REPORT
on the Free Movement of Workers in Luxembourg in 2011-2012

Rapporteurs: François Moyse
University of Milan

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Contents

Introduction

The year covered by the report has been marked by one single major issue, the one relating to financial assistance to students. The Government has steadily defended the law of 26 July 2010 on state aid for higher education and its application.

In particular, the Minister of Justice has constantly explained that the law in question is not contrary to European law, despite the many negative reactions of frontier workers, trade unions and questionings in the newspapers.

The new legislation relies on a condition of residence in the territory of Luxembourg, which restricts the beneficiaries. At the same time, it increases the volume of financial assistance, which is granted now to the students themselves.

This has been a topic that has been commented throughout the year in all newspapers. The recourses submitted in the administrative court by several hundred claimants (frontier workers) have been widely commented in the press. The preliminary ruling submitted to the Court of Justice of the European Union is being waited for with much interest in Luxembourg.

One can say that this major trend has overshadowed all other aspects of free movement issues for European citizens.

Indeed, apart from this major topic, there have been few developments that have been surfacing concerning free movement of European workers in Luxembourg this year.

Chapter I
The Worker: Entry, residence, departure and remedies

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

In terms of legislation, nothing substantial has changed since the law of 29 August 2008 on free movement of persons and immigration.[1]

In 2011, the law has been amended once, with the law of 1 July 2011.[2] Article 3 of the law of 2008 has been changed, namely the definition of the third-country national is not only, as previously, 'a person who is not a citizen of the European Union', but also now a person ' who does not enjoy free movement according to the European communities law'.

Also the article 3 h) defines the decision of return as a ministerial decision applying only to illegal sojourn of third-party nationals. The other changes only relate to immigration legislation, i.e. are applicable to third-party nationals and not European Union citizens (free movement).

A law of 18 January 2012 has created a new unemployment body called *Agence pour le Développment de l'Emploi*, replacing the former Administration de l'Emploi and amending the law of 29 August 2008 on free movement of persons and immigration.[3]

According to the new article L. 622-5 of the Labour Code, introduced by this law, any person in search of a job may ask to be put on the list of employment seekers, if they are:

- Luxembourgers, citizens of the European Union (and nationals of EFTA countries and Switzerland) or
- family members (with a reference to article of the free movement law for the definition)
- third-country nationals with a long residence status or third-country nationals who possess a valid residence permit.

Refugees are excluded by this article.

A bill was deposited at the Parliament[4] on 18 July 2011 in order to modify the amended law on free movement and immigration of 20 August 2008. It aims at facilitating the issuing of specific categories of employed third-party nationals who are highly qualified. The bill aimed at transposing Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

1 See coordinated text, *Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration*, Mémorial A N° 138 de 2008, p. 2024, http://www.legilux.public.lu/leg/a/search/index.php?query=all&include=&exclude=&mn=&mp=&mt=0&in_year=&searchDate=date&from_day=29&from_month=08&from_year=2008&to_day=29&to_month=08&to_year=2008&count=0&sort=0&search.x=23&search.y=10.

2 *Loi du 1er juillet 2011 modifiant la loi modifiée du 29 août 2008 sur la libre circulation des personnes et l'immigration et la loi modifiée du 5 mai 2006 relative au droit d'asile et à des formes complémentaires de protection*, *http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf#page=2*.

3 Mémorial A n° 11 du 26.01.2012, p. 168, http://www.legilux.public.lu/leg/a/archives/2012/0011/2012A0168A.html.

4 N°6306, projet de loi modifiant la loi modifiée du 29 août 2008 sur la libre circulation des personnes et l'immigration, http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&backto=/wps/portal/public&id=6306.

It was quickly adopted, amending the free movement and immigration law of 2008 trough a law of 8 December 2011, namely the *'Loi du 8 décembre 2011 modifiant la loi modifiée du 29 août 2008 sur la libre circulation des personnes et l'immigration*'.[5]

The system of a 'blue card' for high skilled workers has thus been adopted for Luxembourg and few changes were actually made on the law of 2008.

One of the features of this law is to adapt the legislation on registered partnerships: the law of 9 July 2004 on partnerships was amended to encompass also foreign registered partnerships: those partnerships are also now included in the law of 2008.

A new article 12 §3 now allows the minister to authorize also residence for partners of other European Union countries who are not registered but who have a lasting relationship, as required by article 3 (2) of Directive 2004/38/EC, which had not been fully transposed previously.

Also, in order to follow the request of the European Commission, article 12 of the law of 2008 has been amended so as to include a necessary motivation for any decision of refusal of entry or sojourn.

Furthermore, article 18 of the law was amended, because the former text could have been seen as requesting an uninterrrupted stay of 5 years before acquiring the long-term residence status.

Article 22 has been changed so as to include, for the family member of a European Union citizen, who does not need a work permit, the status of independent worker.

In order to comply with articles 15 and 32 of Directive 2004/38 as far as the prohibition of entry for EU citizens and their family members is concerned, a new paragraph 4 has been added to article 27 of the law, to cover those people who may be barred from entering the territory on grounds of public order, public security or public health, for no more than 5 years.

Article 35§2 of the law has been modified: the categories of persons not obliged to ask for a work permit if the activity goes on for less than 3 months have been extended.

The law also modifies article 39 and expressly states that the minister who delivers the residence permit shall facilitate the visa formalities for the applicant.

The renewal of a residence permit, as foreseen in article 43 has been simplified, so as to concord with the prescriptions of Directive 2004/38/EC. The rest of the law is a transposition into Luxembourg law of Directive 2009/50/EC on high skilled workers.

2. SITUATION OF JOB-SEEKERS

See below under chapter 4, section 2.2.

3. OTHER ISSUES OF CONCERN

On 14 July 2011, the Administrative Court (*Cour Administrative*) upheld an Administrative Tribunal (*Tribunal Administratif*) decision confirming the immigration ministry's 24 November 2009 decision denying a Belgian citizen EU permanent resident status in Luxembourg. While the applicant had filed his initial arrival declaration in September of 2004, entered into three

5 Mémorial A n° 19 du 03.02.2012, p. 238; http://www.legilux.public.lu/leg/a/archives/2012/0019/2012A0238A.html.

successive lease agreements for the rental of a furnished lodging and carried out other registration formalities with the municipal government authorities at his places or residence, he had neither obtained an EU citizen identification card nor cooperated in the administrative investigations regarding his request. His lodging was a room more like a storage room that an actual living space, and the building manager stated that he was rarely there. Thus, the Administrative Court found that the petitioner did not introduce sufficient proof of uninterrupted residence in Luxembourg since September of 2004, and confirmed the Administrative Tribunal's ruling.[6]

On 19 September 2011, the Administrative Tribunal dismissed an appeal by a Portuguese woman against the immigration ministry's implicit refusal of her 11 June 2010 residence permit application given that three months had passed since her application was filed and she had received no response from the ministry. On 4 April 2003, the petitioner had filed her arrival declaration with her municipal government and applied for a residence permit, stating that her employer was a certain private limited liability company. She received a residence permit issued on 12 November 2003 and valid until 19 January 2004. In June of 2005, in response to residence permit renewal request, her municipal government sent her foreign identification card to the immigration ministry because it was supposedly 'expired'. The ministry responded to the municipality that a new first request for a residence permit had to be filed with all the required documents because the renewal request concerned a residence permit valid for less than 5 years. The petitioner was then requested by letter of 26 October 2005 to personally go to her municipal government's population bureau to file that new permit request and provide proof of her means of subsistence and a copy of a work contract for a period exceeding 3 months.[7]

