

Luxembourg

REPORT
on the Free Movement of Workers
in Luxembourg in 2005

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Introduction

During the year 2005, the following main topics may be specially highlighted.

- *Enlargement*: Luxembourg did not take any position for a long time, very close to the deadline of 30 April 2006, on the issue of maintaining a work permit for the 8 new member states currently submitted to restrictions for their workers wishing to access the national employment market. Early April 2006, the Parliamentary Commission on Foreign Affairs announced that Luxembourg would keep the current restrictions. The Government followed that line by keeping the restrictions, with an exception for several work areas for which it has announced more flexible rules for work permits.
- *the issue of the opening of the public sector to EU citizens* is still to be held under scrutiny. The opening of the public sector is very slow: as a matter of fact one can witness that 99% of the public positions are still held by Luxembourg nationals and the opening by law has been too scarce.
- *the application of EU law* by some internal jurisdictions is problematic. It appears that although some judges are using adequately EU law and the ECJ case-law, other jurisdictions seem not to be willing to do so, so that some internal judgments appear to be in contradiction especially with the jurisprudence of the European Court of Justice.

Chapter I

Entry, residence, departure

Legislation

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.

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 legislation has not been amended during the year 2005. The Government had announced its 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.

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; <http://www.legilux.public.lu/leg/a/archives/1972/0312405/0312405.pdf?SID=6a53ba5381273843db3bf38d711edc77#page=9>.

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, but the change has not been yet to the legislation.

Third-country family members

As far as the issuing of visas to third-country family members is concerned, there is actually no law which is in force and which gives any guidance in this respect.

There seem not to exist problems for spouses in this respect.

The issuing of visas in practice is bound to the general conditions of a residence permit i.e. the visa must be requested in the country of origin, the person in Luxembourg must be able to host the members of the family (parents for example) and guarantee financially their stay and their return in case of necessity.

It is quite difficult to get parents to come to Luxembourg for European citizens as well as third-country nationals. The Ombudsman has been asked to intervene several times in such cases of refusal. These cases concerned Portuguese parents of European citizens: the ministry had refused to allow them to stay with their children in Luxembourg because the pension level was too low. The Ombudsman's intervention finally put an end to the refusal.

Case law

- A court case must be evoked, involving a third-country spouse of a European national. 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 administrative court of first instance dismissed the case, despite the applicant arguing that even if his wife was not to be classified as a worker, directive 90/364 and the direct effect of article 18 of the Treaty 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. The court decided that article 11 of the Regulation 1612/68 was not applicable to the case, as the wife of the claimant was not pursuing an activity as an employed or self-employed person and so her husband did not enjoy a derived right of access on the working market.²

The applicant appealed but unsuccessfully: the appeals Court upheld the legality of the administrative decision and refused to put a preliminary ruling to the ECJ,³ despite the fact that Luxembourg has been, in the meantime, condemned by the ECJ for still requesting a work permit for third-country spouses married to EU citizens!⁴ This case illustrates how some courts do not apply the decisions of the ECJ and thus do not make use at all of EU applied legislation or case-law, a very worrying fact indeed.

- A "Yugoslav" woman married to a German citizen had applied for a work permit, which was refused by the Minister of Labor and Work. Her husband wanted to hire her in his company. The administrative court stated that this refusal violates Regulation 1612/68, §11, which states that a spouse of an EU citizen must be allowed to access any employed position, so that the judges decided that in this case no work permit was necessary.⁵
- In another case, a national of Senegal married to a French citizen was denied a work permit. The case had already been judged by the administrative court, which had dismissed her claim based on the fact that a certificate of annulment of the marriage had proven the absence of marital status. The court of appeal reversed the decision, after another document had shown that the annulment certificate actually proved not to exist. The court stated that in principal the claimant had a right of access to the national work market as a spouse of an EU national, according to Regulation 1612/68/EC.

2 Tribunal administratif, 16 mars 2005, n°18703 du rôle.

3 Cour administrative, 21 février 2006, n°19726C du rôle.

4 ECJ, 27 October 2005, Case C-165-05, see footnote nr. 2.

5 Tribunal administratif, 14 avril 2005, n°18800 du rôle.

However this time the administrative court again rejected the claim, in finding out that the claimants' husband did not reside or work in Luxembourg. The judges stated that her derived right of access was conditioned by the necessity of a linking up/applicability factor (*facteur de rattachement*). The court judged that Regulation 1612/68 was not applicable in this very case.⁶

- It appears that the requirement of declaring to the administration of employment any vacant job for third-country is still an absolute prerequisite and that in absence of such a declaration no valid working contract can be signed between the employer and the third-country employee.⁷
- Also, the employment of third-country nationals, including Polish workers, is illegal without any working permit and leads sometimes to a criminal condemnation of an employer: the judges do not find it necessary to search for a special criminal intention of the employer, it suffices that such illegal employment has occurred in order to condemn the employer.⁸

Case-law relating to expulsion

- A Belgian citizen working in Luxembourg since 1990 and married in Luxembourg in 1998, with two children, was ordered by the Minister of Justice to leave the country on the basis of him being a danger for public order and security.

