



Executive summary

Luxembourg country report on measures to combat discrimination by François Moyse

1. Introduction

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

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

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

As far as religions are concerned, the relations between the State and religious institutions are based on the principle of reciprocal independence, meaning that the State provides for a certain protection of religious groups. The official recognition of a religion is materialised by a convention signed between the State and the religious representative body. Such conventions exist between the State and the main religious groupings, but not yet with the Muslim community.

In the field of anti-discrimination legislation, two laws have been enacted with considerable delay, in order to transpose Directives 2000/43/EC and 2000/78/EC. The law of 28 November 2006 entails a general prohibition of discrimination in society, while the law of 29 November 2006 is restricted to public service. The laws have also amended the existing articles 454 to 457 of the penal code.

2. Main legislation

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

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

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

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

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

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

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

It remains to be seen if the laws will be adequately used. In particular, one has to deplore that the Centre for Equality of Treatment has not been set up yet.

3. Main principles and definitions

Articles 454 to 457 of the Penal Code provide some legal tools for protection against discrimination. Article 454 of this code, as amended by the law of 28 November 2006, defines discrimination as “*Any difference of treatment applied to natural persons on grounds of their racial or ethnic origin, skin colour, sex, sexual orientation, family situation, age, state of health, disability, customs, political or philosophical opinions, trade union activities, their membership, actual or supposed, of an ethnic group, nationality, race or specific religion.*”

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

However the ground of belief has not been included in the amendment of the penal code. Also only direct discrimination is forbidden, while indirect discrimination, harassment and instruction to discrimination are behaviours which are not repressed in criminal law.

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

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

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

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

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

Provisions on reasonable accommodation for disabled persons have also been incorporated in the law, which amends 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.

4. Material scope

As far as penal law is concerned, the amended article 455 of the Penal Code is applicable to discrimination in relation to:

- the refusal to supply or allow enjoyment of goods;
- the refusal to supply a service;
- the restriction of the supply of goods or services on grounds of ethnic or racial discrimination or the exercising of any other form of discrimination at the time of supply;
- the indication in any advertisement of the intention to refuse goods or services or to practise discrimination at the time of supplying goods and services,
- the restriction of the normal exercise of any economic activity;
- the refusal to employ an individual, the sanctioning or dismissal of a person;

- the subjection of access to work, training or working conditions or the membership of, and involvement in, an organisation of workers or employers to a discriminatory condition.

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

As far as civil law is concerned, including labour law, the law of 28 November 2006 has incorporated the full scope of Article 3 of Directive 2000/42 and thus will be applicable to:

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

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

5. Enforcing the law

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

A person may act alone and lodge a criminal complaint in court. The state prosecutor will, however, decide if the case is worthwhile proceeding with.

The law of 6 May 1999 on penal mediation enables the State Prosecutor to use mediation, where it appears that such a remedy is likely to ensure that compensation or damages are paid to the victim.

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

The victim may claim damages in a civil court, with or without the assistance of such associations. The mechanism for sharing the burden of proof has been introduced for civil cases, including labour law cases.

The labour court may be used in case of discrimination at work. A special summons' procedure may be lodged within 15 days of a discriminatory deed, including in case of dismissal and the reintegration of a worker may be asked for in court. Besides, one other sanction is foreseen, the voidness of any discriminatory clause in a contract or a collective convention.

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

One can argue that sanctions are effective, proportionate and dissuasive, but the law lacks other civil sanctions available to victims. Finally, the use of testing and statistical evidence is not foreseen by the laws. Such evidence may be accepted by criminal courts, but it is doubtful that in civil cases the courts would accept such evidence, as it may be seen as unfair collection of evidence.

6. Equality bodies

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

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

The Centre, which has not been set up yet, shall be a body of 5 members including a president, nominated for 5 years by the Grand-Duke on the proposal of the Parliament. Once a year, a report must be submitted to the Government and to Parliament and the Centre is funded by the state.

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

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

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