

REPORT
on the Free Movement of Workers
in Luxembourg in 2008-2009

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Introduction

On 29 August 2008, Luxembourg voted into law its bill on the free movement of people and immigration,¹ and six associated Grand-Ducal Regulations. The law transposes, or contains provisions from, the following EC Directives:

- 1) 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the Member States;
- 2) 2003/109/CE concerning the status of third-country nationals who are long-term residents;
- 3) 2001/40/EC on the mutual recognition of decisions on the expulsion of foreign nationals (already transposed in the law that was repealed by the new immigration law, but the provisions of which are now in the new immigration law);
- 4) 2003/110/CE on assistance in cases of transit for the purposes of removal by air (Article 127 cites to the Grand-Ducal Regulation transposing this Directive, as amended);
- 5) 2003/86/EC on the right to family reunification;
- 6) 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities;
- 7) 2004/114/EC on the conditions of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; and (8) 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research. However, with respect to work permits, Bulgarian and Romanian citizens will continue to be subject to transitory measures until 2011.²

On 19 June 2008, the ECJ issued a judgment condemning Luxembourg for failure to fulfil its obligations under Articles 3(1) and 10 of Directive 96/71 CE concerning the posting of workers in the framework of the provision of services and the monitoring of the implementation of labour law, and Articles 49 EC and 50 EC, in its transposition of the Directive.³ Luxembourg responded quickly with a bill to comply with the ECJ's decision that is still pending before Parliament.

1 Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Mémorial A-No 138, 10 September 2008, at p. 2024.

2 See http://www.gouvernement.lu/salle_presse/actualite/2007/09/20schmit_travailleurs/index.html.

3 ECJ/C-319/06 (19.06.2008), and Loi du 20 décembre 2002 portant transposition de la Directive 96/71/CE concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services, Mémorial A-No. 154, 31 December 2002.

Chapter I

Entry, Residence and Departure

1. TRANSPOSITION OF PROVISIONS SPECIFIC TO WORKERS

Art. 7(1a) – This provision is transposed almost *verbatim* by the new immigration law which provides that EU citizens can stay in Luxembourg for over three months if they are salaried workers or self-employed.⁴

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

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

They retain their status as worker for six months if they are involuntarily unemployed and registered with the ADEM as a jobseeker either (1) at the end of their fixed-term contract of less than one year, or (2) when their involuntary unemployment occurred during the first 12 months after they entered into their work contract.⁵

Art. 8(3a) – This provision is fully transposed by the immigration law and corresponding Grand-Ducal Regulation, providing that EU citizens wishing to stay in Luxembourg for over three months must obtain a registration certificate from the local government administration of their place of residence within three months of arrival in Luxembourg. To obtain the registration certificate, EU citizens must present documents required by Grand-Ducal Regulation.⁶

The regulation provides that they must take their valid national identification card or passport to the local government of their place of residence. Depending on their situation, they must also present documentation to prove they are either employed, have sufficient financial resources to support themselves or are students. Proof of employment is shown by presenting a work contract, a letter of intent to hire or proof of self-employment.⁷

Art. 14(4 a-b) – This provision is fully transposed by the immigration law which provides that EU citizens and their family members cannot be removed from the country when the EU citizens work in Luxembourg or if the EU citizens entered the country to seek employment for a period not to exceed six months or for a longer period if the EU citizens can provide proof that they continue to seek employment and that they have a real chance of being hired. However, residence permits can be denied to, or revoked from, EU citizens and their family members, whatever their citizenship, and a decision for their removal from the

4 Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Art. 6(1)1.

5 Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Art. 7(1)-(2).

6 Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Art. 8.

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

country can be issued for reasons of public order, security or health. Economic reasons, however, cannot be a basis for the removal.⁸

Art. 17 – This provision is fully transposed by separate articles in the immigration law. Article 17(1) and 17(2) of the Directive are transposed by Article 10 of the immigration law, which provides that permanent residence status is granted to EU citizens if they have resided in Luxembourg for less than five continuous years when:

1. salaried workers or self-employed individuals stop working but have attained the age of eligibility to receive their pension (*pension de vieillesse*), or workers who are given early retirement, if they have held their job for at least the last 12 months and reside continuously in Luxembourg for over three years;
2. salaried workers or self-employed individuals stop working after permanent work disability, if they have resided continuously in the country for over two years; however, if the disability was due to a work-related accident or illness that entitled the person to a full or partial benefit, no length of stay is required; or
3. workers, who after three continuous years of employment and residence in the country, become self-employed in another EU Member State while keeping their domicile in the Grand Duchy of Luxembourg or they return, in principle, every day or at least once per week.⁹

EU citizens acquiring permanent residence status receive a document certifying that status as determined by the Formalities Regulation. The Regulation provides that EU citizens must file their request with the Ministry. In support of their request, they furnish proof that they have legally and continuously resided in Luxembourg or that they fall under one of the exceptions whereby permanent residence status is granted after less than five years. Family members who are themselves EU citizens provide documentation proving that they have legally resided in Luxembourg with the EU citizen, for the same period of time as the EU citizen. The permanent residence status certificate is drafted according to the model decreed by the Ministry and issued within one month of the request.¹⁰

Article 17(3) of the Directive is fully transposed by Article 20(2) of the immigration law which provides that whatever their citizenship, family members of salaried or self-employed workers who reside with the workers in Luxembourg, have the right to permanent residence if the workers themselves have obtained the right to permanent residence in Luxembourg as provided under the provisions of the immigration law that correspond to Article 17(1) of the Directive.¹¹

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

1. on the date of the worker's death, that worker resided for two continuous years in Luxembourg;

⁸ Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Arts. 26 and 27(1).

⁹ Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Art. 10(1).

¹⁰ Règlement grand-ducal du 5 septembre 2008 portant exécution de certaines dispositions relatives aux formalités prévues par la loi du 29 août 2008 sur la libre circulation des personnes et de l'immigration, Art. 6.

¹¹ Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Art. 20(2).

2. the death is due to a work-related accident or illness; or
3. the surviving spouse lost Luxembourg citizenship after marrying the worker.¹²

Art. 24(2) – This provision is transposed by the immigration law which provides that EU citizens and their family members with proper identification, valid passport and required visa, have the right to a stay of up to three months in Luxembourg as long as they do not become an unreasonable burden on the social welfare system. They have the right to stay for longer than three months as long as they meet the requirements applicable to EU citizens for stays exceeding three months, and those applicable to family members who are themselves EU citizens. Their resorting to the social welfare system does not automatically lead to removal measures from Luxembourg. The burden to the social welfare system is evaluated by taking into account the amount and duration of the social services for which no contribution has been made, as well as the duration of the stay.¹³

Article 6 of the immigration law provides that EU citizens can stay in Luxembourg for over three months if they are salaried workers or self-employed. Additionally, EU citizens can stay in Luxembourg for over three months if they are salaried workers or self-employed, or can demonstrate that they have the financial resources sufficient for themselves and their family members not to become a burden to Luxembourg's social welfare system, and adequate health insurance. Those citizens can also stay longer than three months if they are registered in qualifying public or private educational institutions for study, job training, provided they provide evidence of sufficient financial resources for themselves and their families.¹⁴

2. SITUATION OF JOB-SEEKERS

The immigration law contains no specific provisions regarding 'a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice' as set forth in recital 9 of the Directive.

