

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

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Chapter I

The Worker: Entry, Residence, Departure and Remedies

1. TRANSPOSITION OF PROVISIONS SPECIFIC TO WORKERS

Article L. 121-1 of the Code for the Entry and Residence of Foreigners and the Right of Asylum (CESEDA) stipulates: ‘Unless their 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. possession, for themselves and their family members as referred to under 4, of sufficient resources and of health insurance;
3. registration at an establishment for the primary purpose of studying or, within this context, of pursuing vocational training and the guarantee of possession of health insurance and sufficient resources for themselves and their family members as referred to under 5;
4. if they are direct descendants aged under twenty-one or dependents, direct dependent ascendants, spouses, ascendants or direct dependent ascendants of the spouse, or of a national who meets the conditions set forth under 1 or 2;
5. if they are spouses or dependent children of a national who meets the conditions set forth under 3.

Regarding Directive 2004/38/EC, the Administrative Courts of Appeal reject its being invoked with respect to an individual administrative act.¹

Many of the legal decisions passed in 2009 about workers in the European Union concern the nationals of the new Member States. We therefore refer here to the chapter about them. Only the problem of removal seems to pose genuine difficulties.

Removal of Community nationals

Legislation

A Draft bill regarding immigration, integration and nationality was put forward in the Council of Ministers on 31 March 2010. It contains provisions relating to the removal of Community nationals.

Article 25 creates an Article L. 511-3-1, which defines the scope of the obligation to leave French territory with respect to citizens of the European Union and their family members. In fact, beneficiaries of a Community right of residence do not fall within the scope of the ‘return’ directive. The system of the obligation to leave the territory that applies to citizens of the European Union and to their family members, regardless of nationality, can therefore be distinguished from that envisaged in Article L. 511-1, which applies to nationals of third-party countries and demonstrates specific provisions. With a view to simplification

¹ Administrative Court of Appeal of Lyons, 2 June 2009, 08LY02352; Administrative Court of Appeal of Lyons, 27 May 2009, 08LY01892, Prefect of the Loire versus Giurgi.

and coordination favourable to citizens of the European Union and their family members, authorised by Article 30 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 regarding the right of citizens of the European Union and their family members to free movement and residence on the territory of Member States, the second paragraph of Article 25 envisages the possibility for the administration to grant a voluntary departure time limit in excess of thirty days. After Article L. 511-3 of the same Code, an Article L. 511-3-1 is inserted:

‘Article L. 511-3-1. – The competent administrative authority can, in a justified decision, force 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, or a member of his family, to leave French territory upon observation that he can no longer prove any right of residence as envisaged in Articles L. 121-1 or L. 121-3.

In order to meet the obligation imposed upon him to leave French territory, the foreigner has a period that, except in emergencies, cannot be less than thirty days from the day of notification. In exceptional circumstances, the administrative authority can grant a voluntary departure period in excess of thirty days.

The obligation to leave French territory establishes the country of destination to which he will be returned in the event of automatic execution.’

Article 26, modifying Article L. 511-4, is an article of coordination and simplification. Point 2 deletes the last paragraph of Article L. 511-4, which granted special protection to citizens of the European Union from deportation orders issued on the basis of 1, 2 and 4 of II of Article L. 511-1. Since the latter provisions have been deleted, the protection is no longer justified.

Jurisprudence

- A circular² from the Minister for Immigration dated 19 May 2009 mentions the terms of the opinion of the Council of State of 28 November 2008,³ in which the Council of State stipulated the *residence system for Community nationals*.

In its conclusions to this opinion, the government commissioner Mattias Guyomar criticises the overall coherence of the CESEDA, since different parts of it have to be combined in order to arrive at the residence regulations for Community nationals. It quickly but usefully recalls the provisions relating to the removal of the latter. Regarding removal, Article L. 511-1 of the CESEDA envisages that the administrative authority ‘[...] can, by justified decision, force 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, to leave French territory upon observation that he can no longer prove any right of residence as envisaged by Article L. 121-1’.

On the other hand, the Code is silent when it comes to the removal of Community nationals who have been resident for less than three months. In the absence of any explicit provision in this respect, the administrative authority cannot therefore issue an Obligation to

2 Circular IMIM0900064C of 19 May 2009 relating to foreigners – Obligations to Leave French Territory issued with respect to nationals of other Member States of the EU, States party to the European Economic Area agreement and of the Swiss Confederation – opinion of the EC no. 315411 of 26 November 2008.

3 Opinion of the EC, 28 November 2008, 315 441, Silidor.

Leave the Territory (OQTF) with respect to them. As for the deportation order, it can be legally ordered if the parties in question display behaviour that represents a threat to law and order or if they violate labour legislation by virtue of point 8 of II of Article L. 511-1 of the CESEDA. On the other hand, no provision envisages the possibility of removing Community nationals who have stayed for less than three months who may become an unreasonable burden on the social security system.

The circular of 19 May 2009 interprets the opinion of the Council of State of November 2008 and presents its analysis in 3 points:

1. On the need for a procedure hearing both parties before issuing an OQTF

It emerges from all the provisions of book V of the CESEDA, and particularly its Article L. 512-1,⁴ that the legislator intended to determine all the rules of administrative and contentious procedure governing the taking and execution of decisions in which the administrative authority notifies the foreigner of his obligation to leave French territory. The Council of State has concluded that Article 24 of the Law of 12 April 2000, which establishes the general rules of procedure applicable to decisions that have to be justified, could not be usefully cited with respect to an OQTF, whatever the type of decision relating to residence on which the OQTF is based, including with respect to a Community national.

The circular goes further than the Council of state. ‘A citizen of the European Union and similar, drawing his right of residence from Community law, does not have to apply for the issue of a purely declaratory document, possession of which is optional. Consequently, the administrative authority most often has to implement the observation that the right of residence is no longer justified since it has not taken a decision to refuse to issue or to renew the document, nor to withdraw it. Under this hypothesis, the 2nd paragraph of point 1 of Article L. 511-1 of the CESEDA⁵ allows the administrative authority to issue an OQTF ‘by justified decision’ based solely on the observation that the person in question can no longer prove any right of residence as envisaged by Article L. 121-1. The grounds for this decision – its requirement being recalled by law – consists primarily of this observation, inseparable from the OQTF, which takes place without a prior procedure involving hearing both parties.

However, if the Prefect makes a decision on the basis of Article L. 121-4 of the CESEDA to deny residence, to refuse to issue or to renew a residence permit or to withdraw it,

4 Article L. 512-1 of the CESEDA envisages that, ‘A foreigner who is the subject of a refusal of residence, a refusal to issue or to renew a residence card or a withdrawal of a residence card, a receipt for application for a residence permit or temporary residence authorisation, accompanied by an Obligation to Leave French Territory stating the country of destination can, within a period of one month following notification, request the administrative court to cancel these decisions [...]. His appeal suspends execution of the Obligation to Leave French Territory although without creating an obstacle to his being placed in administrative detention under the conditions envisaged in section V of the present book. / The administrative court rules within a period of three months of submission of the case to the court. However, in the event that the foreigner is placed in administrative detention before its decision is handed down, it rules according to the procedure envisaged in Article L. 512-2 on the legality of the Obligation to Leave French Territory and the decision establishing the country of return, no later than seventy-two hours after notification by the administration to the court of this placement in detention. / If the Obligation to Leave French Territory is cancelled, the surveillance measures envisaged in section V of the present book are immediately terminated and the foreigner is issued a temporary residence permit until the administrative authority has again ruled on his case’.

5 Which stipulates: ‘[The administrative authority] 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 of the Swiss Confederation to leave French territory when it observes that he can no longer prove any right of residence as envisaged in Article L. 121-1’.

without accompanying it by a removal measure to which the specific procedures of book V of the CESEDA are attached, such a decision must be accompanied by the procedure envisaged by Article 24 of the Law of 12 April 2000, the requirements of which – particularly the time limit – depend on the circumstances of the case. In the circular, the Minister for Immigration has interpreted this conclusion of the Council of State on the ‘circumstances of the case’ as meaning that a procedure involving hearing both parties is only appropriate in cases where the exceptions are not relevant. Refusals to issue and to renew a residence card following a request would therefore not have to be preceded by this procedure.

2. On the assessment of the duration of residence, more or less than three months, and the burden of proof in this respect

The decision to deny residence accompanied by an OQTF with respect to a Community national cannot be taken within the first 3 months of his presence in France, a period during which he exercises his right to free movement and does not therefore have to prove any right of residence. The proof of the date of entry into France is thus decisive, being up to the administration, which must put forward the elements it uses as a basis to judge that the person in question no longer fulfils the conditions for residence in France. ‘The administration can specifically rely on data from agencies providing assistance when it refers to the burden posed by the Community national on the social security system or on statements previously made by the person in question’. It is up to the foreigner who is requesting cancellation of this decision to provide all elements intended to dispute its validity, according to the usual methods for the administration of proof.

Strangely, one argument from the opinion of the Council of State does not appear in the ministerial circular. The Council of State considers, in fact, that the drafting of Article L. 121-1 of the CESEDA – essentially Community nationals wishing to establish their habitual residence in France are to register with the mayor of their commune of residence within three months of their arrival, those who have not fulfilled this registration obligation are assumed to have resided in France for less than three months – creates a non-irrefutable presumption concerning the duration of residence. Now this presumption seems fundamental in as far as it has already been stipulated that no provisions of French law allow the administration to issue an OQTF against a Community national who entered and has resided on the territory for less than three months.

3. On the enforceability of the condition of insufficient resources envisaged by Articles L. 121-1 and R. 121-4 on a person not covered by the French social security system

It emerges from Articles L. 121-1 and R. 121-4 of the CESEDA⁶ that insufficient resources can be invoked by the Prefect to make a removal decision with respect to a Community national who has been resident in France for more than three months, even though the person in question is not yet effectively covered by the social security system.

J-P Lhernould finds this decision highly open to criticism:⁷ ‘While Article 14 § 2 of the Directive stipulates that non-working citizens of the EU only have a right of residence for as long as they meet the conditions of sufficient resources and full health insurance, the text

⁶ Article R. 121-4 stipulates that, ‘The sufficient nature of the resources is assessed, taking into account the personal situation of the person in question. Under no circumstances can the amount required exceed the amount of the income support referred to in Article L. 262-2 of the Social Action and Families Code [...]’.

⁷ Liaisons sociales Europe no. 218, 22 January to 4 February 2009, p. 5.

adds that recourse to the social security system does not automatically lead to a removal measure. What is more, we cannot see how a removal measure can be taken with respect to a non-worker who has not yet had recourse to social security, particularly if we refer to consideration no. 16 of the Directive.’⁸

- Applications of the opinion of the Council of State of 26 November 2008, *Silidor*⁹
Regarding the duration of residence of less than or more than 3 months for understanding an OQTF

The *Administrative Court of Cergy-Pontoise*, in a judgment dated 8 January 2009, no. 0712678, *Vasile*,¹⁰ annuls a prefectural decision issuing an OQTF with respect to a Romanian national who entered French territory one month before the disputed decision. Now it emerges from the CESEDA that Romanian nationals, who enjoy the freedom of movement and residence granted to all citizens of the European Union, without having to fulfil any other condition or formality for residence on French territory of less than or equal to three months, must hold an identity card or a current passport and prove, if so requested, that they will not become an unreasonable burden on the social security system, particularly health insurance and social welfare. No document in the file shows that Mr. Nicolae VASILE had been stripped of an identity card or valid passport, nor that he had represented an unreasonable burden on the social security system, the services of which he could not in any event claim as a result of the short duration of his residence. In a judgment dated 10 February 2009, no. 0801729, *Calin*,¹¹ the same *Administrative Court* restates the exact terms of the opinion of the Council of State: ‘It is the responsibility of the administration, in the event of a dispute concerning the length of residence of a citizen of the European Union whom it has decided to remove, to put forward the elements it is using as a basis to consider that he no longer fulfils the conditions for residing in France; that it is up to the foreigner who is requesting cancellation of this decision to provide all elements intended to dispute its validity, according to the usual methods for the administration of proof; that the administration can specifically rely on data from agencies providing assistance when it refers to the burden posed by the Community national on the social security system or on statements previously made by the person in question’. The judges annulled the OQTF issued with respect to a Romanian national, in which the Prefect of Val d’Oise did not contradict the allegations of the petitioner according to which he entered France for the last time on 22 November 2007, in other words less than three months before the date of the disputed decision. In the same sense, in a judgment of 2 July 2009, 0711587, *Margel*, the *Administrative Tribunal of Cergy-Pontoise* considered that the Prefect of Val d’Oise had not established that the petitioner had been residing in France for more than three months on the date of the contested decision that issued an OQTF.

The Administrative Court of Appeal of Nantes, in a judgment of 8 June 2008, 08NT02418, *Prefect of Loire-Atlantique versus Badea*, rejects the application of the resi-

8 ‘Beneficiaries of the right of residence should not be the subject of removal measures for as long as they do not become an unreasonable burden on the social security system of the host Member State’.

9 Req. 315441.

10 Identical to Administrative Court of Cergy-Pontoise, 8 January 2009, Balan, no. 0712530.

11 See similar jurisprudence: Administrative Court of Cergy-Pontoise, 12 May 2009, no. 0901211, Iancu.

dence conditions of Article L. 121-1 CESEDA to a Romanian national in respect of whom it is not disputed that he had resided in France for two months at the time of adoption of the OQTF. The Prefect maintained that, as a result of his lack of resources, the family of Mr. X was living on social security, the amount of which was 427 euros per month according to those involved and that this family thus represented an unreasonable burden on the social security system, within the meaning of the aforementioned provisions of Article R. 121-3 of the CESEDA. Now, this Article implements Article L. 121-1, which is not applicable in this case. Thus, the Court confirms the judgment of the administrative court, annulling the prefectural decision.

The Administrative Court of Appeal of Bordeaux, in a judgment of 31 December 2009, 09BX 01757, also states the terms of the opinion of the Council of State on the need for the administration to provide proof of the length of residence of a citizen of the European Union whom it has decided to remove. In this case, by producing a photocopy of a passport issued in his name by the Romanian authorities and issued in Ialomita (Romania) on 23 December 2008, the petitioner profitably disputes the validity of the elements on which the administration relied in order to assess that he had resided in France for more than three months when the disputed order was issued with regard to him.

Regarding the sufficient nature of resources and coverage by health insurance

The jurisprudence assesses the sufficient nature of resources in this way: under the terms of Article R. 121-4 of the CESEDA, the sufficient nature of the resources is assessed, taking into account the personal situation of the person in question. Under no circumstances can the amount required exceed the amount of the income support referred to in Article L. 262-2 of the Social Action and Families Code. The Council of State believes that the combination of these provisions results in the insufficiency of resources being invoked by the Prefect to take a removal decision with respect to a Community national who has been resident in France for more than three months, even though the person in question is not yet effectively covered by the social security system.

The *Administrative Court of Appeal of Lyons* issued several judgments in 2009 relating to this problem. Thus, in a judgment dated 27 May 2009, 08LY01892, *Prefect of la Loire versus Giurgi*,¹² it strictly applied the opinion of the Council of State, emphasising that the person in question was not disputing her inactivity, lack of resources or fixed abode and that it did not establish that she was covered by health insurance on the date of the contested decision. The Prefect was therefore able to take a removal decision with good reason, even if the person in question was no longer effectively covered by the social security system.