He appealed to the administrative court, which applied EU law, particularly Directive 64/221/EEC. The Court also referred to the ECJ cases *Bouchereau* (1977), *Van Duyn* (1974), and *Rutili* (1975). The judges underlined that the threat to public order and security must be sufficiently serious and that a penal condemnation as such is not sufficient to motivate such a decision.

However, in this case, the court decided that the appealed decision was legal, as the plaintiff had been condemned for in Belgium and in Luxembourg for offenses against delicacy (*attentats à la pudeur*).⁹

- The following decision of the administrative Court of Appeals is a good application of European Community law.¹⁰ The case involved a Portuguese citizen who had arrived in Luxembourg at the age of 5 years. Aged 38, he had lived nearly all his life in Luxembourg. He was condemned for drug offences in 1997, 1998 and 1999. The Minister of Justice ordered him to leave the country for being a threat to public order. He had been controlled by the police in 2001 and 2004 for having used drugs for personal consumption.

The Court decided first that the possibility to submit a recourse to the administrative courts is a remedy which is compatible with Directive 64/221/EEC. The judges used the case-law of the ECJ, especially the case *Rutili and Bouchereau*, and found the decision infringed the principle of proportionality. They found that the plaintiff was not hurting seriously enough the interest of society so that the decision was upturned.

- In another decision, the administrative court confirmed a decision of the Minister of Justice to order a person to leave the country within 15 days of the reception of the decision. The EU citizen had been condemned to 13 years of prison for rape on his own daughter. Also a report showed that he had not become aware of the seriousness of his deed, so that he was indeed a current threat to public order.¹¹

- Another case involved a French citizen who had been refused the entry into Luxembourg territory on 12 March 2004. Because the person was found on Luxembourg soil dealing with drugs, an expulsion order was notified to her on 14 December 2004. The plaintiff argued that the decision went against the principle of free movement, as the threat to public order would not be serious enough.

The judges however confirmed the decision of the Minister, arguing that the first decision could not be attacked anymore, the plaintiff having acted too late and that therefore the expulsion order

6 Tribunal administratif, 23 février 2005, n°18691 du rôle.

7 Cour administrative, 17 février 2005, n°18972 du rôle, BIJ 2005, p. 95.

8 Tribunal d'arrondissement de Luxembourg, jugement correctionnel, 1 July 2004, 12th Chamber, BIJ 2005, p. 97.

9 Tribunal administratif, 24 janvier 2005, n°18437 du rôle.

10 Cour administrative, 20 octobre 2005, n°19604 du rôle.

11 Tribunal administratif, 25 avril 2005, n°19152 du rôle.

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was legally motivated, as it is based on the unchallenged decision of 12 March 2004, which refuses the entry to the Luxembourg territory to the plaintiff.¹²

12 Tribunal administratif, 20 juillet 2005, n°19465 du rôle.

Chapter II Equality of treatment

Legislation

A grand-ducal Regulation of 28 January 2005 has amended the grand-ducal Regulation of 16 November 2001 transposing Directive 94/58/EC of 22 November 1994 on sea personnel, as modified by Directive 98/35/EC of 25 May 1998 (Directive 2003/103/EC).¹³

Also, a grand-ducal regulation of 28 February 2005 has modified the regulation of 16 November 2001 transposing Directive 94/58/EC of 22 November 1994 concerning the minimal training of sea personnel.¹⁴

Recognition of diplomas

A grand-ducal regulation of 4 April 2005 has been taken in the field of recognition of diplomas, after the adoption of a new article 4 of the law of 18 June 1969 on the homologation of foreign university diplomas or equivalent studies diplomas.¹⁵

This regulation allows a much for easier recognition of diplomas which were issued in a non-EU country, so that difficulties that were met by applicants before the adoption of this legislation now seem to be a thing of the past.

Especially the reverse discrimination of a Luxembourg citizen (a medical doctor) who had been issued a secondary school final diploma in an African country and who could not get the recognition of this diploma has been ended by the recognition based on this new regulation (see chapter 11, p. 25).

