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# Country report

## Gender equality



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# **Country report**

## **Gender equality**

How are EU rules transposed into  
national law?

## **Luxembourg**

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Reporting period 1 January 2017 – 31 December 2017

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## **1. Introduction**

### **1.1 Basic structure of the national legal system**

The jurisdictional system of Luxembourg consists of both a judicial and an administrative order. The Constitutional Court can be added to these.

Thus the judicial order consists of the Constitutional Court and the instances of the judicial order which are the Superior Court of Justice, the Appeal Court, the district courts and the tribunal of the justice of the peace.

The courts of the administrative order are the Administrative Court and the Administrative Tribunal.

Gender equality law is generally implemented by specific laws which modify existing laws or add specific legislation.

### **1.2 List of main legislation transposing and implementing Directives**

- Article 11(2) of the Luxembourg Constitution on equality between women and men;<sup>1</sup>
- Modified Law of 13 May 2008 on equal treatment between women and men in the labour market;<sup>2</sup>
- Modified Law of 8 September 2003 on domestic violence;<sup>3</sup>
- Modified Law of 21 December 2007 implementing Directive 2004/113;<sup>4</sup>
- Labour Code Articles L. 244-1 – L. 245-8 on equal treatment between women and men;<sup>5</sup>
- Law from 15 December 2016 modifying the Labour Code and Article 2 of the modified law from 21 December 2007 regulating the financial aspects of political parties.<sup>6</sup>

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<sup>1</sup> [http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/constitution\\_gdl.pdf](http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/constitution_gdl.pdf), accessed 20 March 2017.

<sup>2</sup> <http://www.legilux.public.lu/leg/a/archives/2008/0070/a070.pdf#page=2>, accessed 20 March 2017.

<sup>3</sup> <http://www.legilux.public.lu/leg/a/archives/2003/0148/a148.pdf#page=2>, accessed 20 March 2017.

<sup>4</sup> <http://www.legilux.public.lu/leg/a/archives/2007/0232/a232.pdf>, accessed 20 March 2017.

<sup>5</sup> [http://www.legilux.public.lu/leg/textescoordonnes/codes/code\\_travail/Code\\_du\\_Travail.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/code_travail/Code_du_Travail.pdf), accessed 20 March 2017.

<sup>6</sup> <http://legilux.public.lu/eli/etat/leg/loi/2007/12/21/n8/jo>, accessed 19 March 2017.



## **2. General legal framework**

### **2.1 Constitution**

2.1.1 Does your national Constitution prohibit sex discrimination?

Yes. Since July 2006, Article 11(2) of the Luxembourg Constitution stipulates that women and men are equal regarding rights and duties and that the State promotes the elimination of any obstacles in the field of equality between women and men.

2.1.2 Does the Constitution contain other Articles pertaining to equality between men and women?

No.

2.1.3 Can the Article(s) mentioned in the two previous questions be invoked in horizontal relations

Yes.

### **2.2 Equal treatment legislation**

2.2.1 Does your country have specific equal treatment legislation?

The laws transposing European Directives can be considered as being specific equal treatment legislation. There is no specific code on equal treatment, however.  
The laws are:

- Article 11(2) of the Luxembourg Constitution on equality between women and men;
- Grand Duchy Regulation from 10 July 1974 on equal pay;
- Modified Law of 13 May 2008 on equal treatment between women and men in the labour market;
- Modified Law of 8 September 2003 on domestic violence;
- Modified Law of 21 December 2007 implementing Directive 2004/113;
- Labour Code Articles L. 244-1 – L. 245-8 on equal treatment between women and men.<sup>7</sup>

All these laws exclusively deal with gender equality.

The Law of 28 November 2006 on equal treatment covers the other five grounds targeted by EU legislation.<sup>8</sup>

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<sup>7</sup> [www.legilux.lu](http://www.legilux.lu), accessed 20 March 2017.

<sup>8</sup> <http://www.legilux.public.lu/leg/a/archives/2006/0207/a207.pdf#page=2>, accessed 20 March 2017.

### **3. Implementation of central concepts**

#### **3.1 Sex/gender/transgender**

3.1.1 Are the terms gender/sex defined in your national legislation?

No.

3.1.2 Is discrimination due to gender reassignment explicitly prohibited in your national legislation?

No, with the exception of the word for word implementation of European Directives. Thus gender reassignment is not explicitly mentioned in any Luxembourg legislation.

#### **3.2 Direct sex discrimination**

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Luxembourg's legislation does reproduce European Directives word for word which means that it formally complies with European legislation.

In all the legislation mentioned under 1.2, direct discrimination is defined as: *where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation*. This is the case for the modified Law from 13 May 2008 (Art. 1) on equal treatment between women and men in the labour market and the modified Law from 21 December 2007 (Art. 1) implementing Directive 2004/113.

3.2.2 Are pregnancy and maternity discrimination explicitly prohibited in legislation as forms of direct sex discrimination?

Pregnancy and maternity discrimination are explicitly prohibited. Arts.- L. 238-4 – L. 331-1 of the Labour Code concern pregnant workers and workers who have recently given birth or are breastfeeding.

The provisions do comply with Article 2(2) of Directive 2006/54.

3.2.3 Are there specific difficulties in your country in applying the concept of direct sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant

It is difficult to identify specific difficulties as there is almost no case law on sex discrimination. No specific problem appeared by now regarding the concept of direct discrimination.

#### **3.3 Indirect sex discrimination**

3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Luxembourg's legislation reproduces European Directives word for word with regard to indirect sex discrimination which means that it formally complies with European legislation. Indirect and direct discrimination are dealt with in Art. L. 241-1 of the Labour Code. They are also specified in Art. 2 of the modified Law of 21 December 2007 on equal treatment between men and women in access to and the supply of good and services.

Indirect discrimination is defined as: *where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons*

*of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.*

3.3.2 Is statistical evidence used in your country in order to establish a presumption of indirect sex discrimination? Please provide some examples of cases, if available.

There is no available case law.

3.3.3 Is in your view the objective justification test applied correctly by national courts? Please provide some examples of cases, if available.

There is no available case law.

3.3.4 Are there specific difficulties in your country in applying the concept of indirect sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

It is difficult to identify specific difficulties as there is almost no case law on sex discrimination. Another problem is that case law is not widely accessible to the public.

### **3.4 Multiple discrimination and intersectional discrimination**

3.4.1 Is multiple discrimination – i.e. discrimination based on two or more grounds simultaneously – and/or intersectional discrimination – i.e. discrimination resulting from the interaction of grounds of discrimination which interact to produce a new and different type of discrimination - explicitly addressed in national legislation?

No. There are no proposals pending.

3.4.2 Is there any case law that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake)?

No.

### **3.5 Positive action**

3.5.1 Is positive action explicitly allowed in national legislation?

According to Article 11(2) of the Constitution, the State promotes the elimination of any obstacles in the field of equality between women and men. This means that positive actions are explicitly allowed.

Article L. 243-1 to L. 243-5 of the national Labour Code<sup>9</sup> concern positive actions. Positive actions are defined as concrete measures granting specific advantages in order to facilitate the exercise of a professional activity by the underrepresented sex or to prevent or compensate disadvantages in a professional career path. Positive action projects can relate to either one or more companies, or to a sector or an economic branch.

The Committee for positive actions, established by the Grand-ducal Regulation of 25 October 1999, assesses positive action projects introduced by companies from the private sector in order to attain public agreement.<sup>10</sup> This Committee is composed of representatives from the Ministries and also representatives from the Chambre de Commerce, the Chambre des Métiers (employers) and the Chambre des salariés

<sup>9</sup> <http://data.legilux.public.lu/file/eli-etat-leg-code-travail-20170324-fr-pdf.pdf> (pp. 138-140), accessed 6 November 2017.

<sup>10</sup> Annual Activities Report 2017 by the Ministry for Equal Treatment, p. 17.

(employees). Its mission is to give advice regarding each positive action project. The State subsidises the agreed private projects.

In 2017, five firms signed a Convention with the Ministry for Equal Treatment with the aim of participating in the programme for positive action. Three positive action plans have been elaborated, as agreed upon by the Ministry and they will be subsidised for two years. Six firms were rewarded for their positive action plans during the '2017 Ceremony of Positive Actions Awards' (16 November 2017).