In a judgment dated 4 November 2009, 09LY01984, the judges of the same Court considered that, since the petitioner was without fixed abode, had only 350 euros in family allowances as her sole resources and had no health insurance; that, consequently, she did not have resources in excess of the income support, she was able to be regarded by the Prefect of la Loire as not fulfilling the conditions set forth in Article L. 121-1 CESEDA. Here it would appear that the petitioner was already receiving welfare benefits.

- Article 17, right of permanent residence

¹² For similar solutions, Administrative Court of Appeal of Lyons, 8 October 2009, Iancovici, 09LY01119; Administrative Court of Appeal of Lyons, 2 December 2009, 09LY01575.

Circular CNAF 2009-022 dated 21 October 2009 relating more specifically to the conditions for the regularity of the residence of Community nationals in order to receive family allowances¹³ describes the understanding of the right of permanent residence.

When the right of permanent residence is acquired, the person in question has the right to stay in France without further having to prove the criteria of the right of residence. This right is only lost in the event of absence from French territory for a period of more than two consecutive years. The continuity of residence required for the acquisition of the right of permanent residence is not affected by temporary absences not in excess of six months per year; longer absences in order to fulfil military obligations; absence of a maximum of twelve consecutive months for an important reason such as pregnancy, labour, serious illness, study, vocational training or secondment abroad for professional reasons.

A Community national or similar who ceases his professional activity on French territory acquires a right of permanent residence before the expiry of the period of five years referred to above:

- when he reaches the age for asserting his rights to a retirement pension or following planned retirement and provided he has practised a professional activity in France¹⁴ for the previous twelve months and has resided there regularly for more than three years;
- following permanent occupational disability and provided he has resided regularly in France on a continuous basis for more than two years;¹⁵
- following permanent occupational disability and without a residence duration condition if this disability is the result of an industrial accident or of an occupational illness opening up the right to an allowance payable by a social security agency;
- after three years of activity and regular, continuous residence in order to exercise a professional activity in another State (EU, EEA or Swiss Confederation), provided the person has maintained his residence in France and returns there at least once per week.

Periods of involuntary unemployment duly established by the competent unemployment office, periods of inactivity beyond the control of the person in question, as well as the lack of work or stoppage because of illness or accident are also regarded as periods of employment.

Article 24-2: equal treatment in the granting of social security allowances

Generalisation of Workers Solidarity Income (RSA)

The Law 2008-1249 of 1 December 2008 generalised the RSA. Specific rules were established for nationals of the European Union. Article L. 262-6 of the Social Action and Families Code 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 must fulfil the conditions required in order to enjoy a right of residence and have resided in France for the three months preceding the request.*

However, no condition regarding duration of residence can be applied to:

13 It cancels and replaces circular CNAF 2008-024, which established the conditions for issuing family allowances to Community nationals and to their family members. Now, some provisions of this circular were in conflict with Community law.

14 Periods of activity completed in another State are regarded as exercised in France.

15 Periods of activity completed in another State are regarded as exercised in France.

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1. a person who practises a professional activity declared in accordance with the current legislation;
2. a person who has practised such an activity in France and who is either temporarily unfit for work on medical grounds or who is pursuing vocational training.

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 entered France to look for work there and who has remained there for this reason is not entitled to the Workers Solidarity Income’.

It is appropriate to question the conformity of these conditions when European citizens can invoke their status as citizen of the Union or their status as worker. Thus, during the *debate of the General Council of Haute-Saône dated 30 March 2009*, regarding generalisation of the Workers Solidarity Income, it was envisaged that Community and EEA nationals could receive the RSA. The only conditions mentioned are that these nationals must previously enjoy a right of residence and have resided in France for the 3 months preceding the request.

2. SITUATION OF JOB-SEEKERS

Nothing to report.

3. OTHER ISSUES OF CONCERN

French jurisprudence has taken an interest in the application of other provisions of Directive 2004/38.

- Deportation order issued with respect to a Community national, notification: Article 30, Directive 2004/38

Article 30 of Directive 2004/38 contains procedural provisions and information stipulating, as prescribed in the Adoui judgment,¹⁶ that any measure containing a decision based on reservations about law and order, public safety or public health must be notified in writing under conditions enabling the person in question to understand its content and effects. Article R. 512-1-1 of the CESEDA, transposing paragraph 3 of Article 30 of the aforementioned Directive of 29 April 2004, provides that: ‘the notification of deportation orders taken with respect to the nationals mentioned in Article L. 121-4 includes the time given in which to leave the territory. Except in emergencies, this time cannot be less than one month’. The year 2009 was marked by differences of interpretation among the judges on the question of knowing whether the time granted to leave the territory was an integral element of the removal measure or a separate decision. In fact, the consequences are not the same: if it is an integral part of the measure, the lack of indication of the time given could render the measure illegal.

In a judgment dated *9 March 2009, 09951, Pitaru, the Administrative Court of Rennes* believes that the deadline for leaving the territory granted to a Community national who is

¹⁶ ECJ, 18 May 1982, case 115/81.

the subject of a deportation order is not an element of this removal measure, but a separate decision that must be shown on the notification of this removal measure and that relates to its execution. On the other hand, the same court, in a judgment dated *24 March 2009, 0901303, Buzga*, stipulates that indication in the notification of a removal decision of the deadline thus granted to a national of the European Union to leave the territory of the host State does not constitute a simple measure of execution of the removal decision, but an integral element of that decision; and that consequently failure to know about this element is such that it affects the legality of the deportation order pertaining to the national.

The *Administrative Court of Appeal of Douai, 26 March 2009, 08DA01567*,¹⁷ 08DA01568, 09DA00377, offers a more subtle jurisprudence: out of respect for the notification formalities, failure to fulfil the latter has the effect of making it impossible to impose a time limit on a foreigner who intends to lodge an appeal for the annulment of this time limit. However, such circumstances would appear not to affect the legality of the order itself. For the *Administrative Court of Appeal of Bordeaux*, in a judgment dated *29 January 2009, 08BX01056*, ignorance of the aforementioned provisions of Article R. 512-1-1 of the Code for the Entry and Residence of Foreigners and the Right of Asylum affects the legality of a deportation order in its entirety.

The *Council of State* seems to have resolved these differences of interpretation in a judgment dated *13 January 2010*¹⁸ by considering that the removal decision taken with respect to a citizen of the European Union, a national of a State of the European Economic Area or of the Swiss Confederation or a member of his family is illegal if it does not mention the deadline granted for leaving the territory: ‘Inclusion in the removal decision, taken with respect to a national mentioned in Article L. 121-4 and notified to this person, of the deadline allowed to leave the territory, which cannot, except in emergencies, be less than one month, is not a measure executing the decision but an integral element of the decision itself; that, consequently, failure to mention this is such that it affects the legality of the removal decision’.

- *Notion of threat to law and order*

The judges assess the threat to law and order in different ways. Thus, illegally occupying a site and the fact of being of no fixed abode does not typify the existence of a threat to law and order (Administrative Court of Appeal of Versailles, 24 September 2009, 09VE00384, *Baluta*),¹⁹ in the same way as the theft of a bottle of whiskey from a shop (Administrative Court of Appeal of Douai, 30 July 2009, 09DA00377, *Prefect of la Somme versus Horvat*).

On the other hand, the repetition of offences justifies considering the behaviour of the person in question as a real, present and sufficiently serious threat to public safety that is in the fundamental interests of society; and which therefore justifies the issue of a removal measure (Administrative Court of Appeal of Lyons, 22 September 2009,¹ Prefect of the Jura; Administrative Court of Rennes, 9 March 2009, 09951, Pitaru, and Administrative Court of Rennes, 9 March 2009, 09952, Ochea for a theft committed in a meeting).

¹⁷ See AJDA 2009, p. 1425, commentary by J. Lepers.

¹⁸ EC, 13 January 2010, 316-488, see AJDA 2010 p. 69.

¹⁹ See similar solutions: Administrative Court of Rennes, 9 March 2009, 09963 and 09964, Milian; Administrative Court of Appeal of Versailles, 28 April 2009, 08VE02978 and 08VE02979, Prefect of Val d’Oise versus Mihai; Administrative Court of Appeal of Versailles, 29 December 2009, 09VE02276; Administrative Court of Appeal of Versailles, 29 December 2009, 09VE02278, 09VE02279, 09VE02280, 09VE02281.

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The sentence of aggravated violence under appeal, and which has therefore not become final, does not justify a removal measure (Administrative Court of Appeal of Versailles, 8 October 2009, 08VE03868).

Chapter II

Members of the Worker's Family

1. THE DEFINITION OF FAMILY MEMBERS AND THE ISSUE OF REVERSE DISCRIMINATION

The definition of family members who enjoy the right of residence comes from Article L. 121-1 of the CESEDA. This document indicates that the right of residence of the family members of European citizens is acknowledged for descendants aged under 21 or dependent, for direct ascendants dependent on the spouse, for spouses and for dependent children. While the text is limited to the spouse, a circular from October 2006 opened up this right to registered partners under the same conditions as married spouses (Circular 16 October 2006, NOR: INTD0600091C).

On the other hand, some confusion exists concerning the right of residence of cohabiting partners. In fact, a circular of 21 October 2009 relating to the conditions for the regular residence of Community nationals in order to receive family allowances²⁰ states that, 'family members (including cohabiting partners) have (...) a right of residence derived from that of the accompanying or joint Community national'. Now, this broad interpretation of family members who enjoy the right of residence is not approached uniformly in the jurisprudence. On the one hand, it is separate. Thus, in December 2009 the Administrative Court of Appeal of Lyons recalled that, 'Considering that, if Ms. A, on the date of the disputed decision, has been living with Mr. B, of Dutch nationality, for more than 4 years, it is still true that the parties in question are not married; (...); that Ms. A, who has not entered into a registered civil partnership with her partner, does not in any event fall within the scope of Directive 2004/38/EC of 29 April 2004 and could not, consequently, take advantage of it' (Administrative Court of Appeal of Lyons, 29 December 2009, no. 09LY01156). On the other hand, the Administrative Court of Appeal of Nantes seems to have made a breach with a view to recognition of a right of residence for the cohabiting partner (Administrative Court of Appeal of Nantes, 16 October 2009, no. 09NT00703). In this case, the petitioner asserted that the notion of a partner as described in Article 121-1 of the CESEDA does not solely affect spouses, but also cohabiting partners and partners linked by a Civil Solidarity Pact (PACS). Thus, the petitioner alleged that, in his capacity as cohabiting partner, he could enjoy the right of residence granted to family members. If the Administrative Court of Appeal of Nantes rejects the request, it nevertheless indicates, 'that it emerges, in any event, from the documents in the file that on the date of the disputed decision, on the one hand, since Mr. X had only shared two years of communal living with his partner, he could not prove a sufficiently long-term relationship with this partner and that, on the other hand, the Civil Solidarity Pact that he asserts was not registered until 9 April 2009 with the registrar of the District Court of Chartres; that, as a result, the Prefect of Eure-et-Loire was able, without ignoring the aforementioned provisions of Articles L. 121-1 and L. 121-3 of the Code for the Entry and Residence of Foreigners and the Right of Asylum, to refuse to issue to Mr. X the residence permit for which he had applied.' In making reference to the long-term relation-

20 Circular CNAV no. 2009-022 of 21 October 2009, conditions for the regular residence of Community nationals in order to receive family allowances.

ship, the Administrative Court of Appeal seems consequently to have opened the way for the recognition of a right of residence for cohabiting partners.

In fact, a combined interpretation of this jurisprudence and of the circular of 21 October 2009 causes one to question the opening up of the personal scope of the Community provisions. In any event, it suggests that we follow future developments that will enable us, on the one hand, to confirm or refute this movement and, on the other hand, if confirmed, to determine what period can provide proof of a ‘sufficiently long-term relationship’.

2. ENTRY AND RESIDENCE RIGHTS

Family allowances

Family allowances as such represent rights that family members can claim. Their granting in France is governed by legislative and regulatory provisions. A circular of 2008 (CNAF no. 2008-024 of 18 June 2008) established the conditions for the issue of family allowances to Community nationals and their family members. Now, some provisions of this circular were in conflict with Community law. This concerned particularly the provisions relating to health insurance and to sufficient resources (see, in this respect, ruling no. 2010-74 of the HALDE of 1 March 2010). In order to remedy this situation, two circulars have been adopted. The subject of the second of these, dated 21 October 2009, is the right of residence of Community nationals (Circular no. 2009-022). The circular devotes a paragraph to family members and it reads as follows:

‘5. Family members

Family members (including cohabiting partners) have a right of residence derived from that of the Community national being accompanied or joined.

If they so request, family members of an EEA national can receive a residence card bearing the words ‘CE – family member – all professional activities’. Simply producing this document is sufficient to prove legal residence. Family members of the holder of a right of residence remain obliged to hold a residence card if they are nationals of a third-party State. They receive a residence card that is identical to that referred to above. Family allowances can be granted to them as recipients even if the residence card issued is not at that time on the list of documents envisaged in Article D. 512-1 of the Social Security Code.

5.1. Definition of family member

Family members are those whose links with the Community national or similar are as follows:

- spouse, cohabiting partner or partner linked by a PACS;
- direct descendants below 21 years of age or dependent on the Community national;
- direct ascendants dependent on the Community national;
- direct ascendants or descendants dependent on the spouse, cohabiting partner or partners linked by a PACS to the Community national.

Note: When the right of residence of a Community national is granted based on student criteria, only the spouse, cohabiting partner or partner linked by a PACS, or children dependent on this person, can assert a right of residence derived from that of the Community national.

5.2. Prior conditions for the recognition of the right of residence of family members

No conditions are necessary. The right of residence granted to a national is passed to members of his family as defined above.

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5.3. Situations for maintaining the right of residence

A recipient or applicant who no longer fulfils the conditions for being regarded as a family member following a trial of life maintains his right of residence. In the event of a change of family situation, the right of residence can be maintained under the conditions defined below.

Note: Maintenance of the right of residence only has to be analysed in the absence of a right of residence previously granted to the person in question on the grounds of his own situation (worker, non-worker or student).

Characteristics of children who become recipients

In the absence of a right of residence granted on personal grounds (cf. Article L. 121-1 of the CES-EDA), direct descendants of the Community national or similar can receive allowances on their behalf:

- if they are under the age of 18 and the allowances have been paid on their behalf prior to their 18th birthday;
- if, after their 18th birthday, they can show proof of a residence card bearing the words ‘CE – family member – all professional activities’.

5.3.1. Family member who is himself an EEA national

This person maintains his right of residence under the following conditions:

- in the event of the death of the national or if this person leaves France;
- in the event of separation, breakdown of a PACS, divorce or annulment of the marriage.

Note: in the event of the death of the national or if this person leaves France, the children and the family member who takes responsibility for them maintain this right of residence until these children have completed their schooling in a French secondary educational establishment, without the need to verify the aforementioned conditions.

5.3.2. Family member who is a national of a third-party State

A family member who is a national of a third-party State must be in possession of a residence permit. The conditions for maintaining the right of residence (Article R. 121-8 of the CESEDA) are therefore studied by the Prefecture.

