

University of Luxembourg

PROJECT SENSE

LUXEMBOURG POSITION PAPER

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I. Introduction and Definitions

The Grand-Duchy of Luxembourg is a particular case study in terms of the transport sector. It is a state with a rich history of worker protection, stemming from its steel industry from the 19th century¹ and gaining a significance sense of patriotism with the general strike of 31st August 1942, during the German occupation of Luxembourg during World War II.² Currently, a large number of frontier workers (*frontaliers*) reside outside the Grand Duchy, and commute there on a daily basis for work and as of 2018 these frontier workers represent 46% of the workforce.³ Luxembourg is thus relying heavily on the fundamental freedoms and the Single Market, of which it was a founding member, whilst at the same time, wishes to hold on to its high labor standards. This struggle was emphasized in the fourth episode of the Laval Quartet, which dealt with Luxembourg's policy of considering its labor law regime as a public policy norm deserving to be applied instead of foreign law. This struggle between strong social standards and freedom of movement continues to be under pressure with a report of a non-governmental organization stating that Luxembourg requires more foreign workers to finance its pension scheme recently being published,⁴ whilst at the same time Luxembourg is opposing the newest reform of the Social Security Regulation⁵ as it would entail its obligation to fund the social security systems of the frontier workers.⁶

The transportation sector in Luxembourg is the highest per capita in the European Union.⁷ The sector is marked by a stark difference between national transport, with 73% of companies transporting their goods themselves, whereas international transport consists of 85% of transportation companies providing services for others. Furthermore, international road transport mainly consists of in-bound activities, with operations of cabotage with the other states of the Benelux.⁸ Considering that these transportation companies may rely on posted

¹ Jean-Marie Kreins, *Histoire du Luxembourg*, Presses Universitaires de France, 83

² *Generalstreik. Streikbewegung in Luxemburg. August – September 1942. Grève générale. Mouvements de grève au Luxembourg. Août – septembre 1942*

³ STATEC, *Emploi salarié intérieur par branche d'activité 1995 – 2018*, available at : https://statistiques.public.lu/stat/TableViewer/tableView.aspx?ReportId=12914&IF_Language=fra&MainTheme=2&FldrName=3&RFPPath=92

⁴ IDEA asbl, *Retour sur la matinale "Pensions : la situation est-elle si désespérée ?"*, available at : <https://www.fondation-idea.lu/2019/04/18/retour-sur-la-matinale-du-18-avril-pensions-la-situation-est-elle-si-desesperee/>

⁵ *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004*, COM (2016) 815

⁶ Thomas Toussaint, *L'Europe repousse son vote, le Luxembourg gagne du temps*, available at : <https://5minutes.rtl.lu/actu/monde/a/1336567.html>

⁷ EuroStat, *Statistiques sur le transport de marchandises*, available at : https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=390239#Fret_routier

⁸ Frank Hansen, *Regards | 18, sur le transport de marchandises par route*, available at : <https://statistiques.public.lu/catalogue-publications/regards/2011/PDF-18-2011.pdf>

workers and the high percentage of these activities, the regime in Luxembourg becomes particularly important.

In order to explore this regime in more detail, this position paper will first briefly deal with the implementation of EU law at national level (II), then the case law and enforcement measures (III) before presenting the results of the interviews with the relevant stakeholders in the different subjects: the political discussions on transport (IV), the state of remunerations and working conditions (V), the sanctions (VI), the media coverage (VII) and concluding this position paper with reflections on the future of the sector (VIII).

II. Implementation of EU Law

Every year the European Commission releases the so-called “single market scoreboard”, a report on the performance of the Member States regarding their transpositions in national law of directives.⁹ Luxembourg has a deficit of transposition of 1%, corresponding to the Union average of 10 directives awaiting transposal. The Ministry of Foreign and European Affairs (*Ministère des Affaires Européennes et Étrangères*) in a 2018 report views the state of implementation of EU law in Luxembourg as representing a consistent improvement.¹⁰ In this context, the implementation of EU law on transport is no different with all directives having been transposed, including the Posted Workers Directive (A) and the Enforcement Directive (B).

A. Posted Workers Directive

The Posted Workers Directive has been transposed through the Law of the 20th December 2002,¹¹ which itself was subject to further amendments such as the creation of the Luxembourg Labour Code,¹² and a subsequent amendment in 2010.¹³ The first and third articles of the Directive are transposed in their literal terms in national law, respectively in Articles 141-1 and L-010-1.

(i) The Commission v. Luxembourg ruling

⁹ European Commission, *The Single Market Scoreboard*, available at : http://ec.europa.eu/internal_market/scoreboard/

¹⁰ Ministère des Affaires étrangères et européennes, *Rapport Sur La Transposition Des Directives Européennes Et L'application Du Droit De L'union 2018*, available at : <https://maee.gouvernement.lu/dam-assets/directions/d2/Rapport-transposition-directives-et-application-droit-UE.pdf>

¹¹ *Loi du 20 décembre 2002 portant: 1. Transposition de la directive 96/71/CE du Parlement européen et du Conseil du 16 décembre 1996 concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services; 2. Réglementation du contrôle de l'application du droit du travail*, available at : <http://legilux.public.lu/eli/etat/leg/loi/2002/12/20/n9/jo>

¹² *Loi du 31 juillet 2006 portant introduction d'un Code du Travail*, available at : <http://legilux.public.lu/eli/etat/leg/loi/2006/07/31/n2/jo>

¹³ *Loi du 11 avril 2010 portant modification des articles L. 010-1, L. 141-1, L. 142-2, L. 142-3 et L. 142-4 du Code du Travail*, available at : <http://legilux.public.lu/eli/etat/leg/loi/2010/04/11/n2/jo>

The CJEU held in *Commission v. Luxembourg* that the provisions on what Luxembourg considered to be public policy derogations (*lois de police*) are contrary to EU law.¹⁴ The 2010 amendment was the response of Luxembourg to the ruling, which the government at the time still vividly contested as can be seen in the comments of the draft of the amendment.¹⁵ The provisions subject to the ruling survived in writing the 2010 amendment but are excluded from the scope of obligation of companies posting workers to Luxembourg. Said scope is also further restricted to the framework of a contract of provision of services, defined as a contract whose performance ends on at the same time as the contract¹⁶

