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# Country report

## Non-discrimination

Luxembourg

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# **Country report**

# **Non-discrimination**

# **Luxembourg**

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## **EXECUTIVE SUMMARY**

### **1. Introduction**

The Grand Duchy of Luxembourg is characterised by cultural diversity and the common use of several languages. Its population is quite homogeneous, with the vast majority of foreigners being European Union citizens, most of whom are Catholics by religion.

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

In general, relations between different ethnic and racial groups are smooth; incidents of racism and discrimination are rather low. Some intolerance does indeed exist, although violent xenophobic incidents are rare.

In institutional terms, Luxembourg is a constitutional monarchy, in which the Grand Duke has only very limited powers, as conferred by the Constitution. There is a unicameral Parliament, known as the *Chambre des Députés*, which votes on draft bills. All bills must be submitted to the Council of State for its opinion, as well as to the professional chambers. These chambers are public institutions. Their mission is to defend the concerns of a specific professional category (employees, farmers, the self-employed, civil servants and so on).

For a bill to be passed, the Council of State must exempt the Parliament of the second constitutional vote. This means that a bill has to be adopted a second time by the Parliament in a second reading, at least three months later, unless the Council of State does not formally oppose the wording of the draft bill. The latter is the usual scenario.

### **2. Main legislation**

Luxembourg has signed and ratified the European Convention on Human Rights, Article 14 of which prohibits discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Article 14 is directly applicable to court cases examined under Luxembourg law. Protocol 12 on discrimination has also been ratified.

On 28 July 2011 a law ratified the UN Convention on the Rights of Persons with Disabilities as well as the Optional Protocol to the Convention on the Rights of Persons with Disabilities, which had already been signed in 2007.

Other international instruments have been signed by the Luxembourg Government, but have no direct effect and thus cannot be invoked in court, other than together with a more precise national provision. These instruments include the Universal Declaration of Human Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, the International Convention on the Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of the Child. Convention 111 of the International Labour Organisation, concerning discrimination in employment and occupation, was ratified in 2000 in Luxembourg and is directly applicable in internal law.

On a national level, the principle of equal treatment can be found in the general legal principle found in Article 10bis of the Constitution, according to which 'all Luxembourgers are equal before the Law'. However, strictly speaking, this principle applies only to Luxembourg nationals and not to foreign citizens. Although it is understood to be a general principle of law, implying equality for all inhabitants, it clearly is not sufficient to guarantee in all situations and in all court cases that any breach of the principle of equality will be punished. The same is true for Article 111 of the Constitution, which grants protection to foreigners and to their property, unless the law provides for an exception.

One can find penal provisions against discrimination, including religion, race and ethnic origin, disability, sexual orientation and age in the Criminal Code, in Articles 454 to 457. Individual and collective discrimination are thus prohibited and can lead to a fine or imprisonment of up to two years.

The Law of 28 November 2006 (general discrimination law) and the Law of 29 November 2006 (on public service) have strengthened the existing legislation against direct discrimination and have introduced new tools in civil law to fight different forms of discrimination, such as indirect discrimination, harassment or instructions to discriminate. Furthermore, new labour law protection mechanisms against victimisation have been introduced in the Labour Code.

The Law of 28 November 2006 covers the entire scope of Directive 2000/43 in criminal law, for all the grounds apart from belief (including race and ethnic origin in the field of non-public sector employment) and the Law of 29 November 2006 covers all public employees and employers (state administration, municipalities etc.) and all grounds covered by both directives.

In both laws of November 2006, the legislature has gone further than the strict requirements of the directives, by including prohibiting discrimination based on the grounds of religion or belief, disability, age and sexual orientation, as well as race and ethnic origin for all fields included in the scope of both directives, thus forbidding all discrimination in relations between persons.

The fact that there is still no case law has made it difficult to assess the impact of the anti-discrimination laws.

### **3. Main principles and definitions**

Articles 454 to 457 of the Criminal Code provide some legal tools for protection against discrimination. Article 454 of the code, as amended by the Law of 28 November 2006, defines discrimination as:

'any difference of treatment applied to natural persons on grounds of their racial or ethnic origin, skin colour, sex, sexual orientation, family situation, age, state of health, disability, customs, political or philosophical opinions, trade union activities, their membership, actual or supposed, of an ethnic group, nationality, race or specific religion.'

The prohibition is also valid in cases of discrimination against groups, communities of persons and companies.

However the ground of belief has not been included in the amendment of the Criminal Code. Furthermore, only direct discrimination is forbidden; indirect discrimination, harassment and instruction to discriminate are behaviours that are not prohibited in criminal law.

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

All the prohibited grounds of the directives (i.e., religion or belief, age, disability, sexual orientation and race and ethnic origin) are covered within and outside the employment field by the civil law provisions.

As far as victimisation is concerned, all fields are covered. In employment matters, the provisions include a special procedure against dismissals based on discrimination and



declare void any discriminatory clauses in contracts or collective work agreements. Protection against retaliation is also provided for.

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

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

Insurance contracts have been excluded from the prohibition of discrimination on the grounds of age and disability, on the condition that the exception is objectively and reasonably justified.

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

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

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

#### **4. Material scope**

As far as criminal law is concerned, the amended Article 455 of the Criminal Code is applicable to discrimination in relation to:

- the refusal to supply or allow enjoyment of goods;
- the refusal to supply a service;
- the restriction of the supply of goods or services on grounds of ethnic or racial discrimination or the exercising of any other form of discrimination at the time of supply;
- the indication in any advertisement of the intention to refuse goods or services or to practise discrimination at the time of supplying goods and services;
- the restriction of the normal exercise of any economic activity;
- the refusal to employ an individual, the sanctioning or dismissal of a person;
- the making of access to work, vocational training or working conditions, or the membership of and involvement in an organisation of workers or employers subject to a discriminatory condition.

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

As far as civil law is concerned, including employment law, the Law of 28 November 2006 has incorporated the full scope of Article 3 of Directive 2000/43 and thus is applicable to:

- conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- employment and working conditions, including dismissals and pay;

- membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
- social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services which are available to the public, including housing.

The public sector is covered by the Law of 29 November 2006 on the relations between public employees and the administration (the state and municipalities).

## **5. Enforcing the law**

An individual may, acting alone, lodge a criminal complaint in court. The state prosecutor will, however, decide whether it is worthwhile proceeding with the case.

The Law of 6 May 1999 on penal mediation enables the state prosecutor to use mediation where it appears that such a remedy is likely to ensure that compensation or damages will be paid to the victim.

The victim may also apply directly to the examining judge (*juge d'instruction*) if he or she claims to have suffered discrimination; in such cases it is up to the victim to estimate the extent of the loss and claim damages in criminal proceedings. The judge will often require the claimant to pay a guarantee.

The victim may claim damages in a civil court, with or without the assistance of associations.

The Laws of 28 and 29 November 2006 give associations and trade unions or professional associations the ability to assist victims in court or to act in support of victims. Associations and trade unions or professional associations cannot act on behalf of victims.

Article 5 of the general discrimination Law of 28 November 2006 introduced a mechanism for shifting the burden of proof in civil and administrative procedures in the same way as provided for by the directives.

The only relevant case is from 11 December 2003,<sup>1</sup> in which the labour court decided that, according to Article L.244-3, of the Labour Code concerning the burden of proof:

'as soon as a person who considers himself hurt by the non-compliance towards him/her with the principle of the equal treatment, establishes facts that's allow the presumption of the existence of a direct or indirect discrimination, the defendant has to prove that there was no violation of the principle of equal treatment.'

No distinction is made between different types of discrimination, which means 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.

The labour court may be used in a case of discrimination at work, through a special summary procedure, and in a case of dismissal, the reinstatement of a worker may be requested. A person may also ask that any discriminatory clause in a contract or a collective convention be declared void.

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

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<sup>1</sup> Labour Court, No. 5103/03, 11 December 2003.

As there is no existing case law, it is difficult to say whether the available sanctions are effective, proportionate and dissuasive. The use of testing and statistical evidence is not provided for by the laws.

## **6. Equality bodies**

The Laws of 28 and 29 November 2006 created a Centre for Equal Treatment (CET), which is also competent to deal with discrimination cases relating to the public sector.

It took a long time to set up the Centre for Equal Treatment, but it was eventually established in 2008 and is now fully operational. Unfortunately its decisions are not binding and most of its recommendations are not followed by the legislature and other institutions.

The CET is a body made up of five members, including a chairperson, who are appointed for five years by the Grand Duke, having been nominated by the Parliament. Once a year, a report must be submitted to the Government and to Parliament. The CET is funded by the state.

The CET publishes independent reports, issues opinions and recommendations, conducts surveys on all questions linked to discrimination and provides information and assistance to victims of discrimination.

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

The Law of 28 November 2006 underlines the full independence of the Centre for Equal Treatment. This independence may in theory be curtailed by the fact that the Government alone decides on the budget that it will allocate to the CET every year. In practice, the budget has decreased over the last few years.

The CET does not have the ability to support victims in court or to submit claims directly to the courts. In addition it has no quasi-judicial powers.

Since 2008, the CET has been working in the field of anti-discrimination by organising conferences, registering claims of discrimination and by trying to solve cases of alleged discrimination. Since 2012 its activities have been regularly covered by the national newspapers, television and radio.

## **7. Key issues**

There is still very little case law on discrimination, which means that victims of discrimination find it very hard to bring a case to court. There may be different explanations for this phenomenon: the victims do not have the financial means and many people are unaware of discrimination laws.

Although the Law of 28 November 2006 underlines the full independence of the Centre for Equal Treatment, that independence may be curtailed by the fact that the Government alone decides on the budget that it will allocate to the centre every year. In practice, the budget has decreased in the last few years.

The CET does not have the ability to support victims in court or to submit claims to the courts directly. In addition it has no quasi-judicial powers and its recommendations are not binding. For many years the CET has asked the Government to reinforce its investigatory powers as the CET has no power to force institutions, private persons or employers to collaborate with its investigations.

According to the CET several people reported that complaints that they lodged with the police were discontinued after reaching the Attorney General's Office. The CET assumes that a lack of resources is the source of the rejection of discrimination lawsuits. The CET has recommended an increase in resources for the prosecutor's services.

On the reasonable accommodation duty, 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 to both private and public sector employers. This might not be compatible with the approach of the CJEU to the definition of disability, which seems broader and more flexible.

## **RÉSUMÉ**

### **1. Introduction**

Le Grand-Duché de Luxembourg se caractérise par une grande diversité culturelle et l'utilisation courante de plusieurs langues. Sa population est assez homogène, la grande majorité des étrangers qui y vivent étant des citoyens de l'Union européenne, de religion catholique pour la plupart.

Le Grand-Duché de Luxembourg est l'un des pays d'Europe où la proportion d'étrangers est la plus élevée avec une moyenne supérieure à 43 %. Dans la capitale, Luxembourg, plus de 50 % des habitants sont étrangers. Le groupe de non-ressortissants le plus important est celui des citoyens portugais.

Les relations entre les différents groupes ethniques et raciaux sont généralement bonnes, et les incidents liés au racisme et à la discrimination assez peu nombreux. Il existe bien une certaine intolérance, mais les incidents xénophobes violents sont rares.

Sur le plan institutionnel, le Luxembourg est une monarchie constitutionnelle au sein de laquelle les pouvoirs conférés au Grand-Duc par la Constitution sont très limités. Le pays a un parlement unicaméral (la Chambre des Députés), qui vote les projets de loi. Ces derniers doivent tous être soumis pour avis au Conseil d'État ainsi qu'aux chambres professionnelles, lesquelles sont des institutions publiques chargées de défendre les intérêts d'une catégorie professionnelle déterminée (salariés, agriculteurs, travailleurs indépendants, fonctionnaires, etc.).

Pour qu'un projet de loi soit adopté, il faut que le Conseil d'État dispense le parlement du second vote constitutionnel. En d'autres termes, un projet de loi doit être adopté une seconde fois par le parlement en seconde lecture, trois mois plus tard au moins, sauf si le Conseil d'État ne s'oppose pas formellement à son libellé – ce qui constitue le scénario le plus courant.

### **2. Législation principale**

Le Luxembourg a signé et ratifié la Convention européenne des droits de l'homme, dont l'article 14 précise que la jouissance des droits et libertés qu'elle reconnaît doit être assurée, sans distinction aucune fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation. Cet article est directement applicable aux affaires judiciaires examinées selon le droit luxembourgeois. Le protocole n° 12 à la Convention relatif à la discrimination a, lui aussi, été ratifié.

Une loi a ratifié le 28 juillet 2011 la Convention des Nations unies relative aux droits des personnes handicapées ainsi que son protocole facultatif, qui avaient été signés en 2007 déjà.