It must be noted that the 2017 Activity Report by the Ministry for Equal Treatment presents a review of the positive action programme since 1999. During the period 1999-2017, 77 firms from the private sector have elaborated positive action plans. Since 2011, the programme has been extended to the public sector: 24 public administrations and 10 municipalities are currently participating. An evaluation programme has been commenced with the aim of measuring the impact and the effectiveness of the positive action projects. Moreover, the Luxembourg practice has been recognised as *good practice* by the European Commission and was discussed during a Conference in Brussels.<sup>11</sup>

Companies that wish to participate in a positive action programme have to supply indications on the composition of their board and executive committee as well as on the objectives set at those two levels to reach a better balance between women and men. There is no obligation to reach the goals fixed by the company. Positive actions are not focused on gender balance in decision-making, but must be implemented in order to improve gender equality in the participating company.

Companies that participate in the positive action programme are obliged to use the Logib-Lux software<sup>12</sup> in order to identify possible disparities in salary between women and men. However, companies are not obliged to reveal the results of the analysis.

The Labour Code also contains provisions that allow employers to obtain financial support when they employ people of the underrepresented sex. According to Article L. 242-1 the underrepresented sex in a profession is considered to be the sex whose representation is equal to or lower than 40 % of the total workforce in this occupation at the national level. Moreover, according to Article L. 242-3 employers may implement specific advantages in order to facilitate the activities of the workers of the underrepresented sex or to prevent or compensate disadvantages in their professional career path.

This complies with EU legislation.

3.5.2 Are there specific difficulties in your country in relation to positive action? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

Positive action is voluntary. The only difficulty which could occur is that the company doesn't receive the financial support in case of non-respect of the procedure as negotiated with the Government. As an example, if one part of the positive action is to provide an inhouse childcare service, the financial support will not be paid if no such service is offered at the date stated in the positive action plan. This never happened until now.

3.5.3 Has your country adopted measures that aim to improve the gender balance in company boards?

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<sup>11</sup> Annual Activities Report 2017 by the Ministry for Equal Treatment, p. 23-27.

<sup>12</sup> <http://www.luxembourg.public.lu/fr/actualites/2012/07/16-mega/index.html>.

In September 2014 the government adopted its strategy<sup>13</sup> on a better balance between men and women in decision-making. It contains nine measures in the economic sector. Most of the measures aim to encourage companies to set voluntary and measurable targets. The government will also establish a professional monitoring body to oversee the development of the situation.

Regarding the public sector, formal and transparent procedures have now been established for the appointment of members of the boards of public institutions and companies in which the government has an interest.

Moreover, the government is making real efforts in order to achieve its target of 40 % of the underrepresented sex on the boards of public institutions. For example, since 2015 the target has been achieved regarding the administrative boards of the three public research institutions (LISER, LIST and LIH), the University of Luxembourg and the National Fund for Research (FNR).

3.5.4 Has your country adopted other positive action measures to improve the gender balance in some fields, e.g. in political candidate lists or political bodies? If so, please describe these measures.

The financing of political parties is linked to the representation of women and men as candidates at the national and European level. This does not concern the local level.

Political parties have to assure a gender quota of 40 % on lists of candidates for national elections and a quota of 50 % for European elections. The sanction for non-compliance is a reduction in the public financial support accorded to the political party for the pre-electoral campaign. The first time the new law<sup>14</sup> will apply will be in 2018 for national elections.

Local elections took place on 8 October 2017. A large-scale mobilization campaign was organized in order to increase the number of female candidates for the elections.

This campaign was structured around four main aspects:

- The establishment of a special website '[votzegalite.lu/wieltegaliteit.lu](http://votzegalite.lu/wieltegaliteit.lu)';
- The organisation of six information and meeting evenings;
- Participation in 'open doors' organized by some 20 municipalities;
- The collection and the diffusion of testimonials regarding individual support from 47 well-known personalities in Luxembourg.

A total of 1 274 out of the 3 575 candidates were women, which increased the rate from 32 % in 2011 to 35.6 % in 2017. As a consequence, the percentage of women among the elected representatives increased from 22.2 % in 2011 to 24.85 % in 2017. Since 2017, 11 mayors out of a total of 102 are women, whereas 212 communal councilors out of 789 are women.<sup>15</sup>

## **3.6 Harassment and sexual harassment**

3.6.1 Is harassment explicitly prohibited in national legislation?

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<sup>13</sup> Strategy available at <http://www.mega.public.lu/fr/espace-presse/dossiers-presse/2014/prise-decision/strategie-prise-de-decision.pdf>, accessed 20 March 2017.

<sup>14</sup> [http://chd.lu/wps/PA\\_RoleDesAffaires/FTSByteServingServletImpl?path=/export/exped/sexpdata/Mag/161/679/166708.pdf](http://chd.lu/wps/PA_RoleDesAffaires/FTSByteServingServletImpl?path=/export/exped/sexpdata/Mag/161/679/166708.pdf), accessed 16 May 2017.

<sup>15</sup> Annual Activity Report 2017 by the Ministry for Equal Treatment (MEGA), p. 19.

Harassment and sexual harassment are part of the laws listed under 1.2. The definition of harassment is: *where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment*. This is, for example, the definition provided by Art. 1 of the modified Law of 13 May 2008 on equal treatment between women and men in the labour market.

The definition given for both forms of harassment is in compliance with the EU definition as it reproduces the EU definition word for word.

3.6.2 Please specify the scope of the prohibition on harassment (e.g. does it cover employment and access to goods and services; is it broader?).

Art. 2 of the modified Law of 21 December on equal treatment in the field of access to and the supply of goods and services reproduces the same wording as the law in the field of employment. This means that the scope is not reduced when it comes to employment and it also covers access to and the supply of goods and services.

3.6.3 Is sexual harassment explicitly prohibited in national legislation?

The prohibition of sexual harassment in the workplace was introduced at the national level in 2010.<sup>16</sup> Sexual harassment is defined in Art. L. 245-2 of the Labour Code. The definition of sexual harassment is: *any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment*. It is now specifically laid down in the law that employers have to abstain from any sexual harassment in employment relationships. Employers also have to ensure that any reported act of sexual harassment ceases immediately and they have to take preventive measures to ensure the protection and the dignity of their employees. In the case of *L'Estrade c/Barthelemy c/Etat*,<sup>17</sup> the Supreme Court of Justice (*Cour Supérieure de Justice*) recognised the employer's responsibility for acts by his manager, arguing that the manager was the physical representative of the employer. In *Rausch c/Luxair*<sup>18</sup> which was decided by the Supreme Court of Justice it was held that the employer is not obliged to start a formal investigation before suspending a worker who is accused of having engaged in sexual harassment.

3.6.4 Please specify the scope of the prohibition on sexual harassment (e.g. does it cover employment and access to goods and services; is it broader?).

The modified law of 21 December 2007<sup>19</sup> implementing Directive 2004/113 prohibits sexual harassment in the field of access to and the supply of goods and services.

3.6.5 Does national legislation specify that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of or submission to such conduct amounts to discrimination (see Article 2(2)(a) of Directive 2006/54)?

Yes, harassment is the object of Art.L.241-1 of the Labour code and sexual harassment of Art.L.245-2 of the same code.<sup>20</sup>

### 3.7 Instruction to discriminate

<sup>16</sup> Labour Code Articles L. 244-1 – L. 245-8.

<sup>17</sup> C.S.J. 30 January 2003 No. 26327.

<sup>18</sup> C.S.J. 29 June 2006 No. 30051.

<sup>19</sup> <http://legilux.public.lu/eli/etat/leg/loi/2007/12/21/n1/jo>, accessed 27 June 2017.

<sup>20</sup> <http://data.legilux.public.lu/file/eli-etat-leg-code-travail-20170324-fr-pdf.pdf>, accessed 27 June 2017.

3.7.1 Is an instruction to discriminate explicitly prohibited in national legislation?

An instruction to discriminate on the ground of gender constitutes discrimination. Provisions reproducing EU law have been implemented in all the laws on equal treatment between women and men. In this regard, Luxembourg's law complies with EU law. An instruction to discriminate is included in Art. L. 241-1 of the Labour Code and Art. 2 of the modified Law of 21 December 2007 on equal treatment between men and women in access to and the supply of goods and services.

3.7.2 Are there specific difficulties in your country in relation to the concept of instruction to discriminate? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

As no case law has been published, it is impossible to answer this question.

**3.8 Other forms of discrimination**

Are any other forms of discrimination prohibited in national law, such as discrimination by association or assumed discrimination?

No.

## **4. Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54)**

### **4.1 Equal pay**

#### **4.1.1 Is the principle of equal pay for equal work or work of equal value implemented in national legislation?**

On 10 July 1974 equal pay for women and men for the same work or for work to which an equal value is attributed was introduced by a grand-ducal regulation.<sup>21</sup> Remuneration includes wages or the basic or minimum ordinary salary and all other direct or indirect advantages and benefits, in cash or in kind, paid by the employer. Since then provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay have been declared null and void. The highest remuneration is automatically substituted when pay is not equal.

