

REPORT
on the Free Movement of Workers
in Luxembourg in 2004

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Introduction

During the year 2004 as far as the *Enlargement process* is concerned, there is not much to be noted. Luxembourg does require a working permit for the workers of the new member states, apart from Cyprus and Malta.

The issue of the *public sector* has not evolved since the last report. The same concerns are still valid. 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).

The legislator has chosen to list key positions in the public sector, which are excluded from the opening to other EU-citizens, rather than enact a general criteria which would determine which administrations or positions are open to non Luxembourgers.

In the sports area, the issue of discrimination based on nationality of *football* players due to quotas in football clubs must be solved in accordance with the EU legislation.

Chapter I Entry, Residence, Departure

The legislation has not been amended during the year 2004. However, it is the Government's intention to amend the current legislation i.e. the modified grand-ducal regulation of 12 May 1972 on the applicable measures to foreign workers in the territory of Luxembourg.¹ This Regulation foresees, in article 1, that EU workers are exempted from the prerequisite of a working permit.

The Government has announced on 6 May 2005 that the amendments to this Regulation will entail the abolition of the working permit:

- for Swiss workers;
- for the third-country spouses of a EU national;
- for the third-country spouses of a Luxembourg citizen.

As far as work permits are concerned, an ECJ case has condemned Luxembourg for imposing on service providers established in another Member State who wish to deploy in its territory workers who are nationals of non-member countries a requirement of individual work permits.²

A case involving a third-country spouse of a European national is worthwhile mentioning. A Swedish woman, her Israeli husband and their child moved from Sweden to Luxembourg. The husband found a job, but his wife, who had worked in Sweden, did not apply for a job in Luxembourg. The work permit was refused to the husband, due to the fact that his wife was not a worker in the European sense.

The husband seized the administrative court of the case, arguing that even if his wife was not to be classified as a worker, directive 90/364 should have allowed her - and thus him - to stay legally in Luxembourg, so that either the husband did not need a work permit or that this permit should have been issued to him. No judgement has been issued in 2004 yet on the case.

The administrative court of appeal has issued a judgement in a case of a Portuguese citizen, who was denied entry in Luxembourg by the Minister of Justice. He asked to be allowed to come to Luxembourg because his fiancée, a resident of Luxembourg, was pregnant. The decision was annulled in the first instance administrative tribunal.

The decision of the Minister was based on the fact that the applicant had been condemned by the Luxembourg tribunal correctionnel, especially for drug detention and transport, so that he was deemed to be a danger for public order, due to his personal behaviour.

The first judges had analysed the case in view of article 3 of Directive 64/221/EEC, according to which measures relating to public order or security must be based exclusively on the personal behaviour of the person and that the existence of criminal convictions may not suffice to justify by itself, such measures. They found that the violation to Luxembourg law had occurred between 10 and 6 years before the judgement and that they were not severe enough to be a legal base for a refusal of entry.

However, the Court of Appeal repealed this judgement and found that the repetitive condemnations of the person and the fact that some were due to drug abuses were sufficient elements for the Minister to legally motivate a decision of refusal of entry.³

1 *Règlement grand-ducal du 12 mai 1972 déterminant les mesures applicables pour l'emploi des travailleurs étrangers sur le territoire du Grand-Duché de Luxembourg Mémorial A, p. 45.*

2 See chapter X, Provision of services.

3 C.Adm., 25 mai 2004, n°17807 C du rôle.

In another case, the administrative Court of Appeal repealed a judgement of first instance and annulled a ministerial decision not to grant a residence permit to an EU national, for reasons of public order. The Court, referring to Directives 64/221/EEC and the case law of the Court of justice of the European Communities, found that, as the notion of public order must be interpreted in a restrictive way, the behaviour of the person was not serious enough to justify a refusal of residence permit and the obligation to leave the country.

The court decided that as the criminal convictions (for bankruptcy) had been pronounced in 1998 and as the mere fact of being condemned was not sufficient to consider her as a danger for the public order, the Minister had violated the principle of proportionality.⁴

Voting Rights

As far as the voting rights are concerned, a law of 10 February 2004 modifying and completing the electoral law of 18 February 2003 was adopted. Only article 1 is relevant to the question of the EU citizens. It foresees that the separate list of EU citizens participating in the European elections has to mention the nationality of the eligible voters.

4 C. Adm., 15 juillet 2004, n° 17915 C du rôle

Chapter II Equality of Treatment

The grand-ducal regulation of 18 September 1995 on legal aid has been amended by a new grand-ducal regulation of 29 October 2004, which transposes Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.⁵

The regulation has added in § 4 of article 1, the possibility for persons domiciled or residing in another EU member state, who prove that they cannot face the costs of a civil or commercial dispute because of the difference of the cost of living between their state of origin and Luxembourg.

