REPORT
on the Free Movement of Workers in France in 2006

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CHAPTER I. ENTRY, RESIDENCE, DEPARTURE

A. Entry

1. Transposition of Directive 2004/38

Directive 2004/38 regarding the right of citizens of the Union and their family members to move and reside freely on the territory of the Member States has been the subject of initial transposition through Article L-121-1 of the Code for the Entry and Residence of Foreigners and the Right of Asylum (CESEDA), a more than partial transposition being effected by Law 2003-1119 of 23 November 2003.[1] This law confined itself in fact to recalling, in one chapter and one single article that, "nationals of the Member States of the European Union, of other States party to the European Economic Area agreement and of the Swiss Confederation who wish to establish their place of habitual residence in France are not required to hold a residence permit" subject to particular provisions relating to new Member States. This law was followed by a circular dated 26 May 2004[2] and by Decree 2005-1332 of 24 October 2005.[3]

Law 2006-911 of 24 July 2006 regarding immigration and integration[4] very broadly modifies the CESEDA by implementing a genuine transposition operation some months later than the transposition deadline established by the Directive. In so doing, Law 2006-911 repeals the preceding texts and remains in a position of anticipating an application text, the decree of the Council of State explicitly envisaged by Article L.121-5 of the Code and which has not yet been adopted.

After having added the phrases, "as well as residence by their family members" to the title of part II of the CESEDA which now governs, "the entry and residence of nationals of the Member States of the European Union or those party to the European Economic Area agreement and Swiss nationals as well as residence by their family members", the CESEDA is therefore organised around two newly-created chapters: Chapter 1 relates to the right of residence and Chapter II relates to the right of permanent residence.

2. Text(s) in force

Article L.121-1 of the CESEDA aims to transpose the terms of Article 7 of Directive 2004/38 and compiles the list of conditions opening up the *right of residence* on French territory. At least one of these conditions must be fulfilled. According to these stipulations, "unless his presence poses a threat to law and order, all citizens of the European Union, all nationals of another State party to the European Economic Area agreement or the Swiss Confederation have the right to reside in France for a period longer than three months if they satisfy one of the following conditions:

> 1. Exercise of a professional activity in France;
> 2. Availability, for themselves and their family members [...] of sufficient resources so as not to become a burden on the social security system, as well as of health insurance;
> 3. Registration at an establishment [...] for the primary purpose of undertaking studies or [...] vocational training and the guarantee of health insurance and sufficient resources for themselves and their family members [...] so as not to become a burden on the social security system;
> 4. If they are direct descendants aged under twenty-one or dependents, direct dependant ascendants, spouses, ascendants or direct dependant ascendants of the spouse, accompanying or joining a national who meets the conditions set forth under 1 and 2;
> 5. If they are spouses or dependent children accompanying or joining a national who meets the conditions set forth under 3.

1 *French Official Journal*, 27 November 2003.
2 *Interior Official Bulletin*, 2/2004.
3 *French Official Journal*, 29 October 2005.
4 *French Official Journal*, 25 July 2006, p. 11047.

Moreover, the text reserves certain cases of application. Thus, Article L.121-2 emphasises that citizens of the European Union who wish to practise a professional activity in France remain subject to possession of a residence permit during the period of validity of transitional measures possibly envisaged in this respect by the accession treaty of the country of which they are nationals and unless this treaty stipulates otherwise. If these persons wish to exercise a paid activity in a trade characterised by recruitment difficulties and appearing on a list drawn up at national level by the administrative authority, they cannot be refused employment on the grounds of Article L.341-2 of the Labour Code. On the other hand, once these citizens have successfully completed a training course at a nationally accredited higher education establishment, leading to a diploma at least equivalent to a master's, they are not subject to possession of a residence permit in order to exercise a professional activity in France.

Generally speaking, it will be noted with regard to this mechanism that "sufficient" resources can comprise not only personal income but, more broadly, all the financial means at their disposal for residing in France without the need for various social security services.

Equally, the rejection of a parliamentary amendment aimed at granting a right of residence to persons attached to a Community national by a Civil Solidarity Pact (PACS) will be observed, on the grounds that this would amount to granting the Community national an advantage above that enjoyed by French citizens. In fact, it is known that French legislation regarding alien law has not recognised a right of entry for the foreign partners, even registered, of nationals. Moreover, the legislator considers that the PACS, although registered, does not confer rights "equivalent" to marriage. The CESEDA is therefore silent on the situation of the "partner with whom the 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, registered partnerships are equivalent to marriage and abiding by the conditions envisaged by the relevant legislation of the host Member State", although envisaged by Directive 2004/38.

Article L.121-2 of the CESEDA is inspired by Article 8 of Directive 2004-38 and it provides that, "the nationals referred to in Article L.121-1 who wish to establish their habitual residence in France are to register with the mayor of their municipality of residence within three months of their arrival. They are not required to hold a residence permit. If they so request, a residence permit is issued to them".

The administrative registration formality is new and aims to specify the administrative formalities applicable to which Community nationals or similar, who enjoy a right of residence of more than three months in France, by establishing the methods of their registration and the possible issue of residence permits in their favour. Based on the provisions of Article 8 of Directive 2004/38, Article L.121-1 therefore retains this registration mechanism for statistical purposes and assigns its implementation to the mayor of the municipality of residence.

B. Residence

Text(s) in force

The right of residence granted to a Community national can also be a *right of permanent residence*, as recognised in Chapter II of the same Part II of the CESEDA via the Law of 24 July 2006 by establishing the cases in which Community nationals or similar and their family members can acquire in France a *"right of permanent residence",* confirming the right of ordinary residence acknowledged by the provisions of Chapter I.

Article L.122-1 of the CESEDA envisages acquisition by a Community national or similar and his family members, who already enjoy right of residence in France by virtue of the provisions of the previous chapter, of a *permanent* right to reside on the national territory, on two conditions. It attaches a dual condition to this acquisition:

- these persons must have been resident in France for at least five years without interruption and entirely legally. This period, as well as the requirement that the residence be

legal, are the direct result of Article 16 of the Directive of 29 April 2004, which stipulates that, *"citizens of the Union who have legally resided on the territory of the host Member State for an uninterrupted period of five years acquire the right of permanent residence on its territory"*. Moreover, the family members of the Community national or similar are required to have completed this residence period of five years *"with the national"*, in accordance with Article 16 of the aforementioned Directive;

- these persons must not pose a threat to law and order in line with the regulations of Article 27 of Directive 2004/38. The legislator has emphasised his desire to avoid a situation where a person who has benefited from the latter, before becoming a threat to law and order, automatically acquiring the right of permanent residence.

A national who has acquired the right of permanent residence in France cannot lose it if he ceases to fulfil the conditions envisaged in the previous chapter, particularly with respect to the resources conditions and the health insurance requirement.

Nonetheless, Article L.122-2 of the CESEDA indicates that "absence from French territory for a period of more than two consecutive years causes the holder to lose the benefit of the right of permanent residence", thus applying Article 16 of the Directive.

On 21 March 2007, a decree in the Council of State stipulated, by regulatory means, the conditions for application of these provisions, in particular the list of documents granting the right of permanent residence, the conditions under which the right of permanent residence is acquired by workers who have ceased to work in France and the conditions relating to the continuity of residence, as well as the sanctions imposed. It will be discussed in the next report.

Jurisprudence

Administrative Court of Appeal of Bordeaux, 28 February 2006, Mr. O, 03BX02322: Mr. O, a retiree of Spanish nationality, was the holder of a ten-year residence card which had been issued to him as a salaried worker and which expired on 31 March 2000. In 1998, he was sentenced to a term of imprisonment. In a decision of 2 August 2001, the Prefect of Tarn-et-Garonne refused to renew his residence permit on the grounds that he represented a threat to law and order as a result of this criminal sentence. In a decision of 17 September 2001, the Prefect invited him to leave the territory within a period of one month. The applicant therefore disputed these decisions before the administrative judge.
The Administrative Court of Appeal rules that, "if the administration can refuse entry for residence on the basis of grounds relating to law and order, such grounds could not legally justify denial of the request for renewal of the residence permit submitted by Mr. O since no restriction on the renewal of this permit linked to the presence of a threat to law and order was envisaged in Article 7 [of Decree 94-211]".

C. Departure

Text(s) in force

Article L.121-4 of the CESEDA provides that, "any citizen of the European Union, any national of another State party to the European Economic Area agreement or the Swiss Confederation [...] who cannot provide a right of residence or whose presence poses a threat to law and order can be the subject, depending on the case, of a decision to deny residence, to deny the issue or renewal of a residence permit or of a withdrawal of this permit as well as of removal measures.

Article L.511-1 of the CESEDA stipulates, moreover, that the administrative authority refusing to issue or renew a residence permit to a stranger "can, by reasoned decision, force a national of a Member State of the European Union, of another State party to the European Economic Area agreement or the Swiss Confederation to leave French territory if it asserts that he no can no longer prove any right of residence as envisaged in Article L.121-1".

Article L.511-4 of the CESEDA envisages that the holder of a right of permanent residence cannot be the subject of an obligation to leave the territory or of a measure involving deportation.

Article L.521-2 of the same Code also stipulates that "a national of a Member State of the European Union, of another State party to the European Economic Area agreement or of the Swiss Confederation who has been residing regularly in France for ten years" cannot form the subject of an expulsion measure. However, and exceptionally, this national, "can be the subject of an expulsion order if he has been definitively sentenced to a term of imprisonment without remission of at least equal to five years".

Finally, we emphasise that the French legislator was referring to the classic condition of a threat to law and order within the generic meaning of the phrase, without explicitly transposing the instructions of Article 27 of § 2 of the Directive, which mention observance of the principle of proportionality and the need to take as an exclusive basis the personal behaviour of the person in question. Nonetheless, in law, the applicable jurisprudence and review by the judge are organised on the bases of these precepts and the principle of proportionality.

Jurisprudence

Several decisions by the administrative jurisdiction remain relevant and are worth quoting.

Council of State, 12 December 2005, *Chief of Police vs. Ms. Beata X*, no. 262919: Ms. X, of Polish nationality, not subjected to the visa obligation, entered France on 21 April 2003 and remained on the territory upon expiry of a period of three months from her entry, without being holder of a residence permit. The Chief could therefore decide to have her deported. The Council of State considers that there is no reason to repeal the deportation order dated 28 October 2003 in view of the circumstances of the case, notably the conditions for residence and its discontinuous nature. On the other hand, it recalls that Polish nationals no longer have to apply for issue of a residence permit, with effect from 1 May 2004, unless they wish to practise an economic activity in France. It is not evident from the documents in the file that Ms. X exercised this kind of activity, leading the Council of State to conclude that the deportation order issued with regard to her cannot be implemented.

Council of State, 12 December 2005, *Chief of Police vs. Mr. Darius X*, 253240: the facts are similar, also involving a Polish national with regard to whom a deportation order was issued, which the Council of State regards as valid but which cannot be implemented.

CHAPTER II. ACCESS TO EMPLOYMENT

Equal treatment in access to employment

Text(s) in force

A *decree of 27 July 2005* abolishes the compulsory prior authorisation for aerial photography activities performed by French non-residents and thus enabled the filing of the infringement proceedings against France regarding discrimination in this area.

Decree 2006-1229 of 6 October 2006 relating to the regulatory section of the Tourism Code enables French law to be brought into line in this respect in an entire series of provisions of unequal interest by modifying the regulatory texts applicable until now.

Thus, its Article R.133-12 stipulates that Community nationals can be appointed as directors of Tourist Offices under the same conditions as French nationals by providing that, "In order to be appointed director, candidates must specifically be of French nationality or hold the nationality of a Member State of the European Community or a party to the European Economic Area agreement, enjoy their civil and political rights and be in a regular situation with regard to the obligations of national service of the State of which they are nationals".

Regarding the professions of tour guide and interpreter and lecturing guide, Decree 2006-1229 includes a section about the professional skills acquired in other States, leading to the issue of a professional card.

Its article R. 221-15 indicates that those who are awarded the professional card referred to under 2 of Article R. 221-1, either as national tour guide and interpreter without holding the tour guide's and interpreter's diploma referred to in Article R. 221-11, or as national lecturing guide without fulfilling the conditions required in Article R. 221-12, are French nationals or nationals of another Member State of the European Community or of a party to the European Economic Area agreement who have successfully completed an academic cycle of at least one year or an equivalent part-time period preparing them to practise the profession, at a university or higher education establishment or in another establishment of an equivalent training level, and who can prove:

1. A diploma, certificate or other qualification allowing the exercise of an activity on a professional basis in a Member State of the European Community or a party to the European Economic Area agreement which regulates access to or the exercise of the profession and awarded:
   a) Either by the competent authority of this State, marking the successful completion of training acquired primarily in the European Community or European Economic Area;
   b) Or by a third-party country on condition that a certificate of accreditation be provided by the competent authority in the Member State of the European Community or the party to the European Economic Area agreement which recognised the diploma, certificate or other qualification and certifying that the holder has actually practised the activity on its territory, on a professional basis, for a minimum period of three years;
2. Or a training qualification marking successful completion of a regulated training course, within the meaning of d bis of Article 1 of Directive 89/48/EEC of the Council of 21 December 1988, modified by Directive 2001/19/EC of the European Parliament and the Council of 14 May 2001;
3. Or full-time practice of the activity for at least two years during the previous ten years in a Member State of the European Economic Community or a State party to the European Economic Area agreement which does not regulate access to or the practice of this profession, on condition that this professional experience be certified by the competent authority of this Member State or the State party to the aforementioned agreement.
   However, in the event that the National Commission of tour guides and interpreters and lecturing guides has established that the training provided on the basis of 1 or 2 above covers subjects that are substantially different from those featured on the na-

tional diploma programme or those covered by the national lecturing guide examination or in cases where the activity is not regulated in the Member State or the State party to the European Economic Area agreement or is regulated in a substantially different way, and has verified that the knowledge acquired by the applicant during his professional experience is able to compensate, wholly or partially, for the difference in training, the Prefect – acting on the recommendation of this Commission – may require that the person in question choose either to take an aptitude test or to complete an adaptation course, the duration of which may not exceed three years and which is the subject of an evaluation.

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

With regard to the professional card for regional tour guides and interpreters, Article R.221-16 stipulates that, without fulfilling the conditions required in Article R. 221-13, this is issued to French nationals or nationals of another Member State of the European Community or a State party to the European Economic Area agreement who can prove:

1. Possession of a diploma, certificate, other qualification or certification of competence prescribed by a Member State of the European Community or a State party to the European Economic Area agreement which regulates access to or practice of the profession;
2. Or qualifications obtained in another Member State or party to the aforementioned agreement, providing guarantees equivalent to those required for nationals.

   However, in the event that the National Commission of tour guides and interpreters and lecturing guides has established that the person in question cannot give proof of one of the training qualifications or certificates of competence referred to under 1 and has verified that the qualifications obtained during the vocational experience are able to compensate for those required to practise the activity, the Prefect – acting on the opinion of this Commission – may require that the person in question choose either to take an aptitude test or to complete an adaptation course, the duration of which may not exceed two years and which is the subject of an evaluation.

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

Article R.221-17 indicates that the professional card for lecturing guides in artistic and historical cities and countries referred to under 2 of Article R. 221-1 is awarded, without having successfully passed the examination referred to in Article R. 221-14, to nationals of a Member State of the European Community or a State party to the European Economic Area agreement who can prove:

1. Possession of a diploma, certificate, other qualification or certification of competence prescribed by a Member State of the European Community or a State party to the European Economic Area agreement which regulates access to or practice of the profession;
2. Or qualifications obtained in another Member State or party to the aforementioned agreement, providing equivalent guarantees to those required for nationals.

   However, in the event that the National Commission of tour guides and interpreters and lecturing guides has established that the person in question cannot give proof of one of the training qualifications or certificates of competence referred to under 1 and has verified that the qualifications obtained during the vocational experience are able to compensate for those required to practise the activity, the Prefect – acting on the opinion of this Commission – may require that the person in question choose either to take an aptitude test or to complete an adaptation course, the duration of which may not exceed two years and which is the subject of an evaluation.

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

By virtue of Article R.221-18, persons possessing the professional aptitude acquired under the conditions envisaged in Articles R.221-15, R.221-16 and R.221-17 are to submit their application for a professional card to the Prefect of the *département* of their place of residence, for those residing in France. Persons residing abroad submit their application to the Prefect of Paris.

This application is accompanied by a complete file. An acknowledgement of receipt of the application is issued. The reasoned opinion of the Prefect is given no later than four months from the date of issue of the acknowledgement of receipt of the complete file, following the opinion of the National Commission of tour guides and interpreters and lecturing guides, envisaged in Article R. 221-4.

The programme and the composition of the juries referred to in Article R. 221-4, the methods of organising the aptitude test and the adaptation course and the content of the file referred to in the previous paragraph are established by an order from the Minister of the Interior and the ministers responsible for higher education, culture and tourism."

Jurisprudence

Administrative Court of Appeal of Paris, 11 April 2006, Ms. X, 02PA03551: the judge recalls that,

> "in the absence of agreements requiring unanimity of the Member States which, under the terms of Article 135 of the Treaty creating the European Community, should in particular establish the system of the free movement of workers from Member States in the countries and overseas territories associated with this Community, the list of which [...] specifically includes the territory of French Polynesia, nationals of the Member States cannot take Community law as a basis for claiming right of entry and residence in one of these countries or territories with a view to gaining access to a paid job and exercising it there".

The ground of the violation of Community law in terms of the free movement of workers who are nationals of the Member States of the Union is inoperative.

