

Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States

Report of the *European Group of Experts
on Combating Sexual Orientation Discrimination*¹
about the implementation up to April 2004 of
*Directive 2000/78/EC establishing a general framework
for equal treatment in employment and occupation*

12 Luxembourg

by Anne Weyembergh²

translated from French³

¹ The European Group of Experts on Combating Sexual Orientation Discrimination (www.emmeijers.nl/experts) was established and funded by the Commission of the European Communities under the framework of the Community Action Programme to combat discrimination 2001-2006 (http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm).

The contents of the Group's report do not necessarily reflect the opinion or position of national authorities or of the European Commission. The report, submitted in November 2004, aims to represent the law as it was at the end of April 2004; only occasionally have later developments been taken into account.

The full text of the report (including English versions of all 20 chapters and French versions of most chapters, plus summaries of all chapters both in English and French) will be published on the website just mentioned; links to it will be given on www.emmeijers.nl/experts.

² Dr. A. Weyembergh (aweyembe@ulb.ac.be) is researcher at the Institute for European Studies of the Université Libre de Bruxelles, Belgium.

³ The original version of this chapter can be found in the *Version française* of this report, and also on the website mentioned in note 1.

12.1 General legal situation

Before getting to the heart of the matter, attention should be drawn to the scarcity of available sources on this subject. The present report is based primarily on current law texts, bills that have been tabled, preliminary work, parliamentary questions and ministerial replies that have been given to those questions. It is also based on interviews with people working in the relevant public services and people from various associations, such as the main association that concerns itself with the rights of gays and lesbians in Luxembourg, namely the non-profit association Rosa Lëtzebuerg⁴, and the Gay and Lesbian Information Centre or CIGALE⁵. The Luxembourg case law is, generally speaking, not only difficult to access, but also extremely rare, even non-existent on this subject. As regards the sources of legal doctrine, these are extremely scarce too. To our knowledge, no record or study exists of discrimination against gays and lesbians in Luxembourg.

In this respect it is worth remembering the peculiar situation of Luxembourg⁶. It is true that Luxembourg is characterized by its bilingualism and by the presence of a large proportion of foreigners⁷, which would tend to encourage tolerance and open-mindedness. However, Luxembourg is a small country⁸, with no large urban centres. Everyone knows everyone else, hence the hesitation to talk and to denounce existing discrimination. The absence or virtual absence of complaints in this respect does not mean that there is no discrimination at all.

Luxembourg law has always been very strongly influenced by the law of certain other Member States of the European Union, in particular French and Belgian law. As a result of the French occupation in 1794-1795, the laws criminalizing sodomy were abolished at the end of the 18th century. The French Penal Code of 1791 and then of 1810 was in force in Luxembourg until 1879. The Luxembourg Penal Code of 1879 was largely inspired by the Belgian Penal Code of 1867, which in turn was influenced by the French Penal Code⁹. For nearly two centuries, Luxembourg law contained no provision penalizing homosexual relations. In 1971, however, following the Belgian 'example', Luxembourg introduced a higher age of consent for homosexual relations between men and between women, namely 18 years, whereas the general age of consent was fixed at 14 years¹⁰. The fact of an individual over 18 years of age having sexual relations with a person of the same sex under 18 was punished by a prison sentence of 6 months to 3 years and a fine of 10,001 to 200 Luxembourg francs. In 1992, the above-mentioned distinction was abolished and the general age of consent or the age of sexual majority was

⁴ The non-profit association Rosa Lëtzebuerg was established in 1996. Its purpose is to promote the civil rights and to combat all discrimination against homosexual and bisexual citizens and to campaign at the social, cultural and legal level for full equality for homosexual and bisexual persons (see its site at www.gay.lu).

⁵ Gay and Lesbian Information Centre or CIGALE, which opened on 15 November 2002.

⁶ On this peculiarity, see Krickler, 1998, pp. 81 and 82.

⁷ In 2001, there were 164,700 foreigners, or 37.3% of the total population (see site www.gouvernement.lu/tout_savoir/population_langues/populati.html).

