LUXEMBOURG

Athanase Popov[1] and Luca Ratti[2]

Question 1

The Grand Duchy of Luxembourg is in a unique situation within the EU. The majority of its workers are foreign nationals, mostly EU citizens. Moreover, 46% of its workforce is made up of frontier workers (commuters, *frontaliers, Grenzgänger*) who reside in the neighbouring countries, but work in the Grand Duchy[3]. Besides, even among the resident population, more than half of the workforce is made up of workers who were not born in the country and often do not intend to settle there[4]. As a result, Luxembourg is the EU Member State with the highest share of mobile workers.

The existing EU framework on equal treatment of EU mobile workers is well implemented in Luxembourg, sometimes better than in neighbouring States. Article 10bis of the Luxemburgish Constitution provides that "Luxembourgers are equal before the law. They are admissible to all public, civil and military employment; the law determines the admissibility of non-Luxembourgers for such employment". Yet, this is not always enough to fully enforce equal treatment due to the local specifics which demand more far-reaching action.

Equal treatment is notably mandated by the law of 28 November 2006 transposing Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[5]. The law of 28 November 2006 has a broader scope than the Directive in that it prohibits direct and indirect discrimination based on religion, personal opinions, disability, age, sexual orientation, race and ethnicity. Nonetheless, consistently with the scope of the Directive, the law of 28 November 2006 does not cover discrimination

[1] PhD in EU law, Master of Slavonic Studies, Legal and policy officer at the European Commission, assistant to the Director of Euratom Safeguards, DG ENERGY; former member of the Executive Board of Association de Soutien aux Travailleurs Immigrés, reachable at: athanase.popov@ec.europa.eu. The views expressed here are personal to the author.

[2] Associate Professor of European and Comparative Labour Law, University of Luxembourg.

3 "Panorama sur le monde du travail luxembourgeois à l'occasion du 1er mai", Regards, n° 03, 04/2022, available at: https://statistiques.public.lu/dam-assets/catalogue-publications/regards/2022/regards-03-22.pdf (Institut national de la statistique et des études économiques, hereinafter "STATEC", accessed on 8 July 2022).

[4] *Ibid*. According to STATEC, out of 246 000 resident workers in 2021, only 121 000 were Luxembourgish nationals, which of course includes foreign workers having recently acquired dual or multiple citizenship. Thus, the total workforce in the country is mostly foreign.

[5] The law has been codified as Article L.251-1 of the Labour code (*Code du travail*).

based on nationality, which constitutes a major weakness, given the percentage of foreign workers in Luxembourg.

a)

Equal treatment is commonly well respected in Luxembourg, with national authorities and courts fully aware of its meaning and significance.

The Law of 28 November 2006 introduces the possibility for associations to assist a victim of discrimination before national courts and tribunals. Such bodies, however, must have legally existed for five years and be recognised by the Ministry of Justice as being nationally representative in the field of anti-discrimination.[6]

However, when it comes to the practical implementation of the law, language may lead to various situations of indirect discrimination, notably via the inclusion of contractual obligations for the foreign worker to learn Luxembourgish – a language with a very recent grammar and fluctuating pronunciation and vocabulary – within a given deadline. For workers who are not gifted for languages and who have very few occasions to practice Luxembourgish, these contractual obligations may lead to unfair dismissals.

The same applies to the public sector, where language may lead to situations of indirect discrimination on the basis of nationality in the sense that the opening of various positions to EU citizens is partially limited via linguistic requirements, even where there are no communication issues. The country thus insists on the promotion of the national language among foreigners, instead of insisting on a good knowledge of Luxembourgish grammar by all citizens, including natives, who typically practice Luxembourgish as a mostly oral language. Thus, language may constitute a specific barrier to equal treatment.

Another specificity of Luxembourg is the relatively high number of EU institutions based in the country. With regard to barriers to equal treatment, EU officials may face specific issues such as medical overcharging, which constitutes indirect discrimination on the basis of nationality according to the General Court of the EU[7].

Access to vocational training is ensured without any known cases of discrimination.

[6] European network of legal experts in gender equality and non-discrimination, "A comparative analysis of non-discrimination law in Europe", Publications Office of the European Union, Luxembourg, 2019, 86.

[7] Judgment of the General Court (Ninth Chamber) of 30 April 2019, *Francis Wattiau v European Parliament*, T-737/17, ECLI:EU:T:2019:273, on which the only available academic commentary seems to be A. Popov, "Surfacturations hospitalières et qualité de vie des fonctionnaires européens au Grand-Duché de Luxembourg : le Tribunal de l'Union constate que la convention négociée entre l'Union et les hôpitaux luxembourgeois viole le principe de non-discrimination en raison de la nationalité", *Revue des affaires européennes*, 2019/2, 391-399.

b)

In principle, EU citizens who are not economically active are not treated differently compared to EU workers. Compared to other Member states, Luxembourg has a relatively low percentage of economically inactive persons, mostly due to its dynamic labour market.[8] However, the lack of financial resources often leads to very difficult social conditions, i.e. the impossibility to benefit from medical insurance. On the other hand, pensioners are allowed to benefit from medical and social insurance in Luxembourg even if they reside most of the time in another Member State.