(ii) Minimum Wage

The provision on minimum wage, also subject to the ruling, is however still enforceable as a public policy derogation at first glance. The amount cannot be derogated by contract but can be increased, usually through collective bargaining.¹⁷ Hence, the posted workers are subject to the minimum wage, or the wage set out by an applicable collective agreement.¹⁸ However, Luxembourg adapts the amount every two years by law on the basis of an index related to the cost of living.¹⁹ This indexation and the wording of the law has been viewed by the CJEU as granting unwarranted discretion to the Member State to impose a mandatory minimum wage, which effectively restricting the posting companies' freedom to provide services.²⁰ To curb this discretionary aspect, the 2010 amendment states that for posted workers this indexation relates purely to the minimum wage or the sector specific minimum wage,²¹ avoiding the uncertainty at the basis of the CJEU's decision.²²

(iii) The definition of a posted worker

The definition of a posted worker at first generally referred to any worker being temporarily posted in another Member State, without any regards to their nationality nor the company they are working for. The 2010 amendment gives a more concise definition of a posted worker as any employed worker usually working abroad and who is performing its work on the territory of Luxembourg for a limited period determined by the performance of the services for which the

¹⁴ *Commission of the European Communities v. Grand Duchy of Luxembourg*, C-319/06, EU:C:2008:350 (hereinafter *Commission v. Luxembourg*)

¹⁵ *Projet de loi portant modification des articles L. 010-1, L. 141-1, L. 142-2 et L. 142-3 du Code du Travail*, n. 5942, p.4 : "The Luxembourg Government continues to consider that all the éléments of Article L.010-1 of the Labour Code form the heart of Luxembourg's social law and that their applications to all workers, including posted workers, should be the norm." (*freely translated*)

¹⁶ Article L-141-1 (2) Code du Travail

¹⁷ Article L-222-7 Code du Travail.

¹⁸ Article L-141-1 (2) Code du Travail.

¹⁹ Article L-222-2 Code du Travail.

²⁰ *Commission v. Luxembourg*, §50

²¹ Article L-141-1 (2) Code du Travail.

²² *Commission v. Luxembourg*, §45

mentioned contract of provision of services is concluded.²³ On the basis of these broad terms, any type of service is included in the definition, therefore including the transport sector as well. This is further confirmed by Recital 17 of the Regulation (EC) No. 1072/2009 establishing common rules for access to the market of international transport of goods by road,²⁴ and the national Collective Agreement on Transport and Logistics signed by the two main national labor unions.²⁵

The 2010 amendment additionally extended the provision applicable to posted workers concerning the duration of work and weekly rest periods to also include break times and daily rest periods.²⁶

B. The Enforcement Directive

The Directive 2014/67/EU of 15 May 2014 on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Enforcement Directive) was transposed in the Law of the 14th March 2017.²⁷

(i) Subcontracting liability

The 2017 law introduces most notably a liability regime pursuant to Article 12 of the Directive. Article L-281-1 obliges the project manager (*maître d'ouvrage*) and the principal (*donneur d'ordre*) who entered into a service agreement must inform the Labour inspection authority (*Inspection du Travail et des Mines*) about the said service agreement. The fourth paragraph sets out that either the project manager or the principal are jointly liable with the company for paying the wages, contributions and allowances to the workers subject to and limited to the framework of said agreement.

(ii) Electronic filling and the social badge

Another notable addition is the creation of an online electronic platform²⁸ of the Labour inspection authority for the disclosure of information in exchange of a so-called “social badge”. This document akin to an employer identification document was introduced in order to curb social dumping and takes the form of a

²³ Article L-141-1 (3)

²⁴ REGULATION (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market

²⁵ Convention Collective transports et logistique, available at : http://www.ogbl.lu/wp-content/uploads/2011/10/acal_convention_collective_fr.pdf

²⁶ L-141-1 (1) Code du Travail.

²⁷ Loi du 14 mars 2017 portant 1. modification du Code du travail ; 2. modification de l'article 3 de la loi du 17 juin 1994 fixant les mesures en vue d'assurer le maintien de l'emploi, la stabilité des prix et la compétitivité des entreprises, available at : <http://legilux.public.lu/eli/etat/leg/loi/2017/03/14/a300/jo>

²⁸ The online electronic platform is available at : <https://guichet.itm.lu/edetach/>

barcode that an inspector from the labour inspection authority can scan in order to access the relevant information.²⁹

(iii) Sanctions

The 2017 law also introduces sanctions for failure to disclose the necessary documents, amounting to between EUR 1,000 and 5,000 for each posted worker or double in case of repeated violation in the two following years of the first violation.³⁰

III. Case Law, Enforcement of Law and Inspections

In general, public sentiment in the EU has often indicated that the EU is socially underdeveloped in this field and as such, the possibility for modern slavery and exploitation is ever present. The following section places a focus on summarizing the existing case law in Luxembourg that highlights these shortcomings in the international road transport sector.

In Luxembourg, trade unions have been actively protesting such shortcomings for the past years on both humanitarian and political platforms, perhaps this is most strongly highlighted in the *Kralowetz Case* as is further detailed below. What remains true is that there exists a need for the Luxembourg government to take responsibility in the interest of the many reputable freight haulage companies, and consequently, the reputation of the country internationally. This position paper is aimed at highlighting the areas that require change, both in terms of the application and existence of overseeing rules and laws from a legal perspective. Ideally, the change would consist of altering the legal bases that allow for modern exploitation of workers and companies in the sector.

On a positive note, there has been a major investigation³¹ that took place on the 22nd of January 2002 in eight Member States (i.e. Belgium, the Czech Republic, France, Germany, Luxembourg, Austria, Slovakia, Spain) on the orders of the Munich public prosecutor's office.

