

REPORT
on the Free Movement of Workers
in the Grand-Duchy of Luxembourg in 2002-2003

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Introduction

During the period 2002-2003, as far as the **Enlargement process** is concerned, the Luxembourg government has opted for a transitional period of restrictions for workers of the new member states. A law was under preparation (and adopted in 2004). The government envisaged an exception for Cyprus and Malta from these restrictions.

The issue of the public sector is still a difficult issue in Luxembourg, which still struggles with the aftermaths of the ECJ judgment of 2 July 1996, in which Luxembourg was condemned for restricting access to the public sector only to Luxembourg nationals.

Although a law of 17 May 1999 exempted the EU-candidates to a position in the public sector from the nationality condition in some public sectors not related to its sovereignty, it requires the knowledge of the three national languages (Luxembourgish, French and German).

However, in a legislative proposal, the legislator listed key positions in the public sector, which were excluded from the opening to other EU-citizens, rather than enacted a general criteria which would determine which administrations or positions are open to non Luxembourgers, thus dragging its feet to the necessary opening to other EU citizens.

On the other hand, the army was opened to other EU-citizens, but only for lower positions.

In general, there is a problem of method of the Government/legislator. Measures are sometimes being introduced by a simple ministerial declaration, for example in Parliament, rather than by laws or circulars. This is the case of the issue of the third country nationals' family members of EU nationals, who do no longer need a work permit. Such a declaration was made in Parliament by the Ministers of Justice and Labour, following a question of an MP. A note from the administration of Labour was then issued, but not a real circular.

A specific administrative issue, which is far from satisfying is the one of foreign secondary school diplomas. The position of the administration and the courts are, that there is no legal basis for a third-country diploma to be recognized in Luxembourg. In a symbolic case, a Luxembourg citizen is the victim of a reverse discrimination, as he would need a Luxembourg secondary school diploma to be able to exercise his medical profession with university degrees partially obtained in other EU countries.

Chapter I

Entry, Residence, Departure

A. Entry

In general, the entry of foreigners is governed by the law of 28 March 1972 (hereinafter entitled “Entry and Sojourn Law”) concerning:

- a) The entry and temporary visit, or “sojourn” of foreigners;
- b) The medical control of foreigners;
- c) The employment of foreign workers.

The Grand-Ducal regulation of the same date concerning the formalities to be fulfilled by foreigners visiting Luxembourg (hereinafter entitled the “Formality Regulation”) also impacts upon the matter.

A foreigner who wants to reside in Luxembourg for no longer than three months in the Grand-Duchy of Luxembourg must make a declaration to this effect, within three days of arrival, to the local authority of the place where the person intends to stay (Article 1 of the Formality Regulation).

However, according to the Grand-Ducal Regulation of 28 March 1972 concerning conditions for certain categories of foreigners subject to international conventions (hereinafter referred to as the “Special Foreigner Regulation”), which was amended several times, there are special, more easy, conditions for the persons from an EU Member State and from Member States of the European Economic Area (EEA).

Thus, in order to enter and sojourn in the Grand-Duchy of Luxembourg for up to three months, these persons must only present their national identity card or a valid passport (or one which has expired not more than five years prior) or any other piece of identification recognised for the crossing of the border (Article 2 of Special Foreigner Regulation).

However, within three days of their arrival, such persons must signal their presence to the local authorities of the place of their residence (id., at Article 7).

These provisions apply to nationals from a Member State of the EU who intend to come to Luxembourg in order to work for wages, to nationals engaging in an unpaid activity and those who, inter alia, do not intend to live in the Grand-Duchy of Luxembourg, but who offer, as independent workers, “services” as defined by former article 60 of the Treaty of Rome (current article 50 of the EU treaty).

The Regulation is also applicable to those who were formerly engaged in a job or an unpaid activity in the EEA, under the condition that they are the beneficiary of an invalidity, early retirement or retirement pension or of an annuity due to a working accident or a professional illness, which provides them the equivalent of the minimum guaranteed income (RMG) and that they are covered by a health insurance.