Question 2

The Luxembourgish approach towards equal treatment in the area of social security benefits is split into conflicting policy lines. Certain aspects of equal treatment in the area of social security benefits are not particularly contentious, while others are.

a)

Albeit the issue of granting social benefits to economically inactive citizens is less present in Luxembourg as there are fewer economically inactive EU citizens in the country (the unemployment rate being one of the lowest in the EU), the civil society often reports about people who may not claim e.g. medical insurance, as there is no equivalent to the French *couverture maladie universelle* for people without sufficient resources[9].

For economically inactive mobile citizens who are not beneficiaries of international protection, Luxembourg indeed makes access to both social assistance and social security benefits subject to the requirement that such citizens legally reside there. Thus, the citizens who are concerned must have comprehensive sickness insurance and sufficient resources so as not to impose an unreasonable burden on the social security system of the State.

b)

There is a strong opposition to the principle that the country of work of the parent(s) shall be responsible for paying *certain types of* family allowances when the child resides elsewhere. This opposition is not growing, it can rather be described as

[8] See S. Fernandes, "Access to social benefits for EU mobile citizens: "tourism" or myth?", Jacques Delors Institute Policy Paper, 168, 2016, 7.

[9] This has been a recurrent issue in Luxembourgish media for several years, at least as of 2018. See e.g. R. Van Dyck, "Luxembourg : à quand une couverture maladie universelle ?", *Le Quotidien*, 21.05.2018, available at: https://lequotidien.lu/a-la-une/luxembourg-a-quand-une-couverture-maladie-universelle/ (accessed on 25 July 2022).

constant and slightly decreasing for several decades, and it has led to a body of case-law of the Court of Justice, each time obliging Luxembourg to adapt its *legislation*. Thus, the so-called "boni pour enfant" allowance was analysed in *Giersch*[10], where the Court ruled that the previous Luxembourgish legislation, which made the grant of financial aid for higher education studies conditional upon the students' parents or guardians in Luxembourg, gave rise to a difference in treatment amounting to indirect discrimination between persons who reside in the Luxembourg and those who, not being residents of that Member State, are the children of frontier workers carrying out an activity in that Member State. The Court further ruled that while the objective of increasing the proportion of residents with a higher education degree in order to promote the development of the economy of that same Member State was a legitimate objective, which could justify such a difference in treatment, and while a condition of residence, such as that provided for by the Luxembourgish legislation was appropriate for ensuring the attainment of that objective, such a condition went beyond what was necessary in order to attain the objective pursued, to the extent that it precluded the taking into account of other elements potentially representative of the actual degree of integration of the applicant for the financial aid in the local society or labour market.

Such resistance to equal treatment is usually based on the view that scholarships awarded to students as per national law serve the purpose of increasing the percentage of people with higher education in the country, which until 2003 did not have a fully-fledged University. Previously, the government was even explicitly supporting primarily students who were Luxembourgish nationals. Indeed, pursuant to the Law of 22 June 2000, only Luxembourgish nationals and residents of Luxembourg were eligible for the aid[11]. Besides, the 2000 Law required Luxembourg nationals to merely prove their nationality, while non-Luxembourg Union citizens had to be domiciled in Luxembourg and covered by Articles 7 or 12 of the now repealed Regulation No 1612/68. Such discrimination was remedied by a Law of 2005, which required Luxembourgish nationals to reside on the territory

[10] Judgment of the Court (Fifth Chamber), 20 June 2013, *Elodie Giersch and Others v État du Grand-Duché de Luxembourg*, C-20/12, EU:C:2013:411. See generally, about *Giersch* and the subsequent line of case-law, J. Silga, "Luxembourg Financial Aid for Higher Studies and Children of Frontier Workers: Evolution and Challenges in light of the case-law of the Court of Justice", *European Public Law*, Volume 25, Issue 1 (2019) pp. 13-24. Specifically about *Giersch*, Síofra O'Leary writes that the Court of Justice "appears to proceed on the basis of the presumption that a frontier worker is not always as integrated in the Member State of employment as a migrant worker who is employed *and* resident in that State" (in *Common Market Law Review*, 51, 2014, p. 610).