Administrative Court of Appeal of Bordeaux, 19 October 2006, Mr. X and ANPE, 03BX00086: Mr. X, of German nationality, has been registered as a job-seeker for more than one year. He submitted a petition regarding the coverage of training within the context of the provisions of the Labour Code. The regional representative of the National Employment Agency of Réunion Island took as a basis the circumstance that, as a Community national looking for a first job in France, the applicant could not take advantage of the vocational training courses envisaged in the national measures. The Court considers that, by excluding "first-time job-seekers" from benefiting from the measures envisaged in Article L.322-4-1 of the Labour Code, the regional representative of the ANPE added a condition not envisaged by this text and thus committed an error of law. The Court also stipulates that neither regulation 1612-68, nor the principles of Community law can provide a legal basis for this decision by the regional representative of the ANPE.

Recognition of diplomas

Text(s) in force

Chapter II of government edict 2006-956 of 23 May 2006 regarding the legislative section of the Sport Code stipulates the conditions under which a Community national can teach sport in return for payment. Nationals of Member States of the European Community or of States party to the European Economic Area agreement who are qualified to exercise such functions in one of these States can teach, run or organise a physical or sporting activity or train

its practitioners as a principal or secondary occupation on a regular, seasonal or occasional basis.

Article L. 212-7 of the Sport Code also indicates that a decree in the Council of State will have to establish the conditions to which this exercise is subjected if a substantial difference in level exists between the qualification which the interested parties hold and the qualification required in France. This decree will specifically have to stipulate the list of activities where training, even occasional and, if the safety of persons so requires, taking into account the specific environment and the conditions under which they are exercised, can be subject to prior inspection of the technical aptitude of the applicants and of their knowledge of the natural environment, safety rules and emergency measures.

Article L. 212-8 of the Sport Code stipulates that employing a national of a Member State of the European Community or of a State party to the European Economic Area agreement who is exercising his activity in contravention of Article L. 212-7 without having passed the tests set by the administrative authority is punishable by one year of imprisonment and a fine of 15,000 euros.

Order of 4 December 2006 regarding the approval of certain employment agreements applicable in establishments in the social and medico-social non-profit sectors grants approval to a rider to the national collective agreement of 26 August 1965 UNISS, rider 08-2006 of 12 September 2006 with the object of recognising the professional qualifications of European nationals.

Decree 2006-1608 of 23 December 2006 regarding the organisation of the profession of automotive expert introduces Article R.326-10 which stipulates specifically that any person wishing to be registered on the list of automotive experts must make a request to the secretariat of the national commission of automotive experts. This request must be accompanied by a document which establishes the civil status of the person in question and the copy of the qualification issued by a Member State of the European Union or another State party to the European Economic Area agreement that is recognised as equivalent to the qualifications issued in France.

Order of 5 January 2007 of the Minister of National Education[5] establishes the conditions under which qualifications or diplomas are recognised as equivalent when submitted by European students eligible for access to the third academic cycle of medical studies, aimed specifically at Directive 2005/36/EC regarding the recognition of professional qualifications. Its first article indicates that the candidates referred to in the third paragraph of Article 1 of the Decree of 16 January 2004 aforementioned can gain access to the third academic cycle of medical studies on condition that they have followed medical training in accordance with the provisions of Article 24 (3) of Directive 2005/36/EC of 7 September 2005 aforementioned, covering at least six years of study or 5,500 hours of theoretical and practical teaching given at a university or under the supervision of a university.

These candidates must forward to the minister responsible for health, before organisation of the trainee selection procedure, a declaration from their educational establishment of origin stipulating that the training undertaken meets the requirements envisaged in Article 1 of the present order, that it leads to a diploma granting the right to exercise the profession of doctor and that the qualification, certificate or diploma they submit grants access, in the country where it was acquired, to training as a specialist doctor. These documents must be written in French or, failing this, be accompanied by a translation produced by a sworn translator.

Jurisprudence

Court of Cassation, Civil Chamber 2, 8 November 2006, 05-14352: Ms. X, a doctor of Belgian nationality, settled in France in 2001 after having acquired her registration on the register of the association of doctors of the Gironde. In 2002, the CPAM of Gironde denied her request to practise in the sector with different fees, known as sector II, on the grounds that

5 *OJ* no. 14 of 17 January 2007, p. 1022.

she could not prove that she had exercised functions equivalent to those required by French law.

Ms. X appealed against this decision. The appeal judges received her appeal and the Court of Cassation confirms this position. They recall that, in order to opt for sector II, specific qualifications must be held, including that of "former senior registrar of universities/hospital assistant"; the same qualifications, acquired within the European Community, are recognised as equivalent by the National Health Authority (CPAM), on the recommendation of the national health insurance fund for salaried employees. In this case, Ms. X proved that she had acquired a qualification in Belgium equivalent to that of "former senior registrar of universities/hospital assistant".

EC, 11 December 2006, Ms. Diana B, 296217: the recognition of diplomas only applies to nationals of Member States of the European Community or those party to the European Economic Area agreement and, since the petitioner is of Peruvian nationality, the recognition of her Spanish doctor's diploma is therefore legitimately denied.

Administrative Court of Appeal of Nancy, 4 August 2006, Mr. Stéfan X, 04NC00968: the petitioner, of Greek nationality, had successfully passed all the tests in the 3rd year of university in Germany. He had appealed against the decision of the university involving a refusal to issue the bachelor's diploma in business and commerce. The Court considers that this petition could lawfully have been considered by the administrative court as directed against a deed unlikely to be the object of an appeal regarding abuse of power, without pronouncing on the merits.

Nationality condition for ships' captains

The infringement proceedings lodged by the Commission against the Republic of France for failing to respect Article 39 TEC, following French jurisprudence of 2004 of the Court of Cassation[6] applying the jurisprudence of the Court of Justice of the Communities[7] led the French authorities to put an end to this situation.

A bill dated 25 July 2007[8] was submitted by the Prime Minister in order to move towards this harmonisation and it concerns the nationality of ships' crews. Article 1 of its first chapter modifies the second paragraph of Article 3 of the law of 13 December 1926 concerning the Maritime Labour Code. It broadens the exercise of the functions of captain and the officer responsible for his temporary replacement to Community nationals or nationals of a State party to the European Economic Area agreement or of the Swiss Confederation on the basis of the agreement reached with the European Community and its Member States concerning the free movement of persons of 21 June 1999.

As a result of the opening up of the positions of captain and of the officer responsible for his temporary replacement, the provision "the other members of the crew", stated in the second sentence of the second paragraph of Article 3 of the law of 13 December 1926 will be modified. It could be explained by the distinction in nationality conditions between the captain and the officer responsible for his temporary replacement on the one hand and, on the other hand, the other Community national members of the crew. From now on, this distinction is without grounds and the word "other" will be omitted. The second paragraph of Article 1 will replace the phrase, "other members of the crew" with "members of the crew". Article 2 of this same chapter modifies the second paragraph of Article 5 of Law 2005-412 of 3 May 2005 regarding the establishment of the international French register by authorising, under the same conditions, access to the positions of captain and officer responsible for his temporary replacement to Community nationals or nationals of a State party to the European Economic Area agreement or of the Swiss Confederation.

6 Court of Cassation, 23 June 2004.

7 ECJ, 30 September 2003, Colegio de Oficiales de la Marina Mercante Espanola, C-405/01, Rec. p. I-10391 and Anker et al. C-47/02.

8 Doc. Senate no. 415.

CHAPTER III. EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY

1. Working conditions, social and tax advantages

Text(s) in force

Order of 16 October 2006, taken to enforce Articles R.5 and R.60 of the Electoral Code, stipulates the papers enabling nationals of the European Union to prove their identity when they are admitted to take part in electoral operations, as well as the documents which these nationals must provide in support of a request for registration on the electoral lists.

Law 2006-339 of 23 March 2006 stipulates the new rules for access to the RMI (income support) for European nationals. In order to acquire the right to the allowance, nationals of Member States of the EU and the EEA must fulfil the conditions required to benefit from the right of residence and must have resided in France for the three months preceding the request.

The law stipulates that the residence condition cannot be imposed:

- on persons practising a stated professional activity;
- on persons who have practised such an activity in France and are temporarily incapable of working for medical reasons or who are undertaking vocational training or who are registered as job-seekers;
- on ascendants, descendants and spouses of the persons mentioned above.

The law envisages that a decree in the Council of State will have to stipulate the conditions for application of this article.

This text can be interpreted as follows.[9] For persons who, within the meaning of Article L. 262-9-1 new of the Social Action and Families Code, qualify as workers or who fulfil the conditions for maintaining this status (and their family members), the RMI is paid without the condition of a previous residence period in France. For non-workers, the right to the RMI is not granted unless, at the time of their entry into France, they fulfilled the condition of the right of residence, in other words they possessed sufficient means. The condition of three months of previous residence does however apply to them. This interpretation has the advantage of similarity to Articles 14-3 and 24 of Directive 2004-38. It corresponds to the position of the administration (information note DGAS IC/2005/165 of 24 March 2005) which confers the right to the RMI to persons who are the victims of a "life-changing event" (loss of job, family break-up) provided, in the past, they have had sufficient means available to provide for their material independence.

Two orders of the Minister of Employment dated 23 February stipulate the conditions for application of the agreement of 18 January 2006 regarding assistance with returning to work and unemployment allowance.

The first, regarding approval of the agreement of 18 January 2006, states that its scope covers Community nationals since the system of unemployment insurance applies "to seconded employees as well as to expatriate employees who are nationals of a Member State of the European Union, of another State party to the European Economic Area agreement or the Swiss Confederation, employed by companies covered by the territorial scope of the agreement".

The second order concerns the appendices to this agreement and it specifies its conditions of application.

It is thus envisaged that, "employers covered by the territorial scope of the unemployment insurance system introduced by the agreement of 18 January 2006 regarding assistance with returning to work and the unemployment allowance are obliged to insure French expatriate employees or nationals of a Member States of the European Union, of another State party to the European Economic Area agreement or the Swiss Confederation with

9 J.P. Lhernoud, De nouvelles règles d'accès au RMI pour les ressortissants européens, *Liaisons sociales Europe*, no. 150, 13-26 April 2006.

which they are associated through an employment contract during their period of expatriation against the risk of loss of employment".

Regarding shipping companies which sail on ships not flying the flag of a Member State of the European Union or of another State party to the European Economic Area or the Swiss Confederation, sailors who are nationals of these States who, for the duration of their sailing:

- are registered in a French maritime district;
- and have been granted the benefits of the system of the National Establishment of Naval Invalids;

The order stipulates that these companies can have these sailors participate in the unemployment insurance system.

It is also possible to request individual participation in the unemployment insurance system for "expatriate employees who are nationals of a Member State of the European Union or of another State party to the European Economic Area agreement or the Swiss Confederation employed by an embassy, a consulate or an international organisation located abroad as well as employees, who are members of the general social security system, of embassies, consulates or international organisations located in France", who do not participate in the general system of unemployment insurance for expatriate employees.

Jurisprudence

Court of Cassation, Civil Chamber 2, 18 January 2006, 03-17057: the Court of Cassation ruled in favour of a CPAM for having refused to cover the expenses incurred by a young mother, relating to labour and postnatal follow-up care undertaken at her home in Alsace by a midwife established and habitually practising in Germany.

It judges that the regulations which require that a midwife who is a national of another Member State – in which she is based and practises her activities – submit to certain formalities in order to claim to practise in France are in accordance with Community law and that, specifically, the midwife must make a prior declaration to the regional association of midwives. The Court recalls that Directive 80-154 of 21 January 1980, aimed at the mutual recognition of diplomas, certificates and other midwifery qualifications, "envisages that the Member State can prescribe that the beneficiary make a prior declaration to the competent authorities relating to his provision of services in cases where the performance of this service involves a temporary stay on its territory". The midwife, in order to monitor this patient, had to stay temporarily in France, hence the need for a declaration. It matters little that she had already been empowered by the national association of midwives to attend the labour and delivery of another patient.

In this case, the petitioner believed that, "signing a particular declaration before the regional Council of the Association with a view to being empowered to provide services in France to each of her patients constituted, by the weight of the relevant purely administrative constraints and the resulting discrimination between French and Community practitioners, a disproportionate obstacle to the free provision of services."

Court of Cassation, Civil Chamber, 26 April 2006, 03-47334: by virtue of Directive 80/987 of 20 October 1980, applicable to the dispute, when a company that is placed in judicial liquidation in a Member State possesses a branch in another Member State, the claims of employees who practise their activity there are guaranteed, in the event of the employer's insolvency, by the institutions in the place of this activity.

That being the case, the court of appeal which observed that the employer was a company under English law placed under liquidation in the United Kingdom and that the employee was practising his activity in France, where the company was established, decided lawfully that, whatever the legal nature of this establishment, the AGS (Salary Guarantee Association) should guarantee the claims resulting from the breach of the employment contract of the party in question, in application of Article L. 143-11-1 of the Labour Code, which has the value of transposing the aforementioned directive.

The AGS is not confined to covering the risk issuing from joint proceedings undertaken in France, the location of the company being immaterial for triggering this guarantee.

Frontier workers

Text(s) in force

Decree of 23 February 2006 concerning approval of appendices I to VII, IX, XI and XII to the regulations appended to the agreement of 18 January 2006 regarding assistance with returning to work and the unemployment allowance and the application agreements numbered from 1 to 22 and 24 to 29 regarding the said agreement defines frontier workers as those who meet the following conditions:

- their residence is located in France, to which they return theoretically each day or at least once per week while exercising a paid activity in an adjoining State other than a Member State of the European Union, another State party to the European Economic Area (EEA) agreement or the Swiss Confederation; however, frontier workers who are seconded by the company for which they normally work maintain the nature of frontier worker for a period not exceeding 4 months, even if – during this period – they cannot return to their place of residence each day or at least once per week;
- or they are frontier workers as intended by the Franco-Swiss unemployment insurance agreement of 14 December 1978 and match the definition given in Article 1, number 5, of this agreement.

According to *a press release by the Council of Ministers of 31 May 2006*, the Minister of Foreign Affairs has just put forward a bill authorising approval of the framework agreement signed on 22 July 2005 between the French government and the government of the Federal Republic of Germany regarding cross-border health cooperation.

This agreement enables recipients of French or German health insurance, usually residing or staying temporarily in the border regions mentioned in the agreement to have access to care, whether this be emergency assistance, scheduled care or care associated with a chronic pathology.

It also provides a legal framework for reaching a cooperation agreement at local level and enables health professionals in each State to take action temporarily in the other State.

Law 2006-1640 of 21 December 2006 regarding financing of social security for 2007, stipulates in Article 49: "Point II of Article L. 380-3-1 of the Social Security Code is thus rewritten:

> "II. – However, frontier workers employed in Switzerland and exempt from compulsory membership of the Swiss health insurance system can request that the provisions of I not be applied to them or to their beneficiaries until the end of the transitional provisions relating to the free movement of persons between Switzerland and the European Union, in other words twelve years from the entry into force of the aforementioned agreement of 21 June 1999, on condition that they are in a position to produce a health insurance policy covering them and their beneficiaries for all the care received on French territory. These provisions are not applicable to frontier workers or to their beneficiaries who are members of the general system on the date of the entry into force of Law no. 2006-1640 of 21 December 2006 regarding the financing of social security for 2007. Workers who have made such a request can subsequently withdraw it at any time, for themselves and for their beneficiaries indiscriminately and are, from the date of this withdrawal, members of the general system in application of the provisions of I."

Jurisprudence

Administrative Court of Douai, 17 January 2006, Mr. Michel X, no. 04DA00329: Mr. X maintains that the portion of the generalised social taxes (CSG) not deductible from taxable income and the taxes for the reimbursement of social debt (CRDS) have the nature of social security contributions which can, in this capacity, be deducted in their entirety from taxable salaries and wages; that the sums corresponding to generalised social tax deductions and

deductions of taxes for the reimbursement of social debt cannot be taxed because they do not constitute disposable income within the meaning of Article 12 of the General Tax Code; that the non-deductible nature of the entire generalised social taxes and the taxes for the reimbursement of social debt has the effect of creating discrimination between taxpayers working and domiciled for tax purposes in France and foreign or Community nationals whose remunerations are taxable in France but who, since they do not reside there for tax purposes, are exonerated from payment of these contributions.

Considering, on the one hand, that the obligation made by law that the two aforementioned taxes be paid is devoid of any link with the opening up of a right to a service or a benefit paid by a social security system; that thus, even though the European Court of Justice judged that these same deductions, in so far as they affected salaries and were intended to finance social security systems, were within the scope of Community regulations governing the right to subject frontier workers to social security contributions, they have the nature of taxes of a general nature and not of social security contributions within the meaning of national constitutional and legislative provisions; that it follows from this that Mr. X cannot claim a deduction from his taxable income to income tax higher than that resulting from the partial deductibility of the generalised social taxes envisaged by Article 154, 5th, I aforementioned of the General Income Code; that he cannot, consequently, usefully maintain that the sums corresponding to the deductions for the generalised social taxes and the taxes for reimbursement of social debt cannot be taxed on the grounds that they would not constitute a disposable income within the meaning of Article 12 of the General Tax Code;

Considering, on the other hand, that the application of different treatment to persons in dissimilar situations is not discriminatory within the meaning of the provisions of Article 39 of the Treaty of Rome, providing the difference in treatment is in direct relation to the object of the provisions which established it; that the fiscal and social legislation applicable to Mr. X, who is domiciled and exercises his activity in France, is determined by the place of exercise of his activity, such that the difference in treatment is in relation to the social object of the provisions applicable to him; that, consequently, Mr. X is not justified in maintaining that the administration wrongly reintegrated the non-deductible portion of the generalised social taxes into his taxable income for the year 1999, as well as the taxes for the reimbursement of social debt which he had himself deducted from the income he had declared for that year;

Considering that the result of all the above is that Mr. X is not justified in complaining that, in the disputed judgement, the Administrative Court of Lille rejected his request.

