

## Internal regulations: An essential tool for the employer

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Means of communication between employers and employees, governance instruments in international groups and internal regulations influence the terms of the internal functioning of an undertaking.

While preferred in sizable companies or in Anglo-Saxon structures, their use remains limited in Luxembourgish undertakings.

Recent decisions of the European Court of Justice and the Court of Appeal of Luxembourg underline once more the importance of such instruments in any company. These decisions should encourage Luxembourgish employers to put in place an internal regulation regardless of the size of their undertaking.

### INTERNAL REGULATION AND ANCILLARY INSTRUMENTS: WHAT DO THEY CONSIST OF?

Unlike its neighbours, in particular France, which specifically regulated this instrument, no text either defines or outlines its limits in Luxembourg.

In practice, the internal regulation is often mentioned alongside other instruments, such as:

- **The ethical charter or code of conduct:** which applies to collective labour relations, but is usually limited to declarations of intent or formalization of an undertaking's culture or that of a group of undertakings in written form. It can contain mandatory provisions for one of the parties, but in practice, it is common for this type of charter to be attached to the internal regulation.
- **The service note:** which also relates to collective labour relations, has an essentially informative goal. It can be either permanent or temporary and either of general or specific scope. It normally doesn't contain any general mandatory provisions for the employees.
- **The internal regulation** governs collective labour relations inside an undertaking by specifying the general, permanent and usually mandatory provisions affecting the employer and its employees in order to regulate the company's internal rules and follows a specific adoption procedure.

No matter what their designation or form, **these instruments are necessary to undertakings.**

The internal regulation, however, is the most adequate tool legally to materialize the company rule structure and therefore define the respective obligations of employer and employees, and – in the absence of specific legal provisions concerning its content – to introduce a tailor-made content, which truly matches the company's needs

to its size and activity.

In practice, the lack of formalism or requirement concerning the content of the internal regulation rather favours the employer by allowing it a good deal of discretion not only to define which aspects to include, but also to adapt them to its own needs, irrespective of the size of the company.

The internal regulation therefore becomes an essential instrument of dialogue between employer and employees and underlines the company's expectations from its employees.

The internal regulation is not the same as individual labour contract as it embodies the employer's management power and not an agreement reached between two parties. As a consequence, the internal regulation imposes itself on the employees without requiring their consent. It therefore completes the individual labour contract and provides for a uniform application of the rules and penalties applicable to an undertaking.

## IMPORTANCE OF INTERNAL REGULATIONS: CONTRIBUTIONS MADE BY CASE-LAW

Recent European and Luxemburgish case law demonstrates the interest of employers to have put in place such an instrument regarding both **uniform application of the company rules and to legitimize, for instance, disciplinary actions by the employer or the one-off inspection of the employer's electronic devices.**

### Undertaking rule: imposing a neutral dress code on employees

The ECJ[1] recently ruled on the employer's right to forbid, in the context of the execution of the employment contract, **the wearing of symbols which demonstrate a religious, political or philosophical affiliation**, and oblige employees to adopt a neutral dress code.

The Court nevertheless required the prohibition to be provided for by an internal rule established for the undertaking, while guaranteeing it would not lead to inequalities between employees based on their respective beliefs.

As a result, if an employer wishes to impose a neutral dress code on its employees for legitimate purposes, this has to be provided for by an internal rule of which the employees are made aware.

### Disciplinary action against an employee: "no sanction without text"

The Labour Code only provided for two disciplinary actions, i.e. dismissal with notice and immediate dismissal. Case law had consistently recognized written warnings to employees as valid. The High Court[2], had also

declared in favour of a larger set of sanctions available to the employer in a decision on 25 April 2013. The High Court had accepted the employer's practice of salary deduction against an employee as long as the deduction is proportionate and justified as to the intended goal, that is to say the sanction must be in alignment with the severity of the employee's misconduct.

