

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

COUNTRY REPORT 2007

Luxembourg

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State of affairs up to 29 February 2008

This report has been drafted for the **European Network of Legal Experts in the Nondiscrimination Field** (on the grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation), established and managed by:

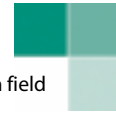
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INTRODUCTION

0.1 The national legal system

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

Luxembourg is a unitary and indivisible state. It is a constitutional monarchy, whereby the Grand-Duke has only very limited powers, as conferred by the Constitution. The Government or members of Parliament propose pieces of legislation. There is one single Chamber at the Parliament, the *Chambre des Députés*, which votes the draft bills. A statement of grounds originally accompanies these draft bills.

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

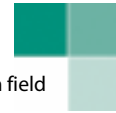
Secondary legislation is exercised by Grand-Ducal regulations. In practice, a regulation is a mechanism to provide further details and/or procedures for the implementation of a particular law and this only in issues which are not reserved to the legislative power by the Constitution. The Government,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

The constitution provides for exclusive competence of the Parliament in various fields, like social security and labour law. The Constitutional court acts as a guardian of this principle.

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

The criminal code contains, mainly in articles 454 to 457 introduced by the law of 19 July 1997¹, various penal provisions forbidding discrimination against persons (individuals or moral persons = groups) based on the grounds of their racial or ethnic origin, skin colour, sex, sexual orientation, family situation, state of health, disability, customs, political or philosophical opinions, trade union activities, their membership, actual or supposed, of an ethnic group, nationality, race or specific religion.

¹ See under 2.1
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In the public sector, there is a compilation of laws relating to the administration, out of which the general statute of civil servants provides for the rules relating to the relationship between them and the administration.

Some laws apply both to the private and the public sector like the law of 8 December 1981 on equality of treatment between men and women.

As far as religions are concerned, in Luxembourg the relations between the State and religious institutions are based on the principle of reciprocal independence, meaning that the State provides for a certain protection of religious groups i.e. recognized Churches. There is thus a separation between State and Churches, but the relations are legally regulated.

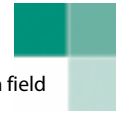
The official recognition of a religion is materialized by a convention signed between the State and the religious representative body. A religious head of the Church/religious group represents the religion such an Archbishop, a chief rabbi etc. Financial assistance is being also granted to the religious bodies (payment of some salaries of religious ministers). Such conventions exist between the state and the main religious communities (Catholic, Jewish, Protestant, Orthodox, Anglican), but not with the Moslem community yet, although this community is now the second in numbers in the country. However within the community, there are problems in electing a representative body, which is a requirement for such a convention to be signed and thus a prerequisite for the official recognition of the community.

0.2 State of implementation

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

Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?

The implementation process of the Directives 2000/43/EC and 2000/78/EC has been long and tortuous. This process started in November 2003 and ended three years later with two laws of 28 November 2006, providing transposition through criminal law, free standing labour law, free standing civil / private law (outside employment) and amendments to the labour code.



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

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

² Loi du 28 novembre 2006 portant

1. transposition de la directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en oeuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique;
 2. transposition de la directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail;
 3. modification du Code du travail et portant introduction dans le Livre II d'un nouveau titre V relatif à l'égalité de traitement en matière d'emploi et de travail;
 4. modification des articles 454 et 455 du Code pénal;
 5. modification de la loi du 12 septembre 2003 relative aux personnes handicapées.
- <http://www.legilux.public.lu/leg/search/resultHighlight/index.php?linkId=3&SID=841cbd8d592e36e5ad8892e67b1f9292>
 = *Law of 28 November 2006*

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

2. transposition de la directive 2000/78/CE du Conseil du 27 novembre 2000 establishing a general framework for equal treatment in employment and occupation

3. modifying the Labour Code and introducing in Book II a new title V on equality of treatment in the area of employment and work;

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

5. modifying the law of 12 September 2003 on disabled persons

<http://www.legilux.public.lu/leg/search/resultHighlight/index.php?linkId=3&SID=841cbd8d592e36e5ad8892e67b1f9292>

³ Loi du 29 novembre 2006 modifiant

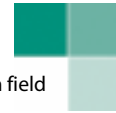
1. la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'Etat

2. la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux.

= *Law of 29 November 2006 modifying*

1. the modified law of 16 April 1979 establishing the general statute of state civil servants

2. the modified law of 24 December 1985 establishing the general statute of municipal civil servants.



The shortcomings of this legislation are:

- the ground relating to belief has not been included in the transposition law
- the limited coverage, as far the personal scope is concerned, with regard to disability: this includes the fact that quite substantial requirements must be met before one can claim protection under the law of 12 September 2003 on disability, especially the condition of a 30% reduction of one's work capacity and the fact that one's health must be deemed to be such as not to be able to find a work post in an ordinary work environment.
- the absence of new civil sanctions (defence of rights and victimisation) outside the employment area
- the penal sanctions do not cover all the scope of directives
- the probable weakness of the control mechanism in the employment area (entrusted to the Inspection du Travail et des Mines, which is not a specialised body; no link to the Centre for Equality of Treatment)
- the weak status of the Centre for Equality of Treatment: it has no power to assist victims in court, has only 5 members and a very small office. At the time of the report, it is still not fully functioning.
- the absence of any clause relating to social dialogue and dialogue with trade unions
- a question arises concerning the compatibility of article 457 of the penal code, which has been maintained, with some small changes, with possible discrimination toward disabled persons. Indeed following exceptions to discriminatory behaviours are included in article 457 § 1:

'differentiation of treatment on grounds of state of health, where this consists of operations intended to prevent or ensure against risk of death, risk of threat of bodily harm to the person, or risk of incapacity for work or invalidity;

discrimination on grounds of state of health or disability, where this consists of a refusal of employment, or of dismissal on grounds of medical unfitness established by the party concerned;'

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

Luxembourg has not used the possibility to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability and the deadline is now passed.

0.3 Case-law

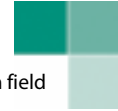
Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

- a) Name of the court*
- b) Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.*
- c) Name of the parties*
- d) Brief summary of the key points of law (no more than several sentences)*

There is currently no case-law on the directives. This is due to the fact that they have not been transposed until very recently.

Also no party has ever asked a court to apply directly the directive.

Even in the year 2007, no case has been brought to a court to decide on a discrimination matter, according to all the possible research that has been made.



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

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

As there are no Roma and Travellers living in Luxembourg, there have been no cases relating to this group of population.



1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

On the national level, the principle of equal treatment can be found in the general legal principle incorporated in article “10 bis” of the Constitution, according to which all Luxembourgers are equal before the Law. This implies that no discrimination shall apply for whatever ground. However this principle applies only *stricto sensu* to the Luxembourg nationals and not the foreign citizens. Although it is understood to be a general principle of law, implying equality for all inhabitants, it clearly is not sufficient to guarantee in all situations and in all Court cases that any breach of the principle of equality will be sanctioned. There is no mention of the prohibition of discriminations in the Constitution. Up to now, there has been no proposal to insert a clear prohibition of discriminations, for whatever ground, in the Constitution.

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

Article 111 of the Constitution of the Grand Duchy of Luxembourg states the following “*Any alien on the territory of the Grand Duchy shall enjoy the protection accorded to persons and property, without prejudice to exceptions established by law*”. As discriminations based on racial origin, religion or belief, are often linked to the foreign origins of a person, the statement is important, although not precise enough to protect foreigners from all discriminations.

