



REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC

COUNTRY REPORT 2010

LUXEMBOURG

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State of affairs up to 1st January 2011

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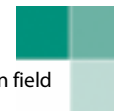


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INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed among different levels of government.

Luxembourg is a unitary and indivisible state. It is a constitutional monarchy, whereby the Grand-Duke has only very limited powers, as conferred by the Constitution. The Constitution dates back to the year 1868 and is about to undergo a general review by Parliament. The draft aims at modernizing the Constitution by abolishing outdated paragraphs and review the general outline. However the redrafting process may take another several years. The Government or members of Parliament propose pieces of legislation. There is one single Chamber at the Parliament, the *Chambre des Députés*, which votes the draft bills. A statement of grounds originally accompanies these draft bills.

All bills must be submitted to the Council of State for its opinion, as well the professional chambers. For a bill to be passed, the Council of State must exempt the Chamber of the second constitutional vote. If the Council of State formally opposes the draft, a second vote must be taken in Parliament to pass the bill. This vote cannot be held less than three months after the refusal of the *Conseil d'Etat* to exempt the Chamber from the second vote.

Secondary legislation is exercised by Grand-Ducal regulations. In practice, a regulation is a mechanism to provide further details and/or procedures for the implementation of a particular law and this only in issues which are not reserved to the legislative power by the Constitution. The Government, through the minister in charge of the issues concerned, is responsible for drafting the regulation, which is submitted to the Council of State for its opinion, adopted by Parliament and then signed by the Grand-Duke, who does not have the power to oppose it.

The Constitution provides for exclusive competence of the Parliament in various fields, like social security and labour law. The Constitutional court acts as a guardian of this principle. However only courts have the right to submit a preliminary question to the Constitutional court, in order to verify if a paragraph of a specific law is compatible with one of the articles of the Constitution. If declared unconstitutional, the provision will nevertheless not be abolished by the Court's decision, but will have to be amended by Parliament.



There are a few basic codes of law, including the civil code (dating from the times of Napoleon Bonaparte, in the beginning of the 19th century, when Luxembourg belonged to France), the criminal code, the code of commerce, the new code of civil procedure, which entered into force on 16 September 1998, the code of criminal procedure, the code of social security and the code of labour, which has been enacted in 2006. This last code is basically a compilation of former texts, with a new numbering of paragraphs.

The criminal code contains, mainly in articles 454 to 457 introduced by the law of 19 July 1997¹, various penal provisions forbidding discrimination against persons (individuals or moral persons = groups) based on the 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.

In the public sector, there is a compilation of laws relating to the administration, called *code administratif*, out of which the general statute of civil servants provides for the rules relating to the relationship between them and the administration, including the central governmental administration and the local administration, mainly the municipalities (=communes). The administrative code groups laws and regulations relating to administrative matters and which are to be submitted to the administrative courts, but it has no legal status as a formal code.

Some laws apply both to the private sector and the public sector, like the law of 8 December 1981 on equality of treatment between men and women, which has been incorporated formally in the Labour Code. According to Art. L. 241-7, any dispute relating to an issue of equality between men and women shall be submitted to the Labour courts for private employers and to the administrative courts for public employers.

As far as religions are concerned, in Luxembourg 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 i.e. recognized Churches. There is thus a separation between State and Churches, but the relations are legally regulated.

The official recognition of a religion is materialized by a covenant signed between the State and the religious representative body. The covenants's aim is to recognize a particular religious group with an official representative structure and to finance (some of) their ministers. The first one to have been signed is the covenant between the State and the Catholic Church dating from 31 October 1997. A religious head of the Church/religious group represents the religion such an Archbishop, a Chief Rabbi etc. Financial assistance is being also granted to the religious bodies (payment of some salaries of religious ministers).

¹ See under 2.1



Such covenants exist between the state and the main religious communities (Catholic, Jewish, Protestant, Orthodox, Anglican), but not with the Moslem community yet, although this community is now the second in numbers in the country. However within the community, there are problems in electing a representative body, which is a requirement for such a convention to be signed and thus a prerequisite for the official recognition of the community. The Government has approved a draft convention with the Moslem community, but the voting of a bill by the Parliament depends on an internal regulation that the representative body, called *Shoura*, has to set up and get agreed by the Government. No progress seem to have been made lately in the setting up and the recognition of such a body for the Moslem community.

Discrimination is not an issue about which there is much public awareness. It seems that it is a kind of hidden phenomenon that does not surface in public. Slowly however the Centre for Equality of Treatment is becoming a known institution and organises regularly debates on the topic of discrimination. Also training sessions and different conferences and events are raising some awareness on the issue within society.

0.2 Overview/State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.

This could also be used to give an overview on the way (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the domestic society (such as immigration law issues) are not appropriate for inclusion in this report.

Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.

The implementation process of the Directives 2000/43/EC and 2000/78/EC has been long and tortuous.

This process started in November 2003 and ended three years later with two laws of 28 November 2006, providing transposition through criminal law, free standing labour law, free standing civil / private law (outside employment) and amendments to the labour code.



The first relevant law is the law of 28 November 2006² (general discrimination law) which covers the entire scope of Directive 2000/43 for all the grounds apart from belief in the criminal law (even race and ethnic origin in the employment area outside the public sector) and the second relevant law, the law of 29 November 2006 (public sector law) covers all public employees and employers (state administration, municipalities etc.) and all grounds covered by both directives.³

This legislation may be seen as a clear improvement compared to the former anti-discrimination legislation, which was lacking many of these requirements of both directives 2000/43 and 2000/78. Not the least is the introduction of the concept of indirect discrimination, as well as the one of harassment, which did not previously exist.

The shortcomings of this legislation are:

- the ground relating to belief has not been included in the penal code; it is the only ground which has not been included there, most probably because the legislator thought that the other grounds cover already this situation i.e. religion or philosophical opinions;

² Loi du 28 novembre 2006 portant

1. transposition de la directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en oeuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique;
2. transposition de la directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail;
3. modification du Code du travail et portant introduction dans le Livre II d'un nouveau titre V relatif à l'égalité de traitement en matière d'emploi et de travail;
4. modification des articles 454 et 455 du Code pénal;
5. modification de la loi du 12 septembre 2003 relative aux personnes handicapées.

<http://www.legilux.public.lu/leg/a/archives/2006/0207/a207.pdf#page=2>

= Law of 28 November 2006

1. transposing Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
2. transposing Council Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
3. modifying the Labour Code and introducing in Book II a new title V on equality of treatment in the area of employment and work;
4. modifying articles 454 and 455 of the penal Code;
5. modifying the law of 12 September 2003 on disabled persons

³ Loi du 29 novembre 2006 modifiant

1. la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'Etat
2. la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux.

= Law of 29 November 2006 modifying

1. the modified law of 16 April 1979 establishing the general statute of state civil servants
2. the modified law of 24 December 1985 establishing the general statute of municipal civil servants.

<http://www.legilux.public.lu/leg/a/archives/2006/0207/a207.pdf#page=7>

- the limited coverage, as far as the personal scope is concerned, with regard to disability, which has not been explained by any particular reason: this includes the fact that quite substantial requirements must be met before one can claim protection under the law of 12 September 2003 on disability, especially the condition of a 30% reduction of one's work capacity and the fact that one's health must be deemed to be such as not to be able to find a work post in an ordinary work environment; these requirements are included in the law of 28 November 2006 as they refer to the law on disability.
- the absence of new civil sanctions (defence of rights and victimisation) outside the employment area; it may be questioned thus if the sanctions are really effective, proportionate and dissuasive;
- the penal sanctions do not cover all the scope of the directives;
- the likely weakness of the control mechanism in the employment area (entrusted to the Inspection du Travail et des Mines, which is not a specialised body; no link to the Centre for Equality of Treatment);
- the weak status of the Centre for Equality of Treatment: it has no power to assist victims in court, as the board only counts 5 members and, the staff is limited in numbers, as the staff is composed of one director and one staff member, with a rather small office. Moreover, the overall budget for 2010 was of only 92.000 Euros, compared to 220.000 Euros for 2009; even worse, in 2011, the operative budget has been decreased to 80.000 Euros.
- the absence of any clause relating to social dialogue and dialogue with trade unions;
- a question arises concerning the compatibility of article 457 of the penal code, which has been maintained, with some small changes, with possible discrimination toward disabled persons. Indeed following exceptions to discriminatory behaviours are included in article 457 § 1: - *differentiation of treatment on grounds of state of health, where this consists of operations intended to prevent or ensure against risk of death, risk of threat of bodily harm to the person, or risk of incapacity for work or invalidity; differentiation of treatment on grounds of state of health or disability, where this consists of a refusal of employment, or of dismissal on grounds of medical unfitness established by the party concerned;*
- nothing has been provided for in the law as occupational pensions are concerned.



On 13 May 2008, a law was adopted on equality between men and women, whereby Directive 2002/73/EC was transposed into Luxembourg legislation⁴. This law has also slightly amended the law of 28 November 2006, in three aspects:

1. Some technical errors were levelled out of the text (wrong references to some articles).
2. The missing ground of sexual orientation, which apparently had been mistakenly erased from the draft bill during the parliamentary debates, was re-introduced into the scope of action of the Center for Equal Treatment.
3. A new limitation was adopted, whereby insurance contracts were taken out of the scope of article 2§1 of the law of 28 November 2006. This means that these insurance contracts are not included anymore in the prohibition of discrimination, while they were previously covered within the category of 'access to and supply of goods and services which are available to the public'.

This exception is however only valid for age and disability and only under the condition that the exception be objectively and reasonably justified.

While this exception is not in violation of both Directives 2000/43/EC and 2000/78/EC, it is however contrary to the spirit of the Directives to pass an amendment diminishing the level of protection against discrimination some 18 months after the adoption of the law of 28 November 2006.

0.3 Case-law

Provide a list of any important case law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

Name of the court

Date of decision

Name of the parties

Reference number (or place where the case is reported).

⁴ Law of 13 May 2008

1.transposing Directive 76/207/EEC of the Council on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002;

2. modifying the Code of Labour;

3. modifying §1 of article 2 of the law of 14 March 1988 relating to the childhood leave;

4. modifying the amended law of 16 April 1979 on state civil servants;

5. modifying the amended law of 24 December 1985 on municipal civil servants

6. modifying the law of 28 November 2006 on

1. The transposition of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

2. the transposition of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

3. modifying the Labour Code and introducing in Book II a new title V relating to equality of treatment in labour and occupation;

4.modifying articles 454 and 455 of the penal Code;

5. modifying the law of 12 September 2003 on disabled persons, Mémorial A n°70, 26 May 2008, p. 969



Address of the webpage (if the decision is available electronically)

Brief summary of the key points of law and of the actual facts (no more than several sentences)

→ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the two Directives (also beyond employment on the grounds of Directive 2000/78/EC), even if it does not relate to the legislation transposing them - e.g. if it concerns previous legislation unrelated to the transposition of the Directives

Please describe trends and patterns in cases brought by Roma and Travellers, and provide figures – if available.

There has been no case-law on the two directives and on the law of 28 November 2006. Neither has there been any case law on discrimination based on the law of 12 September 2003 as far as we know or on any larger case on discrimination. However the Constitutional Court has ruled quite often on the general principle of equality based on Article 10 bis of the Constitution. The Court does not use the mechanisms and concepts of the anti-discrimination law. It verifies if a particular law is consistent with this principle by making sure that any different legal regime applied to certain categories of persons is justified by the fact that the distinction made stems from objective disparities and that it be rationally justified, adequate and proportioned to the goal of the law.

This is a worrying trend, five years after the adoption of the anti-discrimination laws. It shows that the law on discrimination is not used, or is not used enough, and that victims generally do not take actions in court. There have been no cases around the issue of Roma and Travellers to our best knowledge.

Therefore there is no case law at all to be brought forward until now. The same goes for discrimination matters which would not be related to the Directives, but to the Luxembourg criminal code articles.

Even the police reports generally relate to matters of racism rather than cases of discrimination.

There have been only a handful cases relating to racism and anti-Semitism in criminal courts, but not to discrimination as such.

As there are no significant population of Roma and Travellers known to be living in Luxembourg, there have been no cases relating to this group of population. According to some oral information, the Police seem to try and avoid that Roma and Travellers stop over in Luxembourg.



1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

- a) *Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*

On the national level, the principle of equal treatment can be found in the general legal principle incorporated in article “10 bis” of the Constitution, according to which all Luxembourgers are equal before the Law. The contents of this Article dates back from 1848 and has not changed since then. This implies that no discrimination shall apply for whatever ground. However this principle applies only *stricto sensu* to the Luxembourg nationals and not the 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 sanctioned. There is no mention of the prohibition of discriminations in the Constitution. Up to now, there has been no proposal to insert a clear prohibition of discriminations, for whatever ground, in the Constitution.

There are a few articles in the Constitution, which are also relevant to the different grounds of discrimination, as foreseen by both directives.

Article 111 of the Constitution of the Grand Duchy of Luxembourg states the following

“Any alien on the territory of the Grand Duchy shall enjoy the protection accorded to persons and property, without prejudice to exceptions established by law”.

As discriminations based on racial origin, religion or belief, are often linked to the foreign origins of a person, the statement is important, although not precise enough to protect foreigners from all discriminations.

The Constitution contains several articles relating to religion in a broad sense. Article 19 guarantees freedom of worship in all its forms. Article 20 guarantees freedom of conscience and provides for the liberty *not* to take part in any religious ceremony, to respect any religious festival or to respect any day of rest. Thus any discrimination based on religion and opposing these liberties is not allowed⁵.

⁵ Art. 19. Freedom of worship, including its public expression, as well as freedom to express ones religious views, are guaranteed, except for the repression of offences committed while taking advantage of those freedoms ;(“*La liberté des cultes, celle de leur exercice public, ainsi que la liberté de manifester ses opinions religieuses, sont garanties, sauf la répression des délits commis à l’occasion de l’usage de ces libertés* »).

Art. 20. Nobody may be compelled to participate in any way to acts or ceremonies of worship or to respect days of rest (“*Nul ne peut être contraint de concourir d’une manière quelconque aux actes et aux cérémonies d’un culte ni d’en observer les jours de repos.* »)



b) *Are constitutional anti-discrimination provisions directly applicable?*

Constitutional provisions are only directly applicable when they include fundamental rights that are self-explanatory and thus clear enough to be directly applicable by courts.