Administrative Court of Lyons, 26 January 2006, Mr. Seyed X, no. 01LY00599: It follows from the combination of the provisions of Article 17 of the Franco-Swiss tax agreement of 9 September 1966 and of Article 3 of the Agreement of 11 April 1983 reached between the two States relating to the taxation of salaries of frontier workers that the salaries, payments and other similar remunerations received by a person residing in France within the meaning of the agreement by reason of employment practised in Switzerland are only taxable in Switzerland, subject to exceptions envisaged in paragraphs 2, 3 and 4 of Article 17 and Articles 18 to 21 of the agreement, the Agreement of 11 April 1983, to which paragraph 4 of Article 17 of the agreement refers, envisaging taxation in the State of residence of the salaries of frontier workers.

A taxpayer must be regarded as a resident of France within the meaning of the agreement from the point when, if he practises his professional activity in Switzerland or if he has a dwelling there, he is also holder of a residence card in France, where he goes at weekends to be with his wife and his four children and he must be regarded as having the centre of his vital interests in this State. On the other hand, in so far as the taxpayer maintains unquestionably that the full-time job he practised in Lausanne in Switzerland forced him to reside there and did not grant him the possibility of going back to his family residence during the week in the *département* of l'Ain, he cannot be said to have travelled between France and Switzerland frequently enough to have allowed him to be acknowledged as a frontier worker within the meaning of the Agreement of 11 April 1983. Consequently, the income he receives

from his employment in Switzerland is only taxable in this State by virtue of paragraph 1 of Article 17 of the Franco-Swiss agreement of 9 September 1966.

Administrative Court of Appeal of Marseilles, 7 November 2006, Mr. Advocaat, no. 04MA02163: Considering that, in order to request repeal of the judgement of the Administrative Court of Nice, which denied his request for exemption from generalised social taxes and taxes for the reimbursement of social debt to which he was subject, for the years 1997 to 2000, on the income from property which he received for the same years;

Mr. Advocaat asserts that, both with respect to the stipulations of Articles 48 and 52 of the Treaty of the European Communities which introduce the principle of the free movement of workers within the European Union, and Article 13 of European Regulation no. 71/1408 of 14 June 1971, he would not be bound by the above taxes since he already contributes to the social security system of another Member State for the amount of his retirement.

Considering, on the one hand, that the obligation made in law to pay the generalised social taxes and taxes for the reimbursement of the social debt is devoid of any link with the opening up of a right to a service or a benefit paid by a social security system, on the other hand that Mr. Advocaat does not dispute, as the administration finds, that the income taken for calculating the disputed taxes constitute income from property and not income from an employment activity, paid or not, within the meaning of the aforementioned provisions of Regulation (EEC) no. 1408/71; that, thus, although the European Court of Justice judged that these same deductions, in so far as they affected salaries and were intended to finance social security systems, were within the scope of Community regulations governing the right to subject frontier workers to social security contributions, these deductions, as perceived by the first judges, have the nature of taxes of all kinds and not of social security contributions within the meaning of national constitutional and legislative provisions and could be made the responsibility of the taxpayer without ignorance either of Article 13 of the aforementioned Regulation or of Article 48, now 39, of the Treaty of the European Communities; that the argumentation regarding this point by Mr. Advocaat must be rejected.

CHAPTER IV. EMPLOYMENT IN THE PUBLIC SECTOR

An entire series of texts has emerged in this area, the most important of which is Decree 2007-196 of 13 February 2007, relating to equivalence of the diplomas required in order to take the competitive entrance examinations for the civil service corps and levels of employment in the public sector[10]. The draft decree had been presented to the Supreme Council of the Territorial Public Sector on 4 July 2006[11] and its adoption constitutes an entire reconsideration of the rules applicable so far under French law. In this respect, *Decree 2007-196 broadly takes into account the concerns expressed by the Commission.*

This decree has a dual objective: on the one hand, to bring the conditions for access to the public sector into line with Community law and, on the other hand, to enable professional experience to be taken into consideration, for French candidates and for nationals of the Union. In order to do this, it completely re-examines the systems of diploma equivalence. From now on, Community nationals and French nationals will be subjected to identical rules when it comes to considering a diploma acquired in another Member State or professional experience. The text makes a distinction between competitions where access is controlled by the possession of a certain level of diploma and those for which a particular diploma is required.

1. Access to the public sector

Nationality condition

Respect for Community law is now ensured essentially by jurisprudential means, whether this refers to the State public sector or the public sector of the territorial authorities.

Administrative Court of Appeal of Paris, 16 May 2006, 04PA00604: Mr. X, a Greek national, submitted an application for the competitive veterinary inspector examination for the year 2002. This corps has never been open to Community nationals and Mr. X's request for entry was rejected on the grounds of his nationality.

The Administrative Court of Appeal recalls that the provisions of the Rural Code enable Community nationals to practise veterinary activities in France when in possession, specifically, of a diploma, certificate or veterinary qualification issued by one of the States of the European Union. However, these provisions do not have the effect of granting access to the corps of veterinary inspectors to all Community nationals.

It is stipulated that the members of this corps take part, principally, on behalf of the State, in inspecting hygiene standards, in sanctioning their infringement and in fulfilling measures involving a possible recourse to the use of constraint. These functions are covered directly by the exercise of prerogatives of the public authorities.

The Court considers now that Mr. X does not have grounds for maintaining that his nationality is not of the nature of posing a legal obstacle to his access to the corps of veterinary inspectors, nor that he is the victim of a discriminatory measure.

Recruitment procedures following the Burbaud jurisprudence

Law 2005-843 of 26 July 2005, regarding various measures for transposing Community law into the public sector harmonised French law in this respect (see 2005 report).

Recognition of diplomas

Decree 2007-196 specifically targets Directive 2005/36/EC regarding the recognition of professional qualifications and, in particular, its Articles 10 to 15. It thus stipulates in its first Article that, when recruitment by means of competition into a corps or a level of civil service

10 See appendix.
11 AJDA 2006, actualités, 7 July 2006.

employment is subjected, in application of the current regulatory provisions, to the possession of certain national diplomas, candidates may enter this competition, subject to fulfilment of the other required conditions and respect for the provisions of the present decree, if they can prove at least equivalent qualifications, demonstrated:

1. By a diploma or other training qualification issued in France, in another Member State of the European Community or in another State party to the European Economic Area agreement;
2. By any other diploma or qualification marking successful completion of a training course or by any certificate proving that the candidate has successfully completed an academic cycle at least equivalent to that culminating in the required diploma;
3. By their professional experience.
   The diplomas, qualifications and certificates mentioned under 1 and 2 must have been issued by a competent authority, taking into account the legislative, regulatory or administrative provisions applicable in the State in question.

The candidate is obliged to provide, in support of his application, the documents mentioned in the preceding paragraph. These documents are presented, where applicable, in a translation into French produced by a sworn translator.

On the other hand and by virtue of its Article 2, these provisions do not apply to competitions providing access to jobs in professions, the exercise of which is subject to the possession of a diploma which forms the subject, by virtue of European Community directives transposed into internal law, of specific recognition measures or to competitions providing access to those in the teaching corps and similar corps and to those in the corps of research personnel where entry conditions take into account the qualifications referred to in Article 1 and for which the list is established by order of the Minister responsible for the public sector.

Prior to the entry into force of Decree 2007-96, specific texts pursued the opening up of access to the public sector to Community nationals, from the point of view of both the State public sector and the territorial public sector.

Order of 15 February 2006 regarding *the organisation, nature and programme of tests for the competition for technical and scientific police technician in the national police force* specifically stipulates that the external competition is open "to candidates who hold a diploma issued or an equivalent qualification obtained in one of the Member States of the European Community or in another State party to the European Economic Area agreement for which classification as a diploma or document referred to above will have been recognised by the commission created in application of Decree [94-741] of 30 August 1994"; decree rightly rescinded by Decree 2007-196.

The same mechanism is envisaged by Order of 13 December 2006 relating to *qualifications and diplomas required to enter the external competition for access to the corps of higher technicians in industry and mining*.

This is also the provision retained by Order of 30 June 2006 for the entry competition for the *corps of engineers in the technical services of the Ministry of the Interior*.

Order of 26 September 2006 similarly envisages that "qualifications or diplomas awarded in a Member State of the European Community of State party to the European Economic Area agreement and similar under the conditions envisaged in Decree [94-741]" form part of the qualifications or diplomas admitted as equivalent to the general university studies diploma for *entry into the competition for prison officer*.

The Minister of National Education has also considered the problem. Decree 2006-583 of 23 May 2006 brings together the regulatory provisions of book III of the Education Code. Specifically, it codifies the functioning of the *National Commission of Professional Certification*. Article R.335-30 of the Code thus indicates that the National Commission of Professional Certification is responsible for drawing up and updating the national directory of professional certifications… To this end, it registers all diplomas and professional qualifications awarded by the State which have been created following the recommendations of consultative bodies of which the organisations representing employers and employees are members, it investigates all other requests for registration and checks on updating. Moreover, its spe-

cific task is to monitor the quality of information intended for persons and companies regarding the certifications entered in the national directory and the certifications recognised in the Member States of the European Community or States party to the European Economic Area agreement. It contributes to international work on the transparency of qualifications. In order to fulfil its task, the Commission establishes relationships with regional, national and international research institutes for employment and qualifications.

Moreover, the same Code stipulates that, "apart from the equivalences benefiting nationals of Member States of the European Community by virtue of the regulations applicable to them, equivalences between French or foreign diplomas and the State theatre teaching diploma can be granted under the conditions established by order of the Minister responsible for culture".

Order of 10 July 2006 of the Minister of Justice[12] modifies the order of 1 April 1996 and it significantly broadens, in its appendix, the list of competitions for which the commission responsible for judging classification requests, for access to the competitions organised by the Ministry of Justice, of diplomas issued in other Member States of the European Community, is competent.

Order of 19 December 2006 authorising, during the year 2007, the opening up of the competition for recruitment of officers to OFPRA (the French Office for the Protection of Refugees and Stateless Persons) envisages that, "nationals of Member States of the European Community, the Swiss Confederation or another State party to the European Economic Area agreement, if they are appointed to the corps of protection officers, cannot hold a post for which the qualifications cannot be separated from the exercise of sovereignty or involve direct or indirect participation in the exercise of the prerogatives of the public authorities. Their advancement in level or corps promotion will take place under the same restrictions".

An Order of 20 December 2006 of the Ministry of Health explains the conditions for specific training which Community nationals must fulfil in order to be admitted to practise in a blood transfusion institution. The diploma acquired in a Member State other than France must mark the successful completion of specific training which is equivalent to the French training course. The content and validity of the diplomas are examined by a special commission, which understands the level of knowledge and the qualifications which the diploma submitted reflects in terms of its holder, as well as the practical training required in order to obtain the diploma.

Moreover, France has made efforts to reduce the conflict facing the Commission, the latter threatening to complain to the ECJ if France does not challenge the French nationality requirement for *chief architects of historical monuments*. Ministerial response no. 104314 of the Minister for Culture, published on 7 November 2006, thus stipulates that a reform of the status and the practise of project management by chief architects of historical monuments was underway within the framework of the implementation of government edict 2005-1128 of 8 September 2005 regarding historical monuments and protected spaces.

The draft text should enable the competition to be opened up to Community nationals who can prove possession of diplomas equivalent to those of an architect in France. No competitions will be opened until these provisions have entered into force, by 1 January 2008 at the latest.

The administrative jurisprudence monitors observance of Directive 92/51.

The judgment of the Council of State dated 4 August 2006, *Fischer, no. 280769*, is entirely instructive. The applicant, of French nationality, studied music in Germany, where he had qualified as an orchestral musician and cello teacher. In the Federal Republic, these qualifications grant access to positions as music teacher in conservatories. In 2004, Mr. Fischer wanted to enter the external competition for recruitment as a territorial music teacher, access to which is subject to possession of a national vocational training certificate. To this end, he complained to the Commission for the classification of European diplomas for access to the territorial public sector in order to have the equivalence of his German diplomas recognised. In a decision of 23 March 2005, the Commission rejected this request on

12 OJ no. 166 of 20 July 2006.

the grounds that the training provided in Germany was not of an artistic or educational level equivalent to the French diploma.

The Council of State repealed this decision in unambiguous terms. It thus recalls that "a regulated profession within the meaning of Directive 92/51/EEC of 18 June 1992 regarding a second general system for recognising vocational training, as was interpreted by the judgements passed on 9 September 2003 and 7 October 2004 by the European Court of Justice in cases C-285/01 and C-402/02, refers to any professional activity which, in terms of its conditions for access or exercise, is directly or indirectly governed by the legislative, regulatory or administrative provisions requiring possession of a diploma" and therefore that the activity of territorial artistic (music) education teacher must be regarded as a regulated profession within the meaning of the stated Directive.

The Council of State then stipulates that, "as of 1 July 2004, when the commission for the classification of European diplomas for the territorial public sector denied the applicant permission to compete for access to a job as territorial teacher of music, no measures had been taken by France in order to enable nationals of other Member States holding diplomas allowing them to practise a regulated professional in another Member State to practise this same profession on French territory. Consequently, failing provision of a system enabling diplomas granting access to this profession in another Member State to be taken into consideration, the provisions of Article 4 of the Decree of 30 August 1994 were not compatible with the objectives of the Directive of 18 June 1992. Under these conditions, while awaiting a modification of this decree, it is up to the commission for the classification of European diplomas for the territorial public sector to make an assessment of the conditions under which the European diplomas submitted to it grant access to the same profession in the Member State which issues them.

Thus, failing this assessment and, moreover, since the Minister of the Interior does not dispute the fact that the number of German diplomas held by the applicant does, in Germany, enable the practice of the same profession of music teacher as that for which he is applying in the French territorial public sector, the decision is repealed.

Similar judgements illustrate this desire by the administrative judge to guarantee Community legality.

Council of State, 31 March 2006, Miss Valérie A, 254575: by decision of 30 December 2002, the commission for the classification of European diplomas for access to the territorial public sector refused to classify his final higher education diploma in violin, awarded by the Royal Academy of Music in London, with the diplomas required for entry to the competition for territorial teacher.

The judgement of the Council of State provides, "that as of 30 December 2002, when the commission for the classification of European diplomas for the territorial public sector denied Miss A permission to compete for access to a job as territorial teacher of artistic (music) education, no measures aimed at achieving the objective reiterated above of the aforementioned Directive had been taken by France; that, consequently, failing provision of a system enabling experience gained to be taken into consideration, the provisions of Article 4 of the Decree of 30 August 1994 were not compatible with the objectives of the Directive of 18 June 1992; that, under these conditions, it is up to the commission for the classification of European diplomas for the territorial public sector, not only to take into account the professional experience of the candidates, but also to enable the applicants to report this experience; that, thus, having failed to invited Miss A. to produce the elements required to assess whether the abilities she acquired within the context of practical experience adequately complement those demonstrated by her diploma, the commission ignored the obligations incumbent upon it by virtue of the Decree of 30 August 1994, taking into account the Directive of 18 June 1992; that, consequently, Miss A is justified in requesting repeal of the refusal decision handed down to her on 30 December 2002".

See also *Council of State, 31 March 2006, Miss Véronique A, 255340.*

In its judgement passed on *22 March 2006, Miss Christèle A, 260763*: the Council of State this time confirms the decision of the classification commission:

> "Considering that it emerges from the documents in the file that, in July 1991, the applicant obtained a Master's of Science in agricultural engineering at the end of one year of studies undertaken at Cranfield Institute of Technology (UK); that she requested that this diploma be admitted as equivalent to a national diploma marking the successful completion of at least five years of higher education; that the commission committed neither an error in law nor a glaring error of assessment in rejecting this request after having found on the one hand that this diploma could, in the UK, be obtained at the end of four years of higher education and, on the other hand, that the party in question did not prove that she had obtained, before undertaking this year of study in the UK, another diploma which, taken with the aforementioned Master's of Science, could enable her overall training to be classified with the required French diploma;
> Considering that the result of the above is that Miss A is not justified in requesting repeal of the disputed decision".

This jurisprudence also applies to the territorial and hospital public sectors.

Recognition of professional experience

Article 9 of Decree 2007-96 envisages that the Commission for the equivalence of documents and diplomas recognises equivalence specifically:

> "when the candidate can provide proof of a training qualification or a certificate of competence issued by a State other than France, a Member of the European Union or a party to the European Economic Area agreement which permits the exercise of a comparable profession in this State within the meaning of Articles 11 and 13 of Directive 2005/36/EC aforementioned, provided on the one hand that this qualification or certificate of competence is of a level at least equivalent to the level immediately below the academic cycle necessary to obtain the required diploma(s) and, on the other hand, subject to the provisions of Article 10 of the present Decree".

Article 10 thus provides:

> "When the candidate can prove either a qualification following training of a duration of at least one year less than that required by the academic cycle necessary to obtain the required qualification, or a qualification covering subjects substantially different from those covered by the required training qualification, the commission, after having checked – where appropriate – that the knowledge acquired by the candidate during his professional experience is of a nature to compensate fully or partially for the substantial differences observed in duration or subject matter, can require that the candidate either complete an adaptation course of a maximum duration of three years or take an aptitude test prior to his entry to the competition, as he or she shall choose.
> However, when the competition leads to the exercise of a profession requiring an accurate knowledge of French law and where one of the essential and constant elements of the activity is the provision of advice or assistance regarding this law, the choice between the training course and the test is not made by the candidate, but by the competent administration. The list of competitions covered by this provision is established by order of the Minister responsible for the public sector."

The present decree will enter into force on 1 August 2007 and, on this date, a series of texts will be rescinded by virtue of Article 24, including:

> "1. Decree 94-741 of 30 August 1994 regarding the classification, for access to the competitions of the State public sector, of diplomas issued in other Member States of the European Community or States party to the European Economic Area agreement;
> 2. Decree 94-743 of 30 August 1994 regarding the classification, for access to the competitions of the territorial public sector, of diplomas issued in other Member States of the European Community or another State party to the European Economic Area agreement;
> 3. Decree 94-616 of 21 July 1994 regarding the classification, for access to the competitions or examinations of the hospital public sector, of documents or diplomas issued in other Member States of the European Community or in another State party to the European Economic Area agreement."

