



Executive Summary

Country Report Luxembourg 2009 on measures to combat discrimination

By François Moyse

1. Introduction

The Grand-Duchy of Luxembourg is characterized by cultural diversity and the common use of several languages. Its population is quite homogeneous the vast majority of foreigners being European Union citizens, most of which are of catholic religion.

The Grand Duchy of Luxembourg has one of the highest proportions of foreigners in Europe – more than 43% on average. In Luxembourg City, the capital, the percentage of foreigners lies over 50% of all inhabitants. The Portuguese citizens are the largest groups of foreigners.

In general, relations between different ethnic and racial groups are smooth; incidents of racism and discrimination are rather low, though some intolerance does indeed exist. However rarely violent xenophobic incidents are recorded.

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 as 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. The latter is the usual scenario.

As far as religions are concerned, 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 public convention signed between the State and the religious representative body. Such conventions exist between the State and the main religious congregations, but not yet with the Muslim community.

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. Protocol 12 on discrimination has also been ratified.

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.

One can find penal provisions against discrimination, including religion, race and ethnic origin, disability, sexual orientation and age 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.

A new law was adopted and published on 16 December 2008 on reception and integration of foreigners in the Grand-Duchy of Luxembourg. The law contains general provisions aimed at combating discrimination against foreigners. A special agency called ‘Office luxembourgeois de l’accueil et de l’intégration’, shall take over the responsibility of offering equal chances and fight against discrimination, integration being seen as accompanying the process of welcoming foreigners in the country.

The two laws of 28 November (general law) and 29 November 2006 (public service) have strengthened the existing legislation against direct discrimination and have introduced new tools in civil law to fight discrimination, like indirect discrimination, harassment or instructions to discriminate. Also new labour law protection mechanisms against victimisation have been introduced in the Labour Code.

The legislator has gone further than the strict requirements of the directives, by including forbidden discrimination based on the grounds of religion or belief, disability, age and sexual orientation, as well as race and ethnic origin for all area included in the scope of both directives, thus forbidding all discrimination in all relations between persons.

The Centre for Equality of Treatment has taken a long time to be set up but has reached that stage in 2008. It is now fully operational.

No case-law has still made it possible to assess the impact of the antidiscrimination laws.

3. Main principles and definitions

Articles 454 to 457 of the Penal Code provide some legal tools for protection against discrimination. Article 454 of this code, as amended by the law of 28 November 2006, 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, age, 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 ground of belief has not been included in the amendment of the penal code. Also only direct discrimination is forbidden, while indirect discrimination, harassment and instruction to discrimination are behaviours which are not repressed in criminal law.

The laws of 28-29 November 2006 use the same definitions as found in these Directives. They thus introduce the concept of equal treatment as required by the Directives. Direct discrimination, indirect discrimination and harassment are defined adequately in the laws, as well as instruction to discrimination.

All the forbidden grounds of the Directives are covered by the civil law provisions i.e., religion or belief, age, disability, sexual orientation and race and ethnic origin.

As far as victimisation is concerned, only the employment field is concerned, but no other special provisions outside employment have been introduced apart from those included in the Directives. Provisions include a special procedure against dismissals based on discrimination or the voidness of discriminatory clauses in contracts or collective work agreements. Also protection against retaliation is provided for.

As far as exceptions and exemptions are concerned, the law of 28 November 2006 contains provisions on genuine and determining occupational requirements as allowed by Directive 2000/78/EC, based on the nature of the particular occupational activities concerned or of the context in which they are carried out, but only within the sphere of employment. The law also provides for an exception based on the ethos of a church or a religious group in the area of employment.

The law also provides for possible exemptions based on age, if they are appropriate and necessary and if they are objectively and reasonably justified by a legitimate aim.

Insurance contracts have been taken out of the prohibition of discrimination for the grounds of age and disability, under the condition that the exception be objectively and reasonably justified.

Provisions on reasonable accommodation for disabled persons have also been incorporated in the law, which has amended the current law of 12 September 2003 on the income of disabled persons.

Positive action is recognised as being valid, meaning that it is not considered as discrimination.

There is no legal measure, nor case law in relation to cases of multiple discrimination or discrimination by association.

4. Material scope

As far as penal law is concerned, the amended 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, the sanctioning or dismissal of a person;
- the subjection of access to work, training or working conditions or the membership of, and involvement in, an organisation of workers or employers to a discriminatory condition.

Thus, the scope of the Directives is not entirely covered by criminal law.

As far as civil law is concerned, including labour law, the law of 28 November 2006 has incorporated the full scope of Article 3 of Directive 2000/43 and thus is 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.

Public sector is covered by the law of 29 November 2006 for the relations between public employees and the administration (state and municipalities).

5. Enforcing the law

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.

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.

The laws of 28 and 29 November 2006 extend the possibility of associations and trade unions or professional associations assisting victims in court or acting on behalf of victims.

The victim may claim damages in a civil court, with or without the assistance of such associations, using the mechanism of the sharing of the burden of proof.

The labour court may be used in case of discrimination at work, through a special summons' procedure, in case of dismissal and the reintegration of a worker may be asked for. Besides, one can ask any discriminatory clause in a contract or a collective convention to be declared void.

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

One can argue that sanctions are effective, proportionate and dissuasive, but the law lacks other civil sanctions available to victims. Finally, the use of testing and statistical evidence is not foreseen by the laws.

6. Equality bodies

The laws of 28 and 29 November 2006 have created a Centre for Equality of Treatment, competent also for discrimination cases relating to the public sector.

The Centre, which has been set up only in 2008, is 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 publishes reports, issues opinions and recommendations, conducts surveys on all questions linked to discrimination and provides information and assistance to victims of discrimination.

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

The law of 28 November 2006 underlines the full independence of the Centre. This independence may in theory be restricted by the fact that the Government decides alone on the budget it will allocate to the Centre every year.

The Centre does not have the ability to support victims in Court or to submit directly claims to the courts. Thus it has no quasi judicial powers.

Since the year 2008, the Centre has started acting in the field of anti-discrimination, by organising some conferences, as well as collecting claims of discrimination and trying to solve the cases of alleged discrimination. In 2009 its activities have been regularly covered by the national newspapers, television and radio.