In general, laws, rather than the Constitution include rights that are precise enough to be directly invoked in courts. Administrative courts apply sometimes directly the principles of fundamental rights as laid down in the Constitution. This may also be the case for criminal courts. In civil courts however, the direct application of the Constitution is problematic, as the definitions are too broad.

Luxembourg has a constitutional Court, which decides upon the conformity of legislation with the Constitution. A preliminary question can only be put to this constitutional Court by another court, a civil, commercial, penal, social or administrative court. An individual party cannot submit directly a case to this court. The judges decide on whether they put the question to the constitutional Court. This Court may decide that an article in a law violates the constitution and thus is not applicable. In this case, the Government has to react and to modify the given law – or even amend the Constitution.

According to the constitutional Court, the principle of equality “*cannot be construed in an absolute sense, but requires all those who are in the same situation of fact and law to be treated in the same way*”⁶.

According to the judgments of the constitutional Court,

*“the legislature may subject certain categories of persons to different legal regimes without infringing the constitutional principle of equality, provided that the difference introduced derives from objective disparities, and that it is rationally justified, adequate and proportional to its aim”*⁷.

c) *In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

The principle of equality can be enforced against any actor, public or private, with the limitations stated under b), i.e. the provision must be clear enough and not too wide.

⁶ Constitutional Court, Judgment 2/1998 of 13.11.98, Mémorial (Official Gazette) A - no. 102 of 8.12.98, page 2499, <http://www.legilux.public.lu/leg/a/archives/1998/1020812/index.html>

⁷ Constitutional Court, Judgment 09/2000 of 5.5.2000, Mémorial (Official Gazette) A - no. 40 of 5.5.2000, page 948, <http://www.legilux.public.lu/leg/a/archives/2000/0403005/0403005.pdf#page=2>



2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

The forbidden grounds of discrimination are to be found primarily in the penal code, in articles 454 to 457 of the penal code, as introduced by the law of 19 July 1997⁸ and as amended by the general discrimination law of 28 November 2006 transposing the two directives and later modified by the law of 21 December 2007 transposing directive 2004/113/EC.

. Individual and collective discrimination actions i.e. against legal persons, groups or communities of persons, are thus forbidden and can lead to a fine up to 25.000 Euro or even 37.500 Euro in some cases, or to a sentence of imprisonment up to two years.

The penal code contains provisions aimed at combating discrimination based on the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation, as well as gender.

Also, a special agency called '*Office luxembourgeois de l'accueil et de l'intégration*' (=OLAI), as created by the Law of 16 December 2008 relating to the reception and integration of foreigners in the Grand-Duchy of Luxembourg,⁹ has taken over the responsibility of offering equal chances and fight for equal treatment on these grounds, integration being seen as accompanying the process of welcoming foreigners in the country.

Article 3 of the law states that OLAI shall organise the reception of newly arrived foreigners, facilitate the process of integration of foreigners through the implementation and coordination of welcome and integration policy, including the fight against all kind of discrimination, of which it is an essential component. As such, OLAI's tasks only relate to foreigners, meaning that it does not have any power to act in the case of discrimination based on other grounds like sexual orientation, disability and age.

Article 6 of the said law empowers OLAI to establish a draft national action plan for integration and the fight against discrimination. The Government has the mission to present a global strategy and decide on targeted measures for integration and against discriminations.

⁸ *loi du 19 juillet 1997 complétant le code pénal en modifiant l'incrimination du racisme et en portant incrimination du révisionnisme et d'autres agissements fondés sur des discriminations illégales*, [law of 19 July 1997 completing the penal code by amending the accusation of racism and introducing the accusation of revisionism and other acts based on illegal discriminations], Mémorial 07/08/1997 (054/1997).

<http://www.legilux.public.lu/leg/a/archives/1997/0540708/1997A16801.html>

⁹ A — N° 209 24 décembre 2008 p.3155 ;

<http://www.legilux.public.lu/leg/a/archives/2008/0209/a209.pdf>



A first plan was announced by the government at the end of November 2010. However it has not been made public yet.

Every five years the minister in charge will have to write a report on this very issue, to be presented to the Parliament.

Article 454 of the penal code states:

"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 shall constitute discrimination".

"Equally [any difference of treatment] applied to legal entities, groups or communities of persons, or to some or all members of these legal entities, groups or communities 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, shall constitute discrimination".

Thus the grounds of racial and ethnic origin are covered, as well as religion, disability, age and sexual orientation.

However, the word belief is not included in the penal code, although it might be covered by the word religion or even the concept of philosophical opinion. One has also to underline that belief is a notion provided by article 9 of the European Convention of Human Rights, which is directly applicable into Luxembourg law¹⁰. According to this article, everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change one's religion or belief, and freedom, either alone or in community with others and in public or private, to manifest one's religion or belief, in worship, teaching, practice and observance. No definition of belief has been provided by the European Court of Human Rights.

Moreover, all the grounds covered by both Directives are also covered by both laws of 28 (general discrimination law) and 29 November 2006 (public sector law), i.e. religion or belief, disability, age, sexual orientation, race or ethnic origin. Therefore the discrimination based on belief is explicitly forbidden outside the scope of penal law, for civil or commercial cases, administrative conflicts or work relations for example.

¹⁰ "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others"



2.1.1 Definition of the grounds of unlawful discrimination within the Directives

- a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation? Is there a definition of disability at the national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?*

All these notions are not defined as such in legal terms in Luxembourg legislation. Courts have, on their part, not defined as so far these concepts.

Racial or ethnic origin, as well as the word *religion* are used in the penal code, in articles 454 and 457-2 without precise definition.

Belief is not defined in the current legislation. The laws transposing the directives use all of these grounds, without defining them either. The laws also use the notions of disability, age and sexual orientation, without defining them.

The laws transposing the directives do not define the notion of "*person with disabilities*", a notion, which is included in the penal code. Neither there is any cross-reference to a definition in the penal code. Consequently, the term may be given the general interpretation of person with a reduced capacity in one respect or another. It is generally understood, at least in penal terms, as relating to physical or mental capacity, but the Law on Disabled Persons of 12 September 2003 defines disability as a reduced working capacity. A disabled person, when receiving the status of disabled person benefits from a special cash benefit by the National Disability Fund.



According to the law on Disabled Persons of 12 September 2003¹¹, to which there is a reference in §20 of the Law of 28 November 2006, the definition of disability lies in reduced working capacity, whether the cause is natural or accidental, due a work accident or war events.

The law of 12 September 2003 gives the status of “disabled worker” to disabled persons who have a physical, mental, sensory or psychological impairment and /or psychosocial difficulties aggravating this impairment. Such a definition is valid for reductions in working capacity exceeding 30%, for persons who are still able to work somehow, even in a protected environment. Thus an administrative body decides on who receives the status of a disabled person, i.e. a medical commission.

The grand-ducal regulation of 7 October 2004¹², uses following criteria in article 6-1: the quality of disabled person takes into consideration the existence of a reduction of the individual work potential, in relation with the previous work position, as well as the importance of the residual work capacity vis-a-vis the possibilities of work reinstatement in a short period or of the re-education ability of the worker.

The worker’s disability should not be confused with “inability to work”, a concept that derives from a quota of days’ absence during a given period, or “invalidity”, which is granted to workers under certain conditions.

¹¹ Loi du 12 septembre 2003 *relative aux personnes handicapées et portant modification 1. de la loi modifiée du 26 mai 1954 réglant les pensions des fonctionnaires de l'Etat, 2. de la loi du 22 avril 1966 portant réglementation uniforme du congé annuel payé des salariés du secteur privé, 3. de la loi modifiée du 12 mars 1973 portant réforme du salaire social minimum, 4. de la loi modifiée du 30 juin 1976 portant 1. création d'un fonds pour l'emploi; 2. réglementation de l'octroi des indemnités de chômage complet, 5. de la loi modifiée du 19 juin 1985 concernant les allocations familiales et portant création de la caisse nationale des prestations familiales, 6. de la loi modifiée du 27 juillet 1987 concernant l'assurance pension en cas de vieillesse, d'invalidité et de survie, 7. de la loi modifiée du 3 août 1998 instituant des régimes spéciaux pour les fonctionnaires de l'Etat et des communes ainsi que pour les agents de la SNCFL, 8. de la loi modifiée du 28 juillet 2000 ayant pour objet la coordination des régimes légaux de pension et 9. le CAS.* [Law of 12 September 2003 relating to the disabled persons and amending 1. the amended law of 26 May 1954 regulating the pensions of the civil servants of the State, 2. the law of 22 April 1966 uniformly regulating the annual paid leave of the employees of the private sector 3. of the modified law of 12 Mars 1973 reforming the minimum social income, 4. of the modified law of 30 June 1976 which 1. creates a fund for employment; 2. regulating the granting of full unemployment benefits, 5. of the amended law of 19 June 1985 concerning family allowances and creating the national agency of family allowances, 6. of the amended law of 27 July 1987 concerning the insurance pension in case of oldness, *invalidity* and of survival, 7. of the amended law of 3 August 1998 instating special regimes for state and municipal civil servant as well as for the agents of the national railway company, 8. of the amended law of 28 July 2000 with the aim of coordinating the legal regimes of pension and 9. the Code of Social Insurance], Mémorial du 29/09/2003 (144/2003),

<http://www.legilux.public.lu/leg/a/archives/2003/1442909/2003A29381.html>

¹² *Règlement grand-ducal du 7 octobre 2004 portant exécution de la loi du 12 septembre 2003 relative aux personnes handicapées* [grand-ducal regulation of 7 October 2004 applying the law of 12 September 2003 relating to disabled persons], Mémorial du 13/10/2004 (167/2004).

<http://www.legilux.public.lu/leg/a/archives/2004/1671310/2004A25261.html>



The laws transposing the directives on discrimination in the employment area do not define as such the notion of disability, but article 20 of the general discrimination law of 28 November 2006 uses following formula:

' paragraph 8 of the law of 12 September 2003 on disabled persons shall be completed as follows: the employer will take appropriate measures, depending on the needs in a concrete situation, in order to allow a disabled worker to find a job, to work and to progress or for training to be given to him, unless these measures put disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently compensated by the measures foreseen in article 26 of the grand-ducal regulation of 7 October 2004' ¹³

Such an obligation nevertheless has not been explicitly imposed on the public employer, i.e. the state or other administrations in the public sector law of 29 November 2006, probably because the law of 12 September 2003 is directed at any employer, private or public. The duty to provide reasonable accommodation measures is thus valid for both the private and the public sectors.

As far as the *Chacon Navas* case is concerned, as explained above, the law of 12 September 2003 gives the status of "disabled worker" to disabled persons who have a physical, mental, sensory or psychological impairment and /or psychosocial difficulties aggravating this impairment.

In principle, this definition may be seen as compatible with the given case.

However the Luxembourg definition requires a worker to have a reduction in working capacity of a minimum of 30% and so recognised by an official body (the medical commission according to the grand-ducal regulation of 7 October 2004) - these are additional requirements not mentioned by the Court of Justice of the European Union.

The notion of *sexual orientation* has been introduced by the law of 19 July 1997 (which amended the penal code), but does not specify its definition. While the notion was absent in the draft bill, an amendment of the Legal Commission of the Parliament has introduced the concept. During the debates in Parliament, a Member of Parliament¹⁴ defined the concept as being relevant not only to homosexuality, but to sexual behaviour in general.

¹³ " Art. 20. (1) L'article 8 de la loi du 12 septembre 2003 relative aux personnes handicapées est complété par les alinéas suivants:

«(5) L'employeur prendra les mesures appropriées, en fonction des besoins dans une situation concrète, pour permettre à un travailleur handicapé d'accéder à un emploi, de l'exercer ou d'y progresser, ou pour qu'une formation lui soit dispensée, sauf si ces mesures imposent à l'employeur une charge disproportionnée.

Cette charge n'est pas disproportionnée lorsqu'elle est compensée de façon suffisante par les mesures prévues à l'article 26 du règlement grand-ducal du 7 octobre 2004 portant exécution du paragraphe (4) qui précède.»

¹⁴ Laurent Mosar



- b) *Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion' for the purposes of freedom of religion, or what is a "disability" sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?*

The ground of belief is not being used in the Luxembourg legislation. The concept of belief may, though, fall under the general concept of religion. The Constitution uses rather the word *worship*. However, there is no constitutional, legal or court definition of religion, of worship or of belief. Non religious belief is covered in the penal code by the notion of philosophical opinions.

Even in the important judgement of 20 November 1998, the constitutional Court did not define "religion" as such. It decided that a pupil, member of the 7th Day Advent Church, who asked for the permission not to attend school on Saturdays, due to religious grounds, may not be granted a general exemption¹⁵.

The constitutional Court decided that article 1 of the former law of 10 August 1912 on the organisation of primary schools, which has been abolished in the meantime by the law of 6 February 2009 on the organisation of fundamental education, is not contrary to article 19 of the Constitution, which guarantees freedom of worship. In the eyes of the court, the right of a child to be educated cannot be suppressed or severely damaged, even on a religious ground. Freedom of worship was not defined in general terms.

It is interesting to note that court used the notion of religious or philosophical belief¹⁶. The issue of reasonable accommodation as regards religious practices was not discussed as such in the case.

A recent judgment of the Court of Appeal assessed a criminal complaint against a former judge brought by the State's attorney for anti-Semitic comments in a daily newspaper. It indicated that despite a law granting the Jewish Consistory of Luxembourg the right to represent the interests of Jews in matters related to worship (culte), the aforementioned body was denied the right to act as a civil party in this trial. The judges thus denied that representing the Jewish community in order to get damages allotted for anti-Semitic comments was permissible under the law, judging that such representation is not an issue of "worship".¹⁷

¹⁵ Constitutional Court, Judgment 3/1998 of 20.11.98, Mémorial (Official Gazette) A of 18.01.1999, n°002/1999,

<http://www.legilux.public.lu/leg/a/archives/1999/0021801/0021801.pdf#page=2>

¹⁶ « *considérant d'un autre côté que les convictions religieuses ou philosophiques ne peuvent aller à l'encontre du droit fondamental de l'enfant à l'instruction* » ; [considering on the other hand that religious religious or philosophical belief may not go against the fundamental right of the child to education]

¹⁷ <http://www.justice.public.lu/fr/actualites/2011/03/arret-affaire-biermann/index.html>

As far as the notion of disability is concerned, there is no definition in social security legislation that would refer to recital 17 of Directive 2000/78/EC.

