

**REPORT**  
**on the Free Movement of Workers**  
**in Luxembourg in 2010-2011**

Rapporteur: François Moysse  
Avocat à la Cour

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## **Introduction**

There are two trends to be noted concerning the period covered for this report.

The first one relates to financial assistance to students. The Government has decided to change substantially the way how to allocate study grants. Already during the parliamentary procedure, claims of discrimination especially against frontier workers were heard. Despite those critics, the Government of Luxembourg decided to go forward and Parliament voted a new bill, which became the law of 26 July 2010 on state aid for higher education, which has significantly amended the former Law of 22 June 2000.

The new legislation seems to extend the beneficiaries of grants, but actually develops a main criterion to award a grant: a condition of residence in the territory of Luxembourg, which restricts the beneficiaries. Many voices are claiming that the Law discriminates persons on the ground of nationality. The European Commission is challenging the position of the Luxembourg Government. The Government maintains that the residence condition is not discriminatory and it is likely that the Court of Justice of the European Union will have to take a judgment on this issue.

The second one is the amelioration of the access of non-Luxembourgers to the public sector. It can be noted that formally at least, the number of open positions for other European Union citizens is growing. The Luxembourg nationality is less required, as the law that amended the general statute of civil servants requires.

However in reality there are problems that are surfacing slowly. The language requirement, namely the knowledge of the three administrative languages, is more and more required. While in most positions there is a general understanding that this requirement is adequate to the Luxembourg society's multilingual environment, in some cases remains the question on the reason of requesting knowledge of these 3 languages altogether for some positions in the administration.

Moreover, it appears that the level required for different positions was significantly strengthened. This level seems to be very difficult to attain, but for natives of Luxembourg who went through the classical Luxembourg school curriculum and thus for many foreign persons who master some of the requested languages fairly well and others with more difficulties.

Besides these trends, one can note that there has been a lot of talk about Roma people in the newspapers in the past few months. A direct relationship to free movement is the issue of Roma Romanian citizens who seem to have a hard time in being allowed to stay on Luxembourg territory, even on a camping ground for a longer period.

Also, even if there is only an indirect link to free movement of workers, there has been a significant increase in asylum seekers' numbers, many of them being Roma people from Serbia. The Government has amended the 2006 law on asylum to be able to facilitate the negative decisions against those Roma asylum seekers, for the reason that they are not threatened with persecution in their home country.

## Chapter I: The worker: Entry, residence, departure and remedies

### 1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

In terms of legislation, nothing has changed since the law of 29 August 2008 on free movement of persons and immigration<sup>1</sup>. The law has not been amended since for the main articles and particularly for the articles concerning free movement for European citizens.

The law only has been amended by the law of 29 May 2009 creating and organising a centre for retaining foreigners. This change only relates to third-country foreigners who are on the territory without proper immigration documents, so that there is no impact on free movement of workers in the EU.

As far as the key provisions of Directive 2004/38 are concerned, i.e. articles 7(1a); 7 (3 a-d); 8(3a); 14 (4 a-b), 17, 24 (2), they have not changed.

*Art. 7(1a)* – Article 6 (1)1 of the free movement and immigration law provides that EU citizens can stay in Luxembourg for over three months if they are salaried workers or self-employed.

*Art. 7(3 a-d)* is transposed almost *verbatim* by the law which provides that they retain their status as worker after having been a salaried worker or self-employed, if one of the following occurs:

1. They are temporarily unable to work due to illness or accident;
2. They are involuntarily unemployed after having worked for over one year and have registered with the Employment Administration (*l'Administration de l'Emploi*) (ADEM) as a jobseeker; or
3. They are enrolled in some form of job training/continuing education related to their former job, unless they are involuntarily unemployed.

They retain their status as worker for six months if they are involuntarily unemployed and registered with the ADEM as a jobseeker either (1) at the end of their fixed-term contract of less than one year, or (2) when their involuntary unemployment occurred during the first 12 months after they entered into their work contract.<sup>2</sup>

*Art. 8(3a)* – This provision is fully transposed by the law and corresponding Grand-Ducal Regulation, providing that EU citizens wishing to stay in Luxembourg for over three months must obtain a registration certificate from the local government administration of their place of residence within three months of arrival in Luxembourg.<sup>3</sup>

The regulation provides that they must take their valid national identification card or passport to the local government of their place of residence. Depending on their situation, they must also present documentation to prove they are either employed, have sufficient

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1 Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration.

2 Art. 7(1)-(2).

3 Art. 8.

financial resources to support themselves or are students. Proof of employment is shown by presenting a work contract, a letter of intent to hire or proof of self-employment.<sup>4</sup>

*Art. 14(4 a-b)* – This provision is fully transposed by the law: EU citizens and their family members cannot be removed from the country when the EU citizens work in Luxembourg or if the EU citizens entered the country to seek employment for a period not to exceed six months or for a longer period if the EU citizens can provide proof that they continue to seek employment and that they have a real chance of being hired.

Residence permits can be denied to, or revoked from, EU citizens and their family members only for reasons of public order, security or health according to articles 26 and 27 (1).

*Art. 17* – Article 10 of the law provides that permanent residence status is granted to EU citizens if they have resided in Luxembourg for less than five continuous years when:

1. salaried workers or self-employed individuals stop working but have attained the age of eligibility to receive their pension (*pension de vieillesse*), or workers who are given early retirement, if they have held their job for at least the last 12 months and reside continuously in Luxembourg for over three years;
2. salaried workers or self-employed individuals stop working after permanent work disability, if they have resided continuously in the country for over two years; however, if the disability was due to a work-related accident or illness that entitled the person to a full or partial benefit, no length of stay is required; or
3. workers, who after three continuous years of employment and residence in the country, become self-employed in another EU Member State while keeping their domicile in the Grand Duchy of Luxembourg or they return, in principle, every day or at least once per week.<sup>5</sup>

EU citizens acquiring permanent residence status receive a document certifying that status as determined by the Formalities Regulation, which foreshows how to file such a request.

Article 17(3) of the Directive is fully transposed by Article 20(2) of the law which provides that whatever their citizenship, family members of salaried or self-employed workers who reside with the workers in Luxembourg, have the right to permanent residence if the workers themselves have obtained the right to permanent residence in Luxembourg.<sup>6</sup>

Article 17(4) of the Directive is fully transposed by Article 20(3) of the immigration law which provides that if an EU citizen who is a salaried or self-employed worker in Luxembourg dies before that EU citizen acquires permanent resident status, the family members residing with that EU citizen acquire permanent resident status if one of the following requirements is met:

1. On the date of the worker's death, that worker resided for two continuous years in Luxembourg;
2. The death is due to a work-related accident or illness; or
3. The surviving spouse lost Luxembourg citizenship after marrying the worker.<sup>7</sup>

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4 Règlement grand-ducal du 5 septembre 2008 portant exécution de certaines dispositions relatives aux formalités prévues par la loi du la loi du 29 août 2008 sur la libre circulation des personnes et de l'immigration, Mémorial A-No 138, 10 September 2008, at p. 2058.

5 Art. 10(1).

6 Art. 20(2).

7 Art. 20(3).

*Art. 24(2)* – The law provides that EU citizens and their family members with proper identification, valid passport and required visa, have the right to a stay of up to three months in Luxembourg as long as they do not become an unreasonable burden on the social welfare system. They have the right to stay for longer than three months as long as they meet the requirements applicable to EU citizens for stays exceeding three months, and those applicable to family members who are themselves EU citizens. Their resorting to the social welfare system does not automatically lead to removal measures from Luxembourg.<sup>8</sup>

Article 6 of the law provides that EU citizens can stay in Luxembourg for over three months if they are salaried workers or self-employed. Additionally, EU citizens can stay in Luxembourg for over three months if they are salaried workers or self-employed, or can demonstrate that they have the financial resources sufficient for themselves and their family members not to become a burden to Luxembourg's social welfare system, and adequate health insurance. Those citizens can also stay longer than three months if they are registered in qualifying public or private educational institutions for study, job training, provided they provide evidence of sufficient financial resources for themselves and their families.

