

New forms of employment

Employee sharing, Luxembourg

Case study 19: Policy analysis

*This paper examines the temporary sublease of employees – *prêt temporaire de main d'oeuvre* – introduced in Luxembourg in 1994. With certain safeguards for wages and working conditions, it permits companies to sublease permanent employees to other companies as an alternative to laying them off or reducing their hours and pay.*

Introduction

Luxembourg is one of the smallest EU Member States both in its surface area and population. This peculiarity is important for an understanding and analysis of how and why certain legislation is adopted. This analysis addresses a specific mechanism in Luxembourg's legislation covering new forms of employment. The temporary sublease of employees – *prêt temporaire de main d'oeuvre* – was introduced in Luxembourg in 1994 in the law of 19 May 1994 regulating temporary work and temporary sublease of employees.

The concept is defined in the Labour code under articles L. 132-1 and its sub-sections. Framed within rather restrictive conditions (see the background and objectives section), the temporary sublease of employees means that, in practice, workers are sent by their initial and legal employer (the sending company) to work for a third party (the receiving company).

This third party can be a company, but it may also include public authorities such as public agencies or local authorities in strictly limited circumstances. Such limitations mainly address public institutions' lack of an independent budget that would make it possible for them to decide whether or not to recruit additional workers. However, a special provision permits the public employment agency (ADEM) to recruit workers on a temporary sublease through subsidies granted by the National Employment Fund.

The instrument's main objective is to promote employment and safeguard jobs, and is mostly used in the metalworking industry, construction and retail sector.

This instrument analysis presents the general features of *prêt temporaire de main d'oeuvre* in Luxembourg, its initial objectives, the main reasons for its implementation, the evolutions the scheme has undergone and potential for improvement.

Various stakeholders were interviewed while conducting this analysis, including experts, academics and social partners. The analysis also draws on two case studies conducted in January and March 2014 in companies that have used the scheme in Luxembourg and on general information available on the internet (Eurofound, 2015a and b).

Background and objectives of employee-sharing

As defined in article L 132-1 of the Labour Code, employee sharing (*prêt temporaire de main d'oeuvre*) is limited to companies that are not temporary work agencies. They must have prior authorisation from the Ministry of Labour, Economy and Social Solidarity Economy on the advice of the public employment agency (ADEM), and must use the scheme for a limited period of time. Companies must be using it for one or more of the following four reasons:

- without it, the company may have to lay off staff or cut working hours;

- performance of casual work (provided that the receiving company is not capable of performing it itself and that the receiving company belongs to the same branch of activities as the sending company);
- because company restructuring is under way;
- because the company intends to use the Employment Retention Plan.

This last condition was introduced by the law of 22 December 2006 promoting retention of employment. This is the only reform ever made to the *prêt temporaire de main d'oeuvre* mechanism. It is mainly used where the sending company has temporary difficulties and hopes to avoid making employees redundant.

It is considered to be a tool to be used in times when the economy is in difficulty and to respond to the common needs of two companies: one which temporarily lacks work and the other one which temporarily needs more workers. The mechanism makes safeguarding possible by moving workers no longer needed to another company which needs extra workers. The intention is that, if at all possible, they will return to their original company. It may help companies to avoid dismissing and rehiring employees and the associated costs, and help employees who do not have to experience unemployment.

The law also makes it possible for the Minister of Labour to authorise the sublease of employees in exceptional circumstances that do not meet the general requirements, provided that such subleasing is covered by an agreement between social partners.

The mechanism of the temporary sublease of employees was initiated by the government and introduced into Luxembourg legislation in 1994. It was first discussed at the end of the 1980s, and a first bill was introduced in 1989 in parallel with the start of negotiations at the European level in 1982 on temporary agency work. The main objective of the legislation that was eventually introduced in 1994 was to regulate temporary agency work, and it seems that the opportunity was taken to introduce the *prêt temporaire de main d'oeuvre* within the same law, although as a separate measure. This is why the official title of the 1994 law was 'regulating temporary agency work and prêt temporaire de main d'oeuvre', with the focus on temporary agency work. Session minutes from parliamentary debates prior to the adoption of the law show that the discussions and debates were mostly about temporary agency work, and the temporary sublease of employees was rather incidental. The adoption of the *prêt temporaire de main d'oeuvre* was very smooth and no opposing views were reported in the minutes.