On 13 December 2005, the petitioner went to the municipal government and filed a residence permit application stating that her means of subsistence was the guaranteed minimum income ('*GMI*'). In mid-January 2006, she received a letter stating that her right to GMI would end at the beginning of February 2006 because she was either not authorized to reside in Luxembourg, not domiciled there or did not actually live there. In July of 2006, the immigration administration request that the municipal government to supply either her work copy valid for over three month or proof of sufficient resources. The local police precinct noted that she had left the city without leaving a forwarding address in early November of 2006, and was thus struck from the City of Dudelange population register in early December of 2006.[8]

At the end of November of 2007, she filed a work permit application with the Bettembourg municipal administration, stating that she worked for a nearby café. In March of 2008, the ministry asked the petitioner to provide an employment contract or promise of employment for employment exceeding 3 months, stating that, under the new regulation in force on 1 January 2008, if she provided the requested document, she could receive a registration certificate.[9]

In 7 May 2009, the petitioner's representative inquired with the Ministry about her November 2007 work permit application, stating that the petitioner had lost her wallet with all her documents. The ministry replied that the petitioner had to go to the municipal government of her place of residence to file a registration declaration under Article 8 of the Law of 29 August 2008 on the free movement of people and immigration, as amended. Further exchanges of letters occurred between the petitioner's representative and the immigration ministry, including her representative's 11 June 2010 request that the ministry issue an appealable decision regarding her residence card application. When there was no response after 3 months, the representative

6 Cour admin., 14 juillet 2011, No. 28082C.
7 Trib. admin., 19 septembre 2011 No. 27550, p. 1-2.
8 Trib. admin., 19 septembre 2011 No. 27550, p. 2.
9 Trib. admin., 19 septembre 2011 No. 27550, p. 3.

filed an appeal with the Administrative Tribunal, arguing among other things, that the refusal was invalid because it was not reasoned. The Tribunal responded that while the implicit refusal was obviously not a reasoned refusal, the State validly complied with that requirement by supplying reasons in its pleadings during the course of the Administrative Tribunal proceeding.[10]

The petitioner further argued that the government incorrectly applied the Law of 28 March 1972 (the old immigration law which had been repealed), but the Administrative Tribunal rejected that argument, stating that only the Law of 29 August 2008 was applicable to her 11 June 2010 request. The Tribunal found that the petitioner had not presented the employment information required under the Law of 29 August 2008, and thus affirmed the ministry's denial of her residence permit application.[11]

4. FREE MOVEMENT OF ROMA WORKERS

There are still a high number of applicants for asylum from former Yugoslavia, especially Serbia and Macedonia, this after the visa requirement was abolished for travellers from these countries since December 2009. Approximately 75% of those travellers are still Roma people.

The consequence has been a drastic reduction of financial assistance to those applicants. Though it is an issue relating to asylum seekers, it must be stated that it touches indirectly upon the question of free movement of European citizens, as the lifting of the visa requirement for Former Yugoslavia nationals is a European Union decision that has impacted on Luxembourg policy towards asylum seekers in general.

10 Trib. admin., 19 septembre 2011 No. 27550, p. 3-5
11 Trib. admin., 19 septembre 2011 No. 27550, p. 5-7.

Chapter II
Members of the Family

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

The application by the administration of the *Zambrano*[12] case law seems to be problematic. The CJEU had to decided on this case concerning the situation of a third-party national who had been refused residence rights in Belgium, who has several children born in Belgium (children who have the Belgian nationality), who worked for a certain time but to whom unemployment benefits were refused.

The Court decided that article 20 of the Treaty confers a residence right to such a person, as a parent, due to the fact that the small children have the nationality of the country of residence and would otherwise face expulsion.

In a letter of 3 August 2011 to the association ASTI, the Minister of Immigration states that the ministry will follow the lines of this judgment. Thus parents of a third-party nation of a European child under 18 years old, who are taking care of this child, may ask for a residence permit as a worker. The Minister states that however such parent does not enjoy a direct right of residence trough Directive 2004/38.

However it appears that the Ministry of Immigration does not follow completely the lines of this CJEU decision and only applies this case law if the concerned person lives as a couple with the father/mother of his/her European child. There are problems if the couple does not live together anymore (after a divorce for example) and if the other spouse refuses to sign a declaration that he/she guarantees financial assistance for the child. Such policy seems to be too restrictive in those cases and against the interests of the children concerned.

2. ENTRY AND RESIDENCE RIGHTS

On 11 December 2011, the Social Security High Council (*Conseil supérieur de la sécurité sociale*, '*CSSS*') rejected an appeal from the National Family Benefits Fund (*Caisse nationale des prestations familiales*, '*CNPF*') against a National Insurance Arbitration Board (*Conseil arbitral des assurances sociales*) decision which reversed the CNPF's 21 February 2008 decision to reject an application for prenatal and maternity benefits from a third-country (Republic of the Congo) national mother in a partnership registered in Holland with a Dutch national living in Luxembourg. The CNPF refused to grant the benefits on the grounds that the mother did not fulfil the domicile requirements under the Law of 30 April 1980 creating maternity benefits, and the Law of 20 June 1987 creating the childbirth allowance because the mother's domicile had to be where she had to be in Luxembourg, and she allegedly did not have her legal domicile in Luxembourg until she obtained her residence permit in March of 2008. The CNPF further ar-

12 Arrêt de la Cour (grande chambre) du 8 mars 2011, *Gerardo Ruiz Zambrano contre Office national de l'emploi (ONEm)*, Affaire C-34/09.

gued that a provisional residence permit does not create a right to a fixed, definite and legal domicile.[13]

However, the CSSS pointed out that the preamble and applicable provisions of Directive 2004/38/EC, and Article 20 of the TFEU directly confer rights on EU Member State family members, and the granting of a residence permit is not the granting of the right to establish one's domicile in a Member State, but simply an administrative formality that acknowledges that right directly conferred by the above-mentioned Directive 2004/38/EC and the TFEU. The mother had taken all required steps to legally establish her domicile in Luxembourg. Thus, in stating that the mother's legal domicile was in Luxembourg only from the time she received her residence permit violated the directive and the TFEU. The CSSS decision in this case followed the Court of Cassation's reasoning when it decided in the matter on 19 May 2011.[14]

Entry conditions

On 17 May 2011, the Administrative Court issued its decision in an appeal against a 15 December 2010 Administrative Tribunal decision upholding the immigration ministry's 15 January 2010 refusal to grant a residence permit to the petitioner's nephew. The petitioner, a Luxembourg citizen filed a family reunification application for his nephew, a Nigerian national. The immigration ministry refused the uncle's request on the grounds that family reunification extends only to direct descendents and ascendants.[15]

The uncle had explained in his direct appeal to the ministry that he had taken care of that nephew since his birth, including paying for his education in Nigeria, because the nephew was the youngest of seven children and his parents did not have the means to pay for his studies. Because the uncle had been given a transfer of parental rights over his nephew, he considered that the nephew was assimilated to direct descendents under the Law of 29 August 2008 on the free movement of people and immigration. The Administrative Tribunal pointed out that because the uncle was a Luxembourg citizen, EU law did not apply, and that the Law of 29 August 2008 did not apply to collateral relatives. Given that the nephew was neither the biological nor the adoptive son of the uncle, and that the uncle had not provided sufficient proof that the Nigerian transfer of parental rights was the equivalent of a court order, the Tribunal could not conclude that the nephew was the equivalent of a direct descendant of the uncle. Moreover, the Tribunal pointed out that Article 8 of the CEDH's definition of family requires that the existence of an actual and stable family life be proven, which was not the case here.[16]

