GENERAL MEMORANDUM LUXEMBOURG

1. Brief introduction to Luxembourgish labour law

a. General background

In the Luxembourgish legal systems a number of provisions are intended to protect employees. In principle no rule of lower rank may be less favorable to the employee than a rule of higher rank, in the following descending order:

• Constitution

• Labour Code (Code du travail) and special laws

• Grand-ducal Regulations

• Collective bargaining agreements

• Employment contracts

Collective agreements can be declared generally binding by means of a Grand-ducal regulation. However, this regulation does not have the same value as the other Grand-ducal regulations. Indeed, "any provision [of collective agreements] against the laws and regulations is void, unless it is more favorable for employees" (Article L. 162-12 (6) of the Labour Code). Thus, collective agreements declared generally binding by a Grand Ducal regulation may be contrary to a Grand-ducal regulation only insofar as they are more favorable to workers.

Similarly to most of continental countries, the labour code provides for the rule according to which 'The parties to the employment contract are allowed to derogate from the provisions of this title in a direction more favourable to the employee. Is null and void any clause contrary to the provisions of this title insofar as it seeks to restrict the rights of the employee or exacerbate its obligations.' (Article L. 121-3, Labour Code). Consequently, 'Any stipulation of an individual employment contract, any internal regulations and generally any provision whatsoever contrary to the provisions of a Collective bargaining agreement are void, unless they are more favourable for employees.' (Article L. 162-12 (7), Labour Code).

Labour Code

The legal provisions relating to employment law are contained in the Labour Code. Indeed, the laws concerning labour law have been codified by an Act of 31st July, 2006.[1] This law, codifying the legal provisions applicable to the employment relationship, at the same time repealed the laws codified, with the exception of some of them. The laws that were not repealed are mainly laws concerning issues wider than just employment relationship (hereafter « special laws »).

The above-mentioned 'special laws' include:

- Law of 11 November 1970 on assignments and seizures of earnings;

[1] Law of 31 July 2006 creating a Labour Code, Mémorial p. 2455.

- Laws on some special paid leave (educational leave, leave for professional sportsmen, leave to adopt a child, parental leave);
- Law of 2 August 2002 on personal data protection;
- Mandatory health and safety provisions of the Association for Insurance against Accidents (Association d'Assurance contre les Accidents, « AAA »);
- Law of 11 August 1982 on protection of private life
- Law of 8 June 1999 on Supplementary Pensions
- Law of 20 July 1992 amending the system of patents
- Law of 29 August 2008 on the free movement of persons and immigration, which contains provisions dealing specifically with the posting of workers
- Law 14 March 2017 regulating the posting of workers and enforcement measures

Sources of labour law and social security law

Personal scope

Since January 1st, 2009, the Labour Code provides for an identical regime for blue- and white-collar workers.[2] However, a transitional period enables social partners to renegotiate the agreements so that their application is no more limited to blue- or white-collar workers. Currently, some collective agreements still limit their application to a category of staff. This is the case of the collective agreement applicable in the construction sector, applicable only to blue-collar workers. The collective agreement for temporary workers, for example, does not distinguish between categories of employees, and applies to all workers concerned.

Employee protection

MINIMUM WAGE

The law sets directly the level of minimum wages. To this end, every two years, the Government submits to the House of Representatives [Chambre des Députés] a report on developments and general economic conditions and incomes, accompanied, if appropriate, of a bill raising the minimum wage level (Article L. 222-2, Labour Code). Wage rates resulting from a law, a collective agreement and a contract of employment are adapted to changes in cost of living in accordance with Article 11, paragraph (a) of the amended law of 22 June 1963 fixing the pay of civil servants. The same principle applies to traineeship allowances. The level of minimum wage is increased by 20% for skilled employees. The level of minimum wage for employees under the age of 18 years is reduced as follows: for workers aged 17 years, it is 80% of the minimum salary applicable to an adult; for workers aged 15 or 16 years, it is 75%. The minimum wage rates are mandatory for employers and employees, and cannot be lowered by them by individual agreement or by collective bargaining agreement, unless ministerial approval.

The salary may not be below the social minimum wage under any circumstances. Social minimum wage EUR 1.998,59 (index 794.54 as of 1 January 2017) (gross monthly salary for 40h/week)

Gross monthly wages as of 1 January 2017:

[2] Law of 13 May 2008 on the introduction of a single status, Mémorial A, p. 789.

- 18 years and over, skilled worker = 120 % = € 2,398.30
- 18 years and over, unskilled worker = 100 % = € 1,998.59
- 17 to 18 years = 80 % = € 1,598.87
- 15 to 17 years = 75 % = € 1,498.94

All provisions relating to minimum wage apply to the posting of workers in Luxembourg, as they are considered to be 'public policy provisions applicable to all employees occupied in the territory of the Grand Duchy of Luxembourg', together with 'all legal, regulatory and administrative provisions, as well as those resulting from collective agreements declared generally binding, or resulting from a decision of arbitration with a scope similar to the collective agreements declared generally binding, and the provisions of agreements resulting from multi-industry social dialogue declared generally binding, regarding: (…) minimum social wage and automatic adjustment of pay to changes in the cost of living. On the contrary, the automatic adjustment of wages to changes in the cost of living provided in paragraph (1) subsection (2) of Article L. 010-1 applies to posted workers only in relation to the legal minimum wage or in relation to minimum wage rates applicable in the sector, branch and / or occupation by application of a collective agreement declared generally binding. (Article L. 141-1 (1) § 2, Labour Code).

WORKING TIME/OVERTIME

The rules relating to the provision and pay of overtime are contained in the provisions relating to hours of work, and therefore apply to posted workers in accordance with Article L. 010-1, paragraph 3, of the Labour Code. Overtime shall be compensated by paid time off (1,5 hour of paid time off for every overtime hour worked). Paid time off might be recorded at the same rate on a time saving account which arrangements may be established by the applicable Collective agreement or by any other agreement concluded between social partners at the appropriate level. In companies that apply a legal or contractual reference period, overtime recorded at the end of the reference period are offset in the next reference period under the above mentioned rate increases or recorded at the same time rate on a time saving account. If for reasons related to business organization, time off cannot be granted to the worker or if the employee leaves the company for any reason before he/she made use of the paid time off the employee was entitled, the latter is entitled to their normal hourly rate plus 40% for each overtime hour worked. These 140% are free of taxes and contributions for social security, with the exception of contributions for benefits in kind on the overtime hour (not increased). The hourly wage is obtained by dividing the monthly wages by the fixed number of 173 hours. A collective agreement may adapt these rules. The terms of overtime pay provided for by law or collective bargaining agreement are not applicable to senior executives, except as specially provided for by the collective agreement. The applicable Collective bargaining agreement must mention the categories of personnel not covered under the rules on provision and compensation of overtime (Article L. 211-27, Labour Code).

