



Executive summary

Luxembourg country report on measures to combat discrimination

by François Moyse

1. Introduction

Luxembourg is a very small, land-locked country, situated between Germany, France and Belgium. Cultural diversity and the use of several languages have always marked the country throughout its history. Luxembourg is relatively homogeneous in terms of the composition of the population. Indeed, the vast majority of foreigners are Europeans, coming from the European Union member states, most of which are of catholic religion.

The Grand Duchy of Luxembourg has one of the highest proportions of foreigners in Europe – close to 40% on average. In Luxembourg City, the capital, the percentage of foreigners is about 50% of all inhabitants. Most of the foreigners are Western Europeans, the Portuguese being the largest groups of foreign citizens. In general, relations between different ethnic and racial groups are smooth; incidents of racism are rather low, though some intolerance does indeed exist. Luxembourg society has witnessed a certain increase in xenophobia within the last few years, although luckily there have been no violent attacks on foreigners.

In institutional terms, Luxembourg is a constitutional monarchy, whereby the Grand Duke has only very limited powers, as conferred by the Constitution. There is one single Chamber in the Parliament, the *Chambre des Députés*, which votes on draft bills. All bills must be submitted to the Council of State for its opinion, as well to the professional chambers. These chambers are public institutions. Their mission is to defend the concerns of a professional category (employees, farmers, self-employed, civil servants...). For a bill to be passed, the Council of State must exempt the Chamber of the second constitutional vote. This means a bill has to be adopted a second time by the Chamber in a second reading, at least three months later, unless the Council of State does not formally oppose the wording of the draft bill.

While both the government and civil society feel that the principle of equal treatment and anti-discrimination in respect of racial and ethnic origin are to be respected, NGOs and to a certain extent the social partners are at the forefront of pushing for the development of anti-discrimination legislation and practice, while the institutional response has been much more low-profile.

As far as religions are concerned, in Luxembourg there is no separation between State and Church. The relations between the State and religious institutions are based on the principle of reciprocal independence, meaning that the State provides for a certain protection of religious groups.

The official recognition of a religion is materialised by a convention signed between the State and the religious representative body. Such conventions exist between the State and the main religious groupings, but not yet with the Muslim community.

In the field of anti-discrimination legislation, the current laws, especially Articles 454 to 457 of the penal code, are clearly insufficient to meet the requirements of both Directives 2000/43 and 2000/78. The transposition process has been extremely slow and inadequate. First, the Government drafted two bills, which were then merged into one draft bill, Nr.5518,



following the opposition of the Council of State. The Government has announced that it will be accompanied by another draft bill for public service. The legislative procedure is still going on, so that the Directives are not yet in force in Luxembourg.

2. Main legislation

Luxembourg has signed and ratified the European Convention on Human Rights, Article 14 of which prohibiting *discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*. This article is directly applicable to court cases examined under Luxembourg law.

Other international instruments have been signed by the Luxembourg Government, but have no direct effect and thus cannot be invoked in court, other than together with a more precise national provision. These instruments include the Universal Declaration of Human Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, the International Convention on the Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of the Child.

Convention No.111 of the International Labour Organisation, concerning discrimination in employment and occupation, was ratified in 2000 in Luxembourg and is directly applicable in internal law.

On a national level, the principle of equal treatment can be found in the general legal principle found in Article 10 bis of the Constitution, according to which “all Luxembourgers are equal before the Law”.

However this principle applies only *stricto sensu* to Luxembourg nationals and not to foreign citizens. Although it is understood to be a general principle of law, implying equality for all inhabitants, it clearly is not sufficient to guarantee in all situations and in all court cases that any breach of the principle of equality will be punished. This is also true for Article 111 of the Constitution, which grants protection to foreigners and to their property, unless the law provides for an exception.

The main provisions against discrimination, including religion, race and ethnic origin, disability and sexual orientation are to be found in the Penal Code, in Articles 454 to 457. Individual and collective discrimination are thus prohibited and can lead to a fine or imprisonment of up to two years. Age is not covered by this legislation.