According to the regulation, the Minister of Justice is the competent authority for receiving and sending cross-border legal aid requests.

In the field of anti-discrimination, on 24 February 2005, the Court of Justice of the European Communities has issued a judgement, by which the Grand-Duchy of Luxembourg was condemned for non-transposition of directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic Origin. The case C-320/04 follows an action under article 226 EC by the European Commission against Luxembourg for failure to fulfil its obligations and was launched on 27 July 2004.

Indeed the transposition process of both Directives 2000/43 and 2000/78 (equal treatment in employment) has not evolved a lot. The state's Council gave its very critical opinion on draft bills 5248 and 5249, on 7 December 2004.⁶

5 *Règlement grand-ducal du 29 octobre 2004 portant modification du règlement grand-ducal du 18 septembre 1995 concernant l'assistance judiciaire, Mémorial A., p. 2798.*

6 The criticism of the State's Council is blatant regarding many items, of which the following may be highlighted:

- It considers that it would have been wiser to have a single bill rather than two bills. The scope of the two draft bills is criticized as being legally unacceptable, as mainly the draft bill transposing Directive 2000/78 is referring to several other bills. Also the scope is not the same as the one foreseen in both directives, leaving out the public sector as well as independent work. There is a clear warning about the possible responsibility that the State would incur should the transposition process be inadequate.

- As far as definitions are concerned, the State's Council is critical with the use of the word "race" (in French). It advises to use the solution already adopted in the penal code, namely to insert, before the words "race" and "ethnic origin" (*ethnie*), the words "their real or supposed belonging or non belonging to a ...".

Also, this body criticises the wording of the exception relating to genuine and determining occupational requirements for Churches, as it could be interpreted as introducing new restrictions to religious freedom and to freedom of expression.

- Though the State's Council finds that the age criteria is indeed included, it firmly condemns the fact that in the public sector the age requirement is still applicable, while it would be banned in the private economy.

- Concerning the defence of rights, it does not agree with the absence of a special mechanism to ensure such defence, disagreeing with the Government about the efficiency of existing legal possibilities in this field.

- The same goes for victimisation, as only the draft bill on the employment area (Directive 2000/78) has included new legal remedies.

- The State's Council also stresses that, as far as sanctions are concerned, there should be no new definition of discrimination, the existing one being included in the Penal Code, and disapproves the creation of new, competing penal sanctions.

The case-law of the administrative courts, in the matter of working permits has been steady in recognizing that a third-country national married to an EU citizen residing in Luxembourg does not need a working permit.⁷

However, it has also continued to decide that in the case of a Luxembourg national married to a third-country national, such a working permit would still be required for the third-country national, the EU legislation being not likely to be applicable to such a case,⁸ so that there is a reverse discrimination for Luxembourgers in comparison with other EU nationals.

- Finally, the *Conseil d'Etat* formally opposes the absence of the Independent body for the promotion of equal treatment, stressing that such a body could be set up according to the recommendations issued by the Council of Europe's ECRI (European Commission on Racism and Intolerance).

7 T.A., 1 mars 2004, n° 16718 du rôle.

8 T.A., 10 novembre 2004, n° 17823 du rôle.

Chapter III Employment in the Public Sector

In the report 2002-2003, it was said that

“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”.

Indeed, a grand-ducal regulation was signed by the Grand-Duke on 5 March 2004, which concerns the positions which are reserved to the Luxembourg nationals in the public sector.⁹

The title of the law refers to the positions in the state administration and the public institutions who 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 using the very words of the Court of Justice of the European Communities in case C-473/93, *Commission vs. Luxembourg*.

The law provides for a list of positions, which are deemed to fall in the abovementioned category and thus are reserved to Luxembourgers only. The list includes some positions in the area of Education in the Ministries of:

- Culture, Higher Education and Research
- National Education, Vocational Training and Sports
- Family, Social Solidarity and Youth

It also lists such positions within the sector of the Posts and Telecommunications i.e. directors of heads of units.

Another Grand-Ducal regulation of 5 March 2004,¹⁰ provides for a list of positions in the state administration and the public institutions for which the knowledge of one of the three national languages¹¹ is not required, because of their nature and their [lower] level of responsibility. The regulation includes positions of teaching personnel in several institutes.

As far as the army is concerned, a grand-ducal regulation of 13 December 2004¹² has defined the modalities by which the volunteers of the army may benefit from a right of priority to access public jobs of the lower careers.