Last 23 December 2016 a new law on the organization of working time has been enacted, amending the Labour Code. Its aims are, on the one hand, to ensure the good functioning of businesses and to boost employment and, on the other hand, to protect the employees' security, health and good working conditions. The Law introduces the option for the employer to set up a work organisation plan (*Plan d'Organisation du Travail - POT*) which allows the employer to determine the weekly working schedule and weekly working hours subject to flexibility and to compute the hours of work over a reference time period based on the expected activity. It also introduces a new maximum threshold of working hours over which overtime is computed. The employer may amend the POT with 3 days' notice. The employee concerned may request not to comply with

the POT, as modified, for compelling and justified reasons, unless the modification is due to a specific case of *force majeure*.

DISMISSAL PROTECTION

- Probationary period

An employment contract generally begins with a probationary period called a trial period (for permanent and fixed-term contracts). During this period, the parties may terminate the employment contract without compensation. The terminating party must respect a notice period, which is dependent on the duration of the initial trial period stipulated in the employment contract (or by the collective agreement where applicable). The notice period is dependent on the initial duration of the trial period. Notice periods are the same for both parties. A notice period may not be shorter than: as many days as the trial period has weeks, when the duration of the trial period is indicated in weeks (e.g. 10 weeks is 10 days notice); or 4 days per month trial period without being shorter than 15 days and without exceeding 1 month, when the duration of the trial period is indicated in months.

- Dismissal with notice

An employer who dismisses an employee for a reason other than serious misconduct (just cause) must grant a notice period and severance pay if the employee has been employed in the business for 5 years or more. If the business employs more than 150 employees, it must conduct a pre-dismissal interview with the employee before effective dismissal can take place. Businesses with at least 15 staff members must also notify the economic committee (Ministry of economy) about each dismissal for reasons that have nothing to do with the employee's person.

- Dismissal without notice

An employer may dismiss an employee with immediate effect if the latter has committed an offence (just cause), which renders the working relationship definitively and immediately impossible. Dismissal of an employee with immediate effect constitutes a more serious sanction than dismissal with notice and from the employer's point of view, there is generally a more serious reason behind this type of dismissal. For this type of dismissal, the employer does not provide a severance package. Furthermore, under certain conditions, the employer may request that the employee reimburses the costs for any continuous vocational training received.

- Redundancies

Following the basic rules contained in Dir. 98/59, Luxembourgish law provides that an employer who intends to dismiss, for reasons other than the employee's person, at least 7 employees over a period of 30 days or at least 15 employees over a period of 90 days must apply a collective redundancy procedure. The procedure consists of four steps: information to the National Employment Agency (ADEM) and the staff representatives (or the employees directly if the business regularly employs less than 15 persons); negotiation of a redundancy plan; implementation of the redundancy plan; request for a tax exemption for voluntary departure or severance pay, if applicable.

General information on Luxembourgish labour law

An overview on Luxembourgish labour law can be found in:

- J.-L. Putz, G. Wirtz, *Droit du travail. Répertoire de jurisprudence luxembourgeoise*, ed. Répertoire, 2016
- C. Domingos, *Relations collectives de travail au Luxembourg* (Legitech, 2015)
- J.-L. Putz, *Droit du travail*, Larcier, 2014
- J.-L. Putz, *Comprendre et appliquer le droit du travail*, Larcier, 2014
- C. Domingos, *Employment in Luxembourg, A practical guide to Luxembourg employment and social security law* (Editions Mike Koedinger, 2010)
- An online database (restricted access) dedicated to labour law issues is available at: www.legiwork.lu , implemented by G. Castegnaro (at http://www.castegnaro.lu/en)
- General information can be consulted also at: http://www.guichet.public.lu/entreprises/en/ressources-humaines/index.html

b. Overview judicial system

Labour disputes in Luxembourg are subject in the first instance to the jurisdiction of a division of the *Justices de Paix*, namely the *Tribunal du Travail*. The *Cour Supérieure de Justice*, which includes the *Cour d'Appel* and the *Cour de Cassation*, re-examines the cases decided by the *Juge de Paix* on labour law, being the Court of appeal subject to the authority of the *Cassation*. As in most civil law countries, the *Cour de Cassation* does not judge the facts of the case, but decides on matters of law or application of the law, as its jurisprudence must ensure the uniform application of the law.

Luxembourg's Equal Treatment Law does not specify the period for which a discrimination action must be brought. Luxembourg's Labour Code provides that actions for unfair employment contract termination must be brought within 3 months, unless the employee has requested a written explanation from the employer within 1 month or receipt of the termination notice, in which case the action must be brought within 12 months. For all other matters, unless another law is applicable, the common law statute of limitations of 30 years would apply.[3]

Who claims for the application of social provisions retains the right to appeal the decisions taken by the social security authorities. The system is divided into two. By one side you have the *Conseil arbitral*, by the other one the *Conseil supérieur de la sécurité sociale*. The *Conseil arbitral* is competent to decide cases on membership, taxation, contributions, ordered fines and services, up to the value of € 1.250. The individual must file a complaint within 40 days form the date of the decision to be appealed. The *Conseil supérieur de la sécurité sociale* is competent for the appeals on the same subjects with a value higher than € 1.250. The same time limit of 40 days applies to the appeal. The decisions taken by both the *Conseil arbitral* and by the *Conseil supérieur de la sécurité sociale* can be recurred before the Cour de cassation.

[3] Article 124(11)(2), Labour Code: '(2) L'action judiciaire en réparation de la résiliation abusive du contrat de travail doit être introduite auprès de la juridiction du travail, sous peine de forclusion, dans un délai de trois mois à partir de la noti cation du licenciement ou de sa motivation'.

c. Role of social partners

Social dialogue

The social partners are involved very early in the establishment of legal provisions. As for Social dialogue, the "tripartite" or the "Luxembourg model" is based on a continuous and institutionalized dialogue between government, employers and unions on important economic and social issues to find a consensus. The "tripartite" is thus a consultative body, a sort of platform for dialogue, institutionalized and permanent, allowing the search for consensual solutions to economic and social problems.
Four institutions provide continuous social dialogue:

- the tripartite committee,
- the Economic and Social Council,
- the Tripartite Coordination Committee, and
- the Tripartite Conference in the steel industry.

As regards more particularly the establishment of labor law in general, the Tripartite Coordination Committee and the Economic and Social Council have an important role to play. The Tripartite Coordination Committee gathers representatives of the Government (Minister of Finance, Minister of Economy, Minister of Employment and Labour), of the employers (Chamber of commerce, Chamber of Crafts) and of the employees (unions). It is chaired by the Prime Minister. Its function is to build consensus on economic and social important issues. The Economic and Social Council consists of representatives of employers, employees and government. It is the permanent advisory body to the Government on the economic and social orientation of the country.

The social partners are always involved upstream in the preparation of bills and draft of Grand-Ducal regulations. Apart from trade unions and organizations representing employers, there is in Luxembourg a third type of representation: the professional chambers. These are organizations to which employers or employees are automatically enrolled, according to their activity. They have notably an advisory mission for the development of opinions on bills and drafts of regulations. The main chambers of the private sector are the following:

- All employees working in Luxembourg are members of the Chamber of Workers ("Chambre des salariés", CSL). CSL is a legal person with civil and financial autonomy, while being placed under the Ministry of Labour and Employment.