The law of 27 July 1993 on the integration of foreigners in the Grand Duchy of Luxembourg and on social action for foreigners states that “*all discrimination against a person, group of persons or a community on the grounds of race, colour, descent, national or ethnic origin or religion of that person, or all or some members of the group or community is prohibited*”. However there is no sanction attached to this prohibition.

In practice criminal law has not been used, only a few complaints having been registered in court. This situation shows that criminal sanctions must be accompanied by civil sanctions, including in the area of labour law.

The bill Nr.5518 transposing both Directives has been deposited at Parliament in November 2005 and by January 2006 the Council of State had not yet given its advice on this draft bill.



Article 14 provides for an obligation to provide reasonable accommodation for disabled persons by employers, referring to the grand-ducal regulation of 7 October 2004 which provides for the payment by the state of the costs of such accommodation.

This means that currently the legislation transposing Directives 2000/43 and 2000/78 is not in force yet, although it will introduce key anti-discrimination provisions in Luxembourg legislation.

3. Main principles and definitions

In the absence of a large body of civil law against discrimination, Articles 454 to 457 of the Penal Code provide the legal tools for protection against discrimination. Article 454 of this code defines discrimination as *“Any difference of treatment applied to natural persons on grounds of their racial or ethnic origin, skin colour, sex, sexual orientation, family situation, state of health, disability, customs, political or philosophical opinions, trade union activities, their membership, actual or supposed, of an ethnic group, nationality, race or specific religion.”*

The prohibition is also valid for discrimination for groupings, communities of persons and companies.

However the grounds of age and belief are not yet covered by Luxembourg legislation. Also only direct discrimination is forbidden, while indirect discrimination, harassment and instruction to discrimination are behaviours which are not repressed in Luxembourg.

Furthermore, the provisions foreseen by the Directives, like occupational requirements or reasonable accommodation do not exist up to now.

Draft bill Nr.5518 transposes Directives 2000/43 and 2000/78 and uses the same definitions as found in these Directives. When passed, it will introduce the concept of equal treatment as required by the Directives. Direct discrimination, indirect discrimination and harassment are defined adequately in the draft bill, as well as instruction to discrimination.

However, as far as victimisation is concerned, there are no adequate innovative measures, the draft bill referring only to the existing Penal Code and general Civil Code on damage claims. It includes protection against victimisation in the employment field but no more general provisions outside the employment world.

As far as exceptions and exemptions are concerned, the Luxembourg draft bill contains provisions on genuine and determining occupational requirements as required by the Directives, based on the nature of the particular occupational activities concerned or of the context in which they are carried out. The draft bill also provides for an exception based on the ethos of a church or a religious group in the area of employment.

The grounds of the Directives are all covered by the draft legislation.

4. Material scope

The current Article 455 of the Penal Code is applicable to discrimination in relation to:

- the refusal to supply or allow enjoyment of goods;



- the refusal to supply a service;
 - the restriction of the supply of goods or services on grounds of ethnic or racial discrimination or the exercising of any other form of discrimination at the time of supply;
 - the indication in any advertisement of the intention to refuse goods or services or to practise discrimination at the time of supplying goods and services,
 - the restriction of the normal exercise of any economic activity;
 - the refusal to employ an individual and in relation to sanctions and dismissals;
 - the subjection of an offer of employment to a condition.
- Thus, the scope of the Directives is for the moment not entirely covered by the law.

However Bill Nr.5518 has incorporated the full scope of Article 3 of Directive 2000/42 and thus will be applicable to:

- conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- employment and working conditions, including dismissals and pay;
- membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
- social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services which are available to the public, including housing.

The problem relating to the scope of the Directives relates to the fact that only the private sector is covered by Bill Nr.5518. Public sector has been excluded from it and a draft bill amending the general statute of civil servants is to be submitted to Parliament. This draft bill incorporates the same provisions for the public sector, but the draft bill has not yet gone through the full parliamentary procedure and has not been voted on yet. Currently, Articles 454 to 457 of the penal code are exclusively applicable, including to public service.