## 2. SITUATION OF JOBSEEKERS

The situation can be recapitulated as such. The Directive is correctly transposed by Articles 5 and 8 of the immigration law and the corresponding Grand-Ducal regulation. All EU citizens holding a valid identification card or passport can freely enter and stay in Luxembourg for up to three months, whatever the purpose of their visit. They can also freely exit the country and enter another EU Member State, which includes jobseekers.

EU citizens wishing to stay in Luxembourg for over three months must obtain a registration certificate from the municipality within three months of arrival in Luxembourg. Depending on their situation, they must also present documentation to prove they are either employed, have sufficient financial resources to support themselves or are students. Proof of employment is shown by presenting a work contract, a letter of intent to hire or proof of self-employment.<sup>9</sup>

Article 13(1) of the immigration law has transposed Article 6(2) of the Directive. According to these provisions, third-country national family members who accompany or join an EU citizen have the right to enter and stay in Luxembourg for up to three months if they have a valid passport and, as necessary, the proper visa for entry into the country.<sup>10</sup>

Article 26 of the immigration law has transposed Article 14(4) of the Directive. Thus EU citizens and their family members cannot be removed from the country when the EU citizens work in Luxembourg or if the EU citizens entered the country to seek employment for a period not exceeding six months or for a longer period if the EU citizens can provide proof that they continue to seek employment and that they have a real chance of being hired.

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<sup>8</sup> Art. 24.

<sup>9</sup> Règlement grand-ducal du 5 septembre 2008 portant exécution de certaines dispositions relatives aux formalités prévues par la loi du la loi du 29 août 2008 sur la libre circulation des personnes et de l'immigration, Mémorial A-No 138, 10 September 2008, p. 2058.

<sup>10</sup> Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Art. 13(1), and Projet de loi No. 5802 sur la libre circulation des personnes et l'immigration, Tableaux de correspondance [bill on the free movement of people and immigration, transposed directive correspondence tables], p. 53.

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Article 26's legislative history commentary expressly cites the *Antonissen* decision for the proposition that a more favourable treatment of jobseekers was established by the Directive in application of the jurisprudence of the Court of Justice of the European Union.<sup>11</sup>

A judgement of 4 May 2011 from the Constitutional Court of Luxembourg must be commented in this section.<sup>12</sup>

A company had asked to the Director of the Employment Office (ADEM), the reimbursement of social security benefits for workers aged over 45 years, when they are registered as job seekers for at least one month. The Director refused to grant this payment, for the reason that the person hired, despite being aged 52, had not been registered as a job seeker with the administration.

The company fought this refusal in the administrative courts and the appeal court submitted a preliminary question to the Constitutional Court. It asked whether §541-1 (1) of the Labour Code was compatible with article 10bis of the Constitution, which states that 'Luxembourgers are equal before the law', as job seekers which are registered with foreign Employment administrations are excluded from such benefits.

In this case the hired lady was a Luxembourger but was living in Germany and registered there as a job seeker. The Court stated that the two situations are comparable. It referred to the parliamentary documents, according to which the goal of this law is to enhance the chances of older workers who are long-term unemployed workers by overcoming the financial reticence of employers to hire them.

The Court found that the law has created a distinction between a job seekers registered in Luxembourg and one registered abroad, but that the distinction is justified, adequate and proportionate. However the judges do not explain how they come to such a conclusion.

### 3. OTHER ISSUES OF CONCERN

We could not identify any such particular issue.

### 4. FREE MOVEMENT OF ROMA WORKERS

The issue of Roma people, especially in light of what happened in France, with the Government's decision to press and act for the return of Roma people from Romania in their country of residence, brought attention in the press to this topic in Luxembourg as well.

A parliamentary question was submitted on 27 September 2010 by a member of the Chamber of Deputies<sup>13</sup> on the situation of Roma established on a camping ground. The press related a story according to which around 20 Roma people asked for the permission to stay there for 'some time'. The Deputy asked several questions on what the conditions for Roma are to be able to stay in Luxembourg, especially for Romanian and Bulgarian citizens.

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11 Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Art. 26, and Projet de loi No. 5802 sur la libre circulation des personnes et l'immigration, Tableaux de correspondance [bill on the free movement of people and immigration, transposed directive correspondence tables], p. 53, and p. 65 of the bill commenting on Art. 26.

12 Arrêt de la Cour constitutionnelle, 4 mai 2011, n°0064, Mémorial A, p.1572

13 Gast Giberyen, Question 0923

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In an answer dated 9 November 2010, Minister of Labour Nicolas Schmit stated that the government cannot confirm such news (!?). The only condition for any European citizen to circulate freely for three months is to have an ID or passport, even to live on a camping ground. Only after 3 months, some proof of means of living may be asked for. For Romanian and Bulgarian citizens a transitory regime allows for an authorization to access the labour market. Finally the Minister stated that he had informed the competent Parliamentary commission of the aspect of free movement relating to Roma people. This statement is obviously very vague.

A related issue can be reported concerning the increasing number of applicants for asylum from Serbia and Macedonia, especially since December 2009 when the visa requirement was abolished for travellers from these countries. Approximately 75% of those travellers are Roma people.

It has been observed, and media reported in May 2011, that an important number of Roma people apply for asylum in Luxembourg in order to profit from social benefits and health care before being sent back to their home country. Indeed, Serbia and Macedonia are classified as 'safe' countries, so that an application for asylum hardly has a chance to be accepted.

As an answer to such behaviour, the Chamber of Deputies has adopted the Law of 19 May 2011 modifying the modified law of 5 May 2006 on asylum right. This law introduces three new legal ways to contest a decision refusing the international protection within an 'accelerated procedure'. Immigration Minister Nicolas Schmit hopes, by reducing the duration of procedures and subsequently by reducing financial assistance as well as the number of applications accepted, to significantly cut down the number of applicants for asylum.

## Chapter II: Members of the family

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

There is nothing substantive to be reported on this issue.

### 2. ENTRY AND RESIDENCE RIGHTS

#### *Entry conditions*

One case concerned the refusal to deliver a tourist visa to a third country national, ascendant of an EU citizen residing in the Grand-Duchy. The Passport, Visa and Legislation Office considered that the son's support to his mother was insufficient, as he and his wife only had at their disposal an insertion allowance of 1.500€/month.

In this respect, the Ombudsman reminded the *Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC* which states that 'as the right to be issued with an entry visa is derived from the family link with the EU citizen, Member States may require only the presentation of a valid passport and evidence of the family link (and also dependency, serious health grounds, durability of partnerships, where applicable). No additional documents, such as a proof of accommodation, sufficient resources, an invitation letter or return ticket, may be requested'<sup>14</sup>.

Since the applicant is a family member of an EU citizen and complies with all above mentioned requirements, the Minister, on request of the Ombudsman to re-examine the refusal in the light of point 2.2.1 of the Communication, accepted to do so and the Passport, Visa and Legislation Office finally issued the entry visa.

#### *Marriage*

The Ombudsman also received a complaint of a third country national wanting to marry his French fiancée residing in Luxembourg. Because of the petitioner's irregular situation, the celebration of the marriage was refused.

Having encountered this kind of difficulty several times already, the Ombudsman did not fail to remind the Minister of Justice that the general refusal to proceed to the marriage where one of the spouses is a third country national not legally residing in Luxembourg is contrary to article 12 of the European Convention of Human Rights.

The Minister of Justice shares the Ombudsman's point of view according to which 'the right to marriage is independent from the residence status, i.e. the marriage must be celebrated by the registrar of Births, Marriages and Deaths (*officier de l'état civil*) when the future spouses comply with all requirements and must produce all required evidence of the *Code civil*.