The Constitution contains several articles relating to religion in a broad sense. Article 19 guarantees freedom of worship in all its forms. Article 20 guarantees freedom of conscience and provides for the liberty *not* to take part in any religious ceremony, to respect any religious festival or to respect any day of rest. Thus any discrimination based on religion and opposing these liberties is not allowed⁴.

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

Constitutional provisions are only directly applicable when they are clear enough. In general it is the case only with a bill. Administrative courts apply sometimes directly the principles of fundamental rights as laid down in the Constitution. This may also be the case for criminal courts. In civil courts however, the direct application of the Constitution is problematic, as the definitions are too broad.

Luxembourg has a constitutional Court, which decides upon the conformity of legislation with the Constitution. A preliminary question can only be put to this constitutional Court by another court, a civil, penal, social or administrative court.

⁴ Art. 19. « *La liberté des cultes, celle de leur exercice public, ainsi que la liberté de manifester ses opinions religieuses, sont garanties, sauf la répression des délits commis à l’occasion de l’usage de ces libertés* ».

Art. 20. « *Nul ne peut être contraint de concourir d’une manière quelconque aux actes et aux cérémonies d’un culte ni d’en observer les jours de repos.* »



The judges decide on whether they put the question to the constitutional Court. This Court may decide that an article in a bill violates the constitution and thus is not applicable. In this case, the Government has to react and to modify the given law – or even amend the Constitution.

According to the constitutional Court, the principle of equality “ *cannot be construed in an absolute sense, but requires all those who are in the same situation of fact and law to be treated in the same way*”⁵.

According to the judgments of the constitutional Court, “*the legislature may subject certain categories of persons to different legal regimes without infringing the constitutional principle of equality, provided that the difference introduced derives from objective disparities, and that it is rationally justified, adequate and proportional to its aim*”⁶.

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

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

⁵ Constitutional Court, Judgment 2/1998 of 13.11.98, Mémorial (Official Gazette) A - no. 102 of 8.12.98, page 2499, <http://www.legilux.public.lu/leg/a/archives/1998/1020812/index.html>

⁶ Constitutional Court, Judgment 09/2000 of 5.5.2000, Mémorial (Official Gazette) A - no. 40 of 5.5.2000, page 948, <http://www.legilux.public.lu/leg/a/archives/2000/0403005/0403005.pdf#page=2>



2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

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

The forbidden grounds of discrimination are to be found primarily in the penal code, in articles 454 to 457 of the penal code, as introduced by the law of 19 July 1997⁷ and as amended by the general discrimination law of 28 November 2006 transposing the two directives. Individual and collective discrimination are thus forbidden and can lead to a fine or imprisonment up to two years.

Moreover, a 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 and it seems that the law has never been invoked in court.

A recent draft bill, date 21 December 2007, intends to reshuffle the law of 1993⁸. It will not affect the 2006 law on discrimination. The draft bill contains provisions aimed at combating discrimination based on the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation, as well as gender. A special agency called ‘*Office luxembourgeois de l’accueil et de l’intégration*’, shall take over the responsibility of offering equal chances and fight for equal treatment on these grounds, integration being seen as accompanying the process of welcoming foreigners in the country.

Article 454 of the penal code states: “*any difference of treatment applied to natural persons on grounds of their racial or ethnic origin, skin colour, sex, sexual orientation, family situation, age, state of health, disability, customs, political or philosophical opinions, trade union activities, their membership, actual or supposed, of an ethnic group, nationality, race or specific religion shall constitute discrimination*”.

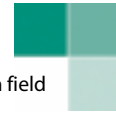
“*Equally [any difference of treatment] applied to legal entities, groups or communities of persons, or to some or all members of these legal entities, groups or communities on grounds of their racial or ethnic origin, skin colour, sex, sexual orientation, family situation, state of health, disability, customs, political or philosophical opinions, trade union activities, their membership, actual or supposed, of an ethnic group, nationality, race or specific religion, shall constitute discrimination*”.

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

⁷ *loi du 19 juillet 1997 complétant le code pénal en modifiant l’incrimination du racisme et en portant incrimination du révisionnisme et d’autres agissements fondés sur des discriminations illégales*, [law of 19 July 1997 completing the penal code by amending the accusation of racism and introducing the accusation of revisionism and other acts based on illegal discriminations], Mémorial 07/08/1997 (054/1997).

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

⁸ N°5825, Projet de loi concernant l’accueil et l’intégration des étrangers au Grand-Duché de Luxembourg



However, the word belief is not included, although it might be covered by the word religion. One has also to underline that belief is a notion provided by article 9 of the European Convention of Human Rights, which is directly applicable into Luxembourg law⁹. According to this article, everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. No definition of belief has been provided by the E.C.H.R.

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

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

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

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

Racial or ethnic origin, as well as the word *religion* are used in the penal code, in articles 454 and 457-2 without precise definition. The same is true for the law of 27 July 1993 on the integration of foreigners in the Grand Duchy of Luxembourg and on social action for foreigners (see. under §2-3).

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

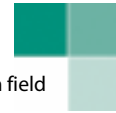
The notion of *sexual orientation* has been introduced by the law of 19 July 1997 (which amended the penal code), but does not specify its definition. While the notion was absent in the draft bill, an amendment of the Legal Commission of the Parliament has introduced the concept. During the debates in Parliament, a Member of Parliament¹⁰ defined the concept as being relevant not only to homosexuality, but to sexual behaviour in general.

The laws transposing the directives do not define the notion of "*disabled person*", a notion, which is included in the penal code. Neither is there any cross-reference to any other law for

⁹ "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others"

¹⁰ Laurent Mosar



its definition. Consequently, the term may be given the general interpretation of person with a reduced capacity in one respect or another. It relates to physical or mental capacity, etc. A disabled person, when receiving the status of disabled person benefits from a special revenue by the National Disability Fund.

According to the law on Disabled Persons of 12 September 2003¹¹, the definition of disability lies in reduced working capacity, whether the cause is natural or accidental, due a work accident or war events.

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

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

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

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

’ paragraph 8 of the law of 12 September 2003 on disabled persons shall be completed as follows: the employer will take appropriate measures, depending on the needs in a concrete situation, in order to allow a disabled worker to find a job, to work and to progress or for

¹¹ Loi du 12 septembre 2003 relative aux personnes handicapées et portant modification 1. de la loi modifiée du 26 mai 1954 réglant les pensions des fonctionnaires de l’Etat, 2. de la loi du 22 avril 1966 portant réglementation uniforme du congé annuel payé des salariés du secteur privé, 3. de la loi modifiée du 12 mars 1973 portant réforme du salaire social minimum, 4. de la loi modifiée du 30 juin 1976 portant 1. création d’un fonds pour l’emploi; 2. réglementation de l’octroi des indemnités de chômage complet, 5. de la loi modifiée du 19 juin 1985 concernant les allocations familiales et portant création de la caisse nationale des prestations familiales, 6. de la loi modifiée du 27 juillet 1987 concernant l’assurance pension en cas de vieillesse, d’invalidité et de survie, 7. de la loi modifiée du 3 août 1998 instituant des régimes spéciaux pour les fonctionnaires de l’Etat et des communes ainsi que pour les agents de la SNCFL, 8. de la loi modifiée du 28 juillet 2000 ayant pour objet la coordination des régimes légaux de pension et 9. le CAS.