Characteristics of prêt temporaire de main d'oeuvre

The subleasing of employees mechanism involves three actors: the sending company, the employee hired by the sending company and the receiving company. In principle, the mechanism is quite easy to understand. In a temporary economic downturn a company needs fewer workers, perhaps only for a limited period of time. Rather than cutting jobs only to find that it needed to hire more workers once the downturn is over, the company will try to find a temporary placement for workers in another company that needs extra workers, perhaps only temporarily. Both companies (the sending company and the receiving company) agree the conditions that will apply during the subleasing, subject to conditions required by law.

In order to apply for *prêt temporaire de main d'oeuvre*, the participating companies have to submit a request to the Minister of Labour. To be accepted, this request must be:

- jointly presented by the sending company and the receiving company;
- accompanied by the opinion of employee representatives from the sending and the receiving companies.

In companies employing fewer than 15 employees, there is no requirement to have employees' representative bodies, which means the required 'opinion' may not be able to be obtained. However, if the temporary sublease is for not more than eight weeks, whether the consecutive or not, within a six-month reference period, a prior notification can simply be addressed to the public employment agency (ADEM) jointly by the sending and the receiving companies. For this exception, the law does not state that employees' representative bodies should be consulted.

In practice, the authorisation is granted very quickly – usually within a week – and is rarely denied, except where a request does not comply with the legal provisions.

The request for subleasing must state how long it is to last for. However, the law does not establish a maximum period but only states that subleasing can be implemented 'for a limited period of time'. In

practice, the period can range from a few weeks to several months, depending on the reason why temporary sublease of employees was used.

In the event of a temporary sublease, the employment contract between the employee and his company of origin is maintained without any loss of earnings for the employee. The sending company must still pay the subleased employee, and the receiving company pays the sending company its contribution towards the worker's wages.

The subleased employee can be sent to the receiving company to perform either a job equivalent to the one performed in the sending company, or can be asked to do different work if they have the skills and qualifications necessary. A subleased employee may not be paid less than was earned in the sending company, even if salaries in the receiving company are lower.

The salary paid by the sending company to its subleased employees cannot be less than that paid to permanent employees in the receiving company who have the same or equivalent professional qualifications. Therefore, a subleased employee may get a salary increase.

Financial support can be given under an Employment Retention Plan through a Re-employment Help grant. Re-employment Help is designed to encourage workers who have lost their jobs to take a lower-paid job rather than remain unemployed. If they take a job that pays less than their previous job, Re-employment Help tops up their salary to at least 90% of their previous salary for at least four years, provided that this is no more than 3.5 times the minimum wage. It is up to the worker to apply for this help within six months. If a company using subleasing has an Employment Retention Plan in place, it is also possible for employees who are subleased to benefit from the Re-Employment Help. If this happens:

- the sending company keeps paying the entire wage that is usually paid to the subleased employee;
- the receiving company pays the sending company the amount agreed for the subleasing;
- the Employment Fund (Fonds pour l'Emploi) refunds the sending company any difference between the two figures up to 90% of the employee's usual salary through the Re-Employment Help scheme.

So, for example, if an employee was paid €2,000 by their sending company, but the receiving company has agreed to pay the sending company only €1,000, the sending company continues to pay the employee €2,000 and will receive €800 from the Employment Fund. The sending company covers the remaining 10%.

Subleased employees must be guaranteed the same conditions in their receiving company as its permanent employees, particularly any catering and transport facilities or assistance.

For the duration of the sublease, liabilities are shared. The receiving company must ensure compliance with all health and safety conditions, and application of the legal, regulatory, administrative and conventional dispositions on working conditions and workers' protection. The subleased employee will have to adapt and submit to the rules and conditions in place within the receiving company even if they are less advantageous than the ones in the sending company. The sending company is in charge of paying the subleased employee's wages and the related social and fiscal taxes.

