health and maternity coverage. In so far as the person cannot demonstrate these two cumulative elements, he has no right to family allowances. Moreover, if this condition relating to health coverage is not fulfilled, there is no purpose in checking for the possession of sufficient resources.
- For a spouse who is a third-country national, it is possible to check that this person holds a residence card bearing the words, 'family member of an EU national'. From now on, if the spouse or cohabiting partner of the Community national holds this card, it is possible to deduce from it that the two spouses or cohabiting partners are in a regular situation in so far as, in order for this card to be issued, the Community national must be in a regular situation.

N.B.: It is however possible to question this logic, deduced from the Circular, in so far as French legislation (Article L 121-2 of the CESEDA) does not require possession of a residence card for European citizens. In fact, the only obligation imposed on those wishing to establish their habitual residence, beyond three months in France, is registration with the mayor of their commune of residence.

- The circular then details the methods for proving that the person has health insurance coverage: providing a certificate from the health insurance company (social security agency, mutual insurance society, private insurance, etc.) that covers the party in question, for himself and for the family members concerned. This agency can be based in France or in a foreign country (country of origin, for example). Finally, the Circular describes the applicable rules if the national of a Member State is the beneficiary of Universal Health Coverage (see 2007 Report).

Law no. 2008-596 of 25 June 2008 modifies Article L 1226-1 of the Labour Code. The Law reduces to one year, instead of the three, the condition of seniority in a company in order for the salaried employee to receive, in the event of absence from work based on disability resulting from illness or accident attested by a medical certificate and second examination, if appropriate, a *supplementary benefit to the daily allowance* envisaged in Article L. 321-1 of the Social Security Code (provision relating to expenses covered by health insurance). By way of reminder, the conditions to be fulfilled in order to receive the supplementary benefit are as follows:

- proof of this disability within forty-eight hours;
- coverage by social security;

- care provided on French territory or in one of the other Member States of the European Community or in one of the other States party to the European Economic Area agreement.

These provisions do not apply to salaried employees working at home, to seasonal salaried employees, to occasional salaried employees or to temporary salaried employees.

3. OTHER OBSTACLES TO THE FREE MOVEMENT OF WORKERS?

See 2007 Report (pages 44 and 45).

The year 2008 was characterised by the adoption of *many rules relating to the recognition of qualifications and professional experience*. Rules were also adopted in order to determine access by European citizens to certain professions.

The following professions and activities are affected:

- The profession of lawyer: *Decree no. 2000-199 of 18 February 2009* modifies Article 99¹³ of the Decree of 27 November 1991 *regulating the profession of lawyer*.¹⁴
- Recognition of the experience of land and agricultural or forestry experts: *Decree no. 2009-180* details these conditions for European citizens with the creation of three new articles in the Code (Articles R 171-12-1 to R 171-12-3 of the Rural Code).¹⁵ *Government edict no. 2008-507* of 30 May 2008 created an Article L 171-2 in the Rural Code regarding the conditions for the temporary or casual practice of the functions of land and agricultural expert or forestry expert for nationals of the Member States of the European Union.¹⁶ *Decree no. 2009-180* sets forth the conditions for implementation of Article L 171-2 of the Rural Code.

13 Article 99 of the Decree of 27 November 1991 lists the particular provisions relating to the recognition of vocational qualifications of persons who have obtained the status of lawyer in a Member State of the European Community or in another State party to the European Economic Area agreement, other than France. From now on, the first paragraph reads as follows, 'Persons who, on the one hand have successfully completed a cycle of post-secondary studies lasting at least one year or an equivalent part-time duration, for which one of the entry conditions is completion of a cycle of secondary studies required for entry to university or higher education, or completion of an equivalent secondary-level training as well as the vocational training possibly required in addition to this post-secondary cycle of study and who, on the other hand, can demonstrate (...), can be registered at the bar without fulfilling the conditions relating to diplomas, to theoretical and practical training or professional examinations envisaged in Articles 11 and 12 of the Law of 31 December 1971 aforementioned. Specifically, the decree adapts the conditions of the required diplomas and training. They continue to apply to Swiss nationals and to persons who fulfil the conditions for becoming lawyers in their Member States of origin or provenance, including the final completion of vocational training, in other words work experience possibly required in addition to post-secondary training order to gain entry to the profession of lawyer.

14 Decree no. 2009-199 of 18 February 2009 modifying regulation of the profession of lawyer and, for this profession, regarding transposition of Community directives, NOR: JUSC0823102D, *French Official Journal*, 20 February 2009.

15 Land and agricultural experts or forestry experts can practise their profession permanently in France. In order to do so, they must, in accordance with Article L 171-1 of the Rural Code, join the National Council for Land, Agricultural and Forestry Expertise, which draws up an annual list of land and agricultural experts and forestry experts. In application of Article R 171-10 of the Rural Code, nationals of Member States can be registered on this list if they satisfy the required conditions.

16 The latter indicates that, 'professionals who are nationals of a Member State of the European Community or of another State party to the European Economic Area agreement, without being on the list of land and agricultural experts or forestry experts, can carry out the valuation assignments envisaged in the first paragraph on a temporary and casual basis on the national territory provided that:

1. They are legally established in one of the States to practise the profession of land and agricultural expert or forestry expert;

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- Corporate manager: *a decree of 19 December 2008* determines the conditions for the establishment in France of Community nationals in the capacity of corporate manager.¹⁷
- Midwives: *Decree no. 2008-863* adds a 14th point to Article R 4127-318 of the Public Health Code.¹⁸
- Certified auditor in the cooperative agricultural sector: *Decree no. 2008-242*, adopted on 10 March, envisages that nationals of the Member States of the European Community practising the activity of *agricultural auditor* can be registered on the list of auditors.¹⁹
- Osteopath: *Decree no. 2008-1441* determines the conditions and the procedure for the temporary and casual practice of the activity of *osteopath* in France by a European citizen established and practising this activity in another Member State.²⁰

2. If neither the profession of land and agricultural expert or forestry expert nor the training leading to it is regulated in the State of establishment, they have practised this profession in this State for at least two years over the ten years preceding the service;

3. They are insured in accordance with the eighth paragraph of Article L. 171-1;

4. They satisfy, prior to the first provision of services, the declaratory obligations defined by Decree in Council of State.

- 17 This text envisages that the Chamber of Trades and Crafts for the *département* in which he wishes to settle can submit the applicant to an aptitude test or to an adaptation course if the examination of his professional qualifications reveals that this national has not received management training or that his training covers subjects substantially different from those covered by the work experience envisaged in Article 417. However, Community nationals are not subject to the aptitude test or the adaptation course:

- If, for at least three years, they have practised a professional activity requiring a level of knowledge at least equivalent to that of the work experience envisaged in Article 4, or

- If, for at least two consecutive years, they have practised one of the professional activities referred to in the list attached to the present decree, independently or in the capacity of corporate manager¹⁷, after having received, for this activity, training culminating in a diploma, document or certificate recognised by the State, Member or party that awarded it, or judged fully valid by a competent professional body; or

- If, after checking, the Chamber notes that the knowledge acquired by the applicant during his professional experience in a State, Member or party, or in a third-party State are such that they cover, wholly or partially, the substantial difference in terms of content referred to in the first paragraph.

The Decree stipulates that documents not drawn up in French must be accompanied by a translation certified as conforming to the original by a sworn translator or a translator authorised to interact with the legal or administrative authorities of a Member State of the Community or of another State party to the European Economic Area agreement.

The Decree then determines the procedure for filing the request, as well as the rules regarding the aptitude test.

- 18 From now on, a *midwife* is authorised to practise, '*Acupuncture*, provided the midwife holds an acupuncture qualification awarded by a medical university and mentioned on a list drawn up by the ministers responsible for health and higher education; or an equivalent training qualification authorising that person to practise this activity in a Member State of the European Community or party to the European Economic Area agreement'.

- 19 Decree no. 2008-242 of 10 March 2008 relating to the conditions for registration by certified auditors in the cooperative agricultural sector on the list in Article L. 822-1 of the Commercial Code, NOR: JUSC 0803953D, *French Official Journal*, 12 March 2008. However, Article 1 of the Decree makes this possibility conditional upon the principle of reciprocity. Thus, registration on the list will be possible if the other Member State permits French nationals reciprocally to practise the legal inspection of accounts (in other words, the function of auditor).

- 20 Decree no. 2008-1441 of 22 December 2008 relating to use of the title of osteopath and to the practice of this activity, NOR: SJSH0828507D, *French Official Journal*, 30 December 2008. The Decree specifically defines the conditions opening up the possibility of this provision of service, as well as the methods of prior declaration to be carried out for the administrative authority, and the verification conditions. The Decree stipulates that if the checks requested at the time of the declaration 'reveal a substantial difference between the professional qualifications of the provider and the training required in France, of such a nature as to be detrimental to public health, the Prefect of the region requests the party in question to demonstrate that he has acquired the missing knowledge and competences by taking an aptitude test'. Decree no. 2008-1441 stipulates that, 'The osteopath must possess the linguistic knowledge necessary for the provision of his services in France. In the event of doubt, the Prefect of the *département* checks, at the request of the Prefect of the region, the satisfactory nature of his command of the French language. A new verification may be carried out at the request of the party in question by the Prefect of the region'.

- Voluntary sale of furniture by public auction: Decree no. 2009-143 adopted on 9 February 2009 determines the conditions of access by Community nationals to the activity of the voluntary sale of furniture by public auction.²¹
- Various professions: several orders have been adopted in order to determine the conditions for the practice by Community nationals of different professions in France.²²

4. SPECIFIC ISSUES: FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES), SPORTSMEN/SPORTSWOMEN, MARITIME SECTOR, RESEARCHERS, ARTISTS

4.1 Frontier workers

A rider to the Franco-Belgian convention to prevent double taxation was signed by the responsible ministers on 12 December 2008. This rider must be ratified by the Belgian and French parliaments. It envisages the abolition, with effect from 1 January 2007, of the frontier system applied so far to salaried employees working in the French border zone. Thus, payments received since 1 January 2007 by workers whose permanent place of residence is in the Belgian border zone and whose salaried activity is practised in the French border zone should in principle be taxed exclusively in France.

N.B.: The information relating to the modification of the Franco-Belgian convention has been found on several Belgian sites and the only official information available in this regard in France is a press release by the Minister of the Economy. The latter was a political agreement reached on 9 March 2007. As a result, the implementation of this agreement depends on ratification by the national parliaments.

4.2 Sportsmen/sportswomen

The Professional Football Charter obliges a player, upon expiry of his ‘trainee player contract’ to enter into a professional footballer’s contract with his training club. A trainee player

21 Decree no. 2009-143 of 9 February 2009 relating to access by nationals of a Member State of the European Community or of another State party to the European Economic Area agreement to the activity of voluntary sale of furniture at public auctions, NOR: JUSC0823118D, *French Official Journal*, 11 February. To this end, this Decree introduces a new Article R 321-65 into the Commercial Code.

22 See the following texts:

- *Order of 10 April 2008* establishing the applicable methods in terms of a request for authorisation to practise the *profession of genetic counsellor* in France, submitted by nationals of a Member State of the European Community or party to the European Economic Area agreement NOR: SJSH0809151A, *French Official Journal*, 17 April 2008;

- *Order of 30 July 2008* establishing the *exchange conditions for the licences of non-professional flying personnel in civil aviation* awarded by States belonging to the European Community, to the European Economic Area or the Swiss Confederation NOR: DEVA0819000A, *French Official Journal*, 7 August 2008;

- *Order of 4 September 2008* regarding the *recognition of professional qualifications* awarded by a Member State of the European Community or a State party to the European Economic Area agreement for the *professions governed by the civil aviation code* and modifying the Orders of 8 July 1955 regarding the *professional flight photographer’s certificate and licence* in civil aviation, of 3 December 1956 regarding the creation of a *certificate and a licence for professional parachutist and of an instructor’s qualification* and of 16 July 2007 regarding the *qualification and training of AFIS personnel*, NOR: DEVA0821404A, *French Official Journal*, 25 September 2008.

with the Olympique Lyonnais football club refused to sign a professional contract with his training club and preferred to sign with Newcastle. The French club referred the matter to the industrial tribunal and claimed payment from the player of a sum equivalent to the payment he would have received if he had signed the employment contract with the French club (53,000 euros).