At this time, we are aware of two cases in which jobseekers were denied unemployment benefits by *l'Administration de l'Emploi* (ADEM), Luxembourg's Employment Administration. The first case deals with a French citizen who worked for a Luxembourg company while still living on the French border, and was refused unemployment benefits from Luxembourg's *Administration de l'Emploi* [Employment Administration], or ADEM, on the grounds that the petitioner did not fulfill all required conditions for full unemployment benefits. In particular, the petitioner was not domiciled in Luxembourg on the date of receiving notice of termination of his employment as required by Article L.521-3(2) of the Luxembourg Labour Code. The petitioner was notified of the termination of his open-ended employment contract on 14 July 2008, and registered his domicile with the City of Luxembourg on 12 August 2008. The petitioner filed a timely request for re-examination of his request with the ADEM, and on 16 September 2008, registered as a jobseeker with the ADEM. The ADEM's Special Re-examination Commission confirmed the denial of his original request for unemployment benefits on the grounds that he did not reside in Luxembourg on the date

¹² Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Art. 20(3).

¹³ Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Art. 24.

¹⁴ Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Art. 6.

he received notice of his employment termination. The petitioner has now petitioned for appeal with the *Conseil Arbitral des Assurances Sociales de et à Luxembourg* [Luxembourg Social Insurance Arbitration Council] and is awaiting a response.

This denial of unemployment benefits on grounds that the petitioner did not reside in Luxembourg is, in our view, a violation of community law in that it does not permit the petitioner to retain the rights and benefits obtained from his employment, as expressed in paragraph 13 of the preamble of Regulation (EC) No 883/2004. Moreover, we believe that this denial of benefits contravenes, *inter alia*, Article 65 of that regulation which provides that salaried workers working in an EU Member State are subject to the legislation of the Member State in which they work with regard to unemployment benefits. If the workers, whether or not frontier workers, do not reside in the Member State in which they work, but in another Member State, their Member State of residence is competent to grant their unemployment benefits. However, the Member State in which the worker last worked must reimburse the unemployment benefits to the Member State of residence for a maximum period of three months, and without the total amount exceeding the amount to which the worker would have been entitled in the Member State in which he worked during that same period of time. Thus, as the Member State in which the worker last worked, Luxembourg must pay three months of his unemployment benefits.¹⁵ The residence requirement under the Luxembourg Labour Code would place the petitioner in a precarious financial situation with respect to his right to free movement as a worker within the EU, a situation the European Council and Parliament clearly sought to avoid in drafting Regulation (EC) No 883/2004.

The second case is that of the above petitioner's wife and has an identical factual basis and procedural history apart from the date of termination of her employment contract and the period for which she requests unemployment benefits from the Luxembourg government. Both petitioners request that the competent Luxembourg authorities adopt their interpretation of national law to comport with the requirements of EU law as expressed in Article 39 of the EC Treaty, regarding the free movement of workers and the retention of the benefits obtained as regards employment, remuneration and other conditions of work and employment.

While there have been no final decisions in the two above-mentioned cases, the holdings in *Ioannidis* and *Collins* would appear not to be directly on point for purposes of arguing the cases because, while *Ioannidis* and *Collins* do deal with the residence requirement, they do so in the context of jobseekers requesting a social security allowance. Also, the *Collins* decision dates from 23 March 2004, and is prior to Regulation (EC) No 883/2004 coordinating EU Member State social security systems dating from 29 April 2004. The petitioners in the two above-mentioned cases based their arguments solely on Regulation (EC) No 883/2004 as its direct effect leaves no room for contrary interpretation of national law.

¹⁵ Council Regulation (EC) No 883/2004, Art. 65.

Chapter II

Access to Employment

1. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT (E.G. ASSISTANCE OF EMPLOYMENT AGENCIES)

We are not aware that there would be particular problems in this area. However, it is interesting to note the most recent statistics on employment rates in Luxembourg. In 2008, of the persons of employment age (15 to 64 years old), 51% are Luxembourg citizens and born in Luxembourg, and 4% are Luxembourg citizens born abroad.¹⁶

2. LANGUAGE REQUIREMENT

There is nothing specific to report in this area, apart from the fact that most jobs require candidates to speak several languages fluently, including Luxembourgish, French, English and/or German. Those languages are taught in Luxembourg schools and certainly do favour Luxembourgers. However these language requirements are in general a necessity in Luxembourg's multicultural and international employment market.

¹⁶ STATEC, Statnews No. 15/2009, 29.04.2009, available at: http://www.statistiques.public.lu/fr/communi-ques/population/emploi_chomage/2009/04/20090429/20090429.pdf (29.04.2009).

Chapter III

Equal Treatment on the Basis of Nationality

1. WORKING CONDITIONS

While it is a law of general application, it is important to point out that Luxembourg's Law of 23 October 2008 on citizenship came into effect on 1 January 2009. The law provides for the recognition of dual citizenship, as well as the acquisition of Luxembourg citizenship by naturalization and option. The acquisition of Luxembourg nationality by naturalization confers upon the foreigners in question all civil and political rights of Luxembourg citizens. The acquisition, loss, recovery or revocation of Luxembourg citizenship for whatever reason has only a future effect on the rights of the individuals concerned.¹⁷

2. SOCIAL AND TAX ADVANTAGES

There have been several cases of denials of social benefits in the cross-border context. The *Conseil Arbitral des Assurances Sociales* (Social Insurance Arbitral Council), or the CAAS, denied an appeal for reimbursement of a pair of glasses which were purchased in France, but for which the prescription had been given by a Luxembourg ophthalmologist. The petitioner had first been refused reimbursement by the Thionville Primary Fund (France), so then addressed her request for reimbursement in the amount of EUR 165,01 to the Luxembourg *Caisse de Maladie des Employés Privés* [National Salaried Worker Sickness Fund], or CMEP, which denied the request based on Article 19 of Regulation 1408/71.¹⁸

The CAAS also upheld the CMEP's denial of reimbursement of EUR 441,24 to an individual who received treatment in Germany as authorized by form E112. The CMEP denied reimbursement based on Article 22 (1)(c)(i) of Regulation 1408/71.¹⁹

The CAAS also upheld a denial of family benefits by the *Caisse nationale de prestations familiales* [National Family Benefit Fund], or CNPF, for medicine for the children of an Italian citizen. After the divorce with the petitioner's wife became final, the children and their mother went to live in ex-Yugoslavia. Their mother had been given custody of the children, so they could no longer be considered EU residents. Despite the petitioner/father's arguments that such a decision was contrary to Regulation 1408/71, Regulation 1612/68 and Article 48 of the Treaty, the CAAS emphasized that Regulation 1408/71's definition of family member means an individual designated as a member of the household by the legislation under which the benefits are provided. Thus, the father's not having custody of his children deprived him of his ability to assert that they could be considered members of his household or family under Luxembourg legislation, and his request was denied.²⁰

Finally, the CAAS upheld another CNPF denial of child support benefits requested by a mother residing in France, but whose husband worked in Luxembourg. The couple was sepa-

¹⁷ Loi du 23 octobre 2008 sur la nationalité luxembourgeoise, Mémorial A-N° 158, 27 October 2008, at p. 2222. *Idem*, Arts. 19-20.