Language requirement-ECJ

On 29 April 2005, the European Court of Justice has put a case at the ECJ against the Grand-Duchy of Luxembourg for not having abrogated the requirement of knowledge of the three administrative languages for a foreign lawyer who wants to settle in Luxembourg and wants to practice in this area of domiciliation of companies in his law firm.¹⁶

The Commission notes that this requirement is still contained in the law of 13 November 2003 transposing Directive 98/5/EC called "home title".

The second ground for putting the case to the ECJ is to show that the requirement for a foreign lawyer to hand over every year a certificate of the lawyers' bar of origin is to be seen as being in contradiction with the aim of the Directive.

Another case, concerning the profession of lawyer (avocat) is pending before the ECJ. The administrative court has referred the case of Graham J. Wilson against Conseil de l'Ordre des avocats du barreau de Luxembourg to the ECJ on 7 December 2004 for a preliminary ruling on the following questions:

1. Should Article 9 of Directive 98/5 (1) 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 be interpreted as precluding appeal proceedings as provided for under the Law of 10 August 1991, as amended by the Law of 13 November 2002?

13 Règlement grand-ducal du 28 janvier 2005 modifiant le règlement grand-ducal du 16 novembre 2001 transposant la directive 94/58/CE du Conseil du 22 novembre 1994 concernant le niveau minimal de formation des gens de mer telle que modifiée par la directive 98/35/CE du Conseil du 25 mai 1998 (directive 2003/103/CE), Mémorial du 28/02/2005 (024/2005), <http://www.legilux.public.lu/leg/a/archives/2005/0242802/2005A04701.html>.

14 *Règlement grand-ducal du 28 janvier 2005 modifiant le règlement grand-ducal du 16 novembre 2001 transposant la directive 94/58/CE du Conseil du 22 novembre 1994 concernant le niveau minimal de formation des gens de mer telle que modifiée par la directive 98/35/CE du Conseil du 25 mai 1998 (directive 2003/103/CE)*, Mémorial du 28/02/2005 (024/2005), <http://www.legilux.public.lu/leg/a/archives/2005/0242802/2005A04701.html>.

15 Règlement grand-ducal du 4 avril 2005 pris en exécution de l'article 4 de la loi modifiée du 18 juin 1969 sur l'enseignement supérieur et l'homologation des titres et grades étrangers d'enseignement supérieur.

16 ECJ, Commission / Luxembourg, C-193/05.

2. More particularly, do appeal bodies such as the Conseil disciplinaire et administratif and the Conseil disciplinaire et administratif d'appel constitute 'a remedy before a court or tribunal in accordance with domestic law' within the meaning of Article 9 of Directive 98/5 and should Article 9 be interpreted as precluding a remedy which requires referral to one or more bodies of this nature before it becomes possible to refer a matter on a question of law to a 'court or tribunal' within the meaning of Article 9?

The case is still pending.¹⁷

Case-law

A case involved a Belgian citizen who set up a company and applied for a permit to practice in Luxembourg under the title of "conseil économique" i.e. economic adviser.¹⁸ He had obtained a diploma in a Belgian technical and commercial school, after a two-years study period. The Ministry had refused to grant him the permit and the administrative court (tribunal administratif) confirmed this refusal.

Indeed, the court applied Directive 89/48/EC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration.

The judges found that the education of the claimant had been less than for a three years' period and that even if nowadays the same diploma is granted to students after a three-years study period, the case must be solved according to the study period at the moment of the issuing of the diploma.

Another case involved a Belgian woman, with a diploma public health science and of nursing who was refused by the Minister of Education her appointment as a teacher in the technical school system. The candidate had been hired by the state as a private employee, than after successfully passing the exams, she was admitted as a trainee but failed twice to pass the required exams.

She then asked the Minister to reconsider the refusal by arguing that her diploma would automatically grant her the right to become a teacher based on Directive 89/48/EC.

However the administrative court dismissed the claim, by underlining that in Belgium such a diploma does not give her the right to become a teacher as such. The same applies in Luxembourg, where – according to the European community law – such a diploma grants the claimant a right of access to the profession of teacher, but does not guarantee her the exercise of this profession.¹⁹

A citizen of Slovenia applied for a work permit as a manual worker. The permit was refused to him for several reasons including the priority right for EU citizens. The claimant argued that there was no requirement for Slovenian citizens for a work permit.

He stated that § 2.2 of the addendum XIII of the Treaty of accession to the European Union would concern the national measures that the states applied regarding the work market at the time and would not refer to the existing national measures. The court dismissed the argument and confirmed that a work permit was necessary for Slovenian citizens.²⁰

Another case involved a request for a work permit for a Polish woman, who was hired for home assistance. The work permit was refused to her because the employer had failed to declare this position vacant at the administration of labour, which is a requirement according to the national grand-ducal regulation of 12 mai 1972.