[11] Thus, nationals didn't need to prove residence in Luxembourg, although according to the advisory Opinion of the Council of State on 21 March 2000 on the legislative draft No 4562, leading to the *Loi du 22 juin 2000 concernant l'aide financière de l'État pour études supérieures,* Luxembourg's scheme of financial aid for university studies had set as its primary objective the increase of the proportion of its resident population holding a higher education decree. Apparently not quite so, since nationals residing abroad didn't need to prove residence in order to benefit from the scheme.

of Luxembourg in order to be able to claim the aid at issue. Thus, between 2000 and 2005, frontier workers who, by definition, did not reside in Luxembourg, were excluded from the scope of the Law of 22 June 2000[12].

Luxembourgish society still feels that it is unfair for Luxembourg to pay for students whose parents do not reside in the country, thus overlooking or ignoring traditional arguments in favour of the principle "no taxation without consent", at the basis of modern democracies, whereby taxes should not be spent in accordance with purely national objectives, but in accordance with taxpayers' will.

Although the legislation at issue in *Giersch* was amended so as to – at least prima facie – comply with the Court's ruling, the litigation on similar grounds continued in Luxembourg, both before national courts and before the Court of Justice following preliminary references made by the former. Indeed, Luxembourg had not fully integrated the zero-discrimination rationale implicitly contained in *Giersch.*

The Law of 19 July 2013, which was adopted to give effect to the judgment in *Giersch* and which made amendments to the Law of 22 June 2000 relating solely to the academic year 2013/2014, inserted Article 2 bis into the Law of 22 June 2000, which was worded as follows:

"A student not residing in the Grand Duchy of Luxembourg may also receive financial aid for higher education studies where that student is the child of an employed or self-employed person who is a Luxembourg national or a national of the European Union or of another State party to the Agreement on the European Economic Areac or of the Swiss Confederation, is employed or pursuing an activity in Luxembourg, and has been employed or has pursued an activity in Luxembourg for a continuous period of at least five years at the time the student makes the application for financial aid for higher education studies. Employment in Luxembourg must be for at least half the normal working hours applicable within the undertaking, under statute or by virtue of any collective labour agreement that may be in force. A self-employed worker is required to have been affiliated to the social security system in the Grand Duchy of Luxembourg under Article 1(4) of the Social Security Code for a continuous period of five years prior to the application for financial aid for higher education studies".

The amended Law of 22 June 2000 was repealed by the *loi du 24 juillet 2014 concernant l'aide financière de l'État pour études supérieures* (Law of 24 July 2014 on State financial aid for higher education studies) [13] . Article 3 of the Law of 24 July 2014 provides:

[12] Opinion of Advocate General Mengozzi delivered on 7 February 2013, *Elodie Giersch and Others v État du Grand-Duché de Luxembourg*, C-20/12, EU:C:2013:70, para. 5.

[13] Mémorial A 2014, p. 2188.

> "A student or pupil, as defined in Article 2, hereinafter referred to as a 'student', who fulfils one of the following conditions may benefit from State financial aid for higher education studies:
>
> (…)
>
> (5) a student not resident in the Grand Duchy of Luxembourg who:
>
> (…)
>
> (b) is the child of a worker who is a Luxembourg national or a national of the European Union or of another State party to the Agreement on the European Economic Area or of the Swiss Confederation employed or pursuing an activity in the Grand Duchy of Luxembourg at the time when the student's application for financial aid for higher education studies is made, provided that the worker is continuing to contribute to the maintenance of the student and that the worker has been employed or has pursued an activity in the Grand Duchy of Luxembourg *for at least five years at the time of the student's application for financial aid for higher education studies, within a reference period of seven years counting back from the date of the application for financial aid for higher education studies* or, by way of derogation, the person retaining worker status met the aforementioned criterion of five years out of seven when he or she finished work".

The above legislative amendments were deemed still insufficient – bearing in mind that the law applicable to the facts in the main proceedings was even more discriminatory – and the Court ruled, in *Depesme and Kerrou*[14], that Article 45 TFEU and Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union must be interpreted as meaning that a child of a frontier worker who is able to benefit indirectly from the social advantages referred to in the latter provision, such as study finance granted by a Member State to the children of workers pursuing or who have pursued an activity in that Member State, means *not only a child who has a child-parent relationship with that worker, but also a child of the spouse or registered partner of that worker, where that worker supports that child*.

Regarding the five years' or similar periods applicable to frontier workers, but not to residents, the Court further ruled, in *Bragança Linares Verruga*[15], that Article 7(2) of Regulation (EU) No 492/2011 precluded inter alia Luxembourgish legislation which,

[14] Judgment of the Court (Second Chamber) of 15 December 2016, *Noémie Depesme and Others v Ministre de l'Enseignement supérieur et de la recherche*, Joined Cases C-401/15 to C-403/15, EU:C:2016:955.

