



Conformity Study for Luxembourg
Directive 2004/38/EC on the right of citizens of the Union and their
family members to move and reside freely within the territory of the
Member States

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ENVIRONMENTAL LAW & POLICY



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The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the European Commission. The national report reflects that legal situation as it stands on 1 August 2008. No subsequent changes have been taken into account.

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ANALYSIS OF THE LEGISLATION TRANSPOSING DIRECTIVE 2004/38/EC ON FREE MOVEMENT OF UNION CITIZENS

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EXECUTIVE SUMMARY

1. Introduction

Luxembourg is a unitary state. The Constitution of Luxembourg adopted in 1868 is the supreme law in Luxembourg's hierarchy of sources.

Luxembourg is a parliamentary representative democracy, with a constitutional monarchy. The Head of the State is the Grand Duc (Article 33 Constitution). The legislative power is vested in the Chamber of Deputies (<http://www.chd.lu/default.jsp>), which is a unicameral legislature composed of 60 members. These members are directly elected for five year periods from four constituencies. Every Luxembourgian law must be voted by the Chamber of Deputies (Article 46 Constitution). As a principle, every law must be voted on twice by the Chamber of Deputies (Article 59 Constitution). The *Conseil d'Etat*, composed of 21 members appointed by the Grand Duc, advises the Chamber of Deputies in the drafting of legislation.

The Grand-Duc takes the measures (*règlements/arrêtés*) necessary to execute the *lois* (Art. 36 Constitution). The current government is composed of 15 members (one Prime Minister, one vice Prime Minister, 11 Ministers, one '*Ministre délégué*' and one Secretary of State).

2. Introduction to the main particularities of the Luxembourgian legal system relating to the transposition of the Directive 2004/38

The basic law in Luxembourg is the '*loi modifiée concernant l'entrée et le séjour des étrangers, le contrôle médical des étrangers ainsi que l'emploi de main-d'œuvre étrangère*' of 28 March 1972.

On the basis of this basic law five acts ("*règlements*") have been taken:

1. Règlement du grand ducal du 12 mai 1972 déterminant les mesures applicables pour l'emploi des travailleurs étrangers sur le territoire du Grand-Duché de Luxembourg. Last modification: Règlement du grand ducal du 31 juillet 2006.
2. Règlement grand-ducal du 28 mars 1972 relatif aux conditions d'entrée et de séjour de certaines catégories d'étrangers faisant l'objet de conventions internationales.
3. Règlement grand-ducal du 28 mars 1972 relatif aux formalités à remplir par les étrangers séjournant au pays
4. Règlement grand-ducal du 28 mars 1972 relatif à la composition, l'organisation et le fonctionnement de la commission consultative en matière de police des étrangers.
5. Règlement grand-ducal du 17 octobre 1995 relatif au contrôle médical des étrangers.

In order to transpose Directive 2004/38 into the legal order of Luxembourg, the '*Conseil de gouvernement*' adopted on 18 October 2007 a legislative proposal (projet de loi n° 5802 portant sur la libre circulation des personnes et l'immigration), which was presented to the Chamber of Deputies on 7 November 2007. This law is still pending. The proposal n° 5802 would transpose *a.o.*, Directive 2004/38 into Luxembourgian law and replace the '*loi modifiée concernant l'entrée et le séjour des étrangers, le contrôle médical des étrangers ainsi que l'emploi de main-d'œuvre étrangère*' of 28 March 1972. Several organisations have sent their remarks on this proposal to the Chamber of Deputies.

Because the definitive transposition of Directive 2004/38 is still pending in the Chamber of Deputies, a *règlement* grand ducal of 21 December 2007 was issued to provisionally transpose Directive 2004/38.

On 21 March 2008 the '*Conseil de gouvernement*' has also adopted four '*projet de règlement grand-ducal*' implementing the new immigration law:

- (1) le projet de règlement grand-ducal portant exécution de certaines dispositions relatives aux formalités administratives prévues par la loi sur la libre circulation des personnes et l'immigration;

- (2) le projet de règlement grand-ducal relatif à la composition et au fonctionnement de la commission consultative des étrangers, la composition et au fonctionnement de la commission consultative pour travailleurs salariés, la composition et au fonctionnement de la commission consultative pour travailleurs indépendants;
- (3) le projet de règlement grand-ducal relatif à l'exercice d'une activité salariée par un étudiant, tel que prévu par la loi sur la libre circulation des personnes et l'immigration;
- (4) le projet de règlement grand-ducal fixant les conditions et modalités relatives à la délivrance d'une autorisation de séjour en tant que travailleur salarié.

This Conformity Study only examines the *Projet de loi n° 5802* ("Proj."), as the text stands on 2 July 2008. The Proposal is annexed to this Conformity Study.

The règlement grand ducal of 21 December 2007 is not covered by the present Conformity Study. An assessment of this text can be found in the Table of Correspondence, which is also annexed to the present study.

Condemnation by the European Court of Justice and complaint by ASTI

In December 2007 the European Court of Justice (ECJ) condemned Luxembourg because it did not transpose Directive 2004/38 in its legal order.¹

During, this case, Luxembourg argued the following:

“Dans son mémoire en défense, le Grand-Duché de Luxembourg reconnaît ne pas avoir été en mesure de communiquer les dispositions prévues pour se conformer aux obligations imposées par la directive 2004/38 du fait que le vote définitif de la loi sur la libre circulation et l'immigration n'aura pas lieu avant le milieu de l'année 2008”.

However, according to a well established line of jurisprudence, the ECJ refused to take this argument into account and condemned Luxembourg.

Additionally, on 15 January 2008 the *Association de Soutien aux Travailleurs Immigrés* (ASTI, www.asti.lu) filed a complaint with the European Commission as the *Règlement grand ducal* of 21 December 2007 violates several provisions of Directive 2004/38.²

3. Conclusions on the legal analysis of the transposing measures for Directive 2004/38

a. Overview of how the requirements have been transposed

As stated before, the Proposal has not yet been adopted. At this moment RGD 07 transposes the Directive, but it is clear that the Proposal is meant to be a comprehensive and definitive transposition.

On 21 March 2008 the '*Conseil de gouvernement*' adopted four '*projet de règlement grand-ducal*', implementing the new immigration law:

- (1) le projet de règlement grand-ducal portant exécution de certaines dispositions relatives aux formalités administratives prévues par la loi sur la libre circulation des personnes et l'immigration;

¹ E.C.J., 13 December 2007, Commission / Luxembourg, Case C-294/07, not yet published.

² The complaint can be found at <http://www.asti.lu/pdf/ASTIFRATTINI.pdf>

- (2) le projet de règlement grand-ducal relatif à la composition et au fonctionnement de la commission consultative des étrangers, la composition et au fonctionnement de la commission consultative pour travailleurs salariés, la composition et au fonctionnement de la commission consultative pour travailleurs indépendants;
- (3) le projet de règlement grand-ducal relatif à l'exercice d'une activité salariée par un étudiant, tel que prévu par la loi sur la libre circulation des personnes et l'immigration;
- (4) le projet de règlement grand-ducal fixant les conditions et modalités relatives à la délivrance d'une autorisation de séjour en tant que travailleur salarié.

b. Conformity problems and complete and accurate transposition

The requirements of Directive 2004/38 will be mainly correctly transposed in the Prop., and several provisions will be transposed in a more favourable way by the Prop. The overall impression is that the legislative transposition will be quite correct, but the following conformity issues must be flagged out.

1. Beneficiaries

Article 3(2)(b) of the Directive states that the host Member State should facilitate entry and residence of a partner with whom the Union citizen has a durable relationship, duly attested. This provision has not been transposed in the Prop.

Luxembourg authorities indicate that Article 78 Prop. ("L'autorisation de séjour pour des raisons privées") should be a transposition of Art. 3(2)(b). This is not the case, since Art. 78 Prop. belongs to Chapitre 3 of the Prop ("Le droit d'entrée et de séjour du ressortissant de pays tiers"), and not to Chapitre 2 ("Le droit du citoyen de l'Union, du ressortissant des autres Etats parties à l'Accord sur l'Espace économique européen et de la Confédération suisse et des membres de leur famille, de circuler et de séjourner librement sur le territoire du Grand-Duché de Luxembourg »). Probably these persons will be subject to the general immigration provisions. Clarification is needed on this point. In any case, the obligation to carry out an extensive examination of the circumstances has not been transposed for this particular category of other family members.

2. Right on entry

Article 5(2) second subparagraph requires Member States to grant non EU family members (as referred to in Article 5(1) of the Directive) every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure. This provision has not been transposed. Luxembourgian authorities indicate that this will be done in the '*Règlement grand ducal concernant les formalités administratives*'.

Article 5(5) provides that the Member State may require the person concerned to report his/ her presence within its territory within a reasonable and non-discriminatory period of time. This provision is transposed by Articles 1-4 of '*Règlement grand-ducal du 28 mars 1972 relatif aux formalités à remplir par les étrangers séjournant au pays*'. This transposition is not correct. The time limit of 3 days to report your presence cannot be considered a 'reasonable' period. Moreover, the conditions of Article 2 of the *règlement grand ducal* are not foreseen in the Directive. Article 2 of this *Règlement* states: "*La déclaration prescrite par l'article 1er contiendra les indications nécessaires pour pouvoir constater et vérifier l'état civil, la nationalité, les antécédents et les moyens d'existence de l'étranger et des autres personnes comprises dans la déclaration. Elle sera signée par le représentant de l'autorité locale et l'étranger intéressé*".

It is important to note that Luxembourgian authorities has indicated that these provisions will be abolished once the Proposal enters into force.

3. Right of residence for up to three months

A conformity issue arises in that Luxembourg has not exempted job seekers from the obligation to register during the first six months which goes against the Directive and the *Antonissen* case law.

4. Right of residence for more than three months

Article 7(1)(a) of the Directive contains the concept of ‘worker’, which is a concept of EC law. LU transposition defines the concept of a worker. This may lead to an inconsistency with Community law (for example on the basis of case law interpreting the concept of worker). This could become an issue of non conformity and, for this reason, must be considered as a (minor) conformity issue.