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<sup>14</sup> Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, point 2.2.1

However, the mayor of the concerned municipal authority explained that the refusal was linked to the fact that notice of marriage could not be given, but because the claimant's address could not be verified rather than because of his irregular residence.

*In fine*, the difficulty concerned the question of the documents that a third country national in an irregular situation must provide for the marriage with a Luxembourg or other Member State national.

The Minister of Justice considers that the future spouses have to comply with all requirements and must produce all required evidence of the *Code civil* as well as all proper evidence to prove that the requirements of the *Code civil* are met. Since the *Code civil* does not make of the existence of a residence permit a condition to marriage, the illegal residence on the territory cannot be regarded as a valid motive not to celebrate the marriage in the Grand-Duchy.

However, articles 63 and 166 to 168 of the *Code civil* provide for the registrar of Births, Marriages and Deaths to control the residence of the future spouses in respect of giving notice of the marriage.

Therefore, the form of evidence in respect of giving notice of marriage has to be clarified, by legislative means if need be.

#### *Sufficient resources*

The administrative court (*tribunal administratif*) had to deal with the case of an EU citizen whose residence permit was revoked because of the lack of sufficient financial resources for her and her son, leading to her being considered as an unreasonable burden on the social assistance system.

This decision was based on the fact that during a period of 30 months from arrival, she only took up employment for a mere 5 months, being granted the basic social assistance benefit (*RMG – Revenu minimum garanti*) for the other 25 months.

Contesting the revocation of her residence permit, she argued that since the day the revocation decision was taken, she had made serious efforts to take up employment and that she was currently registered with the employment authority (*Administration de l'Emploi*). She also alleged that she had renounced to the basic social assistance benefit, thus no longer being a burden on the social assistance system.

The Court first held that only the legal and factual situation prior to taking the revocation decision can be taken into account in assessing the legality of the decision, whatever the subsequent situation may be.

With respect to article 24 of the law of 29 August 2008, the Court then considered that an EU citizen who does not fulfil the resources condition and who becomes an unreasonable burden can be subject to revocation of his residence permit. For the Court, to determine whether a stranger is an unreasonable burden on the social assistance system, amount and duration of social benefits as well as the length of stay have to be taken into account.

Finally, the revocation decision could not be judged as being unlawful.<sup>15</sup>

#### *Public policy and public security*

In a case concerning an EU citizen currently serving a 2 years sentence, the administrative court (*tribunal administratif*) had to decide whether the authorities could validly refuse his

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<sup>15</sup> Trib. admin. 26 janvier 2011, n°26951

residence and entry to the territory for 3 years on the ground of never having resided regularly in Luxembourg and of numerous previous criminal convictions.

As a defence, the claimant stated that refusal of residence and entry to the territory on the sole ground of previous criminal convictions would be contrary to article 27 of the law. Indeed, this article clearly provides that previous criminal convictions can be taken into account, but they must be the expression of personal conduct constituting a present threat to public order and security.

To prove that he would not be such a threat to society, the claimant also alleged that he had always been working in Luxembourg and that after having finished serving his sentence, his former employer was ready to employ him again, as well as family obligations.

However, the administrative court held that his repeated infringements on drugs and narcotics legislation as well as the fact that he resumed dealing drugs right after being released from prison were sufficient to motivate the contested refusal. It was also held that the attacked decision was proportionate to the claimant's criminal conduct.<sup>16</sup>

### 3. IMPLICATIONS OF THE *METOCK* JUDGMENT

In the *Metock* judgment,<sup>17</sup> the ECJ ruled that the Directive is in fact not conditional on the prior legal residence of third-country family members, and it went even further in stating that it was irrelevant 'when and where their marriage took place and [...] how the national of a non-member country entered the host Member State'. The central importance of *Metock* is thus twofold: first, the ECJ's ruling establishes that EU laws preclude stricter immigration standards applied on a national level and, second, the Court further extends the rights of third-country family members.

A similar case was submitted to the Ombudsman concerning a Luxembourg national who entered into a partnership with a third country national under the law of 9 July 2004 on legal effects of certain partnerships. The latter was however refused a residence permit. The partnership was concluded within 3 months of the third country national's arrival and then registered with the municipality (*répertoire civil*).

The Immigration Authority (*direction de l'Immigration*) however considered that article 4, point 4 of the law of 9 July 2004 must be interpreted as requiring possession of one of the authorisations contained in the law of 29 August 2008 to be able to reside legally in Luxembourg and to subscribe a partnership declaration.

Indeed, the aforementioned provision states that '*to be able to declare [a partnership], the parties must [...] reside legally on the Luxembourg territory*'.

In the Ombudsman's opinion, a third country citizen who complies with the requirements contained in article 34 of the 2008 law does legally reside on our territory, so that this person should be able to conclude a partnership under the 2004 law.

The more general question here was to decide whether a third country citizen in possession of a valid passport can conclude a partnership within the period of validity of the visa or within 3 months of his arrival where such visa is not required.

<sup>16</sup> Trib. admin. 7 février 2011, n°27033

<sup>17</sup> CJUE 25 juillet 2008, *Blaise, Baheten, Metock* e.a.

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Article 12 of the 2008 law states that the partner with whom the EU citizen has concluded a registered partnership under the 2004 law is considered as a family member and that family members of a Luxembourg citizen, if EU citizen or third country national, are treated as family members of a EU citizen.

Article 15 of the same law provides that the third country citizen, who has become a family member of an EU citizen with whom he has concluded a registered partnership, has the right to obtain a residence permit.

The Ombudsman thus recommended that the claimant should be granted the requested residence permit.

### **4. ABUSE OF RIGHTS, I.E. MARRIAGES OF CONVENIENCE AND FRAUD**

Nothing particular to report.

### **5. ACCESS TO WORK**

Nothing particular to report.

### **6. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS**

Their situation is closely linked to the situation of the jobseeker's situation that they are moving with. Thus, they will only be able to reside and get social benefits in the host Member State as long as the jobseeker is admitted as such. No particular cases relating to this issue have come to our attention.

## Chapter III: Access to employment

### 1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

#### *1.1 Equal treatment in access to employment (e.g. assistance of employment agencies)*

Luxembourg, as well as several other Member States, has recently been censured by the ECJ, on 24 May 2011<sup>18</sup>, for reserving the access to the profession of notary to nationals only, on request of the Commission. It was held that reserving this profession to nationals only despite the fact that it does not participate in the exercise of public authority is contrary to the treaties.

As a consequence, access to the profession of notary must be modified so as to take into account this judgement. In order to guaranty a satisfactory level of a notary's service, it seems possible to set up language requirements which a candidate for notary must satisfy.

#### *1.2 Language requirements*

Language requirements in the private sector are asked according to the needs of the job profile. Most jobs request knowledge of French and English. The knowledge of Luxembourg language is always a plus, but is not requested for every job. German language is the third used language. Especially in very technical jobs, the local language requirement is less of an importance.

For example, the banking sector needs very specialised employees, who are mostly recruited abroad, far beyond the greater region around Luxembourg.

Sometimes, advertisements for jobs appear in Luxemburgish. This means automatically that the applicants must know the language. When reading such an ad, it could be expected that the reason for the use of this language is that the knowledge of Luxemburgish is a prerequisite for any candidate, that the use of this language is a main feature of the job. It is however difficult to control this reality which indeed shows that many jobs request applicants to be fluent in Luxemburgish when dealing with people from Luxembourg, especially elder people.