While the industrial tribunal recognised a unilateral breach of contract, the Court of Appeal of Lyons, on the other hand, considered in a judgment of 26 February 2007 that the professional football charter was incompatible with the freedom of labour and of movement. Having had the case referred to it by the Olympique Lyonnais club, the Court of Cassation considered that this case poses a serious difficulty of interpretation of Article 39 of the EC Treaty and referred the case to the Court of Justice by interlocutory means. (See, on this subject, Lhernould J.-P., JCP, édition générale no. 40, 1 October 2008, pp. 36-38.)

4.3 The maritime sector

The 2007 report mentioned the adoption of *Law no. 2008-324 of 7 April 2008 regarding the nationality of ships' crews*. This law modifies, on the one hand, Article 3 of the Maritime Labour Code and, on the other hand, Article 5 of Law 2005-412 regarding the creation of the French international register and brings the French system into line with the jurisprudence of the Court of Justice in this field. However, the law made access to the vacant positions conditional upon possession of professional qualifications and the verification of a level of knowledge of the French language and of legal matters enabling ships' documents to be maintained and the exercise of the prerogatives of public authority.

Decree no. 2008-1143 of 6 November 2008 concerns application of the aforementioned law (French Official Journal of 7 November 2008) and determines the methods for evaluating the required conditions.

Thus, *Article 1* of the Decree envisages that,

‘Possession of the level of knowledge of the French language and of the legal matters required of the captain of a ship flying the French flag and the officer responsible for replacing him (...) is established by the production, prior to embarkation, either of a French certificate of maritime vocational training granting access to the duties of captain in application of the provisions of Decrees no. 93-1342 of 28 December 1993, 99-439 of 25 May 1999 and 2007-1377 of 21 September 2007, or:

- concerning the French language; of a French secondary or higher education qualification or of a certificate marking the successful completion of a course lasting a minimum of one year, given in French;
- concerning legal matters; of any diploma or certificate marking the successful completion of specific training or education relating to the powers and prerogatives of public authority conferred upon the captain of a ship flying the French flag or of a certificate of having followed such training or education and of success in the tests marking its completion.

In the absence of this diploma, qualification or certificate proving possession of the required linguistic and legal knowledge, an officer wishing to gain access to the duties of captain or to be responsible for his replacement on board a French ship is to produce a certificate of knowledge, issued by the commission created by Article 3, under the conditions envisaged in Articles 2 and 4’.

Consequently, *Article 2* stipulates that,

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‘The knowledge required of an officer who, wishing to gain access to the duties of captain or to be responsible for his replacement on board a French ship, cannot prove possession of one or more of the diplomas, qualifications or certificates envisaged in Article 1 is assessed by a written test and, possibly, by an interview between the officer in question and the members of a national commission comprising five members.

The written test and the interview, which take place in French and are based specifically on a practical case suggested by the commission, enable the commission to assess the applicant’s knowledge of the legal matters necessary for the exercise of his duties, in other words the general organisation of French maritime administration and justice, and the powers and prerogatives of public authority conferred by French law upon the captain of a ship.

On this occasion, the commission evaluates the aptitude of the applicant to communicate with the French authorities in a current and specific professional context and to draft in French ship’s documents and reports, unless he possesses a diploma or qualification as envisaged in the second paragraph of Article 1. The questions asked by the commission are adapted to the type of navigation and to the characteristics of the ships that correspond to the licence for which the party in question has obtained recognition. The commission issues to the officers whose level it deems satisfactory, with regard to the duties and responsibilities they are required to exercise, the certificate proving their knowledge. This certificate is valid for the category of licences comprising that for which the party in question has obtained recognition on the date of its issue’.

Articles 3 and 4 of the decree determine the composition of the commission and the conditions for its meeting, respectively.

N.B.: While the conditions envisaged by the decree can be legitimated with respect to the importance that the French State attaches to the conditions for exercising the duties of ship’s captain and first mate, the decree tends nevertheless to establish new conditions for gaining access to the position of captain or first mate. *The proportionality of such conditions and their implementation must now be assessed with respect to Community law as interpreted by the Court of Justice.*

Decree no. 2008-203 of 28 February 2008 determines the conditions under which Community nationals can practise, in the form of a temporary and casual service, the main duties on board fishing vessels or ships equipped with fishing tackle²³. Access to this temporary and casual activity is possible, provided these persons:

- are legally established in a Member State other than France in order to exercise this activity in the said Member State;
- or, if the activity is not regulated in this Member State, have practised it for at least two years during the ten years preceding the service. This condition is not applicable if the training leading to this activity is regulated in this Member State.

N.B.: The persons mentioned in the first paragraph must, when they transfer for the first time to carry out their service on the national territory, duly inform in advance the Regional Director of maritime affairs who is responsible for the port of embarkation of the sailor or the ship’s port of fitting out, *in a statement* that may give rise to verification of their professional qualifications. The ensuing inspection must enable the duly informed Regional Director of maritime affairs to ensure that the service will not undermine the safety of the crew or sea

²³ Decree no. 2008-203 of 28 February 2008 modifying Decree no. 99-439 of 25 May 1999 regarding the issue of maritime professional training qualifications and the conditions for practising functions on board commercial and fishing vessels, as well as yachts with a muster roll, NOR: DEVT0765948D, *French Official Journal*, 1 March 2008.

traffic as a result of the lack of qualifications of the sailor. The temporary and casual nature of the service is assessed on a case-by-case basis by the duly informed Regional Director.

4.4 Researchers/artists

Pursuant to the recodification of the regulatory section of the Labour Code (Decree no. 2008-244), the provisions applicable to performing arts, advertising and fashion professions are given in *Articles R. 7121-1 ff. of the Labour Code*.

Pursuant to the judgment of the ECJ Commission vs. France (C-255/04), the Directorate-General of Employment adopted an *instruction dated 18 March 2008* aimed at recalling the modifications to French law resulting from this jurisprudence.²⁴ *N.B.*: As a result, compliance with the Community rules has led to a modification of French law.

Thus, Article 7 of Law no. 2008-89 of 30 January 2008 has modified Article L. 762-1 of the Labour Code by stipulating that, ‘this presumption of salaried payment does not apply to artists recognised as providers of services established in a Member State of the European Community or in another State party to the European Economic Area agreement where they usually provide similar services and who come to practise their activity in France, in the form of the provision of services in a temporary and independent manner’. Equally, within the context of the recodification of the Labour Code, an Article L. 7121-5 has been inserted, which mentions the exception to the principle of the presumption of salaried payment in the new paragraph of Article L. 762-1²⁵.

Article 41 of *Government Edict no. 2008-507* incorporates a new Article L 362-1-1 into the Education Code, relating to the new methods of practising the profession of dance teacher. The new Article L 362-1-1 of the Education Code stipulates:

‘I. – Nationals of a Member State of the European Community or of another State party to the European Economic Area agreement may also settle in France in order to teach dance in return for payment or make use of the title of dance teacher if they possess:

1. A certificate of competence or a training qualification awarded by the competent authorities of a Member State or of another State party to the European Economic Area agreement that governs access to the profession of dance teacher or its practice and allowing this profession to be legally exercised in this State;
2. A training qualification awarded by a third-party State that has been recognised in a Member State or another State party to the European Economic Area agreement and which has enabled them legally to practise the profession in this State for a minimum period of three years, on condition that this professional experience be certified by the State in which it was acquired;
3. A certificate of competence or a training qualification awarded by the competent authorities of a Member State or of another State party to the European Economic Area agreement, which does not govern access to or the practice of the profession of dance teacher and confirming their preparation for the practice of the profession if they can prove having practised this activity full-time for two years over the past ten years in a Member State or another State party to the European Economic Area agreement.

24 DGT instruction no. 2 of 18 March 2008 to the inspection services for application of Article L. 762-1 (L. 7121-5) of the Labour Code, NOR: MTST0810800J.

25 Consequently, Instruction no. 18 of 2 October 2006 has become without purpose and is therefore annulled, Article L. 762-1 of the Labour Code, modified, is fully and immediately applicable.

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After having examined whether the knowledge acquired by the applicant over the course of his professional experience is not able to compensate wholly or partially for substantial differences in training, the minister responsible for culture can require the applicant to undertake compensatory measures.

II. – Nationals of a Member State of the European Community or of another State party to the European Economic Area agreement who wish to teach dance in France on a temporary or casual basis are supposed to fulfil the required professional qualification conditions subject to being legally established in one of these States to exercise this activity and, if the activity or the training leading to it are not regulated in the State in which the interested parties are established, to have practised it for at least two years out of the ten years preceding the service.

The parties in question must provide a declaration to the competent authority in advance of the service.

III. – The present article applies to classical, contemporary and jazz dance. Its methods of application are established by order of the minister responsible for culture.’

An *order of 23 December 2008* determines the conditions for practising the profession of dance teacher that are applicable to nationals of a Member State of the European Community or of another State party to the European Economic Area agreement.²⁶

N.B.: This text is presented in the form of two chapters:

- the first establishes the conditions for practising the profession by way of the provision of service and establishes the documents to be provided in order to practise this activity on a temporary and casual basis;
- the second determines the rules applicable to the establishment of Community nationals in order to practise the profession of dance teacher in France. It determines the documents to be provided, the procedure to be followed and the aptitude tests or courses to be completed in the event of differences in training.

4.5 Access to study grants

A *circular of the Ministry of Higher Education and Research* of 12 June 2008 establishes the methods for awarding higher education grants on social criteria and merit-based assistance and international mobility (NOR: ESRS0800122C, Circular no. 2008-1013). The circular indicates that the higher education grant based on social criteria is granted to a student facing material difficulties that do not enable him to undertake or follow higher education. Annex 1 to the text puts forward the principle of awarding higher education grants. Thus,

‘in order to benefit from a higher education grant on social criteria, the student must be registered for initial training in France or in a Member State of the Council of Europe, at a public or private education establishment and for a type of training able to accept grant-holders. Moreover, he must follow full-time higher education within the competence of the minister responsible for higher education’.

N.B.: Regarding the nationality condition, Annex 3 of the circular states that French students or nationals of a Member State *can receive a grant*. The circular adds that a national of a Member State of the EU (other than France or another State party to the European Economic Area agreement), in application of Articles 7 and 12 of Regulation no. 1612-68 (EEC) of 15 October 1968 regarding the free movement of workers within the Community, must fulfil one of the following conditions:

²⁶ Order of 23 December 2008 regarding the conditions for practising the profession of dance teacher applicable to nationals of a Member State of the European Community or of another State party to the European Economic Area agreement, NOR: MCCH0900878A, French *Official Journal*, 23 January 2009.

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- have previously held a job in France, full-time or part-time: the activity must be genuine and effective and have been practised in the capacity as salaried employee or non-salaried employee;
- prove that one of his parents – or his legal guardian – has received income in France.

It should be stipulated that the condition of holding the status of Community worker or child of a Community worker is not required for students who can demonstrate *a certain degree of integration into French society*. The degree of integration is assessed, specifically, based on the length of residence, education followed in France or family ties in France. This condition is on no account required if the student can prove 5 years of regular and uninterrupted residence in France (in accordance with Article 24 of Directive 2004/38/EC of 29 April 2004).