Le gouvernement luxembourgeois est signataire d'autres instruments internationaux qui n'ont toutefois pas d'effet direct et ne peuvent donc être invoqués devant les tribunaux sans une disposition nationale plus précise. On trouve au nombre de ces instruments la Déclaration universelle des droits de l'homme, la Convention internationale sur l'élimination de toutes les formes de discrimination raciale, la Convention des Nations unies sur l'élimination de toutes les formes de discrimination à l'égard des femmes et la Convention relative aux droits de l'enfant. La convention n° 111 de l'Organisation internationale du travail concernant la discrimination dans l'emploi et le travail a été ratifiée en 2000 au Luxembourg; elle est directement applicable en droit interne.

Au plan national, le principe de l'égalité de traitement est consacré par le principe juridique général visé à l'article 10 bis de la Constitution, lequel dispose que tous les Luxembourgeois sont égaux devant la loi. Cependant, *stricto sensu*, ce principe s'applique uniquement aux ressortissants luxembourgeois et non aux citoyens étrangers. Bien qu'il soit interprété comme un principe général de loi, impliquant l'égalité pour tous les habitants, il ne suffit manifestement pas à garantir que le non-respect du principe d'égalité sera sanctionné dans toutes les situations et dans toutes les affaires judiciaires. Il en va de même de l'article 111 de la Constitution, qui accorde une protection aux étrangers et à leurs biens, sauf exception prévue par la loi.

On trouve aux articles 454 à 457 du code pénal des dispositions contre la discrimination fondée sur la religion, la race et l'origine ethnique, le handicap, l'orientation sexuelle et l'âge. La discrimination individuelle et la discrimination collective sont donc interdites et peuvent donner lieu à une amende ou une peine d'emprisonnement allant jusqu'à deux ans.

La loi du 28 novembre 2006 (loi générale sur la discrimination) et la loi du 29 novembre 2006 (fixant le statut des fonctionnaires) ont renforcé la législation existante en matière de discrimination directe et introduit en droit civil de nouveaux outils de lutte contre diverses formes de discrimination, et notamment la discrimination indirecte, le harcèlement et l'injonction de discriminer. De nouveaux mécanismes de protection contre les rétorsions au titre du droit du travail ont par ailleurs été introduits dans le code du travail.

La loi du 28 novembre 2006 couvre intégralement le champ d'application de la directive 2000/43 en droit pénal pour l'ensemble des motifs à l'exception des convictions (y compris la race et l'origine ethnique dans le domaine de l'emploi en dehors du secteur public) et la loi du 29 novembre 2006 couvre l'ensemble des salariés et employeurs (administration de l'État, municipalités, etc.) et tous les motifs visés par les deux directives.

Dans l'une et l'autre des lois de novembre 2006, le législateur est allé plus loin que les strictes exigences des directives en incluant l'interdiction de discrimination fondée sur la religion ou les convictions, le handicap, l'âge et l'orientation sexuelle, de même que la race et l'origine ethnique, dans tous les domaines couverts par le champ d'application des deux directives, interdisant ainsi toute discrimination dans les relations entre personnes.

L'absence de jurisprudence ne permet pas réellement de mesurer à ce jour l'impact de la législation antidiscrimination.

### **3. Principes généraux et définitions**

Les articles 454 à 457 du code pénal prévoient plusieurs instruments juridiques pour assurer la protection contre la discrimination. L'article 454 dudit code, tel que modifié par la loi du 28 novembre 2006, définit la discrimination comme suit:

«toute distinction opérée entre les personnes physiques à raison de leur origine, de leur couleur de peau, de leur sexe, de leur orientation sexuelle, de leur situation de famille, de leur âge, de leur état de santé, de leur handicap, de leurs mœurs, de leurs opinions politiques ou philosophiques, de leurs activités syndicales, de leur appartenance ou de leur non appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée.»

L'interdiction vaut aussi pour la discrimination à l'égard des groupements, des communautés de personnes et des entreprises.

Le motif des convictions n'a cependant pas été inclus dans la modification du code pénal. De surcroît, seule la discrimination directe est interdite; la discrimination indirecte, le

harcèlement et l'injonction de discriminer sont autant de comportements que le droit pénal n'interdit pas.

Les lois des 28 et 29 novembre 2006 utilisent les mêmes définitions que celles qui figurent dans les directives pertinentes. Elles introduisent donc le concept d'égalité de traitement comme exigé par celles-ci. La discrimination directe, la discrimination indirecte et le harcèlement sont définis de manière adéquate dans ces lois, de même que l'injonction de pratiquer une discrimination.

Les dispositions du droit civil couvrent tous les motifs interdits visés par les directives (à savoir la religion ou les convictions, l'âge, le handicap, l'orientation sexuelle et la race et l'origine ethnique) dans le domaine de l'emploi et en dehors de celui-ci.

En ce qui concerne les rétorsions, tous les domaines sont visés. En matière d'emploi, les dispositions prévoient une procédure spéciale à l'encontre des licenciements relevant d'une discrimination, et déclarent nulle toute clause discriminatoire figurant dans un contrat ou dans une convention collective de travail. Une protection contre les représailles est également prévue.

En ce qui concerne les exceptions et exemptions, la loi du 28 novembre 2006 contient des dispositions relatives aux exigences professionnelles essentielles et déterminantes, comme l'autorise la directive 2000/78/CE, compte tenu de la nature d'activités professionnelles particulières ou du contexte dans lequel elles s'exercent, mais uniquement dans le domaine de l'emploi. Cette loi prévoit également, en matière d'emploi toujours, une exception basée sur l'éthique d'une Église ou d'un groupe religieux.

La loi prévoit aussi des possibilités de dérogation basées sur l'âge pour autant que les exemptions soient appropriées et nécessaires et qu'elles soient objectivement et raisonnablement justifiées par un but légitime.

Les contrats d'assurance ont été exclus du champ d'application de l'interdiction de discrimination fondée sur l'âge ou le handicap à condition que l'exception soit objectivement et raisonnablement justifiée.

Des dispositions en matière d'aménagement raisonnable pour les personnes handicapées ont également été incorporées dans la loi portant modification de la loi du 12 septembre 2003 sur le revenu des personnes handicapées.

L'action positive est reconnue comme valide; autrement dit, elle n'est pas considérée comme une discrimination.

Il n'existe ni mesure juridique ni jurisprudence concernant des cas de discrimination multiple ou de discrimination par association.

#### **4. Champ d'application matériel**

En ce qui concerne le droit pénal, l'article 455 modifié du code pénal est applicable à la discrimination pour ce qui concerne:

- le refus de la fourniture ou de la jouissance d'un bien;
- le refus de fournir un service;
- la subordination de la fourniture d'un bien ou d'un service à une condition fondée sur une discrimination ethnique ou raciale, ou l'exercice de toute autre forme de discrimination lors de cette fourniture;
- l'indication dans une publicité d'une intention de refuser un bien ou un service ou de pratiquer une discrimination lors de la fourniture d'un bien ou d'un service;
- l'entrave de l'exercice normal d'une activité économique quelconque;

- le refus d'embaucher une personne, l'application d'une sanction à une personne ou le licenciement d'une personne;
- la subordination de l'accès au travail, de l'accès à la formation ou des conditions de travail ou de l'affiliation et l'engagement dans une organisation de travailleurs ou d'employeurs à une condition discriminatoire.

Ainsi donc, le champ d'application des directives n'est pas entièrement couvert par le droit pénal.

En ce qui concerne le droit civil, y compris le droit du travail, la loi du 28 novembre 2006 a incorporé l'intégralité du champ d'application de l'article 3 de la directive 2000/43 et s'applique donc:

- aux conditions d'accès à l'emploi, aux activités non salariées ou au travail, y compris les critères de sélection et les conditions de recrutement, quelle que soit la branche d'activité et à tous les niveaux de la hiérarchie professionnelle, y compris en matière de promotion;
- à l'accès à tous les types et à tous les niveaux d'orientation professionnelle, de formation professionnelle, de perfectionnement et de formation de reconversion, y compris l'acquisition d'une expérience pratique;
- aux conditions d'emploi et de travail, y compris les conditions de licenciement et de rémunération;
- à l'affiliation à et l'engagement dans une organisation de travailleurs ou d'employeurs ou à toute organisation dont les membres exercent une profession donnée, y compris les avantages procurés par ce type d'organisations;
- à la protection sociale, y compris la sécurité sociale et les soins de santé, les avantages sociaux, l'éducation et l'accès aux biens et aux services et la fourniture de biens et services, à la disposition du public, y compris en matière de logement.

Le secteur public est couvert par la loi du 29 novembre 2006 régissant les relations entre les fonctionnaires et l'administration (État et municipalités).

## **5. Mise en application de la loi**

Une personne peut, agissant seule, intenteur une action pénale. Il appartient cependant au ministère public de décider s'il convient d'y donner suite.

La loi du 6 mai 1999 sur la médiation pénale permet au ministère public de recourir à la médiation lorsqu'il semble que cette voie de recours est susceptible d'assurer le versement d'une indemnisation ou de dommages-intérêts à la victime.

La victime peut également s'adresser directement au juge d'instruction lorsqu'elle allègue avoir fait l'objet d'une discrimination; il appartient alors à ladite victime d'estimer l'ampleur du préjudice et de réclamer un dédommagement dans le cadre d'une procédure pénale. Le juge exige souvent de la partie requérante qu'elle verse une garantie.

La victime peut saisir une juridiction civile d'une demande de dommages-intérêts avec ou sans l'assistance d'associations.

Les lois des 28 et 29 novembre 2006 habiliter les associations et les syndicats ou associations professionnelles à aider les victimes en justice ou à agir pour les soutenir. Les associations et les syndicats ou associations professionnelles ne peuvent agir au nom des victimes.

L'article 5 de la loi générale antidiscrimination du 28 novembre 2006 instaure un mécanisme de renversement de la charge de la preuve dans les procédures civiles et administratives selon les modalités prévues par les directives.



Le seul arrêt pertinent date du 11 décembre 2003.<sup>2</sup> Le tribunal du travail y déclare qu'en vertu de l'article L.244-3 du code du travail concernant la charge de la preuve:

«dès qu'une personne qui s'estime lésée par le non-respect à son égard du principe de l'égalité de traitement établit des faits qui permettent de présumer l'existence d'une discrimination directe ou indirecte, il incombe à la partie défenderesse de prouver qu'il n'y a pas eu violation du principe de l'égalité de traitement.»

Aucune distinction n'est faite entre différents types de discrimination, ce qui signifie qu'aucun critère ne peut être défini.

L'article 253-2, paragraphe 2, stipule que le renversement de la charge de la preuve ne s'applique pas aux procédures pénales.

Le tribunal du travail peut être saisi en cas de discrimination au travail via une procédure sommaire spéciale et, en cas de licenciement, la réintégration d'un travailleur peut être réclamée. Il est également possible de demander que toute clause discriminatoire figurant dans un contrat ou une convention collective soit déclarée nulle et non avenue.

Dans le domaine de l'emploi, une plainte peut aussi être déposée auprès de l'Inspection du travail, chargée de veiller à la bonne application du droit du travail en général.

En l'absence de jurisprudence, il est difficile de dire si les sanctions prévues sont efficaces, proportionnées et dissuasives. L'utilisation du test de situation et de statistiques comme éléments de preuve n'est pas prévue dans la législation.

## **6. Organismes de promotion de l'égalité de traitement**

Les lois des 28 et 29 novembre 2006 instituent un Centre pour l'égalité de traitement (CET), également chargé des cas de discrimination en rapport avec le secteur public.

La mise en place du CET a pris beaucoup de temps, mais il a été installé en 2008 et il est aujourd'hui pleinement opérationnel. On peut regretter toutefois que ses décisions ne soient pas contraignantes et que la plupart de ses recommandations ne soient suivies ni par le législateur ni par d'autres institutions.

Le CET est composé d'un collège de cinq membres dont un président, nommés pour cinq ans par le Grand-Duc sur proposition du parlement. Le CET adresse une fois par an un rapport de ses activités au gouvernement et au parlement. Le CET est financé par l'État.

Le CET publie des rapports indépendants; émet des avis et des recommandations; réalise des études sur toute question liée à la discrimination; et apporte information et assistance aux victimes de discrimination.

Le Centre pour l'égalité de traitement traite de questions relevant de la discrimination fondée sur la race, l'origine ethnique, le sexe, la religion ou les convictions, le handicap, l'âge et l'orientation sexuelle.

La loi du 28 novembre 2006 insiste sur la totale indépendance du CET – laquelle pourrait être théoriquement limitée du fait que le gouvernement décide seul du budget qu'il alloue chaque année au Centre. Ce budget connaît, dans la pratique, une diminution ces dernières années.

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<sup>2</sup> Tribunal du travail, n° 5103/03, 11 décembre 2003.

Le CET n'est pas habilité à prêter assistance aux victimes en justice ni à engager directement des poursuites devant les tribunaux. Il n'est doté en outre d'aucun pouvoir quasi-judiciaire.

Depuis 2008, le CET mène son action de lutte contre la discrimination en organisant des conférences, en recueillant des plaintes pour discrimination et en tentant de résoudre les dossiers de discrimination présumée dont il est saisi. Depuis 2012, ses activités ont été régulièrement couvertes par la presse, la télévision et la radio nationales.