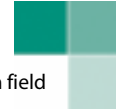
[Law of 12 September 2003 relating to the disabled persons and amending 1. the amended law of 26 May 1954 regulating the pensions of the civil servants of the State, 2. the law of 22 April 1966 uniformly regulating the annual paid leave of the employees of the private sector 3. of the modified law of 12 Mars 1973 reforming the minimum social income, 4. of the modified law of 30 June 1976 which 1. creates a fund for employment; 2. regulating the granting of full unemployment benefits, 5. of the amended law of 19 June 1985 concerning family allowances and creating the national agency of family allowances, 6. of the amended law of 27 July 1987 concerning the insurance pension in case of oldness, *invalidity* and of survival, 7. of the amended law of 3 August 1998 instating special regimes for state and municipal civil servant as well as for the agents of the national railway company, 8. of the amended law of 28 July 2000 with the aim of coordinating the legal regimes of pension and 9. the Code of Social Insurance], Mémorial du 29/09/2003 (144/2003), <http://www.legilux.public.lu/leg/a/archives/2003/1442909/2003A29381.html>

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

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



training to be given to him, unless these measures put disproportionate burden on the employer.



*This burden shall not be disproportionate when it is sufficiently compensated by the measures foreseen in article 26 of the grand-ducal regulation of 7 October 2004'*¹³

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

As far as the *Chacon Navas* case is concerned, as explained above, the law of 12 September 2003 gives the status of "disabled worker" to disabled persons who suffer from a physical, mental, sensory or psychological deficiency and/or from psychosocial difficulties aggravating this deficiency. In principle, this definition may be seen as compatible with the given case.

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

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

The ground of belief is not used in the Luxembourg legislation. The concept of belief may, though, fall under the general concept of religion. The Constitution uses rather the word *worship*. However, there is no constitutional, legal or court definition of religion, of worship or of belief.

Even in the important judgement of 20 November 1998, the constitutional Court did not define "religion" as such. It decided that a pupil, member of the 7th Day Advent Church, who asked for the permission not to attend school on Saturdays, due to religious grounds, may not be granted a general exemption¹⁴.

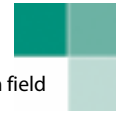
¹³ " **Art. 20.** (1) *L'article 8 de la loi du 12 septembre 2003 relative aux personnes handicapées est complété par les alinéas suivants:*

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

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

¹⁴ Constitutional Court, Judgment 3/1998 of 20.11.98, Mémorial (Official Gazette) A of 18.01.1999, n°002/1999,

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



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

It is interesting to note that court used the notion of religious or philosophical belief¹⁵. The issue of reasonable accommodation as regards religious practices was not discussed as such in the case.

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

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

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

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

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

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

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

d) Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination.

¹⁵ « considérant d'un autre côté que les convictions religieuses ou philosophiques ne peuvent aller à l'encontre du droit fondamental de l'enfant à l'instruction » ;



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

2.1.2 Assumed and associated discrimination

- a) *Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect assumption.*

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

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

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

- b) *Does national law or case law prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?*

The penal code does not provide for such prohibition of discrimination based on association, nor does any other law. However article 454 §2 of the penal code equally states that any difference of treatment applied to legal entities, groups or communities of persons, or to some or all members of these legal entities, groups or communities on grounds of their racial or ethnic origin, skin colour, sex, sexual orientation, family situation, age, state of health, disability, customs, political or philosophical opinions, trade union activities, their membership, actual or supposed, of an ethnic group, nationality, race or specific religion, shall constitute discrimination.

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

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

No court decisions relate to this issue.



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

a) *How is direct discrimination defined in national law?*

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

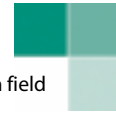
Both laws transposing directives 2000/43/EC and 2000/78/EC for the private sphere and for public service use the very definition of the directives and introduced the concept of equality of treatment as required by these directives, including the definition of direct discrimination.

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

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

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

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



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

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

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

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

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

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

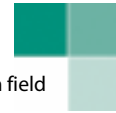
The laws transposing directive 2000/78/EC provide for an exception to the principle of equality for age if they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim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

2.2.1 Situation Testing

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

Luxembourg laws never provides for the possibility of using situation tests. The adoption of the anti-discrimination laws of November 2006 have not change the situation in this respect. It is therefore highly unlikely that any court would accept to use such tests without proper legislation to support the legality of such procedures in a civil procedure.

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



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

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

The principle is valid for any ground of discrimination.

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

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

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

There is no case-law on this issue.

c) *Outline how situation-testing is used in practice and by whom (e.g. NGOs)*

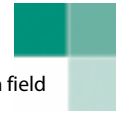
As explained, situation-testing has not been used in Luxembourg until now.

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

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

The definition of indirect discrimination did not exist in the legislation (i.e. penal law provisions) until the adoption of the two laws transposing the directives. The notion of indirect discrimination used in these laws is the same as the one of the directives. Indirect discrimination applies however only for civil cases (including labour law), as the Council of State had warned the legislator that such a provision would be too vague to be acceptable under the general principles of penal law. Therefore indirect discrimination is not sanctioned by criminal law.

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



“indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation, or due to their belonging or non-belonging, real or supposed, to of a racial or ethnic origin/at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary” (transposition of Race Directive and Employment Directive).¹⁶

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

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

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

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

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

c) *Is this compatible with the Directives?*

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

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

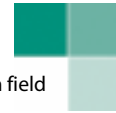
Article 18 (introducing article L-252-2 of the Labour code) of the law on private relations and article 3§4 of the law on public service uses the definitions of article 6 of this directive, nearly word for word.

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

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

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

¹⁶ *une discrimination indirecte se produit lorsqu'une disposition, un critère ou une pratique apparemment neutre est susceptible d'entraîner un désavantage particulier pour des personnes d'une religion ou de convictions, d'un handicap, d'un âge ou d'une orientation sexuelle, de l'appartenance ou la non appartenance, vraie ou supposée, à une race ou ethnies données, par rapport à d'autres personnes, à moins que cette disposition, ce critère ou cette pratique ne soit objectivement justifié par un objectif légitime et que les moyens de réaliser cet objectif soient appropriés et nécessaires.*



This feeling of discrimination is more often felt as far as the restricted access to public employment is concerned, as the languages requirements i.e. speaking the 3 administrative languages (Luxembourgish, French and German) is required in over 90% of the public positions¹⁷. Mostly there a blank language requirement in public job vacancies, adequacy is only tested in positions open to EU nationals.

2.3.1 Statistical Evidence

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

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

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

No, it is not used in practice.

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

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

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

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

- d) *Are there national rules which permit data collection? Please answer in respect to all 5 grounds. The aim of this question is whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

The law on data protection of 02 August 2002¹⁸, allows treatment of data with severe limitations in article 6. Therefore the treatment of data relating to racial or ethnic origin, to political opinions, to religious or philosophical belief or to the belonging to a trade-union as well as treatments of data about health and sexual life, including genetic items is forbidden.

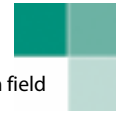
The use of data concerning nationality is nevertheless allowed. The prohibition does not count in criminal investigation or court cases.

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

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

¹⁷ Cahier PSELL n°151, Discrimination à l'Emploi, Décembre 2005, SESOPI, p.61

¹⁸ Mémorial du 13/08/2002 (091/2002), <http://www.legilux.public.lu/leg/a/archives/2002/0911308/2002A18361.html>



2.4 Harassment (Article 2(3))

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

Harassment is not a criminal offence according to the existing legislation. The laws transposing the directives use the very definitions of both directives concerning harassment, so that it is applicable in civil cases and labour cases or in administrative or commercial cases for example.