It is also applicable to those who do not benefit from any right of sojourn due to other provisions of EU laws, provided they are covered by a health insurance for themselves

and their family and who have an income which is at least equivalent to the minimum guaranteed income.

Finally, the same applies to subjects of the EU who occupy a wage-earning job in Luxembourg but who have their main residence in another EU country, on condition that they return to their principal country every day or at least once a week.

The necessity to present oneself to the municipal authority within three days of arrival has never been challenged in court.

The legislation has not been amended during the period of 2002-2003.

B. Residence

Basically the requirements for residing permanently (over three months) in Luxembourg are the same as those as described under A. Entry.

A foreigner who wishes to remain in the Grand-Duchy of Luxembourg for more than three months must make a declaration to this effect to the municipal authority of the place where he or she wishes to reside (Article 6 of the Special Foreigner Regulation). Then the administration delivers a residence permit (“carte de séjour”) to the applicant of an EU country, who is over fifteen years old.

The residence permit is valid as long as the foreign national does not leave the country for more than six months (except for army duties).

The residence permit is valid for a period of five years and then for ten years, once it is renewed, except for students, for which the residence permit is, in principle, valid for the period of studies.

The renewal is free and generally automatic: however, if at the time of the first renewal a foreign EU person has been unemployed for more than 12 months in a row, the permit may be limited to one year. After that period, if the applicant is still unemployed, the residence permit may be refused.

The administrative practice relating to residence permits of third-country nationals who should benefit from the EU spouse’s freedom of movement and freedom of establishment of one’s residence has shown some difficulties.

In one case, a third-country national from the former Portuguese colony Capo Verde was denied a residence permit and was asked to leave the country. Formerly allowed to reside through a marriage, he then got divorced from a Portuguese citizen with whom he had two children. He had another child with another EU-citizen, a Luxembourgish woman and asked for a continuation of a residence permit based on the fact that his forced departure would be a violation of article 8 of the European Convention on Human Rights i.e. the right to have a family life.

The Minister of Justice accepted to grant him a residence permit under two alternative conditions: either he would marry the EU woman or he would get a work permit. The person did not want to get married immediately but found an employer. However the Ministry of Labour refused the work permit! Finally, after nearly two years of administrative wrangling, he got married with the EU woman and only then solved the issue.

C. Departure

The residence permit for EU nationals may be withdrawn and thus lead to the departure of the person for reasons of public order, public security or public health.

If the residence permit or the national identity document becomes outdated, article 10 of the Special Foreigner Regulation provides that this fact cannot lead to expulsion of the country.

According to article 12, a decision of refusal or of withdrawal of the residence permit must include a deadline for leaving the country. The minimum deadline varies from 15 days to a month.

Otherwise, an EU national who leaves the country has to inform the municipality of his departure.

Chapter II Equality of Treatment

The principle of equal treatment can be found in the general legal principle (“*principe général du droit*”) found in article “10 bis” of the Luxembourg Constitution, according to which “all Luxemburgers are equal before the Law (“*tous les Luxembourgeois sont égaux devant la loi*)”.

However this principle applies only *stricto sensu* to the Luxembourg nationals and not the foreign citizens. Although it is understood to be a general principle of law, implying equality for all inhabitants, it clearly is not sufficient to guarantee in all situations and in all Court cases that any breach of the principle of equality will be sanctioned. Especially no precise definition of the principle of equal treatment has been enacted legally.

Article 111 of the Constitution also grants protection to the alien persons and their property, unless the law provides for an exception. This article cannot guarantee as such the full and satisfactory enhancement of the principle of equal treatment.

Following the Maastricht Treaty of 7 February 1992, which has instated the European citizenship, the law of 28 January 1994 inaugurated the participation of other EU nationals to the European Parliament. This step was made possible through the adoption of two constitutional laws of 23 December 1994, which have amended articles 9 and 107 of the Constitution. Thus the directive of 19 December 1994 was adopted on time in Luxembourg.