However, as stated above under *a)*, the law of 12 September 2003 and especially the grand-ducal regulation of 7 October 2004 provide for the duty of reasonable accommodation. The amendment to the regulation introduced by article 20 of the general discrimination law of 28 November 2006, which reads:

'paragraph 8 of the law of 12 September 2003 on disabled persons shall be completed as follows: the employer will take appropriate measures, depending on the needs in a concrete situation, in order to allow a disabled worker to find a job, to work and to progress or for training to be given to him, unless these measures put disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently compensated by the measures foreseen in article 26 of the grand-ducal regulation of 7 October 2004', actually takes over the requirements of article 5 of the said Directive.

Recital 17 is actually reflected in article 457 of the penal code, which allows for *differences of treatment on grounds of state of health or disability, where this consists of a refusal of employment, or of dismissal on grounds of medical unfitness established by the party concerned.*

A bill has been introduced recently on reasonable accommodation in school. The draft does not define disability, but uses the words "pupils with special educational needs"¹⁸.

- c) Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

The laws transposing the directives protect persons against discrimination based on age. In general, there are no restrictions concerning the scope of the protection against age discrimination.

^{18 18} Projet de loi portant sur les aménagements raisonnables permettant une évaluation et une certification adaptées aux élèves à besoins éducatifs particuliers de l'enseignement secondaire et de l'enseignement secondaire technique rendant possible l'accès aux qualifications scolaires et professionnelles = bill on reasonable accommodation allowing for adapted evaluation and certification of pupils with special educational needs in secondary and technical education, allowing for access to professional and school qualification ; N°6151/01
http://www.chd.lu/wps/portal/public!/ut/p/c1/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gXI5ewIE8TIwN380ATayMvVy_z0GA_Ywt3Y6B8pFm8kYVFcJC7o6-rpWWok4GngbNhsGugk5GBpxEB3X4e-bmp-gW5EeUAwR8Qyw!!/dl2/d1/L0IDU0IKSWdrbUEhIS9JRFJBQUlpQ2dBek15cXchL1ICSkoxTkExTtk1MC01RncvN19EMkrWUkk0MjBHVk0xMDJCSTNRSIA5MzhFMS9kTGRIWDI0MjYwMDAz/?PC_7_D2DVRI420GVM102BI3QJP938E1_action=doDocpaSearchAction&PC_7_D2DVRI420GVM102BI3QJP938E1_cmd=&PC_7_D2DVRI420GVM102BI3QJP938E1_id=&PC_7_D2DVRI420GVM102BI3QJP938E1_positionInHistory=&PC_7_D2DVRI420GVM102BI3QJP938E1_SelectLibrary=doDocpaDisplaySearchTemplateAction&PC_7_D2DVRI420GVM102BI3QJP938E1_choice=NumeroDossier&NumeroDossier=6251&MotCleIntitule=&MotCleResume=&Rapporteur=&Auteur=



However, on the level of the municipalities, there is a grand-ducal regulation of 20 December 1990, modified several times, including on 19 June 2009, which regulates the conditions of admission and of examination of municipal civil servants.¹⁹

Article 4 of the regulation provides for the general rule that applicants must be 18 years old at the moment of their provisional appointment.

Also, an exception is provided for some positions: the minimum age is then set at seventeen years.

Finally an exception is provided for the job of concierge, for which the minimum age is 25 years and for the job of firemen, for which applicants must be no more than 28 years old. Although this latter exception may be seen as discriminatory, a recent judgment of the European Court of justice seems to validate such exception for the career of fireman²⁰.

Also, in accordance with article 6 of Directive 2000/78/EC, article 18 of the law of 28 November 2006 has introduced in the labour code a new article L. 252-2, according to which, differences of treatment on grounds of age shall not constitute discrimination, if they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary

d) *Please describe any legal rules (or plans for the adoption of rules) or case law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way the equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination. Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

There are neither legal texts, nor any court decisions or administrative rules, which seem to deal with the issue of multiple discrimination.

The Centre for Equal Treatment is using the concept of multiple discrimination to address cases that are being submitted to it. It is also a concept that has been discussed during conferences on discrimination.

However in the absence of court decisions, no case law exists on this issue.

Also the Luxembourg legislation does not cover multiple discrimination as such. It would be helpful that a European Directive would define and forbid multiple discrimination, so that the Luxembourg legislator would be obliged to include it into the national law.

¹⁹

http://www.legilux.public.lu/leg/textescoordonnes/compilation/code_administratif/VOL_8/PERSONNEL/FONCTIONNAIRES/STAGE.pdf

²⁰ CJEU, 12 January 2010, C-229/08, Colin Wolf vs. Stadt Frankfurt am Main



The Centre for Equal Treatment has actually issued a recommendation in its last annual report for 2010, to include in the law the prohibition of multiple discrimination.

- e) *How have multiple discrimination cases involving one of Art. 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

As stated before, the absence of any court decision, no case law exists on this issue.

2.1.2 Assumed and associated discrimination

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

Yes, in the penal code, article 454 prohibits any discrimination based on the belonging – real or supposed – to an ethnic group, nationality, race or specific religion, as well as article 1 of the general discrimination law. Therefore any discrimination based on the false assumption of the ethnic background, the nationality, the race or a specific religion of a person is indeed forbidden and sanctioned.

There is no such a prohibition for other grounds like age, sexual orientation or based on disability, as the abovementioned article uses the words “their belonging or non-belonging-true or assumed” only for the grounds of ethnic group, nationality, race or specific religion.

In the parliamentary comments of the draft bills transposing the directives, relating to the prohibition of discrimination based on racial and ethnic origin, one can read that, as far as indirect discrimination is concerned, the principle of equality of treatment (for race and ethnic origin) is applicable whether the supposed racial or ethnic origin is real or assumed.

- b) *Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

The penal code does not provide for such prohibition of discrimination based on association as in the Coleman case of the CJEU, nor does any other law.



However article 454 §2 of the penal code equally states that any difference of treatment applied to legal entities, groups or communities of persons, or to some or all members of these legal entities, groups or communities 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, shall constitute discrimination.

This article allows an individual right of action. However even if this article allows a complaint for discrimination against a whole group based on disability for example, it is unclear whether it would allow to cover discrimination based on association with persons with particular characteristics.

Hate speech against a group is not covered by this article, which relates to discrimination, hate speech is covered by articles 457-1 and 457-2 of the penal code.

No court decisions relate to this issue.

2.2 Direct discrimination (Article 2(2)(a))

a) How is direct discrimination defined in national law?

The law of 1997, having amended the penal code, uses the words '*any kind of distinction based on*' ... the various grounds of discrimination. It is quite a vague definition. The Constitution uses the notion of equality, without defining it either.

Both laws transposing directives 2000/43/EC and 2000/78/EC for the private sphere and for public service use the very definition of the directives and introduced the concept of equality of treatment as required by these directives, including the definition of direct discrimination.

The definition used in article 1 of the general discrimination law of 28 November 2006 and article 1-3 (introducing article "1bis" of the general statute of civil servants) of the public sector law of 29 November 2006 is thus: '*direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of...*'

b) Are discriminatory statements or discriminatory job vacancy announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn)

Discriminatory job announcements would certainly fall under the scope of the prohibition of discrimination, as far as conditions for access to employment are concerned and constitute direct discrimination forbidden by law.



The question whether discriminatory statements would be seen as direct discrimination can only be answered with caution. It is unlikely that Luxembourg courts would have decided that a statement as such would be a discriminatory deed.

However, now that the European Court of Justice has decided so and because the Luxembourg law is often a “copy-paste” of the Directives, it is to be believed that the same interpretation of the Directives (in this case Directive 2000/43/EC) would have to be adopted by the judges.

Therefore we believe that indeed, after the *Feryn* judgment, a discriminatory statement would have to be analyzed as being forbidden by the Directives.

Moreover, under criminal law such discrimination is explicitly forbidden by article 455 of the penal code, according to which refusing access to goods and services or the supply of those or the fact to indicate in an add that you intent to refuse goods or services or practice discrimination based on a forbidden ground is punished by penal law.

- c) *Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

Indeed, direct discrimination is forbidden by the penal code and also formally forbidden in the labour law field. Both provide for following exceptions:

- differences of treatment on grounds of state of health, where this consists of operations intended to prevent or ensure against risk of death, risk of threat of bodily harm to the person, or risk of incapacity for work or invalidity;
- differences of treatment on grounds of state of health or disability, where this consists of a refusal of employment, or of dismissal on grounds of medical unfitness (i.e. the candidate for a job). Actually a medical doctor is the only one to be able to declare somebody unfit for a position and not the employer for example. In case the employee or candidate would not agree, he would have to get a medical expert to find the opposite, in order for him to get a court remedy.
- differences of treatment in relation to recruitment for employment, on grounds of nationality, where being of a specific nationality constitutes, in accordance with statutory provisions regarding public service, with regulations applicable to the exercise of certain professions and with provisions on the right to work, a determining condition for employment or the exercise of a professional occupation;
- differences of treatment in relation to entry to, residence in and the right to vote in the country, where being of a specific nationality constitutes, in accordance with legal provisions and regulations regarding entry to, residence in and the right to vote in the country, the determining factor in entry to, residence in and the exercise of the right to vote in the country;



The laws of November 2006 also exempt differences based on nationality and the provisions deemed to be without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Also, an exception relates to payments of any kind made by state schemes or similar, including state social security or social protection schemes, based on article 3.3. of Directive 2000/78/EC. However this exception applies to all the grounds except race and ethnic origin, as those are covered by Directive 2000/43/EC, which does not provide for such an exception.

Whereas also the provisions on reasonable accommodation for disabled persons and the exception based on occupational requirements are provided for, there is also a general clause relating to justification of differences of treatment on grounds of age which are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

However the laws do not specify which measures may be aimed at and which test should be satisfied to justify direct discrimination.

In this respect, the laws have not taken over the possibility enshrined in article 6-2 of the employment directive allowing for the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, without these rules having to be considered as discrimination based on age.

- d) *In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?*

The laws transposing directive 2000/78/EC provide for an exception to the principle of equality for age if they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary, using the very definition of the Directive.

2.2.1 Situation Testing

- a) *Does national law clearly permit or prohibit the use of 'situation testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court? For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation? If the law is silent please indicate.*

Luxembourg laws does not provide for the possibility of using situation tests. The adoption of the anti-discrimination laws of November 2006 has not changed the situation in this respect.



It is therefore highly unlikely that any court would accept to use such tests without proper legislation to support the legality of such procedures in a civil procedure.

Indeed, the system of the civil procedure is governed by the principle of the legality of evidence, meaning that usually only the kind of evidence that is brought according to the civil procedure code are admissible (witnesses, writings etc.).

One could argue that a situation test may be accepted by the judges even if not explicitly provided for in any code, if the evidence is fairly brought in court (*'principe de loyauté de la preuve'*). However we believe that most judges would reject such a method, as it would be more likely to be seen as one element of appreciation of the case by a court, but not as a kind of evidence as such.

Nevertheless, in neighbouring countries like France, private associations usually use the testing method. In Luxembourg, the associations are generally too small and without enough human and financial means to get involved in cases that require the use of testing methods to provide for suitable evidence in court.

In a criminal case, all kinds of evidence are more likely to be accepted by the judges as long as the evidence has been fairly brought by the instructing judge or, rather, the civil party.

The principle is valid for any ground of discrimination.

- b) *Outline how situation testing is used in practice and by whom (e.g. NGOs, equality body, etc)*

As explained above, situation testing is not actually used in practice.

- c) *Is there any reluctance to use situation testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

Yes, as pointed out under a), the reluctance to use such evidence exists. The use of such testing in neighbouring countries like France or Belgium could, in the future, possibly push for some evolution, but it remains to be seen.

- d) *Outline important case law within the national legal system on this issue.*

Up to now, there is no known case-law on this issue

2.3 Indirect discrimination (Article 2(2)(b))

- a) *How is indirect discrimination defined in national law?*



The definition of indirect discrimination did not exist in the legislation (i.e. penal law provisions) until the adoption of the two laws transposing the directives. The notion of indirect discrimination used in these laws is the same as the one of the directives.

Indirect discrimination applies however only for civil cases (including labour law), as the Council of State had warned the legislator that such a provision would be too vague to be acceptable under the general principles of penal law. Therefore indirect discrimination is not sanctioned by criminal law.

Indirect discrimination is defined as follows, in article 1b and 18 for employment purposes of the general discrimination law of 28 November 2006 (private relations) and in article 3b of the general discrimination law of 28 November 2006 (public service):

"indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation, or due to their belonging or non-belonging, real or supposed, to of a racial or ethnic origin/at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"
(= transposition of Race Directive and Employment Directive).²¹

- b) *What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

The test would be the one provided for in the directives, namely that any provision, criterion or practice must be objectively justified by a legitimate aim and the means of achieving that aim should be appropriate and necessary.

These elements should be the legitimate aims that would be accepted by courts, but up to now there have been still no judgements on this issue.

Therefore there is no current answer on whether the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective in domestic law.

²¹ *une discrimination indirecte se produit lorsqu'une disposition, un critère ou une pratique apparemment neutre est susceptible d'entraîner un désavantage particulier pour des personnes d'une religion ou de convictions, d'un handicap, d'un âge ou d'une orientation sexuelle, de l'appartenance ou la non appartenance, vraie ou supposée, à une race ou ethnies données, par rapport à d'autres personnes, à moins que cette disposition, ce critère ou cette pratique ne soit objectivement justifié par un objectif légitime et que les moyens de réaliser cet objectif soient appropriés et nécessaires.*



Also it remains to be seen, for the same reason, what may be considered as an appropriate and necessary measure to pursue a legitimate aim.

c) *Is this compatible with the Directives?*

Yes it would be, if applied by courts in such a way.

d) *In relation to age discrimination, does the law specify how a comparison is to be made?*

Article 18 (introducing article L-252-2 of the Labour code) of the law on private relations and article 3§4 of the law on public service uses the definitions of article 6 of this Directive, nearly word for word.