5. Registration certificate (Article 8) and residence card (Article 10)

Article 8(3) of the Directive lists the documents the competent authority may require ‘for the registration certificate to be required’. Art. 8(2) Prop states that the Union citizen must justify that he/she falls under one of the categories of Art. 6(1) Prop. The documents to be presented will be enumerated in a règlement grand ducal, which has not yet been issued. Transposition of Article 8(3) of the Directive is therefore incomplete.

Article 8(4) has also not been transposed. Pre-legislative proceedings indicate already: *“La condition des ressources suffisantes et d’une assurance maladie est exigée pour les personnes non actives, dans un souci d’éviter que ces personnes ne deviennent une charge déraisonnable pour les finances publiques. Le montant de ressources considérées comme suffisantes et les modalités selon lesquelles la preuve en est rapportée sont précisés par règlement grand-ducal. Il ressort de la jurisprudence de la CJCE qu’il suffit que les citoyens de l’Union disposent de ressources suffisantes, sans que cette disposition comporte une exigence quelconque quant à la provenance de celles-ci. Ainsi importe-t-il peu que les ressources soient propres au titulaire du droit de séjour ou qu’elles proviennent d’une autre source. Elles pourraient donc être constituées ou complétées par celles d’un parent ou d’un tiers, par exemple une personne cohabitant avec le titulaire du droit de séjour ou se portant garant de ce dernier, pour autant que des justificatifs adéquats soient fournis”*. Therefore, until that regulation is adopted, it is not possible to assess whether sufficient resources will be assessed as established in Article 8(4). Nothing has been inserted so far in the proposal to ensure that no fixed amount will be established and that personal circumstances will be taken into account.

Article 8(5) of the Directive, which lists the documents that Luxembourg may require for the issuing of the residence card of EU family members, is transposed by Article 15(1) and (2) Proposal. EU family members must register within three months after their arrival. As in the case of Article 8(3), a règlement grand ducal will have to issue in order to enumerate the documents to be handed over. This has not yet been done. Transposition is therefore incomplete.

Article 10 provides that the right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called ‘Residence card of a family member of a Union citizen’ no later than six months from the date on which they submit the application, and that certificate of application for the residence card shall be issued immediately. The same Article concerns the documents that may be required by the Member State for the issuance of this residence card. This Article is generally not correctly transposed by Luxembourg.

Article 10(1) has been transposed by Article 15(1) and (3) Proposal. However, the condition concerning the maximum period for issuing the card and the immediate delivery of a certificate have not been transposed. Luxembourg authorities indicate that the correct transposition will flow from the ‘règlement grand-ducal sur le formalités administratives’, which has not yet been issued.

Article 15(2) Proposal, which intends to transpose Article 15(2) of the Directive adds: *“Pour la délivrance de l’attestation d’enregistrement ou de la carte de séjour, les membres de la famille doivent présenter les documents déterminés par règlement grand-ducal”*. This règlement grand ducal has not

yet been issued. Transposition is therefore incomplete. Please also note that the pre-legislative proceedings indicate: “*La directive s’est attelée à réduire non seulement les formalités administratives que doivent accomplir les personnes qui sont citoyens de l’Union européenne, mais également celles des membres de la famille du citoyen qui sont ressortissants de pays tiers. Certes, l’exigence d’une carte de séjour est maintenue pour ces personnes, mais afin de leur éviter des tracasseries administratives, le paragraphe (2) renvoie à un règlement grand-ducal qui devra énumérer, à l’instar de la directive, de manière exhaustive les preuves qui peuvent être exigées des personnes concernées, lorsqu’elles font la demande d’une carte de séjour. La durée de la carte de séjour a une période de validité de cinq ans ou moins, si la durée du séjour du citoyen dont ils dépendent est inférieure à cinq ans*”.

6. Retention of the right of residence under Article 12(3)

Article 12(3) of the Directive is transposed by Article 17 (2) Prop. The substance is correctly transposed. A conformity issue arises from Article 18 Prop, which states: “*Avant l’acquisition du droit de séjour permanent prévu à l’article 20, le droit de séjour des membres de la famille visés à l’article 17, paragraphes (1), (2) et (3) reste soumis à l’obligation de pouvoir démontrer qu’ils sont travailleurs salariés ou indépendants ou qu’ils disposent de ressources suffisantes pour ne pas devenir une charge pour le système d’assistance sociale pendant la durée de leur séjour, et qu’ils sont entièrement couverts par une assurance maladie au Grand-Duché de Luxembourg, ou qu’ils sont membres de la famille déjà constituée au pays, d’une personne répondant à ces exigences* ». The Prop additionally subjects the retention of the right of residence to the conditions of Article 12(2) second subparagraph which is not required by the Directive.

7. Right of permanent residence (Article 16)

Article 16(1) of the Directive states a.o. that the right of permanent residence for Union citizens shall not be subject to the conditions provided for in Chapter III. The Luxembourg transposition measure states that the right of permanent residence “n’est pas soumis aux conditions prévues à l’article 6, paragraphe (1)” (Article 6(1) Prop transposes Article 7(1) of the Directive). However, the conditions provided for in Chapter III of the Directive are broader than merely Article 7(1) of the Directive. In this regard the transposition is not correct.

Article 16(2) of the Directive states that the first paragraph also applies ‘to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years’. Art. 20(1) Prop, which transposes this provision of the Directive, has not included that the right is not subject to the conditions under chapter III. The previous paragraph only referred to Article 6(1) which applies to Union citizens but not to third country family members. Transposition is therefore not correct.

8. Documents certifying permanent residence for Union citizens (Article 19) and permanent residence card for non EU family members (Article 20)

Article 19 deals with the obligation for the Member States to issue a document certifying permanent residence of Union citizens upon application and as soon as possible. This provision has been transposed by Articles 11 and 21(1) Proposal. These provisions state that Union citizens and EU family members will receive ‘un document attestant de la permanence du séjour’. One remark could be made concerning the obligation to issue such permanent residence card “upon application”. Luxembourgian transposition says that the persons concerned will “receive” such a permanent residence card. It cannot be definitively assessed whether this is a conformity issue because the modalities to issue the permanent residence card must be provided for in a règlement grand-ducal. This has not yet been issued, therefore transposition is not correct.

Article 20(1) provides for the obligation to issue to family members who are not nationals of a Member State entitled to permanent residence a permanent residence card within six months of submission of the application. This provision is transposed by Article 21(2) Proposal, according to

which a ‘carte de séjour permanent’ will be delivered to non EU family members, ‘selon les modalités à déterminer par règlement grand-ducal’. Transposition is incomplete, since a règlement grand-ducal, which will provide for the modalities, has not been issued yet. Article 20(2) concerns the obligation of family members to submit the application before the residence card expires and the possibility to envisage sanctions for failing the requirement to apply for a permanent residence card. This provision has not been transposed. However, this conformity issue could be solved by issuing a règlement grand-ducal. Moreover, Luxembourg authorities have indicated that no sanction is foreseen (although the Directive allows this).

9. Checks

Article 26 deals with the possibility of Member States carrying out checks on compliance with any requirement deriving from national legislation for non-nationals to always carry a registration certificate or residence card, provided that the same requirement applies to their own nationals as regards an identity card.

This provision is not correctly transposed into Luxembourgian law. Article 136 (1) Proposal would introduce ‘a specific provision concerning the administrative situation for foreigners’, which is contrary to the Directive (“provided that the same requirement applies to their own nationals as regards their identity card”). Article 136(1) Proposal states: “*Sans préjudice de l’article 45 du Code d’instruction criminelle, les étrangers doivent être en mesure de présenter à toute réquisition de la Police grand-ducale, les documents sous le couvert desquels ils sont autorisés à entrer ou à séjourner sur le territoire* ». The comments in the pre-legislative proceedings are: “*En dehors des vérifications d’identité applicables à toute personne, qui sont régies par le Code d’instruction criminelle et pour lesquelles un indice fait présumer qu’il existe un lien entre la personne contrôlée et une infraction pénale, une disposition spécifique concernant la vérification de la situation administrative des étrangers est introduite par le présent article. Ainsi, les étrangers doivent toujours être en mesure de présenter les documents les autorisant à entrer et à séjourner sur le territoire. Les agents de la Police peuvent retenir le passeport ou autre document de voyage des étrangers en situation irrégulière. Dans ce cas ils remettent aux personnes concernées un récépissé pour leur permettre de justifier de leur identité*”.

Luxembourg authorities say that there is no conformity issue, because this ‘prerogative of the police does not apply to Union citizens’. However, it is not clear why Article 136(1) Proposal would not apply to Union citizens: it does not follow from the text.

10. Proportionality and measures on grounds of public policy or public security (Art 27(2))

Article 27(2) provides that measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Moreover, the same Article holds that previous criminal convictions cannot in themselves constitute grounds for taking such measures. This provision is insufficiently transposed by Article 27(2) Prop: there is no mention of the principle of proportionality.

According to the Luxembourg authorities “*La condition de proportionnalité est remplie à l’article 29. Dans son avis du 20 juin, le Conseil d’Etat note à propos de l’article 29 : Il s’agit de la transposition de l’article 28, paragraphe 1^{er} de la directive qui est l’émanation du principe de proportionnalité dont les exigences sont à respecter en cas de mesures restrictives à la liberté de circuler et de séjourner* ». Article 29 Proposal reads : « *Avant de prendre une décision d’éloignement du territoire pour des raisons d’ordre public ou de sécurité publique, le ministre tient compte notamment de la durée du séjour de la personne concernée sur le territoire luxembourgeois, de son âge, de son état de santé, de sa situation familiale et économique, de son intégration sociale et culturelle dans le pays et de l’intensité de ses liens avec son pays d’origine*”. The criteria enumerated in Art. 29 Prop surely will enhance the proportional character of the measures that will be taken, but the principle of

proportionality is larger (it can also be based on criteria other than the ones enumerated). Moreover, the guarantee provided by the principle of proportionality should be written in the legal texts.

11. Mistakes in the transposition of Article 28(2) and (3)

Article 28(2) of the Directive contains the concept of ‘serious grounds’, while Article 30(1) Prop uses the concept ‘imperative grounds’ (*‘raisons impérieuses’*). Although this renders the transposition more favourable, it is probably a mistake because the LU authorities have not used the correct French version of the Directive.