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

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

However the draft bill, which was dated 4 July 2002 and was due to introduce provisions of the prohibition of moral harassment, was finally abandoned during the year 2007. Indeed, after the Council of State had criticized the draft, the Government finally decided to push the reform of the Labour Inspectorate without incorporating the draft provisions on moral harassment. The Minister of Labour declared that he would consider drafting a new text in the future.¹⁹

- b) *Is harassment prohibited as a form of discrimination?*

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

Moreover, a law of 21 December 2007²⁰, transposing Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services also refers to harassment, using the definition of the Directive, i.e.: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

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

¹⁹ Answer to a Parliamentary question n°1846 of MP Laurent Mosar, by Minister François Biltgen, August 2007

²⁰ Loi du 21 décembre 2007 portant 1. transposition de la directive 2004/113/CE du Conseil du 13 décembre 2004 mettant en oeuvre le principe de l'égalité de traitement entre les femmes et les hommes dans l'accès à des biens et services et la fourniture de biens et services; 2. modification du Code pénal; 3. modification de la loi modifiée du 27 juillet 1997 sur le contrat d'assurance. [law of 21 December 2007 1. transposing Directive 2004/113/CE of the Council of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services 2. Modifying the Penal Code 3. Modifying the modified law of 27 July 1997 on the insurance contract]



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

There is one additional source, relating to sexual harassment, stemming from the law of 26 May 2000²¹. This law is applicable both to the private and the public sectors, including also trainees and students working during school holidays.

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

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

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

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

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

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

²¹ loi du 26 mai 2000 concernant la protection contre le harcèlement sexuel à l’occasion des relations de travail [law of 26 May 2000 concerning the protection against sexual harassment at the occasion of the working relations], Mémorial du 30/06/2000 (050/2000).

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



The law encompasses sexual harassment against homosexuals / lesbians, according to the preparatory comments of the legislator²².

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

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

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

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

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

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

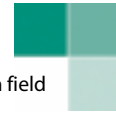
a) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. e.g. → does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*

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

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

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

22 « Certain specific groups are more particularly vulnerabl to sexual harassmentResearch done in several member countries have shown that the reis a link between the risk of sexual harassment and the perception of a certain vulnerability for avictim. Indeed, separated and divorced women newcomers on the employment market and those not having a regular employment contract or those who are in a precarious status, women employed in non traditional tasks, , disabled women, , lesbians and women of racial minorities are faced with a much high risk.. Homosexuals and young men also are vulnerable toward harassment. It is certain that harassment linked to to sexual patterns of these victimsare against the diginity at work of those who are victims of thisand that it cannot be considered as a normal behaviour on the work placeet qu'il ne peut être considéré comme une conduite normale sur le lieu de travail », in commentaire des articles, under article 13.



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

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

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

A draft bill intends to introduce some new legislation for the disabled, allowing for dogs assisting disabled persons to enter any public space and any site open to the public²³.

In the comments of draft bill, there is a clear reference to the law of 28 November 2006 transposing Directives 2000/43/EC and 2000/78/EC. Thus, to refuse access to a disabled person accompanied by a specially trained dog will be considered as indirect discrimination, as it will entail a disproportionate disadvantage for disabled persons without being objectively justified by a legitimate aim. Thus penal fines will be imposed on those who would refuse access to the disabled person with a specially trained dog at the work place, a training facility or in a school.

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

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

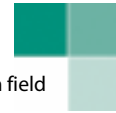
The parliamentary comments on the draft bill concerning access for disabled persons with trained dogs also indicate that the law of 28 November 2006 provides that failing to secure reasonable accommodation for the disabled is to be seen as indirect discrimination.

c) Has national law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?

No it has not.

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

²³ Projet de loi n°5738 relatif à l'accessibilité des lieux ouverts au public aux personnes handicapées accompagnées de chiens d'assistance [draft bill 5738 on access of public places to disabled persons accompanied by assisting dogs]



The law of 29 March 2001 on accessibility of spaces open to the public,²⁴ obliges public administration to allow access to disabled persons by providing the newly built or the refurbished buildings to be adapted to the needs of the disabled.

A Grand-Ducal Regulation of 23 November 2001 has specified the kind of sites that must be accessible to the disabled. This Regulation is about to be adapted. They do set technical standards for design / construction but no sanctions are provided in case of non compliance.

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

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

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

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

A medical commission will recognise the status of disabled worker or gravely disabled worker or decide on the diminishing of the work capacity and taking into account the state of health of the person (article 3). The benefit of the status of disabled person will provoke some financial assistance from the State, paid by the National Fund of Solidarity²⁵.

Once a person is recognised as a disabled worker, the file is continued to another commission²⁶. According to article 8 of the law, the commission may propose to the director of the administration of employment, measures of initiation or training sessions of adaptation or re-adaptation, depending on the age of the candidate and the degree or the nature of the disability and while taking into account his former and residual capacities of work, orientation, training, re-education, integration or professional reinstatement measures.

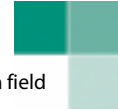
Measures are thus proposed to guide the disabled person to the ordinary labour market, measures which must be accepted by the concerned person. Some of these measures are listed in the law of 2003, like a financial participation in the salary, a participation in the training costs, an encouragement subsidy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

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

²⁴ Loi 29 mars 2001 portant sur l'accessibilité des lieux ouverts au public [law of 29 March 2001 on access to public places open to the public]

²⁵ Fonds National de Solidarité

²⁶ Commission d'orientation et de reclassement professionnel



2.7 Sheltered or semi-sheltered accommodation/employment

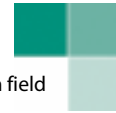
a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?*

Indeed, a possibility provided by the law of 12 September 2003 on disabled persons is the guidance of the disabled persons toward protected workshops.²⁷

b) *Would such activities be considered to constitute employment under national law?*

Yes it is considered as employment under the abovementioned law.

²⁷ chapter 3 of the law



3. PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

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

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

Such restrictions based on nationality already exist in article 457 of the penal code, as amended by the aforementioned law, which exclude protection from discrimination. Therefore one can say that people illegally staying in Luxembourg are not covered by protection against discrimination based only on nationality while they are protected from discrimination based on race and ethnic origin, if one can separate the issue of nationality and the ground of race/ethnic origin.

The penal law does not apply to:

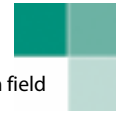
- differences of treatment in relation to recruitment for employment, on grounds of nationality, where being of a specific nationality constitutes, in accordance with statutory provisions regarding public service, with regulations applicable to the exercise of certain professions and with provisions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

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

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

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

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



3.1.3 Scope of liability

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

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

In civil law, according to the general principles, an employer may be held responsible for deeds of his employees²⁸.

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

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

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

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

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

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

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

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

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

²⁸ article 1384 of the civil code



The public sector is also covered by article 456 of the penal code, according to which *“Discrimination as specified in Article 454, committed against a natural person or legal entity, group or community of persons by a person exercising public authority or responsible for a task in the public service, in the exercise of, or while exercising his duties or tasks shall be punishable by a term of imprisonment of from one month to three years and a fine of 251 Euros to 37.500 Euros or one of these punishments alone, where it consists of:*

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

Therefore, although the legislature penalises a refusal of employment motivated by discrimination, it neglects to penalise those situations in the private sector, where *“conditions of access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity, and at all levels of the professional hierarchy, including promotion”*, could lead to difference of treatment between persons, motivated by an intention to discriminate.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

Is the public sector dealt with differently to the private sector?

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

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

Nevertheless, access to public employment is expressly taken out of the law of 28 November 2006.²⁹ Access to public employment is covered by the public sector law of 29 November 2006 on public service, though the wording is so complicated that one has to refer to the Opinion of the Council of State of July 2006 on this draft bill to have such a confirmation of the meaning of the aforementioned articles.