⁸ In 2001, the total population of Luxembourg stood at 441,300 (see site www.gouvernement.lu/tout_savoir/population_langues/populati.html).

⁹ On this development, see Spielmann and Spielmann, 2002, p. 8 et seq.

¹⁰ Article 372bis of the Penal Code.

fixed at 16 years for everybody, that is to say, for men and women, irrespective of the type of relationship, homosexual or heterosexual¹¹.

12.1.1 *Constitutional protection against discrimination*

Although certain proposals have been made in this sense¹², the Luxembourg Constitution contains no provision that expressly establishes the principle of non-discrimination. Consequently, there is no article in the Luxembourg Constitution that prohibits discrimination on grounds of sexual orientation.

The Constitution does, however, establish in general terms the principle of equality of all Luxembourg citizens before the law (Article 10b, par. 1)¹³.

12.1.2 *General principles and concepts of equality*

Besides par. 1 of Article 10bis of the Constitution, we should also mention the second paragraph of the same article, which provides, among other things, that the Luxembourg citizens may be admitted to all public, civil and military service jobs, as well as Article 11 of the Constitution and in particular its par. 4, according to which the law guarantees the right to employment and ensures the exercise of this right for every citizen.

It should also be pointed out that the European Convention on Human Rights is directly applicable in the Luxembourg legal system. Sexual orientation discrimination is therefore prohibited in the exercise of a right established by this Convention. We should also remember that Luxembourg has signed, but not yet ratified, Protocol no. 12 to the European Convention on Human Rights¹⁴.

We should also note that two bills have been tabled: a bill, officially tabled on 10 November 2003, for the transposition of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation¹⁵, and a bill, tabled on 13 November 2003, for the transposition of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin¹⁶.

¹¹ See the Act of 10 August 1992 on the protection of young people, *Mémorial*, A, n° 70, 25 September 1992, pp. 2195 et seq. This Act repealed Article 372b of the Penal Code. In this connection, see the reply of the Minister of Justice to parliamentary question no. 287 of 11 March 1996 put by Renée Wagener, MP for the green party 'Déi Gréng'.

¹² During the proceedings for the revision of Article 11 of the Constitution, proposals were made for establishing the principle of non-discrimination, one of which, inspired by the Treaty of Amsterdam, expressly refers to sexual orientation (see Commission for the Institutions and Constitutional Revision, minutes of the meeting of 17 June 1998, P-1997-O-IR-12-01 and, in particular, the draft text of the Socialist group to which reference is made).

¹³ It should be noted that there exists in Luxembourg a constitutionality review carried out by the Constitutional Court, to which preliminary questions are referred by any court in order to rule on the conformity of statutes with the Constitution, with the exception of those approving treaties (Article 95c of the Constitution and the Act of 27 July 1997 organizing the Constitutional Court (*Mémorial* A, n°58, 13 August 1997, pp. 1724 et seq.).

¹⁴ Date of signature: 4 November 2000.

¹⁵ Bill for the transposition of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, amendment of Articles 3 and 7 of the Amended Act of 12 November 1991 on handicapped workers and repeal of Article 6 of the Amended Act of 12 March 1973 reforming the minimum wage, House of Representatives, Ordinary Session 2003-2004, 10 December 2003, n°5249.

¹⁶ Bill for the transposition of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, House of Representatives, Ordinary Session 2003-2004, 10 December 2003, n° 5248.

Article 1, § 1 of the first bill defines the principle of equal treatment as 'the absence of all direct or indirect discrimination in employment and occupation on grounds of religion or beliefs, handicap, age, sexual orientation, racial or ethnic origin'. By including 'racial and ethnic origin', this second bill covers not only the grounds for discrimination referred to in Directive 2000/78/EC, but also those referred to in Directive 2000/43/EC. By this inclusion, it takes into account not only Directive 2000/78/EC but also the provisions on employment and occupation contained in Articles 3, 4, 5 and 11 of Directive 2000/43/EC¹⁷.