Article 28(3) of the Directive contains the concept of ‘imperative grounds’, while Article 30(1) Prop uses the concept ‘serious grounds’ (*‘motifs graves’*). This is probably an incorrect transposition for the same reason as under Article 28 (2) of the Directive.

12. Procedural safeguards

Article 31(3) concerns the obligation to guarantee that the redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based and that they shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28. This provision can not be considered correctly transposed into Luxembourgian law. First of all, Article 113 Proposal indicates that a “*recours en annulation*” is possible. According to Article 2(1) de *la Loi du 7 novembre 1996 portant organisation des juridictions de l’ordre administratif* the administrative Tribunal can annul the decision on the basis of the criteria therein defined. No “*recours en reformation*” is possible. Secondly, the Proposal indicates that the “*droit commun*” will apply. However, it is not sure that in these redress procedures the judge will also have the power to review “the facts and circumstances on which the proposed measure is based”. In any case, this aspect is not explicitly transposed.

c. Conclusions of the legal analysis of the transposing measures for Directive 2004/38/EC.

In general, Luxembourg, when they adopt the Prop, will have an accurate transposition of Directive 2004/38. The transposition will follow the structure of the Directive.

i. Summary of conformity problems

The summary of conformity problems gives a quick overview of conformity problems, with exception of minor conformity issues.

1. Non conformity due to gaps or incomplete transposition

a. Non-transposition

- Art. 3(2)(b): facilitate entry and residence for Union citizen – partner with durable relationship
- Art. 4(4): validity of passport
- Art. 8(4): sufficient resources
- Art. 5(2), second subparagraph: facility to obtain the necessary visas
- Art. 12(2) second subparagraph last sentence: sufficient resources
- Art. 13(2) second subparagraph last sentence: sufficient resources
- Art. 19(2): issue document certifying permanent residence as soon as possible
- Art. 20(2): application for permanent residence card
- Art. 25(2): issue documents free of charge

b. Incomplete transposition

- Art. 8(3): registration certificate for Union citizens
- Art. 8(5): registration certificate for EU family members
- Art. 10(1) and (2): issue of residence cards
- Art. 19(1): document certifying permanent residence
- Art. 27(2): Proportionality and measures on grounds of public policy or public security
- Art. 27 (3): request for information
- Art. 31(3): redress procedures – examination of the facts and circumstances
- Art. 36: sanctions

2. Incorrect or imprecise/ambiguous transposition

a. Incorrect transposition

- Art. 3(2) para. 2: examination of personal circumstances
- Art. 5(5): report presence
- Art. 6(1): for job seekers
- Art. 12(3): death, departure... of the Union citizen
- Art. 16(1): permanent right of residence for Union citizen
- Art. 16(2): permanent right of residence for non EU family members
- Art. 26: checks
- Art. 28(3): ‘imperative grounds’

b. Imprecise/ambiguous transposition

- Art 7 (1)(a): concept of ‘worker’

SUMMARY DATASHEET

1. Transposing legislation

As stated before, the Proposal has not yet been adopted, and at this point in time RGD 07 transposes the Directive. But it is clear that the Proposal is meant to be a comprehensive and definitive transposition of the Directive.

On 21 March 2008 the '*Conseil de gouvernement*' has also already adopted four '*projet de règlement grand-ducal*' implementing the future new immigration law:

- (1) le projet de règlement grand-ducal portant exécution de certaines dispositions relatives aux formalités administratives prévues par la loi sur la libre circulation des personnes et l'immigration;
- (2) le projet de règlement grand-ducal relatif à la composition et au fonctionnement de la commission consultative des étrangers, la composition et au fonctionnement de la commission consultative pour travailleurs salariés, la composition et au fonctionnement de la commission consultative pour travailleurs indépendants;
- (3) le projet de règlement grand-ducal relatif à l'exercice d'une activité salariée par un étudiant, tel que prévu par la loi sur la libre circulation des personnes et l'immigration;
- (4) le projet de règlement grand-ducal fixant les conditions et modalités relatives à la délivrance d'une autorisation de séjour en tant que travailleur salarié.

2. Assessment of the transposition

a) Incomplete transposition or non-transposition

i. Non-transposition

Article 3(2)(b):	Facilitate entry and residence for Union citizen – partner with durable relationship
Article 4(4)	Validity of passport
Article 5(2) second subparagraph	Facility to obtain the necessary visas
Article 8(4)	Sufficient resources
Article 12(2) second subparagraph last sentence	Sufficient resources
Article 13(2) second subparagraph last sentence	Sufficient resources
Article 19(2)	Issue document certifying permanent residence as soon as possible
Article 20(2)	Application for permanent residence card
Article 25(2)	Issue documents free of charge

ii. Incomplete transposition

Article 8(3)	Registration certificate for Union citizens
Article 8(5)	Registration certificate for EU family members
Article 10(1) and (2)	Issue of residence cards
Article 19(1)	Document certifying permanent residence
Article 27(2)	Proportionality and measures on grounds of public policy or public security
Article 27(3)	Request for information
Article 31(3)	Redress procedures – examination of the facts and circumstances
Article 36	Sanctions

b) Incorrect or imprecise/ambiguous transposition

i. Incorrect or ambiguous transposition

Article 3(2) paragraph 2	Examination of personal circumstances
Article 5(5)	Report presence
Article 7(1)(a)	Right of residence for more than three months for workers (ambiguous)
Article 6(1)	Job seekers
Article 12(3)	Death, departure ... of Union citizen
Article 16(1)	Permanent residence right for Union citizens
Article 16(2)	Permanent right of residence for non EU family members
Article 26	Checks
Article 28(3)	'Imperative grounds'

ABBREVIATIONS USED

- Art: article
- Cf: confer
- Nr.: number
- ECJ: European Court of Justice
- TEC: Treaty establishing the European Community
- Prop.: *Projet de loi portant sur la libre circulation des personnes et l'immigration*

1 INTRODUCTION

This conformity study analyses in detail the provisions of Directive 2004/38/EC on the free movement of EU citizens in its consolidated version, and it compares it with the legislation in place in Luxembourg.

Directive 2004/38/EC repealed the earlier directives on free movement of persons (Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC) as from 30 April 2006.

EU citizenship gives every Union citizen the right to move and to reside freely within the territory of the Member States. The facilitation and promotion of this right, which is at the same time one of the fundamental freedoms of the internal market, is the objective of Directive 2004/38/EC. A second objective of Directive 2004/38/EC was to codify and review the various pieces of legislation and case-law dealing with this issue.

Free movement as a fundamental freedom of the internal market

Free movement is one of the fundamental freedoms of the internal market and can therefore only be restricted in a limited number of pre-determined circumstances. Thus, national legislation cannot adopt more restrictive legislation than provided for in the Directive.

Directive 2004/38/EC introduces, on the one hand, a uniform approach regarding the formalities that Member States can impose upon EU citizens residing in their territory. These formalities are expressly established in the Directive and restricted in function of the duration of the stay in the Member States.

- For a stay of less than three months, the only formality a Member State can impose is the presentation of a valid passport or national identity card.
- For residence of more than three months, a Member State can only require the EU citizen to register in the population register of the place of residence. This registration needs to be validated immediately if a certain number of conditions are complied with. The Member State can only require the EU citizen to present proof that he/she is a worker, self-employed person, student or has sufficient resources not to become a burden upon the social security system of the Member State. Member States cannot lay down a fixed amount of what they consider to be “sufficient resources”, but must always take into account the personal situation of the person concerned. Family members of the EU citizen will have to present an identity document and proof of the family link to an EU citizen.
- After five years of continuous residence in a Member State, an EU citizen obtains a right to permanent residence. The host Member State shall issue a document certifying permanent residence. A permanent resident has the right to be treated equally to a national of the Member State.

On the other hand, the Directive also determines and clarifies the only acceptable reasons for restriction of the free movement of citizens by Member State authorities, namely for reasons of public order, public security and public health. (For the interpretation and conditions of such exceptions, it is important to rely upon the case-law of the Court of Justice.)

These measures guarantee a strong protection against expulsion for EU citizens who have been long-term residents in another Member State. Such measures need to be proportionate and shall always look at the personal conduct of the individual concerned which must represent a “genuine, present and

sufficiently serious threat affecting one of the fundamental interests of society”. In addition, the Directive establishes some procedural safeguards in case an expulsion decision is considered.

1.1 OVERVIEW OF THE LEGAL FRAMEWORK IN LUXEMBOURG

Luxembourg is a unitary state. The Constitution of Luxembourg is the supreme law in Luxembourg’s hierarchy of sources. The Constitution was adopted in 1868.

Luxembourg is a parliamentary representative democracy, with a constitutional monarchy. The Head of the State is the Grand Duc (Article 33 Constitution). The legislative power is vested in the Chamber of Deputies (<http://www.chd.lu/default.jsp>), which is a unicameral legislature composed of 60 members. These members are directly elected for five year periods from four constituencies. Every Luxembourgian law must be voted by the Chamber of Deputies (Article 46 Constitution). As a principle, every law must be voted on twice by the Chamber of Deputies (Article 59 Constitution). The *Conseil d’Etat*, composed of 21 members appointed by the Grand Duc, advises the Chamber of Deputies in the drafting of legislation.

The Grand-Duc takes the measures (*règlements/arrêtés*) necessary to execute the *lois* (Art. 36 Constitution). The current government is composed of 15 members (one Prime Minister, one vice Prime Minister, 11 Ministers, one ‘*Ministre délégué*’ and one Secretary of State).

1.2 FRAMEWORK FOR TRANSPOSITION & IMPLEMENTATION OF DIRECTIVE 2004/38/EC IN LUXEMBOURG

1.2.1 Distribution of competences according to the national Constitution

The basic law in Luxembourg is the ‘*loi modifiée concernant l’entrée et le séjour des étrangers, le contrôle médical des étrangers ainsi que l’emploi de main-d’œuvre étrangère*’ of 28 March 1972.