### 2. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

The situation has significantly improved since the coming into application on 1 January 2010 of the Law of 18 December 2009 which amended the general status of civil servants, at least in theory. The principle for recruiting other EU citizens as civil servants was inverted: as a general rule, EU citizens may now be employed as Luxembourg civil servants. Solely by exception, Luxembourg citizens only qualify for positions which involve direct or indirect

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18 C-51/08.

exercise of public authority, or which safeguard State interests or that of other public legal entities.<sup>19</sup>

A Grand-Ducal Regulation of 12 May 2010 lists the positions that are considered sectors and activities relating to the State's exercise of authority.<sup>20</sup>

Newspaper advertisements still expressly request applicants to furnish their full 11-digit State registration/identification number, which could be seen as an indirect discrimination against EU citizens who live abroad and who may not be registered in Luxembourg, but apply for a position as a Luxembourg civil servant.

However more and more positions are now offered to non-Luxembourgers by those advertisements. Sometimes it is not clear whether the jobs proposed for Luxembourgers really match the list of exclusive positions that are reserved for Luxembourgers.

Therefore, the list of reserved positions must be monitored and checked with the law and the Grand-Ducal regulation on a longer term. It is too early to assess whether the progress that has been achieved so far is significant enough, due to the limited time of application of the new law.

### **2.1 Nationality condition for access to positions in the public sector**

A regulation of 27 February 2011 now opens positions as communal employees (*employé communal*), including a direct or indirect participation in the exercise of public authority, to EU citizens, thus abolishing the former nationality requirement.

As a consequence, the former exceptions to the nationality requirement for positions in the sectors of education, health care, terrestrial transport as well as distribution of water, gas and electricity have become obsolete and are thus abolished.

The position of a State employee (*employé de l'Etat*) is open to EU citizens since a law of 18 December 2009, but still requires adequate knowledge of the three official languages.

### **2.2 Language requirements**

There are no new, significant developments in terms of language requirements. According to the Grand-Ducal Regulation of 12 May 2010 setting the modalities and control of knowledge of the three administrative languages for recruitment of civil servants, adequate knowledge of Luxembourg's three administrative languages (Luxembourgish, French and German) is a condition to be eligible for recruitment in the public sector.

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19 Loi du 18 décembre 2009 modifiant et complétant a) la loi modifiée du 16 avril fixant le statut général des fonctionnaires de l'Etat ; b) la loi modifiée du 27 janvier 1972 fixant le régime des employés de l'Etat ; c) la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux ; d) la loi modifiée du 15 juin 1999 portant organisation de l'Institut national d'administration public, Mémorial A-N° 248, 22.12.2009, p. 4394, and Loi du 17 mai 1999 concernant l'accès des ressortissants communautaires à la fonction publique luxembourgeoise, Mémorial A-N° 62, 04.06.1999, p. 1409.

20 Règlement grand-ducal du 12 mai 2010 déterminant les emplois dans les administrations de l'Etat et les établissements publics comportant une participation directe ou indirecte à l'exercice de la puissance et aux fonctions qui ont pour objet la sauvegarde des intérêts généraux de l'Etat ou des autres personnes morales de droit public, Mémorial A-N° 78, 12.05.2010, p. 1444 ; « Il était temps » *La Voix*, 19.06.2010 ; and *Question parlementaire* 0524 (19.03.2010) and *Réponse* (29.04.2010) regarding the lateness of the implementing regulation.

The language tests measure a candidate's comprehension and oral expression under the 'Common European language reference framework'. High-level civil servants are requested to have higher knowledge of the languages than mid-level ones, who in turn may have a lower level of knowledge of the 3 languages.

We have been informed of problems of transition between the two laws. At least three cases seem to be known of persons who were supposed to be employed as state's employees by the state. Under the former law, not only a position had to be open for a foreign EU citizen, but also a budgetary decision had to be taken to allow for such access of a foreigner to public service.

This last requirement has now been abolished but in these cases described above, an administrative mistake occurred and no budgetary permission had been granted to employ those candidates under the former law.

The new law of 18 December 2009 does not regulate cases of transition, so that those candidates fell into a legislative gap. The Government had intended to have those persons pass the language test of the new law, although the former law did not request those tests to be passed at the same level. At least one person has now been regularly employed.

It seems that the requested levels are far too difficult to obtain for most candidates, so that there seem to be a new indirect hurdle for non-Luxembourgers to access to public employment.

One example of breach of the principles of free access of other EU citizens to public service is an advertisement published in a national newspaper on 19 January 2011.<sup>21</sup> A mid-sized city of the Grand-Duchy of Luxembourg was recruiting a driver-machinist in order to take care of the municipality's vehicles. Candidates were explicitly requested to speak the Luxembourg language. We believe that this language requirement is not necessary for such a job and is in breach of the principles of free access to public service as laid down as a principle by the law of 18 December 2009 and the Grand-ducal regulation. Generally, the level of local administration must be monitored with care as there may be more of a propensity not to fully abide by the new legislation.

The cited regulation of 27 February 2011 now provides for less strict language requirements for positions as communal employees (*employé communal*,) including a direct or indirect participation in the exercise of public power.

Formerly, adequate knowledge of the three official languages was required. From now on, there is only a requirement knowledge of those languages which is adapted to the concerned career, meaning that the higher the position, the better knowledge of languages must be.

Language assessments are nevertheless maintained and set out in another regulation of 27 February 2011.

### ***2.3 Recognition of professional experience for access to the public sector***

There is nothing particular to report.

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<sup>21</sup> Luxemburger Wort.

**3. OTHER ASPECTS OF ACCESS TO EMPLOYMENT**

There is nothing particular to report.

## **Chapter IV: Equality of treatment on the basis of nationality**

### **1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION**

#### ***Specific issue: Working conditions in the public sector***

We could not identify new specific problems are the recognition of professional experience for the purpose of determining the working conditions.

The same goes for the taking into account of diplomas for determining working conditions like salary, grade, career perspectives etc.

Finally, we could not find cases related to breaches of the principle of equal treatment in relation to issues like civil servant status, trade union rights etc. based on nationality.

### **2. SOCIAL AND TAX ADVANTAGES**

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

The Ombudsman had to deal with a case concerning the CEDIES<sup>22</sup>'s refusal to grant an encouragement bonus (*prime d'encouragement*) to a Romanian citizen married to a Luxembourg national, but who had neither the status of a worker, nor the status of a worker's family member according to articles 7 and 12 of the Regulation n°1612/68 of 15 October 1968.

He pointed out that proceeding like this was not conform to the 2008 law, whose article 12 states that 'family members of a Luxembourg citizen, if EU citizen or third country national, are treated like family members of an EU citizen'. This provision emphasizes the legislator's will to avoid reverse discrimination on national residents.

Onto these considerations, the Minister accepted to grant the encouragement bonus.

#### ***Specific issue: the situation of jobseekers***

In general, in Luxembourg the job-seeker is entitled to move within the EU and take along his unemployment benefit, subject to the condition to have had the status of a job-seeker for at least 4 weeks in his home country. On arrival in Luxembourg, he has to register with the ADEM within 7 days. After registration, the ADEM will pay the benefits the person would have gotten in his home country and will be paid back by this country.

The benefits are paid for a maximum period of three months. If the job-seeker has not found an employment within these three months, he has to return home.

We could not identify specific public cases of breach of the right to entitlement to social assistance and other benefits as set out in the case of the CJEU, in the *Ioannidis*, *Collins* or *Vatsouras* cases.

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22 Centre de Documentation et d'Information sur l'Enseignement Supérieur.

## Chapter V: Other obstacles to free movement of workers

### *Recognition of diplomas*

A particular obstacle has been pointed out concerning the recognition in Luxembourg of diplomas obtained abroad, and more precisely the inscription of such diplomas to the Register of higher education titles (*registre des titres d'enseignement supérieur*).

This inscription is subject to the condition of the diploma being obtained in '*compliance with the laws and regulations of the country where the grade has been obtained*', condition contained in the law of 17 June 1963 on the protection of higher education titles.

In a case concerning a request for inscription of a diploma obtained at a private school in an EU member state, the administrative court (*tribunal administratif*) had to decide whether a diploma that does not contain the visa of the competent Minister for National Education has been conferred in compliance with the laws and regulations of the country where the grade has been obtained.