¹⁸ Conseil Arbitral des Assurances Sociales, 6 May 2005, H. c/CMEP Reg. No CMEP 199/04, Arrêt.

¹⁹ Conseil Arbitral des Assurances Sociales, 26 May 2006, S. c/CMEP Reg. No CMEP 16/06, Arrêt.

²⁰ Conseil Arbitral des Assurances Sociales, 13 Janvier 2006, Z. c/CNPF No. du reg : CNPF 2005/0064 No. 2006/0007, Arrêt.

rated, and the mother alleged that the father assumed responsibility for the children. The denial was again based on the definition of family member under Regulation 1408/71. In this case, however, the mother had previously received unemployment benefits in France, and father had stopped exercising his visitation rights to the children. Thus, the mother had effectively assumed responsibility for the children and was in charge of their upbringing. Based on these grounds, the CAAS upheld the CNPF's denial of child support benefits.²¹

We are not aware of discrimination cases with respect to tax advantages.

3. OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS

On 3 February 2009, a new bill reforming the notarial profession was sent to the Chamber of Deputies. It provides, *inter alia*, that more than one notary may now work in a notary's office, and divides the profession into licensed, and unlicensed notaries and notary candidates. All three positions require that the applicants be Luxembourg citizens.²²

As stated in Chapter V below, the public sector and the government have arrived at a compromise regarding the opening of the public sector to non-Luxembourg nationals. Under the compromise, only certain sectors would remain the exclusive domain of Luxembourg citizens. Those sectors include the army, police, judiciary, diplomatic postings, and tax and governmental administration positions.²³ At this time, the notary is still considered a member of the judicial profession, as are magistrate judges, lawyers and bailiffs. A further rationale for continuing to restrict the notarial profession to Luxembourg citizens is that the power of notaries to draft and certify documents, represents the power of the State, and thus a public authority which must only be held by a Luxembourg citizen. When they are sworn in, notaries swear allegiance to the Grand Duke, to the Luxembourg Constitution and to the laws of the State.²⁴

The above-mentioned bill reforming the notarial profession also requires that the applicants have adequate knowledge of Luxembourg's three administrative languages (Luxembourgish, French and German).²⁵ The term 'adequate knowledge' of Luxembourg's three administrative language is neither expressly defined in the proposed bill, nor the existing laws on the notarial profession, as amended, nor Luxembourg's law that defines its three administrative language regime. However, one can assume that adequate knowledge for a notary would mean a notary would be fluent in Luxembourgish, the national language, for all forms of verbal communication and document review, at the least. Further, a notary would be fluent in French as virtually all legislative texts and their implementing regulations are written in French. And, a notary would be fluent in German as by law the parties may choose to have their documents drafted in either French or German. Thus, a notary would be reviewing and certifying or drafting those documents either language. Moreover, given that in all administrative and legal matters, the parties are free to use Luxembourgish, French or German, and this right includes the right to a response from the administration in one of the

21 Conseil Arbitral des Assurances Sociales, 13Janvier 2006, Z. c/CNPF No. du reg : CNPF 2005/0092 No. 2006/0009, Arrêt.

22 Projet de loi N° 5997 portant modification de la loi modifiée du 9 décembre 1976 relative à l'organisation du notariat (23.02.2009), Arts. 13(2)(a), 18(1)(a) and 19(1)(a).

23 'CGFP: un compromis enfin trouvé', in *La Voix* (26.03.2009).

24 Loi du 9 décembre 1976 relatif à l'organisation du notariat, Mémorial A-N° 76, 14 December 1976, as amended, Art. 18, at p. 1232,

25 *Idem*, Arts. 13(2)(c), 18(1)(a) and 19(1)(c).

three languages, a notary would be required to have fluency in those three languages to review or certify documents as well.²⁶

Finally, given that with respect to companies and commercial transactions, the parties have the right to have their corporate documents drafted in English with a French or German translation to follow, a notary would need ‘adequate knowledge’ of English for those purposes. The notarial deed expressly states that the appearing parties have requested that the document(s) be drafted in English and that notary reads and understands English. In apposing his or her seal to the documents, the notary certifies thereto.²⁷

4. SPECIFIC ISSUES: FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES), SPORTSMEN/SPORTSWOMEN, MARITIME SECTOR, RESEARCHERS, ARTISTS

4.1 Frontier workers

In 2008, frontier workers comprised approximately 42.3% of Luxembourg’s labour force. Of those frontier workers, 50% came from France, 26% from Belgium and 24% from Germany. They make up a decreasing percentage of the labour force employed in new jobs, down from 71% in 2004, to 60% in 2008.²⁸

Luxembourg’s Labour Code provides for parental leave for parents who are domiciled or reside continuously in Luxembourg, or who fall under the scope of application of Community regulations, frontier workers would fall under this latter category. Parents who are seconded to worksites abroad at the time of the child’s birth or adoption are also eligible for parental leave. Moreover, the Labour Code provides that stateless persons legally residing in Luxembourg are included in the definition of Luxembourg workers, and frontier workers are included in the definition of workers legally residing in the Grand Duchy, with respect to workers to be taken into account when an employer is requesting a subsidy in order to compensate workers whose employment would otherwise be terminated due to the downturn of the economy. And, frontier workers are included in the definition of resident workers for purposes of internal reclassification, whether in a public or private entity, when workers are not to be considered disabled but are incapable of carrying out their most recent position.²⁹

It must, however, be noted that frontier workers from the neighbouring French Lorraine region are not too satisfied with the long waits for benefit payments in their country of residence, and there are many questions regarding retirement pensions. On 24 April 2008, the Lorraine Regional Government organized a meeting ‘*Travail transfrontalier et droits sociaux, comment faciliter la mobilité?*’ [Crossborder employment and social rights, how can mobility be facilitated?] to discuss the situation and workers’ concerns.³⁰

26 Loi du 9 décembre 1976 relatif à l’organisation du notariat, Mémorial A-N° 76, 14 December 1976, at p. 1230, as amended., and Loi du 24 février 1984 sur le régime des langues, Mémorial A-N° 16, 27 February 1984, at p. 196.