9 *Règlement grand-ducal du 5 mars 2004 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 publique 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., p. 420.*

10 *Règlement grand-ducal du 5 mars 2004 déterminant les emplois dans les administrations de l'Etat et les établissements publics pour lesquels la connaissance de l'une ou de l'autre des trois langues administratives n'est pas reconnue nécessaire en raison de la nature et du niveau de responsabilité de ces emplois, Mémorial A, p. 422.*

11 Luxembourgish, French and German.

12 *Règlement grand-ducal du 13 décembre 2004 concernant le droit d'exclusivité et le droit de priorité des volontaires de l'armée pour les emplois de la carrière inférieure des administrations, offices, services et établissements publics y compris les établissements d'assurance sociale, les communes, les*

Luxembourg

The law of 20 December 2002 has opened this possibility also for the other EU citizens who are not Luxembourg nationals, but only for the areas of research, education, health, inland transport, posts and telecommunications and in the water, gas and electricity distribution services, so that this regulation applies also to foreign EU citizens under the limited conditions.

établissements et syndicats communaux et la société nationale de chemins de fer luxembourgeois, Mémorial A, p. 2974.

Chapter IV

Members of the Family

In the previous report, a case was mentioned, concerning a German man married a Russian woman, who both live in Luxembourg. The man wanted to adopt the son of the Russian woman, who lives with them. The boy was refused a foreigner's card and thus did not have the possibility to travel freely within all the countries of the European Union, because of the Ministry of Justice's position that there are no deliveries of foreigner's card for children under 15 years.

The case has been resolved, the administration finally granting such a document to the son.

Chapter V

Follow-up of Recent ECJ-Judgements

On 30 September 2003, the European Court of Justice issued a judgement, *Colegio dm Oficiales de la Marina Mercante Española v Administración del Estado*, concerning the discriminatory treatment of seafarers, namely Masters and chief mates of merchant navy ships, due to the fact that these posts were reserved for nationals of the flag State.

In Luxembourg such an issue should not arise. The basic law is the one of 12 November 1990 on the Luxembourg maritime register.¹³ This law foresees, in Article 7, that the captain shall be an EU-national, who has the required diploma.

Therefore there is no restriction to nationals for such positions. There are indeed no Luxembourgers who are captains or salesmen, according to the competent ministry.

13 *Loi du 9 novembre 1990 ayant pour objet la création d'un registre public maritime luxembourgeois*, *Mémorial A 1990*, p. 807.

Chapter VI

Policies, Texts and/or Practices of a General Nature with Repercussions on the Free Movement of Union Citizens

The ECJ has condemned the Grand-Duchy of Luxembourg, in a judgement of 10 June 2004,¹⁴ for not having transposed Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

14 *Commission vs. Luxembourg*, Case 333-03.

Chapter VII EU Enlargement

On 10 February 2004, a law was adopted, enabling the EU citizens of the ten new EU member states to participate to the elections to the European Parliament of 13 June 2004, after the accession of these 10 new countries on 1st of May 2004.¹⁵

The law of 8 March 2004 ratifies the treaty of Athens of 16 April 2003, by which the 10 new member countries have joined the EU.¹⁶

According to this law, the electoral law of 18 February 2003 is applicable to the European elections of 13 June 2004 for the new EU citizens. To be able to vote, one has to comply with the usual conditions of Luxembourg electoral law and having resided in the Grand-Duchy of Luxembourg during 5 years preceding the date of 1 April 2003.

A special list is set up for the new EU citizens. The request to be put on this electoral list had to be made before 13 March 2004, so that the deadline was very short. At the next review of the electoral lists, the new EU citizens will automatically be put on the general list of EU voters.

Article 9 of the law also provides for the possibility for the new EU citizens to be candidates for this election, if they abide by the general conditions of the electoral law of 18 February 2003.

The Council of State approved the approach, this law being totally neutral, by not extending and not reducing the voting rights of the other EU citizens, but underlined the delay with which this draft bill was submitted to Parliament.¹⁷

A law ratifying the agreement signed in Luxembourg on 14 October 2003 and enlarging the European Economical Area to the ten new member countries of the EU was adopted on 27 April 2004.

The Government has announced that for a two-years period, a working permit would still be required for EU-citizens of the new member countries, except for Malta and Cyprus. Such a move was made especially considering the attitude of the neighboring countries on the same issue.

The Government has not announced what attitude it will take at the end of this period of two years. It is likely that, again, the decisions of the neighbors will have a great impact on the decision to open-up or not the country to the workers eight other new EU member countries.