Through the law of 28 December 1995,¹ the nationals of the European Union Member States were conferred the right to participate in the communal elections. The law of 18 February 2003 has regrouped the legal provisions for all elections in one text. Until the end of 2003, no law was adopted to enable the citizens of the ten accession countries to participate in the European elections of 13 June 2004.

As far as the freedom of workers is concerned, there is a general practice of the administration (Ministry of Labour) to give priority to job seekers from the European Union. In refusal decisions of working permits to third-country nationals, a clause is generally included in the decision, by which the priority given to EU workers is one of the grounds of the rejection of the requested working permit.

Such a priority for EU workers was deemed compatible with articles 11 (6) and 111 of the Constitution,² such a provision lying in article 10 (1) of the modified grand-ducal regulation of 12 May 1972, as well as compatible with regulation 1612/68 EC of 15 October 1968 and of the law of 28 March 1972 on Foreigners.

The compatibility of this priority set for EU workers was upheld also in respect with international treaties, including the European Convention on Human Rights.³

1 Loi du 28 décembre 1995 fixant les modalités de participation aux élections communales des citoyens non luxembourgeois de l’Union Européenne et modifiant 1) la loi électorale modifiée du 31 juillet 1924 2) la loi communale modifiée du 13 décembre 1988.

2 Exemples : TA 18.05.1998, 10392; CA 20.10.1998, 10754C; TA 29.11.99, 11044.

3 TA 23.02.2000, 10812.

Chapter III

Employment in the Public Sector

In a judgment of the Court of Justice of the European Communities of 2 July 1996, *Commission of the European Communities vs. Grand Duchy of Luxembourg*, case C-473/93, Luxembourg was condemned for restricting access to the public sector only to Luxembourg nationals.

The Court stated that a Member State which, in the public sectors of research, education, health, inland transport, posts and telecommunications and in the water, gas and electricity distribution services, does not restrict the requirement of possession of its nationality to civil servants' and public employees' posts involving direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities, fails to fulfill its obligations under Article 48 of the Treaty and Article 1 of Regulation No 1612/68 on freedom of movement for workers within the Community.

On 17 May 1999, a law was enacted, which exempted the EU-candidates to a position in the public sector from the nationality condition, while requiring the knowledge of the three national languages (Luxembourgish, French and German). Following areas were exempted: research, education, health, inland transport, posts and telecommunications, water, gas and electricity distribution services, i.e. the very list of the Luxembourg Court case C-473/93.

Furthermore, such "opening" of public jobs to other EU nationals is only valid – as determined in the abovementioned judgment – C-473/93, unless the position involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. Thus, the very words of the European Court were used in Luxembourg the legislator.

The Constitution, modified before, on 29 April 1999, allowed this new bill by declaring, in article 10bis § 2, that the law decides upon the admissibility of non-Luxembourgers to the civil and military public jobs.

In 2002, a draft bill was deposited at the Parliament (n° 4891), including two proposals of regulations, which contain a list of public positions which, by definition, are supposed to *involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities*, in the areas mentioned by the Court of Justice, as well as a regulation which decides upon which positions are not submitted to the knowledge of the three administrative languages.

This draft bill has not been enacted in 2003. Yet it can be written that it was criticized by the Permanent Commission on Discrimination, a body of the National Foreigners Conference, for using a very specific list of positions, rather than using some general criteria, which would be valid for all the public sector. It also seemed that most senior positions were pointed as falling under the category of being reserved to Luxembourg nationals, while less important positions were opened to other EU nationals.

As far as the army is concerned, a law of 20 December 2002 modifying the law of 23 July 1952 concerning the military organisation, has allowed that voluntary applicants to the army may not only be Luxembourg nationals but also nationals of other European Union member countries, called European citizens in article 1 of the law.