Bill No. 6892, adopted on 24 November 2016 introduces amendments concerning wage equality. The main amendment is the abrogation of the grand-ducal regulation and its integration in the Labour Code. The new law does not limit itself to a pure and simple transcription of the grand-ducal Regulation of 10 July 1974; rather it adds components of the notion of equal value by integrating the obligation to have common criteria for women and men in job classification systems. Financial sanctions range from EUR 251 to EUR 25 000.

According to the amended Law of 12 June 1965 on collective agreements, the social partners have to apply the principle of equal pay between women and men in any collective agreements.

The question concerning the direct effect of European legislation has been dealt with by the Luxembourg courts. The first judgment substantially adopted the terms of the *Defrenne II* judgment<sup>22</sup> by the CJEU by stating that Article 119 of the EEC Treaty (now 157 TFEU) directly applies without European or national measures being necessary for its implementation.<sup>23</sup> The Court had to determine whether a household premium constituted an advantage paid directly or indirectly to employees. The Court decided that the premium was to be considered as remuneration within the meaning of Article 119 of the EEC Treaty (now 157 TFEU), ILO Convention No. 100 and the grand-ducal regulation from 1974. This judgment reinforced the grand-ducal regulation of 1974, which ranks lower in the legal hierarchy.

#### **4.1.2 Is the concept of pay defined in national legislation?**

According to Art. L. 221-1 of the Labour Code pay includes, alongside remuneration in cash, other possible advantages and remunerations, such as bonuses, percentages, discounts, free housing and any other benefits of the same nature.

This Article does comply with the definition of Article 157(2) TFEU.

#### **4.1.3 Does national law explicitly implement Article 4 of Recast Directive 2006/54 (prohibition of direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration)?**

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<sup>21</sup> *Règlement grand-ducal du 10 juillet 1974 relatif à l'égalité de rémunération entre les hommes et les femmes*, <http://www.legilux.public.lu/leg/a/archives/1974/0056/a056.pdf#page=3>, accessed 8 June 2016.

<sup>22</sup> Case C-43/75 *Defrenne v Société Anonyme Belge de Navigation Aérienne (SABENA)* [1976] ECR 455, [1976] 2 CMLR 98 a.k.a. *Defrenne II*.

<sup>23</sup> *Bank M.M. Warburg-Brinckmann Wirtz International c/ Pagani*, judgment delivered by the *Cour d'Appel de Luxembourg* (Court of Appeal of Luxembourg) on 21 April 1982.



Yes. Since the adoption of a new law on 15 December 2016, Article 4 of Recast Directive is implemented by Chapter V of title II in Book II of the Labour Code.<sup>24</sup>

#### 4.1.4 Is a comparator required in national law as regards equal pay?

On 28 March 1991, the Court of Appeal of Luxembourg decided in *Laroche c/ Administration communale de Pétange* that it is sufficient to establish a difference in wages between female and male workers engaged in the same cleaning service. The employer had argued that the difference in wages between female and male employees was justified by the fact that male workers were likely to be engaged in more strenuous tasks than female workers. Since this decision there has been no further significant case law on this issue.

A comparator is not required in national law.

#### 4.1.5 Does national law lay down parameters for establishing the equal value of the work performed, such as the nature of the work, training and working conditions?

No.

#### 4.1.6 Does national (case) law address wage transparency in any way?

No.

#### 4.1.7 Is the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency applied in your country? If so, how?

According to Art. L. 414-4 of the Labour Code employers have to provide information about the company to the staff delegation. Equal pay is not specifically mentioned.

The Ministry of Equal Opportunities offers an online tool to companies which want to analyse their situation regarding equal pay. The *Logib-Lux*<sup>25</sup> is a calculating instrument based on Excel, which allows the causes of disparities regarding remuneration between men and women in a company to be identified. After obtaining the relevant data, the company receives a report on the remuneration structures within the company, the causes thereof are identified and methods of improving equal pay are indicated.

#### 4.1.8 Which justifications for pay differences are allowed in legislation and/or case law?

The law from 15 December 2016 on 1. modification of the Labour code; 2. Modification of article 2 of the modified law from 21 December 2007 regulating the financing of political parties<sup>26</sup> does not allow any differences.

#### 4.1.9 Are there specific difficulties related to the application of the principle of equal pay for equal work and work of equal value in practice? For example in case of out-sourcing?

No.

## 4.2 Access to work and working conditions

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[http://chd.lu/wps/PA\\_RoleDesAffaires/FTSByteServingServletImpl?path=/export/exped/sexpdata/Mag/161/679/166708.pdf](http://chd.lu/wps/PA_RoleDesAffaires/FTSByteServingServletImpl?path=/export/exped/sexpdata/Mag/161/679/166708.pdf), accessed 16 May 2017.

<sup>25</sup> <http://www.luxembourg.public.lu/fr/actualites/2012/07/16-mega/index.html>, accessed 8 June 2016.

<sup>26</sup> [http://chd.lu/wps/PA\\_RoleDesAffaires/FTSByteServingServletImpl?path=/export/exped/sexpdata/Mag/161/679/166708.pdf](http://chd.lu/wps/PA_RoleDesAffaires/FTSByteServingServletImpl?path=/export/exped/sexpdata/Mag/161/679/166708.pdf), accessed 27 June 2017.

- 4.2.1 Is the personal scope in relation to access to employment, vocational training, working conditions etc. defined in national law (see Article 14 of Directive 2006/54)?

Art. L. 241-2 of the Labour Code literally reproduces Article 14 of Directive 2006/54.

Luxembourg's legislation does not define what a worker is. The situation of subordination is the criterion applied by the courts. According to Art. L. 127-2, every person, except for state or public employees, are employed by an employer to provide paid services which are carried out in a situation of subordination which is the criterion to be applied by the courts.<sup>27</sup>

- 4.2.2 Is the material scope in relation to (access to) employment defined in national law (see Article 14(1) of the Recast Directive 2006/54)?

Art. L. 241-2 of the Labour Code literally reproduces Article 14(1) of Directive 2006/4.

- 4.2.3 Has the exception on occupational activities been implemented into national law (see Article 14(2) of Recast Directive 2006/54)?

Art. L. 241-3 of the Labour Code literally reproduces Article 14(2) of Directive 2006/54. The State has not published an assessment of the occupational activities referred to in Article 14(2) of Directive 2006/54.

- 4.2.4 Has the exception on protection for women, in particular as regards pregnancy and maternity, been implemented in national law (see Article 28(1) of Recast Directive 2006/54)?

Yes. For example, Art. 3(1) of the modified Law from 13 May 2008 on equal treatment between women and men in the labour market states that measures which relate to the protection of pregnancy and maternity do not constitute discrimination, but are a condition for the realization of equal treatment between men and women.

- 4.2.5 Are there particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, working conditions etc.?

No.

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<sup>27</sup> For example: Appeal Court 5 June 2014 (No. 39339).

## **5. Pregnancy, maternity, and leave related to work-life balance (Directive 92/85, relevant provisions of the Directives 2006/54 and 2010/18)**

### **5.1 Pregnancy and maternity protection**

#### **5.1.1 Does national law define a pregnant worker?**

Art. L. 331-1 defines a pregnant worker as a female worker who has informed her employer of her pregnancy. She has to produce a medical certificate attesting to her pregnancy. The information must be sent by registered mail. This definition is consistent with the definition in Article 2 of Directive 92/85.

#### **5.1.2 Are the protective measures mentioned in the Articles 4-7 of Directive 92/85 implemented in national law?**

Art. L.334-1 - L. 334-4 of the Labour Code implement Articles 4 and 5 of Directive 92/85. They cover all the articles of the Directive.

Art. L. 333-1 - 333-4 of the Labour Code implement Article 7 of Directive 92/85. Art. 333-4 defines night work as work between 10 pm and 6 am.

The implementation is correct.

#### **5.1.3 Is dismissal prohibited in national law from the beginning of the pregnancy until the end of the maternity leave (see Article 10(1) of Directive 92/85)?**

According to Art. L. 337-1 of the Labour Code, the dismissal of a pregnant woman is forbidden until 12 weeks after the date of confinement. However, in the case of grave misconduct, the employer can suspend a pregnant worker while waiting for the definitive decision of the employment tribunal.

Pay during maternity leave does not cease when a worker is made redundant during her maternity leave.