27 Loi du 9 décembre 1976 relatif à l’organisation du notariat, Mémorial A-N° 76, 14 December 1976, as amended, Art. 36, at p. 1235,

28 ADEM (2008) Les activités de l’Administration de l’Emploi 2008, at pp. 4 and 8, available at <http://www.adem.public.lu/> (30.04.2008).

29 Code du Travail – 2008, Arts. L- 234-42(1)-(2), L.511-9 and L.551-9 (01.10.2008).

30 See <http://www.lesfrontaliers.lu/index.php?p=edito&id=3185> (17.04.2009).

4.2 Sportsmen/sportswomen

Sports in Luxembourg is governed by Law of 30 August 2005 on sports through the *Comité olympique et sportif luxembourgeois* [Luxembourg Olympic and Sports Committee] or C.O.S.L. The C.O.S.L. is an umbrella non-profit association for all national federations governing a competitive sport, leisure sport associations, multisport groups and other national athletic organizations. In order to be approved, a federation must represent athletic activities or athletics at the national level and be internationally recognized. The Sports Ministry approves a single federation per sport or group of similar or related activities, and requests the opinion of the C.O.S.L. in doing so. If one federation has been approved to cover one or several branches of athletics, that federation alone is can organize or authorize national or international competitions or events. The federations grant licenses to their active members in accordance with their own regulations.³¹

With respect to nationality rules, Luxembourg is examining the application of Article 165 of the Treaty of Lisbon to the national context, in particular what preserving Luxembourg's distinctiveness could mean. One major issue is whether the selection of 6 Luxembourg citizens for a football team is acceptable, or could be considered as contrary to the European principle of free movement. However, it appears at this time that if a team were to require choosing 6 players trained at a particular football club that could be acceptable and would not run afoul of the EU free movement principle.³²

Currently under the rules of the *Fédération Luxembourgeoise de Football* [Luxembourg Football Federation] (FLF), first division national team matches (*matches de la sélection nationale A*), FIFA and UEFA international competition matches, only players with Luxembourg citizenship are selected. Luxembourg citizen non-amateur players developing abroad can also be selected for the team. Foreign players can be selected for all other teams.³³ A team from the Seniors I league can validly compete in an official match when at least 7 players having either Luxembourg citizenship or obtained their first license as a player from the FLF, are in the footballbox (*feuille de match*).³⁴

Under the rules for the *Fédération Luxembourgeoise de Basketball* [Luxembourg Basketball Federation] (FLBB), senior teams in the first and second divisions can use only two foreign players in all official competitions.³⁵ The FLBB also has nationality restrictions for its 'All Star Game' competition, which is the play-off between the two divisions created in the country at the start of the season. Each team is made up of the twelve best players (for both male and female teams), as determined by popular vote. At least six of those players must be Luxembourg citizens. Moreover, the players involved in loans (male and female players loaned for a fee to another team), and exchange in cooperation/partnership (for the male and female *Espoir* players and the women *Cadets* players) must be Luxembourg citi-

31 Loi du 3 août concernant le sport, Mémorial A-N° 131, 17 August 2005, at p. 2270.

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

33 FLF's 2007-2008 Articles of Association, Binder 2, Art. 36-2, available at: <http://www.flf.lu/documents/05.06.2009>.

34 FLF's 2007-2008 Articles of Association, Binder 1, Art. 17, available at: <http://www.flf.lu/documents/05.06.2009> (stating that beginning in the 2006/2007 season, the number would be increased from 5 to 7).

35 FLBB's 5 May 2008 Articles of Association and Regulations, Art. SR-3.4, available at: <http://www.flbb.lu/~data/pdf/Statuts08.pdf?PHPSESSID=ebf18ec97ca9b1ba0ea509ca55ebd8bb> (05.06.2008).

zens or assimilated foreign players as defined in the FLBB's Articles of Association and Regulations.³⁶

However, it should be noted that Luxembourg is aware that while the citizenship requirement is likely against Community doctrine regarding the free movement of persons, it deems the requirement that a player have been trained solely by the club for which he plays may not necessarily be against Community doctrine. Also, it appears that the Luxembourg football, basketball and *boules (boule-pétanque)* federations are busy responding to the European Commission's letter to them regarding discrimination on grounds of citizenship.³⁷

Under FLBB rules, foreign players who have played during an official Luxembourg competitive season and wish to transfer at the end of the season fall under the transfer regulations and must pay a transfer fee. Foreign players that left Luxembourg during the season with an exit letter for another federation but who request a further transfer to another FLBB club other than their old club must also pay a transfer fee. In both instances, while the players must pay transfer fees, they need not carry out the transfer formalities.³⁸

As a general rule, the transfer during a season of players with an FLBB club license, without distinction as to gender, requires the payment of a transfer fee.³⁹ Thus, it would appear that the FLBB's transfer fee requirements are more restrictive for foreign players than for Luxembourg citizen players, particularly as Luxembourg players must only pay transfer fees if they wish to transfer mid-season.

4.3 The Maritime sector

There is nothing new to report on this topic that had an impact on the free movement of workers.

4.4 Researchers/artists

The new immigration law's provisions described above regarding stays up to and beyond three months would apply to EU citizen researchers and artists. Thus, EU citizens and their family members with proper identification, valid passport and required visa, have the right to a stay of up to three months in Luxembourg as long as they do not become an unreasonable burden on the social welfare system. They have the right to stay for longer than three months as long as they meet the requirements applicable to EU citizens for stays exceeding three months, and those applicable to family members who are themselves EU citizens. Their resorting to the social welfare system does not automatically lead to removal measures from Luxembourg. The burden to the social welfare system is evaluated by taking into account the

36 FLBB's 5 May 2008 Articles of Association and Regulations, at p. 104, 109, 111 and 113, available at: <http://www.flbb.lu/~data/pdf/Statuts08.pdf?PHPSESSID=ebf18ec97ca9b1ba0ea509ca55ebd8bb> (05.06.2008).

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

38 FLBB's 5 May 2008 Articles of Association and Regulations, Art. RA-23.2, available at: <http://www.flbb.lu/~data/pdf/Statuts08.pdf?PHPSESSID=ebf18ec97ca9b1ba0ea509ca55ebd8bb> (05.06.2008).