There are no other provisions relating to how a comparison is to be made between workers of different age when discrimination complaints are brought.

e) *Have differences in treatment based on language been perceived as potential indirect discrimination on the grounds of racial or ethnic origin?*

Differences of treatment based on language are indeed often perceived as an indirect discrimination or potential discrimination, but mostly on the ground of nationality, more than on a racial ground or based on one's ethnic origin. This latter ground is often related to the non-European origin of the person concerned, whether white or not, often for access to employment.

This feeling of discrimination is more often felt as far as the restricted access to public employment is concerned, as the languages requirements i.e. speaking the 3 administrative languages (Luxembourgish, French and German) is required in well over three-quarter of the public positions²². Mostly there is a blank language requirement in public job vacancies, adequacy is only tested in positions open to EU citizens.

2.3.1 Statistical Evidence

a) *Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court?*

No, the law does not foresee the use of statistical evidence.

b) *Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?*

²² Over 90% of the public positions in 2005, see Cahier PSELL n°151, Discrimination à l'Emploi, Décembre 2005, SESOPI, p.61



No, it is not used in practice.

Such evidence could be used in criminal proceedings by the public prosecution. It could also in theory be used by private parties in civil litigation, if the data is freely accessible, which is mostly not the case, which also explains the reluctance to use such a method.

The use of such a method in neighbouring countries like France or Belgium could influence in the future the use of such statistics, within the limits of the data protection law (see hereunder d)), but it is not yet the case.

c) *Please illustrate the most important case law in this area.*

As mentioned above, there is no case-law on this issue.

d) *Are there national rules which permit data collection? Please answer in respect to all five grounds. The aim of this question is to find out whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/generated?*

The amended law on data protection of 02 August 2002²³, allows processing of personal data with severe limitations in article 6. Therefore the processing of personal data relating to racial or ethnic origin, to political opinions, to religious or philosophical belief or to the belonging to a trade-union as well as processing of personal data about health and sexual life, including genetic items is in general forbidden.

However a number of exceptions allow for such processing. They include following situations (briefly summarized):

- When the person concerned has given its special consent to the use of such data, unless it is forbidden by law;
- when needed by the responsible person of data processing for labour law purposes and if allowed by law;
- when data processing is necessary for the sake of the person concerned (health reasons);
- when data is kept by an NGO or foundation only for internal reasons, whereby the data may not be communicated to third parties with the consent of the person concerned;
- when the information has already been made public by the person herself;
- for judicial purposes, when needed in the framework of a court case;
- when the use of data is necessary on the ground that it is of public interest, for example for historical, statistical or scientific purposes.

²³ Mémorial du 13/08/2002 (091/2002),
<http://www.legilux.public.lu/leg/a/archives/2002/0911308/2002A18361.html>



Moreover, in its Third Report on Luxembourg ECRI states that Luxembourg's Personal Data Authority, the *Commission Nationale pour la Protection des Données* [National Data Protection Commission] (CNPD) confirmed to it that the law authorised the collection of ethnic data.

Such data collection simply required obtaining prior authorisation from the CNPD, and demonstrating the legitimacy and necessity thereof.²⁴

In July of 2007, the data protection law was indeed modified to allow the processing of racial and ethnic data, not including genetic data, with only prior notification to the CNPD.²⁵

The use of data concerning nationality is nevertheless allowed. The prohibition does not count in criminal investigation or court cases.

Data collection by an employer, which would seek to monitor compliance with anti-discrimination legislation would, in our view, not be compatible with the law on data protection if it uses criteria like racial origin or religion for example, as the law of 2002 does not allow for any exception.

There are no statistical data used to design positive action measures in Luxembourg.

2.4 Harassment (Article 2(3))

- a) *How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

Harassment is not a criminal offence according to the existing legislation. However stalking has now been forbidden by the law of 5 June 2009 amending the criminal code and introducing §442-2 in the penal code. Stalking is defined as obsessional harassment.²⁶

The laws transposing the directives use the very definitions of both directives concerning harassment, so that it is applicable in civil cases and labour cases or in administrative or commercial cases for example.

²⁴ ECRI (2006) Third Report on Luxembourg, at p. 23, English language version available at http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Luxembourg/Luxembourg_CBC_en.asp

²⁵ Luxembourg/*Loi du 2 août 2002 relative à la protection des personnes à l'égard du traitement des données à caractère personnel*, [law of 2 August 2002 on data protection] Mémorial A-N° 91, 13 August 2002, at p. 1836, as amended, Article 6(2)(g), and conversation of 23 March 2009 with CNPD jurist.

²⁶ *Loi du 5 juin 2009 insérant un article 442-2 dans le Code pénal en vue d'incriminer le harcèlement obsessionnel*.
<http://www.legilux.public.lu/leg/a/archives/2009/0134/2009A1889A.html?highlight=obsessionnel>



Thus harassment is deemed to take place in the case when *'an unwanted conduct related to racial or ethnic origin, religion or belief, disability, age or sexual orientation takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment'*, according to article 18 of the general discrimination law of 28/11/2006 and article 5 of public sector law 29/11/2006.

The general discrimination law of 28 November 2006 use the words *"notwithstanding the specific provisions relating to sexual harassment and moral harassment"*.

However the draft bill, which was dated 4 July 2002 and was due to introduce provisions of the prohibition of moral harassment, was finally abandoned during the year 2007. Indeed, after the Council of State had criticized the draft, the Government finally decided to push the reform of the Labour Inspectorate without incorporating the draft provisions on moral harassment. The former Minister of Labour declared that he would consider drafting a new text in the future, but no progress has been made on this issue up to now with the current Government.²⁷

The general statute of civil service contains a definition of moral harassment, which is: any conduct which, by its repetition or its systematization strikes harms a person's dignity or physical integrity (article 10-2).

b) Is harassment prohibited as a form of discrimination?

Yes it is forbidden by the two anti-discrimination laws on 28 and 29 November 2006.

Moreover, a law of 21 December 2007²⁸, transposing Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services also refers to harassment, using the definition of the Directive, i.e.: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment

c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?

²⁷ Answer to a Parliamentary question n°1846 of MP Laurent Mosar, by Minister François Biltgen, August 2007

²⁸ Loi du 21 décembre 2007 portant 1. transposition de la directive 2004/113/CE du Conseil du 13 décembre 2004 mettant en oeuvre le principe de l'égalité de traitement entre les femmes et les hommes dans l'accès à des biens et services et la fourniture de biens et services; 2. modification du Code pénal; 3. modification de la loi modifiée du 27 juillet 1997 sur le contrat d'assurance. [law of 21 December 2007 1. transposing Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services 2. Modifying the penal code 3. Modifying the amended law of 27 July 1997 on the insurance contract]



Article L. 162-12 of the Labour Code provides for any arrangements on the fight against sexual or moral harassment to be included in any collective work agreement, including sanctions (specifically disciplinary sanctions) that may be taken in this framework.

There is one additional source, relating to sexual harassment, stemming from the law of 26 May 2000²⁹. This law is applicable both to the private and the public sectors, including also trainees and students working during school holidays.

According to article 2 of this law, harassment is deemed to exist for any behaviour with a sexual connotation or any other behaviour based on gender in a working environment of which the author knows or must know that it affect the dignity of a person at work, when one of the three following conditions is met:

1. the conduct is inappropriate, abusive or hurtful to the person who is its object;
2. the fact that a person rejects or accepts such conduct on the part of an employer, worker, client, customer or supplier is used explicitly or implicitly as grounds for a decision affecting the rights of that person regarding vocational training, employment, retention of employment, promotion, pay, or for any other decision concerning work;
3. such conduct creates a climate of intimidation, hostility or humiliation in respect of the person who is its object. The conduct specified may be physical, verbal or non-verbal. An element of intent in the conduct is presumed.

It should be noted here that these three conditions are alternative and non-cumulative and that the scope is much more wide-reaching than that of the concept of harassment as defined in the Directive, insofar as the two concepts can be compared.

Furthermore, it is interesting to note that Article 3 of this law states specifically that harassment as defined in Article 2 *"is considered to be contrary to the principle of equal treatment in terms of the provisions of the Law of 8 December 1981 concerning equal treatment between men and women in access to employment, vocational training and promotion and working conditions"*.

Moreover, although prohibition of this conduct has been extended by this very law to work relationships in the public service between state employees (Article 13) and local authority officials (Article 14), this remains, however, limited to work relationships and is not subject to criminalisation and penal sanctions, but allows *"the worker who is victim of an act of sexual harassment to refuse to continue to fulfil the contract of employment and to terminate that contract of employment on serious grounds and without advance notice, with damages payable by the employer whose offence (...) caused the immediate termination"*.

²⁹ loi du 26 mai 2000 concernant la protection contre le harcèlement sexuel à l'occasion des relations de travail [law of 26 May 2000 concerning the protection against sexual harassment at the occasion of the working relations], Mémorial du 30/06/2000 (050/2000).

<http://www.legilux.public.lu/leg/a/archives/2000/0503006/2000A11101.html>



It is also interesting to note that the aforementioned law provides in Article 4 that *“The employer and the employee are required to desist from all acts of sexual harassment within work relationships, as are any clients or customers or suppliers of an enterprise. (...)»*.

The law encompasses sexual harassment against homosexuals / lesbians, according to the preparatory comments of the legislator³⁰.

Also, a collective agreement has been signed between the association of employers, the *Union des Entreprises Luxembourgeoises*, and the two main trade unions OGB-L and LCGB on 25 June 2009 relating to harassment and violence at work.

This collective agreement is now binding for all employers and employees, as it has been declared to be generally applicable by a Grand-Ducal Regulation of 15 December 2009³¹.

2.5 Instructions to discriminate (Article 2(4))

Does national law (including case law) prohibit instructions to discriminate? If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?

Yes, according to the two laws transposing the directives, an instruction to discriminate is a kind of discrimination.

There is also a prohibition in article 457-1 of the penal code relating to incitement to violence and hatred.

According to the opinion of the Council of State of 7 December 2004, the concept of instruction to discriminate of the directives should be covered by this definition for penal purposes, while the laws transposing the directives inaugurate the concept for civil and labour law cases.

30 « Certain specific groups are more particularly vulnerable to sexual harassment. Research done in several member countries have shown that there is a link between the risk of sexual harassment and the perception of a certain vulnerability for a victim. Indeed, separated and divorced women newcomers on the employment market and those not having a regular employment contract or those who are in a precarious status, women employed in non traditional tasks, , disabled women, , lesbians and women of racial minorities are faced with a much higher risk.. Homosexuals and young men also are vulnerable toward harassment. It is certain that harassment linked to sexual patterns of these victims are against the dignity at work of those who are victims of this and that it cannot be considered as a normal behaviour on the work place », in Commentary of the articles, under article 13.

31 Règlement grand-ducal du 15 décembre 2009 portant déclaration d'obligation générale de la convention relative au harcèlement et à la violence au travail conclue entre les syndicats OGB-L et LCGB, d'une part, et l'UEL, d'autre part, Mémorial A n° 3 du 13.01.2010, p.22,, <http://www.legilux.public.lu/leg/a/archives/2010/0003/2010A0022A.html>



Also an instruction to discriminate may be defined as a deed carried out by an accomplice according to articles 66 and 67 of the penal code.

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

- a) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. For example, does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*
Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.

The wording of articles of the law transposing Directive 2000/78/EC is almost identical to that of the Directive itself; this particularly applies to the definition of reasonable accommodation for disabled persons and has amended article 8 of the law of 12 September 2003:

"Employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.

This burden shall not be disproportionate when it is sufficiently remedied by the measures contained in article 26 of the grand-ducal regulation of 7 October 2004.

This article provides for financial measures to support for adjusting work posts and access to one's work, for the purchase of professional equipment and for reimbursements of transport costs to the work place.

Only people who have a 30 % disability and have been officially recognised as such are entitled to claim a reasonable accommodation. This provision should apply for private employers and public employers as well.

Also, article 13 of the law of 12 September 2003 on disabled persons has been amended. Provisions now foresee that any loan shall not be dependent upon or reduced by the fact that a disabled person is paid some social benefits.



A law has introduced legislation for persons with disabilities, allowing for dogs assisting disabled persons to enter any public space and any site open to the public³².

In the preparatory works of the draft bill which resulted in this law, there is a clear reference to the law of 28 November 2006 transposing Directives 2000/43/EC and 2000/78/EC.

Thus, to refuse access to a disabled person accompanied by a specially trained dog must be considered as indirect discrimination, as it will entail a disproportionate disadvantage for disabled persons without being objectively justified by a legitimate aim. Therefore, penal fines are to be imposed on those who would refuse access to the disabled person with a specially trained dog at the work place, a training facility or in a school.

The definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, as the general discrimination law refers for disability matters to the personal scope of the law of 12 September 2003 on Disabled Persons.

- b) *Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of "disproportionate burden" in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

National law does not provide for reasonable accommodation for disabled persons outside the employment area. Therefore one cannot say that there would be any different definition of "disproportionate burden" outside the scope of this law of 28 November 2006, for the very reason that no case law exists in this respect.

However a bill has been introduced recently in Parliament on reasonable accommodation in school.³³ It is too early to assess what will become of the draft bill.

- c) *Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

³² Loi du 22 juillet 2008 relative à l'accessibilité des lieux ouverts au public aux personnes handicapées accompagnées de chiens d'assistance : law of 22 July 2008 on access of disabled persons accompanied by assisting dogs to places opened to the public, Mem. A n° 134 of 08.09.2008, p.2004

³³ Projet de loi portant sur les aménagements raisonnables permettant une évaluation et une certification adaptées aux élèves à besoins éducatifs particuliers de l'enseignement secondaire et de l'enseignement secondaire technique rendant possible l'accès aux qualifications scolaires et professionnelles = bill on reasonable accommodation allowing for adapted evaluation and certification of pupils with special educational needs in secondary and technical education, allowing for access to professional and school qualification ; N°6151/01
http://www.chd.lu/wps/PA_1_084AIVIMRA06I4327I10000000/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/099/912/099181.pdf;



There is no provision in the laws of transposition as to whether the failure to meet the duty shall be considered as discrimination. But the interpretation of the laws should entail that, if these laws are not respected, this shall be deemed to be a case of discrimination. Nevertheless, the courts will have to decide on such a matter, as the penal sanctions are foreseen for any breach of the law.

The parliamentary comments on the law of 22 July 2008 concerning access for disabled persons with trained dogs also indicate that the law of 28 November 2006 foresees that failing to secure reasonable accommodation for the disabled is to be seen as indirect discrimination.