15 *Loi du 10 février 2004 concernant la participation aux élections européennes du 13 juin 2004 des ressortissants des Etats qui deviendront membres de l'Union européenne le 1er mai 2004, Mémorial A, 2004, p. 188.*

16 *Loi du 8 mars 2004 portant approbation du Traité entre le Royaume de Belgique, le Royaume de Danemark, la République Fédérale d'Allemagne, la République Hellénique, le Royaume d'Espagne, la République Française, l'Irlande, la République Italienne, le Grand-Duché de Luxembourg, le Royaume des Pays-Bas, la République d'Autriche, la République Portugaise, la République de Finlande, le Royaume de Suède, le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord (Etats membres de l'Union européenne) et la République Tchèque, la République d'Estonie, la République de Chypre, la République de Lettonie, la République de Lituanie, la République de Hongrie, la République de Malte, la République de Pologne, la République de Slovénie, la République Slovaque relatif à l'adhésion de la République Tchèque, République d'Estonie, de la République de Chypre, de la République de Lettonie, de la République de Lituanie, de la République de Hongrie, de la République de Malte, de la République de Pologne, de la République de..., signé à Athènes, le 16 avril 2003, Mémorial A, 2004, p. 454.*

17 *Avis du Conseil d'Etat (27.1.2004), Projet de loi 5276/01 concernant la participation aux élections européennes du 13 juin 2004 des ressortissants des Etats qui deviendront membres de l'Union européenne le 1er mai 2004, p. 1.*

Chapter VIII Statistics

Following statistics are available from official sources, including the Social Security body (*Inspection Générale de la Sécurité Sociale*) and from the Ministry of Labour and Employment.

In 2004, the numbers of international migrations were 12,495 arrivals and 10,911 departures, so that 1,584 new residents were added to the population.

If one takes the total numbers of arrivals and of departures from EU countries (1584), there is a percentage of arrivals of 48% from old member states of the EU (765), 35% from new EU member countries (546) and 17% of third country nationals (273).

In total there were 9,113 new arrivals from the EU member states and 8,348 nationals of these member countries who left Luxembourg, meaning that 765 new EU citizens came to live in Luxembourg all in all.

There were 704 new arrivals from the new member states and 158 nationals of these new member countries who left Luxembourg.

The number of work permits issued by the competent Ministry is 4,228 (plus 728 special permits for Polish season workers for the wine harvest). The available statistics do not allow to assess the situation of the new EU member countries' citizens, as the Ministry has classified these countries in the global category of Eastern Europe.

One can only underline that out of 4,228 work permits, 2,725 were issued for workers of the 10 new EU member countries, i.e. 65%.

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

Chapter IX Social Security

Legislation

A bilateral convention signed with Slovakia has entered into force on 1 February 2004. This convention includes classical international clauses i.e. the principle of uniqueness of the applicable legislation, the principle of equality of treatment, the principle of the total of insurance periods and the export of benefits. Since 1 May 2004, the regulation 1408/1 applies in the relationship between the two countries. However, two provisions continue to apply, one relating to refugees and the second maintaining the total of insurance periods in a third country with which both countries are linked by an international social security instrument.

Case law

In the 2002-2003 report, a court decision of the *Conseil arbitral des Assurances Sociales*, the jurisdiction of social security, was mentioned, by which it had decided that the refusal to grant a Belgian woman, who gave birth to a child in Belgium, the birth benefit, had to be annulled. This refusal was based on the modified law of 20 June 1977, which obliges the mother to give birth either in Luxembourg or abroad, but in the latter case only during a temporary and motivated absence of the mother. It was also mentioned that the same case had arisen with another child of the same mother, who had again given birth to a child in Belgium. The social security refused to pay for the costs of the delivery.

The same *Conseil arbitral des Assurances Sociales* rejected the claim of the mother, in a decision that cannot be appealed, by deciding that the birth did not take place during a temporary and motivated absence.¹⁸ The single judge (different from the one of the first case) totally rejected the application of European law in two sentences.¹⁹ This shows that the correct application of European law still remains problematic with the jurisdictions, as illustrated by two opposite decisions emanating from the same court for two children of the same family born in the same circumstances, one judge applying European law principles, and the second one just dismissing the application of the same principles!

A judgment of the social security court of first instance has decided to annul the refusal of affiliation at the social security in Luxembourg. The applicant's husband was affiliated at the social security in Luxembourg and received a disability pension, while residing in France and being heavily dependant on outside's care. His wife requested also her affiliation in Luxembourg, in order to have her social security fees be taken over by the long-term insurance, but she was turned down. The Luxembourg institution declared that the woman had to ask the French social security to pay the fees for the long-term insurance, whilst the French social security would be able to ask the reimbursement to its Luxembourg counterpart.