Article 1, § 1 of the second bill defines the principle of equal treatment as 'the absence of all direct or indirect discrimination on grounds of racial or ethnic origin'.

12.1.3 Division of legislative powers relating to discrimination in employment

Luxembourg is a unitary state. In accordance with Article 1 of the Constitution, it is an indivisible state.

The regulations governing employment law – and social security – fall within the competence of the legislator¹⁸, as ensues from Article 11 of the Constitution, in particular par. 4 and 5. The laws in this area may, however, be complemented by regulations necessary for their implementation, which are adopted by the Grand-Duke¹⁹. It should be pointed out that collective labour agreements are also declared generally binding by Grand-Ducal regulations²⁰.

12.1.4 Basic structure of employment law

Whereas there exists a Social Insurance Code, the regulations governing employment law in the private sector have not been codified. This area, however, is governed by various laws, such as the Act of 24 May 1989 on employment contracts²¹.

Public service jobs are covered by administrative law, which is contained in the Administrative Code. Volume 3 of this Code, entitled 'Public Service', contains the main laws and regulations governing the status, salaries, careers and pensions of civil servants.

Certain laws apply to both the public and private sectors. In this connection, we should mention the Act of 8 December 1981 on equal treatment between men and women in access to employment, vocational training and advancement, and working conditions (see below under 12.1.7).

12.1.5 Provisions on sexual orientation discrimination in employment or occupation

The constitutional principle of equality is complemented by its corollary, the prohibition of discrimination, as established and penalized by Articles 454 et

¹⁷ In this sense, see the 'purpose of the bill' and the commentary on Article 1, House of Representatives, Ordinary Session 2003-2004, 10 December 2003, n°5249, pp. 3 and 33.

¹⁸ Articles 46 et seq. of the Constitution.

¹⁹ Article 36 of the Constitution.

²⁰ See on this subject the Act of 12 June 1965 on collective labour agreements.

²¹ This and the other laws are available at this site: www.mt.etat.lu/loisregl/lois0.htm.

seq. of the Penal Code, as amended by the Act of 19 July 1997 supplementing the Penal Code by amending the criminalization of racism and by criminalizing revisionism and other acts based on unlawful discrimination²². This Act, inspired by the relevant French provisions in this area, aims to class alongside racial discrimination a whole series of other forms of discrimination, including those based on sexual orientation²³. According to Article 454 of the Penal Code:

'Discrimination comprises any distinction applied between natural persons by reason of their origin, skin colour, sex, sexual orientation, family situation, state of health, handicap, morals, political or philosophical opinions, trade union activities, or their membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion.

Discrimination also comprises any distinction applied between legal persons, groups or communities of persons by reason of the origin, skin colour, sex, sexual orientation, family situation, state of health, handicap, morals, political or philosophical opinions, trade union activities, or the membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion, of the members or of certain members of these legal persons, groups or communities'.

The aforementioned Act does not punish all the forms of discrimination enumerated, but only those that take the form of one of the acts it enumerates restrictively²⁴.

The forms of discrimination that are liable to penal sanctions according to Articles 454 et seq. of the Penal Code include those on grounds of sexual orientation that consist in obstructing the normal exercise of any given economic activity, refusing to hire, sanctioning and dismissing a person, as well as subjecting an offer of employment to a condition based on sexual orientation²⁵.

To our knowledge, besides these penal provisions, there are no other legal provisions relating to sexual orientation discrimination in employment and occupation.

However, we should remember that a bill has been tabled for the transposition of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (see above under 12.1.2 and below under 12.2.1 et seq.).

12.1.6 *Important case law precedents on sexual orientation discrimination in employment or occupation*

None to our knowledge²⁶.

²² *Mémorial*, A n°54, 7 August 1997, p. 1680 et seq.

²³ On the objectives of this Act, see House of Representatives, report of the Legal Affairs Committee, 5 June 1997, J-1996-O-0461.