Decree no. 2008-974 of 18 September 2008 relating to grants and financial aid granted to students covered by the Ministry of Higher Education (NOR: ESRS0814210D, French Official Journal 19 September 2008) recalls in its 1st Article that, ‘Higher education grants on social conditions and merit-based assistance are awarded to students according to conditions relating to studies, age, qualification, nationality, resources or merit, established by the minister responsible for higher education’.

Chapter IV

Relationship between Regulation 1408/71 and Article 39 and Regulation 1612/68

An Order of 2 February 2009 (NOR: ECED0830266A, French Official Journal 26 February 2009) establishes a convention model governing the *availability of an apprentice working in France for a host company established in another Member State*.

The convention emphasises in its preamble that apprentices who carry out some of their training in another Member State continue to benefit from the social security system of their country of origin by virtue of the provisions of Regulation (EEC) no. 1408/71. Form E101 confirms the employer's membership of a social security system.

Article 7 of the convention recalls that the apprentice benefits from social health and industrial accident/occupational illness coverage under his apprenticeship contract and for the period of application of the present convention. During the period of mobility fulfilled in another Member State of the European Union, the apprentice maintains his status of being subject to the social security system of which he is a member, under the conditions established by European legislation (specifically Regulation (EEC) no. 1408/71) and French legislation (specifically Article L 761-1 of the Social Security Code for apprentices covered by the general system and Article L 764-1 of the Rural Code for apprentices covered by the agricultural employee scheme).

An administrative annex to the convention determines the formalities to be implemented by the employer and the host company in terms of health, industrial accident or occupational illness coverage.

Court of Cassation, Second Civil Chamber, 6 March 2008 (appeal no. 07-11869) – Rejection of Appeal:

‘Whereas, according to the disputed judgment (Colmar, 14 December 2006), having practised a professional activity in France from 1989 to 1991, then in West Germany from 1993 to 1996, *Ms. X received a disability pension from each of the competent institutions in the two States* calculated on a pro rata basis for her periods of activity; subsequently the national health authorities of Sélestat (the authorities) granted her an additional payment for the assistance of a third person, the amount of which was fixed on the same pro rata basis as her principal pension; *Ms. X referred the matter to the social security courts; whereas the authorities objected to the judgment that the additional payment for a third person should be brought to the minimum envisaged by Article R. 341-6 of the Social Security Code although, according to the ground, it follows from the combined provisions of Articles 40, 41, 45 and 46 of Regulation no. 1408/71/EC of 14 June 1971 that the additional pension payable by the competent French institution, in the case of aggravation of an illness, must be calculated on a pro rata basis for the insurance periods completed under French legislation with respect to the total insurance duration; the trial judges could not impose on this Community text, intended to govern the coordination of different systems in the event of a worker moving among different countries of the Union, the text of Article R. 341-6 of the Social Security Code which, as the sole French legislation, envisages a minimum amount of additional payment for assistance from a third person; in ruling as it has done, the court of appeal has infringed the aforementioned articles of Regulation no. 1408/71/EC of 14 June 1971; But, whereas having recalled that in application of Article R. 341-6 of the Social Security Code, the amount of the additional payment for a third person is equal to 40% of the amount of the disability pension without being able to fall below an annual minimum established by decree, the court of appeal correctly inferred that the additional pension payment to Ms. X should be adjusted, since the application of the rate*

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of 40% led to a lower amount, to the minimum amount envisaged in the aforementioned text; it thus follows that the ground is not justified’.

Court of Cassation, Civil Chamber, 10 April 2008 (appeal no. 07-12982):

‘Regarding Article L. 332-3 of the Social Security Code; whereas, according to this text, which makes no distinction between payments in kind and payments in cash, the payments for health and maternity insurance are not made, subject to international agreements and regulations, if the insured party resides outside France; whereas, according to the disputed judgment passed as a last resort, Ms. X resided for several weeks in Poland although she was receiving daily maternity insurance payments; the national health authorities of Paris (the authorities) claimed reimbursement from her of the sum of 1,223.37 euros, corresponding to the amount of the daily payments relating to the duration of her residence in Poland, Ms X referred the matter to the social security courts; whereas, in order to assert the appeal of Ms. X the judgment essentially maintains that, *since she is not covered by the scope of the provisions of Article 22 of Regulation no. 1408/71/EC of 14 June 1971, her rights must be examined exclusively with reference to the provisions of internal law* and that no legal or regulatory provision exists that obliges an insured person receiving daily allowances within the context of her maternity leave not to leave the district of the fund to which she is subject, without the prior authorisation of that fund; whereas, in ruling in this way, although it followed from its pronouncements that no international agreement or Community regulation was applicable to the situation of Ms. X, the court infringed the aforementioned text; ON THESE GROUNDS, the Court of Cassation QUASHES AND ANNULS, in all its provisions, the judgment passed on 30 October 2006 between the parties, by the Social Security Affairs Court of Paris; (...)’.

Court of Cassation, Civil Chamber, 2 October 2008 (appeal no. 07-18286):

‘Regarding Articles 13 point 2, 14 bis, and 14 quater together with Annex VII, point 7, of Regulation (EC) no. 1408/71 of 14 June 1971; whereas, according to the first of these texts, *a person who practises a salaried activity on the territory of a Member State is subject*, subject to Articles 14 to 17, **to the social security legislation of that State**; according to the second, a person who usually practises a non-salaried activity on the territory of Member State and who carries out work on the territory of another Member State *remains subject to the legislation of this State on condition that the foreseeable duration of this work does not generally exceed twelve months*; according to the third, a person who is resident in Spain and simultaneously practises a non-salaried activity in Spain and a salaried activity in another Member State is subject, for each of his activities, to the legislation of each Member State; according to the disputed judgment, the association ‘Orchestre de Picardie’ (the association) recruited Mr. X in the capacity as salaried conductor and musical director, who also practised a liberal profession in Spain, Mr. X obtained from the competent Spanish agency the E 101 certificates envisaged in Article 11 of Regulation (EC) no. 574/72 of 21 March 1972, confirming the application of the rules of secondment envisaged in Article 14 point 1, aforementioned; following an inspection of the situation of the association by the URSSAF de la Somme (the URSSAF), the competent Spanish agency to whom the matter was referred by the Centre for European and International Social Security Relations invalidated the E 101 certificates; the URSSAF, having reinstated the payments made to Mr. X and continued with the adjustment of the agency’s contributions, the association lodged an appeal with the social security jurisdiction; whereas, in order to reject the demand from the association, the disputed judgment, after having recalled the principle of the exclusive application of the legislation of the State of employment stated in Article 13, point 2 above, with the exceptions envisaged in Articles 14-2 and 14 bis of the same regulation, and noted that the competent Spanish agency had invalidated the initially issued E 101 certificates, deduced that the URSSAG was justified in adjusting the contributions; in ruling in this way *without investigating, as it was requested, whether the situation of Mr. X was not covered by Article quarter of the regulation*, the Court of Appeal did not provide a legal basis for its decision. FOR THESE REASONS, the Court of Cassation QUASHES AND ANNULS, in all its provisions, the judgment passed on 19 June 2007, between the parties, by the Court of Appeal of Amiens’.

N.B.: *Senator J-P Sueur questioned the Minister of Employment* concerning the difficulties encountered by some French citizens who have worked abroad in obtaining social security coverage upon their return to France.²⁷ He stressed that this is particularly true of students who joined EU companies as part of the *Volontariat international d'entreprise* (VIE) programme and who became salaried employees under common law at the end of this VIE, but who then found themselves without social security coverage upon returning to France. The senator indicates that, in fact, the European host country refuses to provide these nationals with the required social security forms on the grounds that they are not registered as job-seekers in these countries. These citizens, being recognised neither by French social security nor by the social security system of the European country from which they come, find themselves without social security coverage. Since this delicate situation is in contrast with the law that everyone benefits from social security coverage in return for the payment of social security contributions, he consequently asked the minister which provisions he intended to take so that every French person returning to France after a period working in a European Union country and after having paid social security contributions in this capacity to the competent agency in the host country could effectively receive French social security coverage.

In an *answer* published in March 2008,²⁸ the minister indicates that, according to the provisions of Regulation (EEC) no. 1408/71 coordinating the social security systems of the Member States of the European Union or the European Economic Area and Switzerland, or according to the provisions of Regulation (EC) no. 883/2004 that will replace it, it is correct that a salaried employee subject to the legislation of a Member State where he resides and who, upon losing his employment or resigning from his employment, *transfers his residence to France, usually loses the social security coverage of the State of his last employment, unless he is registered as a job-seeker* and remains there at the disposal of the local employment services, without acquiring French social security coverage, if no new professional activity is practised. The sole exception concerns frontier workers and other categories of workers who did not reside in the State of their last employment, who must register as job-seekers in their State of residence and who acquire in that state continuation of their social security coverage for all branches and risks. Moreover, a salaried employee who is full-time unemployed can go to another Member State for a period not in excess of three months in order to look for a new job there, without losing his unemployment benefit nor the rest of his social security coverage. In the general case of a transfer of residence to France following the end of salaried employment in another Member State, thus apart from the two particular situations referred to above, the parties in question, if they do not resume a professional activity or are not beneficiaries of a replacement income, *are not however deprived of all coverage in France*: firstly, the last State of employment may have, following France's example, legislation that envisages the temporary retention of all or some of the rights that may apply at the beginning of the period of residence in France; then and above all, the parties in question may, in the event of need, receive French payments that are granted solely upon condition of residence on the national territory: health and maternity insurance (CMU) payments in kind and family allowances. It should be pointed out that, in the case of French nationals, the condition of the legality of residence is not in fact applicable to them.

27 Written question no. 00405 by Mr. Jean-Pierre Sueur (Loiret - SOC), *Official Journal of the Senate* of 05/07/2007, p. 1200.

28 Answer from the Ministry of Health, Youth and Sports, *Official Journal of the Senate* of 06/03/2008, p. 446.

Chapter V

Employment in the Public Sector

1. ACCESS TO THE PUBLIC SECTOR

1.1. Nationality condition for access to positions in the public sector

Reminder: (see specifically 2007 Report, p. 55):

Access by Community nationals to the corps and levels of employment in the public sector, with the exception of those relating to the exercise of public authority, has been envisaged since the Law of 26 July 1991. This granting of access has taken place gradually, on a case-by-case basis.

Since 2002, access to the public sector has also been open through the secondment route. In parallel, the secondment of French civil servants to administrations within the competence of other Member States of the European Union is also possible.

In 2005, *Law no. 2005-843* modified Article 5 bis of Law no. 83-634 of 13 July 1983 regarding the rights and obligations of civil servants, in transposing Community law to the public sector.

Article 5 bis of the law states:

‘Nationals of Member States of the European Community or of a State party to the European Economic Area agreement other than France, have access, under the conditions stated in the general civil service regulations, to the corps, levels of employment and posts. However, they do not have access to posts for which the qualifications either cannot be separated from the exercise of sovereignty or involve direct or indirect participation in the exercise of the prerogatives of the public authorities of the State or of other public authorities.

They cannot hold the position of civil servant:

1. If they do not enjoy their civic rights in the State of which they are nationals;
2. If they have been convicted in a manner incompatible with the exercise of the functions;
3. If they are not in a legal position with respect to the national service obligations of the State of which they are nationals;
4. If they do not fulfil the physical aptitude conditions required for the exercise of the function, taking into account the possibilities for handicap compensation.

The individual regulations stipulate, as far as needed, the conditions under which civil servants who are not of French nationality can be appointed to the consultative bodies whose opinions or proposals are imposed on the authority vested with decision-making power.

Civil servants who benefit from the provisions of the present article can on no account be attributed functions involving the exercise of powers other than those referred to in the first paragraph.

The conditions for application of the present article are established by decree in the Council of State’.

The result is that the rule is that the public sector is open to Community nationals, except for certain posts involving sovereignty. From now on, Community nationals can gain access to all professions in the public sector and can enter all entrance competitions without their nationality being an issue.²⁹

²⁹ DGAFP Guide, *The Reception of Community Nationals into the French Public Sector* (in French), www.fonction-publique.gouv.fr.