Holding that obtaining such visa is the only way for private schools and institutions to deliver diplomas and that the fact for the private school to only be recognised by the State is not sufficient to consider the diploma as complying with laws and regulations of the concerned EU member state, the administrative court decided that the Luxembourg Minister had the right to refuse the inscription of a diploma not satisfying those conditions on the ground that it has not been obtained the competent Minister's visa.<sup>23</sup>

### *Health care*

With the adoption of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, a significant step has been made forward to promote free movement of workers and their family members.

Even though the directive has not been transposed into national law yet, health authorities seem willing to apply its provisions as of today, e.g. by publishing the European Commission's prospectus on this matter on their internet site.

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<sup>23</sup> Trib. admin. 2 mars 2011, n°27000.

## Chapter VI: Specific Issues

### 1. FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES)

#### *Unemployment benefits*

A French commuter receiving an invalidity pension in her home country complained to the Ombudsman about the fact that despite his automatic registration as job seeker after his external reclassification, she was refused the unemployment benefit in Luxembourg on the ground that she already was receiving an invalidity pension in her home country.

The Ombudsman suggested a modification of the relevant legislation in order to allow the grant of unemployment benefits reduced by the invalidity pension. The Minister for Work and Employment that the ECJ judged that when an EU member state recognised a person as being able to practise a salaried activity, it is not entitled to rely on payment of an invalidity pension in another EU member state to refuse the right to unemployment benefits to this person.

#### *Family benefits*

The Ombudsman was contacted by a French commuter concerning the National Family Benefits Fund's iterative requests for a certificate of residence. The person's residence municipality however does not deliver such certificates. Even a declaration on honour was not accepted by the fund who insists on the delivery of certificate of residence.

Despite the Ombudsman's efforts, the National Family Benefits Fund's president has not taken a stand yet.

### 2. SPORTSMEN/SPORTSWOMEN

Professional sport activities and high-level competitions are regulated by the federation relevant to the sport practiced by the high-level athlete. Other domains such as leave to practice or participate in athletic events (*congé sportif*), labour contracts and insurance are governed by the legislation specific to them. Activities in team sports such as football, basketball, volleyball, handball, rugby and ice-hockey are governed by the regulations adopted by the approved relevant national federation.

Luxembourg has been examining the application of Article 165 of the Treaty of Lisbon to the national context, in particular what preserving Luxembourg's distinctiveness under that article could mean. One major issue is whether the selection of 6 Luxembourg citizens for a football team is acceptable, or could be considered as contrary to the European principle of free movement. However, it appears at this time that if a team were to require choos-

ing 6 players trained at a particular football club that could be acceptable and would not run afoul of the EU free movement principle.<sup>24</sup>

We are unaware of any discriminatory collective agreements or general practices in Luxembourg that could imply discrimination against EU Member State citizens. However, under the Luxembourg Football Federation (FLF) Rules, for first division national team matches (*matches de la sélection nationale A*), FIFA and UEFA international competition matches, only players with Luxembourg citizenship are selected. Luxembourg citizen non-amateur players developing abroad can also be selected for the team. Foreign players can be selected for all other teams.<sup>25</sup>

According to the regulations of Luxembourg's basketball federation, the FLBB, senior teams (over 17 years of age) in the first and second divisions can use only two foreign players in all official competitions. The two foreign players must fulfill at least one of the following conditions:

1. they must be able to prove their EU Member State citizenship with a nationality certificate (*certificat de nationalité*);
2. by 1 September, they must be able to prove with a residence certificate that they have resided in Luxembourg for 1 year; or
3. by presenting a certificate prove that they worked at least one year in Luxembourg with health insurance, or that they have been on their parents' or spouses' health insurance, or for at least one year enrolled in a Luxembourg grade school or university and have completed exams.<sup>26</sup>

However, this requirement does not apply to an 'assimilated foreign player' (*joueur étranger assimilé*), who is a player that during the course of a sports season had at least one license with a Luxembourg basketball club as a cadet (14-15 years of age), scolaire (12-13 years of age) or mini (11 years and under), or who arrived in Luxembourg before the age of 16 and has resided here for one year without interruption. These players are considered assimilated foreign players when they pass into the junior player category (16-17 years of age). Minors of foreign citizenship between 16 (under the International Basketball Federation, FIBA rule) and 18 years of age who is born in Luxembourg and requests his or her first basketball license will also be considered an assimilated foreign player and can participate without limitation in the FLBB's competitions.<sup>27</sup>

The Luxembourg Volleyball Federation (FLVB) considers a foreign player one who is at least 16 years of age and a citizen of any country other than the EU Member States or assimilated countries. For a national senior (age championship), the number of foreign players on a team cannot be less than 5. Foreign players cannot simultaneously hold a license from clubs in both their home country and Luxembourg. Political refugees unable to obtain trans-

24 'Dans les dédales du Traité européen' [In the EU Treaty Maze], Luxembourg Wort, 19.05.2009, at p. 57, and '6+5 sans l'UEFA' [6+5 without the UEFA], La Voix, 03.06.2009, at p. 46.

25 FLF's 2007-2008 Articles of Association, Binder 2, Art. 36-2, available at: <http://www.flf.lu/documents/05.10.2010>.

26 FLBB's October 2009 Articles of Association and Regulations, Art. SR-3.4, available at: [http://www.flbb.lu/~data/pdf/statuts\\_et\\_reglements\\_28.05.2010.pdf?PHPSESSID=3aff6a42a20986959d1f610b6dfec773](http://www.flbb.lu/~data/pdf/statuts_et_reglements_28.05.2010.pdf?PHPSESSID=3aff6a42a20986959d1f610b6dfec773) (05.10.2010).

27 FLBB's October 2009 Articles of Association and Regulations, Art. RA-23.7, available at: [http://www.flbb.lu/~data/pdf/statuts\\_et\\_reglements\\_28.05.2010.pdf?PHPSESSID=3aff6a42a20986959d1f610b6dfec773](http://www.flbb.lu/~data/pdf/statuts_et_reglements_28.05.2010.pdf?PHPSESSID=3aff6a42a20986959d1f610b6dfec773) (05.10.2010).

fer papers can produce papers from the competent Luxembourg authorities attesting to their status as political refugee unable to obtain transfer papers. These regulations do not apply to foreign players who obtained their FLVB license prior to their 16<sup>th</sup> birthday, or to foreign players who became affiliated prior to 1 July 1996, and whose affiliation has been for 5 consecutive years.<sup>28</sup>

Luxembourg is aware that while the citizenship requirement is likely against Community doctrine regarding the free movement of persons, the requirement that a player have been trained solely by the club for which he plays may not necessarily be against Community doctrine ('home-grown players rule'). Also, in 2009, the Luxembourg football, basketball and *boules* (*boule-pétanque*) federations were busy responding to the European Commission's letter to them regarding discrimination on grounds of citizenship.<sup>29</sup>

### 3. THE MARITIME SECTOR

Nothing new to report.

### 4. RESEARCHERS/ARTISTS

Nothing new to report.

### 5. ACCESS TO STUDY GRANTS

The study grant schemes are now regulated in the Law of 26 July 2010 on state aid for higher education<sup>30</sup> (hereinafter referred to as the „Law”), which has significantly amended the former Law of 22 June 2000<sup>31</sup>.

Furthermore, the Grand-Ducal Regulation of 5 October 2000 is still applicable,<sup>32</sup> although modified by the Grand-Ducal Regulation of 12 November 2010.<sup>33</sup>

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28 FLVB's internal regulations, Art. 3.3, available at: <http://www.flvb.lu/online/www/content/reglement/1276/1278/pagecontent/1281/2413/FRE/1.pdf> (05.10.2010).

29 'Dans les dédales du Traité européen' [In the EU Treaty Maze], *Luxembourger Wort*, 19.05.2009, at p. 57.