²⁴ See in particular Articles 455 and 456 of the Penal Code.

²⁵ See Article 455, par. 5, 6 and 7 of the Penal Code.

²⁶ In the private sector, the absence of case law in this area was confirmed to us on 2 July 2003 by Justice of the Peace D. Mousel-Neyen.

12.1.7 Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation

Although certain proposals have been made in this sense²⁷, there is as yet no provision in the Constitution that expressly stipulates the principle of equality between men and women.

Nevertheless, there are several legal provisions which establish the principle of equality between male and female workers. They are applicable in both the private and public sectors. In this respect, we should mention the Grand-Ducal Regulation of 10 July 1974 on equal pay for men and women²⁸: this stipulates that every employer is obliged to ensure equal pay for men and women for the same kind of work or for equivalent work²⁹.

There is also the Act of 8 December 1981, which provides that the principle of equal treatment between men and women applies to access to employment, professional advancement, career guidance, vocational training, advanced training and retraining, access to self-employment and working conditions³⁰. It prohibits employers and those who disseminate or publish job offers or job advertisements to make reference to the gender of the worker or to use elements in these offers or advertisements indicating or implying the gender of the worker apart from all explicit references. It prohibits all reference to the gender of the worker in the conditions of access and in the selection criteria for employment, as well as the use in these conditions and criteria elements of which, even without making explicit reference to the gender of the worker, result in discrimination. It also prohibits refusal or restriction of access to employment for reasons that are explicitly or implicitly based on sex³¹.

We should also mention the Grand-Ducal Regulation of 31 March 1996 establishing an Interministerial Committee on Equality Between Men and Women³². This Committee is empowered to examine all issues connected with equality between men and women and to address opinions, proposals and suggestions on this subject to the Minister for the Advancement of Women. It is also consulted on any bill that is likely to have an impact on the equality between men and women³³.

²⁷ During the proceedings for the revision of Article 11 of the Constitution, proposals were made for establishing the principle of equality between men and women (see Commission for the Institutions and Constitutional Revision, minutes of the meeting of 17 June 1998, P-1997-O-IR-12-01).

²⁸ Grand-Ducal Regulation of 10 July 1974 on equal pay for men and women, *Mémorial A* n°56, 22 July 1974, pp. 1275 et seq.

²⁹ Examples of judgments on equal pay for men and women include that of the Court of Appeal of 2 May 1985, *Banque nationale de Paris v. Stoffel*, *Pasicrisie luxembourgeoise*, 1984-1986, pp. 273 et seq. and that of the Court of Cassation of 25 April 1991, *Pasicrisie luxembourgeoise* 28, pp. 179 et seq.

³⁰ Article 1 of the Act of 8 December 1981 on equal treatment between men and women in access to employment, vocational training and advancement, and working conditions, *Mémorial A* n° 91, 16 December 1981, pp. 2194 et seq., amended by the Act of 17 November 1986, *Mémorial A* n° 93, 5 December 1986, pp. 2222 et seq. One of the judgments in connection with this Act is that of the Litigation Committee, 13 December 1988, *Pasicrisie luxembourgeoise* 27, pp. 296 et seq.

³¹ Article 3 of the Act of 8 December 1981.

³² Grand-Ducal Regulation of 31 March 1996 establishing an Interministerial Committee on Equality Between Men and Women, *Mémorial A* n°34, 20 May 1996, pp. 1114 et seq., amended by the Grand-Ducal Regulation of 10 July 2000, *Mémorial A* n°65, 4 August 2000, pp. 1318 et seq.

³³ Article 4 of the Grand-Ducal Regulation of 31 March 1996.