In an entire series of decisions, the Council of State draws the conclusions from the Community legislation and the condemnations of France for infringement.

Council of State, 1 February2006, no. 236262:

> "Considering that it emerges from the documents in the file that Ms. A has, with a view to entering the competition for recruitment of social workers in the hospital public sector, asked the Commission for the classification of diplomas for access to the hospital public sector to classify her special needs education diploma awarded by the *Ecole des arts et métiers*, social advancement education, in Erquelinnes (Belgium), with the French State diploma in special needs education, possession of which is necessary in order to apply for the competition in question; that the party in question had emphasised to this commission that she could specifically prove that she had acquired professional experience after obtaining this diploma by exercising the positions of special needs teacher within a medico-social establishment; that, in the disputed decisions, the classification commission judged that, in application of the aforementioned provisions of the Decree of 21 July 1994, it was not its role to take into account – in order to rule on the request for classification relating to the diploma held by Ms. A – the professional experience gained by her after obtaining this diploma; that on the date when this decision was made, no measures had been taken by France aimed at achieving the above objective of the aforementioned Directive, enabling the professional experience acquired after issue of the diplomas to be taken into account when assessing them; that, consequently, as judged by the European Court of Justice in its infringement judgement of 7 October 2004, having thus failed to provide a system enabling experience gained to be taken into account when entering the competitions for the hospital public sector, the provisions of Article 5 of the Decree of 21 July 1994 were not compatible with the objectives of Directive 92-51 of the Council of 18 June 1992 regarding a second general system for recognising vocational training; that, consequently, Ms. A is justified in requesting repeal of the rejection decision handed down to her on 4 May 2001 as well as the decision rejecting its submission for out-of-court settlement on 24 September 2001."

The judgements of the *Council of State of 22 February 2006, Miss Caroline X, 265081*; of *27 February 2006, Miss Cristelle A, 257553*; of *10 March 2006, Mr. Christophe A, 264547* involve the same principles and repeal the rejection decisions of the classification commissions.

CHAPTER V. MEMBERS OF THE FAMILY

1. Residence rights

For periods of residence of less than three months, nationals of third-party States who are family members of a Community national are not subjected to any conditions other than possession of a valid passport.

The Code for the Entry and Residence of Foreigners and the Right of Asylum (CESEDA), modified by Law 2006-911 of 24 July 2006 relating to immigration and integration[13] includes family members within the mechanism which is devoted to citizens of the Union, discussed above. In this respect, the provisions of common law relating to the family reunification of ordinary foreigners are not applicable. The circular by the Minister of the Interior dated 17 January 2006 recalls this in the following terms,

> "nationals of Member States of the European Union (Germany, Austria, Belgium, Denmark, Spain, Finland, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, the United Kingdom, Sweden, the Czech republic, Hungary, Estonia, Latvia, Lithuania, Poland, Slovenia, Slovakia, Cyprus and Malta), as well as their family members, whatever their nationality, are not subjected to this procedure. They are covered by the provisions of Decree no. 94- 211 of 11 March 1994, most recently modified by Decree no. 98-864 of 23 September 1998. The same applies to nationals of States party to the European Economic Area agreement (Iceland, Liechtenstein, Norway), who are also subjected to the measures of the Decree of 11 March 1994, the benefits of which were extended to them by Decree no. 95-474 of 27 April 1995.
>
> Nationals of the Swiss Confederation are also no longer covered by the Code for the Entry and Residence of Foreigners and the Right of Asylum, but by the agreement reached between the European Community and the Swiss Confederation on 21 June 1999".

Article L.121-1, 4 and 5 of the CESEDA therefore defines the beneficiaries of the right of residence conferred by the preceding paragraphs upon Community nationals and their families: a person has to be, "a direct descendant aged under twenty-one years of age or dependent, a direct dependent ascendant, spouse, direct dependent ascendant or descendant of the spouse, accompanying or joining a national who meets the conditions set forth under 1 or the spouse or a dependant child accompanying or joining a national who meets the conditions set forth under 3."

We therefore find here the comments made earlier,[14] "the principles implemented by the law do however assume a restrictive notion of the family. Contrary to Article 2, paragraph 2 of the Directive, non-married partners whose partnership is registered are not included on the list of family members, while French law, via the PACS, recognises these family situations. This reticence can be explained by the fact that application of the Directive would have led to European nationals being granted rights superior to those granted to French nationals".

Moreover, it will be noted that circular INT/D/06/00091/C of 16 October 2006 cross-references: "in a circular relating to the entry into force of the 'Schengen borders Code', the Minister of the Interior, quoting the definition given by the Code of 'persons enjoying the Community right of free movement', stipulates that the definition of 'partner', as given in Directive 2004/38/EC of 29 April 2004, in other words where the registered partnership must be recognised by the host State in order to open the way to rights associated with the Community status of family member, applies to those who have entered into a PACS under French law. This implies that those persons, including nationals of third-party countries, who have entered into a Civil Solidarity Pact (PACS) with a citizen of the European Union residing in France enjoy the right of free movement (and therefore the right to settle in France with a partner) under the same conditions as married spouses. This definition is fun-

13 *French Official Journal*, 25 July 2006, p. 11047.

14 J.P. Lhernould, 'La loi Sarkozy clarifie le droit de séjour des ressortissants européens', *Liaisons sociales Europe*, no. 158, 7 to 20 September 2006, p. 2.

damental in so far as the list of those benefiting from the right to reside in France in the capacity of family member as envisaged in the Code for the Entry and Residence of Foreigners and of the Right to Asylum, in its most recent modification (Article L.121-4, 4), designates only spouses (a term reserved in principle for married spouses), not partners".

Article L.121-3 of the CESEDA provides that, unless his presence poses a threat to law and order, a family member who is a national of a third-party State who is accompanying or joining a citizen of the Union and who meets the conditions for the right of residence, has the right to reside anywhere on French territory for a period of longer than three months. If he is aged over eighteen or over sixteen if he wishes to practise a professional activity, he must hold a residence permit. This permit, which cannot be valid for a period of less than five years or a period corresponding to the period of residence envisaged for a citizen of the Union if this is less than five years, bears the words, "residence permit of family member of a citizen of the Union". It gives its holder the right to practise a professional activity.

By virtue of Article L.121-4, if a member of the family of a citizen of the European Union cannot prove a right of residence in application of Article L.121-3, or if his presence constitutes a threat to law and order, he can be the subject – depending on the case – of a decision to deny residence, of a denial to issue or renew a residence permit or of withdrawal of the permit, as well as of a removal order.

Article L.122-1 envisages that, "unless his presence poses a threat to law and order, the family member [...] also acquires a right to reside permanently anywhere on French territory on condition that he has resided in France legally and without interruption with the national, who is a citizen of the Union who fulfils the conditions for the right of residence, for the five preceding years.

French law will still have to stipulate the conditions for maintaining the right of residence for family members in the event of the death or departure from French territory of the European national (Article 12 of the Directive) or in the event of divorce or separation (Article 13 of the Directive).

The jurisprudence applies these rules.

Administrative Court of Appeal of Marseilles, 5 May 2006, Prefect of Var vs. Mr. Mohamed X, 05MA01694: the Prefect is requesting repeal of the judgement which repealed his order dated 18 January 2005 ordering that Mr. X, of Moroccan nationality, be deported. Mr. X remained on French territory for more than one month following notification, on 18 November 2004, of the decision of the Prefect denying him issue of a residence permit and inviting him to leave the country. The Court states:

> "Considering that if Mr. X, born in 1955, asserts that he entered France in 2003 to join his daughter and that he cohabits with a Community national whom he intends to marry, it is not evident from the documents in the file, given the brief nature of his residence in France, the age at which he entered the territory and the effects of a deportation measure, that this measure would have implied an attack on his right to respect for his private and family life disproportionate to the purposes for which it was taken; that, consequently, the ground of ignorance of the stipulations of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms must be dismissed".

EC, 9 October 2006, Mbarek, 280348: The applicant disputes the lack of grounds for the decision of the appeal commission against the decisions to refuse a visa for entry into France, rejecting its appeal against the decision of the General Consul of France in Tunis, refusing to issue him with an entry and short stay visa for France for which he had applied in order to marry Ms., a British national and holder of a resident's permit.

The Council of State will then find:

> "Considering that, if Mr. A maintains that the decision by the appeal commission against the decisions to refuse an entry visa for France was taken in ignorance of Article 3 of Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 relating to the right of citizens of the Union and their family members to move and reside freely on the territory of the States, under the terms of which, '(...) The host Member State, in accordance with national legislation, favours the entry and residence of the following persons / ( ) / b) the partner with whom the Union citizen has a long-term, duly proven relationship', it is not evident from the documents in the file, in any case, that the relationship between

> Mr. A and Ms., the duration of which has not been established, is "long-term" within the meaning of b) of the aforementioned Directive;
> Considering that it is not evident from the documents in the file that, in accepting the risk of diversion of the object of the visa, the appeal commission has committed a manifest error of assessment;
> Considering that Mr. A, a Tunisian national, and Ms., a British national, have never had a conjugal life in France; that the circumstance that they wish to marry in France and to have children quickly does not permit, since their plans could be fulfilled in the country of the applicant or that of his future wife, the decision of the commission to be regarded as prejudicial to the right of the interested party to respect for his private and family life, guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Liberties, a disproportionate attack with respect to the goals in view of which it was taken".

Administrative Court of Appeal of Bordeaux, 7 December 2006, Prefect of Pyrénées-Atlantiques vs. Ms. Francisca X, 06BX01488: Ms. Francisca X, of Cape Verdean nationality, was the subject of a deportation order, repealed by the Administrative Court of Pau. Ms. X asserts that she has been living conjugally, since October 2005, with a Portuguese national who has been regularly residing in France since 2000 in his capacity as salaried employee, with whom she has a child, born in 1993. The Administrative Court of Appeal considers, however, that the party in question, who entered France without a visa, cannot assert the status of spouse of a national of the European Community. In the end, it will quash the judgement of the administrative court.

CHAPTER VI. RELEVANCE/INFLUENCE/FOLLOW-UP OF RECENT COURT OF JUSTICE JUDGMENTS

In a judgement of 15 June 2006, *Commission versus France*, case C-255/04, the ECJ considered that the presumption of salaried employment by stage entertainers envisaged by the Labour Code was not in accordance with Community law.

Article L.762-1 of the Labour Code introduces a presumption of salaried employment for stage entertainers. In order to respect the principle of the free provision of services, as interpreted by the ECJ, DRT instruction no. 18 of 2 October 2006 invites labour monitoring control officers to assess, "where appropriate by any means likely to verify it, the reality of the status of service provider in the Member State where the entertainer is established and recognised as such and where he usually provides similar services when this status is cited", and to check, "whether the characteristics of the working relationship, for the service provided in France, are those of independent and temporary employment".

In a judgement of *20 December 2006, the Court of Cassation* takes note of this decision of the Court of Justice.[15] In order to decide that the association assigned for payment of contributions for the intermittent employment of French and foreign entertainers owed the paid holiday fund the overdue contributions and surcharges relating to this employment, a court of appeal has found that if the association maintained that the foreigners to whom it had made payments practised their activity in their country privately and independently, this was a matter of simple allegation and that no element of fact was put forward to refute the presumption of salaried employment which would guarantee a social security benefit which European law recognises as particularly important.

In proceedings for failure to fulfil obligations brought on 14 June 2004 by the Commission of the European Communities, the ECJ stated in the case C-255/04 that, "in imposing a presumption of salaried employment on entertainers who are recognised as service providers in their Member States of origin where they usually provide similar services, the French Republic has not fulfilled the obligations incumbent upon it by virtue of Article 49 EC".

Thus, in ruling as it did, without checking whether the action to collect the contributions at issue did not involve payments to entertainers who are nationals of a Member State of the European Community and service providers established in their Member States of origin, where they usually provided similar services, the Court of Appeal did not put the Court of Cassation in a position to perform its inspection with regard to Community law.

EC, 26 July 2006, Mr. Orçun Hasan A, 275895: the applicant, of Turkish nationality, is requesting suspension of the judgement ruling on his deportation.

The EC refers to judgement C-237/91 of 16 December 1992 of the ECJ and stipulates that it

> "follows from the judgement of the European Court of Justice dated 16 December 1992 that Article 6 first paragraph, first dash, of the decision of 19 December 1980 of the Association Council, which has a direct effect in internal law, must be interpreted in the sense that, on the one hand, a Turkish national who has obtained a residence permit on the territory of a Member State in order to marry a national of this Member State there and who has worked there for more than one year with the same employer under a valid work permit has the right to renew his work permit by virtue of this decision even if, at the time when a ruling is made on his request for renewal, his marriage had been dissolved and, on the other hand, a Turkish worker who fulfils the conditions of Article 6, first paragraph, first dash, of the aforementioned decision can obtain, in addition to the extension of his work permit, that of his residence permit, since right of residence is indispensable to access to and exercise of a salaried activity;
> that, however, if Mr. A has referred, in support of the plea of illegality of the denial of his residence permit, to Article 6 of the decision of 19 September 1980, it is evident from the documents of the file that he applied for renewal of his residence permit in his capacity as spouse of a French national, not as salaried employee;
> that, in addition, if he provides slips and certificates of payment corresponding to the period from 5 June 2003 to 30 September 2004, the receipt he was issued when he made his application for renewal

15 See appendix.

> of the residence permit only authorised him to work, in any case, on French territory until 15 September 2003; that thus, he did not prove that he had worked for more than one year under a valid work permit or that he had satisfied the condition of regular employment introduced by Article 6 above of the decision of 19 September 1980".

A similar judgement exists by the Administrative Court of Marseilles, dated 15 June 2006, no. 05MA02726:

> "Considering that it follows from the interpretation given by the European Court of Justice, specifically in its aforementioned decision of 19 November 2002, that Article 6, first paragraph, third dash, of Decision no. 1/80 of the Association Council must be interpreted in the sense that a Turkish worker, who has regularly entered the territory of the host Member State and who has legally practised a genuine and effective economic activity in the service of an employer, in return for which he has received payment corresponding to the work provided, holds regular employment within the sense of the aforementioned provisions; that when this Turkish national has worked for an employer for an uninterrupted period of at least four years, he benefits within the host Member State, in accordance with Article 6, paragraph 1, third dash of the Decision of the Association Council, from the right of free access to any salaried activity of his choice as well as from the correlative right of residence;
> Considering that, moreover, it follows from this same decision by the European Court of Justice, on the one hand, that the regular nature of the employment practised must be assessed with respect to the legislation of the host State, which governs the conditions under which the Turkish national entered the national territory and exercises employment there, on the other hand that the acknowledgement of the rights ensuing from Article 6 above is not subjected to the condition that the regular nature of the employment be established by possession by the national in question of a specific administrative document, such as a work or residence permit, and that as a result the rights conferred by these provisions upon Turkish nationals who are already regularly included in the labour market of a Member State are granted to their beneficiaries independently of issue by the competent administrative authorities which can only establish the existence of these rights without, however, being able to make them into a condition;
> Considering that it is not evident from the documents in the file that Mr. X, who cannot demonstrate the regular nature of his entry into France, held regular employment for an uninterrupted period of at least four years; that it follows from the interpretation recalled above of the European Court of Justice that the party in question does not meet the conditions established by the provisions of Article 6, first paragraph, third dash of Decision no. 1/80 aforementioned;
> Considering that it follows from the above that Mr. X is not justified in maintaining that, in the disputed judgement, the magistrate appointed by the president of the Administrative Court of Montpellier wrongly rejected his request for repeal of the order of 16 September 2005 in which the Prefect of Pyrénées-Orientales ruled on his deportation; that his petition must, therefore, be rejected".

We should add the judgements relating to the recognition of diplomas and qualifications for access to the public sector (above) and the *Inizan* case in terms of social security (below).

With regard to sports agents

Court of Cassation, Criminal Chamber, 24 January 2006, no. 04-85016: it follows from the texts of French laws that all French nationals, regardless of their place of establishment, must fulfil the necessary formalities for acquiring approval before practising the activity of sports agent.

Fulfilment of these formalities is required for any paid activity as sports agent, even casual.

The offence of illegally exercising the activity of sports agent with regard to Article 15-2 of the Law of 16 July 1984, in its wording resulting both from the Law of 13 July 1992 and the Law of 6 July 2000, is committed by a French national established in the United Kingdom who has neither registered with the French administration nor is holder of a licence issued by the competent sporting federation and who takes part, at the request of a player, in negotiations with a view to his recruitment by a French football club since, on the one hand, this activity, even casual, was performed for payment, regardless of the fact that the agreed commission has not actually been paid and, on the other hand, the club's sports agent, who

holds a licence and whom the defendant claimed to have appointed, could not combine the functions of agent for the player and for the club recruiting him.

Information Report of the Assemblée Nationale of 20 February 2007 on the conditions for the transfer of professional footballers and the role of sports agents: As stipulated by Mr. Christian Chevalier,

> in order to operate in France, the agent must be licensed within the meaning of the law of 16 July 1984. In this field, where international exchanges are frequent, it is entirely in his interest also to be holder of a FIFA licence in order to be able to take part in cross-border transactions.
> In principle, the agent for a French player must additionally be holder of the French Football Federation Licence. [...] An Italian club's agent can simply be an agent in Italy, without holding the French licence.
> The task stipulates specifically that the permits and qualifications must be specified which grant the right to equivalence for nationals of the EU and EEA residing in France or generally practising their activity as agent in France;
> It also encourages the harmonisation of national regulations relating to transfers and to the status of sports agents on the basis of the most protective standards and wishes to promote the uniform application of the FIFA regulations regarding the status of sports agents within the European Union.