5.3.3. Length of maintenance of right of residence

The CESEDA does not envisage a limit for maintenance of the right of residence under the aforementioned conditions. This maintenance remains intact for as long as effective residence on French territory is not interrupted. For a family member who is a national of a third-party State, the length of maintenance of the right of residence is limited to the length of validity of the residence card he holds.

5.4. Documentary evidence

Any documents that can support the applicant’s statements can be requested.’

The circular of 21 October 2009 also states that a family member, regardless of nationality, acquires a permanent right of residence before the expiry of his uninterrupted period of five years of regular residence:

- if the worker himself enjoys a permanent right of residence acquired on the grounds of one of the derogations referred to above (§ 6.1.1.);
- if the worker dies while still practising a professional activity in France and he has resided there legally and continuously for more than two years;
- if the worker dies while still practising a professional activity in France following an industrial accident or an occupational illness;
- if the spouse of the deceased worker has lost his French nationality following his marriage to the worker.

3. ACCESS TO WORK

4. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

Article R. 121-4 last paragraph of the CESEDA states, ‘The nationals mentioned in the first paragraph of Article L. 121-1 who entered France in order to look for work cannot be removed on grounds drawn from the illegal nature of their residence provided they are able to prove that they are still looking for work and that they have genuine chances of being hired.’

The Administrative Court of Appeal of Paris referred to the obligation to mention the proof of the search for work and the chances of being hired (*Administrative Court of Appeal of Paris, 29 January 2009, no. 07PA04165*). In a case concerning an Egyptian married to a Hungarian and residing in France, the Administrative Court of Appeal of Paris stated, ‘considering that Mr. X maintains that his spouse could not be the subject of an Obligation to Leave the Territory since she benefited, in her capacity as a Community national, from the aforementioned provisions of Article R. 121-4 of the Code for the Entry and Residence of Foreigners and the Right of Asylum; that, however, it is not evident from the documents in the file that Mrs. X, who was 4 months pregnant at the time of the disputed decision, had looked for work prior to her pregnancy nor that she possessed sufficient resources enabling her to hold a residence card in application of the said provisions; that, consequently, Mr. X, who cannot profitably assert that he was himself the holder of a promise of employment, has no basis for maintaining that his spouse had a right of residence and that he could thus benefit from the aforementioned provisions of Article L. 121-1 of the Code for the Entry and Residence of Foreigners and the Right of Asylum.’

Chapter III

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

A) ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

a.1. Equal treatment in access to employment

A government edict of 28 October 2009 establishes the rules relating to the recognition of vocational qualifications of a professional who is a national of a Member State of the European Community (NOR: ECEI0923798A). This text concerns the method of recognition of vocational qualifications with a view to performance in France of the following professions: maintenance and repair of vehicles and machinery; construction, maintenance and repair of buildings; installation, maintenance and repair of networks and equipment using fluids, as well as materials and equipment intended for gas supply, for heating buildings and for electrical installations; chimney-sweeping; personal beauty treatments other than medical and paramedical and cosmetic beauty modelling without medical purpose; the manufacture of dental prostheses; the preparation or manufacture of fresh bakery, pastry, raw meat, cooked meat and fish products as well as the preparation or manufacture of traditional edible ice cream; blacksmithing.

An important government edict by the Ministry of Health and Sports of 13 July 2009 establishes the list and the conditions for the recognition of vocational qualifications of doctors and specialist doctors awarded by the Member States of the European Community. This text enables the holders of the qualifications in question either to gain access to specialist medical training or to have the right to the title of specialist or general physician (NOR: SASH0915417A, French Official Journal, 31 July 2009). An identical text was adopted on the same day regarding dental practitioners (Government edict of 13 July 2009 establishing the list and the conditions for the recognition of vocational qualifications for dental practitioners awarded by Member States of the European Community (NOR: SASH0915401A, French Official Journal, 31 July 2009).

Article L. 212-7 of the Sports Code states that the functions mentioned in the first paragraph of Article L. 212-1 (teaching, leading, organising or training in return for payment of physical and sporting activities) can be practised on the national territory by nationals of the Member States of the European Community or States party to the European Economic Area agreement who are qualified to practise them in one of these States. Decree no. 2009-1116 of 15 September 2009 applies Article L. 21207 of the Sports Code. A sub-section is introduced into the regulatory section of the Sports Code, entitled, 'Nationals of a Member State of the European Community or of another State party to the European Economic Area agreement wishing to settle in France' (French Official Journal, 16 September 2009). This sub-section includes Articles R. 212-88 to R. 212-91 of the Sports Code and establishes the rules and procedures relating to the recognition of vocational qualifications or professional experience in order to practise the activities in question.

Article 26-1 of the order of 19 September 1945 regarding creation of the order of accountants and regulating the title and the profession of accountant defines the conditions for the temporary or occasional exercise of the profession of accountant by Community nationals. Decree no. 2009-1103 of 8 September 2009 stipulates that any person who intends to

take advantage of this provision must send to the High Council of the Order of Accountants a written statement accompanied by the following documents:

1. A document that establishes proof of his nationality, his civil status and his domicile;
2. A certificate stating that he is legally settled in a Member State, that he practises accounting there and that, on the date of issue of this certificate, he is not prohibited from practising, even temporarily;
3. Proof of his vocational qualifications;
4. If accountancy is not regulated in the country of origin of the applicant, proof by any means that he has practised accountancy for at least two years during the previous ten years.

The decree stipulates that the applicant can provide this statement by registered letter with acknowledgement of receipt, by filing with receipt or by electronic means sent to the high council. It adds that, with respect to the documents received, after having made sure that the file is complete, the High Council forwards a copy immediately to the regional council for the district within which the services will first be performed.

Along the same lines, a decree of 15 June 2009²¹ modified regulation of the profession of surveyor. Chapter II of Decree no. 96-478 of 31 May 1996 regarding regulation of the profession of surveyor and the code of professional duties, as modified by the decree of 2009, concerns specifically the recognition of qualifications and envisages especially that a national of a Member State of the European Union or of a State party to the European Economic Area agreement is recognised as qualified if he holds a certificate of competence or a training qualification that is prescribed by one of these States other than France in order to gain access to the profession of surveyor on its territory or to practise it there. The certificate of competence or the training qualification must: 1) have been issued by a competent authority in one of the aforementioned States; 2) provide confirmation of training at post-secondary level of a minimum duration of three years, equivalent to 180 credits in the European Credit Transfer and Accumulation System (ECTS), or of an equivalent part-time duration, taught at a university or a higher education establishment or at another establishment of the same level of training, culminating in the award of a diploma, certificate or other qualification.

A national of one of the aforementioned States is also recognised as qualified if he holds one or more certificates of competence or one or more training qualifications certifying that he has been prepared to practise the profession of surveyor and that he has practised this profession on a full-time basis for two years out of the previous ten years in one of the aforementioned States that does not regulate this profession.

The minister responsible for urbanisation can decide that the national will complete an adaptation course for a maximum of three years or will take an aptitude test before deciding on the recognition of his qualification: a) if the national's training concerns subjects that are substantially different in terms of duration and content from those on the course leading to the diploma in financial surveying and the course leading to a diploma in surveying engineering; b) or if one or more of the professional activities mentioned under point 1 of Article 1 of the Law of 7 May 1946 aforementioned do not exist in the corresponding profession in

21 Decree 2009-696 of 15 June 2009, modifying the regulations and the code of professional duties of the profession of surveyor, NOR: DEVU0901662D, French Official Journal, 17 June 2009.

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the State where the national acquired his vocational qualifications and they form the subject of specific training that is included both on the course leading to a diploma in financial surveying and on the course leading to a diploma in surveying engineering and concerning subjects that are substantially different in terms of duration and content from those covered by the certificate of competence or the training qualification reported by the national.

The decree includes a specific section devoted to the free provision of services of surveyors. Prior to first providing services on the national territory, the professional in question has to forward to the High Council of the Order of Surveyors, by any means, a statement written in French concerning the compulsory insurance policy indemnifying him against the financial consequences of his professional civil liability. This statement is accompanied by the following documents:

- a certificate stating that the professional is legally established in a Member State of the European Union or party to the European Economic Area agreement to practise the profession of surveyor there;
- if neither the profession of surveyor nor the training leading to this profession is regulated in this State of establishment, the proof by any means that the professional has practised this profession for at least two years during the ten years preceding the provision of service.

If so required, these documents are accompanied by their translations into French. Finally, the decree of 2009 envisaged specific means of communicating information concerning surveyors with the competent authorities in the Member States of the European Union or parties to the European Economic Area agreement.

During the year 2009, several texts were adopted, aimed at recognising vocational qualifications and/or the professional experience of Community nationals for the purposes of practising certain activities – salaried or independently – in France. These decrees also include specific provisions concerning the free provision of services and freedom of establishment. This is the case in particular for the following sectors:

- Decree no. 2009-957 of 29 July 2009 regarding recognition of the vocational qualifications of nationals of Member States of the European Community or parties to the European Economic Area agreement for the practice of the professions of pharmaceutical assistant and hospital pharmaceutical assistant, medical auxiliaries and genetics adviser, NOR: SASH090546D, French Official Journal, 2 August 2009;
- Decree no. 2009-958 of 29 July 2009 regarding the recognition of the vocational qualifications of nationals of Member States of the European Community or parties to the European Economic Area agreement for the practice of the professions of doctor, dental surgeon, midwife, pharmacist, director and assistant director of medical biology analysis laboratories, NOR: SASH0915770D, French Official Journal, 2 August 2009;
- Decree no. 2009-143 of 9 February 2009 regarding access by nationals of a Member State of the European Community or of another State party to the European Economic Area agreement to the activity of the voluntary sale of furniture at public auction, NOR: JUSC0823118D;
- Circular DGAS/4A no. 2009-256 of 7 August 2009 regarding the methods of application of the procedure granting access to the profession of social worker for the holders of foreign diplomas, NOR: MTSA0918910C;
- Decree 2009-214 of 23 February 2009 modifying the regulation of private security activities and comprising the transposition, for these activities, of Directive 2005/36/EC of

- the European Parliament and of the Council of 7 September 2005 regarding the recognition of vocational qualifications, NOR: OICD0825236D, French Official Journal, 25 February 2009;
- Decree 2009-328 of 25 March 2009 regarding the recognition of vocational qualifications for the practice of various regulated agricultural professions that have implications in the fields of public health and safety, NOR: AGRS0903514D, French Official Journal, 27 March 2009;
 - Decree 2009-363 of 31 March 2009 modifying Decree no. 97-558 of 29 May 1997 regarding the conditions for access to the profession of hairdresser, NOR: ECEA0819052D, French Official Journal, 2 April 2009;
 - Decree 2009-1020 of 25 August 2009 regarding the recognition of professional qualifications in the funeral sector, NOR: IOCB0901310D, French Official Journal, 27 August 2009;
 - Decree 2009-1490 of 2 December 2009 regarding the recognition of vocational qualifications for the practice of the profession of architect, NOR: MCCB0919021D, French Official Journal, 4 December 2009.

Finally, an important order of 17 December 2009²² concerns the recognition of vocational qualifications required for the practice of medical, pharmaceutical and paramedical professions. It contains provisions relating to the medical, pharmaceutical and paramedical professions generally and provisions relating to more specific professions: genetic advisers, nursing auxiliaries, ambulance drivers and paediatric auxiliaries. It specifically defines the recognised training qualifications, the conditions for the approval of professional experience as well as the methods for practising the provision of services.

a.2. Language requirements

As indicated in last year's report, Article 1 of order no. 2008-507 of 30 May 2008 creates a general provision relating to linguistic knowledge. The latter states, '*A national of a Member State of the European Community or of another State party to the European Economic Area agreement whose vocational qualifications have been recognised must have the linguistic knowledge necessary to practise the intended profession in France.*' Thus, the need for and the level of knowledge and command of the French language vary depending on the position occupied.

For example, Decree no. 2009-1116 passed in application of the Sports Code indicates in particular that, 'the declarant demonstrates the knowledge of the French language required by Article 1 of order no. 2008-507 of 30 May 2008 regarding transposition of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 relating to the recognition of vocational qualifications, in particular in order to guarantee the safe practice of physical and sporting activities and his ability to call for help.'

The same requirement appears in the order of 17 December 2009 relating to the recognition of vocational qualifications required for the practice of the medical, pharmaceutical and

²² Order no. 2009-1585 of 17 December 2009 regarding the recognition of vocational qualifications required for the practice of medical, pharmaceutical and paramedical professions.

paramedical professions. The requirement for each profession practised is, ‘the linguistic knowledge required for the practice of the profession’, as well as those relating to the systems of weights and measures used in France.

Moreover, Article L. 4111-2 of the Public Health Code enables the Minister to authorise, on an individual basis, certain persons to practise as doctors. This provision does however state that this appointment must be made after the organisation of a test to verify knowledge. These tests include, in accordance with Article D 4111-1 of the Public Health Code, ‘a test of command of the French language.’

*Jurisprudence of the Council of State of 29 June 2009*²³ concerns the problem of the translation into French of diplomas. The original Romanian language version of the pharmacist’s diploma was submitted to the hearing by Ms. A and it was in accordance with its photocopy in the file. However, by contrast, its translation into French as provided by Ms. A includes two additional paragraphs and one fewer paragraph compared to the original: the two additional paragraphs concern the status of the diploma awarded with regard to Community law and the possibilities for recognition that it opens up in the other Member States of the European Union; the deleted paragraph stipulated that Ms. A had not practised the activities mentioned in the previous paragraph on the territory of Romania. The Order of Pharmacists had asked the expert, in forwarding to him the Romanian document and the translation submitted by Ms. A, to indicate whether this document corresponded to her work and, if not, to send to the Order a copy of the translation forward to his client. The expert forwarded to the Order a translation that still contains – compared to the photocopy of the original in the file in the present case – two additional paragraphs, although the deleted paragraph has now been reinstated. In the condition in which the case is presented before the judge sitting in chambers, the discrepancy between the photocopy of the original from the file and the two translations is patently obvious and no explanation for this discrepancy has been forthcoming by Ms. A. When consulted by the Order in November 2008, the Romanian Ministry of Health made it known that the diploma held by Ms. A was not in accordance with European directives because it was before the month of September 2008.

B) ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

The principle of access to the public sector was recognised in a law from 2005. That said, the revolution in France in this field was only partial. In fact, the law of 2005 only concerned the recruitment of Community nationals by external competition. Internal recruitment remains a problem to be tackled, as the remainder of the *Burbaud* jurisprudence emphasised. Law no. 2009-972 of 3 August 2009 puts an end to this situation. In fact, its Article 26 opens up internal competitions to Community nationals (cf. communication at the time of the Cyprus symposium).

Circular NOR: BCF0926531C of 19 November 2009 establishes the methods of application of Law no. 2009-972 relating to mobility and to career paths in the public sector. A paragraph is devoted to opening up internal competitions to Community nationals. It states:

²³ EC, 29 June 2009, 327 275.

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‘3-3 The opening up of internal competitions to Community nationals (Article 26)

Article 26 of the law is devoted to the opening up of internal competitions to Community nationals in the wake of the Law of 26 July 2005 regarding various provisions for transposition into Community law that opened up access for them to all the corps, levels of employment and positions in the public sector. These nationals can now enter internal competitions under the same conditions as candidates from the French Civil Service by highlighting their forms of service, particularly in the civil service of their Member State of origin.