30 Loi du 26 juillet 2010 modifiant: 1. la loi modifiée du 22 juin 2000 concernant l'aide financière de l'Etat pour études supérieures; 2. la loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu; 3. la loi du 21 décembre 2007 concernant le boni enfant; 4. la loi du 31 octobre 2007 sur le service volontaire des jeunes; 5. le Code de la sécurité sociale; Mémorial A n° 118 du 27.07.2010, page 2040; <http://www.legilux.public.lu/leg/a/archives/2010/0118/index.html>.

31 *Loi du 22 juin 2000 concernant l'aide financière de l'Etat pour études supérieures*; Mémorial A n° 49 du 28.06.2000, page 1106, <http://www.legilux.public.lu/leg/a/archives/2000/0049/2000A11061.html?highlight>.

32 *Règlement grand-ducal du 5 octobre 2000 concernant l'aide financière de l'Etat pour études supérieures*, Mémorial A n° 109 du 09.11.2000 page 2548; <http://www.legilux.public.lu/leg/a/archives/2000/0109/2000A25481.html>.

33 *Règlement grand-ducal du 12 novembre 2010 modifiant le règlement grand-ducal du 5 octobre 2000 concernant l'aide financière de l'Etat pour études supérieures*; Mémorial A n° 207 du 18.11.2010 page 3430; <http://www.legilux.public.lu/leg/a/archives/2010/0207/2010A3430A.html>

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According to the current law, in order to receive a study grant, a student must be enrolled in higher education or be allowed by the Minister of Education to study abroad in technical education.

The Law stops the ‘encouragement bonus’ for studies and modifies the beneficiaries of study grants. The new legislation seems to extend the beneficiaries but develops a main criterion to award a grant: a condition of residence in the territory of Luxembourg which restricts sensibly the beneficiaries. Various associations claim that the Law discriminates persons on the ground of nationality. In fact, the Law abolishes the possibility to get a grant for students of an other EU Member State and who are members of a family of a worker in Luxembourg living abroad i.e. frontier workers.

At the moment, 423 individual’s complaints have been lodged with the administrative Court of Luxembourg and several complaints of associations and trade unions have been sent to the European Commission. The Commission decided in her report of 6<sup>th</sup> of April 2011 to send a formal notice to the Grand-Duchy and request a detailed explanation of the Government’s position.

The contents of the Law are as follows. §2 of the Law requires following conditions in order to obtain a study grant:

- be of Luxembourg nationality or a family member of a Luxembourg citizen and having one’s domicile in Luxembourg, or
- be a citizen of another Member state of the European Union or an EFTA Country or of Switzerland, and in this case, to be regularly authorized to sojourn on Luxembourg territory according to the free movement of workers’ rules as defined in Directive 2004/38EC and transposed by Chapter 2 of the amended Law of 29 August 2008, or
- having obtained the status of long stay resident during 5 years at least.

The former condition of Article 2 b) referring to Regulation EC1612/68 has disappeared, It used to request for an applicant to a grant to be *a national from a Member State of the European Union, be domiciled in the Grand-Duchy of Luxembourg and be within the field of application of the provisions of articles 7 and 12 of the Regulation EEC 1612/68 on free movements of workers [...]*.

This condition was likely to be analysed as contrary to the principle of free movement of students in the EU, as it was the case in *Grzelczyk* by the ECJ in 2001. In the latter case, the Court does not authorize a reference to these provisions as the main condition to benefit from a grant. When analysing the modification, despite the absence of a reference to a domicile in Luxembourg, one feels the meaning and the reason of this clause has remained.

Concerning the encouraging bonuses, the Law of 2010 has removed this type of grants. The government also will not take into consideration anymore the parents’ income. Moreover, in every case, it needs an inscription at a University or an establishment of higher education – which has to be recognized by the state – and having a diploma or other certificate demonstrating the successfulness of the study program.

The purpose of the new legislation is, according to the government, to facilitate access to studies by awarding grants and allow an increase of the number of diplomas and this, without regard to the economical situation of the student’s parents.

This law has been very much criticized for its changes. They are considered by many as being a case of discrimination against other EU citizens. Moreover, some of the opponents consider that political and economic aims are concealed in this law.

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The criterion of residence is actually the main condition for the award or the refusal of a study grant. Indeed, students who are not residents in the Grand-Duchy of Luxembourg may not benefit from a grant for their studies. As a consequence, students who are residents in neighbouring countries (France, Belgium or Germany) i.e. members of the family of a frontier worker employed in the Grand-Duchy of Luxembourg, are now excluded from requesting grants for their studies because they are not living in the territory of the Grand-Duchy of Luxembourg.

The Luxembourg government has advanced several arguments to justify these changes. Most notably is the reason that in this period of crisis, there is an attempt to curb down the public expenses and this restrictive piece of legislation is part of such plan to cut corners. Various associations are not convinced by this argument and have lodged a complaint with the European commission because they are worried for those excluded. Those associations see this measure as a revival of primary protectionism aimed at refocusing on the internal borders and support only their nationals.

The government argues that this legislation compensates the suppression of family allowances for students. It also points to the fact that in all countries students are free to benefit from their national system of students' grants.

However, opponents of the measure argue that there is no effective compensation to the financial loss of many families of frontier workers. Most notably, the trade union OGBL set up a report and concluded that in every case those families are the losers.

The Luxembourg legislation does not make a formal difference of treatment between its nationals and the non-nationals if they have their residence on the Luxembourg territory. The question is whether there is an indirect case of nationality discrimination toward other EU citizens due to the residence clause.

Recently, the CJEU's decision of 8 March 2011, in the *Zambrano* case, resulted in the principle that third country parents of a child who is a national of a Member State must be granted the right to work and the right of residence in that Member State in order to protect the right of the child to live in that state.

According to §3 of the Law, the maximum amount granted will be 17.700 Euro per study year. A first part of it, called basic amount (*'montant de base'*), is worth 13.000 Euro. Additionally, enrolment fees over 100 Euro may be compensated financially with a maximum amount of 3.700 Euro per study year, paid out as a loan. Students who are in an outstanding and serious situation (*'grave et exceptionnelle'*) may receive an extra amount of 1.000 Euro, when the student is confronted to outstanding costs.

As far as the criteria and calculation are concerned, the proportion between the part of the financial assistance which is to be considered as a study grant and the part which is considered as a loan depends on the financial and social situation of the student and the tuition fees.

The amount of the grant is set by withdrawing from the basic amount the income of the student. The amount of the loan with the interest to be paid is set by withdrawing from the basic amount the amount of the grant. Tuition fees are added, half to the amount of the grant and half to the amount of the loan. According to the new §5, a student may benefit from the grant for one year more than the normal length of the studies. For research training, the maximum length is 4 years.

There is a change of paradigm, as the law has also amended § 330 of the Social Security Code by putting the study grants and loans under the category of family benefits, which are being paid on top of family allowances.

Instead of granting automatically study grants up to the age of 27 to families, currently the Social Security Code foresees now that pure family allowances will be paid till that age, excluding study grants and loans from that category. Therefore such financial support will be paid only on request.

Furthermore, previously the parents would receive such financial assistance for their children. Now the students themselves, from 18 years on, will be considered as being the recipients of those benefits.

*The issue at core is the legal qualification that can be given to these study grants in the EU*

### *1. The non-application to every student*

In the field of application for students, it is not an obligation for the Member State to allocate study grants. The simple non-national student is not concerned by the Law of 26/07/2010. A student from a European Union's State may benefit from a grant, if he or she is domiciled in the territory and if one of his parents is working in the Grand-Duchy of Luxembourg or if they have the permanent residence right. The Luxembourg government has provided this possibility with regard to European Directive N° 93/96.