- d) *Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?*

No it has not done so.

- e) *Does national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

Indeed, the provision of the shift of the burden of proof applies to any discrimination issue, including cases relating to disabled persons, so that the issue of reasonable accommodation does fall under this principle.

- f) *Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?*

The law of 29 March 2001 on accessibility of spaces open to the public,³⁴ obliges public administration to allow access to disabled persons by providing the newly built or the refurbished buildings to be adapted to the needs of people with disabilities.

A Grand-Ducal Regulation of 23 November 2001 has specified the kind of sites that must be accessible to people with disabilities. This Regulation has been adapted in 2008³⁵. These provisions do set technical standards for design / construction but no sanctions are provided in case of non compliance.

The current regulation targets places and buildings such as: schools and kindergartens, touristic sites, hospitals, religious buildings, prisons, train/bus stations, public administration buildings, banks, including parking places, toilets and telephone facilities.

³⁴ Loi 29 mars 2001 portant sur l'accessibilité des lieux ouverts au public

³⁵ Grand-ducal Regulation of 25 January 2008 modifying the Grand-Ducal Regulation of 23 November 2001, Mem. A 40
dof 07.04.2008, page 640



- g) *Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*

The Regulation of 23 November 2001 does not contain a general duty to provide accessibility for people with disabilities by anticipation, as only new buildings or renovated buildings have to be submitted to an obligation of granting accessibility to disabled persons. Accessibility is defined in technical terms only, by the Grand-Ducal Regulation and includes the disappearance of stairs for example.

As explained under f) above, the Regulation targets places and buildings relating to a variety of fields like employment (administration), social protection, (public) goods and services, transport, tourism facilities, education (schools), park places etc.). Covered by this obligation are the public services (administration). The Regulation does not provide for grounds on which failure to provide accessibility can be justified.

- h) *Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?*

It must be stated that the Constitution has been amended on 29 March 2007. Article 11§5 now provides for following statement: 'law regulates in principle...social integration of disabled citizens'

According to the Law on Disabled Persons of 12 September 2003, the definition of disability lies in reduced working capacity, whether the cause is natural or accidental, due to a work accident or war events.

A medical commission will recognise the status of disabled worker or gravely disabled worker or decide on the diminishing of the work capacity and taking into account the state of health of the person (article 3). The benefit of the status of disabled person will provoke some financial assistance from the State, paid by the National Fund of Solidarity³⁶.

Once a person is recognised as a disabled worker, the file is continued to another commission³⁷. According to article 8 of the law, the commission may propose to the director of the administration of employment, measures of initiation or training sessions of adaptation or re-adaptation, depending on the age of the candidate and the degree or the nature of the disability and while taking into account his former and residual capacities of work, orientation, training, re-education, integration or professional reinstatement measures.

³⁶ Fonds National de Solidarité

³⁷ Commission d'orientation et de reclassement professionnel



Measures are thus proposed to guide the disabled person to the ordinary labour market, measures which must be accepted by the concerned person. Some of these measures are listed in the law of 2003, like a financial contribution to the salary, a contribution to the training costs, an encouragement subsidy or subsidy of re-education, the taking over of the costs of accommodation of work places and its access, participation contribution to the transportation costs or the furnishing of adapted professional equipment.

Also, a Grand-Ducal Regulation of 25 January 2006 organises the '*Conseil supérieur des personnes handicapées*' (Supreme Council of Disabled Persons) in order to assist and counsel the minister in charge in taking decisions relating to those persons.

2.7 Sheltered or semi-sheltered accommodation/employment

- a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?*

Indeed, a possibility provided by the law of 12 September 2003 on disabled persons is the guidance of the disabled persons toward protected workshops.³⁸

- b) *Would such activities be considered to constitute employment under national law-including for the purposes of application of the anti-discrimination law ?*

Yes it is considered as employment under the abovementioned law including for the purposes of application of the anti-discrimination law.

³⁸ chapter 3 of the law



3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

The general discrimination law of 28 November 2006 transposing the directives excludes any discrimination based on nationality, including in cases relating to the entry, stay and employment of third country nationals and stateless persons on the national territory (articles 2-2).

Therefore, all the grounds of discrimination covered by the Directives may be invoked by any person, however third-country nationals may not invoke discrimination based on nationality.

Such restrictions based on nationality already exist in article 457 of the penal code, as amended by the aforementioned law, which exclude protection from discrimination. Therefore one can say that people illegally staying in Luxembourg are not covered by protection against discrimination based only on nationality, while they are protected from discrimination based on race and ethnic origin, if one can separate the issue of nationality from the ground of race/ethnic origin. Indeed, entrance and residence permits may be refused to foreigners, who could not argue that they are being discriminated against because of their nationality.

The penal law does not apply to:

- differences of treatment in relation to recruitment for employment, on grounds of nationality, where being of a specific nationality constitutes, in accordance with statutory provisions regarding public service, with regulations applicable to the exercise of certain professions and with provisions on the right to work, a determining condition for employment or the exercise of a professional occupation;
- differences of treatment in relation to entry to, residence in and the right to vote in the country, where being of a specific nationality constitutes, in accordance with legal provisions and regulations regarding entry to, residence in and the right to vote in the country, the determining factor in entry to, residence in and the exercise of the right to vote in the country.

A foreigner may not claim to be a victim of discrimination based on nationality for being refused a visas or entrance on Luxembourg territory or for being removed from the country because he/she lacks a residence permit.



3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

Article 454 of the penal code prohibits discrimination against physical as well as legal persons.

Article 2 of the general discrimination law transposing the directives of 28 November 2006 specifies that both private and public persons, whether they be natural persons or legal persons, as far as the scope is concerned.

3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

Criminal law only knows personal responsibility and personal punishment. Thus any infringement of the current legislation may only apply to the person who was directly the author of the discriminatory action.

In civil law, according to the general principles, an employer may be held responsible for deeds of his employees³⁹.

As far as reasonable accommodation for disabled people is concerned, the employer failing to abide by his obligations, would be responsible according to the general discrimination law of 28 November 2006.

It does not seem possible to enforce legal liability on persons for actions of third parties.

Furthermore, trade unions or other professional associations may not be deemed liable for actions of their members.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

³⁹ article 1384 of the civil code



The general discrimination law of 28 November 2006 excludes public service in the sense that the employment relationship is not covered (article 3-2), but deems the provisions applicable to all persons, physical or natural persons, private or public, including the public bodies. It covers all kinds of employment and self-employment (article 2a).

Although excluded from the general discrimination law of 28 November 2006, public service, as far as the employment relationship is concerned, is explicitly covered by the special law devoted to it, of 29 November 2006, amending the general statute of civil servants and applies to all civil servants and employees of the state and the municipalities, including also those of the state-run public services.

Thus the laws apply indeed to all sectors of public and private employment and occupation, including contract work, self-employment, army service and holding statutory office.

The public sector is also covered by article 456 of the penal code, according to which

“Discrimination as specified in Article 454, committed against a natural person or legal entity, group or community of persons by a person exercising public authority or responsible for a task in the public service, in the exercise of, or while exercising his duties or tasks shall be punishable by a term of imprisonment of from one month to three years and a fine of 251 Euros to 37.500 Euros or one of these punishments alone, where it consists of:

- *the refusal of the benefit of a right granted by law or*
- *the obstruction of the normal exercise of any economic activity whatsoever”.*

Therefore, although the legislature penalises a refusal of employment motivated by discrimination, it neglects to penalise those situations in the private sector, where *“conditions of 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”,* could lead to difference of treatment between persons, motivated by an intention to discriminate.

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.



3.2.1 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)) Is the public sector dealt with differently to the private sector?

Those conditions have been included fully in the general discrimination law of 28 November 2006 on private relations and cover all grounds i.e. religion or belief (except for penal law), age, disability, sexual orientation, race and ethnic origin.

As far public service is concerned, those conditions have not been named, so that there is a difference of wording. However, as the anti-discrimination legislation is covering the employment rules for civil servants and public employees, including trainees, in the public sector law of 29/11/2006, access to public service is also covered, though by a complicated reference to articles of the general statute of civil servants.

Nevertheless, access to public employment is expressly taken out of the law of 28 November 2006.⁴⁰ Access to public employment is covered by the public sector law of 29 November 2006 on public service, though the wording is so complicated that one has to refer to the Opinion of the Council of State of July 2006 on this draft bill to have such a confirmation of the meaning of the aforementioned articles.

Also, article 455 of the penal code does apply to discrimination in relation with:

- the obstruction of the normal exercise of any economic activity;
- the refusal to employ, sanction or dismiss any person;
- the subjection of an offer of employment to a condition

Thus only these discriminatory deeds may be prosecuted by the state's prosecutor, while discrimination not covered by the penal law may only be sanctioned by administrative or civil sanctions.

3.2.2 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB: Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.

Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

⁴⁰ Are excluded... »as well as persons likely to access one of the statutes or regimes as defined above, when those persons are considered in their relationship with the public authority that hires them, as an employer »



Yes, the wording of the Directives has been copied word for word, meaning that the general discrimination law of 28 November 2006 encompasses employment and working conditions, including dismissals and pay (except for public service, covered by the public sector law of 29 November 2006, including these conditions as foreseen in the general statute on civil servants).

The grounds which are covered are religion and belief, age, disability, sexual orientation, race and ethnic origin.

The penal code applies only to the refusal of hiring someone, to the sanctioning of workers and to the dismissal of workers.

Thus only these discriminatory deeds may be prosecuted by the state's prosecutor, while discrimination not covered by the penal law may be sanctioned with administrative or civil sanctions.

Nothing has been provided for in the law as occupational pensions are concerned.

3.2.3 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

Note that there is an overlap between 'vocational training' and 'education'. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning courses?

Article 2-1 of the general discrimination law of 28 November 2006 covers, just as the Directive 2000/78/EC, the full scope of access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience.

There are no definitions relating to these concepts, so that one shall have to await possible court decisions to have more details. However the general wording of the law means that even vocational training outside the employment area is to be covered. This should also be valid for adult life-long learning courses.

The grounds which are covered are religion and belief, age, disability, sexual orientation, race and ethnic origin.

In addition, the legislature has neither designated as an offence nor assigned penal sanctions to refusal "of access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience" which could be motivated by an intention to discriminate as defined in Article 454 of the Penal Code.



Sanctions will therefore only be administrative or civil sanctions in these cases.

3.2.4 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 (Article 3(1)(d))

Indeed, article 2 (1) of the general discrimination law of 28 November 2006 covers explicitly 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

The grounds which are covered are religion and belief, age, disability, sexual orientation, race and ethnic origin.

In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

In general the two laws transposing the directives forbid any discrimination based on all grounds which are covered by the two directives. Therefore, discrimination based on racial and ethnic origin is also forbidden in the full employment area. Thus the laws are more favourable in Luxembourg than what the Directives impose on the state.

3.2.5 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

Indeed, article 3 of the general discrimination law of 28 November 2006 excludes payments of any kind made by state schemes or similar, including state social security or social protection schemes of the scope of the anti-discrimination protection, for the grounds covered by Directive 2000/78/EC. Discrimination is, though, forbidden on grounds of racial or ethnic origin as far as these payments or social schemes are concerned.

3.2.6 Social advantages (Article 3(1)(f) Directive 2000/43)

This covers a broad category of benefits that may be provided by either public or private actors to people because of their employment or residence status, for example reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.



Social advantages are indeed covered by article 2.1 of the general discrimination law of 28 November 2006, without the law defining the concept.

The grounds which are covered are religion and belief, age, disability, sexual orientation, race and ethnic origin.

Article 455 of the penal code does not specify the prohibition of discrimination in the field of social advantages. However such a prohibition could fall under the wording of article 455 relating to the refusal to supply a service. This limited scope applies only to criminal law.

3.2.7 Education (Article 3(1)(g) Directive 2000/43)

This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated "special" education are favoured and supported.

Article 455 of the penal code does not specify currently a prohibition of discrimination in the field of *education*.

Currently access to disabled children (or young adults) to mainstream schools may be refused, if they are not capable of learning just like in the same way as the other children. This applies to intellectually disabled children, who are placed in specialised institutions called *éducation différenciée*.

As far as physically disabled children are concerned the same may apply if they are too severely disabled to write, for example.

However children who use wheelchairs would be accepted in the regular schools, which are equipped to enable those children to access the school premises. The Director of the school, consulting the parents, would decide on accepting such a child and the Ministry of Education may be called upon in case of differences of opinion between the school and the parents. Public assistance that are available to help children with disabilities attend mainstream schools may be extra teaching assistance or adapted equipment.

There is no segregation of immigrant school children: the official policy is to try and integrate all the immigrants' children by teaching them to use the official Luxembourg language and get all the children to mingle in school. There is specific language education in German for immigrant children, meaning that those who have difficulties with the language are placed in special classes for that purpose, with a lower level.



As mostly immigrant children are faced with problems relating to the use of German, like Portuguese children, such a specific curricula is sometimes criticized as a kind of segregation or discrimination. There are no Roma population/children in Luxembourg.

3.2.8 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

- a) *Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

Access to and supply of goods and services which are available to the public is indeed covered by article 2.1 of the general discrimination law of 28 November 2006. The grounds which are covered are religion and belief, age, disability, sexual orientation, race and ethnic origin.

Also, according to Article 455 of the penal code, discrimination as specified in Article 454, committed against a natural person or legal entity, group or community of persons shall be punishable where it consists of...

- *the refusal of supply or enjoyment of goods; the refusal to supply a service (meaning that the prohibition is not restricted to services available to the public in the penal code);*
- *to make the supply of goods or services conditional on grounds of any of the elements specified in Article 454, or to exercise any other form of discrimination at the time of supply, on grounds of any of the elements specified in Article 454;*
- *the indication in any advertisement of the intention to refuse goods or services or to practise discrimination at the time of supply of goods and services, on grounds of any of the elements specified in Article 454;*
- *the obstruction of the normal exercise of any economic activity;*
- *the refusal to employ, sanction or dismiss any person;*
- *the subjection of an offer of employment to a condition based on any of the elements specified in Article 454.*

Although in general no difference is being made between goods and services available to the public and those offered by private associations, there is a special clause applicable to associations.