More specifically, when calculating the duration of service required by the by the particular rules and regulations and subsequently, where appropriate, for ranking in the entry-level corps or level of employment, all of the following forms of service can be taken into consideration:

- in a civil service, an agency or an establishment of a Member State of the European Community or of a State party to the European Economic Area agreement other than France;
- in which the mission is comparable to that of the civil service and public establishments in which the civil servants exercise their duties.

Where appropriate, Community nationals will also have to prove that they have received training equivalent to that required by the particular rules and regulations.

It should be pointed out that the law does not require that Community nationals should still be in service on the date when the competition opens, contrary to the situation for nationals of France.

Since internal competitions have already been broadly professionalised, this measure will allow for better consideration of the qualifications and professional experience of Community nationals. This measure is directly applicable to all internal competitions organised in the three public sectors without the need for modifying particular rules and regulations. It is up to the authority organising the competition to stipulate in the notice of competition, as is the case for external competitions, that the competition is now open to Community nationals and to mention the derogation envisaged in Article 5 bis of the Law of 13 July 1983 concerning access to positions involving sovereignty. It is then up to the authority to check, if appropriate in liaison with the civil service(s) of origin of the officer, that this person meets the conditions of length of service and, possibly, of training for entry into the competition.

The officer's ranking in the entry-level corps or level of employment will have to be established according to the rules envisaged by the decrees establishing, for each of the public sectors, the general provisions relating to the situation and to the methods for ranking nationals of the Member States of the European Community or of another State party to the European Economic Area agreement.

In order to guide managers in implementing this reform. The competence of the equivalence commission for the ranking of nationals of Member States of the European Union, created by Decree no. 202-759 of 2 May 2002, will be expanded to the assessment of the equivalence of public sector service completed by Community candidates with regard to the duration of service required by the particular rules and regulations. This reform will be the opportunity to substitute optional submission to the commission for compulsory submission envisaged by the texts, so that from now on only complex files are submitted to it for which its expertise offers genuine added value to civil services.’

This therefore implies a major change to French policy which will, it should be ensured, be followed by practical effects, particularly with respect to the obligations incumbent upon the organising authorities.

Decree 2010-311 of 22 March 2010 on the entry conditions for European nationals into the public sector modifies the procedures for the recruitment and ranking of nationals of Member States of the European Union or of another State party to the European Economic Area agreement in a corps, a level of employment or a position in the French public sector. This text repeals and replaces 6 specific decrees.

According to Article 1, these civil servants cannot hold a position for which the remit cannot be separated from the exercise of sovereignty and involves direct or indirect participation in the exercise of the prerogatives of public authority. Article 4 defines the capacity of civil servant. This refers to European nationals who can prove:

- either that they have the status of civil servant in their Member State of origin;

- or that they hold or have held a position in a civil service, an agency or an establishment in their Member State of origin with a mission comparable to that of the civil service, territorial authorities and public establishments in which French civil servants exercise their duties.

Regarding recruitment, by competition or by secondment, the European national will have to provide to the host administrative or territorial authority all documents necessary to reconstruct his career, awarded and authenticated by the competent authorities in the Member State of origin. Article 3 stipulates that, ‘where these documents are not written in the French language, the aforementioned national shall submit a certified translation of them by an approved translator’.

Article 5 states that, ‘all corps, levels of employment or positions are accessible to [European] nationals by means of secondment’. The text also reforms the commission responsible for making a decision concerning the methods of access for Europeans. Submission before the host commission of nationals of the EU or the EEA becomes optional. This may take place under any recruitment scenario involving European nationals, including internal competition. However, the principle is from now on that the civil services may themselves make decisions on the ranking of the Europeans they accept and do not have to refer to the commission except in difficult cases. Eventually, this commission, which is the responsibility of the Minister for the Civil Service, could be eliminated. The decree envisages that this commission will have the task of checking not only appropriateness between the position held by the national of one of the Member States and the position or level of employment into which this person is likely to be accepted by means of secondment, but also the equivalence and duration of the services performed in another public authority.

b.1. Nationality condition for access to positions in the public sector

Apart from cases of closed positions, known as sovereignty positions, which involve participation in exercising the prerogatives of public authority, no further nationality conditions exist for access to positions in the public sector. Moreover, in this respect the filing of two bills should be emphasised (one submitted by deputies in July 2008 [report no. 1070] and the other submitted by senators in May 2009 [report no. 418]) aimed at allowing nationals of third-party countries (extra-Community) to compete for employment in the public sector. The French Equal Opportunities and Anti-Discrimination Commission (HALDE) issued a resolution (no. 2009-139) along the same lines. The HALDE indicates that, ‘Consequently, with regard to the loss of legitimacy of the nationality condition in access to employment and the need to transpose Community Directives 2004/38 of 29 April 2004 and 2003/109/EC of 25 November 2003, the Board recommends that the Government eliminate the nationality conditions for access to the three public sectors, to employment in public establishments and companies and to employment in the private sector, with the exception of those covered by national sovereignty and the exercise of the prerogatives of public authority’.

b.2. Language requirements

The conditions imposed by law in order to become a civil servant in France do not seem to refer explicitly to language requirements. Thus, Article 5 bis of the Law of 1983 stipulates that persons who meet the following requirements can qualify as civil servants:

- they enjoy their civil rights in the State of which they are nationals;
- they have not been given any sentence that is incompatible with the exercise of their functions;
- they are in a legal position with respect to the national service obligations of the State of which they are nationals;
- they fulfil the physical aptitude conditions required for the exercise of the function, taking into account handicap compensation possibilities.

That said, and if it proves necessary, the applicable texts stipulate that the candidate must provide proof that he possesses the required linguistic level in order to practise the professional activity for which he is applying. The proof can be provided by presentation of a diploma of French secondary or higher education, a certificate of success in a French language knowledge test (at the level required for the position to be held) or during an interview with the competent authorities appointed by the texts.

b.3. Recognition of professional experience for access to the public sector

As a general principle, also reiterated by Law no. 2009-972 relating to mobility and to career paths in the public sector, the acceptance of Community nationals into the public sector must take into account diplomas acquired in the EU, professional experience and periods of service completed in the EU or the EEA. In fact, Article 26 of the Law states that internal competitions in the public sector, ‘are also open to candidates who can prove a length of service completed in a civil service, an agency or an establishment of a Member State of the European Community or of a State party to the European Economic Area agreement other than France where the missions are comparable to those of the civil services and public establishments in which the civil servants (...) exercise their duties and who have received, if appropriate, a form of training in one of these States that is equivalent to that required by the particular rules and regulations for access to the corps under consideration’.

An Order by the Ministry of the Economy, Industry and Employment of 21 January 2009 establishes the methods for taking into account the professional experience acquired by some candidates in France or in a State of the European Community or the European Economic Area, in place of the required diplomas, with a view to the recruitment of teaching staff for the *Ecoles Nationales Supérieures des Mines* and the *Ecoles Nationales Supérieures des Techniques Industrielles et des Mines* placed under the supervision of the Minister responsible for industry (NOR: ECEP0820364A).

An Order of 7 September 2009 establishes the list of diplomas, certificates and other training qualifications in general medicine awarded by a Member State that grant access, with exemption from the post-graduate diploma in general medicine, to the functions of senior registrar at universities of general medicine (NOR: ESRH9007754A, French Official Journal, 24 September 2009).

Chapter IV

Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

Private sector

Jurisprudence of the Council of State of 24 September 2009 no. 330309 concerns the striking off of a doctor from the roll of the order of physicians based on previous history highlighted by the order of physicians of Ireland. It is evident from the investigation that Mr. A, a qualified medical doctor specialising in general surgery, was registered on the roll of the order of physicians of the city of Paris in September 1999 after having practised his activity for several years in Guadeloupe. In March 2006 he requested and obtained his enrolment with the order of physicians of Ireland, submitting in support of his application a certificate from the Departmental Council of the order of physicians of the city of Paris, certifying that he had never been the subject of any penalty or sentence that would be likely to have consequences on his enrolment on the roll of the order. However, on being informed that Mr. A had been the subject of a measure prohibiting him from providing care to social security recipients from 1 January to 31 December 2006, which he had not voluntarily declared, the order of physicians of Ireland believed that Mr. A had demonstrated a lack of morals in that respect and declared him struck off the roll of the order, this striking off being confirmed by a decision by the Supreme Court of Ireland dated 10 September 2008. As a result, the order of physicians of Ireland duly informed the Departmental Council of the city of Paris, in application of the provisions of Article 56/2 of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005, which then ordered the withdrawal of the registration of Mr. A from the roll of the order.

Specific issue: Working conditions in the public sector

Legislation

*Decree 2010-311 of 22 March 2010*²⁴ concerning acceptance conditions for European nationals in the public sector modifies the recruitment and ranking procedures for nationals of Member States of the European Union or of another State party to the European Economic Area agreement in a corps, a level of employment or a position in the French public sector. This text repeals and replaces 6 specific decrees.

Article 5 stipulates that the secondment may be followed by integration notwithstanding the absence of provisions or any provision to the contrary envisaged by their particular rules and regulations. The decree therefore aims to take into account the new rules emerging from the Mobility Law of 3 August 2009 regarding secondment and integration. The Europeans, like the French, can in fact be integrated at the end of five years of secondment. Aside from questions about reciprocity it is this latter point, combined with a broad definition of European ‘civil servant’, including holding a position in a (possibly private) ‘agency’ where the

²⁴ Published in the French *Official Journal* of 24 March 2010.

missions are comparable to those of the French civil service, which has produced a reaction from the trade unions. Thus, during presentation of the draft to the Supreme Council of the Territorial Civil Service – which gave a unanimously negative recommendation – the CGT mentioned a risk of ‘discrimination’ with respect to French private salaried employees in comparable situations who cannot gain access to the civil service by secondment or internal competition.

With respect to taking into account functions previously practised, several provisions do take them into account. Thus, Article 6 stipulates that the positions to which European nationals can gain access by means of secondment must correspond to the functions previously held by the parties in question, taking into account the professional experience acquired.

The social security and pension system: Article 8: Any [European] national accepted on secondment is remunerated by the civil service to which he is seconded. He is covered by the social security and pension systems governing the function he is exercising within the context of his secondment.

The rules relating to ranking are slightly modified. Articles 9 and 10 of the decree concern specifically the methods for the receiving authority to take into account services previously completed, methods determined with respect to the legal nature of the commitment that links the petitioner. However, the ranking rules still depend on the legal nature of the link between the officer and his foreign employer (statutory situation, contract under public law or contract under private law). In the second hypothesis, it will be seen that no further distinction is made between a temporary contract and a permanent contract.

It should be noted that the ranking is made notwithstanding any provision allowing a person to maintain, at a personal level, the level of remuneration achieved before the person’s entry into the French public sector.

Jurisprudence

Pursuant to a judgment of the *Court of Cassation dated 11 March 2009*,²⁵ ‘pursuant to the principle of the free movement of workers within the European Union, the provisions of the SNCF statutes, in the case of a former officer of a public railway company of a Member State, that limit the conditions for access to the permanent executive are discriminatory, while a public company cannot, when recruiting its staff, refuse to take into account the length of service, experience and qualifications acquired previously in a comparable sphere of activity in the employment of a public company of another Member State’.

Thus, the periods of employment completed in another Member State in a comparable activity must be taken into consideration when determining the conditions for entry and employment in the SNCF. In this case, a Belgian national had been employed by the Belgian National Railway Company as a steward and then as a deputy station-master. Having moved to France, he applied to the SNCF for similar positions. After having been recruited as a contractor with a trial period, he requested a salary review and his integration into the permanent management in the capacity of ‘rolling stock transport technician’.

While his request for back pay on the grounds of length of service was rejected on appeal, the Court of Cassation annuls the appeal judgment: Article 39 of the EC Treaty of 25 March 1957 and Regulation 1612/68 guaranteeing equal treatment with respect to remunera-

²⁵ Court of Cassation, Social Chamber, 11 March 2009, 08-40381; see *Revue de droit des transports* no. 6, June 2009, commentary by S. Carré, Comm. 115; *Liaisons Sociales Europe* no. 224 of 16 to 29 April 2009, p. 2, commentary by J-P. Lhernould.

tion for Community nationals; periods of employment in a comparable sphere of activity completed previously in the public sector of another Member State must therefore be taken fairly into consideration. In judging that the SNCF was justified in not taking into consideration the length of service and experience acquired by Mr. Denis X within the SNCB, the Court of Appeal has contravened Article 38 of the EC Treaty of 25 March 1957 and EEC Regulation 1612/68 of the Council of 15 October 1968. In fact, when a provision of a national regulatory statute applicable within a public company envisages promotion for the employees of this company, taking into account the length of service in a remuneration bracket fixed by this statute, the migrant worker must effectively be able to take advantage of periods of employment in a comparable sphere of activity, completed previously in the employment of another public company in another Member State.

Two other arguments are put forward by the Court of Cassation. The act of imposing an age limit on nationals of another Member State who have practised the same functions such that, having passed this age limit, they are deprived of the possibility of exercising their right of movement within the Union represents a form of discrimination and an obstacle to the right of movement that are prohibited by Article 39 of the EC Treaty of 25 March 1957 and EEC Regulation no. 1612/68 of the Council of 15 October 1968.

Equally, the act of requiring nationals of another Member State who have practised the same functions to enter a competition aimed at the recruitment of candidates who are not yet qualified also represents a form of discrimination and an obstacle to the right of movement that are prohibited by Article 39 of the EC Treaty of 25 March 1957 and EEC Regulation no. 1612/68 of the Council of 15 October 1968.

2. SOCIAL AND TAX ADVANTAGES

2.1. *General situation as laid down in Article 7 (2) Regulation 1612/68*

Article L. 111-1 of the Social Security Code subjects the receipt of social security allowances to any person who either practises a professional activity involving the payment of social security contributions or resides permanently and effectively in France. In the same way that the verification of the practice of a professional activity gives rise to the payment of contributions, the verification of the residence condition in France forms a priority objective assigned to the social security agencies. In fact, this verification should make it possible to ensure that the persons who receive these allowances contribute to financing the social security system or are entitled to receive allowances financed by national solidarity. *Circular CNAV 2009/8 of 29 January 2009* defines the methods for examining the residence condition with a view to awarding or paying the solidarity allowance to elderly persons and the additional invalidity allowance.

Social security allowances

- *Circular CCMSA no. 2009-021 of 7 May 2009* concerns the methods for applying and inspecting the residence condition for receiving certain social allowances.

The current rules allow for the opening up of rights to social security allowances either on the basis of the practice of a professional activity or on the basis of effective residence in

France, with the exception of contributory national old-age pensions, invalidity pensions and payments made in application of the legislation concerning industrial accidents.

Now, for lack of any precise definition to date of long-term residence, the social security agencies asked social security recipients to provide proof of domicile, which is a vague and inadequate concept for checking the effectiveness of residence in France. Decree no. 2007-354 of 14 March 2007 relating to the methods of the residence condition for the receipt of certain allowances has come to define the concept of residence, inspired by certain criteria used by the General Tax Code, and to organise monitoring of the effectiveness of this condition by the social security agencies. The technical notes accompanying the circular set forth the general principles of the residence condition shared by health, old age and family risks as well as the specific aspects of this concept with regard to each branch.