It is important to note that this mechanism only applies on Luxembourg territory. An employee cannot be subleased to a company outside Luxembourg, not even in the foreign subsidiary of a Luxembourg company. The subleased employee must remain on the Luxembourg soil.

Because the temporary sublease of employees is so strictly defined, it is very important to comply with its conditions. For the unlawful sublease of employees, the sending company can be fined from €500 to €10,000. Repeated offences may be punishable by imprisonment from two to six months and a fine of between €1,250 and €12,500.

Outcomes and effectiveness

Implemented with the objective of promoting employment and safeguarding jobs, the *prêt temporaire de main d'oeuvre* is meant to produce positive effects on two levels. First, it mainly helps to improve the labour market and the economy (macro level), and secondly to influence working conditions (micro level).

Macro level

Originally, employee subleasing was introduced as a bridge between companies so that they could lend workforce to each other according to their needs. This was particularly suited to Luxembourg, as, taking into

consideration the size of the territory, most of the companies know each other and it is therefore easier to collaborate. When companies know that they are experiencing a cyclical drop in the demand for their products or services rather than a structural problem, they can avoid dismissing and rehiring employees.

It also encourages cooperation between companies established in Luxembourg and helps them to network. The Economic Committee (*Comité de conjoncture* – in charge of monitoring the evolution of the economy and labour market and delivering opinions about short-time working and early retirement schemes) can also play a considerable role given its competence on short-time working schemes. It sometimes initiates and suggests resorting to temporary sublease of employees instead of short-time working. The FEDIL (*Fédération des industries luxembourgeoises* – Business Federation of Luxembourg) also organises monthly meetings where companies can exchange information about their needs, a good way to promote temporary sublease of employees.

Since the 2006 legal reform, companies can also resort to temporary sublease of employees when implementing Employment Retention Plans. This has changed and expanded the initial objective of *prêt temporaire de main d'oeuvre* beyond its intended use as a solution for cyclical crises.

By allowing the use of the temporary sublease of employees for companies with an Employment Retention Plan, this mechanism has also become a means of fighting structural economic crises. Instead of dismissing their employees, the sending company will lend them to another company with government financial support and, at the end of this temporary period, employees are supposed to be 'retrieved' by the receiving company. They will, it is hoped, become permanent employees of their receiving companies after having being seconded by the sending company. As a result, the subleased employees never experience unemployment. This means the mechanism can be used as a trial period for the receiving company and act as a stepping stone for employees who do not have to look for new employment. Interviewed stakeholders claim that, in practice, this method is quite efficient and employees are rarely dismissed at the end of the temporary sublease.

Introduced in 2006, since the beginning of the economic crisis some stakeholders report a noticeable increase in the use of subleasing.

Micro-level

The main effect for workers who are subleased and who go to work for another company is that their working conditions change – for example there may be a change to working hours. The receiving company does not necessarily have the same mode of functioning and workers will have to adapt whether the changes are positive or negative.

However, this can be considered as positive because it increases workers' employability and profile, helps them gain new experiences and skills, and proves that they are adaptable. Additional training can often represent a stimulating challenge.

Subleased employees will also have to adapt to a new working atmosphere, to meet new co-workers and to integrate new working teams.

The view of the unions is that whether these changes in working conditions and atmosphere are seen as positive will depend on the individuals. Some of them do not mind this type of shift while others find it more difficult to adapt, particularly if they are older and have spent a great part of their career within the same company.

However, as illustrated in the ArcelorMittal study on the temporary sublease of employees conducted in January 2014 (Eurofound 2015), the temporary sublease of employees can also be positive for senior workers, who, if dismissed, would encounter greater difficulty in finding a new job. In a temporary sublease scheme, they may also be able to work all the way up to retirement and hence be able to get a higher pension, rather than being unemployed until the statutory retirement age.

Strengths and weaknesses of prêt temporaire de main d'oeuvre

From the companies' point of view, *prêt temporaire de main d'oeuvre* has considerable benefits. It prevents them from frequently going through dismissals and recruitment processes and as a result saves costs.

Likewise, companies manage to keep their qualified and trained workforce, even if they have to temporarily send them to another company.