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

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

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

²⁹ *Sont exclus... »ainsi que les personnes susceptibles d’accéder à l’un des statuts ou régimes prédéfinis pour autant que ces personnes soient visées dans leurs relations avec l’autorité publique qui les engage, prise en sa qualité d’employeur”*



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

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

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

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

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

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

- b) *In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 ?*

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

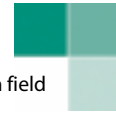
3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

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

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

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

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



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

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

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

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

Indeed, article 2 (1) of the general discrimination law of 28 November 2006 covers explicitly membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations

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

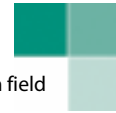
In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

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

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

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

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



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

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

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

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

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

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

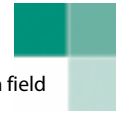
This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may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

Education is indeed covered by article 2.1 of the general discrimination law of 28 November 2006. The grounds which are covered are religion and belief, age, disability, sexual orientation, race and ethnic origin.

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

Currently access to disabled children (or young adults) to mainstream schools may be refused, if they are not capable of learning just like in the same way as the other children. This applies to mentally disabled children, who are placed in specialised institutions called *éducation différenciée*. As far as physically disabled children are concerned the same may apply if they are too severely disabled to write, for example. However children who use wheelchairs would be accepted in the regular schools, which are equipped to enable those children to access the school premises.

There is no segregation of immigrant school children: the official policy is to try and integrate all the immigrants' children by teaching them to use the official Luxembourg language and get all the children to mingle in school. There is specific language education in German for immigrant children, meaning that those who have difficulties with the language are placed in special classes for that purpose, with a lower level. As mostly immigrant children are faced with problems relating to the use of German, like Portuguese children, such a specific curricula is sometimes criticized as a kind of segregation or discrimination. There are no Roma population/children in Luxembourg.



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

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

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

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

- *the refusal of supply or enjoyment of goods; the refusal to supply a service;*
- *to make the supply of goods or services conditional on grounds of any of the elements specified in Article 454, or to exercise any other form of discrimination at the time of supply, on grounds of any of the elements specified in Article 454;*
- *the indication in any advertisement of the intention to refuse goods or services or to practise discrimination at the time of supply of goods and services, on grounds of any of the elements specified in Article 454;*
- *the obstruction of the normal exercise of any economic activity;*
- *the refusal to employ, sanction or dismiss any person;*
- *the subjection of an offer of employment to a condition based on any of the elements specified in Article 454.*

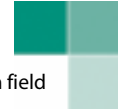
Although in general no difference is being made between goods and services available to the public and those offered by private associations, there is a special clause applicable to associations. Article 6 of the general discrimination law of 28 November 2006 deems any provision to be void, that is included in a contract, a convention or internal regulation of a company or of rules of private associations, of bodies representing independent professions and organizations of workers and employers, and that is contrary to the principle of equal treatment³⁰.

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

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination of the Roma and other minorities or groups.

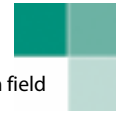
The same article 2.1 of the general discrimination law of 28 November 2006 includes housing, in general, in the list of forbidden discrimination. It seems that all discrimination relating to housing for any of the grounds of both directives is forbidden.

³⁰ « Est à considérer comme nulle et non avenue toute disposition figurant notamment dans un contrat, une convention individuelle ou collective ou un règlement intérieur d'entreprise, ainsi que dans les règles régissant les associations à but lucratif ou non lucratif, les professions indépendantes et les organisations de travailleurs et d'employeurs contraire au principe de l'égalité de traitement au sens de la présente loi. » [Are to be considered void and nul any clause included in a contract, an individual or collective agreement or an internal business regulation, as well as in rules of associations with or without profit, independent occupation and organizations of workers and employers, which are contrary to the principle of equal treatment within the meaning of the current law]



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

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



4. EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

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

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

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

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

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

« if, in the case of occupational activities of churches or other public or private organizations, the ethos of which is based on religion or belief, a difference of treatment on a person's religion or belief has been provided for by laws or practices existing at the date of 2 December 2000, it shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos ».³¹

Thus an exception based on the religious ethos (or belief) of the employer may be maintained, if such requirement has been practised before the law was voted.

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

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

³¹ *« Si dans les cas d'activités professionnelles d'églises et d'autres organisations publiques ou privées dont l'éthique est fondée sur la religion ou les convictions, une différence de traitement fondée sur la religion ou les convictions d'une personne est prévue par des lois ou des pratiques existant au 2 décembre 2000, celle-ci ne constitue pas une discrimination lorsque, par la nature de ces activités ou par le contexte dans lequel elles sont exercées, la religion ou les convictions constituent une exigence professionnelle essentielle, légitime et justifiée eu égard à l'éthique de l'organisation ».*



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

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

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

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

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

No, the laws of 28 and 29 November 2006 do not include any provision or exception related to armed forces.

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

No, the laws of 28 and 29 November 2006 do not include any provision or exception related to police, prison or emergency services.

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

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

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

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

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



4.4 Nationality discrimination (Art. 3(2))

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

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

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

- (§3) differentiation of treatment in relation to recruitment for employment, on grounds of nationality, where being of a specific nationality constitutes, in accordance with statutory provisions regarding public service, with regulations applicable to the exercise of certain professions and with provisions on the right to work, a determining condition for employment or the exercise of a professional occupation and³²
- (§4) differentiation of treatment in relation to entry to, residence in and the right to vote in the country, where being of a specific nationality constitutes, in accordance with legal provisions and regulations regarding entry to, residence in and the right to vote in the country, the determining factor in entry to, residence in and the exercise of the right to vote in the country;

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

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

Stateless persons are considered as being members of the category of foreigners in general, as confirmed by article 3a) of the draft bill n°5802, which will completely reshuffle the law on immigration of 28 March 1972.

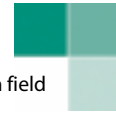
There is no case law on discrimination matters but it seems conceivable that discrimination based on nationality may be considered as an indirect discrimination based on the ethnic or racial background of the discriminated person, and thus enter the scope of the law of 28 November 2006.

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

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

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

³² The law of 28 November 2006 covers all state civil servants as well as municipal civil servants



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

Public service is not concerned by this exception, probably because anyhow most public jobs are reserved to Luxembourgers and only a handful of services are open to recruitment for other EU- citizens.

Indeed, despite the opening of some jobs in the public sector by the Law of 17 May 1999, following the criteria set forth in the ECJ's 2 July 1996 decision in *Commission v. Grand Duchy of Luxembourg*, the proportion of Luxembourg nationals holding civil service jobs is 99%. Only 1% of the civil servant public sector jobs are held by other EU nationals.

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

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

(a) *Does national law permit an employer to provide benefits that are limited to those employees who are married?*

The law on partnerships has been adopted in 2004³³ and introduces partnerships between persons of opposite gender or of the same gender. A declaration must be filed at the municipality ('*officier de l'état civil*').

Unmarried partners are in a different legal situation than married couples or partners are, and who choose to register their legal partnership.

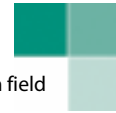
The question whether employers, who would provide for certain benefits only to married couples and not to partnerships, would break the law cannot be answered yet.

The author considers that such a move would not hurt the law on partnerships itself. However, the question remains open whether it would be considered as a discrimination forbidden by the anti-discrimination laws. Such discrimination could be found to exist on the ground of sexual orientation, for same-sex partnerships. However in case of a man and a woman living in a registered partnership and not in marriage, the issue would be a possible breach of the general principle of equality (or of equality based on gender), not discrimination based on the Directive 2000/78/EC.

(b) *Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?*

Again we consider that such a move would not hurt the law on partnerships itself. However, the question also remains open whether it would be considered as a discrimination forbidden by the anti-discrimination laws.