The court applied article 18§1 and Articles 39 and 42 of the EC treaty and decided that the long-term insurance was covered by Regulation 1408/71 (*Molenaar* case of 9 March 1998) and

18 CAAS, 29.10.2004, DELVAUX/CNPF.

19 §5-§6, p. 4.

that the benefits are to be considered as sickness benefits, so that the refusal of the social security to affiliate the wife was declared invalid.²⁰

Another case involved an applicant to a disability pension, who had worked during 14 years as a civil servant for the European Union institutions. The Luxembourg social security refused to take into account this working period and so his application was turned down for not having paid the necessary fees for a long time enough.

The first instance court rejected the claim, by refusing to acknowledge that regulation 1408/71 was applicable to the case.²¹ The Court of Appeal (*Conseil Supérieur des Assurances Sociales*) overturned the judgement, noting that the ECJ had found that a person who has decided to become a European civil servant should be able to keep the benefit of the former national pension system.²² The *Cour de cassation* did not find a breach of the law and confirmed the legality of the decision on appeal.²³

The appeals court of the social security confirmed the application of Regulation 1408/1 to the case of a person who is affiliated to the French social security and receives a retirement pension there and who is residing in Luxembourg. Therefore the court judged that the applicant was entitled to get benefit-in-kind from the Luxembourg authorities and possibly cash sickness benefit from France, according to article 28 of the Regulation. However, the judges decided that the applicant was not entitled to cash sickness benefit from Luxembourg, unless the applicant would ask and obtain the agreement of both the social security bodies of both countries, in case of which Luxembourg would be able to pay out the benefit-in-kind and be reimbursed by France.²⁴

On 26 March 2003, the same court of appeal confirmed a first-instance judgment, which stated that hospital expenses paid by an applicant in Germany, after a hospitalization in urgency were to be repaid by the Luxembourg social security, in the same conditions as a treatment covered in Luxembourg by the social security, even if this treatment is not recognized by the German social security system, otherwise articles 49 and 50 of the EC Treaty would be violated.²⁵

The same court also decided the same day, in another case, that according to Article 22 of Regulation 1408/71, the Luxembourg social security had to reimburse the costs of an urgent treatment in Portugal, which took place in a private hospital, even if there was no nomenclature of the costs to be reimbursed in this country.²⁶ The judges found that the applicant had the right to this reimbursement according to the Luxembourg legislation, so that deciding differently would be a breach of Articles 49 and 50 of the EC treaty.

20 CAAS, M. c/ CCSSA, *Bulletin luxembourgeois des questions sociales*, Vol. 16, p. 177.

21 CAAS, G. c/ CPEP, *Bulletin luxembourgeois des questions sociales*, Vol. 16, p. 222.

22 CSAS, G. c/ CPEP, *Bulletin luxembourgeois des questions sociales*, Vol. 16, p. 228.

23 Cass., G. c/ CPEP, *Bulletin luxembourgeois des questions sociales*, Vol. 16, p. 232.

24 CSAS, 21 janvier 2004, D. c/UCM, *Bulletin luxembourgeois des questions sociales*, Vol. 16, p. 324.

25 CSAS, 26 mars 2003, D/CMEP, *Bulletin luxembourgeois des questions sociales*, Vol. 16, p. 280.

26 CSAS, 26 mars 2003, D/CMEP, *Bulletin luxembourgeois des questions sociales*, Vol. 16, p. 265.

Chapter X Establishment, Provision of Services, Students

Establishment

Legislation

- The law of 28 December 1988 regulating the establishment of craftsmen, tradesmen, industrialist and some liberal professions has been changed quite a lot by the law of 9 July 2004.²⁷ As far as the Europeans are concerned, two professions are being regulated according to the European sectoral directives, namely architects and industrial property counsels.²⁸

- A grand-ducal regulation of 26 May 2004 describes the conditions of access, of study and of success of medical training, especially in the light of the creation of the University of Luxembourg by a law of 12 August 2003.²⁹

The training for general medicine is deemed to be organized according to the modified Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications and Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive (article 2 of the law).

Article 5 of the law only admits candidates to the training of medical doctors who are European citizens, Swiss citizens or EEA citizens.

- A ministerial regulation of 17 November 2004 has established a list of diplomas that are recognized in Luxembourg in order to work as a medical doctor, dentist or veterinarian, in order to extend this list to the citizens of the ten new EU member countries, replacing a former ministerial regulation of 18 November 1996. In case the diploma is not one of those listed, a certificate of the country of origin must be produced, which certifies that the training of the doctor has taken place according to the modified Directive 93/16/EEC and is being assimilated by the country of origin to the diplomas listed in the regulation.