The court established that indeed the position had not been declared as being vacant to the said administration and dismissed the case.²¹

In another case, a Polish craftsman has been refused a collective work permit for several Polish workers for a public building site. The Minister of Foreign Affairs and Immigration refused to grant such a permit based on national laws including a priority right for EU citizens.

The claimant argued that such a refusal violates article 49 of the EC treaty as being an unlawful trade restriction.

17 C-506/04.

18 Tribunal administratif, 26 septembre 2005, n°19341 du rôle.

19 Tribunal administratif, 27 avril 2005, n°18699 du rôle.

20 Tribunal administratif, 7 novembre 2005, n°19533 du rôle.

21 Tribunal administratif, 26 septembre 2005, n°19396 du rôle.

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However the court rejected the claim, stating that Polish workers were still submitted to a work permit request, as Luxembourg had opted for a transitional period for 8 new member states, during which such a work permit was still required, in accordance with the Treaty of accession of Athens of 16 April 2003.²²

22 Tribunal administratif, 30 mai 2005, n°18940 du rôle.

Chapter III
Equality of treatment on the basis of nationality

There is nothing special to report on.

Chapter IV Employment in the public sector

In general, one can note that despite the opening of public sector by the law of 17 May 1999 to some of the public jobs, following the criteria set in the ECJ judgment *Commission vs. Grand-Duchy of Luxembourg* of 2 July 1996,²³ the proportion of Luxembourg nationals holding civil service jobs is of 99%. Only 1% of the public jobs as civil servants are held by other EU nationals.²⁴

Legislation

Currently there are 6 open sectors, concerning research, education, health, inland transport, posts and telecommunications and the water, gas and electricity distribution services, opened to other EU nationals, unless the jobs are relating to 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, where only Luxembourgers are entitled to become civil servants.

However the grand-ducal Regulation of 5 March 2004,²⁵ which was enacted as a consequence of the possibility to open up positions to other EU citizens, has limited the available positions only to the sectors of education and post and telecommunication. Furthermore, the requirement of knowledge of the three administrative languages is still in force. Although a grand-ducal regulation should define the positions where such language requirement may be dispensed of, the grand-ducal regulation of 5 March 2004²⁶ only concerns the sector of education.

The rest are all closed sectors, where only Luxembourgers are entitled to become civil servants. Although these positions were not targeted by the infringement procedure launched by the Commission, the principle of free movement of workers should involve all public positions.

It must be also noted that the state is authorized to recruit every year, through the budget annual law, for motivated reasons linked to the service, foreign persons in the so-called open and closed sectors. The EU citizens are recruited as employees of the state, a separate category from civil servants.

A grand-ducal regulation of 9 June 2005 concerning the recruitment for positions in the postal and telecommunication company, which are submitted to the statute of civil servants, was adopted in 2005.²⁷ Article 1-1 provides for the possibility to be recruited for any citizen of the European Union, being in line with EU law and the ECJ case-law.

Thus the evolution toward a larger opening has not been far-reaching in 2005.

Case-law

A Portuguese citizen was hired as a private employee of the state in a hospital (nurse). He claimed that his professional lengths of service had not been fully taken into consideration, which brought a financial loss to him. He protested against the fact that his service in a Swiss hospital, where he had worked for several years after working in Portugal had not been taken into account.

A first item was cleared by the court, which decided that the claimant was not entitled to become a civil servant. According to the administrative court, article 39 §4 of the treaty, which forbids any

23 C-473/93, Rec. 1996, I, 3207.

24 Rapport 'Discrimination à l'emploi', Cahier PSELL n°151, décembre 2005, p. 58.

25 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, In : *Mémorial A*, N°30 du 11 mars 2004, pp. 420-422.

26 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, In : *Mémorial A* N°30 du 11 mars 2004, pp. 422-423.

27 *Règlement grand-ducal du 9 juin 2005 fixant les conditions et modalités en matière de recrutement, de stage et de formation professionnelle des agents de l'entreprise des postes et télécommunications soumis au statut général de la fonction publique*, *Mémorial* du 08/07/2005 (096/2005), <http://www.legilux.public.lu/leg/a/archives/2005/0960807/2005A1710A.html>.

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discrimination based on nationality, does not apply to public service. Also, article 2 of the national law on public service has been amended in order to apply the jurisprudence of the EJC²⁸ and states that the nationality condition does not apply to the health sector, unless the considered position involves direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State.