The Administrative Court agreed, stating the transfer of parental authority changes nothing with respect to an individual's status as collateral relative, and given the parties stated that the uncle had not adopted his nephew, it upheld the Administrative Tribunal's decision.[17]

On 12 December 2011, the Administrative Tribunal confirmed the immigration ministry's 19 November 2010 refusal of an EU citizen family member permanent residence card. The petitioner, a non-EU citizen, had filed a request with the immigration ministry on 6 September 2010, but the request was refused on the grounds that he did not did not fulfil the requirement of having been married to the EU citizen for at least 3 years before beginning legal divorce proceedings. They were married in 19 June 2004 and the divorce by mutual consent was legally

13 Conseil supérieur de la sécurité sociale, 12 décembre 2011, No. ADIV 2009/0031, p. 2.
14 Conseil supérieur de la sécurité sociale, 12 décembre 2011, No. ADIV 2009/0031, p. 2, et Cour de cassation, 19 mai 2011, No. 2834.
15 Cour admin., 17 mai 2011, No. 27704C, p. 1-2.
16 Cour admin., 17 mai 2011, No. 27704C, p. 2-3.
17 Cour admin., 17 mai 2011, No. 27704C, p. 3-5.

decreed on 5 November 2007, but the proceedings must have been initiated in May of 2007 by the couple's first appearance (*première comparution*) before the divorce court. The individual had also omitted to return his existing residence permit to the ministry and inform it of his divorce. Nonetheless, the ministry stated in its refusal letter that the individual could apply for a work permit as an independent salaried worker if he provided the appropriate documentation.[18]

Sufficient resources

The Administrative Tribunal dealt with the case of an EU citizen whose residence permit was revoked by the immigration ministry due to her lack of sufficient financial resources for her and her son, leading to her being considered as an unreasonable burden on the social assistance system.

This decision was based on the fact that during a period of 30 months from arrival in Luxembourg, she was employed for a mere 5 months, and was granted the basic social assistance benefits (*RMG – Revenu minimum garanti*) for the other 25 months.

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

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

With respect to Article 24 of the Law of 29 August 2008, the tribunal then considered that an EU citizen who does not fulfil the resources condition and who becomes an unreasonable burden on the social assistance system of another EU Member State in which he resides can be subject to revocation of his residence permit. The tribunal ruled that the amount and duration of social benefits as well as the length of stay in that other EU Member State must be taken into account to determine whether a foreigner is an unreasonable burden on its social assistance system.

In this case, the court held that the ministry's revocation decision could not be judged as being unlawful. On 12 May 2011, the Administrative Court rejected the petitioner's appeal against the 26 January 2011 decision and upheld the Administrative Tribunal's decision in this case.[19]

Third-party nationals

A question was posed in Parliament by an MP, Felix Braz, on 4.1.2012,[20] to the Minister of Immigration on the attitude of the Government relating to the Green Book relating to family reunification of third-party nationals residing in the EU (directive 2003/86/EC).

The Minister Nicolas Schmit replied that the Government does not envisage proposing changes in the current legislation while acknowledging that this category of foreigners is not currently included into the available statistics.

18 Trib. admin., 12 décembre 2011, No. 27950.
19 Trib. admin., 26 janvier 2011, n°26951, Cour admin., 12 mai 2011, n°27981C.
20 Question 1832.

3. IMPLICATIONS OF THE *METOCK* JUDGMENT

In the *Metock* judgement,[21] the CJEU ruled that the Directive is in fact not conditional on the prior legal residence of third-country family members, and it went even further in stating that it was irrelevant 'when and where their marriage took place and […] how the national of a non-member country entered the host Member State'. The central importance of Metock is thus two-fold: first, the CJEU's ruling establishes that EU laws preclude stricter immigration standards applied on a national level and, second, the Court further extends the rights of third-country family members.

There have been no new developments around the *Metock* judgment.

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

A draft law N° 5980 that was deposited at the Parliament in 2008 by the Government in order to fight marriages of convenience has been criticized by the National Commission on Human Rights.[22] The state attorney would be entitled to oppose such a marriage and no condition of nationality is being foreseen.

5. ACCESS TO WORK

Nothing particular to report.

6. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

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

According to the Luxembourg free movement and immigration law, family members of the EU citizen jobseeker who are themselves citizens of the EU or nationals of third countries, and who accompany or join him in the host State have the right to enter and remain in Luxembourg up to three months if they have a valid identity card or passport and, as necessary, the proper visa for entry into the country (art. 13 of the free movement and immigration law).

If the family members are staying for more than three months, the procedure is the following:

Members of family who are themselves citizens of the EU must present themselves personally to the Municipality within three months of their arrival with an identity document, a copy of their registration certificate and, as appropriate:

- a document proving the existence of the marriage, partnership or relationship,
- a document from their country of origin showing that they are dependent on the jobseeker,

21 CJUE 25 juillet 2008, *Blaise*, *Baheten*, *Metock* e.a.
22 http://www.lequotidien.lu/politique-et-societe/20058.html.

- a special authorization from the Minister if the person is one of the other members of the family (art.12, 14 and following of the free movement and immigration law).

Members of family who are nationals of third countries must present themselves personally to the municipality of their residence within three months of their arrival and apply for a residence card as a family member of a EU citizen with the documents which were produced on entry in the country and a copy of their registration certificate and, as appropriate:

- a document proving the existence of the marriage, partnership or relationship,
- a document from their country of origin showing that they are dependent on the jobseeker;
- a special authorization from the Minister if he or she is one of the other members of the family (art. 12, 34 and following of the free movement and immigration law).[23]

23 http://www.mae.lu/Site-MAE/Immigration/Entree-et-sejour-des-etrangers.

Chapter III
Access to Employment

1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

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

On 24 May 2011 and on request of the Commission, Luxembourg and several other Member States were censured by the CJEU for reserving the access to the profession of notary to nationals only. It was held that reserving this profession to nationals only, despite the fact that it does not participate in the exercise of public authority, is contrary to the treaties, and thus Luxembourg failed to fulfill its obligations under Article 43 EC.[24]

Consequently, access to the profession of notary had to be modified so as to take into account this judgement. In order to guaranty a satisfactory level of a notary's service, it seems possible to set up language requirements which a candidate for notary must satisfy. Given Luxembourg's upcoming 13 April 2012 amendment to the Grand-Ducal Regulation of 10 June 2009 on the organization of legal internships and regulating access to the notarial profession, the Commission closed its case against Luxembourg on 22 March 2012.[25]

The Grand-Ducal Regulation amendment now states that the completion of a professional internship by interns and candidates from a European Union Member State is one of the requirements to be admitted to the notarial profession, and that access to the exam at the end of the internship requires that candidates provide a copy of their identification card proving Luxembourg citizenship, or citizenship of another European Member State.[26]

1.2. Language requirements

As it was the case last year, language requirements in the private sector are applied according to the needs of the job profile. Most jobs request knowledge of French and English. The knowledge of Luxembourgish language is always a plus, but is not requested for every job. German is the third most used language and is often required as well in newspapers ads.

2. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

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

24 ECJ/C-51/08 (22.03.2012).

25 'Condition de nationalité pour l'accès à la profession de notaires' ('Nationality requirement for access to the notarial profession'), (22.03.2012) www.paperjam.lu.

26 Règlement grand-ducal du 13 avril 2012 modifiant le règlement grand-ducal du 10 juin 2009 portant organisation du stage judiciaire et règlementant l'accès au notariat, Mémorial A N° 75 du 20.04.2012, p. 812.