- A grand-ducal regulation of 10 September 2004 establishes the criteria for the homologation of foreign certificates and grades in law, medicine, pharmacy and in view of acceding to profession of teacher in secondary schools, of foreign certificates and grades in human science, philosophy and humanities as well as natural science, physics and mathematics.³⁰ For EU citizens, article 11 establishes a lighter procedure and refers to European directives in professional qualification.

27 *Loi du 9 juillet 2004 modifiant 1. la loi modifiée du 28 décembre 1988 réglementant l'accès aux professions d'artisan, de commerçant, d'industriel ainsi qu'à certaines professions libérales; 2. le Code des assurances sociales, Mémorial A, p. 2042.*

28 Article 9-1 and 9-3.

29 *Règlement grand-ducal du 26 mai 2004 déterminant les conditions d'accès, les études ainsi que les conditions de réussite de la formation spécifique en médecine générale, Mémorial A, p. 1124.*

30 *Règlement grand-ducal du 10 septembre 2004 fixant les critères d'homologation des titres et grades étrangers - en droit, médecine, médecine dentaire, médecine vétérinaire et en pharmacie et, en vue de*

Diplomas

In the report of 2002-2003, a case was mentioned by which a Luxembourg national who had earned his college degree and his basic medical studies in Africa and who had obtained specialized diplomas in medicine in UK and Ireland was unable to obtain the recognition of his secondary school diplomas, thus impeaching him to exercise his profession of doctor.

The administrative court reversed the decision of the administrative court, which had annulled the ministerial decision of refusal of recognition of the secondary school diploma. As stated in the previous report, it may be analyzed as an indirect discrimination based on nationality, as these diplomas of specialization in medicine were obtained in another EU country.

However, the new Minister of Education has decided to act in this area to facilitate the recognition of non-EU diplomas of secondary school, which will end up in a new grand-ducal regulation in 2005.

Also, several cases involving non-EU citizens have been successfully dealt with. One case involved a recognized refugee, who had become a Luxembourg national and who, therefore, was unable to get his secondary school diploma recognized. The Ombudsman's intervention settled the case. Another case was indirectly resolved, when a Moroccan citizens had his secondary school diploma recognized by the fact that his diploma had already been previously recognized in Belgium, so that this recognition (equivalence) was recognized in Luxembourg.

Provision of Services

ECJ

On 7 September 2004, the ECJ found, just like in the case of France, that the bonus-malus system of insurance was compatible with the principles of freedom, deciding that

“the Commission has not demonstrated that, by introducing and maintaining in force its bonus-malus system, the Grand Duchy of Luxembourg has acted in breach of the principle of freedom to set rates and of elimination of prior or systematic controls on scales of premiums and insurance contracts which is established by Articles 6, 29 and 39 of Directive 92/49”.³¹

However, on 21 October 2004, the ECJ condemned Luxembourg, declaring that,

“by imposing on service providers established in another Member State who wish to deploy in its territory workers who are nationals of non-member countries a requirement of individual work permits, the issuance of which is subject to considerations relating to the employment market, or a requirement of a collective work permit, which is granted only in exceptional cases and only when the workers concerned have, for at least six months prior to the deployment, been in a relationship with their undertaking of origin through a contract of employment of indefinite duration, and by requiring those service

l'admission au stage pour le professorat de l'enseignement secondaire, - en sciences humaines et en philosophie et lettres, ainsi qu' Mémorial A, p. 2484.

31 *Commission vs. Luxembourg*, Case C-346/02.

providers to provide a bank guarantee, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 49 EC.”³²

Legislation

A law of 22 February 2004 has enacted new rules concerning the electricity market, by amending the law of 24 July 2000.³³ The law transposes Directive 2001/77/EC into national legislation.

Directive 2003/44/EC of the European Parliament and of the Council of 16 June 2003 amending Directive 94/25/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft has been transposed by a grand-ducal regulation of 15 October 2004.³⁴

Case law

A case involving a lawyer is worthwhile commenting. A barrister from England asked the administrative tribunal to annul a decision of the Bar Association of Luxembourg, which refused his inscription on the list of lawyers working under the professional title used in the Member State from which he comes (based on the “home-title” Directive on lawyers).

Actually the bar Association had asked him to attend a language test, in order to verify his language skills in the three national languages, as foreseen in the law of 10 August 1991. The barrister came to the test accompanied with a lawyer and the Bar association refused to allow him to pass the test if did not want to attend the test alone.