## **7. Points essentiels**

La rareté du contentieux en matière de discrimination fait qu'il est extrêmement difficile pour une victime de saisir la justice. Plusieurs raisons peuvent expliquer ce phénomène, parmi lesquelles le manque de moyens financiers du côté des victimes et une méconnaissance assez générale de la législation en matière de discrimination.

Même si la loi du 28 novembre 2006 insiste sur la totale indépendance du Centre pour l'égalité de traitement, cette indépendance pourrait être limitée du fait que le gouvernement décide seul du budget qu'il alloue chaque année au Centre. De fait, ce budget connaît une diminution depuis quelques années.

Le CET n'est pas habilité à prêter assistance aux victimes en justice ni à engager directement des poursuites devant les tribunaux. Il n'est doté en outre d'aucun pouvoir quasi-judiciaire et ses recommandations ne sont pas contraignantes. Le CET demande depuis de nombreuses années au gouvernement de renforcer ses pouvoirs d'enquête car il est actuellement dans l'incapacité d'obliger des institutions, des particuliers ou des employeurs à collaborer à ses investigations.

Selon le CET, plusieurs personnes signalent que les plaintes qu'elles ont déposées à la police sont restées en suite une fois parvenues au Bureau du procureur général. Le Centre suppose que cet abandon des poursuites s'explique par un manque de ressources, et il a recommandé une augmentation de celles-ci en faveur des services du procureur.

En ce qui concerne l'obligation d'aménagement raisonnable, seules des personnes ayant 30 % d'invalidité et reconnues officiellement comme telles ont le droit de réclamer un aménagement raisonnable. Cette disposition devrait s'appliquer à la fois aux employeurs du secteur privé et à ceux du secteur public. Elle pourrait s'avérer incompatible avec l'approche de la CJUE quant à la définition du handicap, qui semble plus large et plus souple.

## **ZUSAMMENFASSUNG**

### **1. Einleitung**

Das Großherzogtum Luxemburg ist geprägt von kultureller Vielfalt, Mehrsprachigkeit ist die Regel. Die Bevölkerung ist ziemlich homogen und die große Mehrzahl der im Land lebenden Ausländer sind Bürger der Europäischen Union und katholisch.

Das Großherzogtum Luxemburg hat mit den höchsten Ausländeranteil in Europa – im Schnitt über 43 %. In der Stadt Luxemburg, der Hauptstadt des Landes, sind über 50 % der Einwohner Ausländer. Unter den Einwanderern stellen portugiesische Staatsbürger die größte Gruppe.

Die Beziehungen zwischen den unterschiedlichen ethnischen Gruppen und Rassen sind in der Regel reibungslos, Fälle von Rassismus und Diskriminierung sind eher selten. Es gibt eine gewisse Intoleranz, fremdenfeindliche Gewalt kommt jedoch kaum vor.

In institutioneller Hinsicht ist Luxemburg eine konstitutionelle Monarchie, deren Verfassung dem Großherzog nur sehr wenig Macht verleiht, die ihm von der Verfassung übertragen wird. Das Parlament, die so genannte *Chambre des Députés*, hat eine Kammer und stimmt über Gesetzentwürfe der Regierung ab. Zu allen Gesetzen müssen Gutachten des Staatsrates und der Berufskammern eingeholt werden. Die Kammern sind öffentliche Institutionen. Ihre Aufgabe ist die Wahrung der Interessen der jeweils vertretenen Berufsgruppen (Arbeitnehmer, Landwirte, Selbständige, Staatsbeamte usw.).

Gesetze können nur dann mit der ersten Abstimmung angenommen werden, wenn der Staatsrat einem Verzicht auf eine zweite Abstimmung zustimmt. Das heißt, Gesetze müssen dem Parlament mindestens drei Monate nach der ersten Abstimmung ein zweites Mal vorgelegt werden, außer der Staatsrat hat keine formalen Einwände gegen den Wortlaut des Gesetzentwurfs. Dies ist inzwischen die übliche Praxis.

### **2. Wichtigste Gesetze**

Luxemburg hat die Europäische Menschenrechtskonvention unterzeichnet und ratifiziert, deren Artikel 14 Diskriminierung insbesondere aufgrund von Geschlecht, Rasse, Hautfarbe, Sprache, Religion, politischer oder sonstiger Anschauung, nationaler oder sozialer Herkunft, Zugehörigkeit zu einer nationalen Minderheit, Vermögen, Geburt oder sonstigem Status verbietet. Bei Gerichtsverfahren nach luxemburgischem Recht ist Artikel 14 der Konvention direkt anwendbar. Das Land hat auch das 12. Protokoll über Diskriminierung ratifiziert.

Am 28. Juli 2011 ratifizierte ein Gesetz das Übereinkommen über die Rechte von Menschen mit Behinderungen der Vereinten Nationen und dessen Zusatzprotokoll, das bereits 2007 unterzeichnet worden war.

Die Regierung Luxemburgs hat weitere internationale Rechtsinstrumente unterzeichnet, diese haben aber keine direkte Rechtswirkung und können daher vor Gericht nicht geltend gemacht werden, sofern sie nicht durch konkrete nationale Rechtsvorschriften umgesetzt wurden. Zu diesen Instrumenten gehört die Allgemeine Erklärung der Menschenrechte, das Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung, das Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau und das Übereinkommen über die Rechte des Kindes. Die Konvention Nr. 111 der Internationalen Arbeitsorganisation, das sich auf Diskriminierung in Beschäftigung und Beruf bezieht, wurde von Luxemburg im Jahr 2000 ratifiziert und ist nach internationalem Recht direkt anwendbar.

Im nationalen Recht ist der Gleichbehandlungsgrundsatz im allgemeinen Rechtsgrundsatz in Artikel 10b der Verfassung verankert, nach dem „alle Luxemburger vor dem Gesetz gleich

sind“. Allerdings gilt dieser Grundsatz streng genommen nur für luxemburgische Staatsbürger, nicht für Nicht-Luxemburger. Obwohl dieser Artikel als allgemeiner Rechtsgrundsatz zu verstehen ist, nach dem alle Einwohner gleich sind, kann er nicht in jedem Fall und jedem Gerichtsverfahren garantieren, dass Verstöße gegen den Gleichheitsgrundsatz geahndet werden. Dies gilt auch für Artikel 111 der Verfassung, der Ausländern und deren Eigentum Schutz gewährt, vorbehaltlich gesetzlicher Ausnahmen.

Strafrechtliche Bestimmungen gegen Diskriminierung, unter anderem wegen der Religion, Rasse oder ethnischen Herkunft, Behinderung, sexueller Ausrichtung und Alter sind in den Artikeln 454 bis 457 des Strafgesetzbuches enthalten. Danach ist die Diskriminierung von einzelnen und Gruppen verboten und kann mit einer Geldstrafe oder bis zu zwei Jahren Haft bestraft werden.

Das Gesetz vom 28. November 2006 (allgemeines Diskriminierungsgesetz) und das Gesetz vom 29. November 2006 (über den öffentlichen Dienst) haben die bestehenden Rechtsvorschriften gegen unmittelbare Diskriminierung gestärkt und neue zivilrechtliche Rechtsmittel eingeführt, mit denen unterschiedliche Formen von Diskriminierung, wie mittelbare Diskriminierung, Belästigung oder Anweisung zur Diskriminierung, bekämpft werden können. Außerdem wurden in das Arbeitsgesetzbuch neue Mechanismen zum Schutz gegen Viktimisierung aufgenommen.

Das Gesetz vom 28. November 2006 deckt im Strafrecht den gesamten Anwendungsbereich der Richtlinie 2000/43 für alle Diskriminierungsgründe außer Religion und Weltanschauung ab (einschließlich von Rasse und ethnischer Herkunft bei der Beschäftigung im privaten Sektor) und das Gesetz vom 29. November 2006 gilt für alle Arbeitnehmer und Arbeitgeber der öffentlichen Hand (Behörden, Kommunen usw.) und deckt alle in den beiden Richtlinien genannten Diskriminierungsgründe ab.

In beiden Gesetzen vom November 2006 geht der Gesetzgeber über die strengen Anforderungen der Richtlinien hinaus und verbietet Diskriminierung aufgrund von Religion oder Weltanschauung, Behinderung, Alter und sexueller Ausrichtung sowie Rasse und ethnischer Zugehörigkeit in allen Bereichen, auf die sich die beiden Richtlinien beziehen, und damit alle Arten von Diskriminierung in Beziehungen zwischen Personen.

Da aber bisher noch kein Fallrecht existiert, lässt sich die Wirksamkeit der Antidiskriminierungsgesetze nur schwer einschätzen.

### **3. Wichtigste Grundsätze und Begriffe**

Die Artikel 454 bis 457 des Strafgesetzbuchs stellen Rechtsmittel zum Schutz vor Diskriminierung bereit. In Artikel 454 des Gesetzbuchs, geändert durch das Gesetz vom 28. November 2006, wird Diskriminierung wie folgt definiert:

„Jede Ungleichbehandlung von natürlichen Personen aufgrund ihrer Rasse oder ethnischen Herkunft, ihrer Hautfarbe, ihres Geschlechts, ihrer sexuellen Ausrichtung, ihres Familienstands, Alters, Gesundheitszustands, einer Behinderung, ihrer Gebräuche, politischen oder philosophischen Anschauungen, Mitgliedschaft in einer Gewerkschaft, ihrer echten oder vermeintlichen Zugehörigkeit zu einer ethnischen Gruppe, Nationalität, Rasse oder bestimmten Religion“.

Das Verbot gilt auch für die Diskriminierung von Gruppen, Gemeinschaften und Unternehmen.

Allerdings wurde der Diskriminierungsgrund „Glaube“ nicht in die Neufassung des Strafgesetzbuchs aufgenommen. Außerdem ist nur unmittelbare Diskriminierung strafrechtlich verboten, nicht aber mittelbare Diskriminierung, Belästigung und Anweisung zur Diskriminierung.

Die Gesetze vom 28. und 29. November 2006 verwenden dieselben Definitionen wie die einschlägigen Richtlinien. Damit führen sie das von den Richtlinien geforderte Prinzip der Gleichbehandlung ein. Unmittelbare und mittelbare Diskriminierung, Belästigung sowie Anweisung zur Diskriminierung sind in den Gesetzen angemessen definiert.

Zivilrechtliche Bestimmungen decken alle in den Richtlinien geforderten verbotenen Diskriminierungsgründe (d. h. Religion oder Weltanschauung, Alter, Behinderung, sexuelle Ausrichtung und Rasse und ethnische Herkunft) innerhalb und außerhalb des Arbeitslebens ab.

Auch Viktimisierung ist in allen Bereichen verboten. Die Rechtsvorschriften für den Bereich Beschäftigung führen unter anderem ein spezielles Verfahren gegen diskriminierende Kündigungen ein und erklären alle diskriminierenden Bestimmungen in Arbeits- und Tarifverträgen für unwirksam. Auch ein Schutz vor Racheakten ist vorgesehen.

Das Gesetz vom 28. November 2006 sieht die in der Richtlinie 2000/78/EG erlaubten Ausnahmeregelungen für wesentliche und entscheidende berufliche Anforderungen vor, die aufgrund der Art einer bestimmten beruflichen Tätigkeit oder der Bedingungen ihrer Ausübung notwendig sind; diese gelten jedoch nur im Beschäftigungsbereich. Weitere Ausnahmen im Arbeitsleben betreffen das Ethos von Kirchen oder religiösen Gruppen.

Außerdem sind Ausnahmen in Bezug auf das Alter erlaubt, wenn sie angemessen, notwendig und zur Erreichung eines legitimen Ziels objektiv notwendig und zweckmäßig sind.

Das Verbot von Diskriminierung aufgrund von Alter und Behinderung gilt nicht für Versicherungsverträge, sofern die Ungleichbehandlung objektiv und angemessen gerechtfertigt ist.

Bestimmungen über angemessene Vorkehrungen für Menschen mit Behinderung wurden durch eine Überarbeitung des Gesetzes vom 12. September 2003 über das Einkommen von behinderten Menschen eingeführt.

Positive Maßnahmen sind gesetzlich zulässig, d. h. sie gelten nicht als Diskriminierung.

Es gibt keine Rechtsmittel und auch keine Rechtsprechung zu Mehrfachdiskriminierung oder Diskriminierung durch Assoziierung.