A. Kralowetz Case³²³³

²⁹ Claude Damiani, *Salariés détachés : le badge social porte déjà ses fruits*, available at : <http://www.lequotidien.lu/politique-et-societe/salaries-detaches-le-badge-social-porte-deja-ses-fruits/>

³⁰ Art. 143-2 Code du Travail.

³¹ Karl Kralowetz is the head of the Europe-wide operating company network Kralowetz GesmbH, which is said to have thrown 25 million euros in profits in three years, according to media reports by the exploitation of Eastern European truck drivers. Kralowetz has to answer for almost 4.000 violations of the law.

³² Cour Cassation criminelle, 10 juillet 1997, Instruction criminelle, Instruction préparatoire, Demande en annulation, compétence chambre du conseil, Perquisition par les agents des Douanes et Accises, Code d'instruction criminelle art 126 (1)

In the *Kralowetz* Case, the Luxembourgish police was investigated Karl Kralowetz, the managing director of United Cargo Luxembourg (International), a subsidiary of the Austrian company Kralowetz GesmbH, located in Esch-Sur-Alzette, Luxembourg. The accusations held against Mr. Kralowetz were those of violations of the Alien's Act, counterfeiting, tax evasion, no social contributions to the Luxembourg social security, violations of the European rules on driving and rest periods, illegal employment of drivers from non-EU states at lower wages.

It is key to note that Kralowetz is an important player in the European transport market and at the time of this case, one of the ten largest haulage companies in Europe. Of the Kralowetz Empire, the Esch-Sur-Alzette branches are led by Mr. Kralowetz, specifically these include United Continent Lines (Luxembourg) and United Cargo Luxembourg (since 1986). The headquarters in Esch-Sur-Alzette consists of 800 trucks being directed therefrom to various places in Europe. United Cargo Luxembourg has its administrative headquarters in Esch-Sur-Alzette and has a truck parking lot in the town of Turqyegneux in Meurthe-et-Moselle, where it was alleged that drivers lived in inhumane conditions when not on the road, including a lack of showering and sanitary facilities as well as having to sleep in the vehicles. Indeed, it is alleged that the Company maintains the minimum of office space in order to benefit from the EU right of establishment provisions. Additionally, there exists a Kralowetz gas filling station in Esch-Sur-Alzette that serves only to Kralowetz trucks, drivers are provided with keys to refuel at any time of the day and night.

In the case at hand, Mr. Kralowetz, was arrested in Luxembourg on the 25th of January 2002 on the basis of the allegations above and taken to the town of Schrassig. Notably, his car was found in the parking lot of a French airport on 7 February 2002 containing large amount of case and company records, leading the Police to assume that he was trying to flee prosecution. However, at the time of the arrest, Mr. Kralowetz had already been convicted on the 31st of May 2001 and charged with a fine of CHF 400,000 for co-liability of failing to observe the legally prescribed driving and rest times of his employed drivers. In late January of 2002, drivers were left starving and destitute in Luxembourg after the prefect of Meurthe-et-Moselle with the help of the CRS³⁴, expelled the Turcquegnieux drivers who were misled as to their wages and not paid what was previously agreed upon, meaning that the drivers were unable to afford a return trip to their home country. By February 2002, United Cargo Luxembourg had already declared bankruptcy.

On the 5th of March 2002, the case is held before the Police Court in Luxembourg for violations on the part of Mr. Kralowetz in areas of social legislation, failure to observe legally proscribed driving and rest periods and

³³ Affäre Kralowetz « Das schmutzige Räderwerk. <https://wortonline.atavist.com/kralowetz>

³⁴ “*Compagnies Républicaines de Sécurité*” are the general reserve of the French National Police:

forged holiday permits. The Judge sentenced Mr. Kralowetz on the 19th of April to 6 months imprisonment and a fine of 9,900 euros on the grounds of his offences, notably that of the violation of social legislation in the transport sector, legally proscribed driving and rest periods, payment of drivers according to kilometers drive and falsification or manipulation of tachograph discs.

In 2019, the matter at hand still sees some drivers trying to return to Luxembourg from where they have been stranded, and indeed up to 30 drivers remain at the borders of Portugal and Spain, some running out of fuel. Up to 20 other drivers face similar conditions in Fréjus. The drivers when arriving do so at the temporary shelter of Caritas and the Red Cross, who there provide them with food and accommodation. Many of the drivers are perplexed but still hold on to hope of getting their wages. This can therefore be described as a “humanitarian catastrophe”, the phrase “a slave to the asphalt” is perhaps most applicable whereby these drivers are being paid an approximate amount of EUR 0.10 per mile driven.

The trial of Mr. Kralowetz further revealed that the drivers were not insured by a social security scheme, were not taxed, were not subject to any employment contracts, that their remuneration were in direct contradiction to the rules provided for in the Harmonization Regulation, no holidays were provided for and that they were liable for accidents and repairs. However, drivers were under the assumption that the social security contributions such as taxes and social insurance were all being paid by their employer. Furthermore, on average, these drivers were driving between 12,000 and 20,000km/per month, and have covered approximately 3500 km for a 26 hour period without interruption. As a defense, Mr. Kralowetz noted that while it is customary for long-distance drivers’ to refer only to kilometers and not working hours, he however pays his workers in working hours. The compensation to be provided to these drivers will consisted in a flight out of Sofia and Bratislava as well as a payment of EUR 1,000 each.

The case at hand has led to further political reactions: the then Transport Minister of Luxembourg told the Luxembourgish Parliament on the 29th of January 2002 that the Kralowetz Company was “absolutely legal” and stated that the employees from Easter Europe did not have an entry permit at the time of the events nor had ever set foot in Luxembourg. Meanwhile, the Prime Minister of Luxembourg at the time, Jean-Claude Juncker publicly stated following a meeting of the Council of Ministers, that he was both horrified and hurt by the ongoing events. More importantly, he noted that the sad reality that resulted therefrom could no longer be tolerated and had impacted the country’s reputation. Politicians in Luxembourg referred the case to the EU Commission, which in turn revealed that it was possible that as per a letter sent by Juncker to Kralowetz in 1993 (stating that there was a problem with the “unsustainable situation”) that at the time, Juncker was aware of the situation at hand.