- *Circular CNAF 2009-022 dated 21 October 2009* relates more specifically to the conditions for the regularity of residence of Community nationals for receiving family allowances²⁶.

It is stipulated that the criteria for determining the right of residence are identical for all forms of housing assistance and social security minimum allowances (Handicapped Adult Benefit, Single Parent Benefit, Income Support, Workers Solidarity Income).

In order to avoid any ambiguity concerning assessment of the regularity of the right of residence of Community nationals and similar for the award of family allowances, Article L. 512-2 of the Social Security Code (CSS) has been modified by the Social Security Financing Law for 2008. Until this modification, Article L. 512-2 of the CSS subjected receipt of French family allowances to presentation of a residence card that provides proof of legal residence on French territory for all foreigners. This article now indicates that receipt of family allowances by Community nationals, as well as nationals of a State party to the European Economic Area agreement and nationals of the Swiss Confederation, is subjected to compliance with the conditions for regular residence, as defined in Article L. 121-1 of the CESEDA.

Concerning the monitoring of regular residence, the circular recalls that it is not up to the family allowance fund to study the right of residence of Community nationals as such, but to assess the conditions for regular residence so that they can receive family allowances. In fact, Community nationals and similar, although they are not legally obliged, have the possibility of applying for a residence card from the Prefecture. If they receive this card, simply presenting this document is sufficient to prove the regularity of their residence.

In order to receive family allowances, Community nationals and similar must therefore meet the conditions for regular residence in France (cf. Article L. 121-1 of the CESEDA); fulfil the residence condition in France (a CNAF circular is forthcoming); and meet all the other conditions for access to the right to family allowances.

The right of residence is assessed as a function of the category to which Community nationals and their family members belong at the time of the application for allowances (worker, non-worker, job-seeker, student).

²⁶ It cancels and replaces Circular CNAF 2008-024 that established the conditions for issuing family allowances to Community nationals and to their family members. Now, some provisions of this circular were in conflict with Community law.

For persons practising a professional activity

‘Persons practising a salaried or non-salaried professional activity that allows them to be members of a health insurance scheme have the right to stay in France for a period longer than three months. A Community national or similar is regarded as falling within the category of ‘worker’ if he is in one of the following situations: salaried or non-salaried professional activity, paid leave, parental educational leave, parental leave, family support leave provided this does not involve breaking ties with the employer, gradual early retirement’.

However, the right of residence of recipients of daily allowances for illness, maternity, industrial accident, occupational illness or unemployment can only be taken into account within the context of maintenance of the right (cf. § 2.2).

Prior conditions for the recognition of the right of residence of workers

All persons working and residing in France must be members of a social security system. The Circular refers here to the Local Sickness Insurance Fund (CPAM) or the Independent Social Security System (RSI). This condition can also be verified using the methods envisaged in the appendix to Community Regulation 1408/71 according to which:

- a salaried worker is defined as any person who is a compulsory member of the social security system in accordance with Article L. 311-2 of the Social Security Code (CSS), who fulfils the minimum activity or remuneration conditions envisaged in Article L. 313-1 and following of the CSS for receiving cash allowances from health, maternity, invalidity or other insurance;
- a non-salaried worker is defined as any person who practises a non-salaried activity and who is obliged to take out insurance and to pay contributions for the risk of old age in a system for non-salaried employees.

Situations in which right of residence is maintained (cf. Article R. 121-6 of the CESEDA)

A Community national and similar within the ‘worker’ category who no longer fulfils the conditions referred to above does not immediately revert to an irregular situation, but preserves his right of residence: if he is affected by temporary invalidity as a result of maternity, illness, occupational illness or industrial accident; if he is pursuing vocational training associated with the previous activity unless he has been made involuntarily redundant (a breach of the employment contract does not have to be at the worker’s initiative; it can be a dismissal, a situation of technical unemployment, etc.); if he finds himself in a situation of involuntary unemployment duly recorded at the end of a period of activity of more than twelve consecutive months or not.

The right of residence is now maintained for as long as the situation persists. Nonetheless, the period of maintenance cannot exceed six months if the applicant or recipient is in a situation of involuntary unemployment duly recorded following the practice of an activity for less than twelve months. If it is not possible to maintain the right of residence of the recipient or of the applicant based on one of the above situations, the analysis of the right of residence will have to be carried out with respect to other criteria (non-worker, student, etc.).

- Ruling of the HALDE no. 2010-74 of 1 March 2010, complaints relating to decisions taken by the CAF (Family Allowances Office) of Saint-Étienne to suspend the payment of family allowances to children of Romanian nationality

A complaint was made to the HALDE by the ‘Solidarité Roms’ association regarding 4 decisions to suspend family allowances to persons of Romanian nationality on the grounds that they were allegedly in an irregular situation. It emerges from the investigation undertaken by the HALDE that the CAF based its decision exclusively on Circular CNAF no. 2008-024 of 18 June 2008. Now, the interpretation given in this circular of the right of residence of Community nationals is not in line with the directive applicable in this case or with the interpretation made by the European Court of Justice. Assuming that infringement of the principle of equal treatment between Community nationals and French nationals can be established, the initial decision of the CAF represented banned discrimination based on nationality. This analysis is reinforced both by the reversal of the position of the CAF, which has paid the allowances, and by the favourable judgment of the TASS (Social Security Affairs Court) of Saint-Étienne²⁷, but also by the repeal of the aforementioned circular. New circulars – apparently in accordance with Community law – were enacted in 2009, in particular CNAF Circular no. 2009-022.

The HALDE develops its analysis along two lines: firstly, it observes that the decision is based on an interpretation contrary to the principle of equal treatment among nationals of the European Union; before stipulating that this nationality-based discrimination is prohibited by several international texts. It uses the jurisprudence of the European Court of Justice to support its arguments. The main grounds for suspending family allowances was based on the fact that they did not have sufficient resources for themselves and their families and also on the fact that, as recipients of Universal Health Coverage (CMU), they did not fulfil the condition relating to health insurance. This justification for the HALDE is faulty in law.

- Concerning the absence of health coverage

Article R. 121-4 of the CESEDA – transposing the requirement of health coverage for the right of residence of non-working Community nationals – explains that health coverage must cover health insurance and maternity insurance payments; which is exactly what the CMU corresponds to. The European Commission, in a communication dated 2 July 2009, stipulates that, ‘any insurance, private or public, taken out in the host Member State or elsewhere, is acceptable in principle provided it envisages complete coverage’. Thus, the claimants in receipt of the CMU did fulfil the health insurance condition.

- Concerning the absence of sufficient resources

In order to assert that the claimants did not have sufficient resources, the CAF relied on declarations of resources by the claimants completed during their initial request for allowances. Now, the resources taken into account for calculating the amount of social security allowances are different in nature from those of the resources taken into consideration for the right of residence, which can be more diversified. In referring to Community jurisprudence²⁸, the HALDE stipulates that these resources can include forms of assistance in kind or in cash and that they can come from third parties. Moreover, the CAF also took as its basis the 2008 circular, under the terms of which it is necessary to ‘check that the applicant has at least the equivalent of 6 months of income support at his disposal’. This detail is in violation of Article 8 of Directive 2004/38, according to which in all cases the amount of resources for de-

²⁷ In a judgment dated 30 November 2009, the TASS of Saint-Étienne repealed the suspension decisions and ordered the payment of damages and interest.

²⁸ ECJ, 23 March 2006, *Commission v Belgium*, case C-408/03.

termining the right of residence is not in excess of the level below which nationals of the host State can receive social security assistance, in other words in France the RMI/RSA (Income Support/Workers Solidarity Income). In fact, the CNAF had transformed an approximate ceiling amount of resources into a lower threshold, which constitutes a major restriction of the possibility of fulfilling this condition.

- Ignorance by the CAF of a right to maintenance of family allowances

The CAF monitored the regularity of the residence of claimants as if the latter had never previously received family allowances. Now, with respect to Community law, analysing the regular nature of residence in order to receive allowances differs considerably depending on whether the parties in question have already received allowances or not. In fact, in granting them family allowances in the past – allowances that are awarded on the condition of regular residence – their right of residence was in fact already recognised in 2007. This reasoning is based on the Trojani judgment of the ECJ²⁹. Concerning Community nationals, in as far as the regularity of residence can be recognised by both the Prefecture and the CAF, the reasoning of the Court in the Trojani judgment is transposable to cases in which the CAF itself has, in paying allowances, recognised the right of residence. This reasoning is confirmed by the provisions of the circular from the Social Security Directorate of 3 June 2009, establishing a genuine right to the maintenance of family allowances: ‘the right to allowances (...) of families who are already recipients on the date of publication of the circular will not be called into question again based on the lack of proof of the existence of a right of residence’. It is also confirmed in the CNAF circular of 2 October 2009, which restates the right to maintain family allowances for Community nationals.

Finally, on the grounds for various judgments of the ECJ³⁰ establishing the principle of equal treatment regarding social security allowances on the grounds of European citizenship – and no longer solely on the grounds of the free movement of persons, the HALDE concludes that this leads to the recognition of this equality for non-working Community nationals who cannot prove sufficient resources and/or social security coverage.

It should be emphasised that the HALDE was recently informed of new complaints relating to the suspension of family allowances to Romanian nationals, subsequent to the circulars of 2009. The Board therefore requested the CNAF to invite the directors of CAF to remind all their officers of the applicable rules in terms of the right to maintain family allowances granted to Community nationals and to carry out a new examination of the files of Community nationals whose allowances were suspended on the grounds of the 2008 circular.

2.2. Specific issue: the situation of job-seekers

Order of 30 March 2009 regarding approval of the convention of 19 February 2009 relating to unemployment compensation and of its general regulations in appendix

The unemployment insurance system guarantees a replacement income known as ‘back-to-work assistance benefit’, for a fixed period, to salaried employees involuntarily deprived of employment who meet the activity conditions referred to as period of membership, as well as

²⁹ ECJ, 7 September 2004, *Trojani*.

³⁰ Specifically *Grzelczyk* (C-184/99); *D’Hoop* (C-224/98); *Bidar* (C-209/03); *Forster* (C-158/07).

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conditions of age, physical ability, unemployment, registration as a job-seeker and registration as a person looking for work. Pursuant to Article 4 of the convention, this system also applies to seconded salaried employees as well as expatriate salaried employees who are nationals of a Member State of the European Union, of another State party to the European Economic Area agreement or of the Swiss Confederation, employed by companies falling within the territorial scope of the convention.

This order is supplemented by an order of the same date regarding approval of the agreements relating to appendices I to XII to the general regulations appended to the convention of 19 February 2009, regarding unemployment compensation. These agreements concern specific professions. Agreement IX thus relates to salaried employees employed outside France or by international agencies, embassies and consulates. It stipulates that employers included in the territorial scope of the unemployment insurance system created by the convention of 19 February 2009 relating to unemployment compensation are obliged to insure expatriate French salaried employees or nationals of a Member State of the European Union or another State party to the European Economic Area agreement (EEA) or the Swiss Confederation against the risk of loss of employment, with whom they are linked by an employment contract during their period of expatriation. Within this specific context, in particular expatriate salaried employees who are nationals of a Member State of the European Union or of another State party to the European Economic Area agreement (EEA) or of the Swiss Confederation employed by an embassy, a consulate or an international agency located abroad can request individual participation in the unemployment insurance system, as well as salaried employees who are members of the general system of social security, of embassies, consulates or international agencies located in France who do not participate in the unemployment insurance system within the context of the provisions of section 2.1 (optional employer membership).

This agreement IX also includes a chapter devoted to frontier workers. Frontier workers affected by the present section are those who meet the following conditions: their residence is in France, where they return in principle every day or at least once per week, while practising a salaried activity in a neighbouring State other than a Member State of the European Union, another State party to the European Economic Area agreement (EEA) or the Swiss Confederation; however, frontier workers who are seconded by the company for which they usually work maintain their capacity as frontier worker for a period not exceeding 4 months, even if during the course of this period they cannot return to their place of residence every day or at least once per week. The case of frontier workers is dealt with in application of the provisions envisaged by the convention of 19 February 2009 in terms of the conditions for opening up rights to allowances, the determination of compensation periods, the personalised employment access project and the methods of payment of the allowances. In assessing the conditions for the award of the back-to-work assistance benefit, periods of salaried activity practised in the neighbouring State are taken into consideration.

Circular DSS/2B no. 2009-146 of 3 June 2009 relating to the receipt of family allowances by nationals of the European Union, the European Economic Area and Switzerland in a situation of professional inactivity on French territory

This involves application of Law 2007-1786 of 19 December 2007 regarding social security financing, which envisages the need for any European citizen to reside regularly in France in order to receive family allowances.

‘Community nationals or similar, residing in France, especially in the capacity of non-worker, student or job-seeker, can receive French family allowances provided they hold a right of residence on French territory’. Right of residence – which is now no longer a formality based on possession of a residence document – presupposes two conditions for non-workers and students: the possession of sufficient resources and of health insurance coverage. For citizens of the Union who meet these conditions, family allowances are granted *ipso jure*. An exception is made for those who have lost their resources and/or their health insurance following a ‘trial of life’.

The circular details the methods for proving the effectiveness and regularity of residence in France. Some allowance is made for students, who can prove a sufficient level of resources by simple declaration, certification or any equivalent means of proof.

Since the condition of effective residence is fixed at 6 months and 1 day for family allowances, the funds have to check that the Community nationals in question possess or will possess the equivalent of the amount of the Workers Solidarity Income for a period of 6 months or the amount of Solidarity Allowance for the Elderly if they are aged over 65.

The circular recalls that, ‘the right of residence of Community nationals and similar who are looking for work in another Member State is unconditional, except for reasons of law and order or public safety, provided the persons in question are looking for work and have genuine chances of entering the labour market in the host country’. This is an application of the jurisprudence of the ECJ (Antonissen, Collins). Concerning the granting of family allowances, job-seekers have the authority to return to the State of origin or to pursue their search for work in another State if the search in France proves futile or, by contrast, to reside in France in the capacity of worker or non-worker. ‘Family allowances will therefore not be paid until such time as the persons in question have changed status either because they will be workers or because they will now be regarded as non-workers. The conventional conditions will then apply.’

Circular CNAF 2009-022 dated 21 October 2009 relates to the conditions for the regularity of residence of Community nationals for the receipt of family allowances.³¹ It includes provisions relating to persons who do not work.

Community nationals and similar who reside in France, specifically in the capacity of non-worker, student or job-seekers, can receive French family allowances provided they hold a right of residence on French territory. This right of residence is based on two conditions: the possession of sufficient resources and the possession of health insurance (cf. Article L. 121-1 of the CESEDA) in order not to become an unreasonable burden on the French social security system.

Family allowances can therefore be granted:

- *ipso jure* to community nationals and similar who fulfil the two aforementioned conditions and thus reside in a regular situation;
- under special conditions, to those who experience a trial of life causing them to lose their resources and/or their health insurance.

If the interested parties are aged under sixty-five, the lump sum of the RSA (Workers Solidarity Income) should be taken into consideration (cf. L. 262-2 of the Social Action and Families Code). If they are aged over sixty-five, the level of resources must be compared to

³¹ It cancels and replaces Circular CNAF 2008-024 that established the conditions for issuing family allowances to Community nationals and to their family members. Now, some provisions of this circular were in conflict with Community law.