On the basis of this basic law five acts (“*règlements*”) have been taken:

1. Règlement du grand ducal du 12 mai 1972 déterminant les mesures applicables pour l’emploi des travailleurs étrangers sur le territoire du Grand-Duché de Luxembourg. Last modification: Règlement du grand ducal du 31 juillet 2006.
2. Règlement grand-ducal du 28 mars 1972 relatif aux conditions d’entrée et de séjour de certaines catégories d’étrangers faisant l’objet de conventions internationales.
3. Règlement grand-ducal du 28 mars 1972 relatif aux formalités à remplir par les étrangers séjournant au pays
4. Règlement grand-ducal du 28 mars 1972 relatif à la composition, l’organisation et le fonctionnement de la commission consultative en matière de police des étrangers.
5. Règlement grand-ducal du 17 octobre 1995 relatif au contrôle médical des étrangers.

In order to transpose Directive 2004/38 into the legal order of Luxembourg, the ‘*Conseil de gouvernement*’ adopted on 18 October 2007 a legislative proposal (*projet de loi n° 5802 portant sur la libre circulation des personnes et l’immigration*), which was submitted to the Chamber of Deputies on 7 November 2007. This law is still pending. The proposal n° 5802 would transpose *a.o.* Directive 2004/38 into Luxembourgian law and replace the ‘*loi modifiée concernant l’entrée et le séjour des étrangers, le contrôle médical des étrangers ainsi que l’emploi de main-d’œuvre étrangère*’ of 28 March 1972. Several organisations have sent their remarks on this proposal to the Chamber of Deputies.

Because the definitive transposition of Directive 2004/38 is still pending in the Chamber of Deputies, a *règlement grand ducal* of 21 December 2007 has been issued to transpose provisionally Directive 2004/38.

On 21 March 2008 the '*Conseil de gouvernement*' has also adopted four '*projet de règlement grand-ducal*' implementing the new immigration law:

- (1) le projet de règlement grand-ducal portant exécution de certaines dispositions relatives aux formalités administratives prévues par la loi sur la libre circulation des personnes et l'immigration;
- (2) le projet de règlement grand-ducal relatif à la composition et au fonctionnement de la commission consultative des étrangers, la composition et au fonctionnement de la commission consultative pour travailleurs salariés, la composition et au fonctionnement de la commission consultative pour travailleurs indépendants;
- (3) le projet de règlement grand-ducal relatif à l'exercice d'une activité salariée par un étudiant, tel que prévu par la loi sur la libre circulation des personnes et l'immigration;
- (4) le projet de règlement grand-ducal fixant les conditions et modalités relatives à la délivrance d'une autorisation de séjour en tant que travailleur salarié.

This Conformity Study only examines the *Projet de loi* n° 5802 ("Prop."), as the text stands on 2 July 2008. The Prop is annexed to this Conformity Study.

The *règlement grand ducal* of 21 December 2007 is not covered by the present Conformity Study. An assessment of this text can be found in the Table of Correspondence, which is also annexed to the present study.

1.2.2 General description of organisation of national authorities implementing Directive 2004/38/EC in Luxembourg

The main ministry responsible for implementation and application of the Directive 2004/38/EC is the Ministry of External Affairs and Immigration Affairs (www.mae.lu). Jean Asselbom is the current '*Ministre des Affaires Etrangères et de l'Immigration*'. The Ministry of External Affairs and Immigration Affairs has been attributed a.o. the following competence

"5. Entrée et séjour des étrangers: délivrance des cartes de séjour; délivrance des permis de séjour et des permis de travail; octroi du statut d'apatride. – Procédure d'asile: octroi du statut de réfugié – Politique européenne en matière d'immigration et d'asile".³

The Ministry of External Affairs and Immigration Affairs contains the immigration department, which treats demands for entry and residence in the Luxembourgian territory. The immigration department encompasses the service for foreigners and refugees, and the service delivering work permits.⁴ Once immigrants are in Luxembourg, the Ministry of Family is competent for integration matters through the Commissioner for Foreigners.⁵

Given the unitary character of Luxembourg and the approach taken in the regulations, there is very little potential for conflict of responsibilities in the implementation of the Directive.

³ Arrêté grand-ducal du 7 août 2004 portant constitution des Ministères (Mém. A – 147 du 11 août 2004, p. 2060).

⁴ M. FISCHBACH, Rapport d'activité du 1 octobre 2004 au 30 septembre 2004 de l'Ombudsman, p. 20.

⁵ S. KOLLWELTER, Current Immigration Debated in Europe: A publication of the European Immigration Dialogue – Luxembourg, September 2005, p. 13.

2 LEGAL ANALYSIS OF THE TRANSPOSING MEASURES FOR DIRECTIVE 2004/38/EC

2.1 Definitions, family members and beneficiaries

Definitions

Luxembourgian legislation has correctly transposed Article 2 and in some cases it goes beyond the scope of the Directive's provision. Article 12(1) Prop is the transposing provision.

- **“Union citizen” (Article 2(1))**

Article 2(1) 1 defines a “Union citizen” as “any person having the nationality of a Member State”. Article 3, b) Prop states that a Union citizen is *‘toute personne ayant la nationalité d’un Etat membre de l’Union européenne qui exerce son droit à la libre circulation’*. Every person with the nationality of a Member State is therefore considered a Union citizen for the application of the Prop. This also includes citizens of Luxembourg (see transposition of Article 3(1) of the Directive). The Prop does not say that only ‘foreigners’ with the nationality of a Member State will be considered a Union citizen.

- **The spouse (Art. 2 (2) (a))**

Article 2(2)(a) of the Directive states that the spouse must be considered as a family member. Article 12(1)a Prop has transposed this provision correctly, by stating that ‘le conjoint’ will be considered as a family member.

- **“Registered Partnerships” (Article 2(2)(b))**

Article 2(2)(b) of the Directive states that the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State must be considered as a family member.

Article 12(1)b Prop states that the partner with whom a Union citizen has contracted a registered partnership *“conformément aux de fond de l’article 4 de la loi du 9 juillet 2004 relative aux effets légaux de certains partenariats”* will be considered as a family member. This transposition is correct. The conditions of Article 4 of the Law of 9 July 2004 are:

- 1. être capables de contracter conformément aux articles 1123 et 1124 du Code civil;*
 - 2. ne pas être liées par un mariage ou un autre partenariat;*
 - 3. ne pas être parents ou alliés au degré prohibé conformément aux articles 161 à 163 et à l’article 358 alinéa 2 du Code civil;*
 - 4. résider légalement sur le territoire luxembourgeois*
- Le point 4 ci-avant ne s’applique qu’aux ressortissants non communautaires ».*

- **“The direct descendants who are under the age of 21 or are dependants” Article 2(2)(c):**

The provision has been transposed correctly by Article 12(1)(c) Prop.

- **“The dependent direct relatives in the ascending line” (Article 2(2)(d)):**

The provision has been transposed correctly by Article 12(1)(d) Prop.

Article 3 “Beneficiaries”

- **Article 3 (1)**

Article 3(1) indicates that the Directive applies to all Union citizens who move to or reside in a Member State other than that of which they are national and to their family members who accompany or join him.

- Union citizens and wholly internal situations (Surinder Singh jurisprudence)

Article 3, b) Prop has transposed this provision correctly, since it indicates that a Union citizen is every person having the nationality of a Member State exercising his right to free circulation. This definition also includes Luxembourgian citizens. In addition the transposition is more favourable since the Proposal also covers the family members of a Luxembourg citizen who has not exercised the right of free movement to avoid reverse discrimination. Therefore, wholly internal situations are also covered by the new proposal.

- Family members

For family members the correct transposition follows from Art. 13(1) and 14 (1) Prop. The condition to accompany or join the Union citizen is in both cases explicitly written down in both Articles. Previous lawful residence in another Member State is not required.

- **Other family members (Article 3 (2))**

According to Article 3(2), other family members do not have a right of entry and residence in the host Member State. However, the host Member State has an obligation to facilitate their entry and residence in the host Member State taking into account the personal circumstances of the case.

Those family members are: family members who in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen, and those with whom the Union citizen has a durable relation duly attested.

- Members of the household or needing personal care (Article 3(2)(a))

This provision has been correctly transposed in Article 12(2) al. 1 Prop. The criteria of Article 3 (2) (a) are explicitly written down in the transposing legislation. The “*peut autoriser*” of Article 12(2) al. 1 Prop is the transposition of the obligation to “facilitate entry and residence”. However, this could be considered a soft obligation. Stronger and more direct wording would have been better.

- Partner – durable relationship (Article 3(2)(b))

The Directive also imposes on Member State to facilitate entry and residence of the person with whom the Union citizen has a durable relationship. The provision has not been transposed under Luxembourgian law.

Luxembourg authorities indicate that Article 78 should be a transposition of Article 3(2)(b). Article 78 Prop belongs to Chapitre 3 of the Prop (“*Le droit d’entrée et de séjour du ressortissant de pays tiers*”), and not to Chapitre 2 (“*Le droit du citoyen de l’Union, du ressortissant des autres Etats parties à l’Accord sur l’Espace économique européen et de la Confédération suisse et des membres de leur famille, de circuler et de séjourner librement sur le territoire du Grand-Duché de Luxembourg*»). Probably these persons will be subject to general immigration provisions. Clarification is needed on this point. In any case, the obligation to carry out an extensive examination of the circumstances has not been transposed for this particular category of other family members.

- Obligation to examine the personal circumstances

The obligation under Article 3(2) second subparagraph to undertake an extensive examination of the personal circumstances and to justify any denial of entry or residence has been transposed by Art. 12 (2) al. 2 Prop. However, this provision only applies to the person under Article 3(2)(a) of the Directive and not to persons under Article 3(2)(b). Therefore, the transposition cannot be considered correct.

2.2 Rights of exit and entry

Right of exit (Article 4)

Article 4(1) concerning the right to leave the territory of a Member State to travel to another Member State is effectively transposed by Article 5 Prop (for Union citizens) and by Article 13(3) Prop (for non EU family members).

Article 4(2) states that no exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies. For non EU family members, Article 13(3) Prop explicitly added: “sans qu’un visa de sortie ou une obligation équivalente ne puissent leur être imposés ». For non EU family members, only an ID card is required, so (*a contrario*) no visa formality can be imposed.