39 FLBB's 5 May 2008 Articles of Association and Regulations, Art. RA-26.1 (Player Transfer Financial Regulations), available at: <http://www.flbb.lu/~data/pdf/Statuts08.pdf?PHPSESSID=ebf18ec97ca9b1ba0ea509ca55ebd8bb> (05.06.2008).

amount and duration of the social services for which no contribution has been made, as well as the duration of the stay.⁴⁰

As stated above, Article 6 of the immigration law provides that EU citizens can stay in Luxembourg for over three months if they are salaried workers or self-employed. Additionally, EU citizens can stay in Luxembourg for over three months if they are salaried workers or self-employed, or can demonstrate that they have the financial resources sufficient for themselves and their family members not to become a burden to Luxembourg's social welfare system, and adequate health insurance. Those citizens can also stay longer than three months if they are registered in qualifying public or private educational institutions for study, job training, provided they provide evidence of sufficient financial resources for themselves and their families.⁴¹

4.5 Access to study grants

All students registered in higher education program of studies, no matter what the country in which the studies are being carried out, can request financial aid from the State provided they meet the criteria for being granted financial aid. The student must be either a Luxembourg citizen domiciled in Luxembourg; a citizen of an EU Member State, domiciled in Luxembourg and either a worker's family member or the worker; a third-country national or stateless person, have resided in Luxembourg for at least five years and hold a secondary education diploma or equivalent recognized by the Ministry of Education; or have political refugee status in the Grand Duchy of Luxembourg and live in Luxembourg.⁴² However, the Auguste Van Werveke-Hanno Foundation, a public foundation formed by Luxembourg's Ministry of Culture, Higher Education and Research, and financed by donations, subsidies and the State, requires that the scholarship recipient be a Luxembourg citizen.⁴³

Text(s) in force

- 1) The Law of 22 June 2000, as amended, on State financial aid for higher education - that law was amended in 2005 to require that the Luxembourg citizen applying for financial aid be a Luxembourg resident⁴⁴; and
- 2) Grand-Ducal Regulation of 5 October 2000 on State financial aid for higher education – the regulation has not been amended to conform with the 2005 amendment of the 22 June 2000 law, but presumably Luxembourg citizens would be required to show proof of domicile in Luxembourg as do the other applicants.⁴⁵

40 Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Art. 24.

41 Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Art. 6.

42 See Ministry of Culture, Higher Education and Research's website at <http://www.guichet.public.lu/fr/citoyens/enseignement-formation/etudes-superieures/aides-enseignement-superieur/aide-financiere/index.html> (17.04.2009).

43 See http://www.cedies.public.lu/actualites/2008/07/bourse_van_werveke/formulaire_bourse_van_werveke.doc, and the foundation's French-language articles of association in Luxembourg's legislative journal Mémorial C-N° 705, 8 May 2005, at p. 33795.

44 Loi du 22 Juin 2000 concernant l'aide financière de l'Etat pour études supérieures, Mémorial A-N° 49, 28 June 2000, at p. 1105.

45 Règlement grand-ducal du 5 octobre 2000 concernant l'aide financière de l'Etat pour études supérieures, Mémorial A- N° 109, 9 November 2000, at p. 2547.

Chapter IV

Relationship between Regulation 1408/71 and Article 39 and Regulation 1612/68

The *Conseil Supérieur des Assurances Sociales* [High Social Insurance Council], or CSAS, upheld a denial by the CAAS of a request by a company and the 13 employees concerned, in attempt to prove that the company was established in Luxembourg, and thereby receive social benefits from that Member State. The CSAS rejected the appeal on the basis of Article 14 of Regulation 1408/71, because the petitioners had failed to establish that the company usually exercised its activities in Luxembourg. The workers concerned were employed exclusively in Belgium, and their supporting documents consisting of contracts and work orders referred to the company's Belgian construction sites.⁴⁶

⁴⁶ Conseil Supérieur des Assurances Sociales, 13 Janvier 2006, K. S.A. c/CCSSA No. du reg : CCSS 2006/008 No. 2005/0073.

Chapter V

Employment in the Public Sector

1. ACCESS TO THE PUBLIC SECTOR

The *Confédération générale de la fonction publique* [Public Sector General Confederation] has arrived at a compromise with the government regarding the opening of the public sector to EU citizens. Until now the public sector has been open only to Luxembourg citizens, with limited exceptions.

Despite the opening of some jobs in the public sector by the Law of 17 May 1999, following the criteria set forth in the ECJ's 2 July 1996 decision in *Commission v. Grand Duchy of Luxembourg*, a landmark decision which condemned Luxembourg for violating the EC treaty by reserving the public sector to its own nationals, the proportion of non-Luxembourg nationals holding civil service jobs is still very low.

Under the compromise, only certain sectors would remain the exclusive domain of Luxembourg citizens. Those include the army, police, judiciary, diplomatic postings, and tax and governmental administration positions. Non-Luxembourg citizens will, however, have to pass a test in the country's three languages (Luxembourgish, German and French). They will also be tested on their knowledge of Luxembourg's history.⁴⁷

However, despite the *de jure* opening of public sector employment in the areas of research, education, healthcare, ground transportation, post and telecommunications, and water, gas and energy distribution, has been subject to a *de facto* continuation of the practice of requiring Luxembourg citizenship for virtually all public sector posts, as can be seen in full-page newspaper ads recruiting for public sector positions.

1.1. Nationality condition for access to positions in the public sector

State public sector employment postings still require candidates to have Luxembourg citizenship even for posts not exercising, whether directly or indirectly, any public authority or providing services that protect the general interests of the State. This situation continues to exist despite the legislation cited below. At this time, approximately 89.51% of public servants are Luxembourg citizens.⁴⁸

1.2. Language requirement

The above-mentioned bill reforming the notarial profession also requires that the applicants have adequate knowledge of Luxembourg's three administrative languages (Luxembourgish, French and German).⁴⁹

47 'CGFP : un compromis enfin trouvé', in *La Voix* (26.03.2009).

48 Conseil National pour Etrangers, December 2008.

49 *Idem*, Arts. 13(2)(c), 18(1)(a) and 19(1)(c).

1.3. Recognition of professional experience for access to the public sector

We know of one case in which the prior experience of a nurse of Portuguese citizenship was not given proper recognition for purposes of calculating his years of prior service in the public sector. Upon being hired at a Luxembourg neuro-psychiatric hospital, 9 years and 8 months were recognized in his nursing career by Luxembourg. His career in fact included 3 years and 9 months in Portugal, 8 years and 6 months in Switzerland, and 1 year and 4 months again in Portugal, or a total of 13 years and 7 months. The individual in question petitioned the *Ministre de la Fonction Publique et de la Réforme Administrative* [Minister of the Public Sector and Administrative Reform] for a recalculation of his years of service by Luxembourg, but was denied a recalculation based on the law of 22 June 1963 setting the salary regime of State civil servants, as amended and applicable at the time. The individual then petitioned the Luxembourg Administrative Tribunal for reversal or annulment of the Minister's decision on grounds of violation of Article 39 CE and Regulation (CE) No 1612/68. The Administrative Tribunal ruled that the decision be reversed and that the Minister had not taken into account the totality of the petitioner's service at a Portuguese Hospital, thus under the above-mentioned law, the petitioner was entitled to recognition of 11 years and 6 months' years of service prior to beginning work in at the Luxembourg hospital.⁵⁰ We are also aware that the petitioner's wife also has a similar case pending before Luxembourg's Administrative Tribunal.