- The Chamber of Commerce is a public institution, which includes all businesses except agriculture and handicrafts, which have their own professional chambers: Chamber of Agriculture ("Chambre de l'agriculture") and Chamber of Crafts ("Chambre des métiers"). In the Grand Duchy of Luxembourg, membership of the Chamber of Commerce is mandatory for all individuals, corporations, and branches of foreign companies based in Luxembourg, engaged in commercial, financial or industrial activity.

In the framework of article 11 of the Constitution and pursuant Law dated 12th June 1965, trade unions are subject to certain conditions of sectorial and national representation. Both general Trade Union and sectorial ones can be strategic partners for the transport sector. One can mention the following partners:

- Confédération générale de la fonction publique (CGFP) – For public agent. Founded in 1909, the only representative public service trade union at the national level, the General Confederation of the Civil Service (CGFP) has about 17,000 members, all of whom are civil servants or public employees. Multiple professional organisations and associations regrouping public agents are affiliated to them. CGFP is affiliated to the European Trade Union Confederation (ETUC).

- FNCTTFEL — Landesverband: The National Federation of Railroad Workers, Transport Workers, Civil Servants and Employees (Fédération nationale des cheminots, travailleurs du transport, fonctionnaires et employés, Luxembourg, FNCTTFEL, commonly called the 'Landesverband'), whose foundation also dates back to 1909, is open to all workers and represents the interests of active and retired railroad, public service and public transportation personnel. Its activities are marked by complete political and religious neutrality.

- Lëtzebuerger Chrëschtleche Gewerkschaftsbond (LCGB): The Luxembourg Confederation of Christian Trade Unions (LCGB) is open to all employees.

- Onofhängege Gewerkschaftsbond Lëtzebuerg (OGB-L): The Independent Luxembourg Trade Union Confederation (OGB-L) is a confederation of trade unions open to all employees. It is divided into 15 professional trade unions, according to the different employee groups.

- Confédération générale du travail du Luxembourg (CGT-L) : OGB-L and FNCTTFEL are united in the General Confederation of Work in Luxembourg (CGT-L). CGT-L's only impact is on the supranational level. Indeed, it does not have members in the company councils, does not sign collective agreements and is not involved in social elections. However, it participates in official national consultations, together with the three unions it unites.

The collective agreement (*Convention collective*) applicable to transport and logistics in Luxembourg Is regulating probation period, mandatory provisions in the labour contract, respective obligations, contract ending, vacation, provision regarding heavy transportation, equality, working time, registers, time computation, road costs and cash paid in advance etc.[4]

Trade unions and works councils

Article 11 of the Luxembourg Constitution guarantees the freedom to join a trade union. Employees and employers are organised on a voluntary basis into a number of trade unions, trade and professional federations respectively, whose principal aim is to negotiate collective bargaining agreements.

Staff delegations must be set up in every business in the private sector with at least 15 employees. The number of representatives elected to a staff committee should be proportionate to the total number of workers. For bigger entities (i.e. businesses employing at least 150 employees over a three-year reference period), the law provides that they must have a joint works council. The number of members depends on the size of the business. Joint works councils are composed of an equal number of the employers' and employees'

[4] http://www.itm.lu/home/droit-du-travail/conventions-collectives-de-tra/conventions-collectives-de-trava.html

representatives. The employer's representatives are chosen by the company's management and are elected via proportional representation in a secret ballot of the staff delegates.

The staff delegation is on a general basis in charge of safeguarding and defending the interests of the employees with regard to working conditions, protection of employment and of the social status, as far as those tasks do not fall within the scope of the Joint Works Council, if any. The Joint Works Council must be informed and consulted in order to decide on a number of matters, including the implementation or application of any technical devices aimed at controlling the employees' behavior and performance, the implementation of or change to any measures regarding health and safety at work and prevention of illness, the implementation of or change to the criteria applicable to hiring, secondment, transfer, and termination, and eventually to pre-retirement, the implementation of or change to general criteria applicable to the appraisal of employees, the implementation of or change to internal policies taking into consideration collective bargaining agreements, if any, and the granting of gratification to employees who have brought to the company a useful contribution through initiatives or proposals for technical improvements.

The Labour Code confers to the staff delegates the right to appoint directors representing the staff with the use of a ballot carried out under proportional representation rules. This representation applies only to a business under the form of a joint stock company employing at least 1,000 employees over a three-year reference period. The number of directors is set to at least 9.

Collective labour agreements (CLAs)[5]

Collective agreements do not automatically apply to all employees of signatory companies. Certain categories of employees may be excluded from the application of the collective agreement or specific provisions may be applicable to them. Are concerned on the one hand executive managers (article L. 162-8 (3), Labour Code) and on the other hand other management and support functions not directly related to the implementation of the core business of the company or sector (article L. 162-6 , Labour Code).

Where a collective agreement applies to a group or set of companies or employers in a sector or industry, contracting parties may decide to confer the status of a framework convention and refer the settlement of certain subjects to collective bargaining agreements at lower levels (article L. 162-7 of the Labour Code).

Agreements resulting from multi-industry social dialogue are declared generally binding (article L. 165-1 of the Labour Code). These are agreements on the following topics:

- implementation of collective agreements adopted by the social partners at European level;
- transposition of European directives which provide the possibility of implementation at national level by agreement between national social partners;
- national or multi-industry agreements on matters on which social partners have agreed and which may be, inter alia, the organization and the reduction of working time, vocational training, including issues of access and individual training leave, the so-called atypical forms of work, measures to

[5] "Conventions collectives" are accessible here: http://www.itm.lu/home/droit-du-travail/conventions-collectives-de-tra/conventions-collectives-de-trava.html.

implement the principle of non-discrimination, action against bullying and sexual harassment at work, the treatment of stress at work.

- So far, the following agreements have been declared generally binding:
    - § Grand-Ducal Regulation of 30 March 2006 declares generally binding the agreement resulting from multi-industry social dialogue concerning individual access to vocational training, concluded between unions OGB-L and LCGB on the one hand and the Union of Luxembourg Enterprises (UEL), on the other hand (Mémorial A, p. 1493) ;
    - § Grand-Ducal Regulation of 15 December 2009 declares generally binding the agreement on harassment and violence at work concluded between trade unions OGB-L and LCGB on the one hand, and the UEL, on the other hand; (Mémorial A, p. 21) ;
    - § Grand-Ducal Regulation of 13 October 2006 declares generally binding the Convention on the Legal Regime of telework concluded between trade unions OGB-L and LCGB on the one hand and the Union of Luxembourg Enterprises (UEL), on the other hand (Mémorial A, p. 3309).