For receiving companies, the temporary sublease period can also be used as a trial period during which they can test what an employee is worth and decide to employ them directly after this period or not. Nevertheless, if the receiving company would like to hire the employee after the temporary sublease but the sending company needs them back, the employment contract between the sending company and the employee prevails. It is only if the sending company dismisses the employee or if the employee resigns that the receiving company will be able to hire them.

However, *prêt temporaire de main d'oeuvre* also represents a challenge for companies that are willing to use this mechanism. As mentioned earlier, there is no intermediary body to coordinate this atypical relationship. It is up to the sending companies to find a receiving company. Some stakeholders say, however, that although there is no intermediary body, Luxembourg's limited territory makes it easier to find receiving companies.

Companies also have to present jointly the request for implementing *prêt temporaire de main d'oeuvre* to the Ministry of Labour. Even if there is some support for exchanges between companies in this way, perhaps through the Economic Committee and the monthly meetings held by the FEDIL, it remains tricky to convince companies in the same field of activity that they can use workers hired by their competitors. The issue of confidentiality sometimes comes up in the debates as a barrier to the use of *prêt temporaire de main d'oeuvre*.

From the workers' perspective, the greatest advantage is that subleasing means job security. At the end of the provisional period, the idea is that they either rejoin their company of origin or are integrated into the permanent staff of the receiving company. This is not a formal guarantee that they will never be dismissed, but during the interviews, no-one reported that after the sublease period, employees were dismissed.

However, *prêt temporaire de main d'oeuvre* also has some weaknesses and negative effects on employees. For instance, there is no restrictive geographical mobility clause. An employee can be sent to any company, as long as it is in Luxembourg. Luxembourg is a small country, just 80 kilometres long between its northern and southern ends. However, it is surrounded by Belgium, Germany and France, making it a key traffic platform. Moreover, many frontier workers come every day to work in Luxembourg and the country is quite congested. If workers have to commute to a remote workplace, their journey may be a long one.

The 1994 law does not make it possible for workers to opt for subleasing.

The only information available on that matter dates back from 1989, when parliamentary debate on the proposed legislation mentioned that, unlike temporary agency work, the sublease of an employee constitutes a substantial change of working conditions. This would normally be covered by legal provisions that regulate the revision of employment contracts. This tends to confirm that a worker can refuse to participate in subleasing by resigning. The resignation would be considered to be a dismissal and the employee would have to be compensated. However, the fact that this is not set out in the legislation creates some legal uncertainty.

According to the interviewed stakeholders, in practice workers are generally willing because they will remain in work rather than having to find a new job themselves.

Despite being quite effective, subleasing is not widely known. There have been no national studies on it, so there are no statistics. Likewise, there is no specific central body gathering information and statistics about it or promoting it and acting as an information centre. The Ministry of Labour collates some information when it receives requests for authorisations, and the Economic Committee and the FEDIL have taken a role in implementing subleasing of employees, but for all these bodies it remains very incidental. There is no organisation or structure solely dedicated to it and the national administrative bodies also have limited capacity to facilitate this form of employment.

The ADEM (public employment agency) only delivers an opinion and if the temporary sublease does not go beyond eight weeks, only receives notifications. The Labour Inspectorate exercises its normal monitoring competences and makes sure that legal conditions are complied with, and may impose sanctions on companies violating the rules of the scheme. In practice, it sometimes happens that companies can mistake temporary sublease for service or hire contracts and so do not apply for the prior authorisation.

The specificities of Luxembourg territory are considered both as an advantage and a drawback for *prêt temporaire de main d'oeuvre*. As the territory is small, it is easier to create a network of companies and it is easier for companies to collaborate without the help of external parties. However, some stakeholders said that the limited number of companies in Luxembourg is a problem. If a company in a specific sector is experiencing difficulties, it is very likely that the whole sector is affected and it may be very difficult to find

other companies able to host the employees. However, other stakeholders take the view that employees can easily adapt to other fields of activity and do not have to be subleased within the same sector.

Transferability

As the mechanism is particularly adapted to the specific features of Luxembourg, it seems that it would be complex to transfer it to other countries. In bigger countries, geographical aspects of the mechanism would have to be limited, and it might be more difficult for companies to cooperate without the help of a coordinating third party. However, taking into consideration the effectiveness of this system in avoiding dismissals and keeping workers in employment, it may be worth taking a closer look at the potential to take the application of this mechanism beyond Luxembourg.