#### **5.1.4 In cases of dismissal from the beginning of pregnancy until the end of maternity leave, is the employer obliged to indicate substantiated grounds for the dismissal in writing (see Article 10(2) of Directive 92/85)?**

In the case of grave misconduct, the employer can suspend a pregnant worker while waiting for the definitive decision of the employment tribunal. If the tribunal is of the opinion that the misconduct was not grave, the suspension will not apply.

### **5.2 Maternity leave**

#### **5.2.1 How long (in days or weeks) is maternity leave? Please specify the relevant legislation and Article(s).**

Pregnant workers cannot be required to work during the eight weeks preceding the expected date of confinement. Also, workers cannot be required to work for eight weeks following childbirth. The total duration of maternity leave, however, can exceed 16 weeks. This is the case, for example, when the birth takes place after the expected date of confinement or when the worker is breastfeeding. The total maternity leave cannot exceed 20 weeks.

#### **5.2.2 Is there an obligatory period of maternity leave before and/or after birth?**

Maternity leave is not flexible. According to Arts. L. 332-1 and L.333-2 of the Labour Code the entire period of leave has to take place as mentioned above.

5.2.3 Is there a legal provision insuring that the employment rights relating to the employment contract are ensured in the cases referred to in Articles 5, 6 and 7 of Directive 92/85?

There is no specific article on this matter but rights relating to the employment contract are ensured as the worker cannot be dismissed.

5.2.4 Is there a legal provision that ensures the employment rights relating to the employment contract (including pay or an adequate allowance) during the pregnancy and maternity leave?

According to Art. 25 of the Social Security Code, workers must have been affiliated to the social security system for six months during the year before the start of the maternity leave in order to benefit from the maternity allowance.

5.2.5 Is pay or an allowance during the pregnancy and maternity leave at the same level as sick leave or is it higher?

According to Art. 25 of the Social Security Code, the maternity allowance is the same as the sickness allowance. There is no ceiling.

5.2.6 Are statutory maternity benefits supplemented by some employers up to the normal remuneration?

No.

5.2.7 Are there conditions for eligibility for benefits applicable in national legislation (see Article 11(4) of Directive 92/85)?

Workers must have been affiliated for a period of six months during the year preceding the maternity leave.

5.2.8 In national law, is there a provision that guarantees the right of a woman to return after maternity leave to her job or to an equivalent job, on terms and conditions that are no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence (see Article 15 of Directive 2006/54)?

During maternity leave, the employee's job has to be preserved. The dismissal of workers is prohibited throughout the period from the beginning of their pregnancy to the end of the maternity leave (Art. L. 332-3 of the Labour Code).

### **5.3 Adoption leave**

5.3.1 Does national legislation provide for adoption leave?

In the case of adopting a child under the age of 16, the employee has an unconditional right to two days of leave (similar to the paternity leave). According to Art. L. 234-56 of the Labour Code if the adopted child is too young to be admitted to the first year of primary school, the adoption leave is extended to eight weeks for a single adoption and 12 weeks for a multiple adoption. The leave cannot be refused by the employer, but it has to be requested. Only one of the adoptive parents is entitled to take the adoption leave. However, both of the adoptive parents are entitled to take parental leave. Adoption leave has the same effects as maternity leave. During the adoption leave, the employee receives

maternity benefits, which are paid by the State. The employment contract remains intact during the leave and the employer has to keep the same or a similar job available during the leave. Upon returning to work, there is no guaranteed right to improved working conditions. The adoption leave is taken into account for seniority and related benefits. It is also taken into account for the calculation of the legal annual leave.

Single adoptive parents are entitled to adoption leave subject to the condition that the adopted child has not already lived together with him/her before the adoption.

- 5.3.2 Does national legislation provide for protection against dismissal of workers who take adoption leave and/or specify their rights after the end of adoption leave (see Article 16 of Directive 2006/54)?

An employee on adoption leave is protected against dismissal during the period of the adoption leave. If the employee does not want to return to work after the adoption leave, he/she may resign without giving notice at the end of the leave.

## **5.4 Parental leave**

- 5.4.1 Has Directive 2010/18 been explicitly implemented in your country?

The parental leave legislation first introduced in 1999<sup>28</sup> was modified by the Law of 3 November 2016. The law from 2016 introduced fragmented parental leave. The worker can reduce the working time by 20 % per week over a period of 20 months or split into 4 periods of one month during a maximum period of 20 months. It also made a shift from a fixed allowance towards a proportional allowance, which is, however, limited.

- 5.4.2 Is the national legislation applicable to both the public and the private sector (see Clause 1 of Directive 2010/18)?

Yes.

- 5.4.3 Does the scope of the national transposing legislation include contracts of employment or employment relationships related to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency?

According to Art. L. 234-43 of the Labour Code part-time workers are included if their working time is equal to or more than half time. Current fixed-term contract workers are also included. There is no mention of temporary agency workers.

- 5.4.4 What is the total duration of parental leave? If the provisions regarding duration differ between the public and the private sector, please address the two sectors separately.

The provisions are the same for both the public and private sector.

There are three types of paid parental leave. Parental leave may be 4 or 6 months full time; 8 or 12 months half time. The third type is a flexible parental leave which can be 4 months leave over a maximum of twenty months or a reduction of 20 % in full-time work for 20 months. Part-time and flexible parental leave rely on the employer's agreement. Workers who have not worked for the necessary duration in order to be entitled to paid parental leave are entitled to an unpaid parental leave of four months.

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<sup>28</sup> <http://legilux.public.lu/eli/etat/leg/loi/1999/02/12/n3/jo>, accessed 27 June 2017.

- 5.4.5 Is the right of parental leave individual for each of the parents, a family entitlement or a combination of the two? How many months are reserved for each parent on a take-it or leave it basis?

Parental leave is an individual right and cannot be transferred from one working parent to the other.

- 5.4.6 What form can parental leave take (full-time or part-time, piecemeal, or in the form of a time-credit system)? Do the various available options allow taking into account the needs of both employers and workers and if so, how is that done (see Clause 3 of Directive 2010/18)?

Parental leave can be full time, part time or flexible.

- 5.4.7 Is there a notice period and if so, how long is it? Does the national legislation take sufficient account of the interests of workers and of employers in specifying the length of such notice periods and how is that done? (see Clause 3 of Directive 2010/18)?

According to Art. L. 234-46 of the Labour Code the period of notice is two months before maternity leave for the first parent who takes parental leave. The second parent who takes parental leave is subject to a six-month period of notice.

- 5.4.8 Did the Government take measures to address the specific needs of adoptive parents (see Clause 4 of Directive 2010/18)?

See 5.3.1.

- 5.4.9 Is there a work and/or length of service requirement in order to benefit from parental leave?

There is no requirement for the unpaid parental leave of four months. But for paid parental leave, workers have to have worked for 12 months before the leave (Art. L. 234-43 of the Labour Code).

The sum of fixed- term contracts is taken into account.

- 5.4.10 Are there situations where the granting of parental leave may be postponed for justifiable reasons related to the operation of the organisation?

The second parental leave can be postponed in following cases:

- When a significant proportion of a company or of a department of a company asks for the parental leave simultaneously and when this affects the organization of the work seriously;
- When the replacement of the person cannot be organized during the period of notification because of the specificity of the work made by the applicant or the shortage of hand of work in the aimed branch;
- When the work is of seasonal nature and when the demand concerns a period being situated as a period of seasonal nature;
- When the worker is a senior executive who participates in the effective management of the company;
- When the company occupies less than 15 workers.

- 5.4.11 Are there special arrangements for small firms?

No.

5.4.12 Are there any special rules/exceptional conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness?

No.

5.4.13 Are there provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave (see Clause 5 of Directive 2010/18)?

According to Art. L. 234-48 of the Labour Code the dismissal of workers when on parental leave is prohibited. The Supreme Court of Justice has stated<sup>29</sup> that if the employer proves that it is impossible to reinstate the worker in his/her original work, it can propose other work, even if this is of a different kind. In the relevant case, the worker concerned had refused the proposed new work, in particular because of less favourable career expectations, which were not proved. The contested dismissal was held to be valid.

In another case concerning a dismissal, the Supreme Court of Justice held that the prohibition of a dismissal does not exclude a dismissal due to the reorganisation of the company involving the removal of the work/position where the employee worked before his/her parental leave.<sup>30</sup> After the period of protection during parental leave, a dismissal due to these reasons remains valid. The worker in question had been dismissed on the day after the end of her parental leave.

5.4.14 Do workers benefitting from parental leave have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship?

Yes. According to Art. L.234-48. of the labour code, the employer has to preserve the job of the employee or, in case of impossibility, a similar job corresponding to her/his qualifications and with an equivalent salary at least.