In turn, Ministers announced that they were to reform the right of establishment and put in place further controls for haulage companies in order to stop this behaviour in the future. Furthermore, a special work permit for lorry drivers from non-EU countries was to be introduced, whereby it would neither entitle them to a residence permit not to enter the labour market, but would in turn, allow them to be registered with the social security system in Luxembourg.

Currently, the parking lot of the company is under constant guardianship by the police and the trucks previously parked have been confiscated to cover the VAT duties that are owed by Kralowetz amounting to over EUR 720,000. As of the 19th of May 2002, 123 trucks and 19 semi-trailers have been sold by the company's liquidator and as of the 18th of June 2002 a further 100 trucks have been placed on auction.

B. Case Transdanubia³⁶

The Bavarian public prosecutor's office is investigating Transdanubia, under the basis of an accusation of illegally employing third-country drivers. Drivers do not have a Luxembourg work and residence permit and drive across Europe for Transdanubia. On the 11th of February 2002 the offices of the company located in Bettembourg- Luxembourg were searched. Following this, the managing director was sentenced to preventive detention in Sankt Pölten in Austria on the 14th April on the basis of an accusation of illegally smuggling people in without a permit.

On the 23rd of October 2003, another hauler company of Transdanubia was fined EUR 440,000 and sentenced to 22 months in prison due to the employment of truck drivers from Eastern Europe, particularly Hungary, by its Luxembourgish subsidiary, it was noted therein that within three years there existed a total of 750 cases in which they illegally entered Germany within three years during truck journeys. Furthermore, on the 31 January of 2004, reports of alleged bribes (suspicion of passive corruption between 1989 and 1994), by a then already retired employee of the Ministry of Transport is said to have received was revealed. The topic has been in the headlines for several years and is now reappearing in the wake of the *Kralowetz* affair.

Disciplinary proceedings against him had initially been discontinued following a first-instance decision on the 30th of May 2000, which the Public Prosecutor's Office appealed against. On the 22nd of February 2002, the Council Chamber of the Court of Appeal surprisingly revokes this judgment. Three days later, on 25 February, the Parliament of Luxembourg establishes a

³⁶ Press release Wiener Zeitung GmbH., available at: [link?] : The transport company Transdanubia based in Pasching near Linz advised under attack. Company CEO Franz Grad dismissed the allegations. The Salzburg transport operator Karl Augustin has also denied that with him Eastern European drivers were hired or are, who were employed by the controversial Luxembourg Kralowetz company, and should have received the hush money.

special committee to examine the practices in the Ministry of Transport of the previous 15 years. The trial against the official begins on the 18th of November 2002 and brings to an end an affair that has been smouldering for almost 15 years about suspicions of corruption and rumours of dubious practices by the Ministry of Transport.

Indeed, 15 years later, Soteco SA, the operator of the petrol station where Kralowetz drivers refuelled their trucks, went bankrupt on 5 August 2002 although it should be noted that Kralowetz, the parent company of Luxembourg-based United Cargo Luxembourg still exists today and is currently based in Austria specializing in the transport of liquids. Since 2016, there has been another case here in Luxembourg concerning this topic what is also compared to the case Kralowetz which will be described below.

C. ³⁷Case Jost^{38 39}

The *Jost* case concerns the head of a major Belgian road transport group being suspected of having employed a thousand Eastern European drivers in squalid conditions. He has been remanded in custody, while the Belgium State continues its fight against social dumping. Roland Jost, the head of the Jost Group which employs 1,650 people in 12 European countries and Morocco was charged the day after a wave of 15 raids in Belgium, Luxembourg and Romania were performed according to the Belgian Federal Prosecutor's Office.

With regards to this case, investigators appeared at more than a dozen locations of the Jost Transport and Logistics Group. This is also the case at the company headquarters in Weiswampach, Luxembourg. Everywhere house searches are carried out. There are suspicions of human trafficking, the formation of a criminal organisation and violations of labour law. There have been several arrests. Company boss Roland Jost is also currently in custody in Belgium. Jost is a Belgian citizen. There have been house searches in Belgium, Luxembourg, Romania and Slovakia. Jost was founded in 1958 and is now one of the heavyweights in the transport and logistics sector in Europe. From Luxembourg, the Jost Group controls around 20 companies in ten countries. In 2015, the group's turnover amounted to around 300 million euros and in 2015, the Jost Group employed a total of slightly more than 2,300 people.

The concrete allegations against Jost are the following: the group of companies is accused of hiring around 1,100 of its truck drivers via letterbox companies in Eastern European countries, particularly Romania. Jost's drivers were to make their journeys from Luxembourg and Belgium, among other places

³⁷ The case is not published as of the time of this paper.

³⁸ Interview Guy Staus , Conseiller , Chargé de Direction Ministère du Transport à Luxembourg

³⁹ <http://www.tageblatt.lu/headlines/sozialdumping-belgische-behoerden-wollen-300-trucks-der-jost-gruppe-beschlagnahmen/>; <http://www.tageblatt.lu/headlines/jost-gruppe-undercover-polizist-war-18-stunden-pro-tag-am-steuer-fuer-650-euro/>;

and they would be paid according to the standard that applies in Romania, for example, which would indeed be illegal. For example, if you work in Luxembourg, you have to be paid accordingly as per European law. Two further accusations are that (i) the drivers are not covered by any health insurance and (ii) if they did not drive, they wouldn't get paid. According to the newspaper *La Libre Belgique*, the social security system in Belgium alone was cheated by more than 55 million euros in 2014, 2015 and 2016, it should be noted there there are no current estimates for Luxembourg. If those responsible were found guilty before a Luxembourg court, they would be threatened with up to 15 years imprisonment and a fine of 150,000 euros on the above charges.