Article 4(3) has been correctly transposed by the Arrêté grand-ducal du 30 août 1939, portant introduction de la carte d'identité obligatoire.

Article 4 (4) has been transposed. Law 14 April 1934 regulates passports. The *Règlement grand-ducal du 31 juillet 2006 portant règlement d'exécution de la loi du 14 avril 1934, concernant les passeports biométriques, les titres de voyage pour étrangers, apatrides et réfugiés et l'établissement d'un droit de chancellerie pour légalisations d'actes* includes the obligation of 5 years durability for passports.

Right of entry (Article 5)

Article 5 provides a general right of entry for Union citizens and family members upon presentation of an ID or passport, and in the case of family members upon presentation of passport and when required visa, although visa is not needed if the person holds a family member certification of a Union citizen issued by any Member State.

Article 5 has been correctly transposed, with the exception of Article 5(2) second subparagraph, which is not transposed, and Article 5(5) which has been incorrectly transposed.

Article 5(1) states that Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport. Article 5 Prop states that Union citizens holding an ID card or a valid passport can enter the territory. Non EU family members can, according to Article 13(1) Prop, enter the territory holding a valid passport or an entry visa (for the latter: see Article 5(2) of the Directive).

Article 5(2) states that non EU family members shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. This provision has been correctly transposed by the last part of Article 13(1) Prop (“*et le cas échéant du visa requis pour l'entrée sur le territoire* »).

Article 5(2) second subparagraph requires Member States to grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an

accelerated procedure. This provision has not been transposed. Luxembourgian authorities indicate that this will be done in the '*Règlement grand ducal concernant les formalités administratives*'.

Article 5(3) states that the host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10. This provision has been correctly transposed by Article 13(2) Prop.

Article 5(4) provides that if a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or to have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence. This provision is correctly transposed by Article 23 Prop.

Article 5(5) provides that the Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. This provision is transposed by Articles. 1-4 of '*Règlement grand-ducal du 28 mars 1972 relatif aux formalités à remplir par les étrangers séjournant au pays*'. This transposition is not correct. The time limit of 3 days to report your presence cannot be considered as a 'reasonable' period. Moreover, the conditions of Article 2 of the *règlement grand ducal* are not foreseen in the Directive.

Article 2 of this *Règlement* states: "*La déclaration prescrite par l'article 1er contiendra les indications nécessaires pour pouvoir constater et vérifier l'état civil, la nationalité, les antécédents et les moyens d'existence de l'étranger et des autres personnes comprises dans la déclaration. Elle sera signée par le représentant de l'autorité locale et l'étranger intéressé*".

It is important to note that Luxembourgian authorities indicate that these provisions will be abolished once the Prop enters into force.

2.3 Right of residence

2.3.1 Right of residence for up to three months (Article 6)

Article 6 grants an initial right of residence for up to three months with no conditions or formalities other than holding a valid ID or passport, and in the case of third country family members, holding a passport.

Article 6(1) is correctly transposed by Article 5 Prop, according to which a Union citizen holding an identity card or a valid passport can enter Luxembourg to reside there for a period up to three months.

However, nothing in the legislation excludes job-seekers from the obligation to register. Therefore, they will have to register for periods of residence longer than 3 months instead of 6 as implied by the Directive in recital 9, in line with *Antonissen* case law.

Article 6(2) is also correctly transposed. Article 13(1) Prop, in its original version, left open the possibility to ask for a right of residence for visa non EU family members, while the Directive does not impose a visa for the right of residence. Article 13(1) Prop has been altered and now indicates explicitly that a visa can only be asked for in relation to the right of entry.

2.3.2 The right of residence for more than 3 months (Articles 7-13)

(a) General conditions under Article 7

Article 7 providing a right of residence for more than three months is mainly correctly transposed by Luxembourgian law.

- **Union citizens**

Article 7(1)(a): Luxembourg's transposition defines the concept of a worker whereas this is a community concept. This may lead to an inconsistency with Community law (for example on the basis of case law interpreting the concept of worker). Could become an issue of non conformity. This has been considered an ambiguous transposition.

- **Family members**

1. Article 7(1)(d): Article 14 (1) first sentence, the transposing measure, is correct. For students: see transposition under Article 7(4) of the Directive.
2. Article 7(2): correct transposition by Article 14(1) second sentence Prop.
3. Article 7(4) has been correctly transposed by Article 14(2) Prop.

- **Retention of the Status of worker**

Article 7(3) has been correctly transposed by Article 7(1) 1-3 and Article 7(2) Prop.

(b) Administrative formalities for Union citizens (Article 8)

Article 8 provides for the details for issuance of registration certificates and residence cards for family members who are also Union citizens. Luxembourg has used the opportunity to require Union citizens to register for periods of residence longer than three months.

Article 8 has three conformity issues: Firstly, the obligation to register within three months also applies to job seekers. Secondly, Articles 8(3) and (5) have not been correctly transposed, notably because the *règlements*, which will oblige to present the documents enumerated in Articles 8 (3) and (5) have not yet been issued. Luxembourg authorities indicate that this will be done in a '*règlement grand-ducal concernant les formalités administratives*'. Thirdly, Article 8(4) has not been transposed.

- **Obligation to register and sanctions**

Article 8(1) has been effectively transposed by Article 8 (1) Prop, stating that '*le citoyen de l'Union tel que visé à l'article 6, paragraphe (1) qui a l'intention de séjourner sur le territoire pour une durée supérieure à trois mois, sollicite la délivrance d'une attestation d'enregistrement auprès de l'administration communale du lieu de sa résidence dans un délai de trois mois suivant son arrivée*'.

- **Deadline and issuance of the registration certificate**

Article 8(2) states that the deadline for registration may not be less than three months from the date of arrival, and that a registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration and that failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions. This provision has been correctly transposed by Articles 8(1), (2), (3) and (4) Prop.

Regarding the transposition of Article 8(2) the pre-legislative proceedings indicate that: "*Un règlement grand-ducal indiquera les documents nécessaires pour l'obtention de l'attestation d'enregistrement sur la base des conditions découlant de l'article 6 de la future loi. Le présent projet tente, dans la mesure du possible, de prévoir des dispositions concernant l'inscription des personnes étrangères sur les registres des communes qui seront en conformité avec le projet de loi comportant des modifications en matière de législation sur le registre de la population en voie d'élaboration par le ministre de l'Intérieur. Les paragraphes (3) et (4) tiennent compte des articles 8 et 25 de la directive*

qui réaffirment la jurisprudence constante de la Cour de justice selon laquelle un permis de séjour ne constitue pas une autorisation, mais seulement un document constatant un droit préexistant, et la possession d'une carte de séjour ne constitue pas une condition préalable aux fins de l'exercice des droits liés à la libre circulation des personnes et, en particulier, au droit de séjourner dans un autre Etat membre (arrêt rendu par la Cour de justice dans l'affaire 48/75, Royer). La reconnaissance du droit de séjour n'est donc pas subordonnée à la détention de ce document, et la qualité de bénéficiaire des droits liés à la libre circulation peut être attestée par tout autre moyen de preuve“.

- **Documents requested**

Article 8(3) lists the documents the competent authority may require 'for the registration certificate to be required'. Art. 8(2) Prop states that the Union citizen must justify that he/she falls under one of the categories of Art. 6(1) Prop. The documents to be presented will be enumerated in a règlement grand ducal, which has not yet been issued. Transposition is therefore incomplete.

- **Sufficient resources**

Article 8(4) provides that Member States may not lay down a fixed amount which they regard as 'sufficient resources', but must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State. There is no disposition providing that an authority should not lay down a fixed amount which it regards as sufficient resources. This provision is not correctly transposed by Articles 6(1) 2-3 and Articles 6(2) Prop.

A règlement grand-ducal will have to provide the resources asked for, and how these can be proved. Prelegislative proceedings indicate already: *“La condition des ressources suffisantes et d'une assurance maladie est exigée pour les personnes non actives, dans un souci d'éviter que ces personnes ne deviennent une charge déraisonnable pour les finances publiques. Le montant de ressources considérées comme suffisantes et les modalités selon lesquelles la preuve en est rapportée sont précisés par règlement grand-ducal. Il ressort de la jurisprudence de la CJCE qu'il suffit que les citoyens de l'Union disposent de ressources suffisantes, sans que cette disposition comporte une exigence quelconque quant à la provenance de celles-ci. Ainsi importet-il peu que les ressources soient propres au titulaire du droit de séjour ou qu'elles proviennent d'une autre source. Elles pourraient donc être constituées ou complétées par celles d'un parent ou d'un tiers, par exemple une personne cohabitant avec le titulaire du droit de séjour ou se portant garant de ce dernier, pour autant que des justificatifs adéquats soient fournis”.*

Therefore, until that regulation is adopted, it is not possible to assess whether sufficient resources will be assessed as established in Article 8(4). Nothing has been inserted so far in the proposal to make sure that no fixed amount will be established and that personal circumstances will be taken into account.

- **Documents requested on family members who are EU citizens**

Article 8(5) is transposed by Article 15(1) and (2) Prop. A règlement grand ducal will have to be issued in order to list the documents to be handed over. This has not yet been done.

(c) Family members who are not nationals of a Member State (Articles 9-11)

- **Administrative formalities (Article 9)**

Article 9(1) provides that Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months. This provision is correctly transposed by Article 15(1) and (2) Prop.

The obligation that the deadline for submitting the residence card application is not less than three months from the date of arrival, provided by Article 9(2) of the Directive is correctly transposed by Article 15(1) Prop, which says that they must be asked for *‘dans les trois mois suivant leur arrivée’*.

Article 9(3) has been correctly transposed by Article 140 Prop (sanction between 25 and 250 EUR), whereas for Luxembourg citizens the sanction for not renewing their ID card is *‘une amende de 20 à 50 fr. et d'un emprisonnement de 1 à 7 jours ou d'une de ces peines seulement’*.

- **Issue of residence cards (Article 10)**

Article 10 provides that the right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called ‘Residence card of a family member of a Union citizen’ no later than six months from the date on which they submit the application, and that certificate of application for the residence card shall be issued immediately. The same Article concerns the documents that may be required by the Member State for the issuance of this residence card.