What is a position involving sovereignty?

‘The notion of a position of sovereignty determines, on a case-by-case basis, whether or not a position can be reserved solely for nationals. This analysis must be conducted based on a range of indices, the most significant of which are listed below.

Questioned on the scope of this notion by the Ministry for the Public Sector, the Council of State considered, in its opinion of 31 January 2002, that the ministerial sectors that could be described as sovereign, and therefore correspond to fields of closed employment, are the following: Defence, Budget, Economy and Finance, Justice, Interior, Police, Foreign Affairs.

This opinion also indicates that the notion of direct or indirect participation in the exercise of public authority and the protection of the general interests of the State concerns the exercise of functions described as sovereign and the participation as a main activity within a public entity in at least one of the following elements: the preparation of legal instruments, the monitoring of their application, the sanctioning of their infringement, the fulfilment of measures involving possible recourse to the use of constraint, the exercise of guardianship.

Finally, the Council of State defines a set of indices leading to the view that the employment in question is linked to the exercise of the prerogatives of public authority, based on the following criteria: the taking of an oath, abolition of the right to strike, access to confidential documents, hierarchic positioning and advice to the government, possession of signatory authority.’³⁰

When they are welcomed into the public sector, those who have passed a competition or seconded officers benefit from consideration of the duration of services they have completed in their country of origin, provided these services are comparable to public services within the meaning of French law. The Commission d’équivalence Equivalence Commission for the classification of Community nationals, created in 2002, thus has the task of helping the administrations to take these services into account.

In fact, modifications have been made to improve the inclusion of the experience and the qualifications and diplomas acquired in the European Union to enable Community nationals to avoid obstacles when they wish to gain access to the French public sector.

Thus, *Decree no. 2007-196 of 13 February 2007* regarding the equivalence of qualifications required in order to enter the competition for access to the corps and levels of employment in the public sector simplifies the mechanisms for considering professional experience and the equivalence of qualifications.

Recent and/or current developments

The DGAFP³¹ published, on the occasion of the French Presidency of the European Union, *a guide for the reception of Community nationals*,³² which reminds the state of the law in force in terms of access conditions, the public in question and the procedures envisaged within this framework.

Among recent developments, within the context of a wider reception of Community nationals into the French public sector, *a bill regarding mobility and professional routes* envisages the opening up of internal competitions to Community nationals who fulfil the required seniority conditions for the civil service. This opening up would thus complete the existing mechanism (for details: DGAFP Guide, pages 11 and 12).

30 DGAFP, *The Reception of Community Nationals into the French Public Sector*, p. 9, www.fonction-publique.gouv.fr.

31 DGAFP: Civil Service Administration Directorate-General.

32 DGAFP, *The Reception of Community Nationals into the French Public Sector*, www.fonction-publique.gouv.fr.

The absence of transitional provisions for nationals of the new Member States: the accession treaties of the of the new Member States enable the implementation by the ‘older’ Member States of transitional provisions that restrict the free movement of workers to a fixed period. The public sector is not affected by the implementation of transitional provisions, envisaged by the accession treaties of new Member States, enabling a controlled and gradual opening up of its sector of activity to these nationals (See the Practical Guide, DGAFP³³).

Finally, a reform of the French public sector is often recommended. Mr. Silicani, rapporteur of the *White Paper on the future of the public sector in France*, submitted to the government on 17 April 2008, explains that:

‘Of the four countries historically doted with a *career public sector system*, in other words Spain, Italy, Portugal and France, our country is the only one that has not undertaken any large-scale reform of its public sector in the past twenty years.’

This White Paper puts forward over 40 proposals for modernising the service and the public sector in France. Specifically, it suggests *evolving into a professional public sector* in which a new statutory organisation based on 7 professional sectors would replace the current segmentation based on several hundreds of corps³⁴.

1.2. Language requirements

The conditions imposed by law in order to become a civil servant in France do not seem to explicitly mention linguistic requirements. Moreover, these are the same conditions as those imposed on French nationals.

In order to adapt better to the situation of Community nationals, Article 5 bis stipulates, however, that persons who fulfil the following criteria can hold the status of civil servant:

- they enjoy their civil rights in a State of which they are nationals;
- they have not been handed a sentence incompatible with the exercise of the duties;
- they are in a regular situation with respect to national service obligations of the State of which they are nationals;
- they fulfil the physical aptitude conditions required for exercise of the function, taking account of the possibilities for handicap compensation.

These conditions are assessed with respect to those that are envisaged for nationals (see Article 5 of the Law of 13 July 1983), taking into account, where appropriate, the specificities of the country of origin. The supporting documents relating to the enjoyment of civil rights, the absence of sentences and the regular situation with regard to military service must be provided by the interested party himself.

The checks are carried out ‘document-by-document’ under the same conditions as those that are applied to French nationals. If needed, the translation of the documents provided by the candidate must be performed by a sworn translator or, at the very least, by the authorities

33 DGAFP Guide, *The Reception of Community Nationals into the French Public Sector*, www.fonction-publique.gouv.fr.

34 For access to the White Paper and its summary: www.fonction-publique.gouv.fr/article_1167.html.

of the candidate's country. The translation of these documents is at the expense of the candidates.

The reception of Community nationals must take into account qualifications acquired in the EU, professional experience and service provided in the EU or the EEA³⁵.

1.3. Recognition of professional experience for access to the public sector

The general system³⁶

Candidates wishing to gain access to the public sector can be grouped *into three categories*, depending on whether they have no professional experience or, on the contrary, have professional experience in a public sector or similar in one of the Member States of the EU or of the EEA other than France or, finally, whether they have experience from the private sector.

1. Candidates with no professional experience: These are Community nationals who have completed their school or university career. These groups of people can gain access to the public sector through the external competition. In this case, they must fulfil the conditions required to be a civil servant as well as, if appropriate, the particular conditions for recruitment to the corps or level of employment to which they wish to gain access.
2. Candidates with professional experience in the public sector of another Member State: Community nationals who can prove they have provided services in an administration, an agency or an establishment of the Member State of origin, where the tasks are comparable to those of the administrations and public establishments in which civil servants of the three levels of French public sector practise can, for their part, gain access to the public sector by way of the external competition (soon also internal, see bill quoted above), as well as through secondment.

Provided they fulfil the conditions for being a civil servant and in order to enter for the tests, these experienced persons can enter external competitions. They will be able to enter the internal competitions once the bill relating to mobility and to professional routes within the public sector has been adopted if they fulfil the required seniority conditions (for example, three years of public service). Thus, an English teacher who has practised in Ireland for ten years will be able to gain access to a teaching corps in the public sector by means of internal competition, thus benefiting from the consideration given to his professional experience acquired in Ireland. This candidate will be subject to the same recruitment conditions and to the same competition tests as all the candidates who enter this internal competition. Moreover, these nationals can also apply for secondment to the French administration.

3. Candidates who can prove professional experience in the private sector: Candidates who can prove professional experience in the private sector can, for their part, subject to compliance with the conditions of Article 5 bis of the Law of 13 July 1983 and those established by the particular rules of the corps or levels of employment to which they wish to gain access (five years of experience, for example), opt for recruitment through the third competition. This competition, specifically intended for persons with professional

35 DGAFP Guide, *The Reception of Community Nationals into the French Public Sector*, p. 15, www.fonction-publique.gouv.fr.

36 Source: DGAFP Guide, *The Reception of Community Nationals into the French Public Sector*, p. 18 and 19, www.fonction-publique.gouv.fr.

experience acquired outside the public sector, enables them to give value to this experience when they gain access to the public sector. Within this context, the recognition of the assets of professional experience (RAEP) completes this system. It favours the enhanced value given to these assets gained from experience during recruitment and forms part of the dynamics of opening up the public sector and diversification of the competences of these officers.

Specific texts

France-Spain Agreement

Decree no. 2008-34 concerns publication of the *agreement between France and Spain on the recognition of diplomas and higher education degrees*.³⁷

The object of this agreement is the mutual recognition of diplomas and degrees with a view to access to public employment in both of these Member States. The agreement states that the mutual recognition is without prejudice to the other conditions required in each of the Member States to gain access to public positions.

Recruitment of teachers: Ecole nationale supérieure des mines and Ecole nationale supérieure des techniques industrielles et des mines

An *Order by the Ministry of the Economy of 21 January 2009* establishes the required conditions with a view to *the recruitment of professors for the Ecole supérieure des mines and the Ecole nationale supérieure des techniques industrielles et des mines*.³⁸ Article 1 of the Order envisages that, in application of Articles 6 and 19 of the Decree of 28 March 2007, candidates who can prove the exercise of a professional activity in the fields of higher education and research, public or private, salaried or non-salaried, practised continuously or not and equivalent to a total cumulative duration of at least three years full-time can apply to take part in the competitions for senior lecturer or professor. This practice, of one or more professional activity(ies) conducted in France or in another State of the European Community or of the European Economic Area, must have been fulfilled in functions of a level at least equivalent to those of the positions in the corps to which the competition grants access. The Order then defines the supporting documents to be produced in order for their professional experience to be taken into consideration by the department organising the competition.

Medicine

Within the terms of *Decree no. 2008-744* of 28 July 2008 regarding provisions relating to *teaching staff of universities, tenured and non-tenured in general medicine*, persons who hold a post-graduate degree in general medicine can be recruited in the capacity as senior registrar at universities for general medicine. The decree indicates that the diplomas, certifi-

37 Decree no. 2008-34 of 10 January 2008 concerning publication of the agreement between the Government of the Republic of France and the government of the Kingdom of Spain on the recognition of diplomas and degrees of higher education, signed in Gerona on 16 November 2006, NOR: MAEJ0774844D, *French Official Journal*, 12 January 2008.

38 Order of 21 January 2009 establishing the methods for taking into account professional experience acquired by some candidates in France or in a State of the European Community or of the European Economic Area, instead of the required diplomas, with a view to the recruitment of professors at the *Ecoles Nationales Supérieures des Mines* and the *Ecoles Nationales Supérieures des Techniques Industrielles et des Mines* under the supervision of the minister responsible for industry, NOR: ECEP0820364A, *French Official Journal*, 30 January 2009.

cates or other training qualifications in general medicine awarded by a Member State of the European Community or party to the European Economic Area agreement, other than France, and appearing on a list drawn up by order of the ministers responsible for higher education and health are accepted as an exemption from the post-graduate degree in general medicine. The decree stipulates that the parties in question can submit their applications within four years following the acquisition of their post-graduate degree in general medicine or the diploma, certificate or qualification as a general practitioner accepted by way of exemption.

Concerning *the recruitment of university professors and assistant professors in general medicine*, the decree states that candidates who do not hold French nationality can enter the competitions for recruitment as a professor at universities of general medicine and assistant professor at universities of general medicine under the conditions envisaged in the present part. However, the provisions of the decree do not enable a clear determination of the extent to which nationals of the Member States of the European Community can apply for these recruitment competitions. Articles 10 and 11 of the decree transfer to the minister responsible for higher education the responsibility for determining the equivalent diplomas and training courses opening up the possibility of applying for these posts.

So far, it seems that the orders have not yet been adopted by the minister.

Recruitment and competitions in the armed services corps

Several decrees were adopted over the course of 2008 that have as their object the establishment of the conditions for being a candidate for the recruitment competitions in several armed forces functions and corps. Each decree indicates that the responsible minister draws up the list of diplomas awarded in another Member State of the European Community (...) recognised as equivalent to the diplomas required in order to be a candidate in the competitions. On the other hand, these decrees envisage that candidates who have not met the obligations of the national service code cannot enter certain competitions that lead to their recruitment. Now, this provision is likely to constitute discrimination in so far as nationals of other Member States cannot in principle have satisfied the obligations of national service in France.