The consequence for drivers according to our information is that Jost drivers earn a maximum of 1,200 or 1,300 euros a month. This sum is made up of a basic salary of between 300 to 800 euros (depending on the country) and the payment for the kilometres driven. This represents a potential danger of drivers illegally driving longer than is permitted in order to get higher wages. If the drivers were paid according to Luxembourg labour law, they would receive a salary of around 2,500 euros per month, therefore, Jost contradicts this representation. The press spokeswoman for Jost in Luxembourg states that drivers working for their company here in Luxembourg earn 2,000 to 2.200 euros. It is key to note that according to the press, there might be about 200 people who are employed in Weiswampach. In addition to about 100 drivers, there would be about 100 office workers and just some time ago Jost had up to 300 riders in Luxembourg.

In a press release⁴⁰, Jost resolutely denied the accusations. The original text:

"Nous faisons actuellement l'objet de contrôles sur tous nos sites. Nous sommes accusés à tort de dumping social, comme beaucoup de sociétés de transport avant nous, en Belgique et au Luxembourg. Nous sommes parfaitement en ordre avec tous les niveaux. Il s'agit donc d'une collaboration totale avec les autorités. Le travail est presté normalement et le service à nos clients est assuré à 100%."

The largest trade union in Luxembourg commented on the case at hand⁴² and the Luxembourg labour inspectorate "*Inspection du travail et des mines*" (ITM)

⁴⁰ <http://www.tageblatt.lu/nachrichten/jost-gruppe-kampf-ums-uberleben-28374145/> and <http://www.tageblatt.lu/nachrichten/absolut-illegal-die-halten-fahrer-wie-sklaven-23538376/>

⁴² According to information in the Belgian press, Diekirch's public prosecutor's office, the Belgian, Slovakian and Romanian prosecutors have coordinated a major operation this week in about 15 companies of the transport and logistics group Jost from Weiswampach. What has been suspected for months has now become a sad reality. The OGBL / ACAL Syndicate has been complaining for months about the practices of social dumping by Jost in Weiswampach. The truck drivers from the East are recruited under the working conditions of their countries of origin without taking into account the legislation of the various countries in which they work.

For months, we denounce this illegal practice of the slavery of truck drivers.

For months we have been doing this unscrupulous procedure of the person in charge of the company Jost S.A. from Weiswampach attentive. Every attempt at social dialogue falls on deaf ears! We now demand that any offense be prosecuted by the Luxembourg authorities and that

have already made an appearance at the Jost company in Weiswampach. They are convinced that "social dumping on a grand scale" is being practised there and that the company had also "rejected any contact with the trade unions". The trade union has described what is happening at the company as "absolutely illegal, keeping their drivers like slaves" and is therefore not surprised by the on site raids of the company and further states that "Jost is known for it. It tried to introduce slavery on a grand scale."

First and foremost, it is now necessary that the justice system and investigators complete their work. OGBL assumes that the boss of the company will soon be released from custody. However, the trade union does not want to make assumptions due to the *Jost* case. However, the "black branch" suspicion, is not unjustified. Following the *Kralowetz* scandal, the legislation was amended to allow for stricter legal regulations. Since then, companies have had to demonstrate real activity in Luxembourg - such as bookkeeping, account management and disposition. Inspections may be made by the agents of Inspection du *Travail et des Mines*, the Luxembourg Police and Customs Agents (see articles L.142-1 to 142-4 of the Luxembourgish Labour Code) in order to check the compliance with the national legislation.

IV. Political Discussions on Transport

A. Political reaction to the case *Kralowetz*:⁴³

The Ministry of Economy expressed surprise by certain statements concerning the right of establishment ("trade authorization") in connection with the *Kralowetz* affair. The fact being that a trade authorization does not allow a transport operator to carry out international transport activities at all, for this he also requires the allocation of transport licenses.

Foreign transport companies do not come to Luxembourg because of our right of establishment, which is at least as strict as in other countries, but because of favorable economic and tax conditions and above all because of low enrolment costs and advantageous granting of international transport licenses. This is their right as long as they comply with the legal and regulatory provisions in their transport activities.

If liberalization in the transport sector has opened doors to legally employ drivers under unacceptable working and wage conditions, these doors must be closed as soon as possible. There are various legal and regulatory possibilities in Luxembourg for punishing and punishing transport companies for violations of

social dumping across Europe be finally tackled. It is not enough to have signed an alliance with eight other European countries in order to simplify the implementation of the regulations and to make the controls more effective, no, we have to act now!

The fight against social dumping must be given absolute priority throughout Europe. www.ogbl.lu

⁴³ Interview Guy Staus, Conseiller, Chargé de Direction Ministère du Transport à Luxembourg

transport, labour, social, tax or immigration law, both by the courts and by the competent administrations.

The withdrawal of the right of establishment by the Ministry of Economy is regarded as a last resort to put a stop to a dishonorable hauler. This is a far-reaching decision and can therefore only be taken on the basis of precisely prescribed legal provisions, in particular the existence of a court judgment. The assertion that the failure to transpose Directive 98/76/EC on access to the occupation of transport operator is to blame for the Kralowetz affair is absurd.

In comparison with the current legislation of 3 October 1991, this Directive does not alter anything essential as regards the disqualification of a transport operator from professional fees. In the case of Kralowetz, therefore, this directive would not have brought about any change at all.

In particular, the new version of the Luxembourg law will be used to define the concept of "*établissement stable*" more strictly and more precisely, thus eliminating mailbox companies in the transport sector. We do not need transport companies that only want to take advantage of Luxembourg's advantages but do not want to engage in real economic activities here. However, this new provision would not have had any influence on the Kralowetz case either.