The Council Directive 93/96/EEC dispenses to award a grant to students in Article 3: 'This Directive shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence.' However this Directive was repealed by Directive EC 2004/38/EC.

In article 24 (§2) of the Directive 2004/38, it goes:

'By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided in Article 14 (4) (b), not shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families'.

In consequence there is no obligation to allocate a grant to a student until there is a permanent right of residence (up to 5 years of residence) in the Member State.

The abovementioned complaints did not contest this general situation but point out to the situation where the student is a child of a worker in the territory of the Member State, whereby living in a border country.

There is an illustration with a decision from an administrative jurisdiction, of the 22<sup>nd</sup> of March of 2010, Tribunal Administratif of Luxembourg, n° 25884. In this case, the decision notifying the refusal to award a study grant, sent by the Luxembourgish administration referred to the Directive 93/96. In this decision, it was stated that Luxembourg shall not be obliged to confer entitlement to maintenance grants. The student was not a worker or a family member of a worker in the Grand-Duchy of Luxembourg, according to the meaning of Regulation EC 1612/68. The student had a permanent residence entitlement in Luxembourg because she was a resident for over five years. Also the Administrative Tribunal based its decision on the ECJ decision of 20 September 2001, in the *Grzelczyk* case, stating that it is not possible to condition the allowance of such grant within regard to Regulation EC 1612/68. Therefore the administration lost the case and had finally to award a grant to this student.

## 2. *A social and family benefit*

One of the arguments used by complainants to the European Commission is that the grants are social and family benefits. It is necessary to determine the legal nature of these grants to decide on the applicable legal regime and find out if there is a discriminatory situation towards frontier workers.

The law also concerns non-national children of workers, so that there is a hidden interest for the Government to qualify such grant as social benefit and notably family benefit, according to the complainants. If the grants are characterized as social allowances, the Grand-Duchy cannot make a difference of treatment between workers on the ground of nationality.

Moreover, another argument is developed by these associations, that the study grants aims at compensating the suppression of family allowances. The former family allowances were social benefits, so that these study grants should also be considered as social benefits.

Equally, the European jurisprudence seems to have the same position. In the cases of 10<sup>th</sup> October 1996, *Hoever* and *Zachow*, the ECJ decided that the education allowance granted by a Member State to compensate family charges have to be considered as family benefits.

This family benefit was qualified as such by Regulation EEC 1408/71. Article 73 stated that:

‘An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.’

(The provisions of Annex VI do not concern study grants). This Regulation does not permit a condition of residence to be granted some family benefit.

Also, the new Regulation EC 883/2004 (coordination of the social security systems) in the article 7 now states that:

‘Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than in which the institution responsible for providing benefits is situated’.

## 3. *The characterization as social advantage*

The non-national worker in a Member State has to benefit from the same allowances as a national worker. This principle results notably from the fundamental right of free-movements of workers in the European Union. To facilitate free movement, it needs to admit equality between workers to avoid discrimination by nationality.

Regulation 1612/68/EC, in article 7 §2, states that the non-national worker in the territory of the Member State ‘*shall enjoy the same social and tax advantages as national workers*’.

This Regulation clearly is the oldest one which express the will to ban any discrimination in the ground of nationality between workers concerning the social and tax advantages.

According to article 12 of Regulation 1612/68/EC:

‘The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational train-

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ing courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions’.

In the Luxembourg Law of 26/07/2010, the legal nature of the grant is characterized as a social and family benefit but could be seen as a kind of social advantage for workers.

The ECJ decision in the *Meints* case of 27 November 1997, establishes for nationals from a Member State that:

‘A benefit which takes the form of a single payment to agricultural workers whose contract of employment has been terminated as a result of the setting aside of land belonging to their former employer is to be classified as a social advantage within the meaning of Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.’

In consequence, the term ‘social advantage’ has an extended definition. In this case, a single payment grant is considered to be a social advantage.

Moreover, the ECJ decision of 18 July 2007 in the *Wendy Geven* case concerning a German study grant explains that the expression ‘social advantage’ may not be interpreted restrictively.

Accordingly,

‘ In the light of the above considerations, the answer to the national court’s question must be that Article 7(2) of Regulation No 1612/68 does not preclude the exclusion, by the national legislation of a Member State, of a national of another Member State who resides in that State and is in minor employment (between 3 and 14 hours a week) in the former State from receiving a social advantage with the characteristics of German child-raising allowance on the ground that he does not have his permanent or ordinary residence in the former State’.

On the same date, the decision in the *Hartmann* case of the ECJ exposes that:

‘A national of a Member State who, while maintaining his employment in that State, has transferred his residence to another Member State and has since then carried on his occupation as a frontier worker can claim the status of migrant worker for the purposes of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community’. ‘In circumstances such as those at issue in the main proceedings, Article 7(2) of Regulation No 1612/68 precludes the spouse of a migrant worker carrying on an occupation in one Member State, who does not work and is resident in another Member State, from being refused a social advantage with the characteristics of German child-raising allowance on the ground that he did not have his permanent or ordinary residence in the former State’.

### *Bologna Process*

A number of complaints have been submitted to the Ombudsman concerning a difference of treatment between students enrolled in universities where the Bologna Process has already been transposed and students enrolled in universities where it has not.

This law indeed makes a difference between 2-cycle-studies and 3-cycle-studies. 2-cycle-studies contain a 1<sup>st</sup> cycle accessible with a secondary school-leaving certificate (*diplôme de fin d’études secondaires*), a 2<sup>nd</sup> cycle accessible with a 1<sup>st</sup> cycle final university

degree and a 3<sup>rd</sup> cycle of specialised or research studies. 3-cycle-studies contain a cycle of *pre-licence* and a cycle of *post-licence*.

The Minister considered the bachelor's grade as 2<sup>nd</sup> cycle studies and master's degree as 3<sup>rd</sup> cycle studies.

Such a categorisation had as a consequence that students enrolled in 2-cycle-studies were privileged in respect of 3-cycle-studies because master students, considered as 3<sup>rd</sup> cycle, received substantial non-refundable scholarships since their parents' social and financial situation was not taken into account, which was not the case for 2-cycle-students in countries not having adopted the Bologna system yet.

This led to a difference of treatment between students being in the same situation of studies though.

This situation does not longer exist since the adoption of a the new law of 26 July 2010 regulating financial aids for students which does no longer take into account the parents' social and financial situation and granting all students the same basic scholarships. The sole difference in amounts results from the difference of enrolment fees.

## 6. YOUNG WORKERS

The relevant legislation governing this field is the Luxembourg Labour Code [*Code du Travail*],<sup>34</sup> the Law of 4 July 2008 on Youth<sup>35</sup> and the Ministerial Regulation of 19 September 2007 on apprenticeship compensation in the commercial sector, as most recently amended on 25 August 2010.

Luxembourg's territorial approach to labour regulation operates to apply the Labour Code to all Luxembourg workers, indiscriminately of whether they are Luxembourg citizens; citizens of other EU Member States residing and working in Luxembourg; third-country national residents legitimately working in Luxembourg; or, non-Luxembourg residents legitimately working in Luxembourg.

The Labour Code divides young workers into the following three groups:

- i. children (*enfants*) – defined as all young people who have not attained the age of 15 years or who are still subject to the schooling obligation imposed by the applicable legislation (schooling is mandatory from 4 through 16 years of age<sup>36</sup>);
- ii. young persons (*jeunes*) – defined as (a) all persons under 18 years of age, having an employment contract pursuant to Article L. 121-4 of the Labour Code, and working as a salaried employee in Luxembourg; (b) persons under 18 years of age having a contract or employment relationship governed by legislation other than that of Luxembourg and working in Luxembourg; (c) interns; (d) persons working professionally by virtue of

34 The Labour Code entered into force on 1 September 2006, and codified and repealed 51 laws or legal provisions, including the Law of 22 July 1982 on the employment of pupils and students during school vacation periods; the Law of 17 June 1994 on the safety and health of workers, as amended; the Law of 12 February 1999 on various measures favoring the employment of youth, as amended; and the Law of 23 March 2001 on the protection of young workers.