As far as the lengths of service is concerned, the court found that the bilateral agreement between Switzerland and the European Union on free movement of persons of 21 June 1999 was not applicable to the claimant's case, as he was not in a situation of migration between Switzerland and the European Union but in a situation of migration between two member states.²⁹ The decision was appealed and the case is still pending.

28 2 July 1996, *Commission of the European Communities vs. Grand Duchy of Luxembourg*, case C-473/93.

29 Tribunal administratif, 21 mars 2005, n°18533 du rôle.

Chapter V

Members of the family

Legislation

The Government has announced on 6 May 2005 that the amendments to the Regulation of 1972 will entail the abolition of the working permit not only for Swiss workers, but also for:

- third-country spouses of a EU national
- third-country spouses of a Luxembourg citizen

However, until the end of 2005, there has been no progress to report on this matter.

Also it must be noted that Directive 2004/38/EC of 29 April 2004 on the right of citizens of the union and their family to move and reside freely within the territory of the member states has still not been transposed. There is no official indication on the start of the transposition process so that it will not be transposed on time, until 30 April 2006.

The European Court of Justice has, in between, condemned The Grand-Duchy of Luxembourg for failing to amend its legislation, by still imposing the granting of a work permit for third-country spouses married to a European worker and thus for failing to put its legislation in line with Regulation 1612/68 EC of 15 October 1968 on the free movement for workers within the Community.³⁰

Case-law

The following case involved a “Yugoslav” citizen, who is married to a Luxembourger and who applied for a work permit. The permit was denied to her for classical reasons inherent to the national work market, including the right of priority of EU workers.

During the case, the delegate of the Government declared that the marriage was doubtful and questioned the right to a work permit for this reason.

The court refused to take this factor into consideration but rejected the claim based on the validity of the application of the national laws on foreigners.

The court thereby confirmed its case-law by stating that a third-country national married to a Luxembourg citizen still needs a work permit. Such a position may be seen as a reverse discrimination against Luxembourg nationals, as the European Court of Justice has stated³¹ that requiring a work permit for third-country nationals of an EU citizen violates European Union law.³²

Another case touched upon the right of a Brazilian mother of a European Union child, who lived together permanently with a Portuguese citizen to a work permit. The permit was refused to her and she argued that this refusal was contrary to EU law, as she would have a derived right of access to the national work market, based on her child’s right of free movement and liberty of establishment.

The court annulled the decision of the Minister. However the issue of the violation of EU law was not referred to, the judges simply establishing that the same Minister had requested a valid work permit for the issuing of the residence permit and had refused to issue such a work permit, that the Minister had requested beforehand.³³

30 ECJ, 27 October 2005 C-165-05.

31 Cf. chapter 1, § 5.

32 Tribunal administratif, 27 juin 2005, n°19276 du rôle.

33 Tribunal administratif, 11 mai 2005, n°17796 du rôle.

Chapter VI

Follow-up of recent ECJ judgements

The Commission has warned Luxembourg concerning the non-compliance with the judgment of the ECJ of 21 October 2004.³⁴

Indeed, companies established in another member state still face problems when they envisage to send third-country workers temporarily in order to offer services. The problems concern the issuing of a visa, conditions for entry and employment and the return of the foreign worker after completion of the work.

If an employer from an EU country, like Poland for example, wants to send a third-country mobile worker, an individual work permit is required by the Luxembourg authorities or a collective work permit, which is given according to the situation of the work market and in exceptional circumstances. The worker must also be employed for at least 6 months and a bank guarantee of 1.487 Euros per worker must be paid.

The administrative practice is contrary to the ECJ judgment of 21 October 2004 for not being proportionate.

34 ECJ, 21 Oct. 2004, Commission vs. Grand-Duchy of Luxembourg, case 445/03.

Chapter VII

Policies, texts and/or practices of a general nature with repercussions on the free movement of Union citizens

Antidiscrimination legislation and case-law

As far as the transposition process of both Directives 2000/43 and 2000/78 is concerned, the two draft bills 5248 and 5249 were withdrawn after a very critical opinion of the Council of State on 7 December 2004 and a new draft bill was deposited at the Parliament.

A judgement of the administrative court decided that the condition stated in the civil servants statute to become a civil servant, which is to be not more than 45 years of age was not contrary to Directive 2000/78. The court decided that article 6 of this Directive, which provides for a possible exception based on age, allowed such a restriction.