Article 6 of the general discrimination law of 28 November 2006 deems any provision to be void, that is included in a contract, a convention or internal regulation of a company or of rules of private associations, of bodies representing independent professions and organizations of workers and employers, and that is contrary to the principle of equal treatment⁴¹.

- b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

The law of 28 November 2006 provides for possible exceptions relating to age if objectively and reasonably justified, including legitimate employment policy, labour market and vocational training objectives and if the means of achieving that aim are appropriate and necessary.

Also, as far as disability is concerned, the law allows for better treatment for protecting their health and their security and facilitating their work through measures taken in favour of them.

The law has been amended on 13 May 2008 so as to include an exception for insurance contracts: those contracts may be subject persons to a different treatment for age or disability reasons if this exception is objectively and reasonably justified.

The law does not provide for any detail on what the assessment of risk has been based, whether on relevant and accurate actuarial or statistical data or not.

3.2.9 Housing (Article 3(1)(h) Directive 2000/43)

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination against the Roma and other minorities or groups, and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.

The same article 2.1 of the general discrimination law of 28 November 2006 includes housing, in general, in the list of forbidden discrimination. It seems that all discrimination relating to housing for any of the grounds of both directives is forbidden.

Moreover, article 455 of the penal code should be applicable to housing as well (refusal of supply or enjoyment of goods).

⁴¹ « Are to be considered void and nul any clause included in a contract, an individual or collective agreement or an internal business regulation, as well as in rules of associations with or without profit, independent occupation and organizations of workers and employers, which are contrary to the principle of equal treatment within the meaning of the current law»



The law does not specifically require or promote the availability of housing which is accessible to people with disabilities and older people.

There is no Roma population in Luxembourg which is living there permanently. There has been no published case so far of open discrimination against minorities or groups, although certainly some persons of foreign origin may have had trouble in finding adequate housing, though there is no data about these likely problems.



4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

Yes, article 18 of the general discrimination law of 28 November 2006, introducing article L-252-1 (1) in the labour code uses the wording of the Directive i.e. *a difference of treatment which is based on a characteristic related to any of the grounds ... shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.*

Also, article 3-3 of the public sector law of 29 November 2006 on civil service applies the same principles, with the same wording, to public service.

4.2 Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78)

a) *Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

The general discrimination law of 28 November 2006, in its article 18, introducing article L-252-1 in the Labour code, indicates, after having been redrafted during the parliamentary procedure, that

« if, in the case of occupational activities of churches or other public or private organizations, the ethos of which is based on religion or belief, a difference of treatment on a person's religion or belief has been provided for by laws or practices existing at the date of 2 December 2000, it shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos".⁴²

There is no mention of the requirement of proportionality. As the text of the law has been copied from the Directive 2000/78, one can think that the exception as such is intended to be proportionate.

⁴² 'Si dans les cas d'activités professionnelles d'églises et d'autres organisations publiques ou privées dont l'éthique est fondée sur la religion ou les convictions, une différence de traitement fondée sur la religion ou les convictions d'une personne est prévue par des lois ou des pratiques existant au 2 décembre 2000, celle-ci ne constitue pas une discrimination lorsque, par la nature de ces activités ou par le contexte dans lequel elles sont exercées, la religion ou les convictions constituent une exigence professionnelle essentielle, légitime et justifiée eu égard à l'éthique de l'organisation'.



However the application of such a clause may be the only way to find out if the global exception is really in line with the proportionality requirement. Formally the requirement of proportionality has been respected, in accordance with the Directive.

Public service is covered as well by article 3-3 §2 of the public sector law of 29 November 2006, the same wording as in the general discrimination law of 28 November 2006 being used in order to sustain this exception.

- b) *Are there any specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground.)*

No, there are no provisions or case-law relating to such conflicts

- c) *Are there cases where religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? What are the conditions for such selection? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

There is no exception in the internal laws or international agreements concerning any specific religion. Thus the principles described above and taken over from the Directive are generally applicable. This is the case in a country where religious congregations are receiving subsidies from the state.

The state is supposed to be religiously neutral. It would not be admissible to select a teacher on a religious ground in general, but it is clear that religious teachers will be recruited by the state according to the religion in which they are giving lessons.

There are contacts with the Catholic Church for the recruitment of religious teachers. Jewish children are not being taught their religion at school, but at the synagogue, partly due to the lack of possibilities to send the Chief Rabbi to various schools around the country. There are no courses of Muslim religion for the time being, as there is no convention between the State and this religious community yet.

As far as private schools are concerned, when partly financed by the state, the same principles apply. There is no known example of the Catholic Church being forced to hire a teacher of catholic course on the basis of the fact that he/she is not a Catholic. In practice, the teachers are always of this given faith. The exception of article 252-1 (2) of the Labour Code, authorizing for Churches a difference of treatment based on a religious ground should allow such a refusal.



4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)

- a) *Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*

No, the laws of 28 and 29 November 2006 do not include any provision or exception related to armed forces, which are very small in Luxembourg.

- b) *Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

The laws of 28 and 29 November 2006 do not include any provision or exception related to police, prison or emergency services.

However, on the level of the municipalities, a modified Grand-ducal Regulation of 20 December 1990 regulates the conditions of admission and of examination of municipal civil servants.

An exception is provided for the position of firemen, for which applicants must be no more than 28 years old. Although this latter exception may be seen as discriminatory at first glance, a recent judgment of the European Court of justice seems to validate such exception for the career of fireman⁴³.

4.4 Nationality discrimination (Art. 3(2))

Both the Racial Equality Directive and the Employment Equality Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).

- a) *How does national law treat nationality discrimination? Does this include stateless status?
What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well?)*

Article 457 of the penal code, as amended in November 2006, the word 'discrimination' being replaced by the terms 'differentiation of treatment', foresees an exception for and thus does not prohibit:

⁴³ CJEU, 12 January 2010, C-229/08, Colin Wolf vs. Stadt Frankfurt am Main



- (§3) differentiation of treatment in relation to recruitment for employment, on grounds of nationality, where being of a specific nationality constitutes, in accordance with statutory provisions regarding public service, with regulations applicable to the exercise of certain professions and with provisions on the right to work, a determining condition for employment or the exercise of a professional occupation and ⁴⁴
- (§4) differentiation of treatment in relation to entry to, residence in and the right to vote in the country, where being of a specific nationality constitutes, in accordance with legal provisions and regulations regarding entry to, residence in and the right to vote in the country, the determining factor in entry to, residence in and the exercise of the right to vote in the country;

There is no list or case-law defining those exceptions.

The laws transposing the directives also contain an exception relating to nationality (see hereunder b).

Stateless persons are considered as being members of the category of foreigners in general, as confirmed by article 3a) of the law of 29 August 2008 on free movement of persons and immigration⁴⁵, which has completely reshuffled the law on immigration of 28 March 1972.

There is no case law on discrimination matters but it seems conceivable that discrimination based on nationality may be considered as an indirect discrimination based on the ethnic or racial background of the discriminated person, and thus enter the scope of the law of 28 November 2006.

b) *Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?*

Yes, the general discrimination law of 28 November 2006 on private relations has taken over the exception of article 3(2) of the two Directives and provides that:

“the law of does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned”.

Thus non-EU citizens are excluded from any protection against discrimination based on nationality, not only as far as their residence or working permits are concerned, but also for any preference of an employer toward a worker based exclusively on national grounds.

⁴⁴ The law of 29 November 2006 covers all state civil servants as well as municipal civil servants

⁴⁵ Memorial A n° 138, 10 September 2008, p.2023



Public service is not concerned by this exception, probably because anyhow most public jobs are reserved to Luxembourgers and only a handful of services are open to recruitment for other EU- citizens, although new legislation does open up civil service to other EU citizens more and more. Currently the principle is that most public jobs should be open to EU citizens, while as an exception to free movement of workers in the EU, some jobs are being reserved to Luxembourg nationals, where the positions involve direct or indirect exercise of public authority, or safeguard State interests or that of other public legal entities.

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employees and their partners. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

- a) *Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?*

Luxembourg slowly moves towards a recognition of an egalitarian situation of married and unmarried partners in many situations. Unmarried couples may choose to register their legal partnership at the municipality ('registre d'état civil').

The question whether employers, who would provide for certain benefits only to married couples and not to partnerships, would break the law cannot be answered with certainty. Such a move may not hurt the law on partnerships itself. However, the question remains open whether it would be considered as a discrimination forbidden by the anti-discrimination laws. Such discrimination could be found to exist on the ground of sexual orientation, for same-sex partnerships. However in case of a man and a woman living in a registered partnership and not in marriage, the issue would be a possible breach of the general principle of equality (or of equality based on gender), not discrimination based on the Directive 2000/78/EC.

- b) *Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees with opposite-sex partners?*

The question remains open whether it would be considered as a discrimination forbidden by the anti-discrimination laws. Such discrimination could be found to exist on the ground of sexual orientation, for same-sex partnerships, as benefits should be granted to couples living permanently together, whether married or registered partners. Such discrimination is forbidden by article 2 (1) of the general discrimination law of 28 November 2006.



4.6 Health and safety (Art. 7(2) Directive 2000/78)

- a) *Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?*
- b) *Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?*

Article 18 (article L.252-3 of the labour code) of the general discrimination law of 28 November 2006 and article 3.2 of the public sector law of 29 November 2006 on public service have taken over the text of article 7(2) of the Directive. They state that specific measures for disabled persons are not to be seen as discrimination.

The wording is: *“as far as disabled workers⁴⁶ are concerned, provisions concerning the protection of health and of security in the work place and measures deemed to create or maintain provisions or facilities in order to safeguard or encourage their integration in the labour market do not constitute direct or indirect discrimination⁴⁷.*

Currently, the Law on Disabled Persons of 12 September 2003 provides more specific measures for disabled persons (see under 2.6).

4.7 Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)

4.7.1 Direct discrimination

- a) *Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?*

Article 18 of the general discrimination law of 28 November 2006, introducing article L.252-2 of the Labour Code has transposed the exception of article 6 of the Directive 2000/78 by declaring that:

differences of treatment on grounds of age shall not constitute discrimination, if they are objectively and reasonably justified, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

The test should in theory be compliant with the Mangold-case law, but it will be up to the courts to decide in practice.

⁴⁶ and in article 18 of the law of 26.11.2006 are included the workers with a reduced capacity

⁴⁷ (as translated from French)



Article 3-4 of the law on public service provides for the same exception, with the same wording.

- b) *Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?*

Only in general terms as stated under a). However, on the level of the municipalities, a Grand-ducal Regulation of 20 December 1990, when providing for the general rule that applicants must be 18 years old at the moment of their probationary appointment, allows for several exceptions:

- For some positions the minimum age is set at seventeen years;
 - For the job of concierge the minimum age is 25 years
for the job of firemen, the applicants must be no more than 28 years old.
- c) *Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2) ?*

No it does not.

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

The law of 23 March 2001⁴⁸, protects young workers (basically under 18), children and adolescents as far as working conditions are concerned. This law has been incorporated in the Labour Code since then, in Articles L. 341-1 to L. 345-2.

Children may not be put to work as a principle. Some exceptions exist such as work in technical and professional schools when the general principle is education and domestic assistance given by children in a family, if it is occasional. Article 7 also forbids any work for money in the cultural, artistic, sportive, publicity or fashion fields. If exceptions are allowed, they are submitted to strict conditions.

In general the employer must take care of the security and health of young workers. Risky work is basically forbidden as well as work with accelerated rhythm i.e. work to intensive time schedules.

Article 11 allows employment of teenagers only if they are not being exploited and if their health and development are safeguarded.

⁴⁸ Loi du 23 mars 2001 concernant la protection des jeunes travailleurs, Mémorial A, 2001, p.908 ; [law of 23 March 2001 concerning the protection of young workers];



The law provides for a strict framework for them, in terms of working hours, rest-breaks and work during holidays and the night.

As far as persons with caring responsibilities are concerned, the law of 12 February 1999⁴⁹, incorporated in the Labour Code in the meantime, gives the right to a special family leave for a parent of a child who is less than 16 years old, in case of grave illness, accident or other grave health problem. This leave cannot exceed two days per year.

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

Generally there are no such exceptions at national level.

However, on the level of the municipalities, a Grand-ducal Regulation of 20 December 1990, whereby providing for the general rule that applicants must be 18 years old at the moment of their provisional appointment, allows for several exceptions:

- For some positions the minimum age is set at seventeen years;
- For the job of concierge the minimum age is 25 years
for the job of firemen, the applicants must be no more than 28 years old.

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals actually retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

For these questions, please indicate whether the ages are different for women and men.

- a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work longer, or can a person collect a pension and still work?*

In the private sector, the legal pension age is currently 65. The worker may decide to stay in activity until he reaches the age of 68. A person may not collect a pension and continue to work as a regular employee.

⁴⁹ Loi du 12 février 1999 portant création d'un congé parental et d'un congé pour raisons familiales, Mémorial du 23/02/1999 (013/1999), [law of 12 February 1999 creating a parental leave and a leave for family reasons] [<http://www.legilux.public.lu/leg/a/archives/1999/0132302/1999A02096.html>]



In the public sector, the normal age is also 65⁵⁰.

- b) *Is there a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work longer, or can an individual collect a pension and still work?*

The law on occupational pension schemes of 8 June 1999⁵¹ does not provide for a normal age in order to begin receiving such occupational pension payments. This law does not alter the other legal rules relating to pension age.

- c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, and if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

The pension age is 65, so that workers may not retire before, unless they have accumulated enough months (480) of obligatory subscription. The upper age limit is 68, when a worker is indeed obliged to retire. If the worker retires earlier, only part of the pension will be paid.

However there are some exceptions in the public sector. The police forces may retire between the ages of 55 and 60. The ambassadors may be prolonged in their office. Ministers of religion do not have an age limit.

In the private sector, an early retirement is possible at the age of 57 or 60, depending on the length of social insurance.

In the public sector the civil servant may retire early at the age of 60 after 30 years of duty or even at 57 after 40 years of duty.

- d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

No.