The list of all collective agreements declared of general application includes: Agents des sociétés de service de sécurité et de gardiennage; Assurances; Banques; Bâtiment et génie civil; Carreleurs; Chauffeurs d'autobus et salariés auxiliaires des entreprises d'autobus privés; Chauffeurs de taxis; Electriciens; Entreprise de travail intermaire - travailleurs intérimaires; Etablissements hospitaliers; Garagistes; Gens de mer; Installateurs d'ascenseurs; Installateurs sanitaire, de chauffage et de climatisation et installateurs frigoristes; Mécanicien de machines agricoles; Menuisiers; Métiers graphiques; Nettoyage de bâtiments; Ouvriers de l'Etat; Peintres; Pharmacies; Plafonneurs-Façadiers; Salariés du secteur de l'assistance en escale des aéroports; Secteur social; Sociétés d'exploitation cinématographique; Toiture (Métiers de couvreur, chapentier, ferblantier et calorifugueur); Transport et logistique.[6]

[6] The list together with the French or German text of all collective agreemens of is available at: http://www.itm.lu/home/droit-du-travail/conventions-collectives-de-tra/conventions-collectives-de-trava.html

2. Implementation

a. Implementation of the parts from Module 1

i. Fundamental freedoms

Mostly fundamental freedoms apply without any further implementation. There are implementation acts on some topics relating to these fundamental freedoms – such as implementation acts based on the Directive 2006/123/EC on services in the internal market - although they do not bear relevance with regard to this project.

ii. Private international law

Obviously, the regulations Brussels I and Rome I do not require any implementation under Luxembourgish law.

iii. Posting of workers directive (including Enforcement directive)

In 2002, Luxembourg transposed almost literally articles 1 and 3 of the PWD. Amendments brought in 2010 tend to limit the notion of posting in terms of length of stay and highlight the fact that the posting is strictly dependent on the contract for the provision of service. In this way, the applicable law gives further information on the elements described above.

The provisions of the Labour Code regarding posting do not impose specific conditions in order to consider the activity of a posted worker as "normal" in their country of origin, such as those concerning the regularity of the activities of the employee in the country of origin, or a minimum period of previous employment in the country of origin. Article L. 141-1 (3) of the Labour Code merely defines the posted worker as the one who "regularly works abroad".

Definition of posting

Article L. 141-1 of the Labour Code provides for that« (1) The provisions in Article L. 010-1 (1) [mandatory provisions of national public policy], except items 1, 8 and 11, shall apply to undertakings, with the exception of merchant navy seagoing personnel, which post workers to the territory of the Grand Duchy of Luxembourg as part of a transnational provision of services.

The automatic adjustment of wages to changes in the cost of living provided in paragraph (1) subsection (2) of Article L. 010-1 applies to posted workers, only in relation to the legal minimum wage or in relation to minimum wage rates applicable in the sector, branch and / or occupation by application of a collective agreement declared generally binding.

(2) 'Posting' within the meaning of paragraph (1) above means inter alia the following operations carried out by the undertakings concerned, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting:

1. the posting of workers, albeit for a short or predetermined period, on the account of undertakings and under their direction, as provided for in paragraph (1) of this Article, to the territory of the Grand Duchy of Luxembourg under a contract concluded between the undertaking making the posting and the party established or operating in Luxembourg for whom the services are intended;

2. the posting of workers, albeit for a short or predetermined period, to the territory of the Grand Duchy of Luxembourg to an establishment owned by the undertaking making the posting or to an undertaking owned by the group the undertaking making the posting forms part of;

3. the posting, without prejudice to the application of Title III of this book [governing temporary employment and the temporary hiring-out of employees], by a temporary employment undertaking or within the framework of the hiring-out of employees, of workers to a user undertaking established or operating in the territory of the Grand Duchy of Luxembourg, albeit for a short or predetermined period.

Implementing the *exemption* provided for by Article 3(2), Dir. 96/71, Article L. 141-2, Labour Code provides that:

« (1) In the case of the posting of workers within the meaning of Article L. 141-1 in the framework of *initial assembly and/or first installation of goods* where this is an integral part of a contract for the supply of goods and necessary for putting the goods supplied into use and carried out by the skilled and/or specialist workers of the undertaking supplying the goods, Article L. 010-1 (1) points 2 and 4 of this Law shall not apply, if the period of posting does not exceed eight calendar days. The aforesaid length of the posting shall be calculated on the basis of a reference period of 12 months. For the purpose of such calculations, account shall be taken of any periods during which the post has been filled by a worker replacing a posted worker.

(2) However, the derogation laid down in paragraph (1) above shall not apply to activities in the *field of building work* relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following works: 1. Excavation; 2. Earthmoving; 3. building work; 4. assembly and dismantling of prefabricated elements, including sanitary and heating installations and the installation of alarm systems and luminous signs; 5. fitting out or installation; 6. Alterations; 7. Renovation; 8. Repairs; 9. Dismantling; 10. Demolition; 11. Maintenance; 12. upkeep, painting and cleaning work; 13. Improvements »

The provisions of the Labour Code relating to the posting are designed in general terms and do not exclude any sector or mode of delivery of work within the provision of service. They therefore also apply to road transport sector, including cabotage and transnational provision of work force.

Regulation (EC) No. 1072/2009 establishing common rules for access to the market of international transport of goods by road (among other governing cabotage) provides in recital (17) that "Directive 96/71 (…) on the posting of workers in the framework of a provision of services applies to companies carrying transport cabotage services". Accordingly, Article 2 of the collective agreement on working conditions in the transport sector and logistics, signed on 1 February 2010 between the unions, (OGBL-ACAL, independent trade union confederation in the transport sector, LCGB, Federation of Christian Trade Unions), and the employers organization CLC-Transport Group, the Convention applies "without prejudice to the provisions of article L. 141-1 – L. 141-4 of the Labour Code implementing the PWD".

The law of 20 December 2002 was amended by the law of 19 May 2006, which in the article which lists the types of legal provision applying to posted workers added the concept of "break time and daily rest period" to

that of "duration of employment" and of "weekly rest period". (point 3 of §1 of Article 1, Principle of the territorial application of labour law).

Two provisions – the question of minimum wages and of indexation – have been treated separately:

- the applicability to all workers, including posted workers, of the minimum wage levels set by the law and by universally applicable collective agreements, of arbitration awards with a scope similar to that of universally applicable collective agreements and of agreements at the level of interprofessional social dialogue which are declared to be universally applicable. The text stipulates that the minimum wages referred to are obviously the legal minimum social wages for skilled and unskilled workers, but also the minimum wage levels applicable to a sector, branch or professional category under the terms of one of the aforementioned forms of universally applicable agreement. For example, the minimum wage set by the universally applicable collective agreement in the construction sector for a bricklayer with a given level of qualification and seniority is of course applicable to all workers.

- the indexation of salaries, for which the text has been adapted to take account of the content of the CJEC ruling, which limited its application for posted workers to the minimum wage levels defined in the previous point. The text therefore mentions the indexation of salaries as an area of national social public order with regard to workers working in Luxembourg, stipulating that for posted workers, indexation relates purely to the minimum wage levels; this is the principle recommended by the CJEC as consistent with Community legislation.