12.1.8 *Provisions on sexual orientation discrimination in other fields than employment and occupation*

According to Articles 455 et seq. of the Penal Code, penalties are imposed on discrimination on the grounds enumerated in Article 454, and therefore also on grounds of sexual orientation, which consists in refusing the supply or enjoyment of goods – which also covers the housing market³⁴ -, refusing to supply a service, subjecting the supply of goods or services to one of the conditions of Article 454, such as any condition based on sexual orientation, or operating any other form of discrimination when supplying goods or services. The same applies to the fact of indicating in an advertisement the intention to refuse goods or services or to operate discrimination when supplying goods or services on the basis of one of the conditions of Article 454, such as any condition based on sexual orientation³⁵.

It is also worth drawing attention to Article 457-1 of the Penal Code, which punishes public incitement to the acts of discrimination referred to in Article 455 of the Penal Code, as well as incitement to hatred or violence against a natural or legal person, group or community on any one of the grounds referred to in Article 454, including sexual orientation (see below under 12.2.6 and 12.2.7).

12.2 **The prohibition of discrimination required by the Directive**

12.2.1 *Instrument(s) used to implement the Directive*

The process of transposing the Directive was launched³⁶ and resulted in the tabling of a bill on 10 November 2003 (see above under 12.1.2). The bill was submitted to the Council of State for an opinion, yet this is still awaited. In view of the general elections and the end of the term of office in June 2004, the Council of State will not deliver its opinion before the end of 2004. Once this opinion has been obtained, the bill will be examined within the Committee on Employment and Labour of the House of Representatives and should then in principle be discussed in plenary session. It is as yet impossible to predict how long it will take for the Act in question to be adopted. This will in fact depend on various elements of which we have no knowledge yet, such as the substance of the Council of State's opinion, any amendments that are made by the Committee on Employment and Labour of the House of Representatives, etc.

12.2.2 *Concept of sexual orientation (Art. 1 Directive)*

To our knowledge, it was the Act of 19 July 1997 that introduced the concept of 'sexual orientation' into Luxembourg law, yet it does not define the term. The Luxembourg courts have not yet had the opportunity to interpret this concept.

³⁴ The term 'enjoyment of goods', which did not appear in the initial version of the bill which resulted in the Act of 19 July 1997 (bill complementing the Penal Code by criminalizing racism, revisionism and other acts based on unlawful discrimination, n° 4071, tabled on 3 July 1995 (J-1994-O-0521)), was introduced at the suggestion of the Council of State so as to encompass the housing market (Council of State opinion of 23 January 1996).

³⁵ Article 455, par. 1 to 4 of the Penal Code.

³⁶ The first interministerial meetings took place in November 2002, while the preliminary work for the transposition began in January 2003.

However, some information in this connection can be found in the preliminary work for the aforementioned Act.

Discrimination on grounds of sexual orientation was not expressly mentioned in the initial version of the bill which subsequently became the Act of 19 July 1997³⁷. This Act, however, referred expressly to discrimination on grounds of 'morals', which encompass, at least according to some, discrimination based on sex life³⁸. The Legal Affairs Committee of the House of Representatives, considering that the expression 'morals' was too vague and too general, and in order to avoid any miscarriages of justice in this area, amended the bill by making explicit reference to discrimination against individuals on grounds of their 'sexual orientation'³⁹. On the occasion of the parliamentary debates on this point, some have emphasized that sexual orientation discrimination should not only cover homosexuality but rather sexuality in general⁴⁰.

It is worth noting that the bill for the transposition of Directive 2000/78/EC contains no indication of the concept of sexual orientation.

12.2.3 *Direct discrimination (Art. 2(2)(a) Directive)*

It emerges from Article 454 of the Penal Code that the constituent element of the criminal offence of discrimination resides in the distinction that is made as a result of the various criteria that are listed. No additional information is given in connection with the terms 'distinction' or 'discrimination', despite the observations made on this point by the Council of State⁴¹. The Luxembourg courts have not yet had the opportunity to interpret Article 454 of the Penal Code. It is true that the Act of 19 July 1997 has given rise to a judgment by the Magistrates' Court on 27 November 2000, but this concerned Article 457-1 of the Penal Code in connection with acts of incitement (see below under 12.2.6).

General information about the concept of discrimination can be found in the Luxembourg case law on the constitutional provisions regarding the principle of equality⁴².