In order to create a safe, efficient and socially responsible road transport sector it is necessary to ensure adequate working conditions and social protection for drivers, on the one hand, and suitable business and fair competition conditions for operators, on the other. The balance between enhancing social and working conditions for drivers and facilitating the exercise of the freedom to provide road transport services based on fair competition between national and foreign operators is crucial for the smooth functioning of the internal market. Respecting the principle: "Same pay for the same work at the same place" fighting against social dumping in Europe.⁴⁴

B. EU Mobility Package ⁴⁵⁴⁶

The Ministry of Transport is currently negotiating the mobility package on behalf of Luxembourg. Regarding these negotiations there is a provision inserted, requiring the vehicle to return every 6 weeks to the Member State of establishment. Some Member States will appreciate this provision but others will also oppose an obligation with the argument that it will increase empty returns of trucks. Luxembourg supported this in order to be consistent with the driver's regular return home. Luxembourg can use the argument referring to the "cooling

⁴⁴ Informations received by Oswald Tom, Coordinateur général, Ministère du travail à Luxembourg.

⁴⁵ Interview Guy Staus, Conseiller, Chargé de Direction Ministère du Transport à Luxembourg

⁴⁶ Grand-Duché de Luxembourg ; Représentation permanente auprès de l'Union européenne
« Paquet Mobilité I », Tentative d'approche générale

off period”, that they provided a system for returning the vehicle if they do not want to undergo a long cooling off period. Some countries would like to have derogation to this because of the sea route and so are accused to profit for setting up mailbox companies in their countries. Another point to discuss is the one of the 45-hour weekly rest ban in the cabin, with derogations so that it will not be applied in practice. It is based on secure and equipped parking infrastructures along European motorways that do not exist in all Member States and there is no legal obligation to create them. another very controversial point and the Red Line for Luxembourg, Benelux is cabotage, we have to solve the problem of systematic cabotage. Luxembourg want a European solution, not bilateral solutions.

Détachement rules applicable to road transport: this element of the dossier is still very important for the Member States in the eastern periphery. They want a flexible regime, which allows them to operate internationally without having to apply the rules of “*détachement*” in Western countries. The Presidency presented a completely new system which provides for the application of the rules of *détachement*, salary and leave of the host country according to the type of transport operation carried out. Luxembourg operators and controllers are mainly affected by the administrative procedures under this regulation in view of our very high salaries and social standards. There is talk of exempting purely bilateral international transport from the application of the rules on *détachement*. In addition, the operator will be entitled to two loading operations and two unloading operations on the way to and from the vehicle. The outward journey must correspond to the return journey. As an example: Portuguese which makes an operation of bilateral international transport to Luxembourg passes through Spain where it can load/unload (1 operation), then through France where it can load/unload (1 operation) These are so-called "cross trade" operations. the same applies to the return. 2 operations on the outward journey / 2 operations on the return journey. This is difficult to control, and the Road Alliance will therefore support an exemption for purely bilateral operations (Portugal-Luxembourg, Luxembourg-Portugal) in a first round of negotiations. In the second round we can reconsider our position or not.

Combined transport, Scandinavian countries face unfair competition from operators from the East and the periphery who enter Denmark by sea with their lorries and thus benefit from combined transport status, which means that according to the current combined transport directive which is under revision, the following and preceding road segment (in this case maritime transport) is exempt from cabotage rules. This should be an incentive for operators to use less polluting modes of transport such as rail and sea/river navigation more and more. Thus, SE and DK have been trying since the beginning of the negotiations to find a solution for their problem during the revision of the Combined Transport Directive. Luxembourg (like the other members of the Road Alliance) supported DK and SE with this, but since the problem with the "cooling of period" is expected to return from these countries. Has always kept its word, but DK has

not been very favorable to the BENELUX proposal on Cooling off. We can therefore continue to support them but insist that we expect them to support the BENELUX proposal.

B. Position of our government regarding proposal on posting⁴⁷

Due to the ongoing negotiations regarding the creation of a legal framework for the posting of workers in the transport sector, the reporting obligations in respect of posting of workers provisions and compliance verification of Luxembourgish regulations regarding the minimum social wage for posted drivers in the frame of cross-border merchandise and people transport are currently suspended until the outcome of the discussions in Brussels is known. Inspections may be made by the agents of ITM, the Police Grand-Ducal and the Customs (see articles L.142-1 to 142-4 of the Labour Code) in order to check the compliance with the national legislation on driving time and Cargo.

V. Remuneration and Working Conditions

Remuneration and working conditions of drivers are overseen by national laws and collective agreements that have been declared as generally applicable to posting situations of cross-border merchandise and the transport of persons. According to the European Commission, the international carriage in transit across the territory of a Member State does not constitute a situation of posting due to the weakness of the link between the driver's activities and the Member State it transited. Indeed, transit operations are characterised by the fact that the driver passes the Member State without loading or unloading freight and without picking up or setting down passengers.

However, it should be noted that due to the ongoing negotiations regarding the creation of a legal framework for the posting of workers in the transport sector, the reporting obligations in respect of posting of workers provisions and compliance verification of Luxembourgish regulations regarding the minimum social wage for posted drivers in the frame of cross-border merchandise and people transport are currently suspended until the outcome of the discussions in Brussels is known.

VI. Sanctions

Sanctions follow as the logical sequence of controls. The most common sanctions in the transport sector are concerning breaches regarding driving and resting times.

If the charge is not well secured, the one that loaded the truck will be held responsible for that. Under certain conditions, the driver will also bear a part of

⁴⁷ Informations reçues par Oswald Tom, Coordinateur général, Ministère du travail à Luxembourg

the responsibility, if he contributed to the fixing of the charge. However, if he just picked up the trailer somewhere with the direction to bring it to a certain destination without any need to care about the goods, then he cannot be held liable.

In order to perform your business as a transport company in Luxembourg, you need to have a licence, but you also have to be established in Luxembourg. The Luxembourgish law concerning the access to the profession already dates back to 2002 and is going beyond the 2009 EU Regulation. According to our government, this Regulation should have gone further concerning the issue of establishment. As a result, but also due to a lack of staff, the 2002 law was never really adjusted to the 2009 EU Regulation. As the Commission provided that no stricter measures were admissible, we had to get derogation for that.

As a consequence, what the law is stricter, what more conducts will be likely to be constitutive of breaches, and so this increases the number of sanctions. Of course, issuing a sanction will always be the consequence of controls, so it also depends on how the controls are performed, if they are performed at all, and on the degree of tolerance granted during these controls.