**However**, recent decisions from the 3rd Chamber of the Luxembourg Court of Appeal[3] rendered in the same case temper the employer's freedom. The Court of Appeal ruled that the employer **cannot legitimately adopt a disciplinary sanction which is not expressly provided for by law, a collective agreement, the labour contract or the internal regulation under pain of the sanction being pronounced null and void.**

Hence, like the dictum established in criminal law, "*no punishment without law*"[4], the employer cannot sanction an employee if such a penalty has not been set down in writing.

The majority of collective agreements and labour contracts remain silent as to disciplinary actions, such as warnings.

The Court of Appeal decisions do, however, show the necessity for the employer to put in place a text or an applicable norm to sanction certain behaviours. In the absence of any applicable collective agreements and without such provisions in the labour contracts, it falls to the internal regulation to determine the general and permanent rules regarding disciplinary matters and especially, the nature and range of sanctions the employer may adopt. Using the internal regulation to that end allows, contrary to individual labour contracts (a less flexible tool), the adaptation of the nature and range of penalties during the labour relations and guarantee moreover uniformity – and therefore equality – of employee treatment in the undertaking.

## Inspection of electronic devices

A last example of the internal regulation's usefulness is demonstrated by the decision rendered on 5 December 2017 by the European Court's Grand Chamber in the case where a Romanian employee, Bogdan Mihai Barbulescu, was dismissed by his employer after it had inspected his professional messaging activity.

In 2016, the Court had decided that: "the surveillance of his communications by his employer had been reasonable in the context of a disciplinary proceeding." The Court believed that the employer's behaviour did not violate Article 8 of the European Convention of Human Rights on the right to respect for private and family life, including the right to respect of the confidentiality of correspondence.

Unsatisfied with this decision, Mr Barbulescu pursued his action, with success, as the European Court's Grand Chamber judges ruled that: "the national (Romanian) authorities had not correctly protected Mr Barbulescu's right to respect for private life and of the confidentiality of correspondence."

A lesson to remember: if the employer can limit the personal usage of electronic devices by his employees, the latter have to be previously "informed of the devices put in place and of the control mode."

The internal regulation therefore appears once more as a vital instrument for the employer.

## INTERNAL REGULATION: A NECESSITY?

The employees' supervision and eventual sanction imply prior action on behalf of the employer. The implementation of an internal regulation therefore appears necessary, regardless of the undertaking's size or line of business.

In order for the internal regulation to become part of the contractual sphere and be fully binding on the employee, it is advisable to add a reference to the regulation in the individual labour contract and conserve evidence that the employee was made aware of such regulation at the time of his hiring (for instance, by having the employee sign a copy, not for approval, but for "acknowledgment of receipt" or by sending him a copy via e-mail).

In this way, the employee is perfectly informed of the obligations he has to comply with and the sanctions he may incur for breaching them as soon as he has entered the undertaking.

As long as the employer can prove the internal regulation was made available to the employee in due time (and likewise for any subsequent modification of the regulation), the employee will be held accountable for any lack of actual knowledge of the contents of the regulation. This will make the disciplinary sanctions and dismissal for breach of professional obligations of the employee more difficult to dispute.

It is nonetheless necessary to adapt and individualize the internal regulation of each undertaking to its specific needs (geographic sector, business line, higher standards, especially with regard to security measures etc.).

[1] ECJ 14 March 2017 cases C-157/15 Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding / G4S Secure Solutions and C-188/15 Bougnaoui et Association de défense des droits de l'homme (ADDH) / Micropole Univers

[2] Cass, 25 April 2013, n°31/13

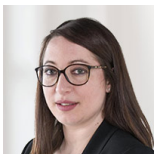
[3] Court of Appeal, 30 June 2016, Court of Appeal 30 March 2017, n°42278

[4] Constitutional Court, decision n°82-155 of 30 December 1982 enshrining the principle of the legality of criminal offences and penalties, which poses as a requirement that a text or applicable norm exist in order to punish certain behaviour.

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