#### **4. Sachlicher Geltungsbereich**

Im Bereich des Strafrechts gilt das Verbot von Diskriminierung gemäß dem überarbeiteten Artikel 455 des Strafgesetzbuches für die folgenden Handlungen:

- die Weigerung, Güter bereitzustellen oder freizugeben,
- die Weigerung, eine Dienstleistung zu erbringen,
- die Beschränkung des Zugangs zu Gütern oder Dienstleistungen aufgrund von ethnischer Diskriminierung oder Rassendiskriminierung oder jede andere Form der Diskriminierung bei der Bereitstellung,
- Werbeaussagen, die auf die Absicht zur Verweigerung von Gütern oder Dienstleistungen oder sonstige diskriminierende Handlungen bei der Bereitstellung von Gütern und Dienstleistungen hinweisen,
- Handlungen, die die normale Ausübung wirtschaftlicher Tätigkeiten beschränken,
- Nichteinstellung, Sanktionierung oder Kündigung von Personen,
- diskriminierende Bedingungen für den Zugang zu Beschäftigung, beruflicher Bildung, Arbeitsbedingungen oder für die Mitgliedschaft und Mitwirkung in einer Arbeitnehmer- oder Arbeitgeberorganisation.

Das heißt, das Strafrecht deckt nicht alle Anwendungsbereiche der Richtlinien ab.

Zivilrechtlich umfassen das Gesetz vom 28. November 2006 und das Arbeitsrecht den gesamten Anwendungsbereich nach Artikel 3 der Richtlinie 2000/43 und gelten daher für folgende Bereiche:

- die Bedingungen – einschließlich Auswahlkriterien und Einstellungsbedingungen – für den Zugang zu unselbständiger und selbständiger Erwerbs- und Berufstätigkeit, unabhängig von Tätigkeitsfeld und beruflicher Position, einschließlich des beruflichen Aufstiegs,
- den Zugang zu allen Formen und allen Ebenen der Berufsberatung, Berufsausbildung, beruflichen Weiterbildung und Umschulung, einschließlich der praktischen Berufserfahrung,
- die Beschäftigungs- und Arbeitsbedingungen, einschließlich der Entlassungsbedingungen und des Arbeitsentgelts,
- die Mitgliedschaft und Mitwirkung in einer Arbeitnehmer- oder Arbeitgeberorganisation oder einer Organisation, deren Mitglieder einer bestimmten Berufsgruppe angehören, einschließlich der Inanspruchnahme der Leistungen solcher Organisationen,
- Sozialschutz, einschließlich der sozialen Sicherheit und der Gesundheitsdienste, soziale Vergünstigungen, Bildung sowie Zugang zu und Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, einschließlich von Wohnraum.

Der öffentliche Sektor ist durch das Gesetz vom 29. November 2006 über das Verhältnis zwischen öffentlichen Angestellten und der öffentlichen Hand (Staat und Kommunen) abgedeckt.

## **5. Rechtsdurchsetzung**

Jede Einzelperson kann in eigenem Namen einen Strafantrag stellen. Dann entscheidet jedoch die Staatsanwaltschaft, ob ein Verfahren eingeleitet wird.

Nach dem Gesetz vom 6. Mai 1999 über Schlichtung in Strafsachen kann der Staatsanwalt ein Schlichtungsverfahren führen, wenn dadurch ein angemessener Schadensersatz oder ein Schmerzensgeld für das Opfer gewährleistet werden kann.

Opfer können sich auch direkt an den Ermittlungsrichter (*juge d'instruction*) wenden, wenn sie das Gefühl haben, diskriminiert worden zu sein. In diesem Fall müssen sie die Höhe des Schadens schätzen und in einem Strafverfahren auf Schadensersatz klagen. Häufig verlangt der Richter vom Kläger die Zahlung einer Bürgschaft.

Opfer können außerdem vor einem Zivilgericht klagen, mit oder ohne Hilfe von Interessenverbänden.

Nach den Gesetzen vom 28. und 29. November 2006 sind Vereinigungen, Gewerkschaften und Berufsverbände berechtigt, Opfer vor Gericht zu unterstützen. Allerdings sind sie nicht befugt, im Namen des Opfers zu handeln.

Artikel 5 des allgemeinen Diskriminierungsgesetzes vom 28. November 2006 führt Mechanismen zur Umkehr der Beweislast in Zivil- und Strafverfahren ein, die den Vorgaben der Richtlinien entsprechen.

Der einzig relevante Fall stammt vom 11. Dezember 2003.<sup>3</sup> Damals entschied das Arbeitsgericht gemäß Artikel L.244-3 Arbeitsgesetzbuch in Bezug auf die Beweislast Folgendes:

„Immer dann, wenn Personen, die sich durch die Nichtanwendung des Gleichbehandlungsgrundsatzes für verletzt halten, bei einem Gericht oder einer anderen zuständigen Stelle Tatsachen glaubhaft machen, die das Vorliegen einer unmittelbaren oder mittelbaren Diskriminierung vermuten lassen, muss der Beklagte beweisen, dass keine Verletzung des Gleichbehandlungsgrundsatzes vorgelegen hat.“

Dabei wird nicht zwischen einzelnen Formen der Diskriminierung unterschieden, d. h. die Bestimmung unterliegt keinen weiteren Bedingungen.

Nach Artikel 253-2(2) Arbeitsgesetzbuch ist eine Verlagerung der Beweislast in Strafverfahren ausgeschlossen.

Das Arbeitsgericht behandelt Fälle von Diskriminierung im Arbeitsleben in einem speziellen Schnellverfahren und kann bei Kündigungen die Wiedereinstellung des Arbeitnehmers anordnen. Außerdem kann jeder beim Arbeitsgericht beantragen, dass diskriminierende Bestimmungen in Arbeits- oder Tarifverträgen für ungültig erklärt werden.

Im Bereich Beschäftigung sind außerdem Beschwerden bei der Gewerbeaufsicht möglich, die allgemein die Umsetzung des Arbeitsrechts überwacht.

Da es bisher kein Fallrecht gibt, lässt sich nur schwer abschätzen, ob die verfügbaren Sanktionen wirksam, verhältnismäßig und abschreckend sind. Die Verwendung von Situationstests und statistischen Daten als Beweismittel ist gesetzlich nicht geregelt.

## **6. Gleichbehandlungsstellen**

Mit den Gesetzen vom 28. und 29. November 2006 wurde ein Zentrum für Gleichbehandlung (CET) geschaffen, das auch für Diskriminierungsfälle im öffentlichen Sektor zuständig ist.

Die Einrichtung des Zentrums für Gleichbehandlung war langwierig, aber 2008 wurde es schließlich eröffnet und ist heute voll funktionsfähig. Leider sind seine Entscheidungen nicht bindend und auch seine Empfehlungen werden vom Gesetzgeber und anderen Institutionen meist nicht berücksichtigt.

Das CET hat fünf Mitglieder einschließlich eines Vorsitzenden, die vom Parlament nominiert und vom Großherzog für jeweils fünf Jahre ernannt werden. Das Zentrum muss Regierung und Parlament einmal jährlich einen Bericht vorlegen. Das CET wird vom Staat finanziert.

Es veröffentlicht unabhängige Berichte, erstellt Gutachten und Empfehlungen, führt Studien zu allen Diskriminierungsfragen durch und bietet Opfern von Diskriminierung Informationen und Unterstützung an.

Es ist für Diskriminierung aufgrund von Rasse, ethnischer Zugehörigkeit, Geschlecht, Religion oder Weltanschauung, Behinderung, Alter und sexueller Ausrichtung zuständig.

Das Gesetz vom 28. November 2006 betont die völlige Unabhängigkeit des Zentrums für Gleichbehandlung. Eine theoretische Einschränkung dieser Unabhängigkeit stellt die Tatsache dar, dass die Regierung frei über die jährlichen Mittel für das CET entscheidet. In der Praxis wurden die Mittel in den letzten Jahren mehrmals gekürzt.

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<sup>3</sup> Arbeitsgericht, Nr. 5103/03, 11. Dezember 2003.

Das CET kann Opfer nicht vor Gericht unterstützen oder direkt vor Gericht klagen. Außerdem hat es keine außergerichtlichen Befugnisse.

Das CET kämpft seit 2008 gegen Diskriminierung mit Hilfe von Konferenzen, durch die Erfassung von Diskriminierungsbeschwerden und durch die Untersuchung von Fällen mutmaßlicher Diskriminierung. Seit 2012 wird in den Zeitungen, Fernseh- und Radiosendern des Landes regelmäßig über die Tätigkeit des Zentrums berichtet.

## **7. Schlüsselprobleme**

Im Bereich Diskriminierung gibt immer noch sehr wenig Rechtsprechung, weshalb es Opfern von Diskriminierung schwer fällt, ihren Fall vor Gericht zu bringen. Für dieses Phänomen gibt es mehrere mögliche Erklärungen: den Opfern fehlen die finanziellen Mittel und viele Menschen kennen die Diskriminierungsgesetze kaum.

Obwohl das Gesetz vom 28. November die völlige Unabhängigkeit des Zentrums für Gleichbehandlung betont, wird diese Unabhängigkeit dadurch eingeschränkt, dass die Regierung eigenständig über die Mittel entscheidet, die dem Zentrum im Jahr zur Verfügung stehen. In der Praxis wurden die Mittel in den letzten Jahren mehrmals gekürzt.

Das CET kann Opfer nicht vor Gericht unterstützen oder in eigenem Namen vor Gericht klagen. Außerdem hat es keine außergerichtliche Funktion und seine Empfehlungen sind nicht bindend. Das CET hat die Regierung schon länger um eine Ausweitung seiner Untersuchungsrolle gebeten, weil das Zentrum Institutionen, Privatpersonen oder Arbeitgeber nicht zwingen kann, an seinen Untersuchungen mitzuwirken.

Nach Angaben des CET berichteten mehrere Personen, dass Anzeigen, die sie bei der Polizei erstattet hatten, eingestellt wurden, nachdem sie der Generalstaatsanwaltschaft zugeleitet worden waren. Das CET vermutet, dass fehlende Mittel der Grund für die Abweisung von Diskriminierungsklagen sind. Das CET hat empfohlen, die Mittel für die Dienststellen der Staatsanwaltschaft zu erhöhen.

In Bezug auf angemessene Vorkehrungen haben nur Menschen mit einer amtlich bestätigten Behinderung von mindestens 30 % Anrecht auf entsprechende Vorkehrungen. Diese Bestimmung gilt für Arbeitnehmer im privaten und im öffentlichen Sektor. Dies verstößt möglicherweise gegen die Definition von Behinderung des EuGH, die weiter gefasst und flexibler zu sein scheint.



## INTRODUCTION

### The national legal system

Luxembourg is a unitary and indivisible state. It is a constitutional monarchy, in which the Grand Duke has only very limited powers, as conferred by the Constitution.

The Government or members of Parliament propose pieces of legislation. Luxembourg has a unicameral Parliament, the *Chambre des Députés*, which votes on draft bills. A statement of grounds originally accompanies these draft bills.

All bills must be submitted to the Council of State (*Conseil d'Etat*) for its opinion, as well as to the professional chambers. For a bill to be passed, the Council of State must exempt the Parliament 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 Council of State to exempt the Parliament 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 is only used in relation to areas that are not reserved to the legislative power by the Constitution. The Government, through the minister in charge of the area 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.

There are a few basic codes of law, including the Civil Code (dating from the times of Napoleon Bonaparte, at the beginning of the 19<sup>th</sup> 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 Labour Code, (which was enacted in 2006). The Labour Code is basically a compilation of former texts, with a new numbering of paragraphs.

In the public sector, there is a compilation of laws relating to the administration, called *code administratif*, in which the general statute of civil servants sets out the rules relating to the relationship between civil servants and the administration, including the central Government administration and the local administration, mainly the municipalities (known as communes).

Some laws apply both to the private sector and the public sector, such as the Law of 8 December 1981 on equality of treatment between men and women in the field of employment, which has been incorporated formally into the Labour Code.

### List of main legislation transposing and implementing the directives

Law of 28 November 2006<sup>4</sup> (general discrimination law):

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. amending the Labour Code and introducing in Book II a new title V on equality of treatment in the area of employment and work;
4. amending articles 454 and 455 of the Criminal Code;
5. amending the Law of 12 September 2003 on disabled persons.'

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<sup>4</sup> <http://www.legilux.public.lu/leg/a/archives/2006/0207/a207.pdf#>.

This law covers the entire scope of both directives.

The law entered into force on 9 December 2006 and was last amended on 13 May 2008 by the Law on Equality between Men and Women.

Law of 29 November 2006 (public sector law), which amends:

1. the amended Law of 16 April 1979 establishing the general statute of state civil servants;
2. the amended Law of 24 December 1985 establishing the general statute of municipal civil servants.

The Law of 29 November 2006 covers all public employees and employers (state administration, municipalities etc.) and all grounds covered by both directives.<sup>5</sup>

The law entered into force on 1 January 2007.

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<sup>5</sup> Luxembourg, Law of 29 November 2006, modifying 1. the amended Law of 16 April 1979 establishing the general statute of state civil servants and 2. the amended Law of 24 December 1985 establishing the general statute of municipal civil servants. (*Loi du 29 novembre 2006 modifiant 1. la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'Etat et 2. la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux.*)  
<http://www.legilux.public.lu/leg/a/archives/2006/0207/a207.pdf#>.