Points 8 and 11 in the old legislation have been repealed. These points listed as elements of national public order the Luxembourg laws on part-time and fixed-term employment as well as those on collective agreements. The CJEU has declared these provisions to be contrary to European legislation.

Two new provisions have been inserted in the Labour Code in order to define and contextualise the concept of cross-border working, in line with the purpose of the Directive:

- the definition of service provision: a provision which is the subject of an ad hoc contract relating to a precise object or activity which is time-limited and comes to an end with the execution of the contract's object. The text stipulates that a service provision arrangement cannot be used to make provision for the company's "normal" activities, via the use of a service provision contract. The aim is to make it impossible for regular salaried workers to be replaced on a long-term basis by the employees of service-providers, particularly those subject to less restrictive pay and working conditions than the user company.

- maximum duration for a service provision contract. For the sake of harmonisation with the texts on social security, this limit is set at a period of 12 months, which may be prolonged by 12 months.

Articles 142-2 and 142-3 on monitoring the application of labour law have also been modified in line with the Court's directions.

National Implementation of the Enforcement Directive (2014/67/EC)

Last 14 March 2017, the legislature introduced a new set of rules, in order to implement the enforcement directive, now amending the Labour Code.

The law of 14 March 2017 1) amending the Labour Code; 2) amending Article 3 of the Law of 17 June 1994 laying down measures to safeguard employment, price stability and business competitiveness (hereinafter "the Law") entered into force on 24 March 2017.

The Law transposes into national law 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.

The Law introduces some important changes into the Labour Code:

- Company responsibility in subcontracting chains, through the setting up a mechanism for the *joint and several liability of all companies involved*. As the compliance with the applicable rules in the field of posting and the effective protection of workers' rights is a matter of particular concern in subcontracting chains, the Law introduces a mechanism of direct subcontracting liability, in addition to the liability of the employer with respect to the employee's rights.

The Law foresees that the project owner (*maître d'ouvrage*) and the principal (*donneur d'ordre*) who entered into a service agreement with a service provider must inform the Labour Inspectorate (Inspection du Travail et des Mines) about the said service agreement. In case the project owner or the principal is informed by the Labour Inspectorate (i) that the service provider did not pay the posted workers' salary or (ii) of a violation of the public order provisions by the service provider, it must request the service provider by registered letter to immediately remedy this situation.

The service provider is consequently required to confirm by registered letter and within a reasonable period of time (at the latest within 15 days), that it has addressed the situation. In case the service provider does not respond to the injunction, the project owner or the principal must inform the Labour Inspectorate.

In case the project owner/the principal does not comply with the above-mentioned information and injunction obligations, it will be held jointly liable with the service provider with respect to the outstanding wages and social security contributions. The project owner and the principal may further be subject to an administrative fine, the amount of which may vary from EUR 1,000.- to EUR 5,000.- per posted worker (with a cap of EUR 50,000.-).

- The introduction of an *electronic platform for posting* arrangements, following administrative practices already in place. The electronic platform which the Labour Inspectorate has already put in place in 2013 is improved and extended with the Law. This mechanism should improve the accessibility of the relevant information and provide the required information about posted employees in a clear and precise manner.

After having provided the Labour Inspectorate with all the required information via the electronic platform, the Law provides that the posted employees will receive a so-called "social badge" which contains all relevant information with respect to their posting.

Whereas in the past it was further foreseen that the posting entity must provide a contact person who holds all the necessary documentation with respect to the given posting, the Law now foresees that the posting entity must designate a contact person in Luxembourg to liaise with the Labour Inspectorate and the other authorities in case of queries regarding the posting of workers.

- New documents to be produced by the posting company, for effective control ensuring posted employees actually receive payment of wages due in relation to hours actually worked;

- Strengthening of administrative collaboration at the national level, associating the Directorate of Immigration, the Department of Public Works, the Public Roads Administration and the Administration of Public Buildings with the supervisory roles falling within the competence of the Labour and Mines Inspectorate;

- The introduction of effective redress mechanisms enabling posted employees to lodge complaints or initiate legal proceedings before the Luxembourg courts, directly or with their agreement, through trade unions, even if the employee has left Luxembourg territory in the meantime;

- The introduction of administrative penalties for infringements of the provisions on the posting of employees, where offenses are punishable by an administrative fine of between EUR 1,000 and EUR 5,000 per seconded employee, but the total amount of the fine cannot exceed EUR 50,000;

- The introduction of rules governing the cross-border enforcement of administrative penalties and fines between the Grand Duchy of Luxembourg and another Member State;

- The introduction of the possibility for the ITM to close a site for serious breaches of labour law.

Core of the terms of employment from Luxembourgish labour laws

Article L. 141-1, paragraph (1) of the Labour Code excludes the application of some of provisions declared to be mandatory provisions of national public policy in case of posting. They are contained in numbers 1, 8, and 11 of the following list. All the remaining provisions are applicable also to posted workers.

Article L. 010-1 of the Labour Code provides the following:

« (1) Are public policy provisions applicable to all employees occupied in the territory of the Grand Duchy of Luxembourg all legal, regulatory and administrative provisions, as well as those resulting from collective agreements declared generally binding, or resulting from a decision of arbitration with a scope similar to the collective agreements declared generally binding, and the provisions of agreements resulting from multi-industry social dialogue declared generally binding, regarding:

1. written contracts of employment or documents drawn up under Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship;

2. minimum social wage and automatic adjustment of pay to changes in the cost of living;

3. duration of employment rest breaks, daily rest and weekly rest period;

4. paid leave;

5. collective leave;

6. public holidays;

7. rules on temporary employment and the hiring-out of employees;

8. rules on part-time and fixed-term employment;

9. protection measures applicable to the terms and conditions of employment of children and young people, pregnant women and women who have recently given birth;

10. non-discrimination;

11. collective agreements;

12. compulsory non-performance of duties in accordance with legislation on badweather unemployment and technical unemployment;

13. unauthorised or illegal employment, including provisions concerning work permits for workers who are not nationals of a Member State of the European Economic Area;

14. the health and safety of employees at work in general, and more particularly the minimum health and safety provisions laid down by Grand Ducal regulation on the basis of article L. 314-2.