The EU citizen must however have resided for three years in Luxembourg before being able to volunteer for the army. Furthermore, the upper careers are reserved to Luxembourg nationals (“officiers” and “sous-officiers”).

Only the Luxembourgers may, after three years of service in the army, be candidates for a list of positions included in article 3 of this law.⁴ They also enjoy a right of priority for lower jobs in the administration.

Article 3 § 2 also allows EU nationals to benefit from these provisions, for the limited sectors mentioned above,⁵ with the usual restriction i.e. if they

involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities.

While some restrictions on EU nationals are understandable in this list, like the police, one can question the reason for reserving jobs like prison ward or postman to Luxembourg nationals.

On 28 November 2003, a law on teaching personnel in secondary schools was enacted as well as a grand-ducal regulation, which is about the planification of the recruitment of this personnel. Both texts allow for preliminary tests to be held, in order to verify the knowledge of the three national languages i.e. Luxembourgish, French and German.

In a decision of 5 May 2000, the Constitutional court of Luxembourg declared that the legislator may, without violating the constitutional principal of equality, submit some categories of people to different legal regimes, on the condition that the instated difference is due to objective disparities, that it is objectively justified, adequate and proportionate to its goal (arrêt 9/00, Mém. A-40, 30 mai 2000, p.948). These criteria are to be applied by the constitutional judge according to the preparatory documents of the laws.

A judgment of the administrative tribunal of 25 September 2000 rejected a claim by a German woman, who was teaching under the status of “employée de l’Etat”, a private employee of the state, to become a full civil servant.

The judges decided that the Minister had been right in rejecting the application, as she had not fulfilled all the conditions to become a teacher in a secondary school. The judges underlined that the applicant did not speak the three national languages, a condition set in article 4 of the general statute of the civil servants of the state.

4 Sous-officier de carrière de l’armée proprement dite, sous-officier de carrière de la musique militaire, caporal de carrière de l’armée proprement dite, brigadier de police, gardien des établissements pénitentiaires, facteur de l’entreprise des postes et télécommunications, préposé de l’administration des douanes et accises, cantonnier de l’administration des eaux et forêts.

5 Research, education, health, inland transport, posts and telecommunications, water, gas and electricity distribution services.

The tribunal decided that such a condition being valid for both Luxembourg nationals and other EU nationals, there was no discrimination based on nationality, referring to the text of the decision of the Court of justice of the European Communities of 2 July 1996, cited above, which itself referred to the conclusions of the Advocate General (points 132 to 143).

Two other judgments of the same court decided that a an employee of the state, in specie a teacher of foreign language and a municipal employee who is a music teacher were not to be considered as equal to Luxembourg nationals and enjoy the same rights, according to former article 48 of the Treaty of Rome and the EC Regulation 1612/68 of 15 October 1968.⁶

The new Government, which came into power after the elections of 13 June 2004, has announced in its governmental declaration that it will envisage a larger access of foreigners to certain categories of public jobs, but will keep the requirement of the three national languages.⁷

6 TA 12-5-1999, n°10889, TA 18.11.1999, n° 11003.

7 Chambre des Députés, Compte rendu des séances publiques, n° 1, p. 20.

Chapter IV Family Members

European Union citizens may travel freely and may come to Luxembourg to visit their relatives.

As for permanent residence, the Special Foreigner Regulation is applicable to:

- the spouse and children of persons mentioned in §1-4, younger than twenty-one or dependants, without consideration of nationality;
- the spouse and dependant children of persons mentioned in §5-7, without consideration of nationality
- the dependant ancestors of persons mentioned in §1,2,3,4,5,6 and 7 and their spouse, without consideration of nationality.

Thus, in order to enter and sojourn in the Grand-Duchy of Luxembourg for up to three months, these persons must only present their national identity card or a valid passport (or one which has expired not more than five years prior) or any other piece of identification recognised for the crossing of the border (Article 2 of Special Foreigner Regulation).

However, within three days of their arrival, such persons must signal their presence to the local authorities of the place of their residence (id., at Article 7).