## **1 GENERAL LEGAL FRAMEWORK**

### **Constitutional provisions on protection against discrimination and the promotion of equality**

The constitution of Luxembourg includes the following articles dealing with non-discrimination:

Article 10 bis: contains a general legal principle, which states that all Luxembourgers are equal before the law. However, strictly speaking, this principle applies only to Luxembourg nationals and not to foreign citizens.

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.

Article 111: states that:

‘Any foreigner on the territory of the Grand Duchy shall enjoy the protection accorded to persons and property, without prejudice to exceptions established by law’.

These provisions do not apply to all areas covered by the directives. Their material scope is not broader than those of the directives.

These provisions are directly applicable if they include fundamental rights that are self-explanatory.

These provisions can be enforced against any actor, public or private, with the limitations that the provision must be clear enough and not too broad.

## **2 THE DEFINITION OF DISCRIMINATION**

### **2.1 Grounds of unlawful discrimination explicitly covered**

The grounds of discrimination that are prohibited are to be found primarily in the Criminal Code, in Articles 454 to 457 of the Criminal Code, as introduced by the Law of 19 July 1997<sup>6</sup> and as amended by the general discrimination Law of 28 November 2006 transposing the two directives. The general anti-discrimination Law of 28 November 2006 covers the grounds of religion or belief, disability, age, sexual orientation, race or ethnic origin.

The Criminal Code covers discrimination based on the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation, as well as gender.

Article 454 of the Criminal Code covers all the prohibited grounds: 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, specific religion.

#### **2.1.1 Definition of the grounds of unlawful discrimination within the directives**

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

Luxembourg legislation does not provide a definition of the grounds of discrimination covered by the directives. Thus far, the courts have not defined these concepts.

The laws transposing the directives use all of the grounds, without defining them either; the laws use the concepts of race and origin, religion and belief, disability, age and sexual orientation, without defining them.

Religion or belief: not defined

Age: not defined

Sexual orientation: not defined in the law or in the preparatory works. There is on-going academic discussion on the definition of sexual orientation.

Race: not defined<sup>7</sup>

Ethnic origin: not defined

Disability: not defined in the laws transposing the directives

#### **2.1.2 Multiple discrimination**

In Luxembourg, prohibition of multiple discrimination is not included in the law. Since 2009, the Centre for Equal Treatment has recommended the inclusion of the prohibition of multiple discrimination in law, but so far, this recommendation has not been followed up.

In Luxembourg, there is no case law dealing with multiple discrimination.

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<sup>6</sup> Luxembourg, Law of 19 July 1997 completing the Criminal Code by amending the accusation of racism and introducing the accusation of revisionism and other acts based on illegal discriminations (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); Mémorial 07/08/1997 (054/1997) <http://www.legilux.public.lu/leg/a/archives/1997/0540708/1997A16801.html>.

<sup>7</sup> There is no case law on race or ethnic origin that could show how these grounds are interpreted.

### **2.1.3 Assumed and associated discrimination**

#### **a) Discrimination by assumption**

In Luxembourg, Article 454 of the Criminal Code prohibits discrimination based on the belonging – real or supposed – to an ethnic group, nationality, race or specific religion. Such discrimination is also prohibited under Article 1 of the general anti-discrimination law of 28 November 2006 and Article 3 of the public sector law of 29 November 2006 for real or supposed belonging to a race or ethnic group. Therefore any discrimination based on the false assumption of the ethnic background, nationality, race or specific religion of a person is forbidden and punishable.

There is no such prohibition for other grounds, such as age, sexual orientation or 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.

#### **b) Discrimination by association**

In Luxembourg, there is no law that prohibits discrimination based on association with persons with particular characteristics.

However, Article 454(2) of the Criminal Code 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, constitutes discrimination.

Article 454 allows an individual right of action. However, although the article allows a complaint for discrimination against a whole group, for example, on the ground of disability, it is unclear whether it would cover discrimination based on association with persons with particular characteristics.

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

#### **a) Prohibition and definition of direct discrimination**

In Luxembourg, direct discrimination is prohibited in national law. It is defined.

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

The definition used in articles 1(a) and 18 (introducing article L.251-1 in the Labour Code) of the general anti-discrimination Law of 28 November 2006, and in Article 1-3 (introducing Article 1bis of the general statute of civil servants) of the public-sector Law of 29 November 2006, is:

'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) Justification of direct discrimination**

There is no justification for direct discrimination that does not fall within any of the specific exceptions dealt with below in sections 4.1 to 4.8.

### **2.2.1 Situation testing**

#### **a) Legal framework**

In Luxembourg, the law is silent about situation testing.

Article 348 of the Code of Civil Procedure provides that the facts on which the solution of the dispute depends can be the object of any legally acceptable investigative measure. Judicial interpretation is required to decide if situation testing is a legally acceptable investigative measure.

#### **b) Practice**

In Luxembourg, situation testing is not used in practice.

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

#### **a) Prohibition and definition of indirect discrimination**

In Luxembourg, indirect discrimination is prohibited in national law. It is defined.

Indirect discrimination applies only in civil cases (including employment law) and is not punishable by criminal law.

Indirect discrimination is defined in Articles 1b and 18 for employment purposes of the general discrimination Law of 28 November 2006 (private relations) and in Articles 1.3 and 2.3 of the public-sector Law of 29 November 2006 (public service).

#### **b) Justification test for indirect discrimination**

The two anti-discrimination laws of 28 and 29 November 2006 use the same definitions as found in the relevant directives. Justification test for indirect discrimination

The justification 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 that the means of achieving that aim should be appropriate and necessary.

Legitimate aims that satisfy those elements should be accepted by courts, but as yet, there have been no judgements on the issue.

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

Furthermore, for the same reason it remains to be seen what measures might be considered as an appropriate and necessary to pursue a legitimate aim.

#### **c) Comparison in relation to age discrimination**

Article 18 (introducing Article L-252-2 of the Labour Code) of the general discrimination Law of 28 November 2006 and Article 1.3.4 of the public sector Law of 29 November 2006 use the definitions of Article 6 of the directive, nearly word for word.

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

### **2.3.1 Statistical evidence**

#### **a) Legal framework**

In Luxembourg, there are national rules permitting data collection.

The amended Law on Data Protection of 2 August 2002 allows processing of personal data, with severe limitations (set out 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 the processing of personal data about health and sex life, including genetic information is forbidden in general. These are considered as sensitive data.

However, there are a number of exceptions to allow for the processing of such data. They include the following situations (briefly summarised):

- when the person concerned has given their specific consent to the use of such data, unless it is forbidden by law;
- when needed by the person responsible for data processing for employment 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 without the consent of the person concerned;
- when the information has already been made public by the person him or 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.

In July 2007, the Law on Data Protection was amended to allow the processing of racial and ethnic data, not including genetic data, but only with prior notification to the National Commission for the Protection of Data (*Commission Nationale pour la Protection des Données*).

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

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

In Luxembourg, statistical evidence is not provided for by national law in order to establish indirect discrimination.

#### **b) Practice**

In Luxembourg, statistical evidence in order to establish indirect discrimination is not used in practice.

### **2.4 Harassment (Article 2(3))**

#### **a) Prohibition and definition of harassment**

In Luxembourg, harassment is prohibited in national law.

The laws of 28 and 29 November 2006 transposing the directives use the definitions of both directives concerning harassment, so that the provisions are applicable in civil cases and

labour cases and, for example, in administrative or commercial cases and cover the full material scope for all grounds.

According to Articles 1(3) and 18 of the general discrimination Law of 28 November 2006 and Article 1.5 of the public-sector Law of 29 November 2006, harassment is considered to be discrimination when:

'An unwanted conduct related to religion or belief, disability, age, sexual orientation, race or ethnic origin 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'.

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

On 25 June 2009, a collective agreement was signed between the Luxembourg association of employers (*Union des Entreprises Luxembourgeoises*), and the two main trade unions, OGB-L and LCGB, relating to harassment and violence at work. The agreement was declared to be mandatory for all employers and employees by a grand-ducal regulation of 15 December 2009.

In Luxembourg, harassment does explicitly constitute a form of discrimination.

Harassment is forbidden and defined as a type of discrimination by Articles 1(3) and 18 (introducing Article L.251-1(3) of the Labour Code) of the anti-discrimination Law of 28 November 2006 and by Articles 1.5 (introducing Article 10(c), paragraph 6 in the amended Law of 16 April 1979, establishing the general statute of state civil servants) and 2.5 (introducing Article 12(c), paragraph 5 in the amended Law of 24 December 1985 establishing the general statute of municipal civil servants) of the anti-discrimination Law of 29 November 2006.

#### b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Luxembourg the employer and the employee may be liable. The employer may be responsible under Article 1384(3) of the Civil Code, which provides that the employer is responsible for damage caused by their employees carried out during the course of their functions.

### **2.5 Instructions to discriminate (Article 2(4))**

#### a) Prohibition of instructions to discriminate

In Luxembourg, instructions to discriminate are prohibited in national law. Instructions are defined as the behaviour of ordering someone to practise discrimination against another person.

The relevant articles are Articles 1(4) and 18 (introducing Article 251-1(4) in the Labour Code) of the Law of 28 November 2006 and Articles 1.3 (introducing Article 1bis1.b in the amended Law of 16 April 1979 establishing the general statute of state civil servants) and 2.3 (introducing Article 1bis1.b in the amended Law of 24 December 1985 establishing the general statute of municipal civil servants) of the Law of 29 November 2006, which provide that discrimination is considered as any behaviour consisting in ordering someone to discriminate against people for one of the following motives: religion or belief, disability, age, sexual orientation, race or ethnic origin. The prohibition of instruction to discriminate covers all the fields of the directive.



In Luxembourg, instructions explicitly constitute a form of discrimination.

b) Scope of liability for instructions to discriminate

In Luxembourg, the instructor and the discriminator are liable.

The relevant articles are Articles 1 and 18 (introducing Article 251-1(4) in the Labour Code) of the Law of 28 November 2006 and Articles 1.3 (introducing Article 1bis1.b in the amended Law of 16 April 1979 establishing the general statute of state civil servants) and 2.3 (introducing Article 1bis1.b in the amended Law of 24 December 1985 establishing the general statute of municipal civil servants) of the Law of 29 November 2006.

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

a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Luxembourg, the duty to provide reasonable accommodation is included in the law. It is defined in Article 20 of the general discrimination Law of 28 November 2006. This article also amended and completed Article 8 of the Law on Disabled Persons of 12 September 2003. The wording of the general discrimination Law of 28 November 2006 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, which amends 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.’

Article 5 of the UN Convention on the Rights of Persons with Disabilities is relevant in this context, given that Luxembourg adopted the convention in the Law of 28 July 2011.

A mandatory duty to provide reasonable accommodation 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 all employers, both private and public.

b) Practice

Such a burden would not be considered disproportionate when sufficiently remedied by the financial support measures contained in Article 26 of the grand-ducal regulation of 7 October 2004.

Article 26 of the grand-ducal regulation of 7 October 2004 provides for financial measures to support the adjustment of working environments and access to a place of work, for the purchase of professional equipment and for reimbursements of transport costs to the workplace.

Only people who have a 30 % disability and have been officially recognised as such are entitled to claim a reasonable accommodation. The provision applies to both private and public employers.

Article 13 of the Law on Disabled Persons of 12 September 2003 has been amended and now provides that any loan must not be dependent upon or reduced by the fact that a disabled person is paid some social benefits.

There is no available information or case law about the disproportionate burden in cases where there is no public support to cover costs.

c) Definition of disability and non-discrimination protection

The definition of a disability for the purposes of claiming a reasonable accommodation is more restrictive than for claiming protection from non-discrimination in general, as only people who have a 30 % disability and have been officially recognised as such are entitled to claim under the duty to provide reasonable accommodation.

d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Luxembourg, there is a limited duty to provide reasonable accommodation for people with disabilities outside employment.

Article 2-5 of the Law of 15 July 2011 on access to school and professional qualifications of pupils with special educational needs provides for a reasonable accommodation to be made in school. However, the law makes no reference to 'disproportionate burden' and for the moment no case law exists in that respect.

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In Luxembourg, failure to meet the duty of reasonable accommodation does not count as discrimination.

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

The comments made in Parliament on the Law of 22 July 2008 concerning access for disabled persons with trained dogs indicates that refusing access to a disabled person with a trained dog to a building open to the public is indirect discrimination.

Neither the anti-discrimination Law of 28 November nor the Criminal Code provides a specific sanction in case of failure to provide reasonable accommodation. Sanctions would therefore only be administrative or civil sanctions in such cases.

f) Duties to provide reasonable accommodation in respect of other grounds

In Luxembourg, there is no duty to provide reasonable accommodation in respect of other grounds in the public and/or the private sector.

g) Accessibility of services, buildings and infrastructure

In Luxembourg, national law requires buildings and infrastructure available to the public to be designed and built in a disability-accessible way.

The Law of 29 March 2001 on accessibility of spaces open to the public, obliges public administrations to allow access to disabled persons by providing that newly built or refurbished buildings must 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. The current regulation targets places and buildings such as: schools and kindergartens, touristic sites, hospitals, religious buildings, prisons,

train and bus stations, public administration buildings, banks, parking places, toilets and telephone facilities.