Luxembourg citizens only qualify for positions which involve direct or indirect exercise of public authority, or which safeguard State interests or that of other public legal entities.[27]

A number of problems still remain (see comments below).

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

In the ads of the Ministry in charge of public recruitment i.e. the Ministry of Civil Service (Ministère de la Fonction Publique), it is still written that Luxembourg nationality is required as a rule and only as an exception some jobs are marked with an asterisk as being open to other EU citizens. This reality exists despite the change of the rule and the theoretic opening of all positions to other EU citizens, with many exceptions of course. The practice does not take into account this change of rule.

Also remains a sentence in those ads asking for the 11-digit national number (n° de matricule national complet), while this number only exists for Luxembourg residents and not for applicants from abroad.

Statistically, the ads of the state show that out of a total of 102 positions offered (samples that the author of the report used therefore), a number of 65 positions where open to non-Luxembourg EU citizens as well: the percentage is therefore 64% or about two-thirds of the positions. There is clear progress in the number of positions in the civil service open to foreign recruitment.

On the level of the municipalities, one can witness that the requirement of Luxembourg nationality still appears in some ads, for positions that should not be closed to other EU citizens, like administrative clerks (expéditionnaire administratif)[28] or engineer-technician[29]. Sometimes an ad appears in Luxembourgish language[30], which is obviously authorized, but few foreigners do read and understand Luxembourgish well.

2.2. Language requirements

The newspaper advertisements for public posts show that some problems remain. A first issue is that the knowledge of the 3 administrative languages (Luxembourgish, French and German) is always required in these ads, whatever the position to be filled may be. If you can understand that most of these jobs require the knowledge of all those languages, that are indeed used by the population in general and the civil servants in particular (Luxembourgish as a rule), there are some positions where you wonder why a general requirement of knowing those 3 languages is requested.

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

28 Luxemburger Wort, 2.7.2011, Commune de Betzdorf.

29 Luxemburger Wort, 20.4.2011, Commune de Vianden.

30 Luxemburger Wort, 2.7.2011, Ministère de la Famille et de l'intégration, 'd'staatlech Kannerheemer Schëffleng'.

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

There is nothing particular to report. However there are some problems that we are aware of, that some diplomas of foreign universities are not always recognized as being suitable for some careers in the public sector.

3. OTHER ASPECTS OF ACCESS TO EMPLOYMENT

There is nothing particular to report.

Chapter IV
Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

Specific issue: Working conditions in the public sector

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

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

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

2. SOCIAL AND TAX ADVANTAGES

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

A married couple residing in Luxembourg since the end of March of 2010, filed an unemployment benefits claim with Luxembourg's Ombudsman, the *Médiateur*. Both individuals had a 7-month, season fixed-term contract that ended on 31 October 2010. They registered with the Unemployment Administration ('*ADEM*') on 29 October 2010 and filed their application for full unemployment benefits on 3 November 2010. Their unemployment benefit request was refused because they did not fulfil the residence requirement under Article L.521-3 of the Labour Code which provides that an individual requesting full unemployment benefits under a fixed-term contract must be domiciled in Luxembourg for at least months prior to the contract's end. The claimants had registered with the local government of the place of residence on 21 May 2010, even though they had lived there since the end of March. However, the residence certificate date was the determinative date for the ADEM.[31]

In his investigation of the file, the *Médiateur* questioned the manner in which 'domiciled' is to be interpreted under that Labour Code article, and came to the conclusion that it should be interpreted in the same manner in which it is interpreted under the Civil Code. Under Article 102 of the Civil Code, domicile is the place where an individual's principal establishment is situated. Under Article 103 of the Civil Code, a change of domicile requires two elements, (1) an objective element consisting of the actual residing in another place, and (2) a subjective element being the intent to set up one's principal establishment there. When there is no express declaration of that intent, Article 105 of the Civil Code allows any form of evidence to prove that intent.[32]

And, contrary to the Social Security Code provisions applicable to family benefits which consider a legal Luxembourg resident any person who is authorized to reside here and is legally declared a resident and has legally established his principal residence here, the legislation on full unemployment benefits contains no express requirement that a person declare his domicile

31 Rapport d'Activité du Médiateur, 01.10.2010-30.09.2011, R13.
32 Rapport d'Activité du Médiateur, 01.10.2010-30.09.2011, R13.

with the municipal government. Despite this argument, the ADEM maintained its refusal of the couple's full unemployment benefits, a refusal which the *Médiateur* deems unjustified because lawmakers purposely did not include that requirement in the applicable Labour Code provision, and thus he deems the Civil Code provisions should apply.[33]

See also the Bulgarian work permit case below under Chapter VII, 2 (Transitional Measures imposed on workers from Bulgaria and Romania).

2.2. Specific issue: the situation of job-seekers

As far as the *residence rights* of job-seekers are concerned, for a period not exceeding three months, Union citizens who are seeking employment have the right of residence in the Grand Duchy of Luxembourg without being subject to any formalities other than the requirement to hold a valid identity card or passport. They can also freely exit the country and enter another EU Member State.

For a period of residence exceeding three months, Union citizens who are seeking employment have to:

- Hold a valid identity card or passport;
- Within eight days from their arrival in the Grand Duchy of Luxembourg, produce an arrival declaration/notification to the municipal administration of the place where they intend to have their residence;
- Ask the municipality in which they are living for a registration certificate before the end of three months after their arrival (art. 8 of the free movement and immigration law)[34];
- Have sufficient resources for themselves and their family members in order to not become a burden on the social assistance system of the Grand Duchy of Luxembourg, and have a health insurance in the Grand Duchy of Luxembourg. This has to be proven in order to obtain the delivery of the registration certificate (Art. 6 (1) 2 of the free movement and immigration law[35]).

According to the Luxembourg free movement and immigration law, family members of the EU citizen jobseeker who are themselves citizens of the EU or nationals of third countries, and who accompany or join him in the host State have the right to enter and remain in Luxembourg up to three months if they have a valid identity card or passport and, as necessary, the proper visa for entry into the country (art. 13 of the free movement and immigration law).

After the end of six months looking for work in the Grand Duchy of Luxembourg, a UE citizen should be able to prove that he is still looking for a job and that he has genuine chances of being hired. If he does so, he cannot be removed from the Luxembourgish territory (art. 26 of the free movement and immigration law).

Every EU citizen intending to settle in the Grand Duchy of Luxembourg for a period over three months as a job-seeker possessing sufficient personal resources in order to avoid becoming a burden to the welfare system, has to ask the municipality in which he is living for a registration certificate. So as to receive this certificate, the job-seeker must show his passport or national identity card, to prove the sufficiency of his resources for himself and his family and to

33 Rapport d'Activité du Médiateur, 01.10.2010-30.09.2011, R13.

34 http://www.guichet.public.lu/fr/citoyens/citoyennete/libre-circulation-UE/sejour-moins-5-ans/citoyen-UE/index.html; http://www.guichet.public.lu/fr/citoyens/citoyennete/libre-circulation-UE/sejour-moins-5-ans/citoyen-UE/sejour-plus-90-jours/index.html.

35 Loi du 29 août 2008 sur la libre circulation des personnes et l'immigration, transposing the Directive 2004/38/EC of the European Parliament and of the Council.

provide a health insurance certificate. The municipal official then issues the certificate in the municipal office.

The UE citizens seeking a job have the right of residence in the Grand Duchy of Luxembourg for more than three months, *as long as* they have sufficient resources for themselves and their family members in order to not become a burden on the social assistance system of the host state, and also have a health insurance in this state (art. 24 (2) of the free movement and immigration law).