(2) The provisions of paragraph 1 of this Article shall apply to workers, irrespective of their nationality, at the service of any undertaking, without prejudice to the nationality of the undertaking, and to the legal or effective location of its registered office.»

iv. Social security

v. European Social Dialogue

b. Implementation of EU law on road transport (only a list, not in detail)

- Loi modifiée du 12 juin 1965 sur les transports routiers (Mém. A-N°32 de 1965) et ses règlements d'exécution;
- Loi modifiée du 29 juin 2004 portant sur les transports publics et modifiant la loi modifiée du 12 juin 1965 sur les transports routiers (Mém. A-N°17 de 2006, texte coordonné);
- Règlement grand-ducal du 15 mars 1993 portant exécution et sanction du règlement (CEE) n° 881/92 du Conseil des Communautés Européennes du 26 mars 1992 concernant l'accès au marché des transports par route dans la Communauté exécutés au départ ou à destination du territoire d'un Etat membre ou traversant le territoire d'un ou plusieurs Etats membres (Mém. A-N°28 de 1993);
- Règlement grand-ducal du 28 février 1994 portant exécution et sanction du règlement (CEE) n° 684/92 du Conseil des Communautés Européennes du 16 mars 1992 établissant des règles communes pour les transports de voyageurs effexctués par autocars et par autobus, et du règlement (CEE) n° 1839/92 de la Commission des Communautés Européennes portant modalité d'application du règlement (CEE) n° 684/92 du Conseil (Mém. A-N°20 de 1994);

- Règlement grand-ducal du 14 avril 1992 fixant les conditions de l'admission de transporteurs non-résidents aux transports nationaux de marchandises par route au Benelux (Mém. A-N°89 de 1992);
- Règlement grand-ducal concernant les modalités et les sanctions relatives à l'installation et l'utilisation des tachygraphes (Mém. A-N°137 de 2011).

3. National framework on transnational transport

a. Introduction and most important problems

The Luxembourg Labour Code contains provisions specifically dedicated to international transports located in the Chapter IV of the first Title, Book II of the Labour Code (articles L.214-1 to L.214-4) on the organisation of the working time of persons performing mobile road transport activities (Chapitre IV.- Durée du travail des salariés exécutant des activités mobiles de transport routier), which are coming from the national transposition laws[7] of the Directive 2002/15/EC[8] . Those provisions are specific to these activities and are not under the scope of the general applicable provision of article L. 211-2 regarding working time of workers in Luxembourg in general, or under the one of articles 211-15 et 16 which regards night working time. Those provisions refer to working time are applicable to every mobile workers and only more favourable national provision can derogate to them (Article L.214-1).

In this respect, a specific collective bargaining is applicable to transport and logistics workers as well[9], which organise generally more favourable working conditions that the general Law provides (not only regarding working hours) for workers in transport and logistics in general.

Another Chapter 5 has been enshrined in the Labour Code book 2 regarding the working hours in the railroad by the Law dated 2nd of June 2011 which transposes Directive 2005/47/EC on the agreement on certain aspects of the working conditions of workers engaged in interoperable cross-border rail services and creates new articles L.215-1 à L.215-17 of the Labour Code.

Collective labour agreements in the transport sector

The collective agreement applicable to transport and logistics in Luxembourg (*Convention collective de travail pour le secteur des transports et de la logistique*) – available in French at this link: http://www.itm.lu/home/droit-du-travail/conventions-collectives-de-tra/conventions-collectives-de-trava.html – regulates the probation period, mandatory provisions in the individual contract of employment, respective obligations of the parties, contract ending, vacation, provisions regarding heavy transportation, equality, working time, registers, time computation, road costs and cash paid in advance etc. It has been given the declaration of general applicability

[7] Loi du 21 décembre 2007 portant 1. transposition de la directive 2002/15/CEE du Parlement européen et du Conseil du 12 mars 2002 relatif à l'aménagement du temps de travail des personnes exécutant des activités mobiles de transport routier; 2. modification du Code du travail. (Official publication: Mémorial Luxembourgeois A; Number: 248; Publication date: 2007-12-31; Page: 04580-04582)
Loi du 28 juillet 2011 portant transposition de la directive 2002/15/CE du Parlement européen et du Conseil du 11 mars 2002 relative à l'aménagement du temps de travail des personnes exécutant des activités mobiles de transport routier pour les conducteurs indépendants. (Official publication: Mémorial Luxembourgeois A; Number: 182; Publication date: 2011-08-23; Page: 03240-03242)

[8] Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities

[9] "Convention collective" accessible here: http://www.itm.lu/home/droit-du-travail/conventions-collectives-de-tra/conventions-collectives-de-trava.html, which targets specifically mobile workers on its chapter 2.

on 3 August 2010.[10] The most relevant parts of this Collective agreement are contained in Article 18 *et seq*., and deal with working time, maximum duration of work, availability, rest breaks, and indemnities.

b. Minimum wage

The Collective agreement declared of general applicability (3 August 2010) draws a distinction between those workers who drive in any case work moving, and the "*sedentaires"* (office workers and others).

As for the remuneration of the first category, the Collective agreement provides (Article 31):

a) A distinction among drivers:
- catégorie I: conducteurs de véhicules pour lesquels le permis de conduire B est exigé;
- catégorie II: conducteurs de véhicules pour lesquels le permis de conduire C1 est exigé;
- catégorie III: conducteurs de véhicules pour lesquels le permis de conduire C est exigé;
- catégorie IV: conducteurs de véhicules pour lesquels le permis de conduire C1E est exigé;
- catégorie V: conducteurs de véhicules pour lesquels le permis de conduire CE est exigé.

b) A different barème (index) according to seniority:

c) Exemplifying, the following barèmes are for the first category (licence B):
- 1 747,96: < 6 months
- 1 770,71: > 6 months
- 1 798,13: 2-3 years
- 1 892,28: 4, 5, 6 years
- 1 986,51: 7, 8, 9 years
- 2 060,66: 10, 11, 12 years
- 2 099,66: 13, 14, 15 years
- 2 137,33: 16, 17, 18
- 2 174,94 : 19, 20, 21
- 2 212,93: 22, 23, 24
- 2 244,04: 0 or > 25

For international transports, an additional rule applies, according to which when the trip is in charge of two drivers, the period of driving to complete the trip (amplitude) can be extended to 21 hours, at the condition that the drivers take a rest of minimum 9 consecutive hours. This is the implementation of the rule contained 561/2006.

Additional allowances are given for lunch breaks and for those trips that are requested to start in places other than the seat of the company or the domicile of the driver (Article 30).

[10] Règlement grand-ducal du 3 août 2010 portant déclaration d'obligation générale de la convention collective de travail transports et logistique et d'un avenant y relatif, conclus entre le Groupement Transports, d'une part, et les syndicats LCGB et OGB-L/ACAL, d'autre part.

4. Monitoring and enforcement

a. Information and transparency

The Labour and Mines Inspectorate (ITM) must be informed once the work has started that a posting is taking place in connection with the provision of a service in order to be able to take the necessary measures for effective inspection. The information to the ITM must include the essential points: the identity of the posting company, its representative and of the person in Luxembourg who holds the documents necessary for inspection; the place of execution of the service provision in Luxembourg; the expected duration of the service provision, and the essential information about the posted workers

The documents necessary for inspection must be kept in Luxembourg only for the duration of the posting. They do not have to be kept in the possession of an ad hoc representative but in the possession of a person present in Luxembourg for the duration of the work; the choice of that person is left up to the company. Obviously, the ITM must be informed who this person is. If a legal person is chosen, it must carry on a material, real economic activity, in order to prevent the choice of so-called "PO Box companies", making proper inspection impossible.

b. Monitoring (administration, notification)

1. Administrative measures

The road transport sector in the Grand Duchy of Luxembourg benefits from supervision jointly administered at the administrative level by the Department of Transport and the Ministry of Middle Classes and Tourism and on the ground by the Grand Ducal Police and the Administration Customs and Excise. At the international level, effective and efficient information exchange takes place within the framework of the Euro Control Route administrative arrangement, which regularly gives rise to concerted action on the ground in order to ensure road safety and ensure compliance with the rules on the working conditions of professionals in the sector.