In Luxembourg, national law does not contain a general duty to provide accessibility by anticipation for people with disabilities.

There is no provision in the national law concerning accessibility of services.

The Law of 22 July 2008 introduced measures for persons with disabilities, allowing for dogs assisting disabled persons to enter any public space and any site open to the public.

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. Article 7 of the Law of 22 July 2008 specifies that criminal fines can be imposed on anyone who refuses access to a disabled person with a specially trained dog, for example, to their workplace, a training facility or a school.

#### h) Accessibility of public documents

There is no law that requires public services to translate documents into Braille, sign language or other accessible formats.

### **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)**

In Luxembourg, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

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

###### **a) Protection against discrimination**

In Luxembourg, according to Article 2 of the general discrimination Law of 28 November 2006, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of protection against discrimination.

###### **b) Liability for discrimination**

In Luxembourg, according to Article 2 of the general discrimination Law of 28 November 2006, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination.

##### **3.1.3 Private and public sector including public bodies (Article 3(1))**

###### **a) Protection against discrimination**

In Luxembourg, the personal scope of national law covers private and public sector including public bodies for the purpose of protection against discrimination.

The provisions can be found in Article 2 of the general discrimination Law of 28 November 2006 and Articles 1.2. and 2.2 of the public-sector Law of 29 November 2006.

###### **b) Liability for discrimination**

In Luxembourg, the personal scope of national law covers private and public sector including public bodies for the purpose of liability for discrimination.

The provisions can be found in Article 2 of the general discrimination Law of 28 November 2006 and Articles 1.2. and 2.2 of the public-sector Law of 29 November 2006.

#### **3.2 Material scope**

##### **3.2.1 Employment, self-employment and occupation**

In Luxembourg, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service and holding statutory office, for the five grounds.

The provisions can be found in Article 2(1) of the general discrimination Law of 28 November 2006 and Articles 1.2. and 2.2 of the public-sector Law of 29 November 2006.

### **3.2.2 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))**

In Luxembourg, national legislation prohibits discrimination in the following areas: 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, for the five grounds, in both private and public sectors, as described in the directives.

The provisions in relation to the private sector can be found in Article 2(1)(a) of the Law of 28 November 2006.

As far as public service is concerned, the areas in which discrimination is prohibited have not been named, so there is a difference of wording. However, as the anti-discrimination legislation covers the employment rules for civil servants and public employees, including trainees, under the public-sector Law of 29 November 2006, access to public service is also covered, although this is through a complicated reference to articles of the general statute of civil servants.

Nevertheless, access to public employment is expressly exempted from the Law of 28 November 2006. Access to public employment is covered by the public-sector Law of 29 November 2006 on public service, although the wording is so complicated that one has to refer to the Opinion of the Council of State of July 2006 on the draft bill in order to confirm the meaning of the aforementioned articles.

### **3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))**

In Luxembourg, national legislation prohibits discrimination in the following areas: working conditions including pay and dismissals, for all five grounds and for both private and public employment.

The provisions in relation to the private sector can be found in Article 2(1)(c) of the Law of 28 November 2006.

Working conditions in the public service are covered by the Law of 29 November 2006 through a complicated reference to articles of the general statute of civil servants, including such conditions as provided in the general statute of civil servants.

#### **3.2.3.1 Occupational pensions constituting part of pay**

Nothing has been provided for in the general discrimination law in relation to occupational pensions.

The Law of 8 June 1999<sup>8</sup> on occupational pensions provides that any provision of a pension rule that violates the principle of equal treatment between men and women and is likely to

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<sup>8</sup> Luxembourg, Law of 8 June 1999 on occupational pensions amending:

- a) amended Law of 4 December 1967 on income tax;
- b) amended Law of 24 May 1989 on the employment contract;
- c) amended Law of 18 May 1979 reforming the personal delegations;
- d) amended Law of 6 May 1974 establishing joint committees in the private sector and organizing the representation of employees in companies.

*(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,*

cause direct or indirect discrimination based on sex is void. The provision does not mention any other ground of discrimination.

#### **3.2.4 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))**

In Luxembourg, national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

The provisions can be found in Article 2(1)(b) of the Law of 28 November 2006 and apply to the private and public sector

#### **3.2.5 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))**

In Luxembourg, national legislation prohibits discrimination in the following areas: membership of, and involvement in workers' or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.

The provisions can be found in Article 2(1)(d) of the Law of 28 November 2006.

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

In Luxembourg, national legislation prohibits discrimination in the following area: social protection, including social security and healthcare as formulated in the Racial Equality Directive.

The provisions can be found in Article 2(1)(e) of the Law of 28 November 2006. Luxembourg law reaches further than Directive 2000/43 and covers all grounds including those covered also by Directive 2000/78/EC.

##### **3.2.6.1 Article 3.3 exception (Directive 2000/78)**

Article 3 of the general anti-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, from the scope of the anti-discrimination protection, for the grounds covered by Directive 2000/78/EC. Discrimination is, however, forbidden on grounds of racial or ethnic origin as far as such payments or social schemes are concerned.

#### **3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)**

In Luxembourg, national legislation prohibits discrimination in the following area: social advantages as formulated in the Racial Equality Directive.

The provisions can be found in Article 2(1)(f) of the Law of 28 November 2006. Luxembourg law reaches further than Directive 2000/43 and covers all grounds including those covered also by Directive 2000/78/EC.

In Luxembourg, the lack of definition of social advantages does not raise problems.

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*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).*

### **3.2.8 Education (Article 3(1)(g) Directive 2000/43)**

In Luxembourg, national legislation prohibits discrimination in the following area: education as formulated in the Racial Equality Directive.

The provisions can be found in Article 2(1)(g) of the Law of 28 November 2006. The grounds that are covered are religion and belief, age, disability, sexual orientation, race and ethnic origin.

Migrants benefit from anti-discrimination law enforcement and implementation in education. However, there is no case law.

In 2012, one of the priorities of the national action plan for integration and the fight against discrimination 2009-2014 was to guarantee equal access to the education (including for migrants) and to prevent academic failure.

#### **a) Pupils with disabilities**

In Luxembourg, the general approach to education for pupils with disabilities does not raise problems. Where possible, pupils with disabilities are educated in mainstream education. The most recent data available is for 2014-2015, which shows that there were approximately 1 350 pupils with special educational needs:<sup>9</sup>

- 58 % were fully integrated into regular education, thanks to the support of multidisciplinary teams;
- 25 % were educated in differentiated classes (special education classes in mainstream schools);
- 16 % were in separate structures.

#### **b) Trends and patterns regarding Roma pupils**

In Luxembourg, no specific patterns, such as segregation, exist in education regarding Roma pupils. This seems to be due to the small number of Roma.

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

In Luxembourg, national legislation prohibits discrimination in the following area: access to and supply of goods and services as formulated in the Racial Equality Directive.

The provisions can be found in Article 2(1)(h) of the Law of 28 November 2006. The grounds that are covered are religion and belief, age, disability, sexual orientation, race and ethnic origin.

Insurance contracts were taken out of the scope of Article 2(1) of the Law of 28 November 2006. 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'.

#### **3.2.9.1 Distinction between goods and services available publicly or privately**

In Luxembourg, national law does not 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).

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<sup>9</sup> Ministry of Education data, available at: <http://www.men.public.lu/fr/themes-transversaux/eleves-besoins-specifiques/index.html>.

The provisions can be found in Article 2(1)(h) of the Law of 28 November 2006.

### **3.2.10 Housing (Article 3(1)(h) Directive 2000/43)**

In Luxembourg, national legislation prohibits discrimination in the following area: housing as formulated in the Racial Equality Directive.

The provisions can be found in Article 2(1)(h) of the Law of 28 November 2006. The grounds that are covered are religion and belief, age, disability, sexual orientation, race and ethnic origin.

Within the framework strengthening the coordination between the Government and the municipalities, the Ministry of the Interior announced a temporary programme, planned over three years, to support residents in search of accommodation who are on the waiting list of the Luxembourg housing fund—this includes the beneficiaries of international protection.

Under the programme, the State will take care of the difference between the rent negotiated with the owner and the cost of the provision according to a defined scale. To exclude every risk of discrimination, the municipalities commit by contract to ensure that there is no distinction in the offer of housing for beneficiaries of international protection and for other residents in search of accommodation (housing) who are on the waiting list of the Luxembourg housing fund.

Migrants benefit equally with nationals from the enforcement and implementation of anti-discrimination law in relation to housing. There is no specific policy or case law regarding migrants.

#### **3.2.10.1 Trends and patterns regarding housing segregation for Roma**

In Luxembourg, there are no patterns of housing segregation and discrimination against the Roma.

This seems to be due to the small number of Roma.



## **4 EXCEPTIONS**

### **4.1 Genuine and determining occupational requirements (Article 4)**

In Luxembourg, national legislation provides for an exception for genuine and determining occupational requirements in accordance with the directive.

The provisions can be found in Article 18 (introducing Article L-252-1 (1) in the Labour Code) of the Law of 28 November 2006.

For the public sector, the relevant articles are: Article 1-3 (3) of the public-sector Law of 29 November 2006 on civil service, introducing Article 1bis (3) to the amended Law of 16 April 1979 establishing the general statute of state civil servants and Article 2-3(3) of the public-sector Law of 29 November 2006, introducing Article 1bis (3) in the amended Law of 24 December 1985 establishing the general statute of municipal civil servants.

There is no case law on this issue.

### **4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)**

In Luxembourg, Article 18 of the Law of 28 November 2006 introducing Article L-251-1 in the Labour Code and Article 1-3 (3) of the Law of 29 November 2006 (introducing Article 1bis(3) to the amended Law of 16 April 1979 establishing the general statute of state civil servants) provide for an exception for employers with an ethos based on religion or belief.

The wording of the exception is in line with the directive. There is no case law.

### **4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)**

In Luxembourg, national legislation does not provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78).

### **4.4 Nationality discrimination (Article 3(2))**

#### **a) Discrimination on the ground of nationality**

In Luxembourg, national law includes exceptions relating to difference of treatment based on nationality.

The relevant article is Article 2 (2) of the Law of 28 November 2006.

In Luxembourg, nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law.

#### **b) Relationship between nationality and 'race or ethnic origin'**

There is no case law on discrimination matters but it seems conceivable that discrimination based on nationality may be considered as 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.

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

##### **a) Benefits for married employees**

If employers provide certain benefits only to married couples and not to those in partnerships, this should not be considered as a form of discrimination forbidden by the anti-discrimination laws as Luxembourg introduced same-sex marriage in the Law of 4 July 2014. Such discrimination could be found to exist on the ground of sexual orientation, in respect of same-sex partnerships. However, if a man and a woman living in a registered partnership and not in marriage were denied such benefits, the issue would be a possible breach of the general principle of equality (or of equality based on gender), rather than discrimination based on Directive 2000/78/EC.

##### **b) Benefits for employees with opposite-sex partners**

The question remains open whether it would be considered as a form of 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 (Article 7(2) Directive 2000/78)**

In Luxembourg, there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78).

The relevant articles are: Article 18 (introducing Article L.252-3 of the Labour Code) of the general discrimination Law of 28 November 2006 and, Article 1-3 (2) of the public sector Law of 29 November 2006 on civil service, (introducing Article 1bis (2) in the amended Law of 16 April 1979, establishing the general statute of state civil servants) and Article 2-3 (2) of the public service sector Law of 29 November 2006, (introducing Article 1bis (2) in the amended Law of 24 December 1985, establishing the general statute of municipal civil servants).

According to these articles, provisions on the protection of health and safety at work or measures aimed to create or maintain provisions or facilities for safeguarding or promoting disabled people in the working environment are not considered as direct or indirect discrimination.

#### **4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)**

##### **4.7.1 Direct discrimination**

In Luxembourg, national law provides an exception for direct discrimination on the ground of age.

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 Directive 2000/78.

Article 1-3 (4) of the public-sector Law of 29 November 2006 on civil service, introducing Article 1bis (4) in the amended Law of 16 April 1979 establishing the general statute of state civil servants and Article 2-3 (4) of the public-sector Law of 29 November 2006, introducing Article 1bis (4) in the amended Law of 24 December 1985 establishing the general statute of municipal civil servants, provide for the same exception.

a) Justification of direct discrimination on the ground of age

In Luxembourg, it is possible, in specified circumstances, to justify direct discrimination on the ground of age, for example in employment policy and for the purposes of labour market and vocational training objectives.

The test should, in theory, be compliant with the ECJ case law of *Mangold* C-144/04 and *Kücükdeveci* C-555/07, but it will be up to the courts to decide in practice. For the moment, there is no case law in Luxembourg.

b) Permitted differences of treatment based on age

In Luxembourg, national law permits differences of treatment based on age for activities within the material scope of Directive 2000/78 only in general terms.