[15] Judgment of the Court (Second Chamber) of 14 December 2016, *Maria do Céu Bragança Linares Verruga and Others v Ministre de l'Enseignement supérieur et de la recherche*, C-238/15, EU:C:2016:949. See, on both cases, C. Jacqueson, "Any news from Luxembourg? On student aid, frontier workers and stepchildren, *Bragança Linares Verruga* and *Depesme*", *Common Market Law Review*, Volume 55, Issue 3 (2018) pp. 901-922.

with the aim of encouraging an increase in the proportion of residents with a higher education degree, makes the grant of financial aid for higher education studies to a non-resident student conditional on at least one of that student's parents having worked in Luxembourg for a minimum and continuous period of five years at the time the application for financial aid is made, but which does not lay down such a condition in respect of a student residing in the territory of that Member State.

That line of authorities was then complemented by the ruling in *Aubriet*, where the Court considered that a rule, which made the grant to non-resident students of financial aid for higher education studies subject to the requirement that a parent who has worked in Luxembourg for a minimum period of five years in the course of a reference period of seven years preceding the application for financial aid, entailed a restriction which went beyond what was necessary to achieve the legitimate objective of increasing the number of residents holding higher education degrees[16].

As a result, Luxembourgish legislation was amended once more in 2016, making it possible to consider frontier workers' stepchildren, as well as children of registered partners, to be eligible for financial support for higher education[17].

The litigation before the Court of Justice did not stop there. In *Caisse pour l'avenir des enfants I*[18], the Court ruled that Article 45 TFEU, read in conjunction with Article 4 of Regulation No 883/2004, must be interpreted as precluding the refusal by the competent authorities of one Member State to pay to a national of a second Member State, who works in the first Member State without living there, family allowances for his child living in a non-member country with her mother when, under identical conditions for the grant of those benefits, those competent authorities recognise the entitlement of their own nationals and residents to family benefits pursuant to a bilateral international convention concluded between the first Member State and that non-member country, unless those authorities can put forward an objective justification for refusing to do so.

In *Caisse pour l'avenir des enfants II*[19], the Court further ruled, firstly, that Article 45 TFEU and Article 7(2) of Regulation (EU) No 492/2011 of the European

[16] Judgment of the Court (First Chamber) of 10 July 2019, *Nicolas Aubriet v Ministre de l'Enseignement supérieur et de la Recherche*, C-410/18, EU:C:2019:582. See, on these recent Luxembourgish cases before the Court of Justice, G. Friden, A. Germeaux, "Cour de justice de l'Union européenne, 2019-2020", *Annales du droit luxembourgeois*, "6.3. Les droits des frontaliers", pp. 579-582.

[17] Article 3 of the *Loi du 23 juillet 2016 portant modification de la loi du 24 juillet 2014 concernant l'aide financière de l'État pour études supérieures*, Mémorial A, No 143 of 29 July 2016, at p. 2430.

[18] Order of the Court (Sixth Chamber) of 5 September 2019, *E.U. v Caisse pour l'avenir des enfants*, C-801/18, EU:C:2019:684.

[19] Judgment of the Court (Sixth Chamber) of 2 April 2020, *Caisse pour l'avenir des enfants*, C-802/18, EU:C:2020:269.

Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union must be interpreted as meaning that a family allowance based on the fact that a frontier worker pursues an activity as an employed person in a Member State constitutes a social advantage within the meaning of those provisions. Secondly, the Court ruled that Article 1(i) and Article 67 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, both read in conjunction with Article 7(2) of Regulation No 492/2011 and with Article 2(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, must be interpreted as precluding the Luxembourgish legislative provisions pursuant to which frontier workers were entitled to receive a family allowance, on the basis of the fact that they pursue an activity as employed persons in that Member State, *solely for their own children, and not for a spouse's children with whom those workers have no child-parent relationship, but whom those workers support, whereas any child residing in that Member State is entitled to receive that allowance*. The said legislative provisions have to be amended accordingly. The latest legislative amendments have not yet reflected the latest rulings of the Court in this never-ending litigation.

Question 3

Workers' mobility in the Grand Duchy is mostly problematic at the moment in so far as teleworking was difficult for frontier workers to make use of tax regimes agreed with neighbouring countries prior to the Covid-19 pandemic. Derogations were granted during the pandemic, and it remains to be seen to which extent upcoming agreements will address the tax distribution so that teleworking – which allows a better work-family balance and is more environmentally friendly – will remain possible without penalising frontier workers.

a)

According to a study conducted by LISER,[20] in 2021 Luxembourg domestic employment was composed of at 27% of Luxembourgish residents, 27% of foreign residents, and 46% of non-resident cross-border (frontier) workers. These latter predominantly work in the services sector. Most of them are nationals of other EU Member States. This trend is compounded over time, as housing prices are constantly rising. Some specific sectors, such as the catering industry and the