³³ *loi du 9 juillet 2004 relative aux effets légaux de certains partenariats*, *Mémorial A*, n° 143, du 6 août 2004, p. 2020, [law of 9 July 2004 relative to the legal consequences of certain partnerships], <http://www.legilux.public.lu/leg/a/archives/2004/1430608/1430608.pdf>



Such discrimination could be found to exist on the ground of sexual orientation, for same-sex partnerships. Such discrimination is forbidden by article 2 (1) of the general discrimination law of 28 November 2006.

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

Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?

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

The wording is: “as far as disabled workers³⁴ are concerned, provisions concerning the protection of health and of security in the work place and measures deemed to create or maintain provisions or facilities in order to safeguard or encourage their integration in the labour market do not constitute direct or indirect discrimination³⁵”.

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

Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?

Nothing is provided for in Luxembourg law in this issue.

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

4.7.1 Direct discrimination

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

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

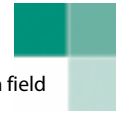
differences of treatment on grounds of age shall not constitute discrimination, if they are objectively and reasonably justified, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

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

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

³⁴ and in article 18 of the law of 26.11.2006 are included the workers with a reduced capacity

³⁵ (as translated from French)



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

Only in general terms as stated under a).

- c) *Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2) ?*

No it does not.

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

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

The law of 23 March 2001³⁶, protects young workers (basically under 18), children and adolescents as far as working conditions are concerned.

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

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

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

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

As far as persons with caring responsibilities are concerned, the law of 12 February 1999³⁷ gives the right to a special family leave for a parent of a child who is less than 16 years old, in case of grave illness, accident or other grave health problem. This leave cannot exceed 2 days per year.

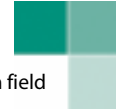
4.7.3 Minimum and maximum age requirements

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

No, there are such exceptions. In the public sector, as far as recruitment is concerned, the maximum age of 45 years to become a civil servant has been abolished.

³⁶ Loi du 23 mars 2001 concernant la protection des jeunes travailleurs, Mémorial A,2001, p.908 ; law of 23 March 2001 concerning the protection of young workers [law of 23 March 2001 on the protection of young workers]

³⁷ Loi du 12 février 1999 portant création d'un congé parental et d'un congé pour raisons familiales, Mémorial du 23/02/1999 (013/1999), [law of 12 February 1999 creating a parental leave and a leave for family reasons]
<http://www.legilux.public.lu/leg/a/archives/1999/0132302/1999A02096.html>



4.7.4 Retirement

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

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

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

In the public sector, the normal age is also 65³⁸.

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

The law on occupational pension schemes of 8 June 1999³⁹ does not provide for a normal age in order to begin receiving such occupational pension payments. This law may not alter the other legal rules relating to pension age.

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

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

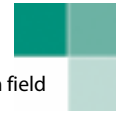
However there are some exceptions in the public sector. The police forces may retire between the ages of 55 and 60. The ambassadors may be prolonged in their duties. The ministers in religion do not have an age limit.

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

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

³⁸ *Texte coordonné de la loi modifiée du 26 mai 1954 réglant les pensions des fonctionnaires de l'Etat, Mémorial A, n°4, du 20 janvier 2004*, [coordinated text of the amended law of 26 May 1954 ruling the pensions of the state civil servants], <http://www.legilux.public.lu/leg/a/archives/2005/0042001/0042001.pdf>

³⁹ *Loi du 8 juin 1999 relative aux régimes complémentaires de pension et portant modification a) de la loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu, b) de la loi modifiée du 24 mai 1989 sur le contrat de travail, c) de la loi modifiée du 18 mai 1979 portant réforme des délégations du personnel et d) de la loi modifiée du 6 mai 1974 instituant des comités mixtes dans les entreprises du secteur privé et organisant la représentation des salariés dans les sociétés anonymes*, MEMORIAL A 074 du 17.06.1999, p.1644 ; law on occupational pension schemes modifying different previous laws ;



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

No.

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

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

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

4.7.5 Redundancy

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

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

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

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

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

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

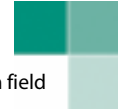
No, there is no such exception.

4.9 Any other exceptions

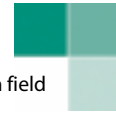
Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

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

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



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



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

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

The laws of 28 and 29 November 2006 have introduced provisions relating to positive action. The abovementioned laws create the legal framework for the use of such positive action by allowing the administration to maintain or adopt specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin, religion or belief, disability, age or sexual orientation⁴⁰.

As far as disabled people are concerned, up to now, only the Disabled Workers Law of 12 September 2003⁴¹ gives special status to some disabled persons on the labour market. According to the law, persons with a physical, mental, or sensory disability and/or due to psychosocial difficulties aggravating the deficiency have the status of disabled worker if their working capacity is reduced by at least 30% as a result of natural or accidental causes. The category in question therefore comprises disabled persons who are still relatively capable of working, but whose capacity is seriously impaired.

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

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

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

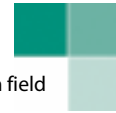
Also a number of jobs are reserved for disabled persons. The state gives financial assistance in order to support the employment of disabled persons (see under item 2.6).

According to the law, a minimum proportion of 5% of disabled workers must be employed in the public sector. For the private sector, the number is one disabled worker for 25 employees, 2% for 50 employees, 4% for 300 employees. If an employer of the private sector refuses to employ the required number of disabled persons, the employer has to pay a fine to the state. In reality, the vast majority of employers chose to pay the amount due rather than to employ disabled persons.

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

⁴⁰ article 18 (L.252-3) and article 3

⁴¹ See under item 2.6



Another possibility provided by the law is the guidance of the disabled persons toward protected workshops⁴². In such a situation the contract must include several additional clauses.

According to article 18 of the law of 26/11/2006 and article 3-2 of the public sector law of 29/11/2006 on public service, measures which create or maintain clauses or facilities in order to safeguard or encourage the insertion of disabled persons or persons with reduced capacities are not discriminatory measures.⁴³

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

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

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

b) *Do measures of positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted., classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of disabled persons to the labour market, any related to Roma and regarding minority rights based measures.*

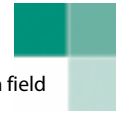
In general no positive action measures have been identified so far for the different grounds of discrimination. However there is a National Action Plan in favour of disabled persons, which can be seen as a kind of positive action plan⁴⁴.

Also, sometimes there a antidiscrimination campaigns, but they cannot be seen as positive action measures as such.

⁴² chapter 3 of the law

⁴³ 'En ce qui concerne les personnes handicapées et les travailleurs à capacité de travail réduite, des dispositions concernant la protection de la santé et de la sécurité sur le lieu de travail et des mesures visant à créer ou à maintenir des dispositions ou des facilités en vue de sauvegarder ou d'encourager leur insertion dans le monde du travail ne constituent pas une discrimination directe ou indirecte'. [As far as disabled persons and workers with reduced work capacities are concerned, the measures concerning health protection and security on the workplace and the measures aimed at creating or maintaining measures or facilities in order to safeguard or encourage their insertion in the employment world do not constitute direct or indirect discrimination]

⁴⁴ see under 2.6



6. REMEDIES AND ENFORCEMENT

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

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*
- b) *Are these binding or non-binding?*
- c) *Can a person bring a case after the employment relationship has ended?*

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

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

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

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

A person may act alone and lodge a criminal complaint in court. The state prosecutor will however decide if the case is worthwhile proceeding with (art. 23-1 of the Criminal Procedure Code). It may take a long time until the case is brought to court. Once a criminal complaint has been lodged, a supplementary private prosecution may not be used by victims of discrimination, but they can do so after the prosecutors' refusal to prosecute the author. Also finding evidence is a crucial problem, which may hinder proper prosecution of the author of discrimination.