CHAPTER VII. POLICIES, TEXTS AND/OR PRACTICES OF A GENERAL NATURE WITH REPERCUSSIONS ON FREE MOVEMENT OF WORKERS

Law 2006-64 of 23 January 2006,[16] regarding the fight against terrorism and including various details relating to security and border checks, contains several provisions which strengthen the options for checking foreign nationals on French territory.

Regarding the Schengen Information System, we will mention in particular the implementation of the computerized processing of personal data "in order to improve border checks and to fight illegal immigration". The law stipulates that this processing can be the subject of links to the files on the persons being traced and the Schengen Information System.

These data are gathered from international movements from or to states that are not members of the European Union. These data can be found on boarding or landing cards for passengers of air carriers. They can also be collected from the "machine-readable strip on travel documents, on the national identity card and from passengers' visas" or imported from reservation and departure control systems. A carrier which fails to provide this information is liable to a fine of up to € 50,000.

In addition, identity checks can now be carried out on international rail links "on the section of the route between the border and the first stop located over twenty kilometres from the border". On certain lines, designated by ministerial order, checks can be carried out between this first stop and "a stop located within the following fifty kilometres".

These checks are liable to be carried out on any person likely to have committed or to commit an offence.

16 *French Official Journal*, 24 January 2006, p. 1129.

CHAPTER VIII. EU ENLARGEMENT

1. Changes in internal law since the previous report

The most important text with regard to the general situation of nationals of the new Member States is represented by circular DPM/DMI2/2006/200 of 29 April 2006 relating to employment authorisations issued to nationals of the new Member States of the European Union during the transitional period.

The text recalls that, in accordance with the option offered by the treaties of accession of Estonia, Latvia, Lithuania, Hungary, Poland, the Czech Republic, Slovakia and Slovenia to the European Union, France introduced a transitional period with effect from 1 May 2004, the date of this accession, for the free movement of workers with regard to nationals of these eight states. During the term of this transitional period, nationals of these eight states remain subject to the requirement to obtain prior employment authorisation in order to practise a paid professional activity on French territory.

Upon expiry of the first phase of the transitional period, on 1 May 2006, the French government, during the inter-ministerial committee on Europe of 13 March 2006, meeting under the presidency of the Prime Minister, decided to proceed with a gradual and controlled lifting of the restrictions on the free movement of salaried workers who are nationals of these eight Member States with effect from 1 May 2006.

The lifting of these restrictions concerns access to certain trades experiencing recruitment difficulties. Following analysis of the employment situation and consultation with the social partners, a list of the trades under pressure has been compiled and is shown in the appendix to circular DPM/DMI2/2006/200. In order to hold a job in one of these trades, each identified by a ROME code (*Répertoire Opérationnel des Métiers et des Emplois* – Operational List of Professions and Jobs), the employment authorisation is maintained but the employment situation referred to in paragraph 1) of Article R.341-4 of the Labour Code is no longer applicable. Taking into account the interest attached to knowing the development of migration flows generated by this decision, the Minister of Employment requested the regional departments of labour, employment and vocational training to carry out strict follow-up, on behalf of the department of population and migration, of applications for work authorisation relating to nationals of these eight countries and the decisions made.

Issue of work authorisation without opposition from the employment situation for trades under pressure

The text of the circular recalls that, in addition to maintaining the work authorisation for access to a paid job by these nationals and for their recruitment by employers, regardless of the trade or sector of activity concerned, employers remain obliged to pay the taxes due to the ANAEM (flat-rate contribution and reimbursement). Moreover, this situation with regard to Community law is just cause for some astonishment.

With regard to access to the intended trades under pressure, the employment situation is no longer enforceable. These trades are specifically listed in its appendix, by a clear designation and by a ROME code, as results from the nomenclature established by the ANPE. These trades include some of the jobs in the following sectors of activity:

- construction and civil engineering, the hotel trade, catering and food;
- agriculture;
- mechanical engineering and metalworking, the process industries;
- business and sales, cleaning.

When the ROME code covers several trades, all these trades enjoy the non-enforcement of the employment situation. An employer wanting to recruit a national of one of the aforementioned countries is therefore not bound to look in advance for candidates on the national labour market nor, in addition, to justify these searches with the labour administration.

When an application for work authorisation involves a job not referred to in the present circular, investigation of the application is carried out according to the usual conditions of common law, invoking the employment situation when the local labour market situation is poor, with respect on the one hand to the statistical information held by the regional department of labour, employment and vocational training and the ANPE and, on the other hand, potential difficulties encountered by the employer in order to fill this vacancy.

The non-enforcement of the employment situation concerns applications for introduction, which remain the rule, and applications for change of status, including those currently being examined. In accordance with paragraph II of circular DPM/DMI 2 no. 2002-26 of 16 January 2002, applications for change of status are filed at the *préfecture*, while applications for introduction are made to the regional departments of labour, employment and vocational training.

It is pointed out that, with the exception of cases where nationals of these eight new Member States reside regularly in France under another status (student in particular) than that of salaried employee and are applying for a change of status, applications for work authorisation should continue to be made within the context of the introduction procedure. It is therefore important for employers to be informed locally of the need to respect this procedure. If the interested parties are already in France, they may however, in exceptional cases, file an application for work authorisation according to the rules of the procedure for a change of status (filing at the *préfecture*).

The *other conditions for investigating applications for work authorisation* envisaged in Article R.341-4 of the Labour Code remain applicable, specifically those relating to respect by the employer of social rules and those relating to the principal of equal treatment, specifically in terms of remuneration.

When *the work authorisation is renewed*, checks are performed to ensure that the conditions for issue of the original authorisation have been met (identity of trade, identity of remuneration conditions, identity of employer in the case of an APT). In this respect, if it appears that the interested party has changed trade before renewing his work authorisation and if the activity he practises is not on the list of the trades under pressure, the criteria of the employment situation will be fully enforced with respect to him.

Applications for work authorisation

The regional departments of labour, employment and vocational training are the preferred actors in the implementation of this decision.

The government stresses that, on the one hand, its departments must bear in mind that complete freedom of access to the labour market is planned by the end of 3 or 5 years maximum for all nationals of the new Member States who are awaiting genuine simplification of this access and increased rapidity. On the other hand, the authorities wish to follow as closely as possible the development and characteristics of labour migration flows from these eight Member States. The regional departments of labour, employment and vocational training are invited to examine closely applications for salaried work authorisation, where the number seems to be blatantly incompatible with the size or activity of the business or its recent creation.

Management should be pursued by putting in place very regular statistical monitoring in order to monitor flows and avoid any loss of control. Each regional department is therefore requested to fill in, for the benefit of the department for population and migration, a online table on the Labour intranet. This table will soon be accessible via the heading “Main Files”, “foreign labour”, “transitional period”. More detailed instructions will be available on this site for filling in the table.

List of 61 trades open
Construction and Civil Engineering
Civil Engineering, concrete and extraction sector
Civil engineering worker

Concrete worker
Solid extraction worker
Construction sector (shell construction)
Mason
Metallic structure assembler
Woodwork assembler (carpenter)
Installer of rigid coverings (e.g. paver)
Installer of flexible coverings (e.g. carpet layer)
Construction sector (interior work)
Roofer
Installer of joined closures (joiner, locksmith)
Equipment fitter-plasterer (e.g. stall or kitchen installer)
Technicians and supervisors in construction and civil engineering
Construction and civil engineering draughtsman
Surveyor
Construction and civil engineering technical planner
Construction and civil engineering site foreman
Construction and civil engineering clerk of works
Hotel, catering and food
Floor worker
Cook
General catering worker
Restaurant waiter
Preparer of meat products (butcher)
Agriculture
Market gardener-horticulturalist (exclusively seasonal)
Arboriculturist-wine grower (exclusively seasonal)
Off-land livestock farmer (breeder of pigs, rabbits, poultry)
Mechanical construction and metalworking
Coppersmith-sheet metalworker
Operator-setter on machine tool
Industrial pipe fitter (delivery and assembly of pipes)
Mechanic-fitter
Laminator-mould maker (moulder-laminator)
Mechanical construction manufacture and metalworking inspector
Others
Operator of automatic machines in electrical production
General maintenance technician (industry and construction maintenance operator)
Operator of first metalworking machines
Electrical and electronic production framing operator
Draughtsman-mechanical construction project
Mechanical construction and metalworking manufacturing technician
Mechanical construction and metalworking quality technician
Lift (and other mechanical systems) installer-maintenance engineer
Process industries
Installation pilot in chemical and energy production industries
Installation pilot in food processing industries
Operator of manufacturing machines and equipment in food processing industries
Operator of first metalworking machines
Installation pilot in glass material production
Glass forming (transforming) operator
Installation pilot in cement production
Ceramics and construction materials production operator
Wood-based panel production operator
Paper and board pulp production operator

Paperboard production operator
Forming operator
Meat processing operator (slaughter, preparation, packaging)
Traditional fermentation operator (wine, cider, beer, cheese production, etc.)
Sales and commerce
Sales representative for professional capital goods
Sales representative for semi-processed goods and raw materials
Sales representative for services to companies
Remote sales engineer
Home representative
Merchandiser (design of points of sale and shelving)
Specialist window cleaner
Urban maintenance and cleaning operative
Maintenance and drainage operative
Cleanliness
An accurate definition of these trades can be found on the ANPE site (www.anpe.fr).

This mechanism was applied by inter-ministerial circular DPM/DMI2 2006/244 of 6 June 2006 regarding work authorisations issued to nationals of new Member States of the European Union coming to take up seasonal jobs in the agricultural sector for the 2006 harvest. The latter indicates that, in the agricultural sector, the trades recognised as under pressure are those corresponding to the following ROME codes:
- 41112 – Market gardening – horticulture, for seasonal jobs only;
- 41114 – Arboriculture – wine growing, for seasonal jobs only;
- 41117 – Seasonal agricultural worker (including grape-pickers);
- 41124 – Off-land livestock farmer (breeder of pigs, rabbits, poultry).

The trade of seasonal agricultural worker, corresponding to ROME code 41117 has been added to the list appended to the circular of 29 April 2006. It concerns in particular the workers needed to pick fruit, gather vegetables and pick grapes.

Situation regarding nationals of Bulgaria and Romania

Several texts attempt to adapt French law on the subject.

The *circular of the Ministry of the Interior INT/D/06/00115/C of 22 December 2006* relating to the methods of entry for residence and of departure for Romanian and Bulgarian nationals with effect from 1 January 2007[17] summarises the conclusions to be drawn from the Law of 13 October 2006, published in the Official Journal of 14 October 2006, authorising ratification of the treaty of accession of the Republic of Bulgaria and of Romania to the European Union.

Since this accession became effective on 1 January 2007, their nationals are subject, as of this date, to the provisions regarding the right of residence of part II of the book of the Code for the Entry and Residence of Foreigners and the Right of Asylum (CESEDA), which transposes the rules set by Directive 2004/38/EC of 29 April 2004 regarding the freedom of movement and of residence of citizens of the Union and their family members. They are also subject to the special rules for access to labour during the transitional period envisaged by the accession treaties of these two States.

Regarding the right of residence, the terms of the circular of the Minister of the Interior are very reserved since, in his view, "the integration of these countries into the Union does not mean *ipso facto* recognition in favour of their nationals of an unconditional right of residence, since the exercise of this right is based on meeting a certain number of criteria". A distinction is made depending on whether the duration of the residence of the nationals in question is more or less than three months. Where periods of residence in France of less than three months are involved, these nationals enjoy freedom of movement under the same

17 See appendix.

conditions as other citizens of the European Union. The conditions for exercising this right remain unchanged; a valid passport or identity card are the only documents required. They in fact enable the nationality of the Community national to be established and, hence, enjoyment of the right to freedom of movement envisaged in the European treaties. Consequently, the enforceable entry conditions for nationals of third-party countries (accommodation certificates, proofs of insurance, minimum resources in particular) should not be imposed upon Romanian and Bulgarian nationals.

Nonetheless, it is explicitly recalled that, "the French authorities can impose restrictions on the right of movement and of residence if the parties in question pose a threat to law and order or constitute an unreasonable burden on the French social security system". The concept of "unreasonable burden" supposes that a blatant abuse of the right of residence is observed, represented by the fact that the sole objective of the residence in reality is to benefit from social security measures which are available without compensation, in other words without it being necessary to pay a contribution. In practice, this affects all non-contributory social security services.

A list of indications must be compiled in order to establish the unreasonable nature of this burden.

Thus, the existence of this burden will be ascertained when recourse to social security is of a recurrent nature during the periods of residence of less than three months or when the sole objective of the residence is to benefit from French social security assistance or services.

In order to implement this assessment, it is necessary to distinguish whether the parties in question will or will not be in a position to receive, during their residence in France, social security coverage from their country of origin. In application of the provisions of Regulation 1408/71, insured parties of a Member State can be covered for their health care by French health insurance which will then be reimbursed for the expenses incurred by the health insurance of that Member State. In this scenario, recourse to the French health care system cannot constitute a true indication of an abuse of rights.

On the other hand, lack of this social security insurance may give rise to a strong presumption regarding the excessive nature of the request for assistance. In fact, in a scenario where the Community national does not have social security cover in his country of origin and he quickly calls on the French health care system, the administrative authority will wonder about the reasons for the residence. The nature and duration of the coverage requested as well as its cost must considered in order to determine if the appeal for assistance is actually excessive. It will also be taken into account from the time when the pathology covered is stated. An indication of an excessive burden will be the case of a Community national without resources or social security in his country and who, suffering from a stated pathology in this country, comes to France in order to receive care there, without financial compensation. Another example of the existence of an unreasonable burden is the systematic reliance on emergency housing.

In practice, the administrative services will establish the date of entry to French territory, taking as a basis if necessary the documents provided by the assistance-providing bodies which will establish the presence in France of the beneficiary. These services (health insurance fund, regional council, etc.), being in the best position to identify abusive behaviour, will provide these documents upon identification of the Community nationals in question.

The administrative authority states:,

> "taking into account the difficulties of characterising an unreasonable burden within a period of three months, you will have to consider that the elements gathered form part of the evaluation of the right of residence beyond this period if the Community national remains in France. In addition, if this assessment results in the characterisation of abusive behaviour, *you will be within your rights to consider that the party in question no longer enjoys a right of residence in France, including for a period of less than three months*, even if he has left the country. Thus, in the event of a return to French territory and another application for access to French social security assistance, the service providers to which application is made may inform you and refuse to grant assistance if enjoyment of it is subjected to a right of residence".

The attention of the services is drawn to the need to register information about the situation of the parties in question on the AGDREF, in order to allow continuity of monitoring in the event of a change of *département* of residence of the Community national.

The right to residence of more than three months is granted to Romanian and Bulgarian nationals under the same conditions as to nationals of States which entered the European Union on 1 May 2004. As all Community citizens must, they have to complete registration formalities in advance at the town hall of their place of residence.

The fundamental modification of the right of residence of Romanian and Bulgarian nationals necessarily affects the right of removal which will be applicable to them since it is no longer possible to impose entry conditions.

With effect from 1 January 2007, it will not be possible to envisage the deportation of Romanian or Bulgarian nationals for reasons associated with failure to respect the conditions of Article 5-c of the convention applying the Schengen agreements. Enjoyment of the freedom of movement under the conditions stated above involves, in accordance with Articles 10 and 11 of Regulation no. 562/2006 of the European Parliament and of the Council of 15 March 2006, establishing a Community code relating to the system of border crossing by persons, known as the "Schengen borders code", the abolition of the punching of travel documents of Bulgarian and Romanian nationals at the external borders of the Schengen area. On the other hand, removal on serious grounds of law and order remains possible under the conditions of common law since no particular legislative provisions exist governing the grounds for expulsion of nationals of the European Union.

Circular DPM/DCI/2006/541 of 22 December 2006 relating to work authorisations issued to nationals of Bulgaria and Romania during the transitional period applicable to new Member States of the European Union establishes their situation with regard to employment[18]. Its content is intended to generalise, in their respect, the procedure and the list of trades under pressure enforceable with regard to new Member States. These provisions will apply from now on to Bulgarians and Romanians who, as of 1 January 2007, will be able to gain access to paid employment under conditions identical to those granted as of 1 May 2006 to nationals of the ten Member States which joined the European Union on 1 May 2004. Moreover, the freedom of provision of services as well as the freedom of establishment are guaranteed to Bulgarian and Romanian nationals.

Circular DSS/DACI no. 2007-13 of 8 January 2007 relating to the consequences in terms of social security of the enlargement of the European Union by two new Member States (Bulgaria and Romania) draws the legal conclusions from this new situation and aims to provide details on the methods of implementation of the coordination rules (EEC) no. 1408/71 and no. 574/72 in relationships with these new Member States.

In the first place, the circular recalls that all of the Community *acquis* is reasserted and is applicable by and to these new Member States, as well as to their nationals, subject to adaptations and transitional measures.

Secondly, the importance of this transitional period is put into perspective by the circular, which emphasises that the system applicable is very close in its principle to that which was established for previous accessions, with the exception that Bulgarian and Romanian workers wishing to work in France are treated, with effect from 1 January 2007, in the same way as workers are currently treated from the ten States which joined on 1 May 2004 (and who are, with effect from 1 May 2006, in the second phase of the transitional period applicable to them in particular). This treatment involves a gradual lifting of the restrictions on access to employment, translated in the first instance by a relaxation of the criteria for granting work authorisation for access to 62 trades "under pressure", in other words experiencing recruitment difficulties, while access to the non-affected trades remains subject to acquisition of work authorisation under the usual conditions.

In this respect, the text emphasises that:

- during the transitional periods, the restrictions target access to the national employment market, which remains governed by the internal legislation of the State under consideration and the existing bilateral agreements reached with the State of origin of

18 See appendix.

the party in question, but these restrictions affect only salaried workers who go to a former Member State to take up employment in one of its companies. Students, researchers and the self-employed are not affected by transitional periods.