[20] LISER (Luxembourg Institute of Socio-Economic Research), "Domestic employment 1994-2021", available at: https://www.liser.lu/ise/display_indic.cfm?id=601 (last accessed on 20 August 2022).

medical sector, but also, lately, the police and other public administrations, are reporting that they face recruitment issues.

b)

The idea of "fair movement" has not yet gained support in Luxembourg. In fact, instead of the possibility for greater control or an "emergency brake" for the host State[21], or for a "selective mobility" [22], Luxembourg has been extending some of the free movement rights, including political rights, to nationals of third countries, who may e.g. vote and even be elected in local elections.

c)

Essential workers in critical occupations (in sectors such as healthcare, farming, transportation etc.) are a priority, and concrete support for their mobility would need to be established, well beyond the temporary measures adopted during the Covid-19 crisis aimed at favouring their entering and exiting the country.[23] Their mobility requires a rethinking of the freedom of movement of workers in so far as neighbouring countries face even more important shortages of medical workers due to the higher attractivity of Luxembourg.

Question 4

There is no brain drain phenomenon in Luxembourg, or it is limited to certain niche activities such as contemporary art, music, etc., for which the country is too small to offer valuable career opportunities.

a)

There is no significant outflow of workers to other Member States. However, there is a minor outflow of people who become frontier workers once they realise that they can no longer afford to reside in the country although they were born or used to live there. There are no official statistics yet as to their exact number.

b)

There are no measures aimed at retaining certain types of workers currently in place.

[21] As per C. Barnard and S. Fraser Butlin, "Free movement vs. fair movement: Brexit and managed migration", *Common Market Law Review,* 55: 203-226, 2018.

[22] As per S. Robin-Olivier, "Free movement of workers in the light of the Covid-19 sanitary crisis: from restrictive selection to selective mobility", *European Papers*, Vol. 5, 2020, n° 1, European Forum, Insight of 16 May 2020, available at: https://www.europeanpapers.eu/en/europeanforum/free-movement-of-workers-covid-19-sanitary-crisis (last accessed on 20 June 2022).

[23] L. Ratti, "Covid-19 and labour law in Luxembourg", *European Labour Law Journal*, 2020, Vol. 11(3) 314–318.

c)

To our best knowledge, there are no case-law or administrative decisions which examine the compatibility with EU law of measures aimed at retaining certain types of workers.

Question 5

The regulation of posting is provided by Title IV of the Labour Code (Articles L-141-1 to L. 145-1) fully implementing the EU directives. The situation of posted workers is regulated by clear and sufficiently detailed statutory provisions.

a)

Directive 2018/957 was transposed into Luxembourgish law by the Law of 15 December 2020[24]. The key innovations include inter alia the rules applicable to long-term posting, posting via temporary employment agencies, and allowances due to the posted worker. Furthermore, an important and innovative aspect is the public policy provisions to be complied with. They are now listed in Article L. 010-1 of the Labour Code and relate to remuneration, working time, paid leave, bank holidays, etc.

Article L. 010-1(2) of the Labour Code, introduced by the Law of 15 December 2020, provides that public policy provisions are now also those relating to equal minimum salary for equal work, as well as the various components of the salary set out in binding legal provisions, namely "all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements" [25]. In that respect, Luxembourg adopts a minimalistic, literal approach towards transposition, given that the revised Article 3 of the Directive sets out very precisely that "for the purposes of this Directive, the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and means all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements". Thus, since there are no general national provisions on equal pay for equal work, it

[24] Loi du 15 décembre 2020 portant modification : 1° du Code du travail en vue de transposer la directive (UE) 2018/957 du Parlement européen et du Conseil du 28 juin 2018 modifiant la directive 96/71/CE concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services […], publiée au Mémorial A n°1024 du 18 décembre 2020 et entrée en vigueur le 22 décembre 2020.

[25] In the French original, provisions relating to " (…) rémunération correspondant aux taux de salaires minima ainsi qu'à tous les éléments constitutifs du salaire fixés par une disposition légale, réglementaire, administrative, ou par une convention collective déclarée d'obligation générale ou par un accord en matière de dialogue social interprofessionnel déclaré d'obligation générale et à l'adaptation automatique du salaire à l'évolution du coût de la vie ".

may happen that posted workers are paid less for the same work than residents and nationals where the agreed remuneration exceeds the minimum salary and/or where the constituent elements of remuneration are purely contractual and have not been "rendered mandatory by national law, regulation or administrative provision, or by collective agreements". There are no publicly available data on the extent of such a pay gap.

It ought to be observed that this situation is partly due to the case-law of the Court of Justice, which had previously ruled that the Luxembourgish salary indexation scheme, i.e. the automatic adjustment of rates of pay to the cost of living, which does not exist in most other Member States, was inconsistent with the fundamental principle of the freedom to provide services[26]. As a result, in the subsequent legislative amendments, Luxembourg has restricted the application of the equal pay for equal work principle to the situation of workers who earn the minimum salary, which has to be the same for all workers, regardless whether they have been posted or recruited locally.