The spouse and children of EU citizens receive a residence permit together with the main applicant.

The relatives of immigrants of third-country nationals (non EU and non EEA citizens) are subject to the general legislation on foreigners and must also apply for a residence permit. Article 3 §3 of the Special Foreigner Regulation foresees that a members of the family who do not possess an EU nationality will receive a residence permit, which will last as long as the one of the (main) EU resident.

According to a decision of the Luxembourg administrative court, a third-country national married to an EU citizen has the right to a residence permit and to a work permit, according to the European Regulation EEC 1612/68 (articles 10 and 11).⁸ Such a right continues even during a procedure of divorce.⁹

Also, a decision of the administrative tribunal stated that the right to family reunification, in this case the mother of a Belgian woman, of a third-country nationality, is directly derived from the right of residence of the EU national – in this case the daughter, so that the refusal to let this person come to Luxembourg to live with her daughter was annulled.¹⁰

However a case must be evoked, which shows some difficulties in the application of administrative practice. A German man married a Russian woman and both live in Luxembourg. The man wanted to adopt the son of the Russian woman who lives with them. The boy (“VD”) got a visa D+C which has been re-issued every year, with which he can only travel freely with the Schengen zone. He never got a foreigner’s card, which

8 TA 29-10-99, BADANI, n° 11587; also TA 11.12.2002, n° 14695.

9 TA 12.10.2000, n° 11573a.

10 TA 07.03.2001, n° 12344.

is issued to foreigners with a residence permit. Therefore he does not have the possibility to travel freely within all the countries of the European Union, which is a violation of freedom of movement. The Ministry of Justice's dubious explanation is that for children under 15 years, foreigner's cards are not delivered in Luxembourg.

The case has been put to the European Parliament's Commission on Petitions, which acted, as well as the European Commission, toward the Luxembourg Government in order to get this issue solved, but with no avail. The case has not been solved yet.

Chapter V

Follow-up of Recent ECJ-Judgments

The ECJ judgments are generally invoked in court and the Luxembourg civil courts do take the ECJ decisions very seriously. In case European law is invoked and a national provision contrary to an ECJ decision has not been amended, the national judge will apply the ECJ decision. However in social security matters, which are very complex, the interpretation of the courts must be followed-up with great care, as it is not always clear that the freedoms granted by European laws are completely and correctly applied.

A decision of the court of appeal of the Social Security, the “Conseil Supérieur des Assurances Sociales” of 10 January 2002, follows-up the ECJ decision of 31 May 2001. In a very complex decision, it grants a maternity allowance to the demanding party but rejects the claims for an education allowance.¹¹

On 6 March 2003, in a case *Commission of the European Communities vs. Grand-Duchy of Luxembourg*,¹² the latter was condemned for violating the principle of freedom to provide as stated in article 49 of EC treaty. The Court

“declares that, having regard to the requirement that patent agents, when supplying services, should elect domicile with an approved agent, and having regard to the fact that the Luxembourg Government has not provided information concerning the precise conditions for the application of Article 85(2) of the Law of 20 July 1992 amending the rules on patents and Articles 19 and 20 of the Law of 28 December 1998 governing access to occupations in craft trades, business and industry, and to certain liberal professions, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 49 EC and Article 10 EC.services”.

11 CSAS, 10 janvier 2002, D. c/CNPF, Bull. lux. Questions Sociales, Vol. 13, 2003, n° 35.

12 Case C-478-1, European Court reports 2003, p. I-02351.

Chapter VI

Policies of a General Nature with Possible Repercussions on the Free Movement of Union Citizens

According to a notice from the director of the administration of labour (undated), from 1 August 2003, a third-country national who is a spouse of an EU citizen has free access to the labour market and thus does not need a work permit (anymore).

This is a welcome clarification as problems often occurred with the administration of labour (“administration de l’emploi”), as far as the work permit of third-country spouses married with a Luxembourg citizen or a EU citizen are concerned. The work permit was in many cases requested by the administration, which did not recognize the fact that the spouse of an EU citizen established in Luxembourg had to profit from the liberty of movement and establishment of the EU citizen.