5.4.15 Are rights acquired or in the process of being acquired by the worker on the date on which parental leave starts maintained as they stand until the end of the parental leave?

Yes. According to Art. L.234-48. of the labour code, all rights acquired or in the process of being acquired by the worker are maintained until the end of the parental leave.

5.4.16 What is the status of the employment contract or employment relationship for the period of the parental leave?

According to Art. L.234-48. Of the labour code, the employment contract is suspended throughout parental leave.

5.4.17 Is there continuity of the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave?

Yes. According to Art. 307 of the Social Security code, the allowance is submitted to taxes and social security charges. It is exempt of contributions for the pecuniary compensation for disease as well as contributions regarding accident insurance.

5.4.18 Is parental leave remunerated by the employer? If so, how much and in which sectors?

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<sup>29</sup> Judgment C.S.J. 7 June 2007 No. 31422.

<sup>30</sup> Judgment C.S.J. 6 December 2007 No. 32095.

No.

5.4.19 Does the social security system in your country provide for an allowance during parental leave? If so, how much and in which sectors?

No. The allowance is paid by the family allowance system. The parental leave allowance is related to the salary. The minimum is EUR 1 922 while the maximum is EUR 3 200 per full month.

5.4.20 In your view, regarding which issues does the national legislation apply or introduce more favourable provisions (see Clause 8 of Directive 2010/18)?

Parental leave is paid by means of a monthly parental allowance which is paid by the State.

## **5.5 Paternity leave**

5.5.1 Does national legislation provide for paternity leave?

Paternity leave is a short period of mandatory leave for fathers. The duration of the leave granted to male employees by Art.L.233-16 of the labour code for the birth of a legitimate or a legally recognised child born out of marriage is two days. It is part of the so-called 'leave for personal reasons' and has the same effect as the normal annual leave.

5.5.2 Does national legislation provide for protection against dismissal of workers who take paternity leave and/or specify their rights after the end of paternity leave (see Article 16 of Directive 2006/54)?

There is no specific provision regarding paternity leave. This leave of 2 working days falls under the common rules regarding leaves which are a right for the worker. It is possible to send the dismissal notice during this short period of leave.

## **5.6 Time off/care leave**

5.6.1 Does national legislation entitle workers to time off from work on grounds of force majeure for urgent family reasons in case of sickness or accident (see Clause 7 of Directive 2010/18)?

The legislation regarding leave for family reasons has been amended by the Law of 15 December 2017.<sup>31</sup> Prior to this law, 2 days of leave per year could be requested by a parent whose child was sick.

The new law, introducing Articles L. 234-50 to 234-55 into the Labour Code (LC), links the length of the leave to the age of the child:

- 12 days are granted for a child, who is less than 4 years old, and who is suffering from a major illness or has had a major accident or who needs, for any other compelling reason, the presence of one of his/her parents;
- 18 days are granted for a child over 4 and under 13 who suffers from a major illness or has had a major accident or who needs, for any other compelling reason, the presence of one of his/her parents;
- 5 days are granted for a child over 13 and under 18 who suffers from a major illness or has had a major accident or who needs, for any other compelling reason, the presence of one of his/her parents and who is hospitalized.

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<sup>31</sup> Loi du 15 décembre 2017 abrogeant la loi modifiée du 12 février 1999 portant création d'un congé parental et d'un congé pour raisons familiales. Memorial A N° 1082 du 18 décembre 2017. *Law of 15 December 2017 repealing the amended Law of 12 February 1999 creating parental leave and leave for family reasons. Memorial A N°1082 of 18 December 2017.*



Only one parent can benefit from the leave (Article L. 234-55 LC).

It must be noted that the period of the leave for family reasons is treated as a period of incapacity for work due to a disease or an accident. The parent must produce a medical certificate concerning the condition of the child. The period of the leave for family reasons is not treated as, like other forms of leave, a period of professional activity. The employer is obliged to continue to pay the employee's wages during the period of the leave. Thus it makes the payment and will be reimbursed 100 % by the sickness insurance scheme. During the period of the leave for family reasons, all legal provisions regarding social security matters apply to the beneficiaries. As a consequence, pension rights are guaranteed.

Statistics regarding the beneficiaries of this leave for family reasons under the legislation in force prior to the reform (2011-2013) show that there is a persistent imbalance between women and men.

## **5.7 Leave in relation to surrogacy**

5.7.1 Is parental leave available in case of surrogacy?

No.

## **5.8 Leave sharing arrangements**

5.8.1 Does national law provide a legal right to share (part of) maternity leave?

No.

5.8.2 Is there a possibility for one parent to transfer part of the parental leave to the other parent?

No.

## **5.9 Flexible working time arrangements**

5.9.1 Does national law provide workers with a legal right (temporarily or otherwise) to reduce working time on request?

The public sector is regulated by the modified Law of 16 April 1979. Flexible working time arrangements are regulated by Arts 18 and 19 as well as Arts 28 to 31-2 of this law. There are two kinds of part-time work in the public sector. One kind consists of unpaid leave for a certain period. The other kind consists of a reduction of working time. Civil servants who are employed on a full-time basis are entitled, at their request, to unpaid leave. This leave can be for two years or half-time leave and is intended for raising a child until that child attends primary school. This right has to be claimed immediately after the maternity leave or the adoption leave or the parental leave. Half-time leave can also be requested after the period of two years of unpaid leave. These forms of leave are a right and cannot be refused. A third form of unpaid leave may be refused. Civil servants may also be entitled to unpaid leave or half-time leave to raise a child up to 15 years of age or for personal reasons.

5.9.2 Does national law provide workers with a legal right to adjust working time patterns (temporarily or otherwise) on request?

In the public sector part-time work corresponds to 25 %, 50 % or 75 % of a full-time occupation. Civil servants who perform a management function and civil servants who are on unpaid leave or half-time leave are excluded from this measure. Part-time work can

only be granted if it is compatible with the interest of the department. The answer is therefore yes, but only in the public sector. There is no such right for the private sector.

5.9.3 Does national law provide workers with a legal right to work from home or remotely (temporarily or otherwise) on request?

No.

5.9.4 Are there any other legal rights to flexible working arrangements, such as arrangements by which workers can "bank" hours to take time off in the future?

No.

## **6. Occupational social security schemes (Chapter 2 of Directive 2006/54)**

### **6.1 Is direct and indirect discrimination on grounds of sex in occupational social security schemes prohibited in national law?**

Luxembourg's social security system is compulsory. It covers illness, maternity, work-related accidents or illnesses, pensions, disability, survivor's insurance, family benefits, unemployment, long-term care insurance, early retirement and the guaranteed minimum wage.

The law of 15 December 1986 concerning the progressive implementation of the principle of equal treatment between men and women regarding social security doesn't mention direct or indirect discrimination. It simply implements the principle of equal treatment between men and women. No modification was brought after adoption of the Directive 2006/54.

In March 2017, the Superior Council of Social Security, which is the Court of Appeals for the labour courts, submitted a question to the Constitutional Court for a preliminary ruling. It asked the following question: Is Article 196 §2 point c) of the Social security Code in accordance with Article 10a §1 of the Constitution?

Article 196 §1 states that 'a survivor's pension is not due to a spouse or a partner, (a) if marriage or partnership was concluded less than one year either before death or retirement on the grounds of invalidity or old age (b) if marriage or partnership has been concluded with the beneficiary of an old-age pension or an invalidity pension'.

Article 196 §2 states that 'nevertheless, §1 is not applicable if one of the following conditions is met: c) if the deceased beneficiary of the pension was not more than 15 years older than his or her spouse or partner and if the marriage or partnership had lasted, at the time of death, for at least 1 year.

It must be noted that Article 196 has a historical background, when the old-age pension scheme, based on contributions, considered that young women concluded marriages with older men with the sole objective of being entitled, without paying contributions, to survivor's pension rights for the remainder of their lives. In order to prevent the finances for the old-age pension scheme from experiencing such an excessive burden, a limit of 15 years in the age difference between spouses was introduced. This stereotypical provision has never been repealed

The Superior Court of Social Security did not find indirect discrimination on grounds of sex, but rather discrimination between spouses or partners with an age difference of greater than 15 years and spouses or partners with an age difference of less than 15 years. It must be noted that a partner who claimed the survivor's pension was a man and not a woman.

The Constitutional Court decided on the 7<sup>th</sup> of July 2017 that Article 186 §2 c) was not contrary to Article 10a of the Constitution, which states that 'Luxembourgers are equal before the law.'<sup>32</sup>

The arguments were the following:

- The exception foreseen in Article 196 §2 must be implemented in compliance with the principle of equality enshrined in the Constitution.
- The principle of equality means that people in comparable situations cannot be treated differently, unless a difference in treatment is due to existing clear differences

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<sup>32</sup> Case law N°129 of 7th July 2017. Memorial A N°638 of 14 July 2017. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2017-638-fr-pdf.pdf>.

between them, and is rationally justified, adequate and proportional to the aim sought.