Regarding sectors of activity where "equal pay for equal work" in the context of posting does not apply, due to the highly mobile nature of the work in international road transport and the need for special rules, the Law of 15 December 2020 provides that workers from the international road transport temporarily posted in Luxembourg remain bound by the previous provisions of the Labour Code, as they were in force prior to the entry into force of the Law of 15 December 2020. Yet this is consistent with Directive (EU) 2020/1057 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector, which provides that "a driver shall not be considered to be posted for the purpose of Directive 96/71/EC when the driver transits through the territory of a Member State without loading or unloading freight and without picking up or setting down passengers" (Article 1(5)). Thus, albeit the legislative draft No 7901 purports to transpose Directive (EU) 2020/1057 while failing to apply the "equal pay for equal work" principle to international road transport, this is consistent with the latter Directive. Article L. 010-1 of the Labour Code does not apply to international road transport where the driver transits through Luxembourg's territory without loading or unloading freight and without picking up or setting down passengers.

It is not known to the national rapporteurs which are the sectors where exploitation of posted workers is most problematic.

[26] Judgment of the Court (First Chamber) of 19 June 2008, *Commission of the European Communities v Grand Duchy of Luxemburg*, C-319/06, EU:C:2008:350, and J.-L. Putz, *Comprendre et appliquer le droit du travail*, 5th edition, Larcier Luxembourg, 2020-2021, p. 40.

b)

To our best knowledge, there are no cases decided on posting of workers via temporary employment agencies.

Question 6

Neither Article 49 TFEU nor Article 16 CFR have been used to challenge employment rights before the Luxembourgish courts.

On the contrary, concerning the right to strike, a ruling in a 1950 case first had considered that trade union freedom (*libertés syndicales*) did not necessarily include the right to strike[27]. Subsequently, the national case-law admitted that the constitutional guarantee of trade union freedom included the right to strike, while considering that this was implicit in article 11 of the Constitution[28]. Legal scholars concurred[29].

The *Laval* and *Viking* case-law may still lead to certain consequences in Luxembourgish Labour law. Indeed, in the Grand-Duchy, it is the National Conciliation Office (ONC) which pronounces upon the legality of a strike, while stating that the conciliation is admissible or otherwise, pursuant to L. 164-2(3) of the Labour Code. The ONC's decision may then be challenged before the administrative courts. Following the *Laval* and *Viking* case-law, the ONC now needs to assess whether workers' or unions' demands do not disproportionally restrict the freedoms under EU law. Prior to that case-law, the demands' being legitimate or otherwise did not affect the legality of the strike[30].

Question 7

a)

To our best knowledge, cases of religious discrimination decided by the CJEU did not have a significant impact on national case-law, mostly due to the lack of domestic litigation on this specific issue.

The notion of "reasonable accommodation" has been implemented both via the Law of 15 July 2011[31], which deals with students having special educational needs,

[27] Tribunal arbitral du canton de Luxembourg, 16 mars 1950, quoted in J.-L. Putz, *Droit du travail collectif – Tome 1*, 2nd edition, Larcier, 2021, p. 554.

[28] CSJ, cassation, 24 July 1952, Pas. 15, 355 ; CSJ, 15 December 1959, Pas. 18, 90.

[29] Putz, 2021, *ibid*.

[30] Putz, 2021, p. 561.

[31] Loi du 15 juillet 2011 visant l'accès aux qualifications scolaires et professionnelles des élèves à besoins éducatifs particuliers.

and via the Law of 28 July 2011, implementing the Convention on the Rights of Persons with Disabilities, as well as the Optional Protocol to the Convention on the Rights of Persons with Disabilities. The Law of 15 July 2011 contains extensive developments on the notion of "reasonable accommodation", but only as regards school education, and thus not about workers. The international Convention on the Rights of Persons with Disabilities and its optional protocol have been ratified in national law by the Law of 28 July 2011, yet, practically speaking, a lot remains to be done. In 2020, the trade union OGBL kept insisting that people with reduced mobility needed more concrete measures[32].

b)

The working time acquis is currently implemented by the Law of 23 December 2016 concerning the regulation of working time.[33]

Under the current legislation, any company has the option of applying a statutory reference period that is longer than 1 month, accompanied by a work organisation plan (WOP) and without recourse to a collective labour agreement. The maximum legal reference period is extended from 1 month to 4 months and the employer can choose between a set of legal reference periods that differ in length, the longest of which is 4 months. The choice of a legal reference period exceeding one month entitles the employees concerned to additional days off.