This concerns:

- *Decree no. 2008-931* of 12 September 2008 (NOR: DEFH0801138D) concerning particular statuses of the corps of bandmasters and deputy bandmasters in the armed forces and the national *Gendarmerie*;
- *Decree no. 2008-932* of 12 September 2008 concerning particular status of the technical and administrative corps of maritime affairs, NOR: DEFH0801140D;
- *Decree no. 2008-938* of 12 September 2008 concerning particular status of the corps of naval officers and specialist naval officers NOR: DEFH0801158D;
- *Decree no. 2008-943* of 12 September 2008 concerning particular status of the corps of flight officers, flight engineer officers and air base officers NOR: DEFH0801185D;
- *Decree no. 2008-945* of 12 September 2008 concerning particular status of officers of the technical and administrative corps of the land army, the navy, the *Gendarmerie*, the armed forces health service and the petrol services of the armed forces NOR: DEFH0801188D;
- *Decree no. 2008-946* of 12 September 2008 concerning particular status of the corps of officers of the *Gendarmerie* NOR: DEFH0801190D;

- *Decree no. 2008-944* of 12 September 2008 concerning particular status of the corps of weapons officers NOR: DEFH0801187D.

Military weapons engineer

Decree no. 2008-941 of 12 September 2008 concerning the particular status of the military corps of *weapons engineers* determines the recruitment conditions for the latter.³⁹ Article 10 of the Decree stipulates that,

‘The list of documents and the list of diplomas awarded in another Member State of the European Community or in another State party to the European Economic Area agreement recognised as equivalent to the diplomas required in order to be a candidate for recruitment is established by order of the Minister of Defence’.

Judicial proxy and family allowances representative

Decree no. 2008-1508 determines the *conditions for access to the training* necessary for the practice of the *functions of judicial proxy and family allowances representative*.⁴⁰

N.B.: In the two cases in point, the decree specifies that, in order to gain access to this training, persons must hold a diploma or a qualification registered at level III of the national directory of professional certifications or, for nationals of another Member State, an equivalent qualification’. For access to the training courses for judicial proxy, the person may prove seniority of at least three years in a position usually requiring a diploma or qualification at this level (Article 1).

2. WORKING CONDITIONS

Decree no. 2008-550 adopted on 11 June 2008 organises the *grading conditions for Parisian administrative assistants*.

This text contains the provisions that determine the conditions for the grading of assistants who can prove services fulfilled in an administration, an agency or an establishment of a Member State of the European Community. On principle, the latter are graded in application of part II of Decree no. 2003-673 of 22 July 2003 establishing the general provisions relating to the situation and to the grading methods for nationals of Member States of the European Community or of another State party to the European Economic Area agreement appointed to a level of employment in the territorial public sector. Decree no. 2008-550 does however envisage that, if the latter cannot take advantage of the Decree of 2003, the grading provisions of Decree no. 2008-550 are applicable.

Decree no. 2008-308 envisages the *conditions for tenure and for grading of university lecturers/practitioners and university professor/hospital practitioners and the pharmaceutical disciplines*.⁴¹ With a view to hospital tenure and grading, the degree indicates that hospital functions can be taken into consideration that are equivalent to those required in France

39 Decree no. 2008-941 of 12 September 2008 concerning the particular status of the military corps of weapons engineers, NOR: DEFH0801180D, *French Official Journal*, 6 September 2008.

40 Decree no. 2008-1508 of 30 December 2008 regarding the age, training and professional experience conditions that have to be met by judicial proxies for the protection of adults and by family allowances representatives, NOR : MTSA0828334D, *French Official Journal*, 31 December 2008.

41 Decree no. 2008-308 of 2 April 2008 concerning provisions relating to teaching and hospital staff in the pharmaceutical disciplines, NOR: ESRX0773477D, *French Official Journal*, 4 April 2008.

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and practised in the establishments of a Member State of the European Community or of a State party to the European Economic Area agreement, other than France, where the tasks are comparable to those of establishments providing a public hospital service. However, the text stipulates that these functions are included,

‘at the rate of half of their duration up to twelve years and at the rate of one quarter beyond this duration and on condition that they have been fulfilled at the rate of a quota of working time equivalent to at least half of full-time’.

N.B.: In other words and at the time of their appointment, *the grading that will be assigned to a Community national will be less advantageous* than the grading that will be assigned to a national, in so far as the total of the duration of exercise of the functions of the national of a Member State will not be taken into account, unlike that of a French person. Thus, of twelve years of activity calculated for the grading of a professor or lecturer in France, only six years will be taken into account for a tenured person who practised equivalent hospital functions in another Member State.

Chapter VI

Members of the Worker's Family and Treatment of Third Country Family Members

1. RESIDENCE RIGHTS- TRANSPOSITION OF DIRECTIVE 2004/38/EC

1.1. Situation of family members of job-seekers

By way of reminder (see 2007 Report)

For periods of stay of *less than three months*, nationals of *third-party* States to the EU, members of the family of a Community national, are not subject to any other condition than possession of a current passport.

For a *period of residence of more than three months*, the CESEDA, as modified by Law 2006-911 of 24 July 2006 relating to immigration and integration, *includes members of the family within the system that it devotes to citizens of the Union*. The result is that the provisions of common law relating to the family reunification of foreigners are not applicable to them. On the other hand, a member of the family who is a national of a third-party country remains obliged to hold a residence card 'EC – family member – all professional activities', with a period of validity that corresponds to the planned duration of residence of a citizen of the Union with a limit of five years (Article L.121-3 of the CESEDA).

Article L.121-1, 4 and 5 of the CESEDA envisages that the right of residence of family members of European citizens is recognised:

'4. If he is a direct descendant aged under twenty-one or dependent, direct dependent ascendant, spouse, direct dependent ascendant or descendant of the spouse, *accompanying or joining a national who satisfies the conditions listed under 1 and 2*;

5. If he is the spouse or a dependent child accompanying or joining a national who satisfies the conditions listed under 3'.

Circular CNAF no. 2008-024 of 18 June 2008, on the right of residence of Community nationals, has stipulated that (page 2):

'The right of residence is assessed as a function of the category to which the Community nationals and the members of their family belong at the time of the request for services (working, non-working, *job-seekers*, students).

The acknowledged right of residence of a Community national serves as right of residence for all members of his family (spouse, cohabiting partner or *PACS partner*, child aged under 21 or dependent child).'

N.B.: Two observations can be made upon reading this Circular:

1. It should be noted that the Circular in question *makes explicit reference to 'job-seekers'*, as one of the four 'categories to which Community nationals and members of their family' can belong, although Article L.212-1 of the CESEDA only explicitly targets the three other categories (workers, non-workers and students). The case of European citizens and similar who are looking for work is taken into account in the regulatory section of the CESEDA (Article R.121-4 of the CESEDA), in application of the jurisprudence of

the Court of Justice and Directive 2004/38. *Article R.121-4 of the CESEDA* states that citizens of the European Union who entered France in order to look for work cannot be removed on grounds drawn from the illegal nature of their *residence provided they are able to prove that they are still looking for work and that they have genuine chances of being hired*.

The explicit reference made in the aforementioned circular to this particular category of ‘job-seeker’ perhaps signals a desire to clarify this ‘category’, which should effectively grant a right of residence to European citizens in France, consistent with consideration 9 of Directive 2004/38 (see above). It will be necessary to follow the jurisprudence on this point (see, for an example of jurisprudence above: Administrative Court of Appeal of Paris, 29 January 2009, no. 07PA04165).

2. It should be recalled that the list of family members drawn up by the CESEDA (L.121-1, 4, above), *does not explicitly include a PACS partner*. In fact, it had been noted, in the 2007 Report, that the CESEDA was silent on the situation of a ‘partner with whom a citizen of the Union has entered into a registered partnership, based on the legislation of a Member State if, in accordance with the legislation of the host Member State, the registered partnerships are the equivalent of marriage and in compliance with the conditions envisaged by the relevant legislation of the host Member State’, although envisaged in Directive 2004/38. The aforementioned CNAF Circular therefore adds a detail in that it explicitly targets, in its list, family members of European citizens who are ‘PACS partners’.

The explicit reference made there to the ‘PACS partner’ might have the effect of breaking this silence and also of clarifying the situation concerning this ‘category’ of family member of a European citizen in France. This development seems consistent with Article 2 point 2 of Directive 2004/38 on the question of a ‘registered partner’ (see 2007 Report). It will therefore also be necessary to monitor the jurisprudence on this matter.

1.2. Application of Métock judgment

Transposition into French law: third-party national married to a European citizen

The provisions of Article L.121-1 of the CESEDA state that, with the exception of a threat to law and order, direct descendants aged under 21 or dependent, direct dependent ascendants, spouses, direct ascendants or descendants, dependent on the spouse, accompanying or joining a citizen of the EU who holds a right of residence in France for a period of more than three months *have the right to reside in France*,⁴² provided they are employed in France or the citizen of the EU has, for himself and for members of his family, sufficient resources so as not to become a burden on the social security system, together with health insurance.

The conditions for entry to French territory are detailed in the Decree of 21 March 2007, which introduced Articles R.121-1 and R.121-2 into the CESEDA, with a view to transposing Articles 3, 4 and 5 of Directive 2004/38:

Article R 121-1 of the CESEDA indicates that,

42 In accordance with Directive 2004/38, they are obliged to apply for a residence permit (Article R.121-16 of the CESEDA).

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‘All nationals referred to in the first paragraph of Article L. 121-1 who hold *an identity card or a current passport* are admitted to French territory, provided their presence does not pose a threat to law and order.

Any family member referred to in Article L. 121-3, who is a national of a third-party State, is admitted to French territory provided his presence does not pose a threat to law and order and he holds, in the absence of a current residence card, a current passport or visa or, if issued, a document establishing his family relationship. The consular authority is to issue the required visa upon presentation of proof of his family relationship, free of charge and as soon as possible’.

Article R 121-2 of the CESEDA stipulates,

‘The nationals mentioned in the first paragraph of Article L. 121-1 and in Article L. 121-3, who do not hold the entry documents envisaged in Article R. 121-1, are given all reasonable means to enable them to obtain these documents within a reasonable period or to prove or to confirm by other means that they enjoy the right to move and to reside freely in France, before taking steps to return them’.

Effects of the *Metock* jurisprudence in France

The ECJ judgment of 25 July 2008 (case C-127/08, METOCK) represents a reversal of the jurisprudence,⁴³ in so far as it allows a citizen of the EU residing in a Member State other than his state of nationality to be joined by his spouse, a national of a third-party State, without it being necessary for that person to have legally resided beforehand in another Member State.

Some commentators, starting with the principle that French law is in compliance with the Directive, have denounced *administrative practices* that seem to depart from Community law:

‘The question arises now that some Prefectures seem to apply the same system to nationals of third-party States married to European citizens as that reserved for nationals of third-party States who are married to French nationals, which translates *into the requirement of a long-stay visa*. Now, while this condition does not in itself seem to in conflict with the Directive, requiring that the visa application be made from the country of origin and that, failing that, the interested party must return to that country in order to submit his application, is incompatible with the objectives of the Directive. It is sometimes difficult to admit that Community law allows citizens of the EU to receive better treatment than nationals, which the Court recalls in the judgment. But this is a legal reality that the administrative authorities cannot circumvent by refusing to apply Community law (Jean-Philippe LHERNOULD, *Un revirement de jurisprudence au profit des citoyens de l’UE mariés à des étrangers*, Liaisons sociales no. 215-216, December 2008-January 2009).