In Luxembourg, first you need an authorisation for establishment, which grants you access to the profession, then only you can get your licence, which grants you access to the market. When a request for a licence is made, the ministry of transport is checking whether the carpool is in order, whether there is valid contrôle technique, but also whether tax payments are done properly. If one of these elements is not in conformity with what is provided by the law, the ministry of transport does not issue the licence as long as everything is not how it should be.

This does not consist in a proper sanction, which is given after a breach has been committed. Rather, it is a preventive measure that consists of sanctioning the companies that do not fulfil all the requirements, by not granting it the licence. In this regard, the sanction concerned has the effect of keeping the company from entering the market as long as these three points are not fulfilled. According to the ministry, this works good and as the licence is issued for a period of three years, this preventive control or sanctioning mechanism can be exercised on a regular basis.

When a new company is entering the market, it is continuously checked by the ministry of transport during the first year. Often, there are some issues, because the company was not well advised or because some groups of companies did not regard their Luxembourgish subsidiary as a separate entity. As a result, there is this mechanism of continuous surveillance, but there is no particular sanction attributed for small breaches in that period, just the fact that the licence could not be continued.

The ministry of transport has only the power to act on the basis of administrative measures, being the non-renewal or the discontinuation of the licence giving the company access to the market. It is noteworthy to note here, that if the company does not drive internationally, in order to drive only on the national territory, the authorisation of establishment is enough. This will generally not be of a big consolation.

Sanctions are a matter of domestic law. In Luxembourg, it is not easy to make controls because the country is so small. If you collaborate with neighbour countries and make controls at the borders, there will be the question on whose system will apply, concerning the sanctions.

Even though sanctions vary a lot between countries, there is a common rule that sanctions cannot be disproportionate. There is a certain harmonisation concerning controls, however the sanctions resulting from them still vary a lot as this is a national matter.

In addition, it seems noteworthy to mention that, as the cabotage rules came into force, many companies left Luxembourg. At first sight, it looked like they left because of the financial crises. As a result, the cabotage rules could also be classified as a kind of prevention or sanctioning regulation, which kept the companies from abusing cabotage. In Luxembourg, if you get controlled and you cannot show the proper documents, the sanctions are very high.⁴⁸

VII. Media Coverage

In 2018, Luxembourg and France introduced a double taxation Convention⁴⁹ aiming at avoiding double taxation. This Convention includes all other transport means, like ships, planes and trains, but excludes road transport (article 8 1.). As a result, drivers crossing the French border still have to pay taxes in both countries if they find themselves more than 24 days in France. For a Luxembourgish transport company, this is not comprehensive.

Luxembourgish transport companies signalled that they wanted to be included in article 8 1. of the Convention, in order to be excluded from the double taxation. However, the minister had already agreed on this Convention and did not want to change it, so they said it was too late. When drafting new rules, the government omits to ask the opinion of the companies and so is failing to meet the needs of the concerned sector. In Luxembourg, every driver has a card which indicates that he/she is working in Luxembourg and that he/she pays his/her taxes here.⁵⁰

⁴⁸ Interview with the Ministry of Transport.

⁴⁹ Convention entre le Gouvernement du Grand-Duché de Luxembourg et le Gouvernement de la République française en vue d'éviter les doubles impositions et de prévenir l'évasion et la fraude fiscale en matière d'impôts sur le revenu et sur la fortune du 20 mars 2018.

⁵⁰ Interview with Marianne Welter from Arthur Welter.

It can be interesting to have foreign drivers working for your company, because for example, if you are delivering a lot of goods in one part of Europe, then you should employ drivers from that area, because they know best the country or region, be it because of the language, culture, etc. As a company, this makes you less subjected to potential problems that might arise in those countries.⁵¹

Trade Unions mostly have to deal with the ITM. They are competent if a driver is not paid a salary, or not paid the right amount of the salary. Generally, the Trade Unions don't consult the Ministry of Transport, rather they go directly to the company, or to the ITM, depending on the nature of the problem at stake. They also try to include anti-abuse clauses in the collective work agreements, in order to prevent social dumping.⁵²

In 2009, an Italian company was hired to perform a construction in the UK. They did not want to employ local people to do the construction, because they came with their own workers. However, this was very criticised and the end, they still had to partly use local workers. In order to combat social dumping, the CJEU has granted the Member States of the EU the possibility to restrict the free movement of workers in cases where there is a legitimate aim to do so.⁵³

Luxembourgish transport companies only have a minimum of Luxembourgish drivers, because the Luxembourgish people do not want to work as drivers anymore, for the French ones, it is not attractive anymore, so automatically, you mainly have Rumanian, etc. drivers. So in Luxembourg, the free movement of workers is a fundamental principle, because without it, Luxembourgish transport firms would not survive. However, rules on social dumping limit very much the freedom of such companies.⁵⁴

Another problem consists in these small vans, which often carry more than the allowed 3.5 tons and which consist a problem for competitiveness in the internal market, because they cannot be controlled as easily. Most of transport rules do not apply to them, like limitations in driving and resting times. They are on the way to destroy the market. The EU is working on setting down the tonnage limit, which is to be applied to trucks. As a result, as you don't have much control over them, you cannot properly control whether they perform social dumping.⁵⁵

The Arthur Welter company introduced green Diesel in their fleet, because they want to drive ecologically. This already costs more than the general Diesel.

⁵¹ Interview with the Ministry of Transport & Interview with Marianne Welter from Arthur Welter.

⁵² Interview with the Ministry of Transport.

⁵³ Social Dumping Doctrine, Larcier, Available on Strada Lex Luxembourg.

⁵⁴ Interview with Marianne Welter from Arthur Welter.

⁵⁵ Interview with the Ministry of Transport & Interview with Marianne Welter from Arthur Welter.