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that of the Solidarity Allowance for the Elderly. The CAFs must check that the applicants will have the equivalent of the sums above for six months. A health coverage certificate (including CMU) covering health and maternity risks must be provided by Community nationals and similar for themselves and their beneficiaries. If, within this context, the right to family allowances is open, the conditions can be regarded as satisfied provided the person does not make an application for minimum welfare, in which case the situation must be reconsidered on the grounds of trials of life.

Regarding job-seekers more specifically, the instructions in the circular concern Community nationals and similar who entered France in order to look for work there. They do not apply to persons who entered France with the status of worker and who are looking for work following the termination of their activity. European citizens looking for work in France are in a special situation. They benefit from a right of residence provided their efforts to find work are effective and without the rules applicable to non-working Community nationals and similar being applicable to them. Job-seekers should be regarded as having temporary residence. These persons have the authority to pursue their search in another State if their search bears no fruit in France. By contrast, if they decide to settle in France, the right to family allowances can be examined in application of the criteria applicable to 'non-workers'.

Chapter V

Other Obstacles to Free Movement

The secondment of workers

A circular DGT 2008-17 dated 5 October 2008³² concerns the transnational secondment of workers in France within the context of the provision of services

The free provision of services enshrined in Article 49 of the Treaty creating the European Community enabled the development of foreign companies' operations and of their salaried employees on French soil.

Based on this observation and from the perspective of encouraging the exercise of the free provision of services within a well-defined context, of guaranteeing fair competition among companies and better protection for workers, on 16 December 1996 the Member States of the Union and the European Parliament adopted Directive 96/71/EC regarding the secondment of workers within the context of the provision of services, which envisages:

- the existence of a hard core of compulsory rules to be observed in the host country;
- exchanges of information among national authorities;
- and guarantees of application (inspection, procedures available to workers, judicial competence).

Secondment within the meaning of the Labour Code

The transnational secondment of workers is governed by Articles L. 1261-1 to L. 1263-2 and R. 1261-1 to R. 1264-3 of the Labour Code. These texts aim to guarantee minimum protection in terms of working and employment conditions to seconded salaried employees and to stipulate the monitoring methods. They have no effect on the other provisions of the Labour Code, except those that they adapt or replace.

These texts do not cover:

- the system of work permits applicable to salaried employees seconded to France. In this respect, reference should be made to Article R. 5221-2, 1 and 2 of the Labour Code and to Circular DPM/DM12/2007/323 of 22 August 2007 relating to work permits;
- provisions governing the mutual recognition of diplomas and those relating to the exercise of an activity subject to prior declaration or authorisation (security, insurance, etc.);
- the social security system applicable to salaried employees seconded to France that is based, for Community nationals, on EEC Regulation 1408-71 of 4 June 1971 and, for nationals of third-party States, on bilateral conventions reached, as appropriate, between their State of origin and France.

³² Published in the Official Bulletin of Labour of November 2008.

Employers affected by secondment

a) Foreign companies operating on French territory

The secondment system is triggered by the start of activity on the territory. French law applies to employers immediately, from the first day of work by its salaried employees on the territory, regardless of the length of their secondment.

b) The obligation of significant activity in the country of origin

Any employer established abroad can carry out the provision of services on French territory and can second salaried employees there without any obligation to establish business there. They must nevertheless fulfil two prior conditions in their State of origin:

- they must be regularly established there and be incorporated and managed in accordance with the legislation of that State. The legal status of the company is irrelevant, whether they be companies under civil or commercial law or any other legal entities under public or private law;
- they must prove significant, stable and continuous activity, while Article L. 1262-3 of the Labour Code prohibits the creation of an establishment in a Member State with the sole aim of seconding its salaried employees. For example, Article L. 1262-3 has the objective of preventing a ‘letterbox’ company from being created in a country where the social laws are less favourable. On the other hand, the fact that a foreign company has established business in France is not in itself sufficient to forbid it from seconding salaried employees. If it emerges that the foreign company has habitual, stable and continuous activity in France, it must establish itself there and subject its salaried employees to all the rules of the Labour Code.

c) Secondment is temporary in nature

The situation of the seconded worker

Within the meaning of Article L. 1261-3 of the Labour Code, a seconded salaried employee is ‘any salaried employee of an employer that is regularly established and practising his activity outside France and who, working habitually on behalf of the latter, performs his work at the request of this employer for a limited period on French soil under the conditions defined in Articles L. 1262-1 and L. 1262-2 of the Labour Code’.

- The seconded worker must be salaried before his secondment;
- The seconded salaried employee remains a salaried employee during his secondment.

Seconded salaried employees in France enjoy the right of paid leave under the same conditions as salaried employees employed by a French company, in application of Article R. 1262-6 of the Labour Code. Their right to leave is evaluated on a pro rata basis according to their residence in France. All the provisions relating to family leave (especially leave for family events, maternity and paternity leave) apply to seconded salaried employees.

Social welfare

Employers must be able to prove (up-to-date) social welfare for every seconded salaried employee since failure to comply with the obligation to declare to the social welfare agencies

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can constitute a concealment of activity within the meaning of Article L. 8221-3 of the Labour Code. Employers must be members in France of the paid leave fund (buildings and public works and entertainment sectors) and pay subscriptions to the system of ‘bad weather unemployment’ (buildings and public works sector only) during the secondment of their salaried employees in France. Certain cases are exempt from this obligation, in particular for employers established in a Member State of the European Union, the European Economic Area and the Swiss Confederation, who can refer to the existence in their country of origin of schemes that are the equivalent of those under French law and that offer the same guarantees to their salaried employees.

Minimum wage

The minimum wage is calculated based on the gross salary amount and in the same way as for French salaried employees (see Article D 3231-6 of the Labour Code). Thus, the employer of seconded salaried employees must observe the minimum wage, if it is more favourable than the SMIC (index-linked minimum growth wage), envisaged by the provisions of the agreement or the applicable broad collective agreement.

Declarations and monitoring. Documents submitted in the language of origin.

Article R. 1263-3 envisages that every company that seconded a salaried employee to France is obliged to forward, before the commencement of the service, a declaration to the labour inspector, enabling the latter to have access to information regarding the identification of seconded salaried employees, to the company employing them and to the conditions under which the service has to be provided. Regarding the monitoring services, this means checking that the rules applicable to seconded salaried employees are observed. To this end, they are authorised to require the presentation, in French and in euros, of an exhaustive list of documents specified under Articles R. 1263-1, R. 1263-8 and R. 1263-9, specifically the document providing proof of a medical examination in the country of origin equivalent to that carried out in France, for employers established in a country of the EU, the EEA or the Swiss Confederation; the pay slips of each seconded salaried employee or any equivalent document (if the secondment is longer than or equal to one month) or any document providing proof that the minimum wage has been observed (for secondment of less than one month); the document certifying acquisition of a financial guarantee or any equivalent document (for temporary employment agencies).

The Labour Code has envisaged four equivalence systems for European employers. The latter can in fact produce documents equivalent to:

- pay slips;
- membership of a paid leave fund (incorporated in the pay slip)
- a financial guarantee for temporary employment agencies;
- medical monitoring of their salaried employees.

The employer will be able to present documents in the forms required in his country of origin provided the wording on them make it possible to assess their level of equivalence compared to the French requirements. Nonetheless, all these documents are to be produced in French. Taking into account the recent jurisprudence of the European Court of Justice, the Member States can only require a limited number of documents from companies providing services, translated into the language of the host country (judgment Commission versus Germany, C 490/04 of 18 July 2007). Consequently, only the documents listed in Articles R.

1263-1 and R. 1263-8 of the Labour Code can be required in the French language. Moreover, Article 20 of Law 2006-911 of 24 July 2006 (Article L. 8271-3) allows the labour inspectorate to refer to a sworn translator in order to monitor salaried employees on secondment. For example, in the case that various documents are likely to be presented to the inspection services (certification that proves that specific training has been followed for driving certain heavy vehicles, for example), they can be produced in the language of origin of the employer. These services can then, in the event of doubt about their reliability and depending on the possibilities, request a translation.

Jurisprudence

*The Court of Cassation handed down an important judgment on 3 March 2009*³³ on the secondment of Polish workers sent to agricultural firms in France by a British company, stating that it was acting in the capacity of service provider. It made these salaried employees available for an hourly wage of 9.51 euros, all costs included, of which it took 3%. The operators were charged with the illicit provision of manpower and concealed labour. For the Court of Cassation, the operation undertaken can be analysed as an illicit provision of manpower practised outside the rules of temporary labour ‘when:

- the remuneration for the services provided, assuming no specific know-how, has been calculated on an hourly basis’;
- the service provider has maintained no authority over the workers;
- and the ‘means and material for the labour were provided’ by the operators.

Moreover, ‘the defendants could not ignore the fact that they were using foreign staff in the same way as temporary manpower and at a low cost, compared to the cost of the salaried employees they usually employed’. The Court is of the opinion that this is not a provision of services ‘performed within the framework of a company contract, a provider contract within the context of temporary labour or any other provision of salaried employees’ because ‘no employment relationship exists between the sending company and the worker for the period of secondment’.

The free provision of services and freedom of establishment

Decree no. 2009-1650 of 23 December 2009 regarding application of Law no. 2009-888 of 22 July 2009 on the development and modernisation of tourist services details the conditions for the freedom of establishment and the free provision of services for the activities of travel agents and other operators in the sale of travel and holidays.

Article L. 211-1 of the Tourism Code concerns natural or legal persons who open themselves up to or compete in, regardless of the methods of their remuneration, operations consisting of the organisation or the sale of:

- a) individual or collective travel or holidays;

³³ Court of Cassation, Criminal Chamber, 3 March 2009, 07-81.043; see *Liaisons Sociales Europe* no. 225, 30 April-13 May 2009, p. 7.

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- b) services that can be provided during travel or holidays, specifically the issue of travel documents, the reservation of rooms in hotel establishments or in tourist accommodation facilities and the issue of accommodation or food vouchers;
- c) services associated with welcoming tourists, specifically organising visits to museums or historic monuments.

It also involves the production or sale of tourist passes as well as the operations associated with the organisation and reception of fairs, trade fairs and conferences or related demonstrations provided these operations include all or some of the services envisaged under a, b and c of the present I.

The 2009 decree added some details to the freedom of establishment or of the provision of services by European nationals for these activities by creating an Article R. 211-50 and an Article R. 211-51 of the Tourism Code:

- Pursuant to Article R. 211-50, concerning the freedom of establishment;

Any natural or legal person who is a national of another Member State of the European Union or of another State party to the European Economic Area agreement who wishes to settle in France in order to practise the activities referred to under I of Article L. 211-1 is obliged to file a registration request with the registration commission. In addition to the obligations concerning financial guarantee and professional civil liability, professional skill is regarded as having been acquired by all nationals of a Member State of the European Union or of another State party to the European Economic Area agreement if they can prove:

- either completion of a training period of a duration of no less than four months followed in another Member State of the European Union or of another State party to the European Economic Area agreement in association with the activities mentioned under I of Article L. 211-1 and for which certification has been awarded by a competent authority of this State;
- or professional experience of a minimum duration of one year in one of the States during the ten years preceding submission of the complete registration request file in one of the fields related to the activities mentioned under I of Article L. 211-1 or to tourist accommodation services or tourist travel services;
- or the possession of a diploma, document or certificate awarded by a competent authority in one of these States, authorising the practice of the activities mentioned under I of Article L. 211-1 or activities involving tourist accommodation services or tourist travel and certifying a level of vocational qualification at least equivalent to the level immediately below that required in application of Article R. 211-41.

If needed, a translation into French of the documents forming the registration request referred to in Article R. 211-20 is attached.

- Concerning the free provision of services, Article R. 211-51 envisages:

Any natural or legal person legally established in another Member State of the European Union or another State party to the European Economic Area agreement who wishes to take part, either temporarily or occasionally, in one of the activities mentioned under I of Article L. 211-1 is obliged to declare this prior to his first provision of services. He is to make his declaration by any means enabling confirmation of reception to the registration commission in Article L. 141-2, accompanied by the following documents:

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1. Proof of his nationality;
2. Certification that he is legally established in a Member State of the European Union or in another State party to the European Economic Area agreement to practise the activities mentioned in I of Article L. 211-1 in that State;
3. Certification of an adequate financial guarantee;
4. Information about his status of coverage by insurance guaranteeing the financial consequences of professional civil liability;
5. Proof of his vocational qualifications or proof by any means that he has practised the activity of travel agent for at least one year during the previous ten years in the State of establishment, if this activity or the training leading to it is not regulated.

If needed, a translation into French of these documents is attached.

Chapter VI Specific Issues

1. FRONTIER WORKERS

2. SPORTSMEN/SPORTSWOMEN

The Governing Committee of the National Rugby League (LNR) decided, on 2 April 2009, to impose a minimum number of 50% of 'players from French training channels' for professional clubs with effect from 2010-2011, with this level rising to 70% with effect from the 2011-2012 season.

Those regarded as 'players from French training channels' are:

- players who were members of the French federation for 5 consecutive seasons before the age of 21;
- players who trained for at least 3 years at a registered centre and are between 16 and 21 years old.

It seems that the basis for this decision is the desire to limit the number of foreign players in the French rugby championship. Foreign players represent 40% of the players in the line-up of professional teams.

The National Rugby League (LNR), at its general meeting in December 2009, adopted several measures, including a reduction from 50% to 40% of the quota of 'players from training channels' that will be imposed with effect from the next season among those in the Top 14. The new application of this reform will in fact be spread over three seasons. In fact, according to the new provisions voted on by the Governing Committee of the LNR, in the next season the clubs in the Top 14 will have to include at least 40% of players from training channels among their professional players, then 50% in 2011-2012, reaching 60% with effect from the 2012-2013 season. *'This adjustment of the reform mitigates the conditions of implementation and will enable it to be more consensual'*, explained the president of the LNR, Pierre-Yves Revol, referring to these proposals. It would seem that the lowering of the percentages and the spreading out of the measure over three years were initiated following submission of the case by club presidents to the European Commission. In a press release, the Parisian club, Metro Racing 92, states that the rule for 'young players from training channels' breaches Article 81 of the EC Treaty in so far as it 'creates (...) a major restriction on the freedom of employers and employees of rugby to make mutual choices'. The press release stresses particularly – and precisely – that this rule has the effect of re-introducing nationality quotas in contravention of the Bosman jurisprudence and that it thus constitutes an obstacle to the rules of free movement.

An order of 26 November 2009 establishes the conditions and procedures applicable to the establishment in France of sports agents who are nationals of a Member State of the European Community (NOR: SASV0929236A, French Official Journal, 12 December 2009).

3. THE MARITIME SECTOR

The Ministry of Ecology, Energy, Sustainable Development and Sea adopted an order dated 8 February 2010 relating to the recognition of vocational qualifications for the exercise of duties on board fishing vessels and outfitted vessels in marine farming by holders of qualifications obtained in Member States of the European Community other than France or in States party to the European Economic Area agreement (NOR: DEVT1003800A, French Official Journal, 19 February 2010). This order has the specific objective of implementing Law 2008-324 relating to the nationality of ships' crews.