This Article is generally not correctly transposed by Luxembourg.

Article 10(1) has been transposed by Article 15(1) Prop. However, the condition concerning the maximum period for issuing the card and the immediate delivery of a certificate have not been transposed. Luxembourg authorities indicate that the correct transposition will flow from the *‘règlement grand-ducal sur le formalités administratives’*, which has not yet been issued.

Article 10(2) listing the documents that may be requested to prove the conditions still needs to be transposed by a *règlement grand-ducal*, that has not yet been issued. Pre-legislative proceedings already indicate: *“La directive s’est attelée à réduire non seulement les formalités administratives que doivent accomplir les personnes qui sont citoyens de l’Union européenne, mais également celles des membres de la famille du citoyen qui sont ressortissants de pays tiers. Certes, l’exigence d’une carte de séjour est maintenue pour ces personnes, mais afin de leur éviter des tracas administratifs, le paragraphe (2) renvoie à un règlement grand-ducal qui devra énumérer, à l’instar de la directive, de manière exhaustive les preuves qui peuvent être exigées des personnes concernées, lorsqu’elles font la demande d’une carte de séjour. La durée de la carte de séjour a une période de validité de cinq ans ou moins, si la durée du séjour du citoyen dont ils dépendent est inférieure à cinq ans”*. Note that the authorities seem to imply that the *règlement* will include an exhaustive list of the documents accepted as means of proof, which will be against the Directive.

- **Validity of residence cards (Article 11)**

Article 11 provides that the residence card provided for by Article 10(1) shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years and that the validity of the residence card shall not be affected by temporary absences not exceeding six months a year, or by absences of a longer duration for compulsory military service or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

Article 11(1) has been correctly transposed by Article 15(3) Prop and Article 11(2) has been correctly transposed by Articles 15(4) and 9(2) Prop (this provision listing the absences).

(d) Retention of the right of residence by family members in the event of death, departure, divorces, annulment or termination of partnership

- **Retention of the right of residence in the event of death or departure of the Union citizen (Article 12)**

Article 12 provides that family members retain the right to reside where the Union citizen dies or leaves the Member State. The Article deals with a number of different groups of people.

Article 12 is mainly correctly transposed. There are two conformity issues. The first one concerns the last sentence of Art 12(2), which states that ‘Sufficient resources’ shall be as defined in Article 8(4) of the Directive. This has not been transposed in Luxembourg. Please note that Article 6(2) Prop only concerns the definition of sufficient resources as meant by the first two paragraphs of Article 6, and thus can not be applied within the context of Article 18 Prop (which transposes Art. 12(2) of the Directive).

The second one concerns Article 12(3). Art. 12(3) of the Directive is transposed by Article 17 (2) Prop. The substance is correctly transposed. A conformity issue arises from Article 18 Prop, which sounds like this: “*Avant l’acquisition du droit de séjour permanent prévu à l’article 20, le droit de séjour des membres de la famille visés à l’article 17, paragraphes (1), (2) et (3) reste soumis à l’obligation de pouvoir démontrer qu’ils sont travailleurs salariés ou indépendants ou qu’ils disposent de ressources suffisantes pour ne pas devenir une charge pour le système d’assistance sociale pendant la durée de leur séjour, et qu’ils sont entièrement couverts par une assurance maladie au Grand-Duché de Luxembourg, ou qu’ils sont membres de la famille déjà constituée au pays, d’une personne répondant à ces exigences*». The Prop subjects the retention of the right of residence also to the conditions of Article 12(2) second subparagraph which is not required by the Directive.

- **Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership (Article 13)**

Article 13 is similar to Article 12 in that it provides that family members can retain their right of residence whether there is a divorce, annulment or termination of a civil partnership.

Article 13 is mainly correctly transposed, except Article 13(2) second subparagraph last sentence which, as in the case of Article 12(2), has not been transposed (*i.e.*, the condition that sufficient resources shall be defined as in Article 8 (4) of the Directive). Luxembourg authorities have indicated that this conformity issue should be solved by a ‘*règlement grand-ducal sur les ressources*’. This *règlement* has not yet been issued.

Article 13(1) is correctly transposed by Article 16(1) and (2) Prop.

Article 17(3)(1) Prop correctly transposes Article 13(2)(a) of the Directive. Article 17(3)(2) Prop correctly transposes Article 13(1)(b) of the Directive. Article 17(3)(3) Prop correctly transposes Article 13(1)(c) of the Directive and Article 17(3)(4) Prop correctly transposes Article 13(1)(d) of the Directive.

Article 13(2) second subparagraph of the Directive is correctly transposed by Article 18 Prop with the exception of its last sentence, as already mentioned.

The condition that the family members shall retain the right of residence on a personal basis has been correctly transposed by Article 19 Prop.

2.3.3 Retention of the right of residence (Article 14) and Article 15(2)

(a) General aspects

Article 14 provides for the circumstances in which persons retain the rights of residence granted by Article 6 and Article 7 respectively.

Article 14 regulates the situations that lead to the end of the right of residence for not meeting the conditions.

- **Residence for up to three months**

Article 14(1) provides that Union citizens and their family members shall have the right of residence provided for in Article 6 (residence for up to three month), as long as they do not become an unreasonable burden on the social assistance system of the host Member State. This Article is correctly transposed by Article 24(1) Prop.

The pre-legislative proceedings explain: “*Conformément aux articles 5 et 13, les citoyens de l’Union et leurs membres de famille de quelle que nationalité qu’ils soient, jouissent d’un droit au court séjour qui n’est en principe lié à aucune condition expresse de ressources. Mais du moment où ils représentent une charge déraisonnable pour le système d’assistance sociale, ils n’auront plus de droit au séjour, ce qui peut impliquer leur éloignement, conformément à ce qui est prévu à l’article 25, paragraphe (1)*”.

- **Residence for more than three months**

Article 14(2), provides that Union citizens and their family Members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein and that in specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfy the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled and that this verification shall not be carried out systematically. This provision has been correctly transposed by Articles 24 (2) and 134 Prop.

- **Protection against expulsion**

Article 14(3) provides that an expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State. This provision has been correctly transposed by Articles 24(3) and (4) Prop.

Moreover, the pre-legislative proceedings complete: “*Si, contrairement au court séjour, les citoyens de l’Union et leurs membres de famille ont bien droit, durant le séjour supérieur à trois mois, à l’assistance sociale, le fait d’y recourir peut mettre en danger leur droit de séjour, alors qu’ils ne disposent plus de ressources suffisantes. Ce principe a été tempéré par la CJCE qui a statué „qu’il existe une certaine solidarité financière des ressortissants de l’Etat d’accueil avec ceux des autres Etats membres, notamment si les difficultés que rencontre le bénéficiaire du droit de séjour sont d’ordre temporaire“. La limite de ce droit est que „les bénéficiaires du droit de séjour ne doivent pas devenir une charge déraisonnable pour les finances publiques de l’Etat membre d’accueil“ (CJCE, 20 septembre 2001, aff. C-184/99, Grzelczyk c/ Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve). La directive 2004/38/CE a validé cette condition de charge déraisonnable qui est reprise par le présent article. Les bénéficiaires du droit de séjour ne pourront donc pas être éloignés automatiquement pour la seule raison de l’insuffisance de leurs ressources, mais les autorités compétentes devront apporter la preuve qu’ils constituent une charge pour le système d’assistance sociale”.*

- **Protection against expulsion for workers/self-employed persons and job-seekers**

Article 14(4) provides that an expulsion measure may in no case be adopted against Union citizens who are workers, self-employed persons, or under some circumstances job seekers and their family members. This provision has been correctly transposed by Article 26 Prop.

One remark concerning the transposition of Article 14(4) first indent of the Directive: Article 3(d) Prop. defines a worker ('travailleur') as '*toute personne exerçant des activités salariées ou indépendantes réelles et effectives, à l'exclusion d'activités tellement réduites qu'elles se présentent comme purement marginales et accessoires; sont assimilés au travailleur, pour l'application de la présente loi, les apprentis et les stagiaires rémunérés*'. As already mentioned when commenting on the transposition of Article 7(1)(a) the concept of worker so also covers the concept of self-employed persons, and therefore the transposition has been considered correct.

(b) Article 15(2)-(3) expiry of document not a ground for expulsion and prohibition of entry ban

Article 15(2) and (3) have been correctly transposed.

Article 15(2) provides that expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State. This provision is correctly transposed by Article 25(2) Prop.

Article 15(3) provides that the host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies. This provision is correctly transposed by Article 112 Prop.

2.4 Right of permanent residence

2.4.1 General rule for Union citizens and their family members (Article 16: eligibility)

Article 16(1) and (2) provide that Union citizens who have resided legally for a continuous period of five years in the host Member State and family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years shall have the right of permanent residence. These provisions have been transposed by Articles 9(1) – for Union citizens - and 20(1) Prop – for family members. Note that the transposing measures stress the fact that the residence of 5 years must be proven.

Article 16(1) of the Directive states a.o. that the right of permanent residence for Union citizens shall not be subject to the conditions provided for in Chapter III. The Luxembourg transposition measure states that the right of permanent residence "n'est pas soumis aux conditions prévues à l'article 6, paragraphe (1)" (Article 6(1) Prop transposes Article 7(1) of the Directive). However, the conditions provided for in Chapter III of the Directive are broader than the mere Article 7(1) of the Directive. In this regard the transposition is not correct.

Article 16(2) of the Directive states that the first paragraph also applies 'to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years'. Art. 20(1) Prop, which transposes this provision of the Directive, has not included that the right is not subject to the conditions under chapter III. The previous paragraph only referred to Article 6(1) which applies to Union citizens but not to third country family members. Transposition is therefore not correct.

Article 16(3) provides that continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country. This provision is correctly transposed by Article 9(2) Prop.

Article 16(4) provides that once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years. Also this provision is correctly transposed by Article 9(3) Prop.

2.4.2 Acquisition of the right of permanent residence for workers/self employed persons and their family members (Article 17)

Article 17 regulates the conditions under which workers/self-employed persons and their family members will acquire the right of permanent residence before the completion of 5 years of residence

- **Situations under Article 17(1)**

The situations listed in Article 17(1) have been correctly transposed by Article 10(1) – (4) Prop.