5. Enforcing the law

When a person or a group is the victim of discrimination, generally the only mechanisms available are either judicial procedures or the use of mediation.

A person may act alone and lodge a criminal complaint in court. The state prosecutor will, however, decide if the case is worthwhile proceeding with. It may take a long time until the case is brought to court. Also finding evidence is a crucial problem, which may hinder proper prosecution of the perpetrator of the discrimination.

The draft bills should extend the possibility of associations assisting victims in court or acting on behalf of victims, in the situations banned by the draft bill. This is a positive step for the victims, who can thus be assisted in enforcing the law.

The victim may also claim damages in a civil court based on criminal law, with or without the assistance of such associations. The mechanism for sharing the burden of proof is provided for in the draft bill and when introduced, will represent progress for the victims in relation to proving the discriminatory act took place, as currently it does not exist.



Finally, the labour court may be used in case of discrimination at work, but with very limited consequences, as the law does not make provision for any remedies other than criminal ones for the judge to fight discrimination. The Bill transposing the Directives, which is also applicable in cases of racial discrimination in the employment field, has introduced the possibility of taking a case to court immediately, in cases of discriminatory acts, including dismissal.

The law of 6 May 1999 on penal mediation enables the State Prosecutor to use mediation, where it appears that such a remedy is likely to ensure that compensation or damages are paid to the victim, or indeed to bring a conclusion to the disturbance resulting from the offence, or in addition contribute to the rehabilitation of the person committing the offence.

Before the adoption of the Bill, victims of discrimination were able also to ask for the support of NGOs, mostly associations supporting foreigners. According to the law of 19 July 1997, such associations of national significance being able to act in court if the victim has expressed his/her consent to be represented.

However, very few complaints have been lodged in court and there are no known court cases convicting perpetrators of discrimination. The mechanism of the existing law, especially criminal procedure, is not a remedy that allows satisfactory compensation to victims of discrimination in every situation.

In the employment field, a complaint can be lodged with the Labour Inspectorate, which is generally in charge of monitoring the application of labour law.

The draft bill extends the criminal sanctions currently incorporated in the penal code for the behaviours now forbidden i.e. a fine and up to 2 years of prison. One can argue that they are effective, proportionate and dissuasive, but there should be other, civil sanctions available to victims. Besides, only one other sanction is foreseen, namely that any clause in a contract or a convention is void, when it is discriminatory.

Finally, the use of testing and statistical evidence is not foreseen by law. Such evidence may be accepted by criminal courts, but it is highly doubtful that in civil cases the courts would accept such evidence, as it may be seen as unfair collection of evidence.

6. Equality bodies

The Ombudsman, existing since the law of 22 August 2003, may sometimes be asked to act on behalf of a victim of discrimination, if such discrimination occurs within the administration. Also, in accordance with the UN Convention on the Elimination of all Forms of Racial Discrimination, the Special Permanent Commission against Discrimination (CSP-RAC), a body of the National Council for Aliens (CNE), is competent to consider petitions from persons or groups of persons within the jurisdiction of Luxembourg who claim to be victims of discrimination. However, these petitions cannot be considered until all other available local remedies have been exhausted.

Bill Nr.5518 creates a Centre for Equality of Treatment. Draft bill Nr.5583 deems this Centre to be competent also for discrimination cases relating to the public sector.



The Centre shall be a body of 5 members including a president, nominated for 5 years by the Grand-Duke on the proposal of the Parliament. Once a year, a report must be submitted to the Government and to Parliament and the Centre is funded by the state.

The Centre will publish reports, issue opinions and recommendations and conduct surveys on all questions linked to discrimination, provide information and assistance to victims of discrimination.

It shall deal with issues relating to discrimination based on race, ethnic origin, gender, sexual orientation, religion or belief, disability and age.

The draft bill underlines the full independence of the Centre. This independence may be restricted by the fact that the Government decides alone on the budget it will allocate to the Centre every year.