As regards the bill for the transposition of Directive 2000/78/EC, §2a) of Article 1 defines direct discrimination by adopting the terms contained in the Directive in question. In accordance with §1 of the same Article to which reference is made (see above under 12.1.2), racial and ethnic origin are included in the cited grounds for discrimination.

³⁷ See the bill complementing the Penal Code by criminalizing racism, revisionism and other acts based on unlawful discrimination, n° 4071, tabled on 3 July 1995 (J-1994-O-0521).

³⁸ House of Representatives, Legal Affairs Committee, minutes of the meeting of 12 November 1996; see in this sense also the complementary opinion of the Council of State of 18 March 1997, J-1996-O-0326.

³⁹ Bill 4071/07, amendments adopted by the Legal Affairs Committee, 19 December 1996, J-1996-O-0135.

⁴⁰ In this sense, see in particular the position of M. Mosar, Legal Affairs Committee, minutes of the meeting of 26 November 1996, P-1996-O-J-09-01.

⁴¹ See the Council of State opinion of 23 January 1996 and its complementary opinion of 18 March 1997, J-1996-O-0326.

⁴² See in this connection Article 10b, Court of Cassation, 22 February 1996, *Pasicrisie luxembourgeoise* 1996, pp. 2 et seq. and Constitutional Court, 5 May 2000, judgment 9/2000, *Mémorial A*, n°40, 30 May 2000, pp. 948 et seq. ('[...] the implementation of the constitutional rule of equality presupposes that the categories of individuals between whom discrimination is claimed are in a comparable situation with respect to the criticized measure [...] the legislator may, without violating the constitutional principle of equality, treat certain categories of individuals differently from a legal point of view on condition that the difference that is instituted proceeds from objective disparities, and that it is rationally justified, adequate and in proportion to its objective').

12.2.4 Indirect discrimination (Art. 2(2)(b) Directive)

In the course of the parliamentary proceedings, some suggested that an express reference should be introduced to indirect discrimination⁴³. This suggestion was not followed: the Act of 19 July 1997 makes no mention whatsoever of indirect discrimination.

The absence of all reference to indirect discrimination may be due to the penal character of the current anti-discriminatory legislation. In fact Luxembourg law does not overlook this concept altogether, as is testified by the provisions in Luxembourg law on equality between men and women in employment and occupation, which make express reference to indirect discrimination. The Act of 8 December 1981 on equal treatment in access to employment, vocational training and advancement, and working conditions⁴⁴, and the Act of 28 June 2001 on the burden of proof in cases of gender-based discrimination stipulate, 'For the purposes of the present Act, the principle of equal treatment shall imply the absence of all gender-based discrimination, either directly or indirectly'⁴⁵. Furthermore, this Act defines the concept of indirect discrimination as follows: 'For the purposes of the principle of equal treatment referred to in par. 1, indirect discrimination exists where an apparently neutral provision, criterion or practice affects a substantially higher proportion of individuals of a particular sex, unless this provision, criterion or practice is appropriate and necessary and can be justified by objective factors that are unconnected with the sex of the individuals concerned'⁴⁶.

In order to be in conformity with European law, Luxembourg should expressly incorporate this concept in its law with regard to the criteria of discrimination referred to in Directive 2000/78.

This is precisely what the bill for the transposition of Directive 2000/78/EC is intended to do. It defines the concept of indirect discrimination in §2b) of its Article 1 by adopting the terms contained in the Directive in question. As in §1 of the same article, it adds racial and ethnic origin (see above under 12.1.2).

12.2.5 Prohibition and concept of harassment (Art. 2(3) Directive)

Luxembourg law knows the concept of harassment: there is an Act of 26 May 2000 on protection against sexual harassment at work⁴⁷. This instrument covers all private sector employees as well as trainees, apprentices and students with a holiday job⁴⁸. It also covers public officials⁴⁹. In accordance with Article 2 of this Act, sexual harassment at work means 'any behaviour of a sexual nature or any other kind of behaviour based on sex of which the person who is guilty of such behaviour knows, or should know, that it affects the dignity of a person at work, provided that one of the following three conditions is met:

⁴³ See also the opinion of the Chamber of Labour, 17 December 1996, and the joint opinion of the National Council for Aliens and the Special Standing Committee against Racial Discrimination.