- The age difference between spouses or partners is in itself an objective criterion.
- Through the setting of a limit to the age difference, the legislator aimed to restrict the situations in which not only a pension is granted to an insured person who has paid contributions, but also a survivor's pension to a surviving spouse or partner without the payment of direct or indirect contributions.
- A large age difference between spouses or partners would be likely to risk distorting the financial basis of the pension scheme
- The limit of 15 years does not appear to be clearly unreasonable and inappropriate and must be considered as being reasonably proportional to the aim pursued.

**6.2 Is the personal scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 6 of Directive 2006/54? Please explain and refer to relevant case law, if any.**

The personal scope is identical to Article 6 of Directive 2006/54.

**6.3 Is the material scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 7 of Directive 2006/54? Please explain and refer to relevant case law, if any.**

The material scope is identical to Article 7 of Directive 2006/54.

**6.4 Has national law applied the exclusions from the material scope as specified in Article 8 of Directive 2006/?**

No.

**6.5 Are there laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54?**

No.

**6.6 Is sex used as an actuarial factor in occupational social security schemes?**

No.

**6.7 Are there specific difficulties in your country in relation to occupational social security schemes, for example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.**

No.

## **7. Statutory schemes of social security (Directive 79/7)**

### **7.1 Is the principle of equal treatment for men and women in matters of social security implemented in national legislation?**

In Luxembourg, the first pillar is of great importance. This compulsory pillar also covers family members of the worker/self-employed person who are not active on the labour market. Under certain conditions, persons who have no income and are not affiliated through a family member subscribe to voluntary insurance which is subject to the same rules as compulsory membership.

### **7.2 Is the personal scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 2 of Directive 79/7? Please explain and refer to relevant case law, if any.**

The personal scope is identical to Article 2 of Directive 79/7.<sup>33</sup>

### **7.3 Is the material scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 3 par. 1 and 2 of Directive 79/7? Please explain and refer to relevant case law, if any.**

The material scope is identical to Article 3 of Directive 79/7.<sup>34</sup>

### **7.4 Has national law applied the exclusions from the material scope as specified in Article 7 of Directive 79/7? Please explain (specifying to what extent the exclusions apply) and refer to relevant case law, if any.**

No.

### **7.5 Is sex used as an actuarial factor in statutory social security schemes?**

No.

### **7.6 Are there specific difficulties in your country in relation to implementing Directive 79/7? For example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.**

No.

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<sup>33</sup> Luxembourg, Law on supplementary pension schemes, 9 June 1999, *Loi du 8 juin 1999 relative aux régimes complémentaires de pension*, <http://www.legilux.public.lu/leg/a/archives/1999/0074/a074.pdf#page=2>, accessed 8 June 2016.

<sup>34</sup> Ibid.

## **8. Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)**

### **8.1 Has Directive 2010/41/EU been explicitly implemented in national law?**

There is no specific legislative measure which transposes Directive 2010/41.

Self-employed persons are required to affiliate themselves to the social protection system which covers the risk of sickness, maternity, disability, death, old age, occupational accidents, family allowances and unemployment benefits.<sup>35</sup>

There are no specific laws on social security for self-employed workers. The regulations are the same as for the other workers. The only difference is that self-employed workers contributions are made out of the workers part and the employers part. They fall under the scope of the social security code.<sup>36</sup>

### **8.2 What is the personal scope related to self-employment in national legislation? Has your national law defined self-employed or self-employment? Please discuss relevant legislation and national case law (see Article 2 Directive 2010/41/EU).**

Every person exercising a professional activity on the territory of the Grand Duchy of Luxembourg for his/her own benefit and in his/her name is considered to be self-employed.<sup>37</sup>

### **8.3 Related to the personal scope, please specify whether all self-employed workers are considered part of the same category and whether national legislation recognises life partners.**

The legislation on the self-employed is the same for each category of self-employed worker.

The agricultural sector is treated differently regarding the legislation on helping spouses.<sup>38</sup> In the agricultural sector helping spouses are subject to mandatory affiliation to the social security system which is not the case in the other sectors.

Life partners have been recognized since 2004 in Luxembourg. It involves a domestic community of two people living as a couple and having made a partnership statement before the registrar at their common place of residence. Life partners enjoy the same social security rights and benefit from the same tax regulations as married people.

### **8.4 How has national law implemented Article 4 Directive 2010/41/EU? Is the material scope of national law relating to equal treatment in self-employment the same, more restricted, or broader than specified in Article 4 Directive 2010/41/EU?**

The material scope of national law is the same on national level as on European level.

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<sup>35</sup> Social Security Code, Art. 1, [http://www.legilux.public.lu/leg/textescoordonnes/codes/code\\_securite\\_sociale/code\\_securite\\_sociale.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/code_securite_sociale/code_securite_sociale.pdf), accessed 20 March 2017.

<sup>36</sup> [http://data.legilux.public.lu/file/eli-etat-leg-code-securite\\_sociale-20170101-fr-pdf.pdf](http://data.legilux.public.lu/file/eli-etat-leg-code-securite_sociale-20170101-fr-pdf.pdf), accessed 27 June 2017.

<sup>37</sup> Ibid.

<sup>38</sup> Social Security Code, Art. 1, [http://www.legilux.public.lu/leg/textescoordonnes/codes/code\\_securite\\_sociale/code\\_securite\\_sociale.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/code_securite_sociale/code_securite_sociale.pdf), accessed 20 March 2017.

**8.5 Has your State taken advantage of the power to take positive action (see Article 5 Directive 2010/41/EU)? If so, what positive action has your country taken? In your view, how effective has this been?**

The government supports independent women's networks by giving them financial support.<sup>39</sup> This support aims to give independent women more visibility. As an example, le Federation of female entrepreneurs provides exhibitions on the subject. They are asked for interviews on a regular base and do promote women's entrepreneurship. It is of course not possible to measure the exact impact of such measures but in a general way, the topic on independent women is more visible than year ago.

**8.6 Does your country have a system for social protection of self-employed workers (see Article 7 (Directive 2010/41/EU)?**

The social protection system is the same for the self-employed and for employees. It is mandatory and covers health, maternity, dependence and pensions. It is regulated by the social security code.<sup>40</sup>

**8.7 Has Article 8 Directive 2010/41/EU regarding maternity benefits for self-employed been implemented in national law?**

Social security law applies to everyone. The conditions and benefits are the same for self-employed persons and for employees. Maternity is covered by Book 1 of the social security code.<sup>41</sup>

**8.8 Has national law implemented the provisions regarding occupational social security for self-employed persons (see Article 10 of Recast Directive 2006/54)?**

Social security law applies to everyone. The conditions and benefits are the same for self-employed persons and for employees and are regulated by the social security code.<sup>42</sup>

**8.9 Has national law made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54? Please describe relevant law and case law.**

No.

**8.10 Is Article 14(1)(a) of Recast Directive 2006/54 implemented in national law as regards self-employment?**

There is no specific legislation or provisions covering discrimination as provided in 14(1)(a) of the Directive, but whereas there are no exceptions according to article 11 of the Directive in national law, the previously mentioned general rules will apply.

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<sup>39</sup> FFCEL, <http://ffcel.lu/fr/accueil>, accessed 20 March 2017.

<sup>40</sup> [http://data.legilux.public.lu/file/eli-etat-leg-code-securite\\_sociale-20170101-fr-pdf.pdf](http://data.legilux.public.lu/file/eli-etat-leg-code-securite_sociale-20170101-fr-pdf.pdf), accessed 28 June 2017.

<sup>41</sup> [http://data.legilux.public.lu/file/eli-etat-leg-code-securite\\_sociale-20170101-fr-pdf.pdf](http://data.legilux.public.lu/file/eli-etat-leg-code-securite_sociale-20170101-fr-pdf.pdf), accessed 28 June 2017.

<sup>42</sup> [http://data.legilux.public.lu/file/eli-etat-leg-code-securite\\_sociale-20170101-fr-pdf.pdf](http://data.legilux.public.lu/file/eli-etat-leg-code-securite_sociale-20170101-fr-pdf.pdf), accessed 21 August 2017.

## **9. Goods and services (Directive 2004/113)**

### **9.1 Does national law prohibit direct and indirect discrimination on grounds of sex in access to goods and services?**

Directive 2004/113 has been implemented by the Law of 21 December 2007 implementing Directive 2004/113.<sup>43</sup> Direct and indirect discrimination on grounds of sex in access to goods and services are prohibited by Art. 2 of this law.