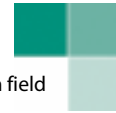
The victim may also apply directly to the examining judge (*juge d'instruction*) if he/she claims to have suffered discrimination; in this case, it is up to the victim to estimate the extent of the loss and claim damages in criminal proceedings. Also often the judge requires the plaintiff to pay a guarantee.

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

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

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

Also, a case can be presented to the labour court in case of discrimination at work. According to the general discrimination law of 28 November 2006⁴⁵, workers' associations (i.e. trade unions) or associations of national significance fighting discrimination and approved by the Minister of Justice may support the victim in a court case. Such a right is *not* granted to Churches according to the law.



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

A law of 6 May 1999⁴⁶ on penal mediation enables the State Prosecutor to use mediation, where it appears that such a remedy is likely to ensure that compensation or damages are paid to the victim, or indeed to bring a conclusion to the disturbance resulting from the offence, or in addition contribute to the rehabilitation of the person committing the offence. Such a procedure is however non-binding.

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

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

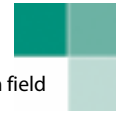
The public sector law of 29 November 2006 on public service introducing the same anti-discrimination procedures as for private relations, a civil servant may make use of the penal procedure or of civil proceedings in court or even complain against other civil servants and try to obtain disciplinary sanctions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

As far as disabled persons are concerned, there is currently no obligation that obliges the public authorities to make all public buildings fully accessible to disabled people. A sad example is the *tribunal d'arrondissement*, the main lower court in Luxembourg which is a two-storey building without a lift and which is thus not accessible to wheelchairs. There are no binding rules relating to the adoption of measures such as sign interpretation or information in Braille.

Cases can be brought to the courts even after the termination of the employment contract. However, in general the deadline for submitting a case to the labour court is restricted to three months after the ending of this contract.

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

⁴⁶ *Loi du 6 mai 1999 relative à la médiation pénale et portant modification de différentes dispositions a) de la loi modifiée du 7 mars 1980 sur l'organisation judiciaire, b) du code des assurances sociales*, [law of 6 May 1999 relating to penal mediation and amending the different clauses of the a) amended law of 7 March 1980 on judicial organisation b) of the code of social insurance]



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

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

a) *in support of a complainant*

According to article 7 of the general discrimination law of 28 November 2006, associations which are recognized by the Ministry of Justice as being nationally representative in the field of anti-discrimination, due to its statutory goal of fighting discrimination, and which have existed legally for 5 years may assist a victim of discrimination before civil and administrative courts, if a damage has been made to the cause it promotes. Such recognition of national representatives derives from an administrative practice: the Ministry of Justice controls that the association is active throughout the country to fight discrimination.

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

b) *on behalf of one or more complaints (please indicate if class actions are possible)*

Class actions are not possible but as explained under a), discrimination against a category of victims may be brought to court, the association representing then such victims.

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

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

The general discrimination law of 28 November 2006 has indeed introduced the mechanism of the shifting of the burden of proof⁴⁷ in civil and administrative procedures in the same way as provided for by the Directives.

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

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

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

What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, → or person that help the victim of discrimination to present a complaint)

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

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

⁴⁷ Article 5



L-253-1 of the Labour code, as introduced by the law of 28 November 2006 states that:
No person ... shall be victimised on the ground of protests against or refusal of an act or conduct contrary to the principle of equality of treatment defined by this Act, or as a reaction to a complaint filed with the company or legal proceedings designed to enforce the principle of equality of treatment.

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

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

In the event of termination of his/her contract of employment, a worker... may, within fifteen days after notification of the termination, make an informal application to the Chairman of the Labour Tribunal for an urgent order, the parties being heard or duly summoned, certifying that the dismissal is null and void and ordering his/her retention or, if applicable, reinstatement, pursuant to the terms of section article L-.124-12§4 of the Labour code. The order of the Labour Tribunal shall be immediately enforceable, regardless of appeals; it may be appealed against by simple request filed, within forty days of the date of notification by the Registrar, before the Chairman of the Court of Appeal with jurisdiction over labour law matters. The ruling shall be given urgently, the parties being heard or duly summoned. [...]

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

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

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

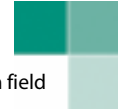
According to article 456, if the facts are committed by a person holding public authority or responsible for public service duties in the exercise or on the occasion of exercising his/her functions or duties, the penalties are increased to imprisonment for 1 month to 3 years, and a fine of 250 to 37,500 Euros, if the offence involves:

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

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

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

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



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

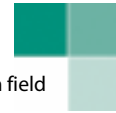
The victim may bring a case to a civil court based on a criminal offence or ask for damages in the penal court⁴⁸, but there are no ceilings foreseen by law for such financial compensation awarded by judges according to their independent decision. The damages are of pecuniary nature.

c) *Is there any information available concerning:*

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

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

⁴⁸ « constitution de partie civile »



7. SPECIALISED BODIES

Body for the promotion of equal treatment (Article 13 Directive 2000/43)

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

- a) *Does a ‘specialised body’ or ‘bodies’ exist for the promotion of equal treatment irrespective of racial or ethnic origin?*

Such a body has been created by the general discrimination law of 28 November 2006, called Centre for the Equality of Treatment (*Centre pour l’Égalité de Traitement*). It relates to all grounds covered by both directives, but sexual orientation has somehow been erased from the final text.⁴⁹

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

Although the law dates from November 2006, the Centre is not yet in operation. The president and the four members are being proposed by the Chamber of Deputies. A first candidate for the presidency was rejected by the Chamber, which decides exclusively on the matter.

In 2007 such a president has been found. Also 3 of the four other members have been chosen. The last member is about to be nominated. Questions like offices, staff and budget are being handled currently.

Currently, there is one similar existing body, in accordance with the UN Convention on the Elimination of all Forms of Racial Discrimination: the Special Permanent Commission against Discrimination (CSP-RAC), a body of the National Council for Aliens (CNE). It is competent to consider petitions from persons or groups of persons within the jurisdiction of Luxembourg who claim to be victims of discrimination. This body may only propose solutions but not enforce them.

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

The Special Permanent Commission against Discrimination (CSP-RAC) is about to be abolished.

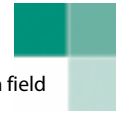
- b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.*

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

Funding will come from the general state’s budget.

⁴⁹ articles 8-17

 human
 european
 consultancy



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

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

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

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

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

Sexual orientation has been probably mistakenly omitted during parliamentary proceedings but the government intends to amend the law in order for the Center to be also in charge of sexual orientation issues.

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

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

It may also publish report and opinions and give recommendations, conduct surveys on issues relating to discrimination⁵⁰.

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

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

- f) *Is the work undertaken independently?*

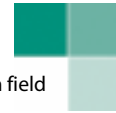
Article 9 of the public sector law of 29 November 2006 underlines that the centre will carry out its missions in full independence⁵¹. Up to now the Centre has not been working in practice.

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

It is highly unlike, as there is no Roma population in Luxembourg.

⁵⁰ article 10

⁵¹ "en toute indépendance"



8. IMPLEMENTATION ISSUES

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

Describe briefly the action taken by the Member State

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

Since the year 2001, there has been an ongoing campaign organised by the Ministry of Family focusing more specifically on discrimination at work. Posters and other information material have been printed and distributed, and lectures were organised.

Two aspects have been aimed at: to inform the public in general and to focus on the actors in the employment field.