⁴⁴ See articles 2, par. 1 and 3 of the Act of 8 December 1981.

⁴⁵ Article 1 par. 1 of the Act of 28 June 2001 on the burden of proof in cases of gender-based discrimination, *Mémorial A*, n°86, 31 July 2001, pp. 1776 et seq.

⁴⁶ Article 1, par. 2 of the Act of 28 June 2001.

⁴⁷ Act of 26 May 2000 on protection against sexual harassment at work and amending various Acts, *Mémorial A*, n°50, 30 June 2000, pp. 1110 et seq. On sexual harassment, see House of Representatives of the Grand-Duchy of Luxembourg, Thematic Dossier 'Sexual Harassment', 28 February 2000.

⁴⁸ Article 1 of the Act of 26 May 2000.

⁴⁹ See on this subject the preliminary work in the above-mentioned thematic dossier, as well as Articles 13 and 14 of the Act of 26 May 2000.

- 1) The behaviour is misplaced, improper and hurtful for the person at whom it is directed;
- 2) The fact that a person refuses or accepts such behaviour on the part of the employer, an employee, a customer or a supplier is used explicitly or implicitly as a basis for a decision that affects the rights of this person in matters of vocational training, employment, maintenance of employment, promotion, salary or any other decision connected with employment;
- 3) Such behaviour creates an atmosphere of intimidation, hostility or humiliation with respect to the person at whom such behaviour is directed.

The behaviour in question may be of a physical, verbal or non-verbal nature, and is presumed to be intentional’.

According to Article 3 of the same Act, the aforementioned behaviour is considered contrary to the principle of equal treatment within the meaning of the Act of 8 December 1981 on equal treatment between men and women in access to employment, vocational training and advancement, and working conditions⁵⁰.

The Act of 26 May 2000 establishes the obligation for employers and employees, as well as customers and suppliers, to refrain from all acts of sexual harassment at work. Besides preventive measures, the employer is obliged to ensure that any act of sexual harassment of which he is aware ceases immediately. Any measures to this end shall on no account be taken to the detriment of the victim⁵¹. A worker who is the victim of an act of harassment may refuse to continue the performance of an employment contract and may terminate it without notice for serious reasons, and also claim damages from the employer whose negligence gave rise to the immediate termination of the contract⁵². The Act of 26 May 2000 does not provide for penal sanctions in this area. If the harassment is not criminalized and penalized as such, acts of harassment may fall within the scope of penal law if they constitute criminal offences such as rape⁵³, assault and battery⁵⁴, indecent assault⁵⁵, indecent exposure⁵⁶, etc.

We should also mention the tabling on 4 July 2002 of a bill on protection against moral harassment at work⁵⁷. This applies to both the public and private sectors and defines moral harassment at work as ‘any behaviour or act, as well as any improper and repeated conduct originating inside or outside the company or institution, which takes the form of unilateral behaviour, remarks, intimidation, acts, gestures and writings intended to damage, or having the effect of

⁵⁰ In this connection, see the opinion of the Council of State of 26 January 1999, which considers that this is a simplistic comparison, since sexual harassment may constitute a form of gender-based discrimination, but not necessarily so (J-1998-O-0305). It is true that the comparison it establishes between sexual harassment and the breach of equal treatment between men and women within the meaning of the Act of 8 December 1981 causes confusion. However, we do not see what might be the basis for the inapplicability of this law in cases where the victim is of the same sex as the perpetrator of the harassment (the person in charge of this subject at the Ministry for Equal Opportunity, Laurence Goedert, confirmed this view of the situation).

⁵¹ Article 4 of the Act of 26 May 2000.