However, at 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 17 years;
- For the job of concierge, the minimum age is 25 years;
- For the job of firefighter, the applicant must be no more than 28 years old;
- For the job of judge the minimum age is 25 (Law of 7 March 1980);
- For the job of prosecutor, the minimum age is 25 (Law of 7 March 1980);
- For the job of notary, the minimum age is 25 (Law of 9 December 1976).

c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In Luxembourg, national law does not 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).

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

In Luxembourg, there are special conditions set by law for older or younger workers in order to promote their vocational integration, for persons with caring responsibilities and for members of staff delegations and health and safety representatives, to ensure their protection.

The Law of 23 March 2001 protects young workers (basically those under 18), children and adolescents as far as working conditions are concerned. This law has since been incorporated in the Labour Code, in Articles L. 341-1 to L. 345-2.

The Law of 31 July 2012, amending article L.523-1(2) of the Labour Code, introduces special conditions for unemployed people who are over 50 years old.

Article L-524-2 of the Labour Code provides for special conditions for the employment of applicants who are over 45 years old.

Article L 541-1 to 541-4 of the Labour Code provides aids for the recruitment of older unemployed workers and the long-term unemployed.

Under Article L.415-10 of the Labour Code, members of staff delegations and the representative for safety and health benefit from special protection against redundancy for the duration of their mandate.

#### 4.7.3 Minimum and maximum age requirements

In Luxembourg, there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

At the level of the municipalities, a grand-ducal regulation of 20 December 1990, which provides 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 17 years;
- For the job of concierge, the minimum age is 25 years;
- For the job of firefighter, the applicant must be no more than 28 years old;
- For the job of judge the minimum age is 25 (Law of 7 March 1980);
- For the job of prosecutor, the minimum age is 25 (Law of 7 March 1980);
- For the job of notary, the minimum age is 25 (Law of 9 December 1976).

#### 4.7.4 Retirement

##### a) State pension age

In Luxembourg, the state pension age is 65.

If an individual wishes to work longer, the pension cannot be deferred.

An individual can collect a pension and still work.

The relevant provisions are Articles 182 to 237 of the Social Security Code.

##### b) Occupational pension schemes

In Luxembourg, there is no normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

An individual can collect a pension and still work.

The Law on Occupational Pension Schemes of 8 June 1999<sup>10</sup> does not provide for a standard age at which to begin receiving such occupational pension payments. This law does not alter the other legal rules relating to pension age.

##### c) State imposed mandatory retirement ages

In Luxembourg, there is no state-imposed mandatory retirement age in the private sector.

In the public sector the retirement age is 65 years. Exceptionally, a civil servant can remain in office until the age of 68 on request.

For officers and non-commissioned officers in the army the retirement age is 55 years.

For the police forces and members of the gendarmerie the retirement age is 60 years.

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<sup>10</sup> Luxembourg, Law on occupational pension schemes amending different previous laws, 8 June 1999 (*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*) ; Mem. A 074 du 17.06.1999, p.1644.

The relevant provisions can be found in Article 2 along with Article 8 of the Law of 26 May 1954, governing the pensions of state civil servants.

d) Retirement ages imposed by employers

In Luxembourg, national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally.

e) Employment rights applicable to all workers irrespective of age

The employment rights provided by employment law apply to all workers, irrespective of age or sex, origin, religion, belief, sexual orientation, race or ethnicity and disability.

f) Compliance of national law with CJEU case law

In Luxembourg, national legislation should be in line with the CJEU case law on age regarding compulsory retirement, however, there is no case law in Luxembourg as yet.

#### **4.7.4 Redundancy**

a) Age and seniority taken into account for redundancy selection

In Luxembourg, national law does not permit age or seniority to be taken into account in selecting workers for redundancy.

b) Age taken into account for redundancy compensation

The law does not provide for special redundancy compensation due to age.

In Luxembourg, Article L-124-6 and 124-12 of the labour Law of 31 July 2006 provides compensation for redundancy.

Article L.124-7 (1) of the Labour Law grants a severance pay to employees who have been in the service of the same employer for a minimum of five years, but this compensation will not be paid to them if they can benefit from a normal old-age pension.

Consequently, this measure deprives certain workers of the right to compensation for redundancy, only for the reason that they can claim a normal old-age pension.

#### **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)**

In Luxembourg, national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

#### **4.9 Any other exceptions**

In Luxembourg, other exceptions to the prohibition of discrimination (on any ground) provided in national law are the following:

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 such persons.

Also, the general discrimination 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. 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) Scope for positive action measures**

In Luxembourg, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is permitted in national law.

As far as employment is concerned, the provisions relating to positive action can be found in:

- Article 18 (introducing Article 252-3 in the Labour Code) of the Law of 28 November 2006 which provides that:  
'In order to ensure full equality in practice the principle of equal treatment does not prevent the maintaining or adoption of specific measures to prevent or compensate for disadvantages linked to one of the grounds mentioned in Article L-251-1 paragraph (1)';
- Article: 1-3 (2) (introducing Article 1bis (2) in the amended Law of 16 April 1979 establishing the general statute of state civil servants;
- Article 2-3 (2) (introducing Article 1bis (2) in the amended Law of 24 December 1985 establishing the general statute of municipal civil servants) of the Law of 29 November 2006, which provides that:  
'In order to ensure full equality in practice the principle of equal treatment does not prevent the maintaining or adoption of specific measures to prevent or compensate for disadvantages linked to one of the grounds mentioned in section 1'.

There are no provisions in the law regarding positive action outside the field of employment.

### **b) Main positive action measures in place on national level**

A minimum proportion of 5 % of public sector employees must be disabled workers.

For the private sector, employers with 25 employees must employ one disabled worker; the proportion of disabled workers must be 2 % for 50 employees and 4 % for 300 employees. There are no public statistics available for 2016. In 2015, 3 892 disabled workers were employed in either the private sector, the public sector (31 %) or sheltered workshops (32 %).

According to Article 12 of the Law of 12 September 2003 on disabled persons, if a private sector employer refuses to hire the required number of disabled people, a compensation tax of 50 % of the minimum social salary has to be paid every month to the Treasury by the employer.

The integration of migrants in the labour market is a priority. To promote the employability of migrants an information and orientation plan has been put in place.

## 6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

In Luxembourg, the following procedures exist for enforcing the principle of equal treatment: judicial and alternative dispute resolution such as mediation.

An individual may, acting alone, lodge a criminal complaint in court. However, the state prosecutor will decide whether it is worthwhile proceeding with the case (Article 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, victims of discrimination may not use a supplementary private prosecution, but they can raise a private prosecution following a decision by the state prosecutor to refuse to prosecute the case. Finding evidence is a crucial problem, which may hinder the proper prosecution of the author of discrimination.

The victim may also apply directly to the examining judge (*juge d'instruction*) if he or 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. Often the judge will require that the claimant pay a guarantee.

The victim may also claim damages in a civil court based on the criminal law. In this context the victim can use the sharing of the burden-of-proof mechanism.

Complaints of discrimination at work can also be presented to the labour court. According to the general discrimination Law of 28 November 2006, 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 (*l'Inspection du Travail et des Mines*), is competent to oversee compliance with labour law regulations. The Inspectorate was also given the role of a watchdog in relation to anti-discrimination legislation under Directive 2000/78/EC.

According to Article 5 of the general discrimination law, victims of discrimination can also claim damages on the basis of the general discrimination law, outside the field of employment, before the civil or the administrative courts.

The Law of 6 May 1999 on penal mediation enables the state prosecutor to use mediation, where it appears that such a remedy is likely to ensure that compensation or damages will be 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. However, such a procedure is non-binding and must be used prior to any criminal investigation.

As far as the public sector is concerned, civil servants may bring a case to the administrative courts, if they feel that they have been discriminated against.

Article 33 of the general statute enables civil servants to make a complaint against the behaviour of another civil servant. Such a procedure is administrative, but can lead to the administrative court if the complaint is rejected by the upper hierarchy. Such a complaint can only lead to administrative or financial sanctions against the author, rather than to civil or penal sanctions.



The public-sector Law of 29 November 2006 on public service introduces the same anti-discrimination procedures as for private relations: a civil servant may make use of the criminal procedure or of civil proceedings in court or even complain against other civil servants and try to obtain disciplinary sanctions against a discriminator who is also a civil servant.

b) Barriers and other deterrents faced by litigants seeking redress

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 end of the contract, with the possibility of extending the deadline to one year when protesting in due time against the reasons for dismissal.

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

The proceedings before the criminal court 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 people without sufficient financial means to renounce such lawsuits. However, the legal aid system offers the potential to ask the Bar to provide a lawyer paid for by the state, due to the victim's low income.

There is currently no obligation for public authorities to make all public buildings fully accessible to disabled people. Only newly built or refurbished buildings have to be accessible to disabled people. There are no binding rules relating to the adoption of measures such as signed interpretation or the provision of information in Braille.

c) Number of discrimination cases brought to justice

In Luxembourg, there are no available statistics on the number of cases related to discrimination brought to justice.

d) Registration of discrimination cases by national courts

In Luxembourg, discrimination cases are not registered as such by national courts.

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

a) Engaging on behalf of victims of discrimination (representing them)

In Luxembourg, associations/organisations/trade unions are not entitled to act on behalf of victims of discrimination.

b) Engaging in support of victims of discrimination

In Luxembourg, associations/organisations/trade unions are entitled to act in support of victims of discrimination.

According to Article 7 of the general discrimination Law of 28 November 2006, associations that are recognised by the Ministry of Justice can exercise before the law the rights given to victims of discrimination if some damage has been made to the cause that they promote.

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

- the fight against discrimination must be one of their statutory goals;
- they must have legally existed for 5 years prior to the facts under consideration.

Such associations may assist (for example by giving legal advice) a victim of discrimination before civil, criminal and administrative courts, if some damage has been made to the cause that they promote.

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

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

According to Article 18 of the general discrimination Law of 28 November 2006 introducing Article L-253-4 in the Labour Code, labour unions that have general national representation or representation in one particularly important sector of the economy are entitled to intervene in actions arising from a collective agreement if the action is instigated by a person bound by the collective agreement and if the solution of the dispute can present a collective interest for its members.

#### c) Actio popularis

In Luxembourg, national law allows associations / organisations / trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (actio popularis).

Associations recognised by the Ministry of Justice can exercise before administrative and civil courts the rights recognised to a victim of discrimination if some direct or indirect damage has been made to the cause that they promote.

The provisions can be found in Articles 7 and 18 (introducing Article 253-4 in the Labour Code) of the Law of 28 November 2006, Article 1-6 (introducing Article 36(a) in the amended Law of 16 April 1979 establishing the general statute of state civil servants) and Article 2-6 (introducing Article 47(a) in the amended Law of 24 December 1985 establishing the general statute of municipal civil servants) of the Law of 29 November 2006.

Any kind of proceedings is open to such associations, without any difference of standing.

Associations may ask for all remedies that are provided for by the law to be applied, such as redress in the 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.

So far there has been no case where these provisions have been used in practice by associations and NGOs.

#### d) Class action

In Luxembourg, national law does not allow associations / organisations / trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

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

In Luxembourg, national law requires a shift of the burden of proof from the complainant to the respondent.

Article 5 of the general discrimination Law of 28 November 2006 has introduced the mechanism of the shifting of the burden of proof in civil and administrative procedures in the same way as provided for by the directives.

In a case from 11 December 2003, the labour court decided that according to Article L.244-3, concerning the burden of proof:

'As soon as a person who considers himself hurt by the non-compliance towards him/her with the principle of the equal treatment, establishes facts which allow the presumption of the existence of direct or indirect discrimination, the defendant must prove that there was no violation of the principle of equal treatment.'

No difference is made between different types of discrimination, so no criteria may be determined.

The shifting of the burden of proof is excluded from 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)**

In Luxembourg, there are legal measures of protection against victimisation.

Articles 4 and 18 (introducing Article L-253-1 of the Labour Code) of the general discrimination Law of 28 November 2006 introduce a protection mechanism against victimisation and cover the full material scope of both directives for all grounds.

The same protection mechanism applies to civil servants, according to Articles 1.7 and 2.7 of the public-sector Law of 29 November 2006 on public service.

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

a) Applicable sanctions in cases of discrimination – in law and in practice

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

According to Article 456, if the discrimination is 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 EUR 250 to 37 500, 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 of discrimination may be punished by the prohibition of exercising certain rights as provided by Article 24 of the Criminal 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 both non-profit and profit-making associations.

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 their reinstatement in their workplace at the labour court. Summary proceedings (*procedure en référé*) may be used in such circumstances.

The victim can also claim damages according to the general principles of civil law.

b) Ceiling and amount of compensation

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

c) Assessment of the sanctions

As there is no existing case law it is difficult to say if the available sanctions are effective, proportionate and dissuasive.

## **7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)**

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The equality body was created by the general discrimination Law of 28 November 2006, and is called the Centre for Equal Treatment, *Centre pour l'Égalité de Traitement* (CET). Its remit relates to all grounds covered by both directives.