It seems that this case is not the only one touching upon those problems.

2. WORKING CONDITIONS

Nothing to report.

⁵⁰ Tribunal administratif du Grand-Duché de Luxembourg, No. 18533 du rôle (21.03.2005).

Chapter VI

Members of the Worker's Family and Treatment of Third Country Family Members

In general the residence rights of workers' family members under the new immigration law are upheld. However, it remains to be seen how these rights will be treated as the new immigration law continues to be implemented.⁵¹

RESIDENCE RIGHTS – TRANSPOSITION OF DIRECTIVE 2004/38/EC

1.1. Situation of family members of jobseekers

Nothing to report.

1.2 Application of Metock judgment

While we are unaware of a Luxembourg tribunal decision applying the *Metock* judgment, we are aware of one 2008 Administrative Tribunal decision in which a work permit was denied the third-country national spouse of an EU citizen that had lived in Luxembourg, but no longer lived there when the work permit was denied. The Ministry had enforced Luxembourg's EU citizen hiring priority and her employer had suspended her work contract. At that time, her husband was not providing her with any alimony, thus she was obligated to work to support herself. However, given that she was unable to prove divorce from her EU citizen husband and she had no other legal basis for her right to work in Luxembourg, the administrative tribunal denied her appeal attacking the Ministry's refusal of her work permit. However, the Tribunal stated that she could be eligible for protective measures but, given her economic situation and the fact that removal proceedings could not be brought against her because her residence authorisation was still valid the threat was not sufficiently serious to justify protective measures on her behalf.⁵²

1.3. How the problems of abuse of rights (marriages of convenience) are tackled

To combat the regular occurrence of feigned marriages in Luxembourg, a bill (No. 5908) prohibiting forced and convenience marriages and partnerships was sent to the Chamber of Deputies on 28 July 2008. It would provide for the establishment of a complete pre-nuptial marriage file and a hearing before a state official with the future spouses. It would also allow for the validation of marriages in other countries when performed according to local requirements, unless the supporting documentation were to be proved false or falsified. A new

51 Telephone conversations of 20 April 2009, with representatives from ASTI and CLAE.

52 Requête en sursis à exécution sinon en institution d'une mesure de sauvegarde introduite par Madame X contre une décision du ministre des Affaires étrangères de l'Immigration en matière de permis de travail, Tribunal Administratif du Grand-Duché de Luxembourg, No. 24868, 13 October 2008.

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Civil Code provision would require that a Luxembourg national be present at his or her marriage ceremony, even if the ceremony were to take place abroad. The Luxembourg Prosecutor would be empowered to postpone or oppose the marriage for just cause, and any entity receive documentation can contest it. Finally, the bill would penalize the entering into a marriage or partnership, or receiving of money for the sole purpose of obtaining a residence permit with prison terms ranging from six months to three years and fines ranging from 10,000 to 30,000 EUR. It would also penalize forced marriages or partnerships with a prison term ranging one to four years and fines ranging from 20,000 to 40,000 EUR. As of this writing, the bill is still pending before the Luxembourg Parliament and it has received no advisory opinions.⁵³

2. ACCESS TO WORK

Nothing particular to report for 2008 that would affect the free movement of EU Member State nationals.

3. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

Nothing to report.

4. OTHER ISSUES CONCERNING EQUAL TREATMENT (SOCIAL AND TAX ADVANTAGES)

Nothing to report.

⁵³ Projet de Loi N° 5908 ayant pour objet de lutter contre les mariages et partenariats forcés ou de complaisance (28.07.2008).

Chapter VII

Relevance/Influence/Follow-up of recent Court of Justice judgments

On 19 June 2008, the ECJ issued a judgment condemning Luxembourg for failure to fulfil its obligations under Articles 3(1) and 10 of Directive 96/71 CE concerning the posting of workers in the framework of the provision of services and the monitoring of the implementation of labour law, and Articles 49 EC and 50 EC, in its transposition of the Directive. Concretely, the Court held that Luxembourg failed to fulfil its obligations by:

1. declaring the provisions of points (1) (employment contract or recognized equivalent), (2) (automatic adjustment of remuneration rates to the cost of living) , (8) (rules on part-time and fixed-term work) and (11) (collective agreements) of Article 1(1) of the Law of 20 December 2002 transposing Directive 96/71/EC to be mandatory provisions under national public policy;
2. failing to fully transpose Article 3(1)(a) of Directive 96//71/EC regarding maximum work periods and minimum rest periods;
3. establishing in the Article 7(1) of the Law of 20 December 2002, conditions on the access to the basic information needed by the competent national authorities for monitoring purposes with insufficient clarity to ensure legal certainty for undertakings desiring to post workers in Luxembourg; and
4. requiring in Article 8 of the Law of 20 December 2002, that documents necessary for monitoring purposes be retained in Luxembourg by an *ad hoc* agent resident there.⁵⁴

In response, the Luxembourg government stated that with respect to provisions (1) (employment contract or duly-recognized equivalent) and (8) (rules on part-time and fixed-term work) of Article 1(1) of the Law of 20 December 2002, the ECJ's arguments that the Member State of the enterprise posting the worker would be responsible for ensuring that labour conditions complied with were fully in line with Community law and jurisprudence, and withdrawing those provisions that refer to Luxembourg's Labour Code would not call Luxembourg's labour law into question, given that those issues are governed by the applicable EU Directives. However, in order to ensure effective monitoring of the application of the relevant provisions, the government does plan to require that the posting enterprises submit copies of the part-time and fixed-term employment contracts, or their duly-recognized equivalents.⁵⁵

With respect to points (2) (automatic adjustment of remuneration rates to the cost of living) and (11) (collective agreements) of Article 1(1) of the Law of 20 December 2002, the government responded that it is clear that the Directive allows national authorities to set not only the minimum 'social' wage, but also the minimum salaries themselves, through the use of collective agreements declared universally applicable, and the Directive leaves no doubt that only collective agreements declared universally applicable could set the minimum wage.

54 ECJ/C-319/06 (19.06.2008), and Loi du 20 décembre 2002 portant transposition de la Directive 96/71/CE concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services, Mémorial A-No. 154, 31 December 2002.

55 Parliamentary Question No. 2633 of 19.06.2008, regarding the erroneous transposition of Directive 96/71 concerning the posting of workers from Deputy Ben Fayot and answer of 03.07.2008, from Minister of Labour and Employment, Mr. François Biltgen, available at <http://www.chd.lu/archives/ArchivesPortlet?action=baselist> (21.04.2009).