Nevertheless the recourse to the welfare system by an EU citizen does not lead automatically to a refoulement measure. The burden for the welfare system must be estimated taking notably into account the amount and length of the welfare payments which do not depend on contributions which have been awarded, as well as the length of the stay (art. 24 (3) and (4) of the free movement and immigration law).

In case of failure to comply with the previously set out terms, the job-seeker can be subject to a stay refusal, an issue or renewal of the residence permit refusal or even a withdrawal of this last permit and in that event a refoulement measure (art. 25 (1) of the free movement and immigration law).

After three months seeking job in Luxembourg, the EU job-seeker citizen will receive, if he asked to, some social benefits from the Luxembourgish State, such as the guaranteed minimum income (*RMG, revenu minimum garanti*). The 'fond national de solidarité' will then communicate to the minister for immigration the name of all jobseekers to whom these social benefits are paid. Then, the minister will check for how long a jobseeker has received these social benefits, and will deduce, if it's still the case, that the jobseeker is still seeking employment. After three or four months of social benefits, the EU job-seeker citizen will receive a letter from the minister for immigration, revoking his right of residence in the Grand Duchy of Luxembourg.

If the job-seeker replies immediately to this letter, explaining and proving that he is still and actively searching for a job, the minister for immigration will allow him in practice to remain six other months in Luxembourg in order to find a job.

After this period, if the EU citizen is still job-seeking, the Minister for Immigration will definitively revoke his residence right, sending him a new letter explaining that the person became a burden on the Luxembourgish social assistance, and won't pay him the social benefits anymore.

However, it does not seem that in practice the EU job-seeking citizens are really expulsed from the Grand Duchy of Luxembourg after the revocation of them residence right.

As far as *benefits for first time job-seekers* are concerned, the most important social benefit which guarantees that all citizens have an sufficient income to live on is the so-called 'RMG', *Revenu minimum garanti* or Guaranteed minimum income. The purpose of this social benefit is, among others, to fight against social exclusion and to guarantee to the citizens sufficient income to enable their professional reinsertion.

The RMG can consist of an integration allowance (*indemnité d'insertion*), of a supplementary benefit (*allocation complémentaire*), or of both of them.

Moreover, at the end of a work contract, the job-seeker who is seeking employment may receive unemployment benefits. A UE citizen who received unemployment benefits from its former residence State and who moves to Luxembourg to find a job there, will have the benefit of three months of unemployment benefits in the Grand Duchy of Luxembourg.

Chapter V
Other Obstacles to Free Movement of Workers

RECOGNITION OF DIPLOMAS

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

A Romanian citizen holding a both a physical education diploma and a physical therapy diploma filed a claim with Luxembourg's Ombudsman, the Médiateur, because his request for recognition of the latter diploma had been rejected in 2011. Prior to commencing his three-year physical therapy studies program in Romania, the individual had inquired with Luxembourg's Higher Education Documentation and Information Centre (*Centre de Documentation et d'Information sur l'Enseignement Supérieur*) ('*CEDIES*') to be sure that Luxembourg would recognize the Romanian diploma. In July 2010, after having finished his three-year program, he requested recognition of his Romanian diploma from the Ministry of Education and Professional Training, and in January 2011, he was informed that his file had been transferred to the Ministry of Higher Education and Research.[36]

That latter ministry stated that the studies had fundamental differences with the Luxembourg program established by Grand-Ducal Regulation, with respect to its theoretical, technical and practical content, as well as the length of the training, given that most of the training program focussed on physical education and sports. That ministry thus stated that in application of the Law of 19 June 2009 on the recognition of professional qualifications, the Romanian undergraduate physical education and sports diploma with a specialization in physical therapy and special motor control could only be recognized as the equivalent of the Luxembourg State masseur-physical therapist diploma if (1) he were to a 2-year full-time adaptation internship at a healthcare institution or other institution accredited by the Health Ministry, or (2) pass an aptitude test on professional knowledge and legislation. Because the individual did not have the language capability to pass a test, he would only be able to do the internship. But first, he wanted to know how the Romanian diploma differed fundamentally from the Luxembourg programme, and why the internship had to be for 2 years given his 3 years of study of the subject.[37]

Nonetheless, he decided to apply for an internship at various institutions, but was unsuccessful. He then filed a claim with the *Médiateur* to have the *Médiateur* obtain responses to his questions. One of his questions was whether it could also be possible for the State, possibly the Health Ministry, to pay his internship remuneration to make it easier for him to obtain an internship, and whether he could do his internship with a private physical therapist's office. Both ministries involved informed the *Médiateur* that the fundamental differences between the claimant's training and that in Luxembourg were that the credits the claimant received specifically for physical therapy in Romania were equivalent only to one year of study, while in Luxembourg the Grand-Ducal Regulation applicable to masseur-physical therapist studies requires 3 years of study, thus the claimant would have either to do a 2-year internship or pass an exam. The applicable provisions of the Law of 19 June 2009 transpose Directive 2005/36/EC (recognition of professional qualifications), and in the case of a masseur-physical therapist, the establishment at

36 Rapport d'Activité du Médiateur, 01.10.2010-30.09.2011, R6.
37 Rapport d'Activité du Médiateur, 01.10.2010-30.09.2011, R6.

which the internship is done must be accredited by the Health Ministry. If the claimant were to do the adaptation internship in a private physical therapist's office where he would receive a fixed-term contract, that office would have to make a specific accreditation request, and the internship remuneration would have to be paid by that private office.[38]

However, the reality is that the claimant has requested internships from some 30 establishments and, despite his efforts, not one wants to hire an intern with an unrecognized diploma, resulting in the ministerial requirements being unattainable in fact. The *Médiateur* once again contacted the competent ministries to explain the situation in which the claimant finds himself.[39]

38 Rapport d'Activité du Médiateur, 01.10.2010-30.09.2011, R6.
39 Rapport d'Activité du Médiateur, 01.10.2010-30.09.2011, R6.

Chapter VI
Specific Issues

1. FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES)

Unemployment benefits

A judgment of the highest Court of 3 March 2011,[40] had to find about the situation of a frontier worker who had been on the list of unemployment beneficiaries in France and moved to Luxembourg. He asked to receive unemployment benefits in Luxembourg but they were refused to him, despite the fact that the inscription of the population register triggers the right to unemployment benefits in Luxembourg.

The Court decided that such a person most not have been on the list of unemployment beneficiaries in his residence state (here : France) for 4 weeks after the beginning of unemployment before being granted unemployment benefits in Luxembourg, nor shall he have to ask for the transfer of his rights from France to Luxembourg.

This decision is an important step in guaranteeing free movement of jobseekers in Europe concerning the frontier workers.

Family benefits

A decision of the *Cour de Cassation* of 19 mai 2011,[41] decided on the interpretation of article 1 of the modified law of 19 June 1985 on family allowances. The decision of the lower courts, who had judged that the issuing of a residence permit, in this case one and a half year after the initial request for such a permit (described by the high Court as a simple administrative formality) to a third-party national who benefits from European Union legislation rights (like the spouse of EU citizen) triggers the right to family allowances, was reversed.

According to this court, the issuing of such a residence permit is not a there to *grant* a right to such third-party national but to *certify* the existence of such right. Therefore the family allowances are due from the date of the establishment of the domicile in Luxembourg.

2. SPORTSMEN/SPORTSWOMEN

There have been no specific developments around sport and free movement of workers.

3. THE MARITIME SECTOR

There is nothing to report in particular.

40 Cour de cassation, 3 mars 2011, n°15/11, n°2822 du registre.
41 *Bulletin d'Information sur la Jurisprudence* 7/2011, 25 novembre 2011, p. 110.