The court accepted the position of the administration as being valid, for three reasons: firstly because the whole system involves a promotion scheme based exclusively on the past career (*ancienneté de service*), secondly because otherwise it would hurt the pension rights of civil servants and finally because problems would arise if older civil servants would be placed well below in the hierarchy than young civil servants, who would give them orders.³⁵

35 Tribunal administratif, 11 juillet 2005, n°19188 du rôle.

Chapter VIII

EU enlargement

On 1 May 2004, 10 new member states became members of the European Union. The Luxembourg Government opted for a two-years transitional period, during which a working permit would still be required for EU-citizens of the new member countries, except for Malta and Cyprus. Such a move was done especially considering the attitude of the neighboring countries on the same issue, which also requested work permits for these workers.

Up to early April 2006, the Government had not announced what attitude it will take at the end of this period of two years. It was likely that, again, the decisions of the neighbors would have a great impact on the decision to open-up the country (or not) to the workers of these eight new EU member countries.

Discussions were going on but no official position had been heard of the authorities, on the decision to be taken for the next three years. The positions of the political parties were divergent.

The deadline being 30 April 2006, it appears that the Parliamentary Commission on Foreign Affairs has decided to keep the current restrictions for another three years, but also to monitor closely the situation every year and thus to follow the example of Germany, for example.

Also, the sectors of employment where there are more problems of recruitment will be treated differently, not so rigidly, like agriculture and hotels/restaurants personnel. The Government took the decision to follow that very line.

Chapter IX 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 2005, the numbers of international migrations were 13.512 arrivals and 10.841 departures, so that 2.671 new residents were added to the population.

If one takes the total numbers of arrivals and of departures from EU countries-(2.671), there is a percentage of arrivals of 45,5% from old member states of the EU (1.212) , 27,5% from new EU member countries (734) and 27% of third country nationals (725).³⁶ The figures have not changed significantly compared with 2004 between new and old EU member countries’ citizens.

In total there were 10.039 new arrivals from the EU member states and 8.827 nationals of these member countries who left Luxembourg, meaning that 1.212 new EU citizens came to live in Luxembourg all in all.

There were 986 new arrivals from the new member states and 252 nationals of these new member countries who left Luxembourg, which means a bonus of 734 more new EU citizens who came to live in Luxembourg compared to 2004.

The number of work permits issued by the competent Ministry of Labour is not available.

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

36 Compared to 48%-35%-17% in 2004.

Chapter X Social security

Legislation

A law of 8 April 2005 has approved the bilateral convention that was signed with Sweden on Social Security on 1 December 2003.³⁷

Case law

The following cases refer to issues relating to free movement of citizens and are due to be published in the next bulletin of case-law of Social Security, which will be the bulletin for 2005.

1. A widow of a Portuguese citizen complained against the refusal by the Pension authority to grant her a survivor's pension. The refusal was based on the fact that her husband had not met the conditions of the Luxembourg legislation which obliges to have been affiliated at least during 12 months during the three years prior to the death of the person concerned. The widow, who lived in Capo Verde, a former Portuguese colony, indicated that her husband had been affiliated during 7 years in Luxembourg during his professional career.
The Social security judges first stated that European Community law does not detract from the powers of member states to organize their social security systems, citing the two cases Duphar³⁸ and Sodemare.³⁹
They also underlined that the Community law main principles, including the principle of equality of treatment between women and men and the principle of free movement of workers may limit the power of decision of those member states.
The widow argued that this traineeship would violate freedom of establishing oneself in any country. The court applied article 9 of Regulation 1408/71 and the ECJ cases Paraschi⁴⁰ and Duchon,⁴¹ indicating that any invalidity pension paid out in another country during a reference period before the event must be taken into consideration and that any legislation that does not foresee how a prolongation of the reference period is possible violates Community law.
It found however that in this specific case, no concrete elements were provided by the widow that would establish that the loss of a social advantage provided by the Luxembourg social security legislation was due, exclusively or for the most important part, by the exercise of her husband of his right to free movement.⁴²
2. The Court of Appeals for Social Security overturned a decision of first instance and refused to grant a plaintiff the reimbursement of expenses in a German hospital. The court found that the woman had actually opted for expenses that are not covered by the German social security (private care) and so these benefits could not be paid out in Luxembourg.⁴³
3. In another case, the same court refused to grant the plaintiffs the reimbursement of expenses that had occurred in Austria, namely a helicopter transport after a ski accident. The judges applied Regulation 1408/71, and specifically §22,1a and decided that as the Austrian social security does not cover these expenses, the same was to be true for the Luxembourg social security.⁴⁴
4. The first instance court also refused to recognize that a woman, who had bought in France a pair of glasses prescribed by a Luxembourg doctor could get the prize of the glasses paid back in Luxembourg, after the French social security refused her the same reimbursement. The judges decided that this decision was taken according to §19 of Regulation 1408/71, which provides for

37 Loi du 8 avril 2005 portant approbation de la Convention entre le Grand-Duché de Luxembourg et le Royaume de Suède sur la sécurité sociale, signée à Bruxelles, le 1er décembre 2003.