Moreover, the minimum wages and pay rates set in that manner would be subject to the automatic adjustment of rates of remuneration to the cost of living. By including the collective agreement clause in the Law of 20 December 2002, Luxembourg simply wanted to mitigate the effects of social dumping, given that the risk of social dumping is greatest in the construction sector. Because the Directive leaves no doubt that only collective agreements declared universally applicable could set the minimum wage, the government found the Court's holding regarding the term 'collective agreements' unnecessary, especially given that the national regime of automatic adjustment of rates of pay to the cost of living would not apply to a posted worker's salary based on a salary index, but rather solely to the minimum salary.⁵⁶

In his response to the parliamentary question on the erroneous translation of the Directive, Luxembourg's Minister of Labour and Employment expressed the government's concern regarding the impact of the decision on European social rights, notably with respect to the Court's very narrow interpretation of the notion of social public policy and the powers of local authorities. The Minister pointed out that the Court's decision is characterised by a sort of linguistic meticulousness that the government found superfluous, given the context of established Community law, particularly with respect to the provision on collective agreements. Additionally, the Minister expressed his opinion in favour of a debate on the relationship between the fundamental freedoms of the Treaty and fundamental rights, as well as between national social public policy and Community legal policy.⁵⁷

Luxembourg reacted quickly. On 21 October 2008, Luxembourg's Labour and Employment Ministry submitted a bill amending the existing legislation to the Chamber of Deputies. However, that bill has not yet been voted into law. Its preamble sets forth the government's position on amending the bill; the amendments would be held to strict minimum to timely bring the existing legislation into compliance with the ECJ decision. Additionally, the government stressed that it chose to draft the original legislation in such a manner as to provoke a debate on European social rights, rather than to blindly copy the Directive.⁵⁸

The amendments in response to the ECJ's decision consist of first deleting from what is now the Luxembourg Labour Code's list of public policy requirements the four items the ECJ deemed to be contrary to Community law (the obligation to have a written employment contract or recognized equivalent; automatic adjustment of remuneration rates to the cost of living; the obligation to comply with Luxembourg rules on part-time and fixed-term work and collective agreements). The provision regarding automatic adjustment of remuneration rates has been divided into two provisions with qualifying provisions; the first ensuring the right to a minimum wage applicable to that particular sector, or in application of collective agreements declared universally applicable, and the second providing for automatic adjustment of remuneration rates, excluding the remuneration for posted workers, unless they receive a minimum wage.⁵⁹

Second, the provisions regarding monitoring and supervision by the ITM were clarified and brought in line with Luxembourg's basic company monitoring standards in that the ITM would no longer require information such as residence or work permits, but rather the information it would need to know about the company posting the employee. And, the following

⁵⁶ *Idem.*

⁵⁷ *Ibid.*

⁵⁸ Projet de Loi N° 5942 portant modification des articles L- 010-1, L. 141-1, L. 142-2 et L. 142-3 du Code du Travail (21.10.2008).

⁵⁹ *Ibid.*

provision simply requires that by the day the work starts further documentation be provided to it with information regarding the worker by provided to it, including declarations that the Member State in which the company posting the worker is located has informed workers of the conditions under which they are to be posted, and that the posting company complies with the rules on part-time work and short-term work contracts in its Member State. The documents would be retained by a posted employee for the time during which the work was being carried out, and thereafter with any other individual of the company's choosing, eliminating the requirement for an *ad hoc* agent domiciled in Luxembourg.⁶⁰

Finally, the amendments add provisions refining the definition of 'posted worker', specifying that the posted worker's employment in Luxembourg is limited in time, and that the work performed is to be that not habitually carried out by the host company's permanent personnel. And, one of provisions on supervision is amended to specify all administrative agencies with which the ITM cooperates. The Joint Social Security Center is removed from the list, and the Health Ministry and Grand-Ducal Police are added to it.⁶¹

We know of no jurisprudence directly on point that would implement the ECJ decisions in *Hendrix* (C-287/05) or *Raccanelli* (C-94/07). With respect to *Renneberg* (C-527/06), there have been no related rulings since the ECJ's ruling in *Lakebrink and Peters-Lakebrink* (C-182/06) issued more than one year prior to the *Renneberg* decision. Advocate General Mengozzi cited extensively *Lakebrink and Peters-Lakebrink* in his opinion on *Renneberg*. Differing factually from *Renneberg*, *Lakebrink and Peters-Lakebrink* dealt with couple living in Germany but earning nearly all of their taxable income in Luxembourg who sought to have their losses from rental income from an apartment they owned but did not occupy in Germany, their Member State of residence, taken into account for purposes of determination of the tax rate applicable to them by Luxembourg, their Member State of employment. While the facts differed, the end result was similar to that in *Renneberg* as in both cases the income losses were taken into account by neither the Member State of employment or that of residence, resulting in discrimination with as compared to resident taxpayers. In its response to the Administrative Court's request for a preliminary ruling, the ECJ's decision in *Lakebrink and Peters-Lakebrink* ruled that the rental income losses relating to properties owned abroad by non-residents working in Luxembourg were to be taken into consideration for purposes of determining the tax rate applicable to them to avoid such discrimination and promote the free movement of workers under Article 39 EC. In its decision of 28 February 2008, Luxembourg's Administrative Court implemented the ECJ decision in *Lakebrink and Peters-Lakebrink*, ruling that the couple's rental income losses were to be taken into account for purposes of determining their Luxembourg taxable income, thereby reversing the Administrative Tribunal's earlier discriminatory denial of that inclusion.⁶²

60 *Ibid.*

61 *Ibid.*

62 Opinion of Advocate General Mengozzi (C-182/06), 29.03.2007, available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006C0182:EN:HTML> (02.09.2009); Opinion of Advocate General Mengozzi (C-527/06), 09.07.2008; ECJ/C-182/06 (18.07.2007); Tribunal Administrative 19039 and 19664 (both of 10.10.2005); Cour Administrative 20675 C (07.04.2006); and Cour Administrative 20675C (28.02.2008).

Chapter VIII

Application of Transitional Measures

We are aware of the identical cases of four Romanian women who, while working as ‘cabaret dancers’ in Luxembourg, were issued orders denying them entry and stay in the country, with an injunction to leave the country within 15 days of service of the order. They appealed their respective orders before the Luxembourg Administrative Tribunal on the grounds that they did not require work permits as they were working as self-employed artists in cabarets and given the lack of legislation on the topic, did not require work permits because as self-employed artists in an unregulated profession, they were not subject to any particular formalities. However, the Tribunal ruled that given that they were Romanian citizens, still subject to the transitory measures, and Luxembourg had informed the European Commission by letter dated 22 December 2006 of its intent to not yet open its labour market to Romania, they were still required to have a work permit under the immigration legislation in force at the time. Luxembourg had stated that, given the difficulties with its labour market, it would not open its labour market to Romania until 2011, a practice that could arguably be called administrative, as there was no legislative basis for maintaining the work permit requirement. However, the Tribunal also ruled that while they had the right to enter into Luxembourg, they were obliged to show that they had sufficient legally earned means to support themselves, a requirement which they could not meet given their illegal status. The Administrative Tribunal thus upheld the Immigration Ministry’s order refusing them entry and stay in Luxembourg.⁶³