4. RESEARCHERS/ARTISTS

There is nothing to report in particular.

5. ACCESS TO STUDY GRANTS

The study grant schemes are now regulated in the Law of 26 July 2010 on state aid for higher education[42] (hereinafter referred to as the „Law'), which has significantly amended the former Law of 22 June 2000.[43]

The issue of whether Luxembourg's study grant and scholarship regime, as amended by the Law of 26 July 2010, violates the right to free movement under EU law remains unresolved.

As mentioned in last year's report, the Law of 22 June 2000 on State financial aid for higher education was significantly amended by the Law of 26 July 2010 (the '*2010 Law*'), which mainly does the following: (1) treats children from the age of 18 as independent adults, and thus bases the grant-loan financial aid ratio on the child's income, not on that of his or her parents, while requiring that the child be a Luxembourg resident to receive financial aid; (2) transforms the child bonus (*boni pour enfant*) and aid for volunteers from elements of family allowances distributed to families by the National Family Benefits Fund (*Caisse nationale des prestations familiales*), to elements of State financial aid for higher learning to be distributed by the Ministry of Higher Learning and Research (*Ministère de l'Engseignement supérieur et de la Recherche*) directly to students benefitting from State financial aid for higher learning; and (3) abolishes the incentive premium (*prime d'encouragement*).

When the 2010 Law went into effect, several unions protested its legality and supported the position of frontier workers. Among those unions were the LCGB, OGBL, Aleba (*Assemblée Luxembourgeoise des Employés de Banque et Assurance*, or Luxembourg Bank and Insurance Employee Association) and the GEIE-FEL (*Groupement Européen d'Intérêt Economic-Frontaliers européens au Luxembourg*, or European Economic Interest Group-European Frontier Workers in Luxembourg, a grouping of Belgian and French frontier worker associations).

Frontier workers see themselves as being discriminated against by the 2010 Law, given that Luxembourg's frontier workers are employed in Luxembourg, pay their taxes and social security contributions here, but are no longer able to receive the benefits they received prior to the entry into force of the 2010 Law, and their children can no longer receive financial aid from Luxembourg for their higher education studies because they are not Luxembourg residents. Consequently, hundreds of applications for annulment (*recours en annulation*) were filed with the Luxembourg Administrative Tribunal after financial aid applications for the 2010-2011 school year were refused and had gone through the proper ministerial appeals procedure.

During a public hearing on 11 January 2012, the Luxembourg Administrative Tribunal rendered its decision in the matter of four appeals against financial aid request denials brought by

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

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

five individuals (one of whom is German, and four of whom are Belgian). Deeming that those appeals were illustrative of the some 600 other similar appeals then before it, the Tribunal joined the appeals against ministry refusals to grant financial aid for the 2010-2011 school year. In the interest of the proper administration of justice, the Tribunal rendered a single decision for all of those appeals.[44]

The financial applications to Luxembourg's Ministry of Higher Education and Research were filed by non-resident students, of whom at least one parent worked in Luxembourg. In one of the named cases, a father who would be obligated to pay even more to finance his daughter's studies given Luxembourg's denial of financial aid, petitioned the Tribunal to intervene in the proceedings filed by his daughter as co-petitioner, but the Tribunal did not allow the intervention because it deemed the father requesting to intervene did not suffer direct harm, but only indirect harm, given that (1) the financial aid would have been given to the daughter as student – thus the daughter herself would have been the party with less means to finance her studies – and (2) the refusal of financial aid was addressed to the daughter, not the father.[45]

The Tribunal reiterates that it must limit itself solely to analysis of the petitioners' arguments against the ministry's refusal to grant financial aid, and that it would not analyze the petitioners' situations or the legality of the legislation in question. However, the Tribunal notes that in using identical wording in its refusals letters, the ministry imposes a residence requirement which all the petitioners contested as constituting direct or indirect discrimination. The direct discrimination allegedly consisted of the 2010 Law's Article 2 imposing a domiciliation requirement on Luxembourg citizens and a residence requirement on non-Luxembourg citizens under the 29 August 2008 law on the free movement of people, as amended. The Tribunal rejects that direct discrimination argument, stating that the applicable legal provisions cover the same factual notion of the place at which the applicant really, legally and continually lives, resulting in Luxembourg citizens, Luxembourg citizen family members and non-Luxembourg EU Member State citizens having to provide a residence certificate to apply for financial aid.[46]

The indirect discrimination argument is rooted in discrimination against them as descendents of workers under Regulation EEC 1612/68 ('*Regulation 1612/68*'), and equal treatment under EU case law also aims to protect discrimination against descendents dependent on their worker parents. The government denies that the financial aid in question is a social benefit under Regulation 1612/68, Article 7, para. 2, because the financial aid beneficiary would be independent adult students, with their own households, not dependent upon their parents. The Tribunal responds that, while the 2010 Law may have gotten rid of all references to the student's parents' financial situation, an assessment of an adult student's financial and social situation could not be complete without knowledge of whether the adult student is financially supported by the parents, and thus an assessment of the parents' financial situation. And thus, assessment of students' financial and social situation first requires verification of whether, the lawmakers' fiction notwithstanding, the students are in fact independent or really supported by their parents.[47]

In all the petitioners' cases, the students are in fact full-time students with no revenue for the 2010/2011 school year, and given that they are all members of their Luxembourg worker parents' households, thus must be considered dependent upon them, thus dependent on an immigrant worker. And, by definition this type of financial aid is support for studies. Under EU case

44 Trib. adm. 11 janvier 2012, Nos. 27576, 27679, 27689, 28442, p. 6.
45 Trib. adm. 11 janvier 2012, Nos. 27576, 27679, 27689, 28442, p. 7.
46 Trib. adm. 11 janvier 2012, Nos. 27576, 27679, 27689, 28442, p. 8-11.
47 Trib. adm. 11 janvier 2012, Nos. 27576, 27679, 27689, 28442, p. 11-12.

law, aid granted for support or for training to pursue university studies resulting in a qualification is a social benefit for the student beneficiary under Regulation 1612/68, Article 7, para. 2, in the same way that financial aid for studies granted by a Member State to children of workers constitutes a social benefit for both migrant workers or frontier workers[48] under that same provision, when the worker continues to support the child financially. Thus, the child can assert Article 7, paragraph 2, to obtain financial aid for studies under the same conditions as those for children of Luxembourg citizen workers.[49]

However, the Tribunal goes on to state that while Luxembourg citizens and other Member State citizens are *de jure and de facto* subject to the same residence requirement, the petitioners deem that such a requirement is at the very least hidden discrimination, given that such a residence requirement is more easily fulfilled by Luxembourg citizens than by citizens of other Member States. And, while overt discrimination based on nationality, as well as other forms of hidden discrimination are prohibited by the principle of equal treatment as defended by the Court of Justice of the European Union (the 'CJEU'), a difference of treatment can be justified when founded on objective conditions independent of the citizenship of the persons concerned, and when proportionate to the goal legitimately pursued by the Member State. Here, the Tribunal states that the CJEU has held that it is desirable for Member States to ensure that their granting of aid to support students from other Member States does not become an unreasonable burden impacting the ability of that Member State to grant aid altogether; that it has been held legitimate for Member States to grant aid only to students demonstrating a certain amount of integration in its society; and, that EC law is not adverse to a Member State subjecting the right to a scholarship of students from other Member States to periods of residence.[50]