38 Duphar 238/82, 7 February 1984.

39 Sodemare e.a., C-70/95, 17 June 1997.

40 Paraschi, 4 October 1991, C-349/87.

41 Duchon, 18 April 2002, C-8 290/00.

42 Conseil Arbitral des Assurances Sociales, 26 mars 2003, D. c/AVI, Reg. N° I 339/03.

43 Conseil Supérieur des Assurances Sociales, 1 Décembre 2004, CMEP/F, N° 2004/0190.

44 Conseil Supérieur des Assurances Sociales, 1 Décembre 2004, F / CMEP, N° 2004/0192.

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rules concerning the residence in a Member State other than the competent State.⁴⁵ It must be deducted from the judgment that the plaintiff resides in France.

5. A woman had bought some drugs in Belgium, in accordance with the prescription of a medical doctor but the social security refused to reimburse them because she had failed to forward a photocopy of the doctor's prescription. The court found that such a decision was not adequate, as the bill of the pharmacist used the same codes as the ones of the physician.⁴⁶
6. A person was refused the full reimbursement of medical expenses that had occurred in Spain, based on §22 of Regulation 1408/71 and §21 and 34 of the application Regulation 574/42 EC. The court confirmed that the person had not used the form E 111 in Spain, so that according to §34 1 of Regulation 574/42, the reimbursement occurs at the tariff of the institution of the country of sojourn. Therefore no reimbursement was granted above the amount of 1000 Euros.⁴⁷
7. Finally, a judgment of the Cour de Cassation related to the situation of a Russian student living in Luxembourg in the house of his sister, also a Russian national, married to a German citizen. He was denied any family benefits in Luxembourg.

The plaintiff argued that such a decision violates the principle of equality of §39 of the Treaty and of Regulation 1408/71, as well as the case-law of the ECJ including cases C-179/98, C-3/90 and C-262/92 by which the plaintiff should have been considered as a member of the family of the husband.

The Court however dismissed the case, arguing that Community Law grants the right to family benefits only to family members of those who are covered by the scope of European Community law,⁴⁸ thereby meaning that no derived rights could have been born in favor of the brother of a Russian person, who herself benefits from derived European rights, through her husband.

There has been no development as far as supplementary pension schemes are concerned.

45 Conseil Arbitral des Assurances Sociales, 6 mai 2005, H. / CMEP, Reg, N° 199/04.

46 Conseil Arbitral des Assurances Sociales, 30 septembre 2005, L. / CMEP, Reg, N° 75/04.

47 Conseil Arbitral des Assurances Sociales, 30 septembre 2005, K. / CMEP, Reg, N° 128/04.

48 Cour de cassation, 24 mars 2005, B. C / CNPF, n°19/05, 24 March 2005.

Chapter XI

Establishment, provision of services, students

Students

A law of 4 April 2005 has modified the law of 22 June 2000 concerning the financial assistance of the state for higher education. Article 2 only amends the conditions for Luxembourgers: it adds the condition of residence for Luxembourg students but does not touch the possibility for students of other EU member countries who are domiciled in Luxembourg to get a grant from the Luxembourg state, based on the principles of Regulation 1612/68.⁴⁹

Diplomas

There has been a case 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. This is to 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 decided to act in this area to facilitate the recognition of non-EU diplomas of secondary schools, which ended up in a new grand-ducal regulation in 2005.⁵⁰

Provision of services - Case law

A Belgian company was sued in a criminal court for executing services in the building industry in Luxembourg without having asked at the Ministry of Economy a certificate by which the Minister declares that the company may indeed provide services in Luxembourg, after having checked that the company is legally admitted to do so in the country of origin.

However the judges decided that such a requirement is not contrary to European Community law, including §43, 49 and 50 of the Amsterdam Treaty, as the Luxembourg companies also have to be registered to be able to provide services in Luxembourg.⁵¹

This clearly breaches EC law including the ECJ decision of 21 October 2004.⁵²

Football

In 2004, the rules of the Football Federation (FLF), which could be considered as being discriminatory on the ground of the nationality criteria for football players have been amended.

The statutes of the FLF contained rules, which restricted 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.

The FLF statutes have been amended in 2005 and the restrictions to the number of foreign nationals allowed to play a match were erased. Therefore there is currently no discrimination relating to this issue.