The judges decided that the applicant had failed to appeal the decision at the Conseil disciplinaire et administratif, a body established by the law in order to take decisions precisely on cases like the refusal of inscription of a lawyer at the Bar association, so that the judges found themselves incompetent to judge the case.³⁵

Football

The Commission has initiated an infringement procedure against Luxembourg (*avis motivé*), in relationship with the rules of the Football Federation (FLF), for discriminatory rules based on the nationality of players.

Indeed the statutes of the FLF contain rules, which restrict the number of foreign players allowed to figure for one football club on the playing form of a match to three players, out of 16 players.³⁶

32 *Commission vs. Luxembourg*, Case C-445/03.

33 *Loi du 22 février 2004 modifiant la loi modifiée du 24 juillet 2000 relative à l'organisation du marché de l'électricité*, *Mémorial A*, p. 604.

34 *Règlement grand-ducal du 15 octobre 2004 transposant la directive 2003/44/CE du Parlement européen et du Conseil du 16 juin 2003 modifiant la directive 94/25/CE concernant le rapprochement des dispositions législatives, réglementaires et administratives des Etats membres relatives aux bateaux de plaisance*, *Mémorial A*, p. 2656.

35 T.A., 13 mai 2004, n° 16779 du rôle.

36 Article 3-05-C of the internal FLF regulation.

The FLF has acknowledged that this rule hurts the EU legislation but has announced that the statutes will be modified in June 2005. The restrictions to the number of foreign nationals allowed to play in a match should be totally erased.

The project contains a provision by which a minimum number of players allowed to be selected for the national football team will have to figure on the playing form (playing list).

The FLF's opinion to this clause is that it is a positive discrimination, which is necessary in order to uphold the specific character of the Luxembourg football. Also the FLF believes that a discrimination would be existing only for players for which football is their work, as they would then have to be considered as workers. This would not be the case, as the players are all amateurs and thus do not "take away" jobs of other football players from foreign countries. Even if some players earn some money, this would not be considered as a job, as the tax authorities would allow such pocket monies to be free of tax up to a certain level (administrative tolerance).

The FLF will also have to apply the rule of the UEFA, which obliges the clubs to have a certain number of team players, which have been trained in the club on the playing list for UEFA matches. The current project is to have 3 such players for the season 2005/2006, 4 for 2006/2007 and 5 for 2007/2008, only for UEFA matches, not for the national championship. The compatibility of the UEFA regulations with the EU law will have to be checked. It is not the intention of the author of this report to analyse such a wider issue.

It is too early to assess the rules which should be adopted by the FLF, as the wording must be checked once they have been adopted. If the current system of a limited number of foreign players is discriminatory in terms of nationality, its abolition will be welcome.

The issue of an obligatory number of players, which are likely to be selected for the national team will have to be analysed. However, it seems that such a rule could be seen as an indirect discrimination, as only Luxembourg nationals are likely to be selected in the national team.

It will have to be assessed whether the fact that these players are amateurs, even if some earn some money, but not as a fulltime job, may be considered as giving them the status of workers, in which case article 39 of the treaty would be applicable. The notion of worker is a *sui generis* notion in EU law and must not be analysed according to Luxembourg law. The answer to this question will entail that there is discrimination or not.

Students

The following case is linked to the studies. A Ukrainian woman, married to a French national residing in Luxembourg, asked for financial support from the State, for management studies at the University of Luxembourg. It was refused on the basis that she could not produce a copy of her residence permit.

The applicant put the case to the administrative tribunal, arguing that she could not produce such a document, being married to an EU national, and thus would have to be considered as an EU national herself and not a third-country national.

However, the judges decided that although a previous judgement had recognised that she had a right of residence in Luxembourg, benefiting from being married to an EU national, she could not claim that this right would automatically entail that she would be considered in all matters as an EU national. The claim was thus rejected.³⁷

37 T.A., 9 mars 2005, n°18796 du rôle.

Chapter XI Miscellaneous - Attachments

Dual Nationality

Until now, the dual nationality is not tolerated according to the very restrictive rules entailed in article 25 LNL. However the Government has declared its will to introduce the dual nationality in 2006. Article 25,1° LNL provides that the person who voluntarily acquires a foreign nationality, loses automatically his Luxembourgish nationality when he is over eighteen years old. This rule can be qualified as traditional as it takes its roots in the Code Napoléon, the French civil code. The foundation of this rule is to avoid positive conflict of nationality and is attached to the idea that an applicant to a foreign nationality is disinterested in his native country. Article 25, 7° regards only Luxemburger over eighteen years old who possess a foreign nationality, which means those with several nationalities. *Jus soli* and *jus sanguinis* are irrelevant in this case. It provides the most arguable rule because the target people will automatically lose their Luxembourgish nationality without any consent. Three different cases are envisaged:

- a) A Luxemburger declares to a competent authority of a foreign state from which he possesses the nationality that he wants to keep this foreign nationality. The Luxemburger loses automatically his nationality by this declaration.
- b) A Luxemburger in the same situation having not made any declaration, but getting a formal notice from the Luxembourgish Ministry of Justice to give up his foreign nationality; he must answer within two years, otherwise he will automatically lose his Luxembourgish nationality at the end of these two years.
- c) A Luxemburger has not, according to article 35 LNL, declared wanting to keep the Luxembourgish nationality when the renouncement of the foreign nationality is impossible.