The provision of services is free, for Bulgarian and Romanian operators, with effect from 1 January. Retirees and non-workers can move freely with effect from the same date under the conditions established by Directives 90/364/EEC and 90/365/EEC of 28 June 1990 regulating their right of residence:

- during the transitional periods, internal regulations regarding access by foreigners to employment cannot be the subject of any additional restrictive provision and the provisions in force cannot be made more restrictive, as a result of the traditional "standstill" clause referred to in the accession treaty;
- the transitional periods do not affect nationals of the new Member States, regardless of their status (salaried workers or others) in terms of social rights (equal treatment in terms of work and conditions of employment, in terms of social security benefits and social security) for themselves or their family members. Regulation no. 1408/71 is not the subject of any suspensive measures during the transitional periods. As for regulation (EEC) no. 1612/68, the provisions of its Articles 1 to 6, application of which is suspended during these same transitional periods in favour of application of national measures and measures ensuing from bilateral agreements governing access to the labour market, not those of Article 7 concerning equality of treatment.

Consequently, the transitional periods are not effective in the area under consideration and, from this point of view, Article 7, paragraph 2 of Regulation no. 1612/68 (equality of treatment alongside national workers in terms of social and tax benefits) and Regulations 1408/71 and 574/72 are fully applicable with effect from 1 January 2007 to Bulgarian and Romanian nationals.

The transitional periods in terms of the free movement of persons, which target only salaried workers, do not affect the rights and obligations relating to social security of Bulgarian and Romanian nationals.

Accession is therefore translated in this field by the immediate reassertion of the *acquis* and the two regulations are therefore wholly and immediately applicable in relationships with these two new Member States and with their nationals (who transition immediately from the status of nationals of third-party States to that of citizens of the European Union).

This *acquis* is taken to mean the regulations, as they have been modified and supplemented by subsequent modifying regulations, of the relevant jurisprudence of the Court of Justice and the decisions taken by the administrative committee for their implementation. In particular, regulation no. 859/2003, aimed at extending the provisions of Regulations 1408/71 and 574/72 to nationals of third-party countries who are not already covered by these provisions solely on the grounds of their nationality, forms part of this *acquis* and therefore applies immediately to nationals of third-party countries residing on the territory of one of the two new Member States or residing on the territory of an old Member State and working or staying on Bulgarian or Romanian territory.

Moreover, the former bilateral social security conventions, such as the Franco-Romanian convention of 16 December 1976, envisage Community regulations taking the place of their provisions (Article 6 of Regulation 1408/71) subject to the hypothesis in the jurisprudence of the ECJ *Rönfeld - Thévenon* which envisages that these provisions could still be applied in a scenario where they would lead to the granting of a benefit to a worker who had applied his right of freedom of movement before 1 January 2007 which is superior to that which he could obtain in application of the provisions of Regulation no. 1408/71.

Finally, the circular notes that the provisions of Articles 14, paragraph 1, 14 *bis,* paragraph 1, and 17 of Regulation no. 1408/71 therefore apply normally and exclusively with effect from 1 January 2007 to all applications corresponding to secondments, extensions of secondment or exceptional secondment for temporary work performed by non-salaried workers.

In referring to the provisions made at the time of previous accessions or upon the entry into force of the agreement creating the EEA or the agreement between the EU and Switzerland on the free movement of persons, the following rules will be applied to secondments of salaried workers current on this date under the provisions of the Franco-Romanian convention or of internal legislation (CSS, Art. L.761-2):

- the parties in question are regarded, as of 1 January 2007, as seconded under Article 14, paragraph 1, point a), for an initial period beginning on that date, in other words without taking into account the secondment already completed previously and the institutions must place these workers in a regular situation (certificate E 101);
- at the end of the initial period of twelve months, i.e. on 1 January 2008, "if the duration of the work to be fulfilled is extended on the grounds of unforeseen circumstances beyond the duration originally envisaged and comes to exceed twelve months", the secondment is regarded as being extended within the meaning of Article 14, paragraph 1, point b);
- if extension beyond twelve months is immediately foreseeable or if the extension to twelve months is not sufficient, a request for extension under Article 17 is foreseeable and, exceptionally, must be systematically granted in cases where an agreement given previously has to be respected under the Franco-Romanian convention or internal legislation and covering such long periods of secondment. However, in any case, the maximum duration of the exceptions granted under Article 17 will not exceed six years, except in very exceptional cases (close to retirement, current serious and intensive medical treatment, etc.).

Secondments (salaried employees) underway on 1 January 2007 are regarded with effect from this date as fulfilled under the provisions of Regulation no. 1408/71, which become effective on that same date, not retroactively.

Moreover, Articles 13 ff. of Regulation no. 1408/71 apply with effect from 1 January 2007, for Bulgaria and Romania, to new situations as well as to current situations, with the potential consequence for the latter of a complete or partial change to the applicable legislation. In order to avoid the difficulties inherent in such modifications, the most complete information possible should be given to the parties in question and they should be given sufficient time to regularise their situation and to take the necessary steps. A certain amount of flexibility in applying the deadlines (retroactive effect of late regularisation procedures) should be in place and the administration stresses that, "systematic penalties should be avoided in such regularisation cases. These changes must be implemented with a certain amount of flexibility bearing the deadlines in mind and without systematic penalties in cases of retroactive regularisation".

In all other cases, where current situations are covered by the provisions of the bilateral Franco-Romanian convention (rights to services in kind for workers and their beneficiaries, for example), the necessary regularisation procedures under Community regulations (change to the scope of rights to services, issue of E forms, etc.) will have to be implemented with effect from 1 January 2007 and, if possible, without waiting for an application from the parties in question (specifically for establishment or an application for certificates or for Community documents). The changes in administrative situation must be made without delay and at the initiative of the institutions.

Equally, the *Decker-Kohll* jurisprudence applies with effect from 1 January 2007 to purchases of medical products and services in these two Member States and therefore the provisions of Articles R. 332-3 to R. 332-6 of the Social Security Code concerning cover for medical care expenses (products and services) incurred in another Member State are applicable to their territory. In this respect also, the provisions inherent to relationships with the former Member States apply with effect from 1 January 2007 to relationships with Bulgaria and Romania.

IX. STATISTICS

I. Extracts from the 2006 Report of the National Institute of Demographic Studies (June 2006)

Immigration by group of nationalities according to age group (workforce)
Year of admission to regular residence 2004

Groupe de nationalités			Ensemble	Groupe d'âges[16]								
				0-17 ans[17]	18-19 ans	20-24 ans	25-29 ans	30-34 ans	35-39 ans	40-49 ans	50-59 ans	60 ans et +
Espace Economique Européen élargi	Espace Economique Européen[11]		40000	3669	734	4157	5460	5363	4787	6700	4284	4845
	Nouveaux Etats Membres[12]		3217	275	57	780	992	511	247	235	101	18
	Total		43216	3944	791	4938	6452	5874	5034	6935	4385	4862
Total			43216	3944	791	4938	6452	5874	5034	6935	4385	4862
Pays Tiers												
	Europe	Autres pays européens[13]	21381	2707	1053	5202	4789	2883	1834	1909	608	396
		Total	21381	2707	1053	5202	4789	2883	1834	1909	608	396
	Afrique	Maghreb	65695	7619	2865	10466	14636	11062	6898	5694	2479	3976
		Pays anciennement sous administration française[14]	26947	1538	1473	5275	6166	5171	3335	2587	764	637
		Autres pays africains	7925	745	253	1029	1560	1602	1227	1095	204	211
		Total	100567	9903	4591	16769	22362	17835	11459	9376	3447	4824
	Asie	Sud-Est asiatique[15]	3084	73	310	1218	668	337	174	213	51	41
		Autres pays asiatiques	26225	1446	983	7905	6255	3931	2145	2232	734	994
		Total	29310	1519	1293	9123	6923	4268	2319	2445	785	635
	Amérique	Amérique du Nord	6243	474	232	2149	867	615	481	747	399	278
		Autres pays américains	8674	723	363	1918	2367	1454	811	648	193	196
		Total	14917	1197	596	4067	3234	2070	1292	1395	593	474
	Autres	Total	684	60	19	123	123	115	82	84	49	28
	Total		166859	15386	7551	35285	37431	27170	16987	15209	5482	6358
Total			210075	19330	8342	40222	43883	33044	22021	22144	9867	11220

Immigration by group of nationalities according to age group (percentages)
Year of admission to residence: 2004

Groupe de nationalités			Ensemble	Groupe d'âges[6]								
				0-17 ans[7]	18-19 ans	20-24 ans	25-29 ans	30-34 ans	35-39 ans	40-49 ans	50-59 ans	60 ans et +
Espace Economique Européen élargi		Espace Economique Européen[1]	100,0	9,2	1,8	10,4	13,6	13,4	12,0	16,8	10,7	12,1
		Nouveaux Etats Membres[2]	100,0	8,6	1,8	24,3	30,8	15,9	7,7	7,3	3,1	0,6
		Total	100,0	9,1	1,8	11,4	14,9	13,6	11,6	16,0	10,1	11,3
	Total		100,0	9,1	1,8	11,4	14,9	13,6	11,6	16,0	10,1	11,3
Pays Tiers												
	Europe	Autres pays européens[3]	100,0	12,7	4,9	24,3	22,4	13,5	8,6	8,9	2,8	1,9
		Total	100,0	12,7	4,9	24,3	22,4	13,5	8,6	8,9	2,8	1,9
	Afrique	Maghreb	100,0	11,6	4,4	15,9	22,3	16,8	10,5	8,7	3,8	6,1
		Pays anciennement sous administration française[4]	100,0	5,7	5,5	19,6	22,9	19,2	12,4	9,6	2,8	2,4
		Autres pays africains	100,0	9,4	3,2	13,0	19,7	20,2	15,5	13,8	2,6	2,7
		Total	100,0	9,8	4,6	16,7	22,2	17,7	11,4	9,3	3,4	4,8
	Asie	Sud-Est asiatique[5]	100,0	2,4	10,0	39,5	21,6	10,9	5,6	6,9	1,7	1,3
		Autres pays asiatiques	100,0	5,5	3,7	30,1	23,9	15,0	8,2	8,5	2,8	2,3
		Total	100,0	5,2	4,4	31,1	23,6	14,6	7,9	8,3	2,7	2,2
	Amérique	Amérique du Nord	100,0	7,6	3,7	34,4	13,9	9,9	7,7	12,0	6,4	4,5
		Autres pays américains	100,0	8,3	4,2	22,1	27,3	16,8	9,4	7,5	2,2	2,3
		Total	100,0	8,0	4,0	27,3	21,7	13,9	8,7	9,4	4,0	3,2
	Autres	Total	100,0	8,8	2,8	18,0	18,0	16,8	12,1	12,3	7,1	4,1
	Total		100,0	9,2	4,5	21,1	22,4	16,3	10,2	9,1	3,3	3,8
Total			**100,0**	**9,2**	**4,0**	**19,1**	**20,9**	**15,7**	**10,5**	**10,5**	**4,7**	**5,3**

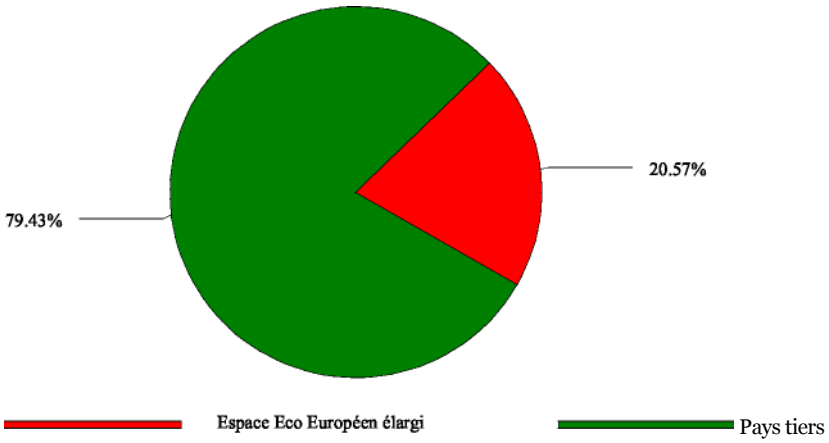
Immigration by group of nationality according to grounds for admission (workforce)
Year of admission to residence: 2004

Groupe de nationalités			Motif d'admission									
			Ensemble	Mineur[6]	Etudiant	Travailleur	Famille d'étranger	Famille de Français	Visiteur	Inactif[7]	Réfugié et apatride	Autres[8]
Espace Economique Européen élargi		Espace Economique Européen[1]	40000	3669	932	14807	3110	1301	0	16126	0	57
		Nouveaux Etats Membres[2]	3217	275	895	830	297	514	0	127	0	278
		Total	43216	3944	1827	15636	3407	1815	0	16253	0	335
	Total		43216	3944	1827	15636	3407	1815	0	16253	0	335
Pays Tiers												
	Europe	Autres pays européens[5]	21381	2707	3717	1336	288.3	5594	499	515	3956	174
		Total	21381	2707	3717	1336	288.3	5594	499	515	3956	174
	Afrique	Maghreb	65695	7619	9797	1017	12054	28951	2845	1973	332	1108
		Pays anciennement sous administration française[4]	26947	1538	6675	317	2636	9488	637	2857	2018	781
		Autres pays africains	7925	745	875	164	1255	1691	286	878	1677	354
		Total	100567	9903	17346	1498	15945	40130	3768	5707	4027	2242
	Asie	Sud-Est asiatique[6]	3084	73	1556	166	119	1022	89	27	22	10
		Autres pays asiatiques	26225	1446	12769	1527	2544	3168	1960	482	1873	456
		Total	29310	1519	14325	1693	2664	4190	2049	509	1895	466
	Amérique	Amérique du Nord	6243	474	2474	887	292	831	1248	5	2	31
		Autres pays américains	8674	723	3472	404	795	2126	508	218	332	95
		Total	14917	1197	5946	1291	1087	2957	1756	223	334	126
	Autres	Total	684	60	162	133	79	106	117	4	16	7
	Total		166859	15386	41496	5951	22658	52976	8189	6958	10228	3085
Total			210075	19330	43323	21588	26065	54791	8189	23211	10228	3381

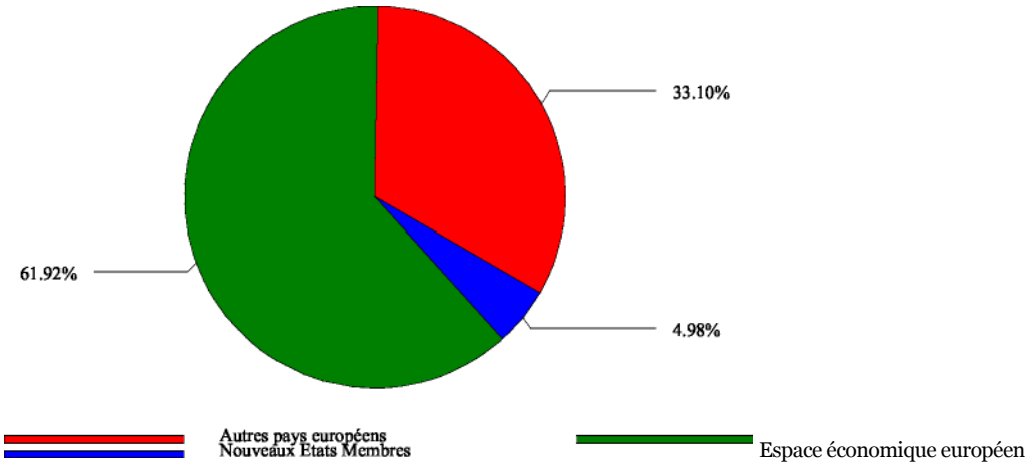
Immigration by group of nationality according to grounds for admission (percentages)
Year of admission to residence: 2004

Groupe de nationalités			Ensemble	Motif d'admission								
				Mineur[6]	Etudiant	Travailleur	Famille d'étranger	Famille de Français	Visiteur	Inactif[7]	Réfugié et apatride	Autres[8]
Espace Economique Européen élargi		Espace Economique Européen[1]	100,0	9,2	2,3	37,0	7,8	3,3	0	40,3	0	0,1
		Nouveaux Etats Membres[2]	100,0	8,6	27,8	25,8	9,2	16,0	0	3,9	0	8,7
		Total	100,0	9,1	4,2	36,2	7,9	4,2	0	37,6	0	0,8
	Total		100,0	9,1	4,2	36,2	7,9	4,2	0	37,6	0	0,8
Pays Tiers												
	Europe	Autres pays européens[5]	100,0	12,7	17,4	6,3	13,5	26,2	2,3	2,4	18,5	0,8
		Total	100,0	12,7	17,4	6,3	13,5	26,2	2,3	2,4	18,5	0,8
	Afrique	Maghreb	100,0	11,6	14,9	1,5	18,3	44,1	4,3	3,0	0,5	1,7
		Pays anciennement sous administration française[4]	100,0	5,7	24,8	1,2	9,8	35,2	2,4	10,6	7,5	2,9
		Autres pays africains	100,0	9,4	11,0	2,1	15,8	21,3	3,6	11,1	21,2	4,5
		Total	100,0	9,8	17,2	1,5	15,9	39,9	3,7	5,7	4,0	2,2
	Asie	Sud-Est asiatique[6]	100,0	2,4	50,5	5,4	3,9	33,1	2,9	0,9	0,7	0,3
		Autres pays asiatiques	100,0	5,5	48,7	5,8	9,7	12,1	7,5	1,8	7,1	1,7
		Total	100,0	5,2	48,9	5,8	9,1	14,3	7,0	1,7	6,5	1,6
	Amérique	Amérique du Nord	100,0	7,6	39,6	14,2	4,7	13,3	20,0	0,1	0,0	0,5
		Autres pays américains	100,0	8,3	40,0	4,7	9,2	24,5	5,9	2,5	3,8	1,1
		Total	100,0	8,0	39,9	8,7	7,3	19,8	11,8	1,5	2,2	0,8
	Autres	Total	100,0	8,8	23,7	19,4	11,6	15,4	17,1	0,6	2,3	1,1
	Total		100,0	9,2	24,9	3,6	13,6	31,7	4,9	4,2	6,1	1,8
Total			**100,0**	**9,2**	**20,6**	**10,3**	**12,4**	**26,1**	**3,9**	**11,0**	**4,9**	**1,6**