2. Notification system

After the enactment of the law 14 March 2017, implementing the enforcement directive of 2014, a number of information must be notified to the ITM in case of posting:

(New) Article L. 142-2, Labour Code

For the purposes of this Title, an undertaking, including an undertaking which has its head office outside the territory of the Grand Duchy of Luxembourg or which carries out its work habitually outside Luxembourg, of which one or more employees are employed in Luxembourg, including those who are temporarily seconded in accordance with Article L.141-1, shall, as soon as the work is commenced in Luxembourg, without prejudice to the possibility of an earlier declaration informing the Labor and Mining Inspectorate by communicating to

it, on the electronic platform intended for this purpose, the elements essential for obtaining the social badge and the legal control to be carried out by the Inspection Labor and Mines:

1. identification data of the sending employer and its representative;

2. the identity of the legal or natural person determined freely and clearly by the posting company present in Luxembourg who will be the reference person to communicate with the Labor and Mines Inspectorate and the other competent authorities listed in article L.142-4 respecting the conditions of posting;

3. the start date and expected duration of the posting, in accordance with the contract for the provision of services;

4. the place or places of work in Luxembourg and the foreseeable duration of the work;

5. the surnames, forenames, dates of birth, nationalities and professions of the employees;

6. the quality in which the employees are engaged in the undertaking and the occupation or occupation to which they are regularly assigned, as well as the activity they exercise on posting to Luxembourg.

Any subsequent change, in particular of place or purpose of the work, shall be reported to the Labor and Mining Inspectorate in the same manner, without prejudice to the need for a new service contract for a different purpose.

(New) Article L. 142-3, Labour Code

Any company, generally established and having its registered office abroad, or which does not have a permanent establishment in Luxembourg within the meaning of the tax law, of which one or more employees exercise, for whatever reason, activities in Luxembourg, shall be obliged to communicate to the Labor and Mining Inspectorate on the electronic platform intended for this purpose, from the date of commencement of the posting, without prejudice to the possibility of a previous declaration decided by the company the following necessary documents to prove the information referred to in Article L.142-2:

1. a copy of the contract of supply if necessary;

2. the certificate of prior declaration or the replacement certificate issued by the ministry responsible for the middle classes, provided for by the Law of 19 June 2009 on the transposition of Directive 2005/36 / EC as regards (a) general system for the recognition of evidence of formal qualifications and professional qualifications; (b) the provision of services;

3. the original or certified copy of Form A1; or, where appropriate, the precise indication of the social security bodies to which the workers are affiliated during their stay in the territory of Luxembourg;

4. the VAT certificate issued by the Registry and Domain Administration;

5. either a copy of the employment contract or an attestation of conformity with Directive 91/533 / EEC of 14 October 1991 concerning the employer's obligation to inform the employee of the conditions applicable to the contract or employment relationship as transposed by the legislation of the competent State issued by the competent supervisory authority of the country in which the sending company has its headquarters or usually performs its services;

6. an attestation of conformity issued by the competent supervisory authority of the country in which the posting office has its registered office or habitually performs its work, of the employment relationship of the seconded employees at the time of their posting in relation to the competent legislation having transposed Directives 97/81 / EC concerning part-time work and 1999/70 / EC concerning fixed-term work;

7. official documents attesting to the professional qualifications of the employees;

8. pay slips and proof of payment for the duration of the posting;

9. the time and place of daily work for the entire period of posting in Luxembourg;

10. a copy of the residence permit or residence permit for any third-country national posted to the territory of Luxembourg;

11. a copy of the medical certificate of hiring issued by the sectorally competent occupational health services.

Documents must be translated into French or German.

c. Enforcement

i. General

a. Inspection authorities

The Inspectorate of Labour and Mines (ITM) [11] has responsibility regarding working conditions and protection of workers in the exercise of their professional activity (with the exception of civil servants).

Under the common principles, the main objective of inspections carried out by inspectors in enterprises is to verify whether employers have taken all necessary measures to comply with the legislation if they have implemented adequate means to detect, prevent and correct any loopholes that may represent a risk to employees in their establishments and to ensure that at least the basic legal conditions are respected in order to guarantee the improvement of working conditions by promoting sustainable social development.

In order to verify the conformity of the companies with the legal and regulatory provisions, the ITM acts by random checks or not, following a complaint submitted to him or to an accident at work occurred.

Following a complaint to the ITM, the secretariat completes a form with the required data from the complainant, who then meets with the labor inspector in charge of the economic sector concerned. It verifies the existence and nature of the problem and completes the respective headings of the form. It is up to the inspector to decide whether or not to visit a company as a result of the complaint.

As a rule, checks on working conditions with employers are not announced. In exceptional cases, an employer may be informed in advance of a scheduled visit. In this case, the employer is informed by letter of the basis of the upcoming inspection as well as the documents required before the inspection. The employer may transmit the required documents by e-mail (preferably) or by any other means of correspondence. The

[11] http://www.itm.lu/en/home.html

inspector shall also inform the staff representative of the planned visit. The method of preparation and the size of the inspection visit depend on the size, number of employees and the scope of the company's activities.

In general, the labor inspector conducts the inspection in the company itself. In the case of a larger inspection, a lawyer or one or more agents of the other bodies concerned may accompany the inspector.

The collection of the necessary information and its subsequent evaluation can prove to be thorough and time-consuming research tasks.

As regards to the posting of workers in the territory of the Grand-Duchy, the ITM controls :

- whether the posted employee has a work permit in the event the employee is subject to this requirement ;
- whether the employee is affiliated to social security in their country of origin, and
- whether the worker is occupied for this company in their country of origin ;

The ITM cannot verify in practice what is the employee's seniority within the sending company, since the ITM has in principle no access to the employment contract of the employee. Indeed, to this end, the contract should be part of the documents that must be made available to the ITM under the law on posting. However, since the Act of April 11, 2010, the sending company may decide to make available to the ITM either a certificate of compliance with the Directive on employee information on the employment relationship, or the employment contract. It is only when the ITM notes irregularities that it recovers his "usual" prerogatives, and in particular that it may require directly the production of the employment contract.

Identification of genuine posting and prevention of abuse and circumvention

One of the main goals of the Enforcement Directive is to prevent any misuse by so-called "letterbox companies" by way of monitoring which posting company genuinely performs substantial and real activities in its home Member State.

In order to serve the said purpose, the Law foresees that in case the Labour Inspectorate has doubts about the reality of the posting, it will carry out an overall assessment of all factual elements which it considers necessary in order to determine the temporary nature of the posting and whether the concerned employer has its factually confirmed registered office in the Member State from which the posting is made.

The Law further explicitly specifies that the posting company must exercise a real and substantial activity in its country of origin.