⁵⁰ Texte coordonné de la loi modifiée du 26 mai 1954 réglant les pensions des fonctionnaires de l'Etat, *Mémorial A*, n°4, du 20 janvier 2004, [coordinated text of the amended law of 26 May 1954 ruling the pensions of the state civil servants],

<http://www.legilux.public.lu/leg/a/archives/2005/0042001/0042001.pdf>

⁵¹ Loi du 8 juin 1999 relative aux régimes complémentaires de pension et portant modification a) de la loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu, b) de la loi modifiée du 24 mai 1989 sur le contrat de travail, c) de la loi modifiée du 18 mai 1979 portant réforme des délégations du personnel et d) de la loi modifiée du 6 mai 1974 instituant des comités mixtes dans les entreprises du secteur privé et organisant la représentation des salariés dans les sociétés anonymes, *MEMORIAL A* 074 du 17.06.1999, p.1644 ; law on occupational pension schemes modifying different previous laws ;



- e) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment, or are these rights lost on attaining pensionable age or another age (please specify)?*

The law applies to all workers irrespective of age or sex.

4.7.5 Redundancy

- a) *Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*

No such criterion is provided by the law in Luxembourg. Therefore it is unlawful to select any worker for redundancy on the basis of age or seniority.

- b) *If national law provides compensation for redundancy, is this affected by the age of the worker?*

The age of the worker does not affect compensation for redundancy.

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

Does national law include any exceptions that seek to rely on Article 2(5) of the Employment Equality Directive?

No, there is no such exception.

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

Following international critics against foreseeing legally valid discrimination clauses, including by the Council of Europe's ECRI, the legislator has scrapped article 457 of the penal code which provided for a general exception based on *differences of treatment provided for by, or arising from, any other legal provision*.

Article 2.2 of the general discrimination law of 28 November 2006 provides for an exception relating to differences of treatment based on nationality or relating to the entry, stay and employment of third-country foreigners or stateless persons, including any treatment relating to the legal status of these persons.



Also, the law does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes, for the prohibition of all discrimination based on motives other than race or ethnic origin (article 3).

Insurance contracts were taken out of the scope of article 2§1 of the law of 28 November 2006. These insurance contracts are now excluded from the prohibition of discrimination and thus are not covered by the category of 'access to and supply of goods and services which are available to the public'.



5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

- a) *What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case law or relevant legal/political discussions on this topic.*

The laws of 28 and 29 November 2006 have introduced provisions relating to positive action. The abovementioned laws create the legal framework for the use of such positive action by allowing the administration to maintain or adopt specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin, religion or belief, disability, age or sexual orientation⁵².

As far as disabled people are concerned, up to now, only the Disabled Workers Law of 12 September 2003⁵³ gives special status to some disabled persons on the labour market. According to the law, persons with a physical, mental, or sensory disability and/or due to psychosocial difficulties aggravating the deficiency have the status of disabled worker if their working capacity is reduced by at least 30% as a result of natural or accidental causes. The category in question therefore comprises disabled persons who are still relatively capable of working, but whose capacity is seriously impaired.

People who apply for this status must register with the Disabled Workers' Office of the Employment Department. When their capacity as a disabled worker is recognised, the Vocational Guidance Commission will recommend employment, training or vocational retraining measures, introductory courses or traineeships, as applicable, to the appropriate Department.

The Department concerned may grant a State contribution (40 to 60%) to wages, a contribution to training costs, a premium, adaptation of the workplace or accesses, the supply of appropriate equipment, etc.

This contribution may be payable for a limited period. It is established on the basis of the severity of the disability. It amounts to between 40 and 60% of the gross wage, before deduction of social security contributions. It is periodically reviewed on the basis of the progress of the disability and the success of the employment.

Also a number of jobs are reserved for disabled persons. The state gives financial assistance in order to support the employment of disabled persons (see under item 2.6).

According to the law, a minimum proportion of 5% of disabled workers must be employed in the public sector.

⁵² article 18 (L.252-3) and article 3

⁵³ See under item 2.6



For the private sector, the number is one disabled worker for 25 employees, 2% for 50 employees, 4% for 300 employees. If an employer of the private sector refuses to employ the required number of disabled persons, the employer has to pay a fine to the state. In reality, the vast majority of employers choose to pay the amount due, rather than to employ disabled persons.

For the independent professions, the disabled person who continues his profession may be granted a total exemption of social security charges.

Another possibility provided by the law is the guidance of the disabled persons toward protected workshops⁵⁴. In such a situation the contract must include several additional clauses.

According to article 18 of the law of 26 November 2006 and article 3-2 of the public sector law of 29 November 2006 on public service, measures which create or maintain clauses or facilities in order to safeguard or encourage the insertion of disabled persons or persons with reduced capacities are not discriminatory measures.⁵⁵

The two anti-discrimination laws have amended the law on disabled workers by introducing in article 20, respectively in article 3.2 the duty for an employer to take appropriate measures for disabled people in order to access to a job, exercise it or progress in it, unless it is a disproportionate burden.

For private employers, the general discrimination law of 28 November 2006 affirms that *this burden is not disproportionate if it enough compensated by the measures foreseen in article 26 of the Grand-Ducal regulation of 7 October 2004 executing the previous paragraph (4)»*.

These clauses relate to financial support by the state for costs relating to employing disabled persons and for their social security contributions.

- b) *Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights-based measures.*

⁵⁴ chapter 3 of the law

⁵⁵ "As far as disabled persons and workers with reduced work capacities are concerned, the measures concerning health protection and security on the workplace and the measures aimed at creating or maintaining measures or facilities in order to safeguard or encourage their insertion in the employment world do not constitute direct or indirect discrimination"



There is a National Action Plan in favour of disabled persons, which can be seen as a kind of positive action plan⁵⁶.

A kind of positive action could be possibly found in the National action Plan for integration and the fight against discrimination of the Ministry of Family. This plan was finalized in November 2010 but its contents has not been made public by the end of 2010.

OLAI also participates in European-funded actions meant to identify good practice actions in order to fight discrimination and promotion of equality with the programme Progress (2007-2013).

⁵⁶ see under 2.6



6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.

In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body).

Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*

When a person or a group is the victim of discrimination, the mechanisms available to victims of discrimination 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 (art. 23-1 of the Criminal Procedure Code). It may take a long time until the case is brought to court. Once a criminal complaint has been lodged, a supplementary private prosecution may not be used by victims of discrimination, but they can do so after the prosecutors' refusal to prosecute the author. Also finding evidence is a crucial problem, which may hinder proper prosecution of the author of discrimination.

The victim may also apply directly to the examining judge (*juge d'instruction*) if he/she claims to have suffered discrimination; in this case, it is up to the victim to estimate the extent of the loss and claim damages in criminal proceedings. Also often the judge requires the plaintiff to pay a guarantee.

The victim may also claim damages in a civil court based on the criminal law, the sharing-of-the-burden-of-proof mechanism being a good tool to be used in this context.

The proceedings must be filed within five years of the offence (article 638 of the Criminal Code as amended).

The costs of a legal procedure, due to the lawyers' fees may cause the renunciation of such a lawsuit for persons without sufficient financial means. However, within the judicial aid system, there is a possibility to ask the Bar to get a lawyer paid by the state, due to low income.



Also, a case can be presented to the labour court in case of discrimination at work. According to the general discrimination law of 28 November 2006⁵⁷, workers' associations (i.e. trade unions) or associations of national significance fighting discrimination and approved by the Minister of Justice may support the victim in a court case. Such a right is not granted to Churches according to the law.

It must be noted that the Inspectorate of the Ministry of Labour, called *l'Inspection du Travail et des Mines* is competent to control the respect of labour law regulations. This Inspectorate also received the competence of a watchdog of the antidiscrimination law concerning Directive 2000/78/EC. The Inspectorate may give fines to parties which do not respect the legislation.

A law of 6 May 1999⁵⁸ 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. Such a procedure is however non-binding and must be used prior to any criminal investigation.

The complex character of the legislation works as a kind of deterrent to victims, who find it difficult to act in full knowledge of the complex procedures.

As far as the public sector is concerned, the civil servants may act in the administrative courts, if they feel discriminated against by colleagues. Also article 33 of the general statute enables the civil servants to complain against a misbehaviour of another civil servant. Such a procedure is administrative, but can lead up to the administrative court, if the complaint has been rejected by the higher hierarchy. It can only lead to administrative/financial sanctions against the author, not to civil or penal sanctions.

The public sector law of 29 November 2006 on public service introducing the same anti-discrimination procedures as for private relations, a civil servant may make use of the penal procedure or of civil proceedings in court or even complain against other civil servants and try to obtain disciplinary sanctions against a discriminator who would be a civil servant.

As far as disabled persons are concerned, there is currently no obligation for the public authorities to make all public buildings fully accessible to disabled people. There are no binding rules relating to the adoption of measures such as sign interpretation or information in Braille.

⁵⁷ article 7

⁵⁸ *Loi du 6 mai 1999 relative à la médiation pénale et portant modification de différentes dispositions a) de la loi modifiée du 7 mars 1980 sur l'organisation judiciaire, b) du code des assurances sociales*, [law of 6 May 1999 relating to penal mediation and amending the different clauses of the a) amended law of 7 March 1980 on judicial organisation b) of the code of social insurance]



Cases can be brought to the courts even after the termination of the employment contract. However, in general the deadline for submitting a case to the labour court is restricted to three months after the ending of this contract, with a possibility to extend it to one year when protesting in due time against the reasons of dismissal.

There are no available statistics on the number of cases related to discrimination brought to justice nor to the Labour inspectorate, which does not have specially trained personnel for this purpose. Furthermore, it may be said that there has been still no known case relating to discrimination in court up to now.

b) Are these binding or non-binding?

The choice of the procedure depends on the parties and circumstances of the discrimination case. Parties wish to take recourse to “soft” procedures like mediation. They may opt for a court case and it is their choice to file a criminal complaint or a civil case. There is thus no binding procedure.

c) What is the time limit within which a procedure must be initiated?

The time limit depends on the law area. In civil cases, there is no other time limit than the one of 30 years. In criminal cases, the deadline is five years for most offences. In labour law cases, the time limit may be three months or one year, depending on the circumstances of the cases.

d) Can a person bring a case after the employment relationship has ended?

Yes, such a case may be brought before a court.

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

Please list the ways in which associations may engage in judicial or other procedures

a) What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association).

According to article 7 of the general discrimination law of 28 November 2006, associations may act in court in discrimination cases if they are recognized by the Ministry of Justice.

Such recognition of national representatives derives from an administrative practice: the Ministry of Justice controls that the association is active throughout the country to fight discrimination. The recognition process seems to work smoothly but there are very few associations that fulfil these criteria.

b) What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants?



Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove “legitimate interest”, what types of proof are needed? Are there legal presumptions of “legitimate interest”?

To be able to be recognized by the Ministry of Justice, the abovementioned associations must not only be nationally representative in the field of anti-discrimination, but they must also meet two other conditions:

- they must have as a statutory goal the fight against discrimination,
- they must have legally existed for 5 years prior to the facts considered.

Those associations may assist a victim of discrimination before civil, penal and administrative courts, if some damage has been made to the cause it promotes.

- c) *Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?*

When associations act for some category of victims of discrimination, no authorization is required from anyone.

There are no special provisions on victim consent in the law for problematic cases.

For individual victims however, the consent of such victim must be given in writing. A representative of the NGO may assist the victim (member of the board) or a lawyer acting on its behalf.

- d) *Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.*
- e) *There are no obligatory causes to act for those associations. They remain free to act or not in all circumstances.*
- f) *What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations’ standing in different types of proceedings, please specify.*

Basically any kind of proceedings is open to these associations, without any difference of standing.

- g) *What type of remedies may associations seek and obtain? If there are any differences in associations’ standing in terms of remedies compared to actual victims, please specify*



Associations may ask for all remedies that are foreseen by the law to be applied, like redress in case of victimisation, the annulment of any written discriminatory document or clause or the annulment of any dismissal. They may ask for damages to be paid.

- h) Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?*

No, there are no specific rules.

- i) Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (actio popularis)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

As explained above under b), those associations may assist a victim of discrimination before any court, if some damage has been made to the cause it promotes.

There are no specific rules provided for in the law in such case.

The mechanism of shifting the burden of proof may be used by associations in any proceedings but the criminal proceedings. Indeed in penal cases, the prosecution has to prove the deed it seeks penalties for.

- j) Does national law allow associations to act in the interest of more than one individual victim (class action) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

Class actions do not exist in Luxembourg and therefore no such action may be used.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

The general discrimination law of 28 November 2006 has indeed introduced the mechanism of the shifting of the burden of proof⁵⁹ in civil and administrative procedures in the same way as provided for by the Directives.

⁵⁹ Article 5



No difference is being made as far as different types of discrimination are concerned, so that no criteria may be determined.

The shifting of the burden of proof is excluded in criminal proceedings according to article 253-2§2 of the Labour Code.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint)

The general discrimination law of 28 November 2006, in its article 4 and introducing also article L-253-1 of the Labour code, introduces a protection mechanism against victimisation.

The same protection mechanism applies to civil servants, according to article 7 of the public sector law of 29 November 2006 on public service.

L-253-1 of the Labour code, as introduced by the law of 28 November 2006 states that:

No person ... shall be victimised on the ground of protests against or refusal of an act or conduct contrary to the principle of equality of treatment defined by this Act, or as a reaction to a complaint filed with the company or legal proceedings designed to enforce the principle of equality of treatment.

Equally, no person may be victimised for having given evidence of or recounted the actions defined in Article L.251-1 of the Labour Code.

Any provision or act, which contravenes the two preceeding paragraphs, and in particular any dismissal which contravenes the said provisions, shall be automatically null and void.

In the event of termination of his/her contract of employment, a worker... may, within fifteen days after notification of the termination, make an informal application to the Chairman of the Labour Tribunal for an urgent order, the parties being heard or duly summoned, certifying that the dismissal is null and void and ordering his/her retention or, if applicable, reinstatement, pursuant to the terms of section article L-.124-12§4 of the Labour code.

The order of the Labour Tribunal shall be immediately enforceable, regardless of appeals; it may be appealed against by simple request filed, within forty days of the date of notification by the Registrar, before the Chairman of the Court of Appeal with jurisdiction over labour law matters. The ruling shall be given urgently, the parties being heard or duly summoned. [...]



6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

- a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

The offences referred to in the modified article 455 of the Criminal Code are punished by eight days' to two years' imprisonment, or a fine of 250 to 25,000 Euros, or both.

According to article 456, if the facts are committed by a person holding public authority or responsible for public service duties in the exercise or on the occasion of exercising his/her functions or duties, the penalties are increased to imprisonment for one month to three years, and a fine of 250 to 37,500 Euro, if the offence involves:

1. refusing the benefit of a right granted by law;
2. hindering the normal exercise of any business.