It should be stated that the French legislator has inserted into the CESEDA the possibility for the third-party national spouse *of a French national* to apply for a long-stay visa directly from the Prefecture, on condition that he has entered France legally, *in order to avoid his returning to his country of origin*. This possibility is conditional upon legal entry to the national territory, including on a short-stay visa (Article L.211-2-1 of the CESEDA). In practice, the spouse of a French national who has entered France legally (regardless of on what

43 The Court revokes its *Akrich* jurisprudence, through which the ECJ had considered that, within the context of Regulation 1612/68, a national of a third-party country, married to a European citizen, had to reside legally in a Member State if his move was to another Member State to which the EU citizen migrates or has migrated (ECJ, 23 September 2003, *Akrich*).

date) can apply simultaneously for a long-stay visa and a residence card from the Prefecture of his place of residence.

In so far as the *Metock* judgment represents a genuine change with respect to the previous jurisprudence of the ECJ, its application in France will no doubt take some time. This time will depend on prefectural practice, on the Prefecture's ability to adapt or not to the consequences generated by this jurisprudence, but also on the monitoring by the National Judge, who will also have to ensure that the decisions to deny a residence card or even to deport, taken with respect to the spouses of European citizens, are not made in ignorance of this innovative judgment in terms of free movement. In any case, prefectural practice will evolve as a function of the monitoring of legality by the National Judge) (chiefly the Administrative Judge).

Jurisprudence after the *Metock* judgment

In a case in which the facts can be likened to those of the *Métock* case, *the Administrative Court of Appeal of Paris, 21 January 2009 (no. 07PA04221*, mentioned in the tables of the *Recueil Lebon*) quashed a judgment by the Administrative Court of Paris, which had repealed a prefectural decision refusing a residence card to the spouse of a European citizen who did not hold an entry visa and forcing that person to leave French territory within one month. It should be noted how the Court of Appeal of Paris justified this cancellation, by highlighting the two decisions concerned (Denial of card and Obligation to leave French territory) in so far as it takes place after the reversal of jurisprudence of the ECJ initiated by its *Metock* judgment:

On the refusal of residence card:

‘Considering that the consequence of the combination of all the aforementioned provisions is that a foreigner who does not himself have the status of Community national and has not been exempted from the obligation to hold a visa, *can only take advantage of his capacity as spouse of a national of the European Union in order to obtain a residence card if he entered France legally*, regardless of the date when he entered France or married his spouse; being a national of Nigerian nationality, Mr. X was subject to the obligation to hold a visa in order to be admitted to French territory by virtue of the aforementioned provisions of Article R.121-1 CESEDA; consequently, *since the applicant did not enter France legally*, judging that the CHIEF of POLICE could not refuse to issue him with a residence card *without previously having provided him with reasonable means* to allow him to legalise his situation with respect to Article R.121-1 of the CESEDA, the Administrative Court of Paris has committed an error of law, since Article R.121-2 only assigns to the administration the obligation to make available to the foreign national in question the benefit of the said means if his return is being undertaken’.

N.B.: The Court *repeals* the Judgment of the Administrative Court of Paris *on this sole point*. It explains that the Court has *committed an error of law in repealing this refusal of residence card* on the grounds, according to the court, that the spouse can only take advantage of this capacity IF he entered into France legally and, within the meaning of Article R.121-2 of the CESEDA, that the administration is obliged to make available to the spouse without the entry documents envisaged in Article R.121-1, ‘all reasonable means enabling him to acquire them or to have otherwise confirmed or proved their capacity as beneficiaries of the right to free movement and residence’ IF steps are being taken to return him.

On the obligation to leave the national territory:

N.B.: The Court *confirms* the repeal decision of the Administrative Court on the grounds that the Prefecture could not pass an Obligation to Leave the National Territory, ‘which constitutes a case of return intended in Article R 121-2- without having made available to the person in question, whose identity and marital ties with a Community national are not disputed, *reasonable means to enable him to legalise the conditions of his entry to the national territory*’, within the meaning of Article R.121-1 of the CESEDA.

In this judgment, published in the *Recueil Lebon*, the Administrative Court of Appeal of Paris differentiates between the requirements inherent in the residence card (legal entry) and those of the ‘return’ from the national territory (reasonable means). The result is therefore that the solution favours the party in question: he will not be deported from France and the Prefecture will have to grant him the aforementioned obligations. This decision, in the consequences it generated, does not therefore contravene the *Metock* jurisprudence. On the other hand, this decision does not seem to be a perfect application of the *Metock* judgment on the question of the residence card in so far as the Court confirms that the party in question ‘*can only take advantage of his capacity as spouse of a national of the European Union in order to obtain a residence card if he entered into France legally regardless of the date on which he entered the country or married his spouse*’. Although the Court refers to the *METOCK* judgment in its decision, by recalling what has to be understood by a family member ‘accompanying or joining’ a Community national (p. 4), *it seems that it has not precisely understood the reversal according to jurisprudence*, which applies Directive 2004/38 in that it does not impose conditions in terms of the place or the conditions of residence of the spouse in the past. The difficulty seems to result from the fact that the Court, in this decision, acknowledges that a Prefecture can refuse a residence card to a spouse of a European citizen who moves, exclusively on the grounds of illegal entry, while the ECJ in its *Métock* judgment, explains that foreigners from third-party countries, who are seeking asylum and entered Ireland without a visa, *benefit from Directive 2004/38* (entry and residence of EU + their family members) ‘*regardless of the place and date of their marriage as well as the way in which this third-party national entered the host Member State*’ (ECJ, C-127/08 of 25/07/08). Moreover, it is possible to wonder what the Administrative Court of Paris means by making available to a foreigner, before any return, ‘reasonable means to enable him to legalise the conditions of his entry into the national territory’... other than forcing him to return to his country of origin in order to apply for a visa.

It is therefore essential to monitor French administrative jurisprudence on this point also.

1.3. How the problems of abuse of rights (marriages of convenience) are tackled

Reference should be made to existing systems and procedures, of which there are many, in the scope of application of French law and which targets marriages known as ‘of convenience’: deferment of solemnisation of marriage, opposition to marriage, annulment of marriage, use of the ‘theory of fraud’ to withdraw a residence card, etc..

2. ACCESS TO EMPLOYMENT

See 2007 Report: on access to employment by family members of European citizens (including those covered by a transitional period): distinction between family members who are Community nationals and those who are third-party country nationals.

New text: see above, Chapter II.1.

The Order of 24 June 2008 therefore marks the end of the transitional measures, with effect from 1 July 2008, for access to employment by nationals of the Member States that joined the European Union in May 2004.

This lifting of restrictions on free movement has not been extended to nationals of Romania or Bulgaria who, if they wish to practise an activity in France, must apply for and obtain a provisional residence permit (Article R.121-16 of the CESEDA; Order of 8 January 2008).

The *HALDE* fears that the form of immigration chosen *opens the way for ethnic selection*:

‘In an opinion submitted to the CIMADE, which had taken cognisance of it, and made public by the latter on Wednesday 29 October, the French Equal Opportunities and Anti-Discrimination Commission (HALDE) observes that the circular implementing the follow-up of immigration labour contravenes the principle of non-discrimination in recruitment, incorporated into the Labour Code and the Penal Code. Since, it explains, it could ‘have the effect of not examining applications, particularly those from nationals of third-party countries (non-Europeans). Listing the trades ‘under pressure’ open to foreigners without invoking the employment situation in France, this circular of 20 December 2007 in effect establishes two lists: *one list of 150 trades, qualified and less qualified, intended for new nationals of the European Union (Romanians and Bulgarians)*; the other of 30 trades, for the most part requiring high qualifications, intended for nationals of third-party countries. In addition, Algerian and Tunisian nationals are ‘excluded from benefiting from the most favourable access measure for certain trades’, as the HALDE recalls. Additional lists of open trades have been established with Senegal, Gabon and Congo, with whom France has reached bilateral agreements on ‘concerted management of migratory flows’. Now, for the HALDE, ‘*variable methods of selection according to the country of origin of migrants*’ risks opening ‘*the way to the selection of workers on ethnic grounds, not exclusively based on professional skills*’. The Commission therefore recommends that the Minister for Immigration ‘stipulate the methods for implementing the circular’ in order to avoid it leading to the exclusion of applications from certain persons for a job by virtue of their nationality. It particularly recommends a ‘uniform application of the list of posts open to nationals of third-party countries’, in other words that there should be one single, identical list of trades open to all.’ (Article from *Le Monde*, 30 October 2008, by Laetitia Van Eeckhout).

3. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

See 1.1 above (*idem*).

4. OTHER ISSUES CONCERNING EQUAL TREATMENT (SOCIAL AND TAX ADVANTAGES)

CNAF Circular no. 2008-024 of 18 June 2008 on the right of residents of Community nationals, recalls that:

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‘Community nationals, although they are not legally obliged (except in cases of activity in certain professional sectors), have the possibility of being issued with a residence card. In this case, simply showing this document is sufficient to prove the legal nature of their residence. In other cases, applicants will have to fulfil several conditions set forth in the continuation of the note. *In the absence of a residence card*, verification of the conditions of right of residence is the competence of the CAF (FAMILY ALLOWANCES OFFICE).

It should be pointed out that the texts envisage that the CAFs have the possibility of requesting the *participation of the Prefecture in disputed cases*. Moreover, in cases that are difficult to assess by the CAFs, it should be noted that the Prefectures cannot put in a plea to bar regarding persons requesting a residence card’.

N.B.: In accordance with Directive 2004/38, the CESEDA does not impose possession of a residence card for European citizens, provided they fulfil the conditions listed above. On the other hand, access to social security services (see to what extent above) is conditional upon legal residence. Now, *in practice, European citizens may find it difficult to produce proof of the legal nature of their residence*, since they are not holders of a residence permit. The circular envisages that, in such cases, the CAF is competent to verify the conditions of right of residence of the applicant, with the participation of the Prefecture where appropriate.

Chapter VII

Relevance/Influence/Follow-up of recent Court of Justice Judgments

The rapporteur indicates that his investigations into this matter and with respect to France, have not been fruitful:

C-287/05 Hendrix

See also Chapter IV, relationship between Article 39 and Regulation 1612/68/EC with Regulation 1408/71/EC.

C-527/06 Renneberg

Nothing special.

C-94/07 Raccanelli

See also under Chapter III 4.4.

Chapter VIII

Application of Transitional Measures

1) New system of access to the labour market for nationals of Member States of the EU subject to a transitional system since 1 May 2004

The Order of 24 June 2008 regarding the issue, without invoking the employment situation, of work permits to nationals of European Union states subject to transitional provisions envisages withdrawing from the current system nationals of ‘Estonia, Latvia, Lithuania, Hungary, Poland, the Czech Republic, Slovakia and Slovenia’ (NOR: IMIK0814571A).

The circular of 1 July 2008 sets forth the new system of access to the labour market for nationals of Member States of the EU who have been subject to a transitional system since 1 May 2004.

With effect from 1 July 2008, France decided to have nationals of the aforementioned Member States join the common law system for Community nationals.

This decision involves several consequences that are the subject of more detail on the following points:

1. Practice of a salaried activity in France: system applied to Community nationals (see 2007 Report).
2. *Role of the ANAEM*: with effect from 1 July 2008, the ANAEM will no longer intervene in procedures of recruitment and introduction of these nationals and employers no longer have to pay it fees nor are they obliged to organise medical examinations.
3. *Handling of disputed files relating to payment of special contributions to the ANAEM*: for files under investigation, the Director of the ANAEM has decided to cease collecting this contribution, except for employers who recruited illegally before 1 July 2008.
4. *Handling of current files regarding applications for work permits*: applications after 30 June 2008 become unfounded, as are submissions for out of court settlements and current applications for renewal.
5. *Young professionals agreements*: nullity of agreements reached with Poland, Hungary and Slovakia.
6. *Seconded salaried workers*: cessation of obligation to hold a residence card beyond three months.
7. *Deportation*: the Prefectures can no longer pass Prefectural Deportation Orders (APRF) in the event of infringement of the transitional measures envisaged in Article L.121-2 of the CESEDA, nor even implement APRFs taken previously on this basis, *which is not the case for Romanian and Bulgarian nationals*.