The Law foresees that four additional documents need to be communicated to the Labour Inspectorate, next to the documents already foreseen in the past. The posting entity will need to submit to the Labour Inspectorate, amongst others, a copy of the employment contract of the posted workers, the pay slips of the posted workers as well as the proof of payment of the salary during the whole period of the posting (which also applies to local employers outside a secondment scenario), a register containing the work duration during the total period of the posting, a copy of the residence permit of any third country national posted to Luxembourg and a copy of the pre-employment medical certificate.

This additional documentation should allow the Labour Inspectorate to efficiently verify whether the social rights of the posted workers are respected as well as to verify whether they are all in possession of the necessary administrative authorisations to legally reside and take up work in Luxembourg.

b. Sanctions, including public prosecution

Article L. 214-10, Labour Code provides for a number of sanctions applicable to the employer (a) or to senders, commissioners, charterers, agents, consignees etc. (b).

a) to have occupied the employees falling within the scope of this Act beyond the maximum hours of work and without respecting the provisions relating to the computation of working hours; or for failure to comply with the provisions on maximum working time limits and the computation of working time, or to rest breaks, or to night work.
b) To give to the employer such orders that have as a direct consequence that of infringing the above mentioned rules

In both these cases a fine from € 2.000 to 10.000 plus an imprisonment from 8 days to 6 months can be imposed.

In case of relapse within two years, the sanctions can be doubled in their maximum amount.

ii. Redress: individual and collective (civil) redress

The Enforcement Directive provides that the Member States should not only guarantee a good cooperation between the different local authorities but also take appropriate measures in the event of failure to comply with the obligations laid down in the Posting Directive, including administrative and judicial proceedings.

The Law provides for increased cooperation between the different Luxembourg ministries and administrations in order to guarantee an increased control of the rights of the posted workers and to monitor genuine posting.

The Law further foresees the possibility for a posted worker to file a complaint against his/her employer or even to engage in judicial or administrative proceedings in case he/she considers having suffered a prejudice due to the non-compliance by the employer with the applicable rules. The Law even provides for the possibility for trade unions claiming general national representativeness to engage in legal proceedings in the name and on behalf of the posted workers whose rights have been violated, provided that they have received the approval of the concerned employee to act in his/her name.

According to the new Article L. 143-1, Labour Code, individuals (seconded persons within the meaning of Article L.141-1 may, including after leaving the territory of the Grand Duchy of Luxembourg) can enforce their rights on the conditions of employment guaranteed by the Code without prejudice, where appropriate, to the possibility of bringing legal proceedings before the competent courts of another State, in accordance with the international conventions on jurisdiction .

According to Article L. 143-1 (2): Trade unions that demonstrate general national representativeness or representativeness in a particularly important sector of the economy in accordance with Articles L.161-4 and L.161-6 may exercise before civil or administrative courts, rights conferred on the seconded employee in the event of a breach of the rules and conditions relating to the posting and which are directly or indirectly harmful

to the collective interests which they are intended to defend by virtue of their object, even if they do not justify an interest material or moral.

(3) However, the trade union organizations concerned may not exercise the rights granted to employees by main means unless they expressly oppose them by applying the procedure set out below.

The employee is thus informed of the legal action envisaged by the trade union organization by registered letter or by any other means making it possible to confer certain date. This letter specifies the nature and purpose of the action envisaged by the trade union organization and states that:

- the employee may inform the trade union of his opposition to the proposed action within fifteen days of receipt of the letter;

- the trade union organization may itself exercise the remedies;

- the employee may at any time intervene in the proceedings initiated by the trade union.

(4) When a legal action falling within the scope of this Title is brought by a seconded employee, the trade union organizations concerned may still intervene in the proceeding if the solution of the dispute can be of collective interest for its members, except in the case of a duly written disagreement on the part of the person who brought the action.

5. Problems and solutions found or contemplated

6. Literature

There are a few relevant publications in Luxembourg, most of which have no academic relevance and are limited to a description of the applicable legislation

7. Case law

Cour d'Appel du 08/05/2014 n° 38933

Article 17.1 [of the Collective agreement applicable to the transport sector] , entitled "Transport of dangerous goods", can not be assimilated to Article 17.5, entitled "Increase in wages for drivers who have successfully completed continuous vocational training" in the collective agreement for the professional transport of goods by road, since the two articles each refer to a different assumption. Article 17.1 to cover the reimbursement of ADR training costs and Article 17.5 to the supplement by obtaining a certificate attesting to a professional training. Article 17.5 provides that Drivers who have taken the courses and passed an examination for continuing vocational training are entitled to a salary supplement of 41,70 EUR (index 652,16) per month. This supplement is adapted to the evolution of the cost-of-living index.

Cour d'Appel du 18/11/2010 n° 34263

Overtime in the field of road transport is generated by the particular nature of the work to be accomplished, which is partly dependent on the hazards of road traffic. The employer's approval of the tasks entrusted to the drivers is therefore incompatible with a lack of agreement for the provision of actual overtime hours required for the performance of the mission.

Tribunal du Travail du 06/06/2017 n° 1644

In order to be entitled to the payment of overtime, the employee must not only prove the materiality of the hours worked, but must also in principle justify the necessity of the hours and thus prove the agreement of his employer with the provision of those hours. However, it is settled case law that in the field of road transport, overtime has its raison d'être in the particular nature of the work to be accomplished, which is partly dependent on the vagaries of road traffic. The employer's approval of the tasks entrusted to drivers, which is not called into question in the present case, is therefore incompatible with a failure to agree on the actual overtime required for the performance of the mission. If, in the particular field of road transport, the agreement of the employer is thus presumed, it is nevertheless for the employee who claims the payment of overtime or supplementary to prove the reality of the provision of the alleged supplementary or supplementary hours.

Tribunal du Travail du 02/05/2011 n° 1911

As a general rule, it is for the employee who claims the payment of overtime to establish, in the face of the employer's challenges, not only the actual overtime work but also the employer's request or agreement . If it is the principle that the employee can not take into account overtime at will, but must justify the necessity and thus obtain the approval of his employer, it must be admitted that the hours in the field of road transport find their raison d'être in the particular nature of the work to be accomplished, partly dependent on the vagaries of road traffic.

Tribunal du Travail du 22/09/2008 n° 1859

It is settled case-law that, although it is a principle that the employee can not account for overtime at the sole discretion of the employee but must justify the necessity of such overtime and thus obtain the approval of his employer, to recognize that overtime in the field of transport according to road and defined in Article 1 of the collective labor agreement for professional transport of goods by road declared to be a general obligation by Grand-Ducal Regulation of 28 September 1992 as being all working hours exceeding working time after weekly enrollment as well as all hours (working) exceeding the amplitude, that is to say the time between the beginning and the end of work their reason for being in the particular nature of the work. The following result to be fulfilled partially depend on the vagaries of the road traffic. The employer's approval of the tasks entrusted to the drivers is therefore incompatible with a lack of agreement for the provision of actual overtime required for the performance of the mission.