- **Assessments of the conditions of length under Article 17(2)**

Article 17(2) provides that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by the worker's or the self-employed person's spouse or partner as referred to in point 2(b) of Article 2 if this spouse or partner is a national of the host Member State or has lost the nationality of that Member State by marriage to that worker or self-employed person. This provision is correctly transposed by Article 10(4) Prop.

Note that Article 3(d) Prop. – transposition of Article 7(1)(a) of the Directive – defines a ‘travailleur’ as ‘toute personne exerçant des activités salariées ou indépendantes réelles et effectives, à l’exclusion d’activités tellement réduites qu’elles se présentent comme purement marginales et accessoires; sont assimilés au travailleur, pour l’application de la présente loi, les apprentis et les stagiaires rémunérés’. Therefore, self-employed persons are covered by the transposition of Article 10(4) Prop.

- **Family member’s rights under Article 17(3) and (4)**

Article 17(3) provides that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by the family members of a worker or a self-employed person who are residing with him in the territory of the host Member State, if the worker or self-employed person has acquired himself the right of permanent residence in that Member State. This provision is correctly transposed by Article 20 (2) Prop. Also note that Article 20 (2) mentions “un travailleur salarié” in stead of “travailleur” (only in the second part of the sentence, the first part mentions also the self-employed person).

Article 17(4) provides that if the worker or self-employed person dies while still working but before acquiring permanent residence status in the host Member State on the basis of paragraph 1, his family members who are residing with him in the host Member State shall acquire the right of permanent residence there, on condition that the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years; or the death resulted from an accident at work or an occupational disease; or the surviving spouse lost the nationality of that Member State following marriage to the worker or self-employed person. This provision has been correctly transposed by Article 20(3) 1-3 Prop.

2.4.3 Acquisition of the right of permanent residence by certain family members who are not nationals of a MS (Article 18)

Article 18 provides that the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State. This provision has been correctly transposed by Articles 18 and 20 Prop.

2.4.4 Documents certifying permanent residence for Union citizens (Article 19)

Article 19 deals with the obligation of the Member States to issue a document certifying permanent residence of Union citizens upon application and as soon as possible.

This provision has been transposed by Articles 11 and 21 (1) Prop. These provisions state that Union citizens and EU family members will receive '*un document attestant de la permanence du séjour*'. One remark could be made concerning the obligation to issue such permanent residence card "upon application". Luxembourgian transposition says that the persons concerned will "receive" such a permanent residence card. It cannot be definitively assessed whether this is a conformity issue because the modalities to issue the permanent residence card must be provided for in a *règlement grand-ducal*. This has not yet been issued, therefore transposition is not correct.

2.4.5 Permanent residence card for family members who are not nationals of a MS (Article 20)

Article 20(1) provides for the obligation to issue family members who are not nationals of a Member State entitled to permanent residence with a permanent residence card within six months of the submission of the application. This provision is transposed by Article 21(2) Prop, according to which a '*carte de séjour permanent*' will be delivered to non EU family members, '*selon les modalités à déterminer par règlement grand-ducal*'. Transposition is incomplete, since a *règlement grand-ducal*, which will provide for the modalities, has not been issued yet.

Article 20(2) concerns the obligation for family members to submit the application before the residence card expires and the possibility to envisage sanctions for the failure to the requirement to apply for a permanent residence card. This provision has not been transposed. However, this conformity issue could be solved by issuing a *règlement grand-ducal*. Moreover, Luxembourg authorities have indicated that no sanction is foreseen (although the Directive allows this).

Article 20(3) provides that interruption in residence not exceeding two consecutive years shall not affect the validity of the permanent residence card. This provision is correctly transposed by Article 21 (2) Prop.

2.4.6 Continuity of residence (Article 21)

Article 21 provides that for the purposes of this Directive continuity of residence may be attested by any means of proof in use in the host Member State and that continuity of residence is broken by any expulsion decision duly enforced against the person concerned. This provision is correctly transposed by Article 9(4) Prop.

2.5 Common provisions (Articles 22-26)

2.5.1 Article 22 territorial scope

Article 22(1) concerns the territorial scope of the Directive and states that the right of residence and the right of permanent residence shall cover the whole territory of the host Member State. This

provision is correctly transposed. Several Articles (such as Article 5 Prop, Article 9 (1) Prop, Article 10(1) Prop etc) confirm explicitly that the right covers ‘le territoire du Grand-Duché de Luxembourg’, ‘le territoire’ etc. Sometimes this is implicitly transposed.

Article 22(2) is not transposed in the Prop. There is apparently no territorial restriction imposed on the right of permanent residence.

2.5.2 Article 23 Related rights

Article 23 about the right to take up employment or self employment in the host Member State is correctly transposed in Luxembourg by Article 22 Prop, which confirms that ‘*les membres de la famille du citoyen de l’Union, quelle que soit leur nationalité, qui bénéficient du droit de séjour ou du droit de séjour permanent, ont le droit d’exercer une activité salariée, sans être soumis aux conditions de l’article 42*’.

2.5.3 Article 24: equal treatment

Article 24(1) concerns the equal treatment for Union citizens and their family members residing on the basis of the Directive in the territory of the host Member State with the nationals of that Member State.

This provision has not been explicitly transposed into Luxembourgian law. However, other provisions of the Luxembourgian legal order point into the direction of the existence of a principle of equality. These are:

- Article 111 of the Constitution (“*Tout étranger qui se trouve sur le territoire du Grand-Duché, jouit de la protection accordée aux personnes et aux biens, sauf les exceptions établies par la loi*”)
- Article 11 of the Code Civil («*L’étranger jouira dans le Luxembourg des mêmes droits civils que ceux qui sont ou seront accordés aux Luxembourgeois par les traités de la nation à laquelle cet étranger appartiendra*”)
- Article 13 of the Code civil («*L’étranger qui aura été admis par l’autorisation du Grand-Duc à établir son domicile dans le Luxembourg, y jouira de tous les droits civils, tant qu’il continuera d’y résider*”).

Concerning Article 111 of the Constitution the Cour Constitutionnelle of Luxembourg underlined in case 29/06 (annexed to the Conformity Study) the following:

“Considérant que l’article 10 bis (1) dispose que «Les Luxembourgeois sont égaux devant la loi»; Que l’article 111 de la loi fondamentale, que la Cour ajoute au besoin, étend cette garantie à des personnes non luxembourgeoises dans les termes suivants: «Tout étranger qui se trouve sur le territoire du Grand-Duché jouit de la protection accordée aux personnes et aux biens, sauf les exceptions établies par la loi», la loi du 28 juin 2002 ne comportant pas d’exception sous ce rapport; Considérant que le législateur peut, sans violer le principe constitutionnel de l’égalité, soumettre certaines catégories de personnes comparables à des régimes légaux différents à la condition que la disparité existant entre elles soit objective, qu’elle soit rationnellement justifiée, adéquate et proportionnée à son but. ».

Article 111 of the Constitution deals with ‘all foreigners’ which includes all Union citizens residing on the basis of the Directive in Luxembourg and also all non EU family members who have the right of residence or the right of permanent residence. As underlined by the Constitutional Court, the legislator can only submit foreigners to a different legal regime as citizens of Luxembourg if an objective distinction that can be drawn between them, and if that distinction is proportionate to the goal it pursues and, finally, if that distinction is justified and adequate. These conditions clearly limit the discretionary power of the legislator to submit foreigners to a different legal regime.

Although Luxembourg did not explicitly transpose Article 24(1) of the Directive, Article 111 of the Constitution serves as a guarantee that the legislator will take into account the principle of equality as enshrined in the Directive. For this reason, transposition has been considered as correct.

Article 24(2), concerns the possible restrictions a Member State can provide for the entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), or the restriction prior to acquisition of the right of permanent residence, on the possibility to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families. This provision has not been transposed into the Luxembourgian legal order. Since Article 24(2) of the Directive is not an obligation, this is not a conformity issue. Luxembourgian law would even be more favourable.

2.5.4 Article 25: general provisions concerning residence documents

Article 25(1) provides that possession of residence documents may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof. This provision has explicitly transposed in Article 8(4) Prop. Moreover, the correct transposition also follows implicitly from other provisions, such as Articles 11 and 21(1) Prop. The latter indicate that a document ‘attest’ a right, and are no condition to exercise that right.

Article 25(2) provides that all documents mentioned in paragraph 1 of the same Article shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents. This provision has not been transposed. Possibly indication of fees will be included in a règlement grand-ducal.

2.5.5 Article 26 checks

Article 26 deals with the possibility for Member States to carry out checks on compliance with any requirement deriving from their national legislation for non-nationals always to carry their registration certificate or residence card, provided that the same requirement apply to their own nationals as regards their identity card.

This provision is not correctly transposed into Luxembourgian law. Article 136(1) Prop would introduce ‘a specific provision concerning the administrative situation for foreigners’, which is contrary to the Directive (“provided that the same requirement applies to their own nationals as regards their identity card”).

The pre-legislative proceedings comment that “*En dehors des vérifications d’identité applicables à toute personne, qui sont régies par le Code d’instruction criminelle et pour lesquelles un indice fait présumer qu’il existe un lien entre la personne contrôlée et une infraction pénale, une disposition spécifique concernant la vérification de la situation administrative des étrangers est introduite par le présent article. Ainsi, les étrangers doivent toujours être en mesure de présenter les documents les autorisant à entrer et à séjourner sur le territoire. Les agents de la Police peuvent retenir le passeport ou autre document de voyage des étrangers en situation irrégulière. Dans ce cas ils remettent aux personnes concernées un récépissé pour leur permettre de justifier de leur identité*”.

Luxembourgian authorities therefore consider that there is no conformity issue, because this ‘prerogative of the police does not apply to Union citizens’. However, it is not clear why Article 136(1) Prop would not apply to Union citizens: it does not follow from the text.

2.6 Restrictions on the right of entry and residence on grounds of public policy, public security and public health

2.6.1 General principles (Article 27)

Article 27 of the Directive lays down the general principles to be respected in the adoption of measures based on public order, public security and public health.