2) The situation of Romanians and Bulgarians still subject to a transitional period

On the obligation to apply for authorisation to work:

- Romanian and Bulgarian nationals are still subject to the provisions envisaged in Article L.121-2 of the CESEDA, which states that, ‘citizens of the European Union *wishing to*

practise a professional activity in France remain subject to possession of a residence card for the duration of validity of any transitional measures (...)'.

- In the event of failure to comply with these formalities aimed at the application for a residence card and a work permit, nationals of the Member States affected by the transitional measures may find themselves removed from the national territory (see 2007 Report).
- *Decree no. 2009-199* opens up the casual and permanent practice of the profession of lawyer to Romanian and Bulgarian nationals.

On the grounds for the removal of nationals subject to the transitional period:

Threat to law and order

In the 2007 Report, it had been pointed out that the French administrative courts tended to apply the concept of 'national' regarding the threat to law and order, although the question was its application to Community nationals who, although subject to transitional measures regarding access to employment, were within the scope of application of Community law and the jurisprudence of the ECJ (see 2007 Report).

In two recent decisions, it seems that the jurisprudence is more inclined to take into account this important development and the fact that Romanians and Bulgarians cannot be removed from French territory on the grounds of a threat to law and order, except when observing the concept of 'Community', which is that retained for any other European citizen (serious, genuine and present threat, based on the personal behaviour of the party in question, etc.):

The Administrative Court of Versailles, 28 April 2009, recalled that *the illegal occupation of land by a Romanian national* (part of the Green Space of the Ile-de-France region), 'in the absence of exceptional circumstances and even though the Prefect of Val d'Oise reported it in his petition for attacks on public health, *was not itself sufficient to characterise the existence of a threat to law and order* within the meaning of the aforementioned provisions (Administrative Court of Appeal of Versailles, 28 April 2009, no. 08VE02982);

The Administrative Court of Rennes, 9 March 2009, recalled that a Romanian national can be removed from French territory, including within a period of less than three months, in the event of a threat to law and order 'presented by his behaviour'. On the other hand, this behaviour will only be regarded as constituting a threat to law and order 'if it represents a genuine, present and sufficiently serious threat to the fundamental interests of society'. In the case in point, the Court judged that the only circumstances cited by the Prefecture, being that the party in question, '*did not possess a home, was illegally occupying a garage unfit for habitation and possessed no resources*', were '*not sufficient to translate into behaviour constituting such a genuine, present and sufficiently serious threat to the fundamental interests of society*'.

Proof of 'sufficient resources' so as not to become a burden on the social security system

The 2007 Report introduced the concept of unreasonable burden on the host State as identified by French jurisprudence, by wondering about its compatibility with Community law and jurisprudence:

'on the one hand, the concept of 'unreasonable burden' in Community texts and in the jurisprudence of the European Court of Justice (ECJ) is a very restrictive concept for the State invoking it in support of

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an assessment of the maintenance of the right of residence of a Union citizen (ECJ, 20 September 2001, case C-184/99, Grzelczyk). On the other hand, the same Article 14 of the Directive of 2004 stipulates that, 'reliance on the social security system by a citizen of the Union or member of his family does not automatically involve a removal measure', which the disputed decree did not envisage (Directive 2004/38/EC, 20 April 2004, preamble 16 and Article 14, § 3).

In its '*SILIDOR*' *Opinion of 26 November 2008*, the Council of State made a statement about the residence of Community non-workers and responded, on this occasion, to a question asked concerning the assessment of this concept of 'unreasonable burden'. The case involved a Romanian national, Mr. SILIDOR, who was the subject of a decision to refuse to maintain his right of residence and to force him to leave the national territory. He brought a request for annulment before the Administrative Court of Cergy, citing grounds implying that several points of law were decided by the Council of State:

1. in the event of residence of more than three months on the national territory, without responding to the conditions established in Article L. 121-1 of the CESEDA, although this national did not apply for the issue of a residence card, the Council of State explains that the provisions of Article 24 of the Law of 12 April 2000 (previous procedure after hearing both parties) are not applicable on the grounds of the particular rules of the OQTF (Obligation to Leave French Territory) procedure, which are applicable.
2. in order to be able to assess the duration of residence, shorter or longer than three months, the Council of State replies that the burden of proof is on the administration but that a foreigner who applies for cancellation of a removal measure can put forward any element of a nature as to contest the merits of the case. The Council of State adds that the administration can rely on data originating from agencies providing assistance if it cites the burden that the party in question represents on the social security system, or on statements previously made by that person.
3. '*the lack of sufficient resources can be invoked* by the Prefect to take a removal decision with respect to a Community national who has been residing in France for more than three months, *even though the interested party is no longer effectively covered by the social security system*' (EC, Silidor Opinion, 26 November 2008, no. 315441).

On this latter point, in particular, commentators have not failed to note that, '*the decision is open to criticism*' since, while Article 14 § 2 of the Directive provides that non-working EU citizens have the right of residence provided they meet the conditions of sufficient resources and comprehensive health insurance, the text adds that, 'reliance on the social security system (...) does not automatically lead to a removal measure'. Even more, it is not evident how a removal measure can be passed against a non-worker who has not yet had recourse to medical care. Preamble no. 16 of the Directive is very clear:

'Beneficiaries of the right of residence should not be the subject of removal measures provided they do not become an unreasonable burden on the social security system of the host Member State'.

'Certainly, Community law makes it very difficult to remove a European citizen from the EU, but the stamp of the fundamental nature of the right of residence that the Council of State has refused to admit in this case should be evident.' (J.-Ph, Lhernoud, First Decision of the Council of State on the residence of Community non-workers, *Liaisons sociales Europe* no. 218, p. 5).

CNAF circular no. 2008-024 of 18 June 2008, regarding the right of residence of Community nationals, provides the following details:

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'How to prove receipt of health coverage'

The person must provide a certificate from the health insurance company (social security agency, mutual insurance society, private insurance, etc.) that provides cover for himself and for the members of his family for whom the services are required. *This agency can be based in France or in a foreign country (country of origin, for example).*

Universal Health Coverage (CMU) is not regarded as health coverage enabling the establishment of a right of residence.

A right to family allowances cannot therefore be open to a first-time entrant who may prove a right to CMU.

In terms of persons who are not first-time entrants, an exception does however exist: a person who receives CMU can have a right of residence under certain conditions: if the person has previously fulfilled the conditions for right of residence (health coverage, etc.) but no longer fulfils them, following a 'trial of life' (loss of employment, separation or death of spouse, termination of marital life, refusal of insurance in the event of serious and non-foreseeable illness, at the time of a change of residence, etc., cf. paragraph 6). In this case, the right of residence is retained for a variable period, depending on the situations.

Thus, in the event of a request for services on the part of a recipient of CMU who is not the first-time entrant, contact should be made with the CPAM. If the right of residence is open by way of maintenance based on a trial of life, family allowances and similar can be accessed for the period of maintenance of the right of residence exclusively.

How to evaluate whether the person possesses sufficient resources

Assessment of the possession of sufficient resources still has to be stipulated by the ministerial departments. *The applicant should be investigated in order to establish that he possesses the equivalent of at least six months of RMI (or solidarity allowance for the elderly (ASPA) if the applicant is aged over 65)'.*

On the constant increase in the number of departures referred to as 'voluntary' and 'humanitarian' of Romanians and Bulgarians: see Chapter IX below.

Chapter IX

Miscellaneous

Compatibility of ‘humanitarian’ assisted return with the status of European citizen or similar (Romanians and Bulgarians)

The annual Report to Parliament of the CICI (December 2008) recalls that the removal of Bulgarian and Romanian nationals remains legally possible (disturbances to law and order, infringement of labour legislation, loss of right of residence for longer than three months). It also confirms a *monumental increase (+959%)* in ‘voluntary returns’.

N.B.: without distinguishing between returns referred to as ‘voluntary’ and ‘humanitarian’: for the first six months of 2007 there were 602 returns of this type included in the figures and 6,386 for the first six months of 2008. Consequently: *‘during the first half of 2008, Romanians once again became the nationality most frequently removed, specifically taking into account the very high number of voluntary returns organised under the aegis of the ANAEM (numbering 5,170)’* (Annual Report to Parliament of the CICI, December 2008, pp. 100 and 101).

As a reminder, France has *two types of assisted return*: ‘voluntary’ assisted return, which affects only nationals of third-party countries who are the objects of a decision to punish illegal residence; and ‘humanitarian’ assisted return, which concerns nationals of third-party countries and Community nationals *who are in a destitute or extremely insecure situation*. Since the year 2007, the ANAEM and the Prefectures have intensified this ‘humanitarian’ assisted return with respect to Bulgarian and Romanian nationals chiefly with respect to Romanians, on the basis that they are in an ‘extremely insecure’ situation. ‘Humanitarian’ assisted returns for the year 2008 involved 7,862 persons, of whom 7,028 were Romanian and 834 Bulgarian (Source: ANAEM, as of 31 October 2008). It should be pointed out that these ‘voluntary returns’ are accounted for in the general category of measures for ‘removal from French territory’.

Based on these figures, Mr. Brice Hortefeux, then Minister for Immigration, explained that he had *fulfilled the objectives* fixed by the President of the Republic, *specifically referring to the 29,796 expulsions*: ‘I am proud of having observed and applied the law’, (Le Figaro, *Expulsions: Brice Hortefeux dépasse ses objectifs*, 13 January 2009): the Minister for Immigration also explained that he had exceeded the objective of 26,000 expulsions established upon his arrival, with 29,796 expulsions in 2008. The increase in the number of ‘removals’ had increased by 28.5% in one year.

On the other hand, many observers and commentators noted that this global figure also included the number of returns known as ‘voluntary’ (including ‘humanitarian’ returns by Romanians and Bulgarians) and wondered about the credibility of the stated figures. In fact, if the number of returns known as ‘voluntary’ are removed (10,072), in other words one-third of the removals accounted for in 2008, this leaves a result for ‘non-voluntary’ removal measures of 19,724 for 2008... *which is beyond the objective of 26,000 expulsions*. In fact, it seems difficult to liken the returns by Romanians and Bulgarians ‘on grounds of insecurity’ (known as ‘humanitarian’ returns) to removal measures which, for the vast majority, punish the illegal residence of third-country (non-EU) nationals. For his part, the Minister for Immigration explains the meteoric rise in the number of these returns referred to as ‘voluntary’ on

the grounds that, 'Every day, our action is increasingly understood by the immigrants themselves', stating that, 'for the first time in a generation, the number of illegals has started to decline in France' (see Introduction to aforementioned Annual Report to Parliament). However, the number of Romanians and Bulgarians who were returned to their country in 2008 (10,072 in 2008) within the context of 'humanitarian' returns cannot be included in the number of 'illegals' removed from France because, as European citizens moving within the EU, they are therefore not necessarily (even rarely) in an illegal situation in a host Member State.