Section 1 of the order concerns the methods of awarding a certificate of recognition of a qualification obtained in another Member State. Article 1 puts forward the principle of the recognition of qualifications obtained in another Member State for the practice of principal functions on fishing or outfitted vessels in marine farming flying the French flag. Article 2 states that a person wishing to obtain a certificate of recognition must file a request with the regional director of marine affairs, accompanied by the required documents listed in the appendix to the order. The text does however stipulate that the documents accompanying the request must be translated into French by a sworn translator. In practice, it is necessary to evaluate to what extent this requirement can represent an obstacle to the practice of free movement. This evaluation can specifically take into consideration the opportunities for finding sworn translators (how many per *département* or region?) as well as the financial burden that such an obligation can mean for the applicant. The order also indicates that, in the event of doubt about the authenticity of the documents submitted, 'the regional director of marine affairs to whom the case is submitted can check this with the competent authorities in the Member State that issued them'.

The director of maritime affairs has one month to issue a receipt confirming filing of the request of informing the applicant of any missing documents. The decision to accept or reject the request is communicated within a period of 3 months, extended by 1 month following receipt of the missing documents.

In application of Article 4 of the order,

'the regional director of maritime affairs issues a certificate of recognition in the following cases:

1. If the document awarded in another Member State of the European Community and submitted by the applicant was awarded by a competent authority of the Member State and marks successful completion of course of training prescribed for the professional practice of the activity in that State;
2. If the applicant can prove that he practised the activity professionally and on a full-time basis in the function for which practice requires a certificate of recognition for at least two years during the preceding ten years, in another Member State of the European Community that does not regulate the practice of the profession. In this case, the applicant must provide certification of his professional experience. He must also provide a certificate of competence issued by a competent authority of the Member State.

In cases where the document submitted has an exact equivalent in France, the certificate of recognition grants the same prerogatives in the practice of the activity as those conferred by the corresponding French document. However, if the document submitted does not have an exact equivalent in France, the certificate of recognition grants prerogatives identical to those that the document confers in the State that awarded it'.

Nonetheless, Article 5 stipulates that the director of maritime affairs can request that the person in question provide proof of his skills or completes the training of his choice, by

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means of an aptitude test or an adaptation course if, upon examination of the file, it is observed that:

- the training that led to the award of the qualification concerned subjects substantially different from those shown in the training references for the French qualification that provides access to the function the applicant wishes to practise on vessels flying the French flag;
- his professional experience has now allowed the person in question to acquire all the skills expected for access to the function he wishes to practise on vessels flying the French flag.

While the second condition enabling an aptitude test or a training course to be prescribed is relatively clear, it is however not certain that the adverb 'substantially' used in the first paragraph will be interpreted uniformly. Thus, and generally speaking, the application of these rules should be monitored in the regions in question in order to evaluate, on the one hand, their uniform application and, on the other hand, to determine to what extent their implementation observes the proportionality principle.

Section III of the order concerns the methods for checking linguistic knowledge in accordance with the applicable regulatory mechanism. Article 12 of the order indicates that the level of linguistic knowledge is established:

- by production of a French secondary or higher education qualification or of a qualification marking the successful completion of a training course of a minimum length of one year, taught in French;
- by presentation of the result of a French knowledge test at level A1;
- by an interview between the sailor and a competent person appointed for this purpose by the regional director of maritime affairs. The order stipulates that the interview allows for evaluation of the sailor's ability to communicate in French within a current and specific professional context. In particular, the understanding of safety and evacuation instructions on the vessel must be verified, even in cases where the working language on board the ship is not French.

Generally speaking, the question of access to the function of fishing vessel's captain is sensitive in France. While the legal mechanism is now in accordance with Community rules, its operational implementation has to be carefully monitored in order to avoid the practice constituting another obstacle to the exercise by ships' captains and seconds-in-command of their right to free movement.

4. RESEARCHERS/ARTISTS

5. ACCESS TO STUDY GRANTS

Circular 2009-101 of 17 August 2009 concerns *national study grants for higher secondary education*. It specifies that, in application of Article 12 of regulation 1612/68, the obligation of residence in France by the family of the grant applicant cannot be imposed on nationals of Member States of the European Union. The latter can in fact benefit from a higher education

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national study grant provided one of the relatives has – or has held – employment on French territory.

Concerning higher education more specifically, Circular 2009-1018 of 2 July 2009 deals with the methods of awarding higher education grants based on social criteria and merit-based aid and international mobility for the year 2009-2010. A student who is 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 can receive a higher education grant based on social criteria. Apart from the general conditions, the latter must then, in application of Articles 7 and 12 of Regulation 1612/68, fulfil one of the following conditions:

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

The condition of having the capacity of Community worker or of a child of a Community worker is not required for a student who can demonstrate a certain degree of integration into French society. The latter is assessed specifically based on the duration of residence (1 year minimum), the school education received in France or family ties in France. This condition is in any event not required if the student can prove 5 years of uninterrupted regular residence in France, in application of Article 24 of Directive 2004/38. This circular is an extension of Circular 2008-1013 of 12 June 2008, which concerned the year 2008-1009 and which drew the consequences from Community law and specifically the *Förster* judgment.

An order of 5 November 2009 more specifically establishes the conditions and the procedure for awarding grants and assistance given to students in higher education establishments under the auspices of the Minister responsible for culture. Chapter II concerns the conditions for the award of specific types of aid. ‘Annual emergency aid can be awarded specifically to a French student or national of a Member State of the European Union, of a State party to the EEA agreement or of the Swiss Confederation who is living alone on French territory and whose declared income of the family residing abroad does not enable an assessment of the right to a grant’.

Chapter VII

Application of Transitional Measures

1. TRANSITIONAL MEASURES IMPOSED ON EU-8 MEMBER STATES BY EU-15 MEMBER STATES AND THE SITUATIONS IN MALTA AND CYPRUS

As indicated in last year's report, an order of 24 June 2008 marks the end of the transitional measures for access to work for nationals of Member States that joined the European Union in May 2004. The order of 24 June 2008 relating to the issue, regardless of employment situation, of work permits to nationals of the States of the European Union subject to transitional measures, provides for withdrawal from the current system of nationals 'of Estonia, Latvia, Lithuania, Hungary, Poland, the Czech Republic, Slovakia and Slovenia', (NOR: IMIK0814571A).

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

As a reminder, since 21 January 2008, salaried Bulgarian and Romanian workers can gain access, via a simplified work permit procedure, to 150 trades (electrician or chef, for example) for which the list is fixed by an order. They are spread among 17 professional fields experiencing recruitment problems. In order to gain access to these trades, those interested must still hold a work permit but the employment situation is not relevant to them. It is still up to the prospective employer to request this permit. The order establishing the list of trades is as follows: Order of 18 January 2008 relating to the issue, regardless of the employment situation, of work permits to nationals of the States of the European Union subject to transitional measures, NOR: IMID0800327A.

Many legal decisions concern Romanians and Bulgarians. This is essentially jurisprudence relating to provisions concerning the threat to law and order and relating, consequently, to removal measures. While all of these decisions are not taken into account in the present chapter, to the extent that they relate to removal and thus to Chapter 1, some do however affect the system of transitional measures applicable to Romanian and Bulgarian nationals. The jurisprudence set forth below has the objective of demonstrating how these rules are interpreted.

The Administrative Court of Cergy-Pontoise ruled, in the case of Romanian nationals who were the object of a removal measure one month after their entry into France, that European nationals subject to the transition period must, in order to reside in France for a period of less than or equal to three months, 'be holders of an identity card or of a current passport and be able to prove, if so asked, that they will not become an unreasonable burden on the social security system' (*Administrative Court of Cergy-Pontoise, 8 January 2009, no. 0712530 and no. 0712678*). The reference to the need not to become an unreasonable burden on the social security system arises from Article R. 121-3 of the CESEDA. This indicates, 'In so far as they do not become an unreasonable burden on the social security system, specifically health insurance and social welfare, the nationals mentioned in the first paragraph of

Article L. 121-1 as well as their family members mentioned in Article L. 121-3 have the right to reside in France for a period of less than or equal to three months, without other conditions or formalities than those envisaged in Article R. 121-1 for entry into French territory'. Now, although this provision is aimed at not opening up the right to family allowances within the period of three months from entry into the territory (see, in this context, circular NOR: SASS091495C of 3 June 2009), it contains an additional condition that is not envisaged by Article 6 of Directive 2004/38/EC. The latter only makes the right of residence subject to the requirement of being in possession of an identity card or a current passport. Thus, the national authorities are not justified in refusing the residence of less than three months by a European citizen on the grounds of a lack of means of subsistence.

On the other hand, the Administrative Court of Douai ruled that a Prefect is justified in issuing a deportation order in respect of a national subject to the transition period who has practised a salaried activity without a work permit within the first three months of his entry into France (*Administrative Court of Appeal of Douai, 26 March 2009, no. 08DA01568*). In fact, Article R. 121-16 of the CESEDA indicates that, 'nationals of Member States of the European Union subject to transitional measures through their accession treaty who wish to practise a professional activity in France are obliged to apply for the issue of a residence permit as well as the work permit envisaged in Article L. 341-2 of the Labour Code in order to practise a salaried activity'. In addition, Article L. 511-1 of the CESEDA stipulates that, 'the competent administrative authority can, in a justified order, decide that a foreigner will be deported in the following cases: (...) 8. if (...) the foreigner has ignored the provisions of Article L. 341-4 of the Labour Code' (we would point out that, pursuant to Article L. 341-4 of the Labour Code, now codified in Article L. 5221-5 of this Code, a foreigner cannot practise a salaried professional activity in France without previously having obtained a work permit). As a result, the administrative judge concluded, 'that if Mr. X took advantage of the fact that the disputed deportation order had been issued with respect to him less than three months after the date of his entry into France, the aforementioned provisions of Article R. 121-3 of the Code for the Entry and Residence of Foreigners and the Right of Asylum would not have presented an obstacle to the pronouncement by the Prefectural authority of a deportation measure, legally taken on the basis of point 8 of Article L. 511-11 aforementioned of the Code for the Entry and Residence of Foreigners and the Right of Asylum, the scope of which extended to include Mr. X, taking into account the fact that he was working without the required permit and notwithstanding the circumstance that this permit had been requested'.

In the same sense, the Administrative Court of Lyons judged that the Prefect can refuse to issue a residence card and force a Bulgarian national to leave the territory if he cannot provide proof that he possesses resources other than those from a professional salaried activity practised regularly in France, in the absence of a work permit or a residence permit issued by the competent authorities (*Administrative Court of Appeal of Lyons, 23 September 2009, no. 091LY00720*).

In a different case, the Administrative Court of Appeal of Lyons regulated the power of the administration (*Administrative Court of Appeal of Lyons, 21 April 2009, no. 08LY01038*). A Romanian national had filed an application for a residence card with a view to practising a professional activity. Specifically, he argued that he had a right of residence in France in his capacity as non-worker. The administrative authority refused to issue him with a residence card and accompanied its decision by an obligation to leave French territory. The administrative court, when requested to cancel the decision, rejected the appeal. The Administrative

Court of Appeal of Lyons looked at the case differently. Taking as its basis Article L. 121-1 of the CESEDA, relating to the right of residence of citizens, the Administrative Court of Appeal of Lyons indicates, ‘that Mr. X, a national of the European Union whose situation was covered by the transitional measures envisaged by the accession treaty of Romania, was not obliged to hold a residence card in order to reside in France if he did not practise a professional activity’. In fact, Article L. 121-1 of the CESEDA recognises a right of residence for citizens who possess sufficient resources. Consequently, the Court of Appeal judges, ‘that as a result, in application of the aforementioned provisions of Article L. 511-1 of the CESEDA, the Prefect could not order his removal until he had observed that he had no right of residence whatsoever; that as a consequence the Prefect whose responsibility it was to investigate whether the person in question did not possess a right of residence on other grounds, could not legally issue a removal measure solely on the grounds of the refusal to issue a residence card previously opposed for the exercise of a professional activity’. In other words, Romanian and Bulgarian nationals are subject to the transition period for practising a professional activity but have a right of residence if they possess sufficient resources. Thus, a Romanian cannot be the subject of a removal measure solely on the grounds that he is applying for the issue of a residence card in order to practise a professional activity. It is up to the administrative authority to examine whether the person does not hold a right of residence on other grounds, such as non-worker for example.

Finally, the GISTI (Group Providing Information and Support to Immigrants) filed an appeal with the Council of State specifically for the annulment of the Circular of 20 December 2007 regarding work permits issued to nationals of the new Member States of the European Union during the transitional period and to nationals of third-party States, based on the lists of trades experiencing recruitment difficulties, in so far as it does not grant access by nationals of third-party States to the same trades as nationals of States of the European Union subject to the transitional measures. In a *judgment dated 23 October 2009*,³⁴ the Council of State stipulates that, ‘nationals of States of the European Union subject to transitional measures are covered by a specific legal system and are in a situation that is objectively different from that of other foreigners in terms of access to salaried work, specifically since the accession treaties of these countries envisage that, in order to gain access to their labour markets, the Member States must set up a preferential system for workers from these countries, with respect to nationals from third-party countries’. ‘Consequently, the disputed documents could legally establish lists of trades that can be exercised regardless of the employment situation, which are different in their content depending on whether the job-seeker is a national of a State of the European union subject to transitional measures or a national of a third-party State; in fact, this difference in treatment is the result of a difference in situation, which is the necessary consequence of the accession treaties and the provisions of internal law taken for their application; that it follows from this that these documents do not overlook either Articles L. 121-2 and L. 313-10 of the Code for the Entry and Residence of Foreigners and the Right of Asylum, nor the principle of equality’.

34 EC, 23 October 2009, 314 397.

Chapter VIII Miscellaneous

1. RELATIONSHIP BETWEEN REGULATION 1408/71-883/04 AND ARTICLE 45 TFEU AND REGULATION 1612/68

Legislation

The order of 2 February 2009 comprising a model convention governing the availability of an apprentice working in France for a host company established in another Member State envisages maintenance of the social security system of the country of origin pursuant to Regulation 1408/71 and French legislation. Article 7 of the model convention stipulates in fact that, ‘The apprentice enjoys health and industrial accident/occupational illness social security coverage on the grounds of his apprenticeship contract and for the term of application of the present convention. During the period of mobility completed in another Member State of the European Union, the apprentice maintains his capacity as a person subject to the social security system that covers him, under the conditions established by European legislation (specifically Regulation [EEC] no. 1408/71) and French legislation (specifically Article L. 761-1 of the Social Security Code for apprentices covered by the general system and Article L. 764-1 of the Rural Code for apprentices covered by the agricultural salaries system)’.

Prior to the departure of his apprentice, a French employer must request the relevant social security fund to issue form E101 (completed in duplicate), which confirms that the apprentice has retained his membership of a social security system. For illness and industrial accident/occupational illness, Community Regulation 1408/71 envisages the receipt of allowances in kind (access to care or reimbursement of care) according to the provisions of the current legislation in the country of secondment. The production of the European health insurance card (CEAM), issued by the social security fund that covers the apprentice, is proof that rights are available to him. The cash allowances are solely covered by French legislation. Simplified formalities are envisaged for secondments lasting less than or equal to three months. The obligations of the employer remain in place for the entire duration of the apprenticeship contract.

The issue here is not to impede the free movement of apprentices, while granting them maintenance of their rights to social security. This also prevents the apprentice from becoming a burden on the host Member State.