The Luxembourg government argues that the aim of the 2010 Law is to increase the percentage of holders of higher education diplomas from its current percentage of 28% of residents, to 40% by 2020, because the current percentage is largely lower than that of comparable Member States. The government further contends that invalidating the residence requirement would mean that students without any connection with Luxembourg could benefit from Luxembourg financial in any country in the world, resulting 'financial aid tourism', something the government cannot afford. The government thus concludes that there is neither direct or indirect discrimination and that the residence requirement should be deemed legitimate given the 2010 Law's pursuit of an objective of general interest as upheld by EC law.[51]

Given these circumstances, the Tribunal ruled to seek a preliminary ruling from the CJEU on the question of whether:

> Given the EC principle of equal treatment set forth by Article 7 of Regulation 1612/68, can considerations of education policy and budgetary policy asserted by the Luxembourg government, seeking to encourage

48 Here, the Tribunal cites point 24 of *Hartmann*, C-212/05, 18 July 2007 ('It should be noted that Mr Hartmann's status of frontier worker does not in any way prevent him from being able to claim the equal treatment prescribed by Article 7(2) of Regulation No 1612/68 in relation to the grant of social advantages. The Court has already held that frontier workers can rely on the provisions of Article 7 of Regulation No 1612/68 on the same basis as any other worker to whom that article applies. The fourth recital in the preamble to that regulation expressly states that the right of freedom of movement must be enjoyed 'without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services', and Article 7 of the regulation refers, without reservation, to a 'worker who is a national of a Member State'').

49 Here, the Tribunal cites point 28 of *Bernini*, C-3/90, 26 February 1992 ('the principle of equal treatment laid down in Article 7 of Regulation 1612/28 is also intended to prevent discrimination to the detriment of descendents dependent upon the worker').

50 Trib. adm. 11 janvier 2012, Nos. 27576, 27679, 27689, 28442, p. 12-13.

51 Trib. adm. 11 janvier 2012, Nos. 27576, 27679, 27689, 28442, p. 13-14.

> an increase in the percentage of persons with higher education diplomas, which is currently insufficient in comparison internationally, considerations which would allegedly be seriously threatened if Luxembourg were to grant higher education financial aid to all students, even those without ties to Luxembourg, to study in any country in the world, resulting in an unreasonable burden on the State budget, are those considerations sufficient under EU case law to justify the difference of treatment resulting from the residence requirement imposed on Luxembourg citizens as well as other Member State citizens who wish to obtain financial aid for higher education?[52]

On 16 February 2012, CJEU Advocate General Sharpston delivered her opinion in Case C-542/09 brought before the CJEU by the Commission against the Netherlands, in what the LCGB has long called a case 'totally transposable' to the Luxembourg situation. While the law of the Netherlands allows migrant workers and their family members to receive financial aid to study in the Netherlands regardless of their place of residence, students wishing to receive financial aid to study outside of the Netherlands must have resided in the Netherlands for at least three of the six years prior to beginning their studies abroad, no matter what their nationality. The Commission filed infringement proceedings, asking the Court to declare that by imposing that residence requirement, the Netherlands indirectly discriminates against migrant workers, especially cross-border workers and their dependent family members, thus infringing EU law. The Advocate General argues that the Court's case law affirms that equal treatment of migrant workers regarding social advantages applies to Member State nationals working in another Member State and their dependent family members, thus comprising cross-border workers and their families.[53]

On 2 August 2010, to show its opposition to the 2010 Law, the OBGL had filed a complaint with the Commission for infringement of free movement of workers and equal treatment.[54] On 15 April 2011, the Commission informed OBGL that an infringement proceeding had been brought against Luxembourg in respect of the financial aid law. In response to the Commission's formal notice letter of 26 May 2011, Luxembourg's Minister of Higher Education and Research, Mr. François Biltgen stated that the government would maintain its position, and that there was no going back.[55]

On 23 January 2012, in response to the infringement proceeding, Mr. Biltgen met in Brussels with Androulla Vassiliou, European Commissioner for Education, Culture, Multilingualism and Youth. At the meeting Mr. Biltgen explained that the for the government the 2010 Law was one of the political measures allowing Luxembourg to obtain the objective of increasing the number of higher education diplomas by 40% as ordered by the EU 2020 strategy, requesting that the Commission examine the financial aid for studies issue from the perspective of higher education, and not solely from a social issue standpoint.[56]

At the end of February 2012, the Commission sent the Luxembourg government a request in the form of a reasoned opinion, asking Luxembourg to end discrimination against migrant

52 Trib. adm. 11 janvier 2012, Nos. 27576, 27679, 27689, 28442, p. 15-16.

53 http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-02/cp120010en.pdf , 'Advocate General Sharpston deems a Netherlands rule limiting funding for studying abroad to students who have resided in the Netherlands for three out of the last six years contrary to EU law on the freedom of movement of workers' (13.06.2012), and 'Le cas néerlandais' ('The Dutch Case'), 10.19.2010, *La Voix*.

54 'La main dans le sac' ('(caught with) The hand in the sac'), 03.09.2010, *d'Land.*

55 'Frontaliers/Bourses d'études: Ouverture d'une procédure en infraction contre le Grand-Duché de Luxembourg' ('Cross-Border workers/Study aid: Infringement Proceeding Against the Grand Duchy of Luxembourg'), press release 15.04.2011, www.obgl.lu; 'Pas de changement en vue' ('No change in sight'), 19.04.2011, *La Voix*.

56 http://www.mesr.public.lu/presse/articles/2012/01/Aide_financiere_de_l_etat_pour_etudes_superieures/index.html?highlight=presse (23.01.2012).

workers and their family members in access to study grants, financial aid for volunteers and the child allowances (*boni pour enfant*), a request to which Luxembourg had two months within which to respond satisfactorily.[57]

In principle, 24 April 2012, was the last day on which the parties could file their observations before the CJEU in the matter regarding the granting of Luxembourg State financial aid solely to students residing in the Grand Duchy. As mentioned above, in 2011 more than 600 individual appeals were filed before the Luxembourg Administrative Tribunal contesting the State's decision to refuse financial aid to children of frontier workers who requested it. As mentioned above, last January, at the request of union and frontier worker associations, the Luxembourg Administrative Tribunal referred a question for a preliminary ruling to the CJUE, the essence of the question is whether education and budgetary policy considerations justify such discrimination. The GEIE-FEL filed its observations with the CJEU, stating in sum that the discrimination acknowledged by the Luxembourg Administrative Tribunal is neither justifiable nor justified, and that the tribunal has already acknowledged the existence of indirect discrimination on grounds of citizenship because the tribunal only asks the CJEU whether such discrimination is justifiable. The GEIE-FEL's lawyers ask the CJEU to determine that the new 'financial aid for studies' retain their status as family benefits. If they were to be considered financial aid for studies, there would be no possible political justification for such discrimination.[58]

On 3 April 2012, GEIE-FEL representatives filed approximately 30 more appeals with the Luxembourg Administrative Tribunal, emphasizing that the frontier workers concerned had until 2 May 2012 to file their appeal if they hoped to benefit from a potential 'damages reimbursement' (*remboursement du prejudice*) if the CJEU determines that such a reimbursement is due.[59]

More recently, by letter of 22 May 2012, requests for financial aid for the 2011-2012 school year concerning approximately 200 were refused by the competent ministry after automatic appeals of right (*recours gracieux*) had been filed for the refusals. This ministerial refusal did not take into account the Luxembourg Administrative Tribunal's decision of 11 January 2012. Applications for annulment of these refusals must be filed with the Luxembourg Administrative Tribunal within 3 months of the 22 May refusal, which the Aleba lawyer will do, meanwhile hoping that during that time the Court of Justice of the European Union will decide on the preliminary question regarding the discrimination issue. At this time the Administrative Tribunal judges have not yet applied the provisions of the 2010 Law.[60]

It remains to be seen whether the Commission will bring a case against Luxembourg before the CJEU, and as we stated in our last report, the 2010 Law is a huge change of paradigm the validity of which we question.