Maximum working time is reduced. The 2016 law introduces new limits for exceeding the legal working time. Specifically, an employee who normally works 40 hours per week, depending on the length of the reference period, cannot be employed for more than 45 or 44 hours without overtime compensation.

The ministerial authorisation of a reference period of up to 6 months has been abolished.

To our best knowledge, there are no hostile reactions in Luxembourg in that area.

c)

Platform work is not yet regulated in Luxembourg. One of the reasons is that so far Luxembourg has not seen its economy and labour market invaded by online platforms intermediating work, as has happened instead in most Member States. Very few cases have been reported by newspapers about the use of platform work, especially in the food delivery sector, where platforms face difficulties in correctly

[32] "Personnes à mobilité réduite: les obstacles persistent!", available at: http://www.ogbl.lu/personnes-a-mobilite-reduite-les-obstacles-persistent/ (accessed on 19 July 2022).

[33] Loi du 23 décembre 2016 concernant l'organisation du temps de travail et portant modification du Code du travail, Mémorial A271.

characterising the contracts with their collaborators and the labour inspectorate conducted several inspections.[34]

To the best of our knowledge, only one case has been decided by a Labour Tribunal about an allegedly self-employed worker delivering food on behalf of an online platform. Quite specific to the Luxembourgish approach, such platform has been found lacking an *autorisation d'établissement* for the self-employed worker, which is an administrative licence to exercise professional activities in Luxembourg typically applicable to artisans, shops, industries and to some liberal professions (such as accountants, engineers, architects, etc.). Consequently, the platform was condemned to pay an administrative sanction.[35]

So far, social partners and the workers have exposed the loopholes in the Labour Code that does not always allow platform workers to rely on valid contracts of employment[36].

Question 8

There is no particular demand for new developments in EU social policy from Luxembourg. The main stakeholders, including trade unions and employers' associations approve e.g. the Commission proposal on an adequate minimum wage in the EU as well as the Commission proposal on platform work, not least because of the political importance of the current Jobs and Social Rights Commissioner Nicolas Schmit, a popular Luxembourgish politician.

Question 9

The Country Specific Recommendations (CSRs) for Luxembourg in the framework of the European Semester stress that – beyond the economic and social challenges addressed by the recovery and resilience plan – Luxembourg faces a number of additional challenges, notably related to growing inequality in the education system.

In 2011, the first exercise of the CSRs, three main reforms were recommended to Luxembourg in the aftermath of the financial crisis:

[34] https://5minutes.rtl.lu/actu/luxembourg/a/1533476.html (accessed on 20 August 2022).

[35] The case is reported by newspapers, e.g. https://paperjam.lu/article/wedely-condamnee-contrats-ses- (accessed on 20 August 2022).

[36] Jean-Michel Hennebert, "Des services de livraison sous le feu des critiques", French online edition of *Wort*, available at:
https://www.wort.lu/fr/luxembourg/des-services-de-livraison-sous-le-feu-des-critiques-6051f650de135b9236c5e474 (accessed on 25 July 2022).

1. Pension reform (increase the participation rate of older workers, in particular by discouraging early retirement and including measures that link the statutory retirement age to life expectancy),

2. Reform of wage setting system to ensure that wage growth better reflects developments in labour productivity and competitiveness and

3. Taking steps to reduce youth unemployment by reinforcing training and education measures aimed at better matching young people's skills to labour demand.

The pension reform was adopted in 2012.[37] The 2012 CSRs explain the main lines of the reform: 'Luxembourg government adopted a draft law to reform the pension system for both the private and the public sector. The reform would build in some corrective mechanisms in case of an adverse evolution of the financial situation of the scheme and contains adaptations to the very generous calculations method of benefits. However, the new calculation method will be phased in over a very long-time horizon of 40 years. Moreover, the possibilities for early retirement remain broadly unchanged and no measures have been proposed to link the statutory retirement age to life expectancy'.

Concerning the reform of wage setting mechanisms, Luxembourg took measures to moderate wage growth by modulating the indexation system between 2012 and 2015. In the 2012 s, it is indicated that: 'the national Parliament adopted a law to limit the application of the automatic indexation of wages between 2012 and 2015 in order to increase the competitiveness of the Luxembourg economy'. 'However, (it continued) besides a possible modification of the reference index, the government has not announced any further plans for a permanent revision of the wage-setting system'.

In the CSRs from 2012 to 2014, the Commission recommended to improve efforts in order to reduce youth unemployment: "Pursue efforts to reduce youth unemployment for low-skilled jobs seekers with a migrant background, through a coherent strategy, including by further improving the design and monitoring of active labour market policies, addressing skills mismatches, and reducing financial disincentives to work. To that effect, accelerate the implementation of the reform of general and vocational education and training to better match young people's skills with labour demand (CSRs 2014)".