Furthermore, article 03-05 contains a provision by which a team may only play a game if at least five players are of Luxembourg nationality or have had their first license granted by the FLF.

The clause has been adopted in order to uphold the specific character of the Luxembourg football, which is an amateur sport, i.e. to maintain a minimum number of players who have received their

49 *Loi du 22 juin 2000 concernant l'aide financière de l'Etat pour études supérieures*, Mémorial du 20/04/2005 (050/2005), www.legilux.public.lu/leg/a/archives/2005/0502004/2005A_07861.html.

50 See chapter II, p. 10.

51 Tribunal d'arrondissement de Luxembourg, 1er juillet 2004, BIJ 2005, p. 98.

52 Commission vs. Luxembourg, Case C-445/03.

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first license in Luxembourg and thus not to have teams which play with a majority of players who have never played before in the Luxembourg championship.

From the year 2006/2007 this number will be increased to 7 players.

The FLF thereby applies the rules 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.

Considering these new rules, which are based on UEFA rules, there seem to have been an adequate response by the FLF to the reproach of discrimination based on nationality. The current rules do not seem to be infringing EU law as such.

Chapter XII Miscellaneous

1. List of Internet sites

Legislation

Government:	http://www.legilux.public.lu/
Council of State	http://www.ce.etat.lu/
Chamber of Deputies	http://www.chd.lu/

Court judgements

Administrative courts	http://www.jurad.etat.lu/
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2. Legal literature

Association Luxembourgeoise des Organismes de Sécurité Sociale, *Bulletin luxembourgeois des questions sociales* 2005, Vol. 17, La reconnaissance des périodes d'éducation d'enfants dans un autre pays de l'Union européenne

Friden, Georges et Thill, Jacques, *Chronique sur la Cour de Justice des Communautés Européennes* (2004), *Annales de droit luxembourgeois*, vol. 14, Bruylant, 2005, pp. 537-572

Schiltz, Christophe, Market Freedoms, Citizenship and Third Country Nationals or the European Court of Justice and National Immigration Policies, *Annales de droit luxembourgeois*, vol. 14, Bruylant, 2005, pp. 323-394

3. List of attachments

1. Règlement grand-ducal du 26 janvier 2005 fixant les modalités pour l'obtention d'un titre de voyage pour étrangers.
2. Tribunal administratif, 16 mars 2005, N°18703 du rôle
3. Cour administrative, 21 février 2006, N°19726C du rôle
4. Tribunal administratif, 14 avril 2005, N°18800 du rôle
5. Tribunal administratif, 20 juillet 2005, N°19645 du rôle
6. Tribunal administratif, 25 avril 2005, N°19152 du rôle
7. Cour administrative, 20 octobre 2005, N°19604C du rôle
8. Tribunal administratif, 24 janvier 2005, N°18437 du rôle
9. Cour administrative, 17 février 2005, N°18972C du rôle
10. T.A., 1er juillet 2004, n°2156/2004
11. Règlement grand-ducal du 4 avril 2005 pris en exécution de l'article 4 de la loi modifiée du 18 juin 1969 sur l'enseignement supérieur et l'homologation des titres et grades étrangers d'enseignement supérieur
12. Tribunal administratif, 23 février 2005, N°18691 du rôle
13. Tribunal administratif, 26 septembre 2005, N°19341 du rôle
14. Tribunal administratif, 27 avril 2005, N°18699 du rôle
15. Tribunal administratif, 7 novembre 2005, N°19533 du rôle
16. Tribunal administratif, 26 septembre 2005, N°19396 du rôle
17. Règlement grand-ducal du 9 juin 2005 fixant les conditions et modalités en matière de recrutement, de stage et de formation professionnelle des agents de l'entreprise des postes et télécommunications soumis au statut général de la fonction publique
18. Tribunal administratif, 21 mars 2005, N°18533 du rôle
19. Tribunal administratif, 27 juin 2005, N°19276 du rôle
20. Tribunal administratif, 30 mai 2005, N°18940 du rôle
21. Tribunal administratif, 11 mai 2005, N°17796 du rôle
22. Tribunal administratif, 11 juillet 2005, N°19188 du rôle
23. Statistics
24. Statistics

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25. CSAS, 1.12.2004-F1321
26. CSAS, 1.12.2004-F1322
27. CAAS, 6.5.2005, H1371
28. CAAS, 30.09.2005, L1406
29. CAAS, 30.09.2005, K1407
30. Cass., 24 mars 2005, B1395
31. CAAS, 26.03.2003, D1381
32. T.A., 1er juillet 2004