The question of the spouse of an EU national, who is from a third country has brought some case law in respect with the right to work in Luxembourg. Some decisions will now be confirmed by the abovementioned notice of the administration of labour.

A decision from the administrative tribunal, based on the regulation 1612/68 of 15 October 1968, mainly articles 10 and 11, stated that European law gives the right of the spouse, who comes from a third country, of all worker, who is a national of a EU country, who benefits from the freedom of movement and of paid work on the territory of a member state, other than the one the worker is coming from.¹³ The condition is though, that the worker occupies a paid job in the other EU country. Otherwise, if the worker does not travel to Luxembourg in order to work, the spouse may not be the beneficiary of the liberty of work.¹⁴

Freedom of movement and thus the right for a third country national, who is the spouse of a EU national, to work in Luxembourg, is applicable to a married couple, but also to spouses who live separately. However the couple must have an effective common life, in order for article 11 of the regulation 1612/68 to be applicable.¹⁵

According to another decision, the supplementary condition of the necessity to exercise the right to free movement after the marriage i.e. the prerequisite for the EU national to marry before his installation in the other EU member country is contrary to article 11 of the abovementioned.¹⁶

Finally, judicial decisions have stated that the third country spouse of a Luxembourg national does not have an automatic right to work in Luxembourg. Thus it does not enjoy the same privileges than the other EU nationals!¹⁷

Such a position was upheld by the Constitutional court in a decision of 6 December 2002.¹⁸

13 TA 20-9-1999, n° 10919.

14 TA 10-5-99, n° 11086; TA 3-5-2000, n° 11280; TA 3-5-2000, n° 11316.

15 TA 28-7-1999, n° 10847.

16 TA 27-6-2001, n° 12703.

17 TA 13-5-2002, n° 14245.

18 Cour const., arrêt n° 14/02, 6 décembre 2002, Hedi Chandoul & Tilly Ludwig/Ministre du Travail et de l’Emploi.

Chapter VII

EU Enlargement

The modified law of 28 March 1972 on entry and sojourn of foreigners, on the medical control of foreigners and on employment of foreign workers foresees that no working permit is needed for nationals of member states of the European Union.

The Luxembourg government having opted for a transitional period of restrictions for the workers of the ten new member states, which became members of the EU on 1st May 2004, the law must be amended in order to fit the addendums V to XIV of the Athens accession treaty of 16 April 2003.

Such a bill was not yet adopted during the period 2002 and 2003. The government envisaged an exception for Cyprus and Malta from these restrictions.

Chapter VIII Statistics

Following statistics are available from the Social Security body (“Inspection Générale de la Sécurité Sociale”).

In 2002, on the labour market, there were 93.006 Luxembourg residents, 64.711 EU citizens and 8.303 third-country nationals as well as 101.621 border commuters (“frontaliers”). In 2003, there were 93.182 Luxembourg residents, 65.817 EU citizens and 8.766 third-country nationals as well as 101.621 border commuters (“frontaliers”).

This is an increase of:

0,2% - Luxembourg residents

1,7% - EU citizens

5,6% - third-country nationals

4% - border commuters (“frontaliers”).

The repartition by *sex* is, in general, of 109.549 women and 182.993 men. Between 2002 and 2003, male workers have increased by an average of 2.35% and female workers by 3,725%.

The repartition by branch was in 2002, in percentage:

Workman/woman: 44% (Lux: 9%, EU: 14%, 3rd country: 2%, border: 18%)

Employees: 48% (Lux: 17%, EU: 10%, 3rd country: 1%, border: 20%)

Civil servants: 8% (only Luxembourgers)

The full figures can be read in the attached statistical document.