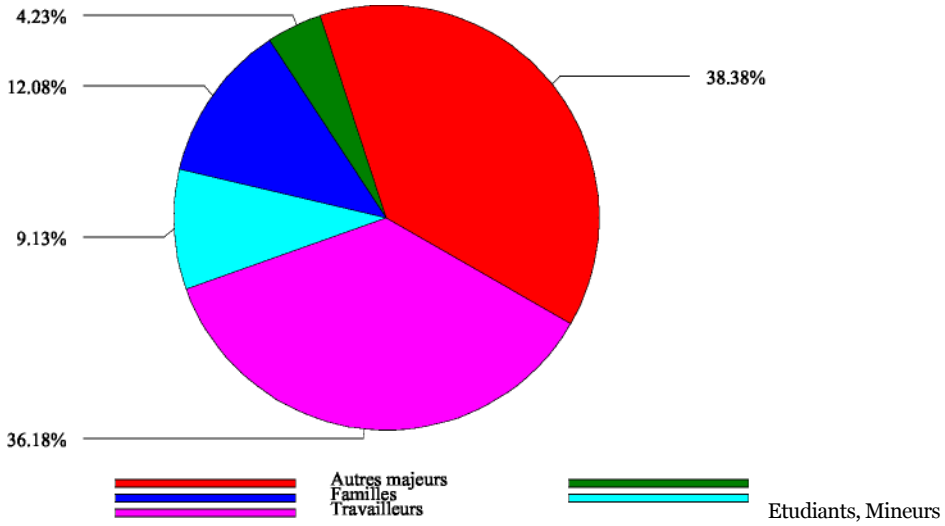
Distribution of immigrants from third-party countries and the EEA
Year of admission to regular residence: 2004



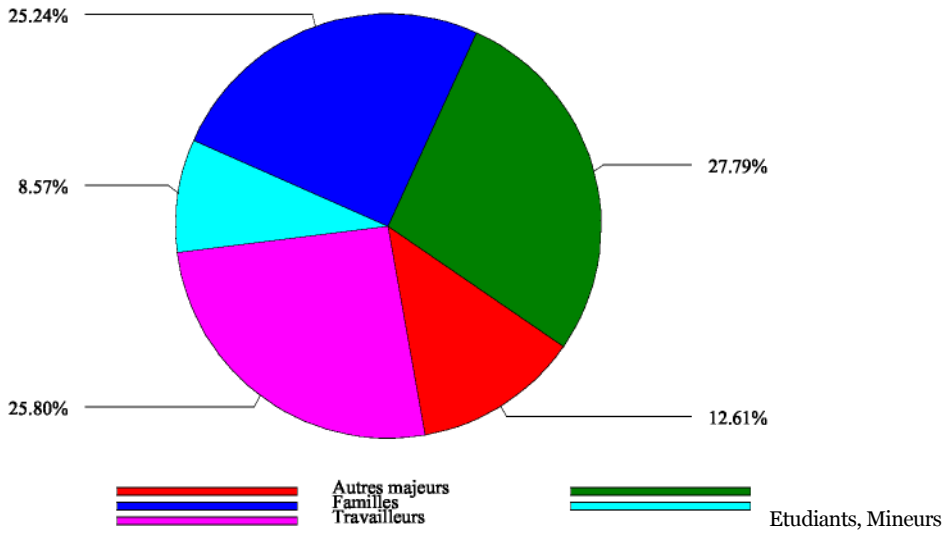
Distribution of immigrants from Europe
Year of admission to regular residence: 2004



Distribution of immigrants from the enlarged EEA according to grounds for admission
Year of admission to regular residence: 2004



Distribution of immigrants from the 10 new Member States of the EU according to grounds for admission
Year of admission to regular residence: 2004



II. Extracts from the Third Report of the Ministry of the Interior to the Parliament regarding the Trends in immigration policy, December 2006 (p. 56 ff.)

2. Issue of residence permits

Foreign nationals subject to Community law. Foreign nationals subject to Community law (citizens of Member States of the European Union or of the European Economic Area and their family members regardless of their nationality) enjoy a privileged right of residence since they enter into France under a simple identity document. In fact, their residence procedure is the direct result of the Treaties creating the European Community, implemented in France essentially by regulatory means (decree of 11 March 1994 modified).

The law of 26 November 2003 abolished the requirement to hold a residence permit for nationals of these States as well as of the Swiss Confederation. These nationals can therefore reside and work in France without being bound to apply for a residence permit. However, they do retain the right to apply for a permit for personal reasons from the Prefect's office.

With respect to nationals of the new Member States of the European Union, with effect from 1 May 2004 and with the exception of Cyprus and Malta, transitional measures have been introduced which require them, if they wish to practise an economic activity in France, to apply for a residence permit constituting work authorisation for the entire transitional period, which can be between two and seven years.

Stock de titres et autorisations provisoires de séjour en cours de validité
par durée et type de titre

Pays tiers		fin 2003	fin 2005	fin 2005	fin sept 2006
supérieur à un an	CEE 10 ANS		6 012	8 201	8 833
	CEE 5 ANS		1 412	1 665	1 752
	CEE TITRE PERMANENT		12	20	25
	CR		1 208 193	1 194 206	1 191 306
	CRA 10 ANS		497 653	503 562	505 072
	CRA 2 ANS		37	42	41
	CST 10 ANS		194	118	112
	CST 5 ANS		16	63	79
	EEE 10 ANS		28	33	33
	EEE 5 ANS		9	11	11
	RETRAITE		2 159	3 012	3 301
	total		1 715 725	1 710 933	1 710 565
un an	CEE 1 AN		172	244	301
	CRA 1 AN		36 888	39 375	42 351
	CST 1 AN		212 037	285 612	295 180
	EEE 1 AN		1	5	
	total		249 098	325 236	337 832
moins de un an	CEE < 1 AN		80	40	38
	CRA < 1 AN		4 281	4 514	2 698
	CST < 1 AN		32 673	40 228	24 882
	total		37 034	44 782	27 618
documents provisoires	APS		11 821	9 826	8 925
	CONVOCATION		1 251	530	380
	RCS		139 797	117 165	121 409
	total		152 869	127 521	130 714
total pays tiers			2 154 726	2 208 472	2 206 729

Tableau n° III-7

Année 2004	Titres non communautaires	Titres communautaires	Total
Nationalités soumises à titre de séjour	197 029	3 349	200 378
dont pays tiers	190455	1395	191850
dont dix NEM (y compris Bulgarie et Roumanie, hors Chypre et Malte)	6 574	1 954	8 528
Nationalités non soumises à titre de séjour	302	5 962	6 264
Total	**197 331**	**9 311**	**206 642**
dont cartes de résident	30 491		
dont cartes de résidents algériens	33 916		
dont cartes de séjour temporaire	132 468		
dont cartes de retraités	456		
Année 2005	**Titres non communautaires**	**Titres communautaires**	**Total**
Nationalités soumises à titre de séjour	190 036	4 370	194 406
dont pays tiers	185 197	1 431	186 628
dont dix nouveaux états membres (y compris Bulgarie et Roumanie, hors Chypre et Malte)	4 839	2 939	7 778
Nationalités non soumises à titre de séjour	103	2 745	2 848
Total	**190 139**	**7 115**	**197 254**
dont cartes de résident	31 028		
dont cartes de résidents algériens	31 254		
dont cartes de séjour temporaire	127 567		
dont cartes de retraités	290		

Source : MIAT, Mission statistiques de la DLPAJ

Tableau n° III-8 - : L'admission au séjour des ressortissants de pays tiers à l'Union Européenne à 27, à l'Espace Economique européen, à la Suisse (Métropole)

			2000	2001	2002	2003	2004	2005
PAYS TIERS	A. Economique	1 - compétences et talents	0	0	0	0	0	0
		2 - actif non salarié	1 353	917	1 035	329	284	325
		3 – scientifique	1 156	1 338	1 197	1 205	1 171	1 203
		4 – artiste	195	172	219	302	241	290
		5 – salarié	8 569	11 380	14 055	6 199	5 274	5 155
		6 – temporaires	3 570	4 378	4 450	4 422	4 328	4 138
		total	14 843	18 185	20 956	12 457	11 298	11 111
	B. Etudiants		45 099	49 466	54 936	52 317	49 305	46 305
	C. Familial	1 - famille de français	34 713	40 961	45 502	59 251	57 779	55 235
		2 - membre de famille*	21 258	21 718	23 283	23 423	23 310	22 990
		3 - liens personnels et familiaux	6 999	5 922	6 864	10 931	13 295	14 155
		total	62 970	68 601	75 649	93 605	94 384	92 380
	D. Divers	1 – visiteur	8 202	8 577	7 522	6 540	6 410	6 018
		2 - étrangers entrés mineurs	3 241	2 592	2 277	1 977	2 521	2 635
		3 - admission après 10 ans de séjour	3 166	2 806	2 871	3 815	3 073	2 678
		4 - rente accident du travail	74	76	203	120	74	40
		5 - ancien combattant	419	383	332	392	448	299
		6 - étranger malade	1 996	3 414	4 183	5 524	7 455	7 196
		7 - retraité ou pensionné	403	404	551	1 481	2 380	2 496
		8 - motifs divers	3 130	1 711	2 548	1 168	907	650
		total	20 631	19 963	20 487	21 017	23 268	22 012
	E. Réfugiés	1 - réfugié & apatride	6 032	7 933	8 841	11 282	13 370	14 761
		2 - asile territorial/protection subsidiaire	407	318	209	147	225	349
		total	6 439	8 251	9 050	11 429	13 595	15 110
	TOTAL		149 982	164 466	181 078	190 825	191 850	186 918

* Regroupement familial
Source : MIAT, Mission statistiques de la DLPAJ

Community documents and European Economic Area documents

The permanent Community national card is issued to a Community worker and to his family members under the conditions established by the decree of 11 March 1994 modified.

The year 2004 was marked by a huge reduction in the total number of first residence permits issued, which is a direct result of the abolition of the requirement that Community nationals hold a residence permit. Nonetheless, it should be mentioned that the nationals of

new Member States of the European Union, with the exception of Cyprus and Malta, remain subject to this requirement if they wish to practise a professional activity during the transitional period. France, together with most of the old Member States, did in fact wish to take up this option of protecting its employment market for an initial period of two years, i.e. until 1 May 2006.

Tableau n° III-13 - Premiers titres de séjour communautaires et titres Espace économique européen afférents aux années 2002 à 2005 France métropolitaine

	2002	2003	2004	2005
1 - famille de français	2 297	2 193	515	503
2 - membre de famille*	7 605	7 624	2 346	1 987
3 - liens personnels et familiaux				1
1 - actif non salarié	1 086	1 095	333	408
4 - salarié	14 756	14 102	2 091	1 926
5 - saisonniers ou temporaires	7 903	7 679	928	265
1 - visiteur	6 983	7 523	1 609	1 012
2 - étudiant & stagiaire	10 637	8 515	903	728
9 - retraité ou pensionné	4 211	4 774	582	189
11 - motifs divers		3	4	96
total	55 478	53 508	9 311	7 115

*Regroupement familial

Source : MIAT/mission statistique de la DLPAJ

CHAPTER X. SOCIAL SECURITY

Decree 2006-306 of 16 March 2006 relating to the authorisation system for laboratories based outside France in a Member State of the European Community or party to the European Economic Area agreement defines the conditions under which the analysis laboratories of a Member State can be approved so that French people with national insurance who make use of them can be covered by health insurance[19]. In this respect, it supplements the law of 9 August 2004 and responds to the criticism expressed about the French situation by the ECJ.

Court of Cassation, Social Chamber, 22 February 2006, 03-18771: the legal obligation for an employer to be a member of a paid holiday fund does not affect the freedom of association protected by Article 11 § 2 CEDH. The employer also cited the location of the place of the head office in Great Britain to avoid the contribution requirement. But since his principal place of establishment was in France, the Court of Cassation was of the opinion that the employer could not avoid becoming a member.

J-P. Lhernould[20] approaches "this position based on the fact that, within the context of the regulations concerning the transnational secondment of workers, the minimal duration of paid holidays is part of the 'hard core' of social standards applicable to salaried workers in France, irrespective of the law governing their employment contract (Directive 96/71; Labour Code, Articles D. 341-5-1 and L. 342-3 new)".

Administrative Court of Appeal of Nancy, 19 June 2006, 03NC00284: Mr. X, born in 1955, was hospitalised on 4 February 1993 at the general hospital in Forbach. In the night of 6-7 February 1993 he attempted to commit suicide by throwing himself out of the unlocked window of his room on the 4th floor; that, entirely unable to work as a result of the accident, he entered into a transaction with the hospital on 9 July 1996 to repair the damage caused.

Since Mr. X was working in Germany, the *Landesversicherungsanstalt für das Saarland*, the social security institution for Saarland, of which the party in question was a member, requested the Forbach general hospital to reimburse the amounts paid or to be paid to its insured party. In the disputed judgement, dated 14 January 2003, the Administrative Court of Strasbourg, while granting the conclusions of the social security institution regarding the disability pension paid to Mr. X, it rejected those referring to the refund of pension contributions claimed by the *Landesversicherungsanstalt für das Saarland*. Mr. X died on 21 April 2005.

Considering that, if the provisions of Article 93-1 a) and b) of Regulation EC no. 1408/71, regarding the application of social security systems to salaried workers, non-salaried workers and their family members who move within the Community, in its version modified and updated by Regulation no. 2001/83, applied to the present case, open up to the debtor institution under German law the possibility of making a claim for refund of the disbursements incurred in favour of an insured party who has been the victim of injury sustained on the territory of the French state, by means of both indirect and direct action, the material content of the rights of the victim and therefore of his social protection institution is determined by the rules of national law which define the origin and limits of the right to compensation held by the victim or his beneficiaries with respect to the responsible third party.

Considering that it follows from the inquiry that, in application of Article 119 of the German Code of Social Laws, a legal mandate exists, conferred upon the *Landesversicherungsanstalt für das Saarland*, to recover on behalf of the victim, from the author of the injury, the pension contributions it has paid on behalf of the victim and if the provisions of French law authorised Mr. X to request compensation for the damage of loss of income from retirement pension caused by the accident which prevented him, as mentioned above, from conducting his professional activity, the fact remains that, since the party in question died before the age when he was eligible to receive this retirement pension, the *Landesversi-*

19 See appendix.

20 L'Europe sociale s'invite à la table de la Cour de Cassation, *Liaisons sociales Europe*, no. 150, of 13 to 26 April 2006.

cherungsanstalt für das Saarland, is in any case not justified in maintaining that it is subrogated to the right of compensation for damage of loss of pension suffered by Mr. X.

Administrative Court of Paris, 20 September 2006, 03PA03576: Mrs. Georgia X, spouse of Y, who lived in Greece, was treated for the first time on 13 July 1992 at the Paul Brousse de Villejuif hospital, after having been diagnosed in Athens in May with a serious haematological illness resulting from breast cancer, treated in 1989. Despite the care she received – numerous out-patient transfusions and periods in hospital from 18 to 29 September 1992, then 7 October 1992 and, finally, from 10 October 1992 – she died in the haematology department of the Paul Brousse hospital on 13 October 1992 at the age of 44. The criminal action initiated by a complaint from the family for failure to assist a person in danger ended in a decree quashing the indictment dated 25 June 1997, confirmed on 25 February 1998 by the court of criminal appeal of the Court of Appeal of Paris and on 27 October 1998 by the Court of Cassation. On 18 July 1997, the Welfare Service of the Paris Hospitals rejected the claim for compensation for damage which the family had submitted, citing errors committed by the hospital. In the disputed judgement of 7 May 2003, the Administrative Court of Melun rejected the claim by the brothers and sisters and the husband and children of Mrs. X directed against this denial of compensation.

Considering that, if the experts agree to acknowledge that it would have been appropriate, taking into account the deterioration in her general condition, to extend the period of hospitalisation of Mrs. X on 7 October instead of sending her home following a transfusion and various examinations, it is not evident from the inquiry nor, specifically, from any of the expert reports, that extending this period of hospitalisation would have prevented or delayed the fatal outcome of her illness;

Finally, considering that, if the services of the hospital repeatedly insisted that the family provide the "form E112" required for social security to cover the planned hospitalisation of a Community national not resident in France, it is not evident from the inquiry that Mrs. X was deprived by the fact of this lack of cover of the care necessary for her condition or that these administrative difficulties delayed the transplant which could have saved her;

Considering that it follows from the above that the applicants are not justified in maintaining that, in the disputed judgement, the Administrative Court of Melun wrongly rejected their claim aimed at ordering the French Blood Services or the Welfare Service of the Paris Hospitals to compensate them for the losses they suffered as a result of the death of Mrs. Georgia X, spouse of Y.

Social Security Court, 2 October 2006, Inizan versus CPAM of Hauts-de-Seine, no. 19041999/N: in the *Inizan* case (ECJ, 23 October 2003, case C-56/01), the ECJ responded to an interlocutory question put forward by the social security court of Hauts-de-Seine, which was seeking to determine whether a person insured under the French national insurance scheme could claim reimbursement for pain treatment received at a German hospital. Responding both on the basis of Article 22 of Regulation 1408/71 and of Articles 49 and 50 of the treaty, the Court of Justice had judged that the prior authorisation for coverage could only be refused, "when identical treatment or treatment of the same level of effectiveness for the patient can be obtained at the appropriate time on the territory of the Member State where he resides".