The CET publishes reports, issues opinions and recommendations, conducts surveys on all questions linked to discrimination and provides information and assistance to victims of discrimination.

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

The public-sector Law of 29 November 2006 deems the Centre for Equal Treatment to be the competent body for discrimination matters relating to civil servants (Article 1-4).

- b) Status of the designated body/bodies – general independence

According to Article 11 of the Law of 28 November 2006, the CET is governed by a body of five members, including a chairperson, who are appointed for five years by the Grand Duke on the nomination of the Parliament (*Chambre des Députés*) according to their skills in anti-discrimination matters. Once a year, a report must be submitted to the Government and to Parliament.

Funding comes from the general state budget; in 2016 the funding amounted to EUR 87 000. The Centre for Equal Treatment has two employees. There has been no discussion on increasing financial support for the CET.

According to Article 9 of the Law of the 28 November 2008, the CET carries out its missions independently, and its purpose is to promote, analyse and monitor equal treatment between all persons without discrimination on the basis of race, ethnic origin, sex, sexual orientation, religion or beliefs, disability or age.

- c) Grounds covered by the designated body/bodies

The designated body has a mandate to deal with the grounds of race, ethnic origin, gender, religion or belief, disability, age and sexual orientation. It can also deal with discrimination against migrants, but they are not a priority issue.

- d) Competences of the designated body/bodies – and their independent exercise

The CET may provide assistance to victims by advising and signposting them in order to inform them on their rights and the legislation – including the available procedures and case law.

According to Article 10 of the Law 28 November 2006, the centre may also publish independent reports and opinions, give recommendations and conduct independent surveys on issues relating to discrimination.

- e) Legal standing of the designated body/bodies

In Luxembourg, the designated body has no legal standing to bring discrimination complaints (on behalf or not of identified victim(s)) or to intervene in legal cases concerning discrimination.

f) Quasi-judicial competences

In Luxembourg, the body 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 options to appeal to any superior institution.

g) Registration by the body/bodies of complaints and decisions

In Luxembourg, the equality body registers the number of complaints, recommendations and cases solved (through mediation or advice) by ground, field, type of discrimination, etc. These data are available to the public. In 2016 the number of registered cases decreased in comparison with 2015.

In 2016 the centre registered 115 new cases. The grounds were: age (6), religion (7), multiple discrimination (4), sexual orientation (4), gender (22), disability (34), race or ethnic origin (24), and other (14).

The incoming files are divided into one of five fields even if they are not a discrimination case:

- access to and supply of goods and services that are available to the public, including housing: 40 cases (34.8 %);
- employment: 31 cases (27 %)
- education: 9 cases (7.8 %);
- social protection, including social security and healthcare: 2 cases (1.7 %);
- others: 33 cases (28.7 %).

The results of the 115 cases were the following:

- 2 cases: no right of intervention;
- 10 cases: no element of discrimination;
- 13 cases: in process;
- 25 cases: withdrawal;
- 65: resolved/advice/orientation.

h) Roma and Travellers

Due to the small number of Roma it is not a priority issue.

## **8 IMPLEMENTATION ISSUES**

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

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

On 28 March 2012, Mrs Marie-Josée Jacobs, Minister for Family and Integration announced a five-year action plan for the implementation of the CRPD by the Luxembourg Government. One of the key points of the plan is awareness raising of the situation and needs of people with disabilities.

The other key points of the plan are:

- accessibility;
- freedom of expression and opinion and access to information;
- work and employment;
- school and education;
- transport and mobility;
- autonomy and inclusion;
- equal recognition before the law.

- b) Measures 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)

In 2016 (as in 2015), the Centre for Equal Treatment in collaboration with the CCDH (Consultative Commission on Human Rights) and Info-Handicap organised empowerment meetings with experts on the Convention on the Rights of Persons with Disabilities.

The third series of meetings took place on 21 April, 3 and 5 May 2016 and was dedicated to equality and non-discrimination, equal recognition before the law, independent living and being included in the community, personal mobility, respect for privacy and respect for home and the family.

The fourth series of meetings took place on 11 and 25 October and 7 November 2016 and was dedicated to accessibility and freedom of expression and opinion, and access to information.

- c) Measures 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)

A diversity symposium, 'How to approach the wage difference in your diversity approach (initiative)', organised by IMS (Inspiring More Sustainability) with the participation of the CET, was held at the headquarters of Deloitte Luxembourg.

A conference on addressing LGBT in the workplace was organised by IMS, the diversity charter Luxembourg and the BGL BNP Paribas bank.

A conference entitled 'Instructions for use: professional inclusion and retention in the employment of the people with a handicap,' was organised by Info-Handicap at the Luxembourg Chamber of Commerce.

- d) Addressing the situation of Roma and Travellers

There are no specific actions and special strategies targeted at Roma and Travellers. Luxembourg (both the state and courts) applies the general non-discrimination criteria provided by the legislation to the Roma and Travellers.

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

### **a) Mechanisms**

The Labour Inspectorate (Inspection du Travail et des Mines) has the power to control the application of employment law, including the anti-discrimination provisions of the general discrimination Law of 28 November 2006.

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

### **b) Rules contrary to the principle of equality**

No such laws or regulations could be identified by the author of this report.



## **9 COORDINATION AT NATIONAL LEVEL**

The Minister for Family is generally in charge of anti-discrimination policies. However, the Ministry of Labour and Employment is in charge of the correct use of employment law, through the Labour Inspectorate. The Minister for Family is also in charge of putting into practice the running of the Centre for Equal Treatment.

The Ministry of Family's national action plan for integration and the fight against discrimination was finalised in November 2010 and made public in April 2011.

Spanning a five-year period, the action plan was based on the 11 guiding principles of European integration. The principles highlight the importance of a global approach to integration. In order to coordinate the commitment and efforts of the different ministries in the field of integration, future Government action plans must be based on the main strategic principles set out in this plan.

The multiannual action plan of integration and fight against discrimination was suspended due to the high amount of applicants for international protection. Given that the context integration has changed, the new challenges will be incorporated in the next multiannual action plan, the finalisation of which is planned for 2017.

## **10 CURRENT BEST PRACTICES**

- Five-year action plan for the implementation of the CRPD by the Luxembourg Government.

## **11 SENSITIVE OR CONTROVERSIAL ISSUES**

### **11.1 Potential breaches of the directives (if any)**

In Luxembourg, only people who have a 30 % disability and have been officially recognised as such are entitled to claim the reasonable accommodation duty. The provision applies to both private and public employers.

This might not be compatible with the CJEU's approach to the definition of disability, which seems broader and more flexible.

Insurance contracts were taken out of the scope of Article 2§1 of the Law of 28 November 2006. 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'.

### **11.2 Other issues of concern**

There is still only very little case law on discrimination in courts. This means that victims of discrimination find it very hard to bring a case in court. There may be different explanations for this phenomenon: the victims do not have the financial means and many people are still unaware of the anti-discrimination laws.

Although the Law of 28 November 2006 underlines the full independence of the Centre for Equal Treatment, its independence may theoretically be restricted by the fact that the Government alone decides on the budget that it will allocate to the centre every year. In practice, the centre's budget has decreased in the last few years.

The CET does not have the ability to support victims in court or to submit claims to the courts directly. In addition, it has no quasi-judicial powers and its recommendations are not binding. For the past few years, the CET has asked the Government to enforce its investigatory powers, as the centre has no power to force institutions, private persons or employers to collaborate with its investigations.

## **12 LATEST DEVELOPMENTS IN 2016**

### **12.1 Legislative amendments**

There were no legislative amendments in 2016.

### **12.2 Case law**

No relevant case law could be identified in 2016.

## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country:** Luxembourg  
**Date:** 1 January 2017

<b>Title of legislation (including amending legislation)</b>	<p>Law of 28 November 2006</p> <ol style="list-style-type: none"> <li>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;</li> <li>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;</li> <li>3. amending the Labour Code and introducing in Book II a new title V on equality of treatment in the area of employment and work;</li> <li>4. amending articles 454 and 455 of the Criminal Code;</li> <li>5. amending the law of 12 September 2003 on disabled persons.</li> </ol> <p>Abbreviation: general anti-discrimination law  Date of adoption: 28 November 2006  Entry into force: 9 December 2006  Latest amendments: Law of 13 May 2008  Grounds covered: religion or belief, disability, age, sexual orientation, race or ethnic origin</p> <p>Civil/administrative/criminal law</p> <p>Material scope: Full scope of both directives</p> <p>Principal content: Prohibition of direct and indirect discrimination, of harassment and instruction to discriminate, provisions of defence of rights and victimisation, creation of an equality body</p>
<b>Title of legislation (including amending legislation)</b>	<p>Law of 29 November 2006</p> <ol style="list-style-type: none"> <li>1. the amended law of 16 April 1979 establishing the general statute of state civil servants</li> <li>2. the amended law of 24 December 1985 establishing the general statute of municipal civil servants.</li> </ol> <p>Abbreviation: public sector law  Date of adoption: 29 November 2006  Entry into force: 1 January 2007  Latest amendments: None  <a href="http://www.legilux.public.lu/leg/a/archives/2006/0207/a207.pdf#">http://www.legilux.public.lu/leg/a/archives/2006/0207/a207.pdf#</a>  Grounds covered: religion or belief, disability, age, sexual orientation, race or ethnic origin</p> <p>Administrative law</p> <p>Material scope: Public employment</p> <p>Principal content: Prohibition of direct and indirect discrimination, of harassment and instruction to discriminate, provisions of defence of rights and victimisation</p>
<b>Title of legislation (including amending legislation)</b>	<p>Title of the law: Law of 19 July 1997 completing the Criminal Code by amending the incrimination of racism and by introducing incrimination of revisionism and other actions based on illegal discriminations.<sup>11</sup></p> <p>Abbreviation:  Date of adoption: 19 July 1997  Entry into force 10 August 1997  Latest amendments: Law of 28 November 2006</p>

<sup>11</sup> 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.

	<a href="http://www.legilux.public.lu/leg/a/archives/1997/0540708/1997A16801.html">http://www.legilux.public.lu/leg/a/archives/1997/0540708/1997A16801.html</a> Grounds covered: 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 Criminal law Material scope: Access to goods or services, employment Principal content: Individual and collective discrimination is forbidden
<b>Title of legislation (including amending legislation)</b>	Law of 12 September 2003 on disabled persons Abbreviation: Date of adoption: 12 September 2003 Entry into force 1 June 2004 Latest amendments: 26 May 2008 <a href="http://www.legilux.public.lu/leg/a/archives/2003/0144/2003A29381.html?highlight=">http://www.legilux.public.lu/leg/a/archives/2003/0144/2003A29381.html?highlight=</a> Grounds covered: Disability Civil/administrative law Material scope: employment Principal content: Obligation to employ disabled persons for employers and financial assistance for assisting people with disabilities
<b>Title of legislation (including amending legislation)</b>	Law of 15 July 2011 on access to school and professional qualifications of pupils with special educational needs amending a) the amended Law of 14 March 1973 creating institutes and differentiated educational services; b) the amended Law of 25 June 2004 organising secondary and technical education. Abbreviation: Date of adoption: 15 July 2011 Entry into force: school year 2011/2012 Latest amendments: None <a href="http://www.legilux.public.lu/leg/a/archives/2011/0150/a150.pdf">http://www.legilux.public.lu/leg/a/archives/2011/0150/a150.pdf</a> Grounds covered: Disability Administrative law Material scope: Education Principal content: Reasonable accommodation in school

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Luxembourg  
Date: 1 January 2017

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Day/month/year</b>	<b>Date of ratification (if not ratified please indicate) Day/month/year</b>	<b>Derogations/ reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
<b>European Convention on Human Rights (ECHR)</b>	4.11.1950	3.9.1953	No	Yes	Yes
<b>Protocol 12, ECHR</b>	4.11.2000	1.7.2006	No	Yes	Yes
<b>Revised European Social Charter</b>	11.2.1998	No	/	Ratified collective complaints protocol? No	/
<b>International Covenant on Civil and Political Rights</b>	26.11.1974	18.08.1983	No	Yes under the condition that the Covenant shall not consider any communications from an individual unless it has ascertained that the same matter is not being examined or has not already been examined under another procedure of international	No

				al investigation or settlement	
<b>Framework Convention for the Protection of National Minorities</b>	20.7.1995	No	/	/	No
<b>International Covenant on Economic, Social and Cultural Rights</b>	26.11.1974	18.8.1983	No	Yes	No
<b>Convention on the Elimination of All Forms of Racial Discrimination</b>	12.12.1967	1.5.1978	No	Yes	No
<b>Convention on the Elimination of Discrimination Against Women</b>	17.7.1980	2.2.1989	No	Yes	No
<b>ILO Convention No. 111 on Discrimination</b>	25.6.1958	22.12.2000	No	Yes	Yes
<b>Convention on the Rights of the Child</b>	21.3.1990	7.3.1994	No	Yes	Some articles only
<b>Convention on the Rights of Persons with Disabilities</b>	30.7.2007	28.7.2011	No	Yes	Yes



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