Jurisprudence

In a judgment dated 15 October 2009, 06MA01101, the Administrative Court of Appeal of Marseilles took cognisance of the question of social security contributions and the taxation of income earned abroad. The Court of Justice of the European Communities judged, in two decisions, 34/98 and 169/98 of 15 February 2000, on the one hand that the generalised social security contribution and the contribution to the reimbursement of the social debt, in so far as they affect salaries and have the objective of financing social security systems, fall within the scope of Community regulations governing the right to subject frontier workers to social security contributions and, on the other hand that, in applying the contribution to reimbursement of the social debt to income from activity and to the replacement of salaried and independent workers who reside in France but work in another Member State and who, pursuant

to Regulation no. 1408/71, are not subject to French social security legislation, the French Republic has failed in its obligations pursuant to Article 13 of the aforementioned Regulation, as well as Articles 48 and 52 of the treaty.

It emerges from the investigation that Mr. X, director of special operations of the company under Dutch law, Vermeer Verenigde Bedrijven, which does not have a permanent branch in France, is responsible for negotiating major contracts abroad and receives salaries from a Dutch source. It also emerges from the investigation that, while the business he manages does not require his permanent presence in the Netherlands, the earnings from his professional activity are, in accordance with the provisions of Article 13 of Regulation no. 1408/71, liable to social security contributions resulting from application of the social security legislation of the Netherlands, the only country in which he has the capacity of member of the national insurance scheme with regard to that country's legislation. Under these conditions, the petitioner could not be regarded as working in France although he was domiciled there from a tax point of view. In his capacity as Community national residing in France but working in another Member State, Mr. X is justified in maintaining that his earnings from income's being subject to the contribution to the reimbursement of the social debt results from ignorance of the rule that the legislation of a single Member State is to apply, set forth in Article 13 of Regulation no. 1408/71, in so far as these same earnings have already been liable to all the social security deductions in the Member State of employment, where the legislation is exclusively applicable pursuant to the said Article 13. In this respect, the circumstance that the contribution to the reimbursement of the social debt has the nature of a tax of whatever kind and not that of a social security contribution is irrelevant, within the meaning of the national constitutional and legislative provisions, in so far as it now affects salaries and has the objective of financing the French social security system, it falls within the scope of Community regulations governing the right to subject Community workers residing in France but working in another Member State to social security contributions.

Any Community national, regardless of his place of residence and nationality, who has made use of the right to the free movement of workers and who has practised a professional activity in a Member State other than the State of residence, falls within the scope of Article 39 of the Treaty. Thus, the situation of Mr. X, who is a salaried employee in the Netherlands although he resides in France, falls within the scope of Article 39 of the Treaty. All the provisions of the Treaty relating to the free movement of people, among which is the principle of the free movement of workers as defined by Article 39 of the EC Treaty, aim to facilitate the practice of professional activities of any kind by Community nationals on the territory of the Community and are opposed to measures that could disadvantage these nationals when they wish to practise an economic activity on the territory of another Member State. Now, it is up to the Member States to respect this freedom, including in matters that remain within their competence, as is the case for direct taxation.

Thus, making earnings from property subject to the disputed contributions in the case of a Community national practising a salaried activity in the Netherlands and residing in France who, pursuant to Regulation no. 1408/71, is not subject to French social security legislation and whose earnings have, as a result, already been the subject of social security deductions in his country of origin, is clearly of such a nature as to make his expatriation less attractive or to impede it. This type of taxation liability, which is the result of an accumulation of applicable legislation and reveals inequality of treatment among Community nationals residing in France between those who work in another Member State and contribute, including from earnings on their property, to financing the social security system of this State, and residents

who are exclusively obliged to contribute, from these earnings, to the social security system of the State of residence, now has the effect of impinging on the free movement of Community workers on the territory of another Member State. Mr. X is, therefore, justified in maintaining that making his life annuities subject to the disputed contributions in return for payment, from a Dutch source, is in contravention of the principle of the free movement of workers created by Article 39 of the EC Treaty.

This judgment was commented on by Laurent Marcovici, First Adviser at the Administrative Court of Appeal of Marseilles.³⁵ ‘The Court has noted the incompatibility of the double taxation of earnings from activity originating in the Netherlands and, consequently, the ignorance of the 1971 Regulation’. The judges thus conform to the judgment of the ECJ of 2000³⁶. ‘But the Court goes further. In fact, it also satisfies the taxpayer in terms of earnings that are not within the material field of the 1971 Regulation in so far as this concerned capital earnings, not earnings from employment. It thus judges that, ‘making his life annuities subject to the disputed contributions in return for payment, from a Dutch source, is in contravention of the principle of the free movement of workers created by Article 39 of the EC Treaty’. The reasoning followed involves observing that the earnings of the taxpayer have been subject to social security deductions in the country of origin and that the latter is thus made to finance two social security systems, that of the country of origin and that of the country of residence. The result is a breach of equality between taxpayers who only receive earnings of French origin and who therefore only finance the French social security systems, and taxpayers who receive earnings of foreign origin who contribute to financing two social security systems. This breach of equality constitutes an obstacle to the free movement of workers.

Certainly, in this hypothesis, the rules should not automatically be imposed on the basis of the treaty, while specific texts govern the matter and did not intend to apply these rules to the matter in hand. In other words, the 1971 regulation applies to earnings from activity and prohibits the application of double social taxation for these earnings. However, it does not apply to earnings from capital. Imposing such a rule on earnings from capital therefore goes beyond the intention of the Community legislator in relying on a constructive interpretation of the Treaty. In fact, this comes to down transferring to the judge the normative power of the Community decision-making bodies. Here too, however, the path is open via the ECJ. It recognises, in fact, an attack on the freedom of establishment in the hypothesis where no discrimination exists between nationals and foreigners, who are the subject of identical treatment.’

35 AJDA 2010, p. 17, ‘Social security contributions and taxation of income earned abroad’.

36 ECJ, 15 February 2000, Commission versus France, case C-169/98.

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

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

3.1 Integration measures

3.2 Immigration policies for third-country nationals and the Union preference principle

- *Circular IMIM0900054C of 5 February 2009 relating to the conditions of admission for residence of foreigners who are victims of human trafficking or procurement, cooperating with the administrative or judicial authorities*

It does not at first sight have the authority to apply to citizens of the European Union, according to the provisions of Article L. 316-1 of the CESEDA. However, point 4.2 of this circular does envisage the situation of nationals of Member States of the European Union subject to a transitional system. Bulgarian and Romanian nationals can therefore be admitted for residence in the capacity as victims of trafficking and those who then wish to practise a salaried activity will be given a residence card bearing the words, ‘all professional activities’, without prior application for validation of the activity by the departmental labour directorate. The justification for such special protection only for Bulgarian and Romanian nationals is not evident in the circular. We do not therefore understand why nationals of other Member States could not also be victims of human trafficking and then benefit from this special system, specifically those who practise no professional activity and do not have sufficient resources or health insurance. However, these latter three conditions are rarely fulfilled by a person who is a victim of human trafficking.

- *Concerning Community preference: Article 37 of Directive 2004/38*

In a judgment of 20 October 2009, the Administrative Court of Lyons³⁷ stipulates that Community nationals do not have to be less protected than other foreigners. They can therefore refer to provisions of the general system of alien law if these are more favourable to them than the provisions relating to Community nationals. The court indicates, ‘that, on the one hand, Article 37 aforementioned of Directive 2004/38/EC authorises, but without forcing them, Member States to maintain or to take, on behalf of citizens of the Union and their families, provisions that are more favourable than those intended by the Directive; that, on the other hand, no text in the Code for the Entry and Residence of Foreigners and the Right of Asylum allows for the exclusion of Community nationals who have no further right of residence based on Community law from the scope of the system of common law applicable in the matter of the residence of foreigners, while moreover no legislative text or general principle of law implies that Community nationals be subject to a less favourable system than non-Community nationals’. As a consequence, the court believes, ‘that Mr. Covaci can

³⁷ Administrative Court of Lyons, 20 October 2009, no. 0904808, Covaci, quoted in AJDA 2010, p. 574.

refer to the articles of the Code for the Entry and Residence of Foreigners and the Right of Asylum, such as Article L. 313-11-11 aforementioned, applicable to non-Community nationals, although he does not fulfil the conditions of Article L. 121-1 aforementioned of the Code, relating only to Community nationals; that thus, Mr. Covaci is justified in maintaining that the Prefect committed an error in law in refusing to apply to him, as a Community national, more favourable provisions of the Code applicable to non-Community nationals; that, consequently, and without the need to proceed with a reference for a preliminary ruling, the disputed decision of 9 January 2009 is illegal and must be annulled’.

Now, the Council of State had made an alternative application of Article 37 of the Directive in a *judgment of 12 January 2009*.³⁸ Considering that Article 37 of Directive 2004/38/EC of 29 April 2004 authorises, but does not force, the Member States to maintain or to take, on behalf of citizens of the Union and their family members, provisions that are more favourable than those intended by the Directive; that the means of the request for appeal of Mr. and Ms. B, including that drawn from the infringement of the principle of equality, are entirely based on an interpretation of this Directive implying, according to them, the obligation to allow Community nationals to benefit from a provision applicable to non-Community nationals, since it would be more favourable; that since this interpretation is obviously incorrect, the plaintiffs are not in any event justified in requesting annulment of the order of 19 December 2008 of the judge sitting in chambers of the Administrative Court of Lyons rejecting their request; that, consequently, their request for appeal can only be rejected in application of Article L. 522-3 of the Code of Administrative Justice.

- *Concerning an asylum request from a citizen of the European Union*

In two judgments of 30 December 2009³⁹, the Council of State was informed of a request for political asylum made by the member of a family of four Romanians of Romanian origin which received a positive response from the Refugee Appeals Board (CRR) on 15 February 2007, in other words one and a half months after Romania’s accession to the Union. As of the date of the board’s decision, Romania had become a member of the European Union on 1 January 2007. The Council of State recalls that, ‘pursuant to the single Article of protocol no. 29 appended to the Treaty creating the European Community, applicable to Romania pursuant to the treaty of accession to the Union of this country, ‘in view of the level of protection of fundamental rights and fundamental freedoms in the Member States of the European Union, these are regarded as certain countries of origin with respect to one another for all legal and practical questions linked to matters of asylum’; that this article consequently envisages that a request for asylum made by a national of a Member State cannot be taken into consideration or declared inadmissible for investigation by another Member State except in four exhaustively listed cases, relating to failure to respect the European Convention on the protection of human rights and fundamental freedoms by the State of origin of the applicant, the implementation of the prevention procedure or the sanction procedure concerning an infringement of the fundamental rights guaranteed by the Treaty creating the European Union or the handling of the application based on the presumption that it is obviously without grounds; that in refraining from investigating whether these conditions had been met, if appropriate, the Refugee Appeals Board has committed an error in law’. Thus, the adminis-

³⁸ EC, 12 January 2009, 323 854 and 323 855, Vaduva and others.

³⁹ EC, 30 December 2009, 305226, OFPRA versus Mr. Covaciu, Commentary by E. Aubin, AJDA 2010, p. 796; EC 30 December 2009, 305227, OFPRA versus Miss Mirela A.

trative judges make strict application of the ‘Aznar’ Protocol and confirm the presumption of democratic guarantee offered by the countries of the European Union, based solely on the fact of their membership.

3.3 *Return of nationals to new EU Member States*

Some jurisprudences do not refer to the French provisions that are specific to citizens of the Union. Thus, in a judgment of the *Administrative Court of Appeal of Versailles dated 28 April 2009*,⁴⁰ the judges will confirm the annulment of a deportation order issued with respect to a Romanian national by referring uniquely to the common law legislation concerning alien law. A judgment by the same *Court, dated 15 July 2009*, on the other hand, is aimed at the provisions of Directive 2004/38 and the French transposition provisions, in order to rule on similar facts that the deportation order was illegal.⁴¹

Logically, the jurisprudence admits that a national of the European Union subject to the transitional period can move within France for 3 months holding only his passport or identity card (*Administrative Court of Cergy-Pontoise, 8 January 2009, no. 0712530, Balan and 0712678, Vasile*).

The judges fairly easily apply the general transposition measures of Directive 2004/38, without referring to the transitional measures, even when these had been referred to by the Prefect. Thus, in a judgment *dated 1 October 2009, 0904292, Covaci, the Administrative Court of Rennes* annulled a removal measure because of the absence of notification of the deadline given to the person in question to leave the territory of the host State, without dealing with the application of transitional measures.

Equally, in a judgment of *1 October 2009, no. 0905913, Ali, the Administrative Court of Lyons* annulled the deportation order of a Bulgarian passed within 3 months of his entry and without respect for the minimum deadline of one month in which to leave the territory, even though the plaintiff was likely to be the subject of such a measure with regard to French law relating to transitional measures.

In a judgment dated *26 May 2009, 0902391, Hadzhiev, the Administrative Court of Rennes* accepted that the Prefect of Finistère could order the deportation of a Bulgarian national

40 Administrative Court of Appeal of Versailles, 28 April 2009, 08VE02978 and 08VE02979, Prefect of Val d’Oise versus Mihai: ‘it is established that Ms. Mihai, of Romanian nationality, had entered France less than 3 months before the date of the disputed decision and that she was illegally occupying, incidentally together with other nationals of the same nationality, a site located at Montmagny belonging to the green spaces agency of the Île-de-France Region. [...] This illegal occupation, in the absence of special circumstances and even though the Prefect (...) reported it in his petition for violations of public health, was not in itself sufficient to constitute the existence of a threat to law and order’.

41 Administrative Court of Appeal of Versailles, 15 July 2009, 09VE01053, Marin: ‘in accordance with the objectives established by this Directive and, specifically, Article 27, the behaviour of a national of the European Union cannot, in application of the provisions of Article L. 121-4 and those of point 8 of II of Article L. 511-1 of the Code for the Entry and Residence of Foreigners and the Right of Asylum, be regarded as posing a threat to law and order unless they represent a genuine, present and sufficiently serious threat to the fundamental interests of society; Considering that it emerges from the documents of the file that Ms. X, of Romanian nationality, had, by her own declaration, been in France for less than three months on the date of the disputed decision; that while she was illegally occupying a site located in Sarcelles at the intersection of the RN 16 and the RD 316, this occupation, in the absence of special circumstances, was not in itself sufficient to constitute the existence of a threat to law and order within the meaning of the aforementioned provisions; that, as a result, the disputed order of 4 March 2008 ordering the deportation of Ms. X is illegal’.

who had been present on the national territory for less than three months and who was practising a professional activity there without being the holder of prior authorisation to work. The disputed order mentions that the person in question, who entered into France in March 2009, has been providing a service since the beginning of the month of April 2009 without this activity's having been the subject of a compulsory prior declaration in accordance with the provisions of Articles L. 5221-1 and R. 5221-1 of the Labour Code – of which only the provisions of point 2 of this article, concerning the situation of foreign nationals of a Member State of the European Union during the period of application of the transitional measures relating to the free movement of workers, are authorised to apply. This situation falls precisely within the scope of Article 511-1 II point 8 of the Code for the Entry and Residence of Foreigners and the Right of Asylum.

4. *National organisations or non-judicial bodies to which complaints for violation of Community law can be addressed*

5. *Seminars, reports and articles*

R. Pellet, 'Assurance maladie et territoire', *Revue de droit sanitaire et social* 2009, p. 38.