Chapter IX Social Security

A court decision of the *Conseil arbitral des Assurances Sociales*, the jurisdiction of Social Security, has decided that the refusal to grant a Belgian woman, who gave birth to a child in Belgium, the birth benefit, had to be annulled.¹⁹

This refusal was based on the modified law of 20 June 1977, which obliges the mother to give birth in Luxembourg or abroad, but only during a temporary and motivated absence of the mother.

The court made an application of the ECJ judgment of 10 March 1993,²⁰ which condemned Luxembourg for having violated both article 7§2 of regulation n°1612/68 and article 18 §1 of regulation n°1408/71. It concluded that the principle of freedom of movement implied that a woman may chose the place where she wants to give birth to her child, on the condition that the health imperative is guaranteed, without having to loose social benefits granted by the Luxembourg legislation.

However the social security instances (“Caisse Nationale de Prestation Familiales”) have refused to apply this principle for another child of the same woman, so that the case will appear again before the same specialized court, the “Conseil Arbitral des Assurances Sociales”.

In a decision of 28 June 2002,²¹ the specialized appeals court, the “Conseil Supérieur des Assurances Sociales”, decided that article 229 of the Code of Social Insurance (“Code des Assurances Sociales”) does not violate the principle of freedom of movement as it applies to both Luxembourg and other EU citizens. The court held that a Dutch woman working for the European Investment Bank could not invoke some discrimination based on nationality, when her pension as a widow was reduced to zero because she was herself earning a wage. Such a solution applies indistinctively of the nationality of the person.

Supplementary pension schemes

The law of 8 June 1999 on supplementary pension schemes is applicable to all workers of a company established in Luxembourg.

19 CAAS, 11.03.2002, DELVAUX.

20 European Commission / Grand-Duchy of Luxembourg, C111/91.

21 CSAS, 28 juin 2002, Z., veuve L. c/CPEP, Bull. lux. Questions Sociales, Vol. 13, 2003, n° 18.

Chapter X Establishment, Provision of Services, Students

Establishment

According to the case law of the administrative courts, EU law is superior to national law. This principle was applied to freedom of establishment.²²

Also, restrictions to liberty of establishment was deemed legal, as long as it applies to both Luxembourg nationals and other EU nationals and that it pursues a goal, which is worthwhile protecting. Such is the case of the national law on establishment permits, which is compatible with former article 52 (now article 43) of the European treaty.²³

A law of 13 November 2002 transposed into Luxembourg law directive 98/5/EC of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.²⁴ The law recognizes all the EU foreign professional titles of lawyers and creates a forth list of lawyers, for those foreign lawyers who apply to settle in Luxembourg under their home title. It also modifies the law of the profession of lawyer of 10 August 1991 and obliges any trainee (“stagiaire”), who comes directly to Luxembourg and passes the exams to become a member of the bar to know actively the three national languages (Luxembourgish, French, German).

A grand-ducal regulation of 20 September 2002 provides for the recognition mechanism of diplomas of EU health assistants (aides-soignants), based on the general recognition system of diplomas of directives 92/51/EEC and 89/48/EEC.²⁵

As far as diplomas are concerned, a recent case may be cited. It is the case of a doctor in medicine, of Luxembourg nationality, who was born in Nigeria and finished his secondary school there. He obtained a diploma of doctor in Nigeria and two specialized diplomas in England and Ireland. His request to be able to practice in Luxembourg was turned down, due to the fact that his secondary school diploma was not recognized as equivalent to a Luxembourg one, because ... of lack of any legal basis. The administrative tribunal annulled the decision of the Minister of Education.²⁶ However, the Court of appeal overturned this judgment.²⁷ The case was then referred back by the applicant to the Minister, by invoking the ECJ decision of 22 January 2002.²⁸ According to the European judges, there is an obligation on the host Member State when presented with an application to practise the profession [of architect] on its territory to make a comparison between the specialised knowledge and abilities certified by the diploma and the experience acquired, and the qualifications required by its national legislation, when no directive is applicable.