The case study on the temporary sublease of employees in ArcelorMittal, carried out in January 2014 (Eurofound 2014), illustrates the effectiveness of the temporary sublease scheme compared to other methods and suggests that resorting to *prêt temporaire de main d'oeuvre* in other countries could be effective. In Schifflange in Luxembourg, the ArcelorMittal plant closure was dealt with through the use – among other things – of *prêt temporaire de main d'oeuvre*. It appears that it helped to avoid dismissals and to reallocate workers. On the other side of the border, in Florange in France, the plant closure was much more painful and took the form of a harsh social conflict between workers and their representatives on the one side, and the government on the other side. No effective measures were taken to avoid dismissals in France, whereas on the other side of the border, the closure seems to have occurred without major incident.

Commentary

Despite being defined by the law, it remains difficult to understand the scope of temporary sublease of employees. The 1994 law which introduced it was substantially devoted to the matter of temporary work, but the *prêt temporaire de main d'oeuvre* remains different from temporary agency work.

Temporary agency work is intended to respond to an immediate rise in the workload and is characterised by the fact that it is a triangular relationship: the temporary work agency acts as an intermediary between the using company and the worker and is remunerated for this service. In contrast, in the temporary sublease of employees, the sending company and the receiving company deal directly with each other. The temporary sublease of employees therefore remains very close to other forms of employment contracts, such as service contracts (*contrats d'entreprises*) or hire contracts (*contrats de louage d'ouvrage*) and a body of evidence has to be used at times to know whether regulations on *prêt temporaire de main d'oeuvre* are to be applied or not. For instance, the subject matter of the contract is not the same. Temporary subleasing answers a provisional workforce need, usually for similar work to that already carried out at a company, whereas a service or hire contract supplies the receiving company with specific know-how for an activity that it is not used to performing.

In the case of a temporary sublease, the sending company no longer gives orders to its employees and does not control their work and the receiving company takes this role. Even if the subleased employee's legal employer remains the sending company, the receiving company will organise the work schedules and inform the receiving company about sick leave, requests for holiday and so on.

Another peculiarity which differentiates the temporary subleasing of employees from service or hire contracts is that subleased employees work in the receiving company using the means and tools provided by the receiving company instead of their own.

The *prêt temporaire de main d'oeuvre* remains a marginally used tool in Luxembourg and, since the beginning of the crisis, its initial objective has been diverted. It is more frequently used as a solution to deal with structural crisis. This means that when employees are subleased, their return to the company of origin is less likely. They are increasingly taken up by the receiving company.

Another consequence of this new use of *prêt temporaire de main d'oeuvre*, some stakeholders report, is that temporary subleases are becoming longer. When used to fight a cyclical crisis, temporary subleasing usually lasts for a few months, and then workers go back to their company of origin. When it is used to deal with a structural crisis, temporary subleasing can last much longer, especially when it is used for senior workers as a stepping stone towards retirement or early retirement, or when it is used to accompany the realisation of a merger or acquisition.

Some stakeholders, particularly the trade unions, would welcome additional efforts in the future on the training of subleased workers. As mentioned previously, when workers are lent to other companies, they often have to adapt to other technologies and workers do not always receive training on their arrival in the host company.

More generally, training should be widely offered to workers throughout their entire career path, so they are prepared to face evolutions and changes in their working life, and to ease adaptation once they are requested to work temporarily for other companies.

In December 2013, Luxembourg elected a new government. This led to the adoption of a new government programme for 2014. This programme mentions the potential introduction of a new form of employment that would supplement the mechanisms already available. The government has indeed committed itself to study the creation of a framework which would allow the implementation of *groupements d'employeurs* – employers' groups – which could hire workers and distribute them between member companies that share working time and working costs on the principle of employee sharing.

Debates still have to take place to decide whether such a system (already in place in neighbour countries such as France, Belgium and Germany) would be suited to the particular situation of Luxembourg.

Information sources

Websites

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