The Ministry has thus organised in 2005 training sessions for worker's delegates at work school (école supérieure du travail). A television and radio message was widely distributed in the press. Also a campaign for persons working in of human resources was organised. Finally, the youth has also been targeted by anti-discrimination campaigns.

There has not been any formal dialogue with the NGOs concerning the drafting procedure of the bill.

The Ministry of Family is about to send out to all households a brochure on the issue discrimination and the way to act against it.

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

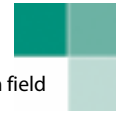
The Ministry of family (through the Commissioner of Government for Foreigners) tries to involve NGO's in promoting the principle of equal treatment.

Some dialogue has always existed through the National Foreigners' Council (CNE), including the permanent special commission against racial discrimination.

One can refer to a seminar which was organised in December 2007 by the Ministry of Family together with the Young Bar association to train young lawyer on discrimination legislation and issues.

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

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



It can be noted that for the disability criteria, bill no. 5045, introduced on 5.11.2002, and which ended up in the law of 30 June 2004 on collective work relations⁵², provides in its article 41 that recognised trade unions may enter into agreements relating to the transposition of the European Directives which are subject to such agreements, or to measures for implementation of the principle of non-discrimination.

Apart from the actions taken in gender issues, there have been public seminars like the one organised with an Employer's federation in 2007 with the Ministry of Family.

d) *to specifically address Roma and Travellers*

There are no specific actions targeted at Roma and Travellers, as there are none living in Luxembourg.

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

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

The Labour Inspectorate (Inspection du Travail et des Mines) has the power to control the application of labour law, including the anti-discrimination provisions of the general discrimination law of 28 November 2006⁵³.

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

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

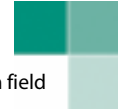
Such laws or regulations could not be identified by the author.

⁵² Loi du 30 juin 2004 concernant les relations collectives de travail, le règlement des conflits collectifs de travail ainsi que l'Office national de conciliation et modifiant 1. la loi modifiée du 7 juin 1937 ayant pour objet la réforme de la loi du 31 octobre 1919 portant règlement légal du louage de services des employés privés; 2. la loi modifiée du 9 décembre 1970 portant réduction et réglementation de la durée du travail des ouvriers occupés dans les secteurs public et privé de l'économie; 3. la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'Etat; 4. la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux; 5. la loi modifiée du 23 juillet 1993 portant diverses mesures en faveur de l'emploi ; Mémorial A, 15.07.2004, p.1782 ; = Law on collective working relations, modifying certain previous laws

⁵³ loi du 4 avril 1974 portant réorganisation de l'Inspection du Travail et des Mines [law of 4 April 1974 reorganising the Labour Inspectorate], Mémorial du 18/04/1974 (027/1974),

<http://www.legilux.public.lu/leg/a/archives/1974/0271804/1974A04861.html>;

see also new §L-254 of the Labour code as introduced by article 18 of the law of 28/11/2006



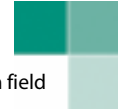
9. OVERVIEW

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

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

It must be stated again that the setting up of the Centre for Equality of Treatment has been much to slow.

Also, no case-law seem to emerge until now, which makes it difficult to assess the effectiveness of the legislation.



10. CO-ORDINATION AT NATIONAL LEVEL

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

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



Annex

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

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: **LUXEMBOURG**

Date **31.12.2007**

| Title of Legislation (including amending legislation) | In force from: | Grounds covered | Civil/Administrative/ Criminal Law | Material Scope | Principal content |
|---|--------------------------|--|---------------------------------------|--|--|
| This table concerns only key national legislation; please list not more than 10 anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address. | Please give month / year | | | e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education | e.g. prohibition of direct and indirect discrimination harassment, instruction to discriminate or creation of a specialised body |
| Law of 28 November 2006 1. transposing Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 2. transposition de la directive 2000/78/CE du Conseil du 27 novembre 2000 establishing a general framework for equal treatment in employment and occupation 3. modifying the Labour | December 2006 | Religion and belief, disability, age, sexual orientation, racial or ethnic origin | Civil/Administrative/Criminal | Full scope of both Directives | Prohibition of direct and indirect discrimination, of harassment and instruction to discriminate, provisions of defense of rights and victimisation, creation of an equality body |

| | | | | | |
|--|----------------------|--|-----------------------|--------------------------|---|
| <p>Code and introducing in Book II a new title V on equality of treatment in the area of employment and work;</p> <p>4. modifying articles 454 and 455 of the penal Code;</p> <p>5. modifying the law of 12 September 2003 on disabled persons.</p> <p>http://www.legilux.public.lu/leg/search/resultHighlight/index.php?linkId=3&SID=841cbd8d592e36e5ad8892e67b1f9292</p> | | | | | |
| <p>Law of 29 November 2006 modifying</p> <p>1. the modified law of 16 April 1979 establishing the general statute of state civil servants</p> <p>2. the modified law of 24 December 1985 establishing the general statute of municipal civil servants.</p> <p>http://www.legilux.public.lu/leg/search/resultHighlight/index.php?linkId=3&SID=841cbd8d592e36e5ad8892e67b1f9292</p> | December 2006 | Religion and belief, disability, age, sexual orientation, racial or ethnic origin | Administrative | Public employment | Prohibition of direct and indirect discrimination, of harassment and instruction to discriminate, provisions on defense of rights and victimisation. |
| penal code, articles 454 to 457 (law of 19 July 1997 completing the penal code | July 1997 | Racial or ethnic origin, skin colour, sex, sexual | Criminal | | Individual and collective discrimination |

| | | | | | |
|--|-------------------------|--|---------------------|---------------------------------------|--|
| <p>by amending the accusation of racism and introducing the accusation of revisionism and other acts based on illegal discriminations) http://www.legilux.public.lu/leg/a/archives/1997/0540708/1997A16801.html</p> | | <p>orientation, family situation, state of health, disability, customs, political or philosophical opinions, trade union activities, their membership, actual or supposed, of an ethnic group, nationality, race or specific religion</p> | | | <p>are forbidden</p> |
| <p>law of 27 July 1993 on the integration of foreigners in the Grand Duchy of Luxembourg and on social action for foreigners http://www.legilux.public.lu/leg/a/archives/1993/0552807/1993A10801.html</p> | <p>July 1993</p> | <p>race, colour, descent, national or ethnic origin, religion</p> | <p>Civil</p> | <p>General, for foreigners</p> | <p>prohibition of (direct) Individual and collective discrimination</p> |

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country

LUXEMBOURG

Date 31.12.2007

| Instrument | Signed (yes/no) | Ratified (yes/no) | Derogations/ reservations relevant to equality and non-discrimination | Right of individual petition accepted? | Can this instrument be directly relied upon in domestic courts by individuals? |
|---|-----------------|-------------------|---|--|--|
| European Convention on Human Rights (ECHR) | YES | YES | | | Yes |
| Protocol 12, ECHR | YES | YES | | | Yes |
| Revised European Social Charter | YES | YES | | Ratified collective complaints protocol? | No |
| International Covenant on Civil and Political Rights | YES | YES | | | No |
| Framework Convention for the Protection of National Minorities | YES | NO | | | No |
| International Convention on Economic, Social and Cultural Rights | YES | YES | | | No |
| Convention on the Elimination of All Forms of Racial Discrimination | YES | YES | | | No |
| Convention on the Elimination of Discrimination Against Women | YES | YES | | | No |
| ILO Convention No. 111 on Discrimination | YES | YES | | | Yes |

| | | | | | |
|---|-----|-----|--|--|--------------------|
| Convention on the Rights of the Child | YES | YES | | | Some articles only |
| Convention on the Rights of Persons with Disabilities | YES | NO | | | No |