Such a situation may be analyzed as an indirect discrimination based on nationality, as these diplomas of specialization in medicine were obtained in another EU country. Such

22 TA 7-5-1997, n° 9322; TA 7-5-1997, n° 9511.

23 TA 15-4-1998, n° 9905.

24 Mémorial 2002, p. 3202-3206.

25 Mémorial 2002, p. 2788-2790.

26 TA 30.06.2003, n° 15716.

27 CA, 02.12.2003, n° 16785C.

28 C-31/00, Dreessen.

is the opinion of the State's Council (Conseil d'Etat), after a new law of 17 December 2003 modified the law of 18 June 1969, which had been declared unconstitutional by the Constitutional Court.²⁹

The new Government, which came out of the elections of 13 June 2004, has announced in its governmental declaration that it will adapt the current legislation on the homologation and recognition of foreign diplomas.³⁰

Provision of services

A law of 25 July 2002 regulating the profession of geometer allows geometers to become official geometers recognized by the state. The law opens this opportunity to both Luxembourg and EU nationals.³¹

A law of 30 July 2002 transposed directive 98/76/CE of 1 October 1998 into national law. This directive is about the admission to the occupation of road haulage operator and road passenger transport operator and mutual recognition of diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators the right to freedom of establishment in national and international transport operations.³² Two grand-ducal regulations of 13 August 2002 provide for further technical details.³³

A law of 20 December 2002 has transposed directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services.³⁴

A law of 19 December 2003 has transposed directive 2001/19/CE of 14 May 2001 amending Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional qualifications and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor.

According to a court decision, national measures likely to hinder or render less attractive the exercise of freedom of provision of services, may be declared compatible with this fundamental freedom, when they meet four criteria: they must apply in a non-discriminatory way, they must be justified by reasons of imperious general interest, they must be good for guaranteeing the realization of the pursued goal and they must not go over what is necessary in order to attain this goal.³⁵

Students

As mentioned before,³⁶ the Special Foreigner Regulation of 28 March 1972 is applicable to persons from an EU Member State and from Member States of the European Eco-

29 Decision of 3 January 2003, n° 15/03.

30 Chambre des Députés, Compte rendu des séances publiques, n°1, p. 15.

31 Mémorial 2002, p. 2740-2744.

32 Mémorial 2002, p. 1862-1865.

33 Mémorial 2002, p. 2844-2845.

34 Mémorial 2002, p. 3722-3724.

35 TA 26-7-2000, n° 10605.

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conomic Area (EEA), including students with sufficient financial means, in order not become a needy person, who benefit from a health insurance and who are indeed enrolled on a course. They are thus free to come and study in Luxembourg.

A bank guaranty is currently requested for third-country nationals, who enrol in a course in Luxembourg by the Ministry of Justice, of about 2,500 EUR. This guarantee is blocked in a bank agreed upon by the Ministry until the end of the study time.

According to the law of 22 June 2000 concerning the financial assistance of the State for superior education, scholarships may be granted to Luxembourg students or other member of EU countries, if the student is domiciled in Luxembourg and falls under the scope of application of articles 7 and 12 of the European Regulation n° 1612/68 on the free movement of workers inside the Community.

Chapter XI

Miscellaneous

Legal literature

Friden, Georges, Chronique sur la Cour de Justice des Communautés Européennes (2002), *Annales de droit luxembourgeois*, vol. 12, Bruylant, p. 409-433.

Jacob, Ralph, La dimension européenne des pensions complémentaires, *Bulletin Luxembourgeois des Questions Sociales*, vol. 13, p. 85-99.

Morel, Anne, Les droits des travailleurs en cas de transfert d'entreprise, d'établissement ou de partie d'entreprise ou d'établissement, *Annales de droit luxembourgeois*, vol. 12, Bruylant, p. 317-343.

Wictor, Jean-Paul, Les pensions complémentaires au Luxembourg, 2ème pilier modeste en essor!, *Bulletin Luxembourgeois des Questions Sociales*, vol. 13, p. 5-15