- **The grounds and economic invocation**

Article 27(1) states that Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health, and adds that these grounds cannot be invoked to serve economic ends. This provision is correctly transposed by Article 27(1) Prop.

- **Proportionality and personal conduct**

Article 27(2) provides that measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Moreover, the same Article holds that previous criminal convictions cannot in themselves constitute grounds for taking such measures. This provision is insufficiently transposed by Article 27(2) Prop: there is no mention of the principle of proportionality.

According to the Luxembourg authorities “*La condition de proportionnalité est remplie à l’article 29. Dans son avis du 20 juin, le Conseil d’Etat note à propos de l’article 29 : Il s’agit de la transposition de l’article 28, paragraphe 1^{er} de la directive qui est l’émanation du principe de proportionnalité dont les exigences sont à respecter en cas de mesures restrictives à la liberté de circuler et de séjourner*». Article 29 Proposal reads : « *Avant de prendre une décision d’éloignement du territoire pour des raisons d’ordre public ou de sécurité publique, le ministre tient compte notamment de la durée du séjour de la personne concernée sur le territoire luxembourgeois, de son âge, de son état de santé, de sa situation familiale et économique, de son intégration sociale et culturelle dans le pays et de l’intensité de ses liens avec son pays d’origine*”. The criteria enumerated in Art. 29 Prop surely will enhance the proportional character of the measures that will be taken, but the principle of proportionality is larger (it can also be based on other criteria than the ones enumerated). Moreover, the guarantee provided by the principle of proportionality should be written down in the legal texts.

Article 27(2) second subparagraph provides that the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. This provision is correctly transposed by Article 27 (2) last sentence Prop.

- **Collaboration with other Member States**

Article 27(3) deals with the possibility to request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. This provision is incompletely transposed by Article 27 (3) Prop: the obligation on the Luxembourg authorities to reply within two months if consulted has not been transposed.

- **Admission of persons expelled from other Member State**

Article 27(4) concerns the obligation to allow any person to which Luxembourg issued the passport or identity card that is expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute. This provision is correctly transposed by Article 32 Prop.

2.6.2 Protection against expulsion Article 28

Article 28 of the Directive lays down specific measures for the protection against expulsion. Article 28 has been correctly transposed.

- **Criteria to evaluate the decisions (Article 28(1))**

Article 28(1) provides that before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin. This provision has been correctly transposed by Article 29 Prop.

- **Expulsion of permanent residents (Article 28(2))**

Article 28(2) provides that an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, is only possible on serious grounds of public policy or public security. This provision is incorrectly transposed by Art. 30(1) Prop.

Article 28(2) of the Directive contains the concept of ‘serious grounds’, while Article 30(1) Prop uses the concept ‘imperative grounds’ (*raisons impérieuses*). This is probably a mistake because the Luxembourg authorities have not used the correct French version of the Directive.

- **Expulsion of persons living in Luxembourg for 10 years and minors (Article 28(3))**

Article 28(3) provides that an expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they have resided in the host Member State for the previous 10 years, or are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989. This provision is incorrectly transposed by Article 30 (2) Prop. The last part of Art. 28 (3) (b) has not been transposed, but Luxembourg has signed and ratified the United Nations Convention on the Rights of the Child of 20 November 1989.

Article 28(3) of the Directive contains the concept of ‘imperative grounds’, while Article 30 (1) Prop uses the concept ‘serious grounds’ (*motifs graves*). This is probably an incorrect transposition for the same reason as under Article 28(2) of the Directive.

2.6.3 Public health (Article 29)

Article 29(1) states that the only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State. This provision has been correctly transposed by Article 28 (1) Prop.

Article 29(2) guaranteeing that diseases occurring after three months from the date of arrival shall not constitute grounds for expulsion has been correctly transposed by Article 28(4) Prop.

Similarly, Article 29(3) regarding checks has been correctly transposed by Articles 28(2) and (3) Prop.

2.6.4 Expulsion as a penalty or legal consequence (Article 33)

Article 33(1) states that expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty. The experts did not find any provision in the Criminal Code according to which a Union citizen or his family members can be expelled as a sanction of a crime. Transposition is therefore correct.

Article 33(2) has been correctly transposed by Article 125(3) Prop. This is a more favourable provision since it applies to all expulsion decision and not only to the ones taken as a criminal penalty.

2.7 Procedural safeguards against decisions restricting free movement (Article 15, and Articles 30-31)

Articles 30-31 of the Directive includes a range of procedural guarantees that need to be respected in the application of expulsion measures as well as in the adoption of decisions to restrict free movement not based on public order, public security and public health (Article 15 RD 240/2007).

2.7.1 Notification of decisions (Article 30)

Article 30 includes the obligation to notify in writing to the person concerned of any measure taken restricting free movement in such a way that they are able to comprehend its content and the implication for them (Article 30(1)), and be informed precisely and in full of the grounds on which the decision is taken unless contrary to the interest of the State security (Article 30(2)), and specify the court or administrative authority competent for appeal, time limit for appeal, and where applicable, the time allowed to leave the territory of the State which cannot be less than a month save in duly substantiated cases or urgency.

- **Notification in writing and comprehension**

Article 30(1) is correctly transposed by Arts. 31 and 110(1) Prop.

- **To be informed precisely and in full of the grounds**

Article 30(2) is correctly transposed by Art. 109(1) and (2) Prop. The latter has been modified during the legislative procedure in order to transpose correctly Article 30(2) of the Directive.

- **Information on appeal procedures and time-limit to leave the country**

Article 30(3) has been correctly transposed by Art. 110 (1) and (2) and Art. 111(1) and (2) Prop.

2.7.2 Procedural safeguards under Article 31

Article 31(1) provides for the right of access to judicial and where appropriate administrative redress procedures. This provision is correctly transposed by Article 113 Prop and Article 109(1) Prop. Prelegislative proceedings stress : « *Les règles ordinaires prévues par la loi du 21 juin 1999 portant règlement de procédure devant les juridictions administratives sont applicables aux recours contre les décisions prises par le ministre* ».

Article 31(2) provides for the possibility to apply for an interim order to suspend enforcement of the decision restricting the right of free movement. This provision has been correctly transposed by Art. 114 Prop. It must be underlined that the first and the second indent of Article 31(2) of the Directive have not been transposed. In this regard, the transposition is more favorable.

Article 31(3) concerns the obligation to guarantee that the redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based and that they shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28. This provision cannot be considered correctly transposed into Luxembourgian law.

First of all, Article 113 Prop indicates that a “recours en annulation” is possible. According to Article 2(1) de la *Loi du 7 novembre 1996 portant organisation des juridictions de l’ordre administratif* the *Tribunal administratif* can annul the decision on the basis of the criteria therein defined. No “*recours en reformation*” is possible. Secondly, the Proposal indicates that the “*droit commun*” will apply. However, it is not sure that in these redress procedures the judge will also have the power to review “the facts and circumstances on which the proposed measure is based”. In any case, this aspect is not explicitly transposed.

Article 31(4) concerns the right for any excluded person to submit his/her defence in person, except when his/ her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory. This provisions has been correctly transposed by Article 115 Prop

2.7.3 Exclusion orders (Article 32)

Article 32 concerns the duration of exclusion orders.

Article 32(1) provides that an application for lifting of the exclusion order may be submitted after a reasonable period, or in every case after three years, and that the decision on this application shall be reached within six months of its submission. This provision is correctly transposed by Article 112 Prop. Originally, Art. 112 Prop. only provided for a three years period, which could not be considered as a correct transposition. During the legislative period, Art. 112 prop. has been altered, and now the application must be submitted within a reasonable period, depending on the circumstances, and in any event after three years.

Article 32 (2) indicates that the person concerned shall have no right of entry to the host Member State while their application is being considered. This provision has not been transposed which implies a more favourable treatment since the person cannot be denied entry while the application is being considered.

2.8 Final provisions (Chapter VII)

2.8.1 Article 34: publicity

Article 34 of the Directive imposes on Member States the obligation to disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication.

The experts did not find such information. This is also ‘logical’, s there are still no transposition measures adopted.

2.8.2 Abuse of rights (Article 35)

Article 35 allows Member States to adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31

Article 35 is correctly transposed by Article 134(3) Prop and Article 25(1) Prop. Article 31 Prop ensures that decisions taken based on fraud and abuse of rights are subject to the procedural guarantees of Article 30 and 31 of the Directive. In fact, Article 31 Prop makes a generic reference to Chapter 4 of Prop which transposes those procedural guarantees.

2.8.3 Sanctions (Article 36)

Article 36 concerns the possibility for Member States to lay down provisions on the sanctions applicable to breaches of national rules adopted for the implementation of the Directive. Transposition can be found back in Article 139 Prop. This provision is not correct because these have not been notified.

2.8.4 More favourable provisions (Article 37)

The Prop contains several provisions which are more favourable.

2.8.5 Transposition

The Prop has not yet been adopted. The Prop that has been taken into account is the one of 2 July 2008 (annexed to the Conformity Study). The Prop of 2 July 2008 is also the Prop that the Luxembourgian authorities have forwarded to the European Commission.

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M. FISCHBACH, Rapport d'activité du 1 octobre 2004 au 30 septembre 2004 de l'Ombudsman, p. 20.

S. KOLLWELTER, Current Immigration Debated in Europe: A publication of the European Immigration Dialogue – Luxembourg, September 2005, p. 13.

ANNEX I: Table of concordance for Directive 2004/38/EC

ANNEX II: List of relevant national legislation and administrative acts

- Projet de loi portant sur la libre circulation des personnes et l'immigration
- Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats
- Arrêté grand-ducal du 30 août 1939, portant introduction de la carte d'identité obligatoire
- Luxembourgian Constitution
- Code Civil of Luxembourg
- Règlement grand-ducal du 8 juin 1979 relatif à la procédure à suivre par les administrations relevant de l'Etat et des communes
- Règlement grand-ducal du 8 juin 1979 relatif à la procédure à suivre par les administrations relevant de l'Etat et des communes
- Loi du 7 novembre 1996 portant organisation des juridictions de l'ordre administratif

ANNEX III: Selected national case law

Case 29/06 of the Cour Constitutionnelle