However, after two years, the ministry of finance imposed excises (indirect taxes) on it and then it was not attractive anymore. Yet another question we can raise concerning competitiveness, is the fact that Belgium firms get reimbursed a certain amount of their gas bill if they drive Euro 6, whereas in Luxembourg this is not performed, because Euro 6 is mandatory.⁵⁶

VIII. Future Way Forward

Some countries⁵⁷ have started a pilot project aiming at introducing so-called Giga Liners in their transport chain. These are trucks of a length of 25 meters, which can load up to 60 tons. The advantage of these trucks are their ability to transport more goods, for still having just one driver. Our government is against this, because it aims at stressing the transport combiné (also called transport intermodal) and alternative drives, rather than putting big trucks on our roads.

Some companies have been happy about this, others were considering that it could be beneficial for long distances. However, whether these truck are allowed, is a matter of national legislations, and in Luxembourg you are not driving a long time before reaching the border, so in this regard it does not make a lot of sense to participate to those kind of projects, when you know that your neighbour countries won't support you. However, for some specific issues, the EU Treaties have granted the Union Economique Belgo-Luxembourgeoise (UEBL) and the BeNeLux the power to act as if they were just one big single country.

The transport combiné is the fact of using different methods of transport, for example trucks, trains or ships. Goods will then be carried to their destination using not just one, but several different transport means. In Luxembourg, we have the Rail-Route in Bettembourg, which is a big platform concerning trains and we have the port in Mertert for ship.

Our current government is stressing this and aiming at developing the transport combiné in Luxembourg. For some goods it is very interesting to use ships, however we are rather limited in that domain. The train in Bettembourg is more interesting, there you have trailers where you can drive on with the whole truck, respectively with the whole trailer to put it on the train, rather than just putting on one container. You don't crane the containers anymore. In the meantime, we have lorry rails where the top part of the wagon can swing out and the trailer can then be pulled on it. The truck can directly pull it up or even just leave its trailer there, because they have their own trucks to pull the trailers on the trains. Then you swing back the top part and the train is ready to start.

⁵⁶ Interview with Marianne Welter from Arthur Welter.

⁵⁷ In the Nederland, partly in Germany, because it depends on the Bundesländer, Belgium also has started.

Years ago, there was a project where trailers were put on a ship in Turkey, then when the ship arrived in Italy, they put everything on the train to Luxembourg and from here everything then went to Benelux, France, Germany by truck.

However, planes are not included in the *transport combiné*, because in the planes you have pallets of goods and not whole containers or trailers and trucks have to be Euro 6, this is the norm. They have less exhaustion gases than the previous generations, however only if you add Add Blue to it. There are many tricks to escape this. Meanwhile, there is no new norm concerning this, because if you want to go one step further, you are driving hybrid. This is not feasible for the trips at stake. There are hardly such vehicles, except for buses. However, this is different, because buses drive on a local level and trucks have to go from station to station.

When you have a truck, you have a driver, which needs to be regulated in order to prevent abuses. Is the sector not already too much regulated? Abuses of the system also lead to the withdrawal of the licence.⁵⁸

The trucks are equipped with new speedometers, which indicate the exact location of the truck. This was one initiative to combat fraud. Same with the *Contract de transport international de marchandises par route* (C.M.R.), which is document, the drivers need to be handed out for each drive and which indicates the whole itinerary. The possibility of a European minimal social wage is not possible, because every country will have to adapt to the currently highest wage. A lot of companies, especially in eastern countries, would go bankrupt.⁵⁹

⁵⁸ Interview with the Ministry of Transport.

⁵⁹ Interview with Marianne Welter from Arthur Welter.

Annex : Questionnaire addressed to stakeholders

1. The importance of the posting of workers

- a) Is the posting of workers in matters of transport activities usual in your activity? How much importance does it have on your activity?
- b) What are the main problems of social dumping in Luxembourg? Which problem do you give the most importance to?
- c) What place does European law have on these problems? Is it a beneficial or harmful influence?

2. Social dialogue

- a) Which role do you play in the social dialogue?
- b) How are you involved in the social dialogue?
- c) How do you rate your relationship with the government in terms of discussing and resolving the aforementioned problems?
- d) Does the European Commission hold consultations where you can participate?

3. The Regulation 833/2004 on the coordination of social security systems and its application.

- a) Does Luxembourg have in your opinion a more liberal or conservative approach in matters of the posting of workers? Does it favour employees or employers? Do you agree with said approach?
- b) In which cases are drivers posted in Luxembourg entitled to the “salaire social minimum” (minimum social wage)?
- c) The ITM has recently announced the suspension of the obligations of declaration in matters of posting of workers in the field of road transport due to the ongoing discussions of the European Commission on the proposal of a new directive for this field. What is the goal of this suspension?
- d) Following this suspension, are the provisions on the grant of the “salaire social minimum” (minimum social wage) still upheld for the posted workers?
- e) Companies posting on the territory of Luxembourg shall apply for a so-called “badge social”. Is the “badge social” required also for the international road transport? Are there any issues in that matter?

4. Social security

- a) In which ways does Luxembourg control and guarantee the emission of the A1 certificates?
- b) Are there any initiatives Luxembourg adopted in order to further the cooperation between competent authorities of different European Union member States?

5. Control

- a) Is control made on the road or mainly at the different points of load and unloading of goods?
- b) What are the organs responsible for such controls? Do these different organs have the same competences and means to make such controls?

For governmental agencies only:

- c) Do these controls reveal irregularities? and if yes, which issue do you encounter most often?
- d) What means, manpower, etc. are available to pursue these controls?
- e) Is there any notable difference between controls in the road transport and other fields such as for example the construction sector? Are there less abuses in the latter sector?

6. Sanctions

- a) What are the consequences a company can face for failure to comply with its obligations?
- b) Which actor will be sanctioned? The posting employer, the receiving employer or the employee?
- c) Is there already a case law, i.e., a policy common to all decisions to sanction irregularities?

7. Concluding remarks

- a) In your opinion, what reserves the future of the road transport sector in Luxembourg (in relation to new technologies, evolution of EU law, increase in online shopping, prohibition of diesel vehicles, etc.)?