In the CSRs 2012 to 2015, one can find the following recommendation on wages: "Reform the wage-setting system, in consultation with the social partners and in

[37] Loi du 21 décembre 2012 portant réforme de l'assurance pension.

accordance with national practices, with a view to ensuring that wages evolve in line with productivity, in particular at sectoral level".

The CSRs from 2012 to 2019 insist on the need to "increase the employment rate of older people by enhancing their employment opportunities and employability while further limiting early retirement, with a view to also improving the long-term sustainability of the pension system".

The most recent CSRs include recommendations to ameliorate the education system. In particular, it is noted that "there is room to improve the education system's governance, further developing evaluation tools and measurable objectives promoting quality and equality of opportunity on both the formal and non-formal sides of the education system". As a result, the Commission recommends inter alia that Luxembourg reduce the impact of inequalities on students' performance and promote equal opportunities in the educational system[38].

Question 10

The case-law of the Court of cassation (*Cour de cassation*) insists on the applicability of the Charter in Luxembourgish law only in so far as the State is implementing EU law. If no provision of EU law applies to a given dispute, the Charter may not be relied as a ground of appeal or cassation[39].

The Charter is mostly relied on by the administrative courts in litigation about asylum and international protection, whenever the applicability of rules of EU law before the national courts may not be challenged.

Question 11

Luxembourg is well on track with the planned transposition of Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers, with the draft legislative act No 7650[40].

[38] Recommendation for a Council Recommendation on the 2022 National Reform Programme of Luxembourg and delivering a Council opinion on the 2022 Stability Programme of Luxembourg, COM(2022) 618 final, available at: https://ec.europa.eu/info/system/files/2022-european-semester-csr-luxembourg-en.pdf (accessed on 27 July 2022).

[39] This consistent case-law is most explicit e.g. in the judgments No 71/2022 (CAS-2021-00060) of 19.05.2022 and, earlier, No 67/14 (3380) of 06.11.2014.

[40] On which, see the conference proceedings of "Les recours collectifs : Perspectives européennes et luxembourgeoises", *Annales du droit luxembourgeois*, Vol. 30, 2020, 1st edition 2021, Bruylant, pp. 173-635.

Question 12

In Luxembourg, the policies to combat climate change, at national level, do try to take social justice into account via direct subsidies. For instance, only households of five people or above may be exempted from the vehicle tax, which is an incentive for private vehicles to be shared by several people[41].

As regards electric vehicles, households of more than 5 people benefit again from better conditions for grant of direct subsidies[42].

Finally, public transport is currently completely free for anybody, which benefits mostly people with low income.

Question 13

The measures that have been taken in Luxembourg in order to provide education on EU citizenship and the values set out in the Treaties in mainstream education are probably more advanced than in other Member States due to the presence of EU institutions in the country and to the unique diversity of the population, yet the inter-governmental vision of the EU prevails most of the time (making "Luxembourg's voice" heard; "Luxembourg speaking with one single voice"). Half of the country's high schools thus have signed a partnership agreement with the European Parliament as "Ambassador Schools" [43]. It is important to stress, though, that not all students are part of the national school system and that there is thus a unique diversity in school models in the country, which in itself is an education on EU citizenship.

Question 14

An important recent development, which can be related to local democracy and the rule of law, is the abolition of the five years' residence requirement before any citizen (including EU and third country citizens) may vote at the local elections[44]. As a result, more citizens will have a say on some of their social rights.

[41] https://environnement.public.lu/fr/emweltprozeduren/personnes-privees/Energie.html (accessed on 29 July 2022).

[42] https://environnement.public.lu/fr/actualites/2021/021/clever-fueren-2021.html (accessed on 29 July 2022).

[43] See the 2018 European Parliament press release on the Athénée high school's website: http://athenee.lu/images/2018-19/EPAS/Communique_de_presse.pdf (accessed on 29 July 2022).

[44] The consolidated version of the Electoral Law of 18 February 2003 is not yet available, yet the legislative reform has already been officially announced by governmental sources: see the 14 July 2022 press release by the government, available at: https://gouvernement.lu/fr/actualites/toutes_actualites/communiques/2022/07-juillet/14-vote-elections-communales.html (accessed on 29 July 2022).

Question 15

The EU is perceived as a Social Union in Luxembourg in academic and judicial discourse due to the massive presence EU scholars, some of whom serve as EU judges. Common European values, in particular equality and solidarity, laid down in Article 2 TEU, are considered to be the constitutional basis for a European Social Union notably by Koen Lenaerts and Stanislas Adam[45], both of whom reside in Luxembourg.

[45] K. Lenaerts, S. Adam, "La solidarité, valeur commune aux États membres et principe fédératif de l'Union européenne", *Cahiers de droit européen,* No 2, 2021, pp. 307-417.