However, a subsequent ECJ ruling recently confirmed the free movement principle enshrined in Article 18 EC and Article 27 of Directive 2004/38/EC, whereby Member States cannot restrict the right of nationals of one Member State to travel to another Member State unless the restriction is based on the personal conduct of those nationals. Their conduct must constitute of a genuine, present and sufficiently serious threat to one of the fundamental interests of society, and the restrictive measure must be appropriate and proportionate to the objective it seeks to attain. In *Ministerul Administrației și Internelor v. Jipa*, the Romanian government sought to prevent a Romanian national from returning to Belgium, from which he had to be repatriated to Romania under a readmission agreement between Romania and the Benelux countries for having ‘illegally’ resided in Belgium. The case does not cite the nature of the defendant’s illegal residence, but confirms that as a Romanian national, he enjoys the status of a citizen of the Union, particularly the right to move and reside freely within the Member States conferred by Article 18 EC.⁶⁴

Thus, the Luxembourg Administrative Tribunal’s decision regarding the four Romanian cabaret dancers violates Community law given that the Romanian women enjoy Union citizenship, and Luxembourg cannot reject their right to free movement within the Union for at least the initial three months of their stay in Luxembourg for reasons other than those based on public policy and safety as upheld in *Jipa*.

63 Tribunal administratif du Luxembourg Nos 22828, 22829, 22830, 22831 du rôle (16.01.2008).

64 ECJ/C-33/07 (10.07.2008).

Chapter IX

Miscellaneous

Finally, we are aware of a case concerning the outstanding salary claims of the former employee of a Luxembourg company which the Luxembourg District Court declared bankrupt at the end of 2008, but for which Luxembourg's Labour and Employment Ministry's (*Ministère du travail et de l'emploi*) Employment Administration (*Administration de l'Emploi*) (ADEM) has refused to pay those claims. The employee is appealing to the ADEM to reconsider its decision in light of Directive 2002/74/CE amending Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. The employee had been working in Luxembourg for a Luxembourg company, but then was temporarily transferred to Greece in the context of the free provision of services. While the employee was working in Greece, his employer continued to wire his social security contributions to the Luxembourg administration, so he continued to be subject to Luxembourg social security legislation. His salary was also wired to his Luxembourg bank account. While working in Greece the employee became ill and the company fired him. In mid-December of 2008, the company was declared bankrupt by the Luxembourg District Court, leaving the employee with many unpaid social benefit claims. He then requested his social security payments for salary and other benefits from the ADEM. The ADEM responded that under 8.a. of Directive 2002/74/EC, the institution competent to pay the worker's unpaid claims is the administration in the Member State in which the employee works, or habitually works, and that ADEM's research indicated that the employee's place of work was Greece, so that the employee should address his request to the Greek authorities. The employee has requested that the ADEM reconsider its denial on the grounds stated above that Luxembourg's Social Security Centre collected the employee's social security contributions from his employer, and thus, he did not habitually work in Greece.

Moreover, the ECJ's decision in *Mosbaek* (C-117/96),⁶⁵ provides two criteria for the determination of the 'competent institution', the first being that the employer paid social security contributions to a Member State, and the second being the Member State in which the bankruptcy proceedings were brought, Luxembourg in both instances. And, another one of its decisions, *Everson and Barras v. Bell Lines Ltd.* (C-198/98),⁶⁶ the ECJ reiterated that when an employer is established in one Member State, Directive 80/987/EEC requires that the institution competent for meeting employees' claims is the Member State in which the employer is established. However, when an employer has several establishments in more than one Member State, a determinative criterion would be the Member State in which the employee habitually carries out his work, and that would be the Member State that collects, or should collect, the employee's social security contributions. Given that, as stated above, the employee's social security contributions were collected by the Luxembourg social security administration, the employee contests that the competent authority to which he should address his request for unpaid claims should be in Greece.

Finally, Directive 2002/74/EC does not appear to have yet been transposed into Luxembourg law. We find no reference to that Directive in the relevant national legislative provi-

65 ECJ/C-117/96 (17.09.1997).

66 ECJ/C-198/98 (16.12.1999).

sions comprising Articles L. 126-1(5) and L. 631-2(1)5, respectively, guaranteeing payment of an employee's claims when the employer has gone bankrupt, when the claims cannot be paid in whole or in part, from available funds within 10 days of the bankruptcy declaration, and creating the Employment Fund that would cover such claims, among others.⁶⁷ The first paragraph of Article 2,1. of the Directive provides that Member States were to transpose it into national law before 8 October 2005, while the second paragraph provides that Member States should make reference to the Directive in their national legislation..

List of Internet sites

Legislation

- Government: <http://www.legilux.public.lu>; <http://www.gouvernement.lu/>
- Council of State: <http://www.ce.etat.lu/>
- Chamber of Deputies: <http://chd.lu/>

Court judgements

- Administrative courts: <http://www.jurad.etat.lu/>

Organes administratifs

- <http://www.ombudsman.lu/>
- <http://www.adem.public.lu/>

Reports

- Rapport d'activité de l'Ombudsman 2007-2008: <http://www.ombudsman.lu/data/RA-2008.pdf>
- Rapport General sur la Sécurité Sociale au Grand-Duché de Luxembourg, 2007, novembre 2008: http://www.mss.public.lu/publications/rapport_general/rg2007/rg_2007.pdf
- Rapport sur la politique européenne du gouvernement 2007-2008, 10 octobre 2008: http://www.europaforum.public.lu/fr/actualites/2008/10/schmit-pol-ue/Rapport_politique_europ_enne_2007-2008_final.doc
- Rapport d'activité 2008 du Ministère de Travail et de l'Emploi, mars 2009: http://www.mte.public.lu/ministere/rapports-activite/rapport_act_2008.pdf
- Rapport annuel de l'ADEM 2008 : http://www.adem.public.lu/actualites/2009/04/rapport_annuel_2008/index.html

Doctrine

A. Becker, Free Movement of Services: recent developments in Cross-Border Access to Healthcare, *Bulletin luxembourgeois des questions sociales*, Vol. 22, 2007, p. 61ff.

⁶⁷ Code du Travail – 2008, Arts. L-126-1(5) and L. 631-2(1)5 (01.10.2008).

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- J. Langers, Nationaux et étrangers résident au Luxembourg: analyse statistique de quelques différences socio-démographiques, *Revue Economie et Statistique*, n. 2/2006, Ed. Statec, p. 3ff.
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- F. Moyse, *Le Luxembourg et la liberté de circulation des travailleurs européens, à l'aune de la loi du 29 août 2008 sur la libre circulation des personnes et l'immigration*, Annales du droit luxembourgeois, vol. 17-18, Brussels: Bruylant 2007-2008.