### **9.2 Is the material scope of national law relating to access to goods and services more restricted or broader than specified in Article 3 of Directive 2004/113? Please explain and refer to relevant case law, if any.**

According to Art. 1 of the modified law of 21 December 2007<sup>44</sup> implementing Directive 2004/113, discrimination between women and men is prohibited in access to and the supply of goods and services which are available to the public and which are offered outside the area of private and family life.

### **9.3 Has national law applied the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education?**

There are no restrictions on the media, advertising and education since the modification of the Law of 18 December 2012.<sup>45</sup> Before the modification, the media, advertising and education were excluded.

### **9.4 Have differences in treatment in the provision of the goods and services been justified in national law (see Article 4(5) of Directive 2004/113)? Please provide references to relevant law and case law.**

Art. 4 of the Law implementing Directive 2004/113 reproduces Article 2(5) of Directive 2004/113 word for word.

### **9.5 Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits (see Article 5(1) of Directive 2004/113)?**

Art. 6(1) of the Law implementing Directive 2004/113 reproduces Article 5(1) of Directive 2004/113 word for word.

### **9.6 How has the exception of Article 5(2) of Directive 2004/113 been interpreted in your country? Please report on the implementation of the C-236/09 *Test-Achats* ruling in national legislation.**

By the Law of 12 June 2012<sup>46</sup> modifying the Law of 21 December 2007 implementing Directive 2004/113 Art. 15-1 on insurance contracts. The new wording does comply with the *Test-Achats* ruling as it no longer mentions any exception.

### **9.7 Has your country adopted positive action measures in relation to access to and the supply of goods and services (see Article 6 of Directive 2004/113)?**

No.

<sup>43</sup> <http://www.legilux.public.lu/leg/a/archives/2007/0232/a232.pdf>, accessed 20 March 2017.

<sup>44</sup> <http://www.legilux.public.lu/leg/a/archives/2007/0232/a232.pdf#page=2>, accessed 20 March 2017.

<sup>45</sup> <http://www.legilux.public.lu/leg/a/archives/2012/0137/a137.pdf#page=2>, accessed 20 March 2017.

<sup>46</sup> <http://cet.lu/wp-content/uploads/2010/08/19juin20121.pdf>, accessed 20 March 2017.



**9.8 Are there specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in your country in relation to access to and the supply of goods and services? Please briefly describe relevant case law.**

No.

## **10. Violence against women and domestic violence in relation to the Istanbul Convention**

### **10.1 Has your country ratified the Istanbul Convention?**

Not yet, but the ratification of the Istanbul Convention is part of the government's programme.<sup>47</sup>

It must be remembered that Luxembourg signed the Istanbul Convention on 11 May 2011.

The Luxembourg Government introduced bill N° 7167 to Parliament on 10 August 2017 with the aim of adopting the Council of Europe Convention on preventing and combating violence against women and domestic violence.<sup>48</sup> The National Centre for Women in Luxembourg (Centre National des Femmes du Luxembourg - CNFL) delivered its opinion on 18 December 2017 (N°7167).<sup>49</sup>

We will first present the main provisions of bill N°7167 and provide some insight into the CNFL's opinion.

#### ***Main provisions of bill N°7167***

The aim of the bill is to approve the ratification of the Convention. Therefore, the Criminal Code and the Code of Criminal Procedure have to be amended. The Law of 8 September 2003 on domestic violence and the Law of 29 August 2008 on the freedom of movement of persons and migration will also be modified.

First of all, the bill designates the official body that is responsible for the coordination, implementation, monitoring and evaluation of policies and measures to prevent and combat all forms of violence covered by the Convention (Article 10): the Inter-ministerial Committee of Human Rights (*Comité Interministériel des Droits de l'Homme - CIDH*), which exists under the leadership of the Ministry for International and European Affairs. Its work will be coordinated within the CIDH by the Ministry for International and European Affairs, the Ministry of Justice and the Ministry for Equal Treatment.

#### ***Modification of the Criminal Code (CP)***

The notion of 'gender identity' (Article 3) will be introduced in Article 454 of the Criminal Code on non-discrimination. In the explanatory statement accompanying the bill it is stated that 'the inclusion of the gender dimension in positive law will allow transgender persons, for whom gender identity does not correspond to sex, to be covered' (bill N°7167 p. 6). It must be mentioned that this modification had already been foreseen in the governmental programme and that the Government had signed the International Day Declaration against homophobia, transphobia and biphobia (IDAHO) in 2016.

A new Article 410 will be introduced into the Criminal Code. Female genital mutilation will be criminalized. The following provisions will apply:

- a) Two essential elements constitute the offence, mutilation of the reproductive organs in any form, on the one hand, and a female victim, on the other;
- b) Consent or the absence of consent by the victim will have no impact on the offence;

<sup>47</sup> <http://www.gouvernement.lu/3322796/Programme-gouvernemental.pdf>, accessed 20 March 2017.

<sup>48</sup> Website:  
[http://www.chd.lu/wps/PA\\_ArchiveSolR/FTSShowAttachment?mime=application%2fpdf&id=1439724&fn=1439724.pdf](http://www.chd.lu/wps/PA_ArchiveSolR/FTSShowAttachment?mime=application%2fpdf&id=1439724&fn=1439724.pdf).

<sup>49</sup> Website:  
[http://www.chd.lu/wps/PA\\_ArchiveSolR/FTSShowAttachment?mime=application%2fpdf&id=4005146&fn=4005146.pdf](http://www.chd.lu/wps/PA_ArchiveSolR/FTSShowAttachment?mime=application%2fpdf&id=4005146&fn=4005146.pdf).

- c) The moral element of the offence will be the fact that a person deliberately wanted to perform, encourage or facilitate this practice;
- d) The perpetrator of the mutilation and all persons who encouraged and facilitated it will be punished;
- e) An attempt will also be punishable;
- f) The sentences for these offences will be more severe than the sentences foreseen in general law regarding intentional bodily harm;
- g) There will be special measures aiming to expand prosecution opportunities and to guarantee their effectiveness (see below);
- h) The new Article will consider aggravating circumstances linked to the identity of the perpetrator, the severity of the harm, the minority age or the vulnerability of the victim, the use of force etc.

#### *Modification of the Code of Criminal Procedure (CCP)*

Article 5-1 CCP will be amended in accordance with Article 44 §3 of the Convention. Extraterritorial jurisdiction will be extended to cover the offences of forced abortion, forced marriage and female genital mutilation.

Articles 637 and 638 CCP will be amended in accordance with Article 58 of the Convention. The period of limitation for initiating any legal proceedings with regard to a crime committed against a minor will start after the victim has reached the age of majority. The period will be 10 years in the case of forced abortion or female genital mutilation and 5 years in the case of forced marriage or female genital mutilation.

#### *Modification of the Law of 8 September 2003 on domestic violence*

In the explanatory statement accompanying bill N°7167 it is stated that the legislation already complies with the Convention. But Luxembourg wants to progress with preventing and combating domestic violence. Luxembourg especially aims at preventing violence among persons living together in the family home and protecting children, who are direct or indirect victims of domestic violence.

There will be a technical amendment regarding the term of an expedited order against the person who has been evicted from his or her family home (Article I §6).

In accordance with Article 19 of the Convention ensuring that victims will receive adequate and timely information on the support services which are available, Article I §7 will provide persons who live in a household with information on the support services which are available. This will be the case when the Public Prosecutor does not grant an expedited order due to the fact that there is insufficient evidence; the police must give the suspect a document containing information on the support services which are available.

According to Article 26 of the Convention, Article II §1 will grant protection and support to child witnesses of all forms of violence. There will be an obligation for minors to be assisted by specialist support services. Support will remain voluntary for young people who have reached the age of majority.

Article III foresees that the Committee for cooperation between professionals combating violence (*Comité de coopération entre les professionnels dans le domaine de la lutte contre la violence*) will have to collect data in accordance with Article 11 of the Convention.

#### *Modification of the Law of 29 August 2008 on the freedom of movement of persons and migration*

In accordance with Article 59 §4 of the Convention on victims of forced marriage, Article 40 §4 foresees that a victim of a forced marriage, who has left the territory of Luxembourg

under coercion for more than 6 months and has therefore lost her residence permit, must still have the right to reside in Luxembourg.

In accordance with Article 59 §3 of the Convention, Article 78 §3 obliges public authorities to issue a renewable residence permit to a victim of any form of violence, if her stay is necessary either for security reasons, health problems, risks in her country of origin or in order to collaborate with the competent authorities in an ongoing investigation or criminal proceedings.