The above mentioned people are able to keep their nationality only in two specific cases:

- a) If the target person does not get any formal notice of the Ministry of Justice. This case is indeed possible because no rules in the LNL oblige the Minister to deliver such notice.
- b) If the target person has responded to the formal notice within the delay of two years, which is only possible in the above mentioned case of the article 25,7°c).

The last scenario, according to article 25,8° LNL, occurs when a Luxemburger, born in a foreign state and having the nationality of this foreign state, lives since his eighteenth birthday and permanently during twenty years in this foreign state and has not declared, according to article 35 LNL wanting to keep his Luxembourgish nationality. From the day of this declaration, a new time limit of twenty years occurs.

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List of attachments

1. Statistics
2. Règlement grand-ducal du 12 mai 1972 déterminant les mesures applicables pour l'emploi des travailleurs étrangers sur le territoire du Grand-Duché de Luxembourg
3. C.Adm., 25 mai 2004, n°17807 C du rôle
4. C. Adm., 15 juillet 2004, n° 17915 C du rôle
5. Règlement grand-ducal du 29 octobre 2004 portant modification du règlement grand-ducal du 18 septembre 1995 concernant l'assistance judiciaire
6. T.A., 1er mars 2004, n° 16718 du rôle
7. T.A., 10 novembre 2004, n° 17823 du rôle
8. Règlement grand-ducal du 5 mars 2004 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 publique et aux fonctions qui ont pour objet la sauvegarde des intérêts généraux de l'Etat ou des autres personnes morales de droit public
9. Règlement grand-ducal du 5 mars 2004 déterminant les emplois dans les administrations de l'Etat et les établissements publics pour lesquels la connaissance de l'une ou de l'autre des trois langues administratives n'est pas reconnue nécessaire en raison de la nature et du niveau de responsabilité de ces emplois
10. Règlement grand-ducal du 13 décembre 2004 concernant le droit d'exclusivité et le droit de priorité des volontaires de l'armée pour les emplois de la carrière inférieure des administrations, offices, services et établissements publics y compris les établissements d'assurance sociale, les communes, les établissements et syndicats communaux et la société nationale de chemins de fer luxembourgeois
11. Loi du 9 novembre 1990 ayant pour objet la création d'un registre public maritime luxembourgeois (excerpt)
12. Loi du 10 février 2004 concernant la participation aux élections européennes du 13 juin 2004 des ressortissants des Etats qui deviendront membres de l'Union européenne le 1er mai 2004
13. Loi du 8 mars 2004 portant approbation du Traité entre le Royaume de Belgique, le Royaume de Danemark, la République Fédérale d'Allemagne, la République Hellénique, le Royaume d'Espagne, la République Française, l'Irlande, la République Italienne, le Grand-Duché de Luxembourg, le Royaume des Pays-Bas, la République d'Autriche, la République Portugaise, la République de Finlande, le Royaume de Suède, le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord (Etats membres de l'Union européenne) et la République Tchèque, la République d'Estonie, la République de Chypre, la République de Lettonie, la République de Lituanie, la République de Hongrie, la République de Malte, la République de Pologne, la République de Slovaquie relatif à l'adhésion de la République Tchèque, République d'Estonie, de la République de Chypre, de la République de Lettonie, de la République de Lituanie, de la République de Hongrie, de la République de Malte, de la République de Pologne, de la République de..., signé à Athènes, le 16 avril 2003
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22. Règlement grand-ducal du 26 mai 2004 déterminant les conditions d'accès, les études ainsi que les conditions de réussite de la formation spécifique en médecine générale
23. Règlement grand-ducal du 10 septembre 2004 fixant les critères d'homologation des titres et grades étrangers - en droit, médecine, médecine dentaire, médecine vétérinaire et en pharmacie et, en vue de l'admission au stage pour le professorat de l'enseignement secondaire, - en sciences humaines et en philosophie et lettres
24. Loi du 22 février 2004 modifiant la loi modifiée du 24 juillet 2000 relative à l'organisation du marché de l'électricité
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26. T.A., 13 mai 2004, n° 16779 du rôle
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