35 Law of 4 July on youth, *Mémorial A*- N° 109, 25 July 2008, p. 1534.

36 Law of 6 February on the schooling obligation, *Mémorial A*-N° 20, 16 February 2009, Article 7, p. 198, providing that any child living in Luxembourg who is four years of age prior to the first of September must attend school, and that obligation extends through the twelve consecutive years following the year in question.

training or continuing education in which they are engaged; (e) trainees (*apprentis*); (f) unemployed young people receiving employment (*mise au travail*); (g) unemployed young people with a contract for temporary employment (*auxiliaire temporaire*) or an integration internship (*stage d'insertion*); and, (h) pupils and students employed during school vacation periods under the applicable legislation, who do not benefit from employment conditions more favourable under special laws, their employment contract or collective employment agreements.

- iii. adolescents (*adolescents*) – all young people at least 15 years of age and under 18 years and who are no longer subject to the schooling obligation imposed by the applicable legislation.<sup>37</sup>

### *Children*

Under Article L. 342-1 of the Labour Code, employment of children of any sort is prohibited, except under certain conditions described briefly below. Exceptions exist for certain types of training activities or employment, such as those in the educational, audiovisual, cultural, artistic, sport, publicity and fashion industries/sectors. However, working hours are strictly regulated and authorization must be obtained from the competent authority.

### *Young Persons*

Employers must take measures to protect the safety and health of young people, particularly taking care to ensure that the employment does not involve economic exploitation of young people. Neither can the employment be dangerous to their health or safety, or their physical, psychological, mental, spiritual, moral and social development. Nor can it compromise their education or training, their participation in professional orientation training programs which have been approved by and are monitored by the competent authorities, or their capacity to benefit from instruction received.

The evaluation must be carried out before the young persons commence their employment, as well as each time there is an important change in the working conditions.

When this evaluation reveals the existence of a risk to the safety, health or physical, psychological, mental, moral or social development of the young people, regular, appropriate examinations and monitoring of the young persons' health must be provided free of charge by the labour health services.

Without prejudice to the provisions applicable to the employment of children, it is prohibited to employ young people in work that exposes them to specific risks to their safety, health, or physical, psychological, mental, spiritual, moral or social development, or which compromises their education or professional training, and that results from a lack of experience, the absence of awareness of existing or virtual risks, or the incomplete development of the young people.

Adolescents are prohibited from performing piecework, assembly line work to be performed at a prescribed speed or under any other system allowing them to obtain a higher salary by means of the accelerated production rate. Written exemptions may be granted.

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<sup>37</sup> Labour Code (as at 11.04.2010), Art. L. 341-1(1).

*Adolescents*

Employment of adolescents can only be authorized on the condition that it does not involve economic exploitation of young people, that it does not damage their health and safety or their physical, psychological, mental spiritual, moral or social development. Neither can it compromise their education or training, or their participation in professional orientation or training programs approved and monitored by the competent authorities, or their capacity to benefit from instruction received.<sup>38</sup>

Special instructions must be given to adolescents if they must receive training in dangerous labour during their professional training. The required work organization plan must have a chapter on adolescent labour. The maximum time adolescents can work is 8 hours per day, and 40 hours per week.

Adolescents are prohibited from working overtime, unless under extraordinary circumstances, in cases of force majeure or if required for the company's existence or security. There are specific rest time provisions.

The competent ministerial authorities can grant written exemptions if objective reasons justify them and if the adolescents are granted an appropriate compensatory rest time on a date not to exceed 12 days thereafter.

Adolescents cannot work on Sundays and on legal holidays. However, under extraordinary circumstances (force majeure), and when the Company's existence and safety depend upon it, employers are as an exception authorized to have adolescents work on Sundays or legal holidays, but only to the extent necessary to avoid situations that prevent the company from operating normally and if adult salaried employees are unavailable.

Adolescents cannot be employed at night. However, when the work does not negatively impact adolescents as described above, the competent ministerial authorities can grant written exceptions to these rules for work performed in professional training organized and supervised by the competent public authorities in specific areas of work.

Adolescents are entitled to at least 25 days of paid annual vacation, unless a collective agreement provides for more favourable vacation terms.

The minimum rate for salaries set by collective agreement for work equivalent to that of adults performed by adolescents under 18 years of age is a percentage of an adult salary. Adolescents between 17 and 18 years of age receive 80 percent, while adolescents between 15 and 17 years of age receive 75 percent of the applicable adult salary. The statutory minimum wage is guaranteed to salaried employees above 18 years of age. For adolescents less than 18 years of age, these reduced percentages are also applicable to the statutory minimum wage, and any contrary provision in an individual or collective employment contract is automatically null and void. However, individual and collective employment contracts can derogate from these rules when they provide more favourable salaries to adolescents.<sup>39</sup>

The Employment Administration (ADEM) promotes contracts for the initiation to employment and practical experience which are aimed at young Luxembourg residents under 30 years of age who hold a technical diploma, a technical secondary school diploma, a secondary school diploma, an Advanced Technician's Certificate, or bachelor's or master's degrees.<sup>40</sup>

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<sup>38</sup> Labour Code (as at 11.04.2010), Art. L. 344-1.

<sup>39</sup> Labour Code (as at 11.04.2010), Art. L. 344-17.

<sup>40</sup> [https://cie-ep.anelo.lu/info\\_candidate](https://cie-ep.anelo.lu/info_candidate) (04.10.2010)

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However, the ADEM also promoted European Job Days in cooperation with the French, Belgian and German public employment services. The job fair was primarily for the hotel, restaurant and café industry, and there was no nationality or residence requirement on the ADEM website announcement.<sup>41</sup>

Luxembourg's national youth service, the SNJ, has a webpage dedicated to helping students find jobs that is linked to other student job sites. We saw no express residence or citizenship requirements in perusing the page, however, it must be noted that some positions require knowledge of Luxembourgish, French and German.<sup>42</sup>

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41 [http://www.adem.public.lu/Divers/European\\_Job\\_Days.html](http://www.adem.public.lu/Divers/European_Job_Days.html) (04.10.2010).

42 [http://www.snj.public.lu/actualites/2006/03/06\\_doit4you-lu/index.html?highlight=emploi](http://www.snj.public.lu/actualites/2006/03/06_doit4you-lu/index.html?highlight=emploi) (05.10.2010).

## **Chapter VII: Application of transitional measures**

### **1. TRANSITIONAL MEASURES IMPOSED ON EU-8 MEMBER STATES BY EU-15 MEMBER STATES AND SITUATION IN MALTA AND CYPRUS**

There is nothing specific to report.

### **2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA**

There is nothing specific to report.

## **Chapter VIII: Miscellaneous**

### **1. RELATIONSHIP BETWEEN REGULATION 1408/71-883/04 AND ART 45 TFUE AND REGULATION 1612/68**

There is nothing specific to report.

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

There is nothing specific to report.

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

There is nothing specific to report.

### **4. NATIONAL ORGANIZATIONS OR NON-JUDICIAL BODIES TO WHICH COMPLAINTS FOR VIOLATION OF COMMUNITY LAW CAN BE LAUNCHED**

In this respect, the Ombudsman has to be cited as a neutral person to whom complaints about public administrations' behaviour towards citizens can be addressed. The Ombudsman will then contact the concerned authority and try to find a solution to the citizen's problem.

The current Ombudsman being an ancient Minister, he has privileged contacts to most of the Ministers and administrations and manages to help obtain acceptable solutions in most of cases.

### **5. SEMINARS, REPORTS AND ARTICLES**

Seminar: *'La coordination de la sécurité sociale en Europe'*, 22 September 2010, at the *Office des Assurances Sociales*, organized by TRESS.