### **Opinion of the National Centre for Women in Luxembourg – CNFL (N°7167<sup>3</sup>)**

This opinion was delivered to Parliament on 18 December 2017. All in all, the CNFL agrees with the content of the bill presented by the Government. Nevertheless it suggests some improvements:

- a) The introduction of the definition of 'violence against women' as contained in Article 3 of the Convention into the legislation;
- b) The *Comité International des Droits de l'Homme* (the International Committee on the Rights of Man) should be modified and should be called the *Comité Interministériel des droits humains* (the International Committee on Human Rights);
- c) The introduction of legal measures aiming to ensure that children who are at risk will remain on Luxembourg territory and to waive the confidentiality of professionals;
- d) An explicit recognition of female genital mutilation as an element to establish asylum.
- e) The organization of training in female genital mutilation for professionals and the distribution of practical guides for these persons;
- f) Extending the 30-year statute of limitation for initiating any legal proceedings with regard to a crime committed against a minor (the recommendation of the French '*Mission de consensus sur le délai de prescription applicable aux crimes sexuels commis sur les mineurs*');)
- g) The addition of victims of domestic violence and persons who refuse to leave the territory in order to protect a minor from female genital mutilation to those persons who are entitled to request a residence permit for private reasons (Article 78 §3 of Law 2008).

## **11. Enforcement and compliance aspects (horizontal provisions of all directives)**

### **11.1 Victimisation**

11.1.1 Are the provisions on victimisation implemented in national legislation and interpreted in case law?

Regarding victimisation, national equal treatment law guarantees protection from adverse treatment for complainants as well as for witnesses. This applies to the field of access to and the supply of goods and services (Art. 10 of the modified Law of 21 December 2007) and to the field of work and employment (Art. L. 241-8 of the Labour Code). The mentioned articles reproduce the text of the Directive word for word.

### **11.2 Burden of proof**

11.2.1 Does national legislation and/or case law provide for a shift of the burden of proof in sex discrimination cases?

Directive 97/80/EC on the burden of proof in cases of discrimination based on sex was implemented by law in 2001. This Law, of 28 June 2001, deals with direct and indirect discrimination based on sex. The Law applies to civil-law proceedings and the administrative procedure concerning the public or private sector in relation to access to employment, pay, professional promotion, access to independent work, working conditions and occupational social security schemes. According to this Law, respondents have to prove that there has been no violation of the principle of equal treatment between women and men if claimants establish, before the court or another competent authority, facts from which it may be presumed that there has been direct or indirect discrimination. Since 2007, the same rules apply in the field of access to and the supply of goods and services (Art. 8).

### **11.3 Remedies and Sanctions**

11.3.1 What types of remedies and sanctions (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.) exist in your country for breaches of EU gender equality law? Please specify the applicable legislation.

According to Art. L. 241-8 of the Labour Code, in the event of a dismissal, the worker can call for the dismissal to be nullified in order to retain his/her job, or if necessary to be reinstated. Concerning job offers, any person who makes an offer which is not in conformity with the principle of equality between women and men is punishable by a fine ranging from EUR 251 to 2 000.

Art. 9 of the Law transposing Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services has introduced an innovative provision by allowing victims to choose between a fixed allowance (EUR 1 000) and covering the damage actually suffered as regards moral harm. The second option implies that the claimant will bear the burden of proof.

11.3.2 In your opinion, do the remedies and sanctions meet the standards of being effective, proportionate and dissuasive? Please explain, if possible referring to relevant legislation or case law.

As gender equality law is not much used by victims, this question is difficult to answer. There is no further information available.

### **11.4 Access to courts**

11.4.1 In your opinion, is the access to courts safeguarded for alleged victims of sex discrimination? Please explain and discuss particular difficulties and barriers victims of sex discrimination have encountered. Refer to relevant legislation and case law.

People do not generally seek judicial redress for discrimination. Maybe this is due to the fact that in a small country one does not want the risk of being tarnished as a potential claimer and people do not want to hinder their professional career. This is only an assumption. There has been no research on this.

11.4.2 In your opinion, is the access to courts safeguarded for anti-discrimination/gender equality interest groups or other legal entities? Please explain and refer to relevant legislation and case law.

Regarding access to the courts, non-profit associations and trade unions can, subject to certain conditions, engage in proceedings on behalf or in support of any victim. Associations can do so in the field of work and employment as well as in the field of access to and the supply of goods and services. Trade unions can only do so in the field of work and employment. Associations should obtain ministerial approval, which will be given subject to certain conditions determined by law.

In addition, the modified Law of 13 May 2008 on equal treatment between women and men in the labour market and the modified Law of 21 December 2007 implementing Directive 2004/113 guarantee this access to the courts.

There is no published case law.

11.4.3 What kind of legal aid is available for alleged victims of gender discrimination?

No special aid is available. To insure the access to the justice for people with low income, the Luxemburg State puts at their disposal a free and total legal aid for the defence of their interests. The legal aid is granted as well in judicial as extrajudicial affairs, in demand or in defence. This is a general assistance. It is not specific in the cases of discriminations.<sup>50</sup>

## **11.5 Equality body**

11.5.1 Does your country have an equality body that seeks to implement the requirements of EU gender equality law?

The national equality body, the Centre for Equal Treatment (*Centre pour l'égalité de traitement*), established by law on 28 November 2006, is competent to cover EU gender equality law. The Centre for Equal Treatment is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. The CET is overseen by a board of five members who are appointed by Parliament. Its competence extends to consultation with victims and research. It has no authority to make decisions.

The Grand-Ducal Regulation of 17 September 2017 amended the Grand-Ducal Regulation of 5 March 2014 laying down the terms of the designation, rights and duties of the gender equality delegates in the ministerial departments and administrations.<sup>51</sup> It refocused the main missions of the gender equality delegates on the organization of the work, training and professional development. The Minister for Equal Treatment has been designated as their special interlocutor. On 1<sup>st</sup> December 2017, 116 gender equality delegates were appointed to the civil service, 89 women and 27 men.<sup>52</sup> A plenary meeting of all the

<sup>50</sup> <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2004-188-fr-pdf.pdf>, accessed 28 June 2017.

<sup>51</sup> Memorial A N°876 of 3 October 2017. Website: <http://legilux.public.lu/eli/etat/leg/rgd/2017/09/17/a876/jo>.

<sup>52</sup> Annual Activity Report 2017 by the Ministry for Equal Treatment (MEGA), p. 14.

delegates was organised on 14 December 2017 under the auspices of the Ministry for Equal Treatment.

### **11.6 Social partners**

11.6.1 What kind of role do the social partners in your country play in ensuring compliance with and enforcement of gender equality law? Are there any legislative provisions in this respect?

The social partners have no official role in the enforcement of gender equality law except for collective agreements (see hereunder).

### **11.7 Collective agreements**

11.7.1 To what extent does your country have collective agreements that are used as means to implement EU gender equality law? Please indicate the legal status of collective agreements in your country (binding/non-binding, usually declared to be generally applicable or not).

The social partners can negotiate collective agreements which can be declared a general obligation. In that case, the sectors concerned must adhere to the rules thus laid down. The checks carried out before an agreement becomes a general obligation relate to the form and not to the content of the deposited agreement.

Any provision which is contrary to the principle of equality between women and men is formally prohibited. According to Art. L. 162-12 of the Labour Code, collective agreements must include the principle of equal pay and methods to prevent sexual and moral harassment. It can be considered regrettable that the elaboration of equality plans does not appear among the obligatory measures imposed on the social partners.

In fact, the legal provision including the obligation to refer to the results of negotiations on various matters, such as the application of 'equality plans for women and men,' can be considered as not very effective because the social partners mostly comply with this by mentioning that these matters have been discussed.

## **12. Overall assessment**

Generally, Luxembourg complies with the implementing provisions, although certain adaptations are sometimes necessary. It is regrettable, however, that the European general framework is rarely exceeded at the national level.

It seems that the concern for promoting equality between women and men has decreased in Luxembourg in recent years. As is true for the European level, one can discern a tendency to gather together the various grounds of discrimination in political actions. This approach results in a great deal of confusion.

When Directives are not implemented by a specific law, it is very difficult for the expert to check on compliance. No information is provided by the different Ministries which may lead one to think that there is no specific focus on this issue within the Ministries. This is in particular the case for social security matters and self-employment. For these two fields one has to refer to general law. This caused no problems until now. As there are no cases on discrimination in general, it is impossible to know if and how courts would apply the general laws to specific cases on social security and self-employment.



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