Luxembourg's Ombudsman, *Le Médiateur*, has also been dealing with cases of students impacted by the 2010 Law. In his most recent report, he notes that the responses received by claimants from the Ministry of Higher Education and Research, particularly from the CEDIES (*Centre de Documentation et d'Information sur l'Education Supérieur* – Higher Education Documentation and Information Centre) receive little-reasoned responses to their claims. The *Médiateur* notes that often the CEDIES cites only the article on which it bases its financial aid

57 'Commission asks Luxembourg to end discrimination in access to study grants and allowances', 27.02.2012, http://ec.europa.eu/social/main.jsp?langId=en&catId=82&newsId=1205&furtherNews=yes.

58 'Etudes: on se bouscule à la Cour européenne' ('Studies: the European Court gets moving'), (23.04.2012) www.paperjam.lu.

59 'Les recours affluent toujours' ('The appeals keep flowing'), 04.04.2012, *Le Quotidien.*

60 'Aides financières pour études supérieures – Années 2011-2012' ('Financial aid for higher education – 2011-2012 school year'), (30.05.2012) www.aleba.lu.

refusal, but does not explain how that rule was not complied with or what criteria not fulfilled, making it sometimes difficult for the claimants to understand the reasons for the refusal.[61]

He states that he received many complaints from students whose requests for financial aid were refused, and cites the case of a student whose request for financial aid for the 2010/2011 school year was refused because the 2010 Law requires that the institution for which financial aid is given be an institution recognized as a higher education institution by the competent authority of the country in which the studies take place. The student in question was studying at a German private university not so recognized, and given that the 2010 Law has no transitory provisions, he found himself denied financial aid to finish his last year of schooling, without no warning that he would no longer benefit from the financial aid he had been receiving. The *Médiateur* cited the principle of legitimate expectations for this case and those of certain other students in the same situation. The Ministry of Higher Education and Research brought the issue before its consultative commission which agreed to grant an exception and grant financial for one last time to those students for the 2010/2011 financial year only, after which they would have to transfer to qualifying establishments if they wished to continue to receive financial aid.[62]

A claim was also brought before the *Médiateur* by a student who was refused financial aid on the grounds that at the time he filed his financial aid application, he was not considered a 'salaried worker' under the 2010 Law. The CEDIES deemed that only a period of employment under an employment contract qualified as salaried employment, and when the individual filed his request, he was doing an internship. The *Médiateur* deemed that the CEDIES incorrectly interpreted the 2010 Law because while Article 1 of the 2010 Law does require that to obtain financial aid from the Luxembourg government a citizen of an EU Member State other than Luxembourg or an assimilated country citizen live in Luxembourg as a salaried worker, EC case law has determined that anyone performing work with real and actual economic value, a part from work that is marginal or purely ancillary, obtains salaried worker status. And, the CJEU has determined that interns qualify as salaried workers under Article 45of the Treaty. Because the claimant had performed an approximately 6-month internship, during which he was paid, there was no doubt that the period could be considered one of real and actual economic value. The *Médiateur* determined that the CEDIES had incorrectly applied the 2010 Law and requested that the Ministry reconsider its refusal and grant the requested financial aid, which it finally did.

6. YOUNG WORKERS

The relevant legislation governing this field is the Luxembourg Labour Code [*Code du Travail*],[63] the Law of 4 July 2008 on Youth[64] and the Ministerial Regulation of 19 September 2007 on apprenticeship compensation in the commercial sector, as most recently amended on 25 August 2010.

61 Rapport d'Activité du Médiateur, 01.10.2010-30.09.2011, R6.
62 Rapport d'Activité du Médiateur, 01.10.2010-30.09.2011, R6.
63 The Labour Code entered into force on 1 September 2006, and codified and repealed 51 laws or legal provisions, including the Law of 22 July 1982 on the employment of pupils and students during school vacation periods; the Law of 17 June 1994 on the safety and health of workers, as amended; the Law of 12 February 1999 on various measures favoring the employment of youth, as amended; and the Law of 23 March 2001 on the protection of young workers.
64 Law of 4 July on youth, *Mémorial* A- N° 109, 25 July 2008, p. 1534.

There is nothing special to report on this issue.

Chapter VII
Application of Transitional Measures

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

There is nothing specific to report.

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

In his most recent report, Luxembourg's *Médiateur*, describes a claim filed with his office by a Bulgarian woman who arrived in Luxembourg in August of 2011, at which time she registered her residence declaration and obtained a work permit, as required under the 29 August 2008 Law's Transitory Measures. She continued to work for her employer when the work permit expired on 21 August 2009, until the employer fired her in September of 2010. Even though she registered with the ADEM, she was refused unemployment benefits because she allegedly did not have a valid residence permit allowing her work, so that the ADEM could allegedly not consider her to be available for the Luxembourg job market.[65]

While the Luxembourg government did decide in 2008 to extend the three-year period decided in 2006 to require Bulgarian and Romanian citizens have a work permit to be allowed access to the Luxembourg labour market, that permit is only required for actual access to the labour market. Point 2 of the Annex to the Bulgarian and Romanian Accession Treaty states that Romanian citizens who work legally in one of the Member States at the time of accession, and who are allowed to work in that Member State for an uninterrupted period of 12 or more months, have access to the labour market of that Member State from then on, but not to the labour market of other Member States which apply their own national measures. Thus, if a Bulgarian or Romanian citizen is employed for 1 year in Luxembourg in a single sector, the work permit requirement lapses and that person has free access to the labour market. [66]

The claimant who had obtained 2 successive 6-month work permits should therefore be able to benefit from the access to the labour market without restrictions, and thus it is incorrect to consider her unavailable for the Luxembourg labour market and deny her full unemployment benefits. At the *Médiateur*'s request, the ADEM reconsidered its decision and awarded the claimant full unemployment benefits.[67]

65 Rapport d'Activité du Médiateur, 01.10.2010-30.09.2011, R13.
66 Rapport d'Activité du Médiateur, 01.10.2010-30.09.2011, R13.
67 Rapport d'Activité du Médiateur, 01.10.2010-30.09.2011, R13.

Chapter VIII
Miscellaneous

1. Relationship between Regulation 1408/71-883/04 and Art 45 TFUE and Regulation 1612/68

There is nothing specific to report.

2. Relationship between the Rules of Directive 2004/38 and Regulation 1612/68 for Frontier Workers

There is nothing specific to report.

3. Existing Policies, Legislation and Practices of a General Nature that have a Clear Impact on Free Movement of EU Workers

3.1. Integration measures

In general the law of 23 October 2008 on double citizenship shows to be quite popular for EU citizens who want to keep their nationality of origin but also want to acquire the Luxembourg nationality.

It is a good tool for integration of foreign nationals, giving a sense of belonging to the Luxembourg nation, while keeping ties with the nationality of origin.

3.2. Immigration policies for third-country nationals and the Union preference principle

There is nothing specific to report.

3.3. Return of nationals to new EU Member States

There is nothing specific to report.

4. National Organizations or Non-judicial Bodies to which Complaints for Violation of Community Law can be launched

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

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

5. SEMINARS, REPORTS AND ARTICLES

TRESS III seminar on: 'La coordination de la sécurité sociale en Europe', 12 juillet 2011, Office des Assurances Sociales, Luxembourg.