On 2 October 2006, the Social Security Court of Hauts-de-Seine handed down its judgement on the merits, in all respects beneficial for the party in question. Mrs. Inizan in fact obtains a retrospective refund of the care expenses incurred in Germany as well as 8000 euro by way of damages. For the Social Security Court, the National Health Insurance Fund could not assert the absence of cover by French health insurance of such treatment since it acknowledged that the insured party could have been covered for the same pathology in a French treatment centre. Moreover, after having noted that the initial treatments undertaken in France had not had an adequate effect on the health of the party in question, the court concluded that the treatment offered in Germany was necessary and original because of the lack of an equivalent structure in France. The fact that the cover applied for is limited to two weeks would not have jeopardised the financial equilibrium of French social security.

Court of Cassation, 2nd civil chamber, 21 December 2006, 05-14540: Cassation: According to decision no. 147 taken in application of Regulation 1408/71 by the Administrative Commission of the European Communities on Social Security for Migrant Workers, when family allowances are current in the same period for the same family member and by virtue of a professional activity envisaged by the legislation of the Member State on whose territory the family members reside, the right to family allowances payable under the legislation of another Member State, where appropriate in application of Articles 73 or 74, is suspended up to the amount envisaged by the legislation of the first member State; that by virtue of the latter, after comparison, the competent institution acts, if appropriate, as complementary to the services envisaged by the legislation of the State of residence of the family members equal to the difference between the amount of the services envisaged by this legislation and that of the services due by virtue of the legislation of the competent State.

Mrs. X, a French civil servant then seconded to Germany, lived there with her husband, of German nationality, whose salaried activity granted the right in 2000 and 2001 to payment by the competent German institution of family allowances for the couple's two children. Having enjoyed parental leave from 1 December 2000 to 28 January 2002, she requested the French Family Allowance Fund to pay family allowance. On 19 May 2004, this body put her situation in order by a differential payment calculated over the period from 1 January to 31 December 2001, taking into account the amount of family benefits paid under the legislation of the place of residence.

Whereas, in order to decide that Mrs. X should receive all of the family allowances payable for this period, the court of appeal essentially accepted that, since the disputed allowance was not the same in nature as the family allowances received by the father in Germany, there were no grounds for applying the differential supplement rule;

That in ruling thus, while the family allowance was of the nature of a family benefit, such that Mrs. X could not claim a supplementary payment equal to the difference between the amount of the supplementary benefits paid by the competent German institution and that of all the benefits which would have been payable by the Family Allowance Fund, the court of appeal, which did not examine whether these methods of calculation had been applied by this body, had infringed the aforementioned texts.

Court of Cassation, 2nd civil chamber, 21 December 2006, 05-18400: Mr. X held successive salaried positions in France for ten years and in Luxembourg from 1971 to 1996, the year when the competent institutions in these two countries each granted him a disability pension calculated on a pro rata basis for his periods of activity. Following the decision by a disability court, the national health insurance fund categorised him in the third category of disabled insured parties by evaluating, using the same calculation, the increase in pension due by virtue of the assistance of a third person.

The Court of Cassation considers that it follows from the combined provisions of Articles 40 1, 41 2, 45 1 and 46 2 of Regulation no. 1408/71 EC of 14 June 1971 in its version then applicable, that the increase in pension payable by the competent French institution in cases of exacerbation of a disability must be calculated on a pro rata basis for periods of insurance completed under French legislation compared to the total duration of insurance, since the conditions required by French legislation to in order to grant the right to the disability benefit have only been satisfied when periods of insurance completed under the legislation of another Member State are taken into account.

CHAPTER XI. ESTABLISHMENT, PROVISION OF SERVICES, STUDENTS

1. Freedom of establishment

EC, 2 June 2006, Mr. Xavier A, no. 275416: Whatever the modest nature of the obstacle posed to the exercise of the freedom of establishment assigned by Article 52 of the treaty creating the European Community (which became, after modification, Article 43 EC), it is clearly opposed to a Member State introducing a mechanism for taxing hidden reserves in cases of transfer of fiscal domicile such as that under consideration in this case. Consequently, the disputed directives of 1997, 1998 and 2004 are illegal in so far as they restate legislative provisions which, in so far as they are applicable to tax payers who transfer their fiscal domicile to another Member State of the European Community, are ignorant of the provisions of Article 43 of the EC Treaty.

EC, 9 June 2006, Mr. Marc A, no. 280911, regarding the profession of notary: the activities associated with the position of notary public must be regarded as part of the exercise of public authority and, as a result, form part of the scope of the derogations to the principles of the freedom of establishment and the free provision of services resulting from the treaty creating the European Community. These stipulations cannot therefore be usefully cited in opposition to a decree governing access to the profession of notary.

EC, 19 June 2006, Mr. Philippe A, no. 277263, regarding the profession of lawyer: Considering that, under the terms of the first paragraph of Article 14-2 introduced in the law of 31 December 1971 regarding reform of certain judicial and legal professions by the law of 11 February 2004: "Continuing education is compulsory for lawyers registered with the association of the order"; that the second paragraph of the same text envisages that, "a decree in the Council of State determines the nature and duration of the activities likely to be validated as part of compulsory continuing education. The National Bar Council determines the methods according to which it is undertaken".

Under the terms of Article 85-1 of the decree of 27 November 1991 created by Article 36 of decree of 21 December 2004, repeal of which is also being requested by Mr. A: "Lawyers inform, no later than 31 January of each elapsed calendar year, the council of the association of which they are members, the conditions under which they have satisfied their obligations regarding continuing education over the past year. The evidence useful in checking compliance with this obligation is attached to this statement".

Article 14-2 of the law of 31 December 1971 modified, in confining itself to setting forth the principle of compulsory continuing education for lawyers established in France, whatever their origins, has not, in any case, disproportionately undermined the freedom of establishment or freedom of provision of services of lawyers as envisaged in Articles 43 and 49 of the Treaty creating the European Community and implemented by Directive 77/249 of the Council of 22 March 1977 aimed at facilitating the practice of the free provision of services by lawyers and by Directive 98/5/EC of the European Parliament and the Council of 16 February 1998 aimed at facilitating the permanent exercise of the profession of lawyer in a Member State other than that where the qualification was obtained.

Administrative Court of Appeal of Lyons, 30 November 2006, no. 06LY00901: "Considering that, by judgement of 11 March 2004, the European Court of Justice, ruling on the interlocutory question which had been submitted to it by the Council of State in its decision of 14 December 2001, ruling on the dispute concerning the petition from Mr. de Lasteyrie du Saillant, has held that, "the principle of the freedom of establishment set forth in Article 52 of the EC treaty (now, following modification, Article 43 EC) must be interpreted in the sense that it is opposed to a Member State introducing, for the purposes of preventing the risk of tax evasion, a mechanism for taxing capital gains not yet realised, such as that envisaged in Article 167 bis of the French General Tax Code, in the event of the transfer of fiscal domicile of a tax payer outside this State";

Considering that, if the aforementioned judgement of the European Court of Justice, which interprets the principle of the freedom of establishment as being opposed to a Mem-

ber State of the European Union introducing a mechanism for taxing capital gains not yet realised in the event of the transfer of fiscal domicile of a tax payer to another Member State, refers only to the mechanism envisaged in Article 167 bis then in force of the General Tax Code, a matter which was referred to it by decision of the Council of State of 14 December 2001, it follows from this same wording that it also has the effect of declaring incompatible with the treaty all similar mechanisms for the immediate taxation of capital gains not yet realised in the event of the transfer of fiscal domicile from one Member State to another Member State and, thus, specifically, that introduced by the aforementioned provisions of 1 bis of Article 167 putting an end to the deferral of taxation of capital gains noted within the framework of Article 92 B, these latter provisions having moreover been introduced, like those of Article 167 bis, by the same Article 24 of the Finance Law for 1999, and rescinded like them by the Finance Law for 2005 for the purposes of making the deferral of taxation of capital gains in conformity with Community law; that, consequently, the incompatibility with Community law of this taxation mechanism must be regarded as having been proved by this legal decision;

Considering that it follows from the above that the legal decision of the European Court of Justice of 11 March 2004 on the one hand represents an event within the meaning of c) of Article R.196-1 of the code of fiscal procedures forming the point of departure for the claim deadline and, on the other hand, authorises the applicant, in application of the 3rd paragraph of Article L.190 of the same code in the version then in force, to undertake an action for recovery of undue sums under dispute, paid after 1 January 2000; that it follows from this that the obligation taken advantage of by the applicant could not be seriously disputed neither on the grounds of the lateness of his claim of 24 November 2004 nor based on the validity of the taxation, the existence of the obligation upon the State to return the disputed amounts, asserted by Mr. X, must be regarded in the current state of play as not seriously disputable within the meaning of the aforementioned provisions of Article R.541-1 of the Administrative Code of Justice".

Court of Cassation, 1st civil chamber, 5 December 2006, no. 01-17569: the application of Articles L.217-1 and L.122-2-1 of the Intellectual Property Code to a French company on the grounds of the broadcasts produced in France in no way conflicts with its freedom of establishment within the meaning of Article 43 EC and the programmes broadcast by it through its German subsidiary, in that they are permanent services, not covered by the freedom of services put forward in Articles 49 and 50 EC.

"A judgement is also legally justified in having accepted that the Company for the collection of fair payment was justified in considering that a company based in Paris producing radio broadcasts using the satellite, borrowing re-transmitters located on French soil and a transmitter located on German soil, in accordance with a concession granted by the *Land* to the German subsidiary of this company, was cumulatively bound to pay fees for both of the broadcasting sites since the European Court of Justice, before which the present case for an interlocutory transfer is brought, has ruled that, "in the case of a radio broadcast such as that principally in question, the Directive of the Council no. 93/83/EEC of 27 September 1993, relating to the coordination of certain copyright rules and rights similar to copyright applicable to satellite radio broadcasting and re-broadcasting by cable, was not opposed to the fee for the use of phonograms being governed not only by the law of the Member State on whose territory the broadcasting company is established, but also by the legislation of the Member State where the terrestrial broadcaster is located, for technical reasons, which transmits these broadcasts to the former State".

2. Provision of services

Texts

The order of 27 June 2006 regarding supplementary professional pensions introduced into the Insurance Code a section relating to the provision of services provided by a professional

pension institution established in a Member State of the European Community or in another State party to the European Economic Area agreement other than France.[21]

Decree 2006-1229 of 6 October 2006 regarding the regulatory section of the Tourism Code enables an upgrade of an entire series of controversial areas of activity.

Thus, the Code defines the conditions which a Community national must satisfy in order to practise the activity of travel agent. Its article R.212-26 provides: "the professional skill envisaged under *a* of Article L.212-2 is said to be acquired by any national of a member State of the European Community or of a State party to the agreement creating the European Economic Area who can prove the qualities required to be a travel agent in this country if this profession is regulated or who fulfils one of the following conditions:

1. Either fulfilment of the duties, in an effective manner, in the branch corresponding to that of travel agent:
   – for six consecutive years independently or as a company manager, branch manager, deputy company manager or senior executive in the commercial sector;
   – for at least five years as a salaried employee and three consecutive years independently or as company manager, branch manager, deputy branch manager or senior executive in the commercial sector;
2. Or completion of prior training culminating in a certificate recognised by the State or judged fully valid by a professional body; in this case, the candidate for the travel agent's licence must have fulfilled the duties:
   – for three consecutive years independently or as a company manager, branch manager, deputy company manager or senior executive in the commercial sector or for five consecutive years as a salaried employee if he is able to prove prior training of at least three years;
   – for four consecutive years in one of the various positions listed in the paragraph above or for six years as a salaried employee if he is able to prove prior training of at least two years".

The financial guarantee which can be given for these travel agents' activities by the financial establishments of other Member States of the European Union is described in Article R.212-30 of the Tourism Code:

> "The financial guarantee provided by a credit establishment or by an insurance company is only accepted if this establishment or company has its head office on the territory of a Member State of the European Community or of a State party to the agreement creating the European Economic Area, or a branch in France. This financial guarantee must in any case be immediately readily available in order to ensure, under the conditions envisaged by Article R.212-32, the repatriation of customers".

An entire section of the Code is devoted to the free provision of services by travel agents. It envisages:

> *"Art. R.212-42.* – All nationals of a Member State of the European Community or of a State party to the agreement creating the European Economic Area can, without being established on the national territory, engage or participate in one or more of the operations referred to in Article L.211-1 and Article L.212-4 if they are holders of a travel agent's licence enabling them to practise their activities within the context of the free provision of services, issued by order of the minister responsible for tourism on the recommendation of the National Tourism Council.
> *Art. R.212-43.* – When the licence application is made by a natural person, it states the name and address of the applicant as well as the address of the place of operation.
> When the application is made on behalf of a legal entity, it states the registered name and address of the head office of the company, as well as the name of the legal representative(s) exclusively authorised to submit the application.
> The application must be accompanied by:
> 1. an official certificate issued by the competent authority of the Member State of origin establishing that the party in question is authorised to practise, in this State, the activity of travel agent;

21 See appendix.

2. a document establishing that the applicant meets the conditions for practice required under *b* of Article L.212-2;
3. proof of the professional skill defined by the regulatory provisions of section 5 of Chapter II;
4. documents proving the financial guarantee and the civil liability insurance issued by the persons mentioned in Article L.212-3.
Art. R.212-44. – The licence for the free provision of services is said to be granted in the absence of a response from the minister upon expiry of a period of four months from the date of receipt of the application.
The order granting the licence mentions the name of the holder, the registered name and the address of the head office of the company as well as the names and addresses of the guarantor and the insurer.
Every year, the holder of the licence for the free provision of services sends the proof of the financial guarantee and its professional civil liability insurance to the minister responsible for tourism.
Art. R.212-45. – Any change affecting one of the elements which led to the issue of the licence must be notified to the minister responsible for tourism who, if necessary, passes a modifying judgement.
Art. R.212-46. – The licence can be withdrawn at the request of its holder.
It can form the subject of temporary withdrawal for a maximum non-renewable period of three months or a permanent withdrawal or an immediate suspension in cases envisaged for travel agents established on the national territory as well as in cases of loss of the capacity of travel agent in the State or origin.
Art. R.212-47. – The withdrawal or suspension of the licence is decided by order of the minister responsible for tourism.
Art. R.212-48. – The decision for temporary or permanent withdrawal, taken on the recommendation of the National Tourism Council, sitting in a special group, cannot be made without the party in question having been previously notified of the grounds for the measure envisaged and invited to be heard personally or by authorised agent in front of the National Tourism Council".

This decree also envisages, in Article R.412-10:

"All nationals of a Member State of the European Community or of another State party to the European Economic Area agreement can engage or participate in the activities referred to in Article R.412-8, without being established on the national territory, provided they are holders of the approval, 'organised special holidays'".

Jurisprudence

Court of Cassation, commercial chamber, 31 October 2006, 05-12195: Whereas, "the ECJ has ruled that, for the period preceding the entry into force of the second Directive 89/646/EEC of 15 December 1989, aimed at the coordinating the legislative, regulatory and administrative provisions concerning access to the activity of credit establishments and its exercise and modifying Directive 77/780/EEC of 12 December 1977, Article 59 of the EEC Treaty must be interpreted in the sense that it is opposed to a Member State forcing a credit establishment, already approved in another Member State, to obtain an approval for granting a mortgage loan to a person residing on its territory, unless this approval is imposed on any person or any company exercising such an activity on the territory of the target Member State, is justified by reasons associated with the general interest such as the protection of consumers and is objectively necessary to ensure respect for the rules applicable in the sector under consideration and to protect the interests which these rules are intended to safeguard, on the understanding that the same result could not be obtained by less restrictive rules and that if the requirement of an approval constitutes a restriction of the free provision of services, the requirement of a stable establishment is in fact the very negation of this freedom, which has the result of removing any useful effect of Article 59 of the Treaty, the object of which is specifically to eliminate restrictions on the free provision of services on the part of persons not established in the State on whose territory the service must be provided, that for such a requirement to be admitted, it is necessary to establish that it is an indispensable condition for achieving the desired objective (ECJ, 4 December 1986, Commission/Germany, 205/84 point 52, and 6 June 1996, Commission/Italy, C-101/94, point 31), the court of appeal, which ruled on improper grounds to establish that the French legislation then applicable did not go beyond what was objectively necessary to protect the interests

which it was intended to safeguard and that the requirement of stable establishment constituted an indispensable condition for achieving the desired objective, has infringed the aforementioned texts".

Court of Cassation, Commercial Chamber, 28 November 2006, 04-19244: "assessing itself the elements of proof submitted to it, the court of appeal noted that the ANHYP fund was not approved in Belgium to grant variable-rate mortgage loans, such as that which was granted to the spouses Hervé X... ; that in the case of this report from which it deduced that an approval had been necessary for this establishment to practise in France the activity which it was not authorised to practise in its State of origin, the judgement, which ruled with good reason, incurs none of the grievances of the ground."

CHAPTER XII. MISCELLANEOUS

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Que faire après une OQTF?, Le point sur la réforme des décisions de retrait et refus de séjour assorties d'une obligation de quitter le territoire (loi du 24 juillet 2006 et décret du 23 décembre 2006), ADDE, Cimade, Fasti, Gisti, LDH, MRAP, January 2007.

Les bénéficiaires du droit de circulation et de séjour des citoyens de l'Union et des membres de leurs familles, J. Cavallini, Aperçu rapide, *JCP A et CT*, no. 21, 22 May 2006.

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De nouvelles règles d'accès au RMI pour les ressortissants européens, J-P Lhernould, *Liaisons sociales Europe* no. 150, 13 to 26 April 2006.

Le marin entre le navire et sa résidence. Le registre national français des navires (RIF), P. Chaumette, *RCDIP*, 95 (2), April-June 2006, p. 275.

Les dispositions de l'article 164 C du CGI sont-elles contraires aux principes communautaires de liberté d'établissement et de liberté de circulation des capitaux ? – le cas des ressortissants des États membres de la Communauté européenne résidant à Monaco, F. Dieu, *Revue Droit Fiscal* no. 16, April 2006.

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