Also the authors may be condemned to the prohibition of exercising certain rights as foreseen in article 24 of the penal code (article 457-4), such as serving as a civil servant, voting, wearing official insignias, being an expert, being a witness in court or teaching in school.

Article 6 of the general discrimination law of 28 November 2006 uses the wording of article 16 b) of Directive 2000/78/EC. Thereby, any provisions contrary to the principle of equal treatment, which are included in contracts or collective agreements, internal rules of undertakings or rules governing the workers' and employers' organisations, are to be declared null and void. The prohibition also applies to non-profit or profit-making associations.

Also article L.253-1 of the general discrimination law of 28 November 2006 deems any dismissal on the ground of discrimination illegal, so that a dismissed worker may ask for his reinstatement in his workplace at the labour court. For this purpose, the summary proceedings may be used ("procédure en référé").

- b) *Is there any ceiling on the maximum amount of compensation that can be awarded?*

The victim may bring a case to a civil court based on a criminal offence or ask for damages in a penal court⁶⁰, but there are no ceilings foreseen by law for such financial compensation, awarded by judges according to their independent decision. The damages are of pecuniary nature.

⁶⁰« constitution de partie civile »



c) *Is there any information available concerning:*

*the average amount of compensation available to victims
the extent to which the available sanctions have been shown to be - or are likely to
be - effective, proportionate and dissuasive, as required by the Directives?*

There is no such information: we know that the existing penal law has hardly been used in court (a few complaints a year).



7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question, if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

- a) *Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin?(Body/bodies that correspond to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so.)*

Such a body has been created by the general discrimination law of 28 November 2006, called Centre for Equal Treatment (*Centre pour l'Égalité de Traitement*). It relates to all grounds covered by both directives.

The public sector law of 29 November 2006 deems the Centre to be competent also for discrimination matters relating to civil servants (article 4).

Although the law dates from November 2006, the Centre has only started to be in operation in 2008. The president and the four members are being proposed by the Chamber of Deputies. A first candidate for the presidency was rejected by the Chamber, which decides exclusively on the matter.

In 2007 such a president was found. Also three of the four other members were chosen. The last member was nominated afterwards. Questions like offices, staff and budget have been settled in 2008.

In 2009 the Centre has collected 139 claims of alleged discrimination, compared to 124 during the previous year.

In 2010, the grounds treated were religion (2), age (11), sexual orientation (10), disability (02) gender (13), race (34) and other (63).

For the first time, multiple discrimination has been mentioned in the statistics, featuring 4 cases.

Currently, there is one similar existing body, 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). It is competent to consider petitions from persons or groups of persons within the jurisdiction of Luxembourg who claim to be victims of discrimination. This body may only propose solutions but not enforce them.



However these petitions cannot be considered until all other available local remedies have been exhausted, so that it cannot be seen as equivalent to an equality or independent body as set out in the Directive.

The Special Permanent Commission against Discrimination (CSP-RAC) has been maintained but there seem to be no relationship between both bodies ?

b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.

According to article 11 of the Law, the Centre is governed by a body of 5 members including a president. They are nominated for five years by the Grand-Duke on the proposal of the Parliament (Chambre des Députés) according to their skills in antidiscrimination matters. Once a year, a report must be submitted to the Government and to Parliament.

Funding comes from the general state's budget and the amount has been decreased to 92.000 Euros for 2010.

c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.

The competences of the centre are more particularly, according to article 10:

- publish reports, issue opinions and recommendations and conduct surveys on all questions linked to discriminations;
- issue and provide every information and every documentation that are useful in the course of its mission;
- provide assistance to persons who think they are victims of discrimination by putting at their disposal an office for counsel and orientation in order to inform victims on their individual rights, on legislation, case law and the means to uphold their rights».

All these tasks must be performed independently according to this very article.

It will deal with issues relating to discrimination based on race, ethnic origin, gender, religion or belief, handicap and age.

Sexual orientation was mistakenly omitted during parliamentary proceedings but the government amended the law again in order for the Center to be also in charge of sexual orientation issues.

d) Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?



The Centre may provide assistance to victims by advising and orienting them in order to inform them on their rights, the legislation- including the available procedures and the case-law.

It may also publish report and opinions and give recommendations, conduct surveys on issues relating to discrimination⁶¹.

- e) *Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

No, it is not foreseen that the Centre may bring complaints to court in any way.

- f) *Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions) Is the independence of the body / bodies stipulated in the law? If not, can the body/bodies be considered to be independent ? Please explain why.*

The Centre is not a quasi-judicial institution. It may not issue decisions but only recommendations or reports. It cannot submit a case to courts or assist victims in courts. No sanctions can be imposed by the Centre.

Article 9 of the Law of 28 November 2006 declares that the Centre shall work in full independence.

- g) *Are the tasks undertaken by the body / bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports)*

Indeed, the work is indeed carried out independently in practice.

- h) *Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions)*

The Centre for Equal Treatment is not a quasi-judicial institution. It can only try to mediate or issue recommendations. It has difficulties in getting the state administrations to reply to its letters. As it cannot take binding decisions, there are no appeal possibilities to any superior institution.

⁶¹ article 10



- i) *Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

It is not a priority issue. There have been lately issues concerning Roma population in Luxembourg, but discussions are linked to immigration issues (asylum seekers).



8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe *briefly* the action taken by the Member State

- a) *to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)*

Several public activities have been organised throughout the year 2010 by the Ministry of Family of Luxembourg in order to disseminate information on discrimination, in conjunction with OLAI, the government agency in charge of integration of foreigners. Some of the activities are being funded by the European Program Progress.

The Centre for Equal Treatment also contributes to the dissemination of information on legal protection against discrimination.

For example, on 15 July 2010, the association Transgender and the Centre have organised a conference in the city of Esch-sur-Alzette on discrimination based on sexual orientation.

On 22 November 2010, the association Caritas has organised a conference on discrimination in housing, in which the Centre has participated.

The Centre has also helped in promoting the conference organised by an institute of the Union of Luxembourg Businesses called *Institut national pour le développement durable et la responsabilité sociale* on 26 October 2010. A vade mecum on how to prevent discrimination within businesses was handed out at this event.

Moreover, 6 different round-tables have been organised by the Centre throughout 2010 on each ground of discrimination: race/ethnic origin, gender, sexual orientation, religion and belief, disability and age. The legal perspective was included each time.

- b) *to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and*

The ad hoc committee of the program Progress upholds regular contacts with NGOs.

Also, OLAI has organised an ongoing dialogue with NGOs of the national working group in the framework of the campaign "For Diversity, Against Discrimination".

- c) *to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)*

The topic of discrimination is sometimes discussed between trade unions, employers' organisations and the Minister of labour in their meetings.

It can be noted that for the disability criteria, bill no. 5045, introduced on 5.11.2002, and which ended up in the law of 30 June 2004 on collective work relations⁶², provides in its article 41 that recognised trade unions may enter into agreements relating to the transposition of the European Directives which are subject to such agreements, or to measures for implementation of the principle of non-discrimination.

Due to such contacts, a collective agreement was signed between the association of employers, the *Union des Entreprises Luxembourgeoises*, and the two main trade unions OGB-L and LCGB on 25 June 2009 relating to harassment and violence at work, which has been declared obligatory for all employers and employees by a Grand-Ducal Regulation of 15 December 2009.

- d) *to specifically address the situation of Roma and Travellers*
- e) *There are no specific actions targeted at Roma and Travellers.*

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

- a) *Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).*

⁶² Loi du 30 juin 2004 concernant les relations collectives de travail, le règlement des conflits collectifs de travail ainsi que l'Office national de conciliation et modifiant 1. la loi modifiée du 7 juin 1937 ayant pour objet la réforme de la loi du 31 octobre 1919 portant règlement légal du louage de services des employés privés; 2. la loi modifiée du 9 décembre 1970 portant réduction et réglementation de la durée du travail des ouvriers occupés dans les secteurs public et privé de l'économie; 3. la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'Etat; 4. la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux; 5. la loi modifiée du 23 juillet 1993 portant diverses mesures en faveur de l'emploi ; Mémorial A, 15.07.2004, p.1782 ; [Law on collective working relations, modifying certain previous laws]



The Labour Inspectorate (Inspection du Travail et des Mines) has the power to control the application of labour law, including the anti-discrimination provisions of the general discrimination law of 28 November 2006⁶³.

Article L. 253-3 of the Labour code, as introduced by article 18 of the law of 28/11/2006 uses the wording of article 16 b) of Directive 2000/78/EC. Thereby, any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, statutes of associations, internal rules of undertakings or rules governing the workers' and employers' organisations are to be declared null and void.

b) *Are any laws, regulations or rules that are contrary to the principle of equality still in force?*

Such laws or regulations could not be identified by the author.

⁶³ *loi du 4 avril 1974 portant réorganisation de l'Inspection du Travail et des Mines* [law of 4 April 1974 reorganising the Labour Inspectorate], Mémorial du 18/04/1974 (027/1974), <http://www.legilux.public.lu/leg/a/archives/1974/0271804/1974A04861.html>; see also new §L-254 of the Labour code as introduced by article 18 of the law of 28/11/2006



9 CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

The Minister of Family is generally in charge of anti-discrimination policies. However the Ministry of Labour and Employment is in charge of the correct use of labour law in this employment field, through the '*Inspection du Travail et des Mines*'. The latter Minister is also in charge of putting into practice the running of the Centre for Equality of Rights.

Is there an anti-racism or anti-discrimination National Action Plan ? If yes, please describe it briefly.

There is indeed an anti-discrimination National Action Plan in Luxembourg. It was adopted by the Government in November 2010.

However it has not been made public, so that it is not possible to describe its contents. Requests to get some information on the Plan have been turned down.



ANNEX

- 1. Table of key national anti-discrimination legislation**
- 2. Table of international instruments**

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: Luxembourg

Date: 1 January 2011

| Title of Legislation (including amending legislation) | Date of adoption: | Date of entry in force from: | Grounds covered | Civil/Administrative / Criminal Law | Material Scope | Principal content |
|---|------------------------------|---|---|--|--|---|
| This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address. | | Please give month / Year | | | e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education | e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body |
| Law of 28 November 2006 1. transposing Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic | 28 November 2006 | December 2006 | Religion and belief, disability, age, sexual orientation, racial or ethnic origin | Civil/Administrative/ Criminal | Full scope of both Directives | Prohibition of direct and indirect discrimination, of harassment and instruction to discriminate, provisions of defense of rights and victimisation, creation of an |

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| <p>origin</p> <p>2. transposing the Directive 2000/78/CE of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation</p> <p>3. modifying the Labour Code and introducing in Book II a new title V on equality of treatment in the area of employment and work;</p> <p>4. modifying articles 454 and 455 of the penal Code;</p> <p>5. modifying the law of 12 September 2003 on disabled persons.</p> <p>http://www.legilux.public.lu/leg/search/resultHighlight/index.php?linkId=3&</p> | | | | | | equality body |

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|---|------------------------------|---|---|--|-----------------------|---|
| SID=841cbd8d592e36e5ad8892e67b1f9292 | | | | | | |
| Law of 29 November 2006 modifying 1. the modified law of 16 April 1979 establishing the general statute of state civil servants 2. the modified law of 24 December 1985 establishing the general statute of municipal civil servants. http://www.legilux.public.lu/leg/search/resultHighlight/index.php?linkId=3&SID=841cbd8d592e36e5ad8892e67b1f9292 | 29 November 2006 | December 2010 | Religion and belief, disability, age, sexual orientation, racial or ethnic origin | Administrative | Public employment | Prohibition of direct and indirect discrimination, of harassment and instruction to discriminate, provisions on defense of rights and victimisation |
| Penal code, articles 454 to 457 (law of 19 July 1997 completing the penal code by amending the accusation of racism | 19 July 1997 | August 1997 | Racial or ethnic origin, skin colour, sex, sexual orientation, | Criminal | | Individual and collective discrimination is forbidden |

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| and introducing the accusation of revisionism and other acts based on illegal discriminations) http://www.legilux.public.lu/leg/a/archives/1997/0540708/1997A16801.htm | | | 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 | | | |
| Law of of 12 Sept. 2003 on Disabled Persons http://www.legilux.public.lu/leg/a/archives/2003/0144/2003A29381.html?highlight= | 12 September 2003 | October 2003 | Disability | Civil/Administrative | Employment | Obligation to employ disabled persons for employers and financial assistance for assisting people |



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|--|------------------------------|---|----------------------------|--|-----------------------|--------------------------|
| | | | | | | with disabilities |

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Luxembourg

Date: 1 January 2011

| Instrument | Date of signature (if not signed please indicate)) | Date of ratification (if not ratified please indicate) | Derogations/ reservations relevant to equality and non-discrimination | Right of individual petition accepted? | Can this instrument be directly relied upon in domestic courts by individuals? |
|--|---|---|--|---|---|
| European Convention on Human Rights (ECHR) | 4.11.1950 | 3.9.1953 | | | Yes |
| Protocol 12, ECHR | 4.11.2000 | 1.7.2006 | | | Yes |
| Revised European Social Charter | 11.2.1998 | No | | Ratified collective complaints protocol? No | No |
| International Covenant on Civil and Political Rights | 26.11.1974 | 18.08.1993 | | | No |
| Framework Convention for the Protection of National Minorities | 20.7.1995 | No | | | No |

| Instrument | Date of signature (if not signed please indicate)) | Date of ratification (if not ratified please indicate) | Derogations/ reservations relevant to equality and non-discrimination | Right of individual petition accepted? | Can this instrument be directly relied upon in domestic courts by individuals? |
|---|---|---|--|---|---|
| International Convention on Economic, Social and Cultural Rights | 26.11.1974 | 18.08.1983 | | | No |
| Convention on the Elimination of All Forms of Racial Discrimination | 12.12.1967 | 01.05.1978 | | | No |
| Convention on the Elimination of Discrimination Against Women | 17.07.1980 | 02.02.1989 | | | No |
| ILO Convention No. 111 on Discrimination | 25.06.1958 | 22.12.2000 | | | Yes |
| Convention on the Rights of the Child | 21.03.1990 | 07.03.1994 | | | Some articles only |
| Convention on the Rights of Persons with Disabilities | 30.07.2007 | Not yet | | | |