In this respect, *the Romeurope Group* denounced these 'expulsion statistics' by recalling that the proportion of returns known as 'voluntary' had apparently quadrupled in one year: 'We may be surprised at the silence concerning the distribution of nationalities among the expulsions; the ANAEM will inform us that, in the first 5 months of 2008, over 6,000 of them (i.e. 40% of the 14,660 returns) departed within the context of humanitarian assisted return, a scheme that involved a significant proportion of European citizens. Among them, Romanians and Bulgarians were strongly represented, two nationalities that already constituted ¼ of removals in 2006 before their entry into the EU. Now, we know that this concerns essentially Romanies, for whom the destitution in which they are trapped acts as a pretext for evacuating their dwellings', within the context of return operations organised jointly by the police and the ANEM. In most cases, requests for humanitarian assisted return are obtained by force and are not the result of a genuine return project, most often signed in a panic situation, deliberately caused, very often under emergency conditions forty-eight hours before their departure, even afterwards, signed as a 'lesser evil' when the State agencies brandish the threat of the police and of prison, often signed without an interpreter, signed without the possibility of retraction because the identity documents are usually confiscated and because the departure and route arrangements usually resemble a situation of coercion, signed under the most secretive of conditions because external observers are kept at a distance. *These return operations contradict what is understood by the term 'humanitarian'; since they are evidently aimed at the evacuation of a site without worrying about the situation of the individuals occupying it; because this mass treatment has dramatic consequences for people.* (Where is the 'humanitarian' when children are left behind on sites or at the school gate, when seriously ill and sometimes infectious people are expelled to Romania, when all those persons' possessions are destroyed, when the integration route of families (children's schooling, steps towards professional insertion, medical follow-up, neighbourhood ties) are brutally interrupted?) Finally, the sums awarded in the absence of actual accompaniment to the country of origin have no effect other than to elicit rapid return trips (departing from France or Romania), sometimes with the sole aim of receiving such benefits (€300 per adult and €100 per child, while the average salary in Romania in March 2008 was €194 per month). It is a phenomenon that jeopardises already fragile population groups by severing established links here and there and that exposes them to various forms of extortion. But it does not matter since even if the number of migrant Romanies in France remains roughly constant, these expulsions and voluntary returns push up the statistics (Press release by the Romeurope National Human Rights Group, *Des statistiques d'expulsions volontairement trompeuses*, <http://www.romeurope.org/?p=780>).

Adoption of Law no. 2008-89 of 30 January 2008

Aimed at transposing Community directives regarding the articles of the association of the European cooperative society and the protection of salaried employees in the event of the employer's insolvency, NOR: MTSX0760738L, French Official Journal 31 January 2008.

CNAF Circular no. 2008-024 of 18 June 2008,

Regarding the right of residence of Community nationals, completes *the system of new elements for students*:

‘1. - STUDENTS: The right of residence in France of Community students is based on Article L. 121-1 of the Code for the Entry and Residence of Foreigners and the Right of Asylum. This envisages that a Community student has the right to reside in France for a period longer than three months if he:

- is registered at an educational establishment principally in order to follow studies or vocational training;
- has health and maternity insurance coverage;
- has sufficient resources for himself and members of his family in order not to become a burden on the social security system.

At his request, he can receive a residence card bearing the words, ‘EC Student’, but this is no longer compulsory and the **acknowledgement of his right of residence is not conditional upon possession of a card**. The condition of sufficient resources must be evaluated in accordance with Article R. 121-12 of the Code for the Entry and Residence of Foreigners and the Right of Asylum. A Community student therefore meets the condition of regular residence provided he can provide: proof of education; a European health insurance card (which has now replaced the former forms E.111, E.128, etc.) or a certificate from the health insurance company (social security agency, mutual insurance society, private insurance company, etc.) that provides cover for him and, if appropriate, for the members of his family for whom services are requested. This agency can be based in France or in a foreign country (country of origin, for example); a statement under oath or any other means guaranteeing that he has available, for himself and for his family, if appropriate, sufficient resources. Unlike non-workers, no threshold is fixed for assessing the level of sufficient resources. This level is not quantifiable therefore, which explains why a simple statement under oath is sufficient’.

Studies, seminars, reports, legal literature

Romeurope international symposium

The international symposium, ‘Dynamics, policy and experiences of the report on endogenous foreigners in Europe: Romanies, Yeniche, gypsies and travellers’, will be held on 27, 28 and 29 April 2009 at the Université Victor Segalen, Bordeaux 2 (3 ter place de la Victoire, 33000 Bordeaux).

SAF symposium on ‘chosen’ immigration

XVIIth symposium organised by the Aliens Law commission (SAF – French lawyers association), with the participation of the Order of Lawyers of the Bar of Lille, ‘Chosen Immigration: selective separation’, Saturday 28 March 2009 – Université de droit et de la santé Lille II.

FRANCE

Annual Report to Parliament of the Interministerial Committee for Immigration Control (CCIC), December 2008.

References to national organisations, bodies where citizens can lodge complaints for violation of Community law on free movement of workers

The HALDE (French Equal Opportunities and Anti-Discrimination Commission), an independent administrative authority that provides assistance to any person in order to identify and combat discriminatory practices: www.halde.fr.

The Children's Ombudsman for France, national institution with the status of independent authority, which takes action on behalf of children whose rights are not being respected (in some cases asserting the greater interest of the child when the child is in difficulty): www.defenseurdesenfants.fr.

NGOs

'Romeurope' National Human Rights Group: <http://www.romeurope.org>.

GISTI (Group Providing Information and Support to Immigrants), French association specialising in aliens law: www.gisti.org.

CIMADE: www.cimade.org.

**OBSERVATIONS SUR LE RAPPORT FRANÇAIS 2008 RELATIF
A LA LIBRE CIRCULATION DES TRAVAILLEURS
DANS L'UNION EUROPEENNE**

INTRODUCTION

Page 2 (dernier paragraphe) :

- Le rapport souligne que si les mesures transitoires mises en œuvre à l'égard des Etats membres qui ont rejoint l'UE en mai 2004 ont été levées à compter du 1er juillet 2008, celles concernant la Roumanie et la Bulgarie, entrées dans l'UE en janvier 2007, subsistent toujours.

La fonction publique n'est pas concernée par la mise en œuvre de dispositions transitoires limitant pour une période déterminée la libre circulation des travailleurs. En effet, il a été considéré que l'application de telles mesures n'était pas opportune dans le secteur public au regard, d'une part, du secteur d'emploi spécifique que constitue la fonction publique et, d'autre part, de l'objectif général d'ouverture et de diversification du recrutement de la fonction publique française.

Le principe d'ouverture généralisée de la fonction publique française s'applique donc de plein droit à l'ensemble des ressortissants communautaires, sans qu'aucune mesure dérogatoire ne puisse être opposée aux ressortissants des deux Etats membres ayant adhéré le 1^{er} janvier 2007.

- Parmi les événements de l'année 2008, il doit être précisé que l'arrêté du 18 janvier 2008 (et non du 8 janvier 2008) a permis de faire passer de 61 à 150 le nombre de métiers ouverts aux ressortissants des nouveaux Etats membres sans opposition de la situation de l'emploi.

- Le document que les ressortissants roumains et bulgares doivent solliciter (dans le cadre de l'exercice d'une activité professionnelle salariée uniquement, l'accès aux autres activités professionnelles étant libre) est une « *autorisation de travail* » (et non une « *autorisation provisoire de séjour* » comme indiqué dans le rapport). Les ressortissants roumains et bulgares exerçant une activité professionnelle en France (salariée ou non salariée) doivent en outre solliciter une carte de séjour.

CHAPITRE I / ENTREE, SEJOUR, DEPART

1 Transposition des provisions spécifiques aux travailleurs

Article 7(1a), page 3 (2^{ème} paragraphe) :

L'article L. 121-2 a été créé en réalité par la loi du 24 juillet 2006, dont les dispositions ont été par la suite modifiées par la loi du 20 novembre 2007.

Article 8(3a), page 6 :

La formalité d'enregistrement n'est actuellement pas applicable, la publication du modèle d'attestation ayant été différée.

CHAPITRE II / ACCES A L'EMPLOI

1 Egalité de traitement pour l'accès à l'emploi

Elément nouveaux/L'arrêté du 24 juin 2008 (page 14) :

Mêmes observations que celles figurant supra concernant les trois derniers alinéas de l'introduction.

CHAPITRE V/ EMPLOI DANS LE SECTEUR PUBLIC

1 Accès au secteur public

1.3 Reconnaissance des expériences professionnelles pour l'accès au secteur public

Recrutement et concours dans le corps des armées (page 30) :

Le rapport évoque le caractère discriminatoire des dispositions qui prévoient dans les conditions de recrutement la condition d'avoir satisfait aux obligations du code du service national.

En fait, il convient de rappeler que le code de la défense, sauf exceptions (légion étrangère et militaires commissionnés, qui sont tous contractuels), impose la condition de posséder la nationalité française pour pouvoir être recruté comme militaire (article L.4132-1 du code de la défense). Par conséquent, tout militaire est en mesure de pouvoir justifier de sa situation au regard du code du service national.

Il est précisé que les dispositions sur les équivalences de diplômes présentes dans les statuts particuliers des militaires concernent les nationaux qui ont fait tout ou partie de leurs études à l'étranger et qui sont de ce fait titulaires de diplômes étrangers.

2 Règlementation du travail

Conditions de titularisation et de classement des maîtres de conférences des universités - praticiens et professeurs des universités-praticiens hospitaliers et des disciplines pharmaceutiques (page 31) :

S'agissant du classement des professeurs des universités-praticiens hospitaliers et des professeurs des universités-praticiens hospitaliers des disciplines pharmaceutiques, il doit être rappelé que la prise en compte des services accomplis dans l'UE s'effectue conformément aux dispositions prévues par les statuts particuliers du corps ou cadre d'emplois auquel accède l'intéressé, dans le respect du principe d'égalité de traitement entre les travailleurs. Aussi, le classement des ressortissants communautaires se fait dans les mêmes conditions que pour les nationaux. Le décret n° 2008-308 du 2 avril 2008 modifie notamment le décret n° 84-135 du 24 février 1984. La modalité de reprise de services mentionnée au dernier alinéa de l'article 69-1 du décret n° 84-135 précité concerne toutes les fonctions énumérées au 1°, 2° et 3°.

Enfin, si le rapport porte aussi sur l'année 2009, il peut être fait mention de l'ouverture des concours internes de la fonction publique aux ressortissants communautaires. Ces derniers, depuis la loi n° 2009-972 du 3 août 2009 relative à la mobilité

et aux parcours professionnels dans la fonction publique (article 26), peuvent être recrutés par concours interne, dans les mêmes conditions que les candidats issus des administrations françaises, en faisant valoir les services accomplis notamment dans l'administration d'un autre Etat membre que la France.

CHAPITRE VI / MEMBRES DE FAMILLE DU TRAVAILLEUR

1 Droit de séjour - transposition de la directive 2004/38/CE

1.2 Application de l'arrêt Metock

Effets de la jurisprudence Metock en France (page 34) :

Il est exact que l'exigence par certaines préfectures d'un visa de long séjour pour les ressortissants de pays tiers membres de famille de citoyen européen était erronée. Afin de mettre un terme à cette pratique dont l'administration centrale n'avait pas connaissance, une circulaire relative au droit de séjour des citoyens communautaires et de leurs membres de famille a été préparée et sera diffusée prochainement.

2 Accès au travail

Elément nouveaux / L'arrêté du 24 juin 2008 (page 36) :

Mêmes observations que celles figurant supra concernant les trois derniers alinéas de l'introduction.

CHAPITRE IX/ DIVERS

1 La compatibilité de l'aide au retour dit "humanitaire" et du statut de citoyen européen ou assimilé (roumains et bulgares)

Partie commençant par "Sur le fondement de ces chiffres, Monsieur Brice Hortefeux" : page 42 :

Le rapport indique que les citoyens roumains ou bulgares retournés dans leurs pays dans le cadre des retours "humanitaires" ne seraient "*pas nécessairement (voire même rarement) en situation irrégulière*" du fait de leur statut de citoyen européen.

Sur ce point, il est utile de rappeler que ces ressortissants, lorsqu'ils n'exercent pas d'activité professionnelle, doivent justifier d'une assurance maladie et maternité ainsi que de ressources suffisantes afin de ne pas constituer une charge déraisonnable pour l'assistance sociale, à l'instar de tous les citoyens de l'UE exerçant leur droit de libre circulation et de séjour prévu par la directive 2004/38/CE.

Faute de satisfaire à ces conditions, ces ressortissants ne peuvent se prévaloir d'un droit de séjour. C'est dans ce sens qu'ils peuvent se retrouver en situation irrégulière et faire l'objet de mesures de reconduite à la frontière ou de retour humanitaire.