⁵² Article 7 of the Act of 26 May 2000.

⁵³ Article 392 of the Penal Code.

⁵⁴ Articles 398 et seq. of the Penal Code.

⁵⁵ Article 378 of the Penal Code.

⁵⁶ Article 383 et seq. of the Penal Code.

⁵⁷ Bill n° 4979 on protection against moral harassment at work.

damaging, the personality, the dignity or the physical or mental integrity of a worker or any other person to whom the present article applies, during the performance of his work, jeopardizing his job or creating an intimidating, hostile, degrading, humiliating or offensive environment'. This bill has certain points in common with the Act of 26 May 2000 as concerns the obligations incumbent upon the employer as well as the right of the worker who is the victim of moral harassment to refuse to continue the performance of the employment contract. As with sexual harassment in the above-mentioned Act, acts of moral harassment do not in themselves constitute criminal offences.

It is likely that, when it comes to settling this question, the case law would include harassment linked to sexual orientation in the concept of sexual harassment referred to in the Act of 26 May 2000. Any doubt in this respect would, however, be removed if the bill on protection against moral harassment were to be adopted. Nevertheless, it is worth noting in this connection the position adopted by the Luxembourg government, which does not rule out legislation in this area, yet does not regard the adoption of this bill as an immediate necessity, since such an intervention constitutes, in its view, merely the final stage in a long-term process⁵⁸.

As concerns the bill for the transposition of Directive 2000/78/EC, Article 1, §3 provides, 'Notwithstanding the specific provisions relating to sexual and moral harassment, harassment shall be considered a form of discrimination within the meaning [of the bill] where undesirable behaviour linked to one of the reasons [enumerated in §1 of the same article] manifests itself, which is intended to damage, or has the effect of damaging, the dignity of an individual and of creating an intimidating, hostile, degrading, humiliating or offensive environment'. The bill thus adopts the wording of the Directive in question. However, it should be emphasized that the first part of the phrase suggests that Luxembourg has legislation on moral harassment, whereas we have seen that this is not the case at present⁵⁹.

12.2.6 *Instruction to discriminate (Art. 2(4) Directive)*

Articles 454 et seq. of the Luxembourg Penal Code do not expressly mention acts consisting of imposing an obligation to practise discrimination. No instruction to discriminate is mentioned either by the Act of 8 December 1981 on equal treatment between men and women. There is therefore *a fortiori* no question in these texts of an express classification of such behaviour as a form of discrimination.

Without there being any further question of classification as discrimination, we should point out that incitement to discrimination is suppressed by Article 457 – 1 of the Penal Code (see below under 12.2.7).

Furthermore, the act of instructing another to discriminate is liable to fall within the scope of Articles 66 and 67 of the Penal Code. The first of these provisions punishes as the perpetrators of a crime or offence those who committed it or directly cooperated in committing it, those who lent a tool for the carrying out of the crime or offence without which the crime or offence could not have been

⁵⁸ See the Government position of 4 November 2002, House of Representatives, Ordinary Session 2002-2003, n°4979, 12 November 2002.

⁵⁹ This discrepancy has been underlined by the Chamber of Labour in its opinion of 17 February 2004, p. 2.

committed, and those who directly provoked this crime or offence by gifts, promises, threats, abuse of authority or power, intrigues or tricks, speeches held at meetings or in public places, posters and placards, printed or other documents that are sold or distributed⁶⁰. In accordance with the second provision, 'those who gave instructions to commit a crime or offence' are punishable as accomplices in a crime or offence.

It is worth noting that Article 1, §4 of the bill for the transposition of Directive 2000/78/EC extends the concept of discrimination to include all behaviour instructing another person to practise discrimination on the grounds enumerated therein.

12.2.7 *Material scope of applicability of the prohibition (Art. 3 Directive)*

It is principally Article 455 of the Penal Code that we need to refer to.

In certain respects, this provision goes further than the Directive in that it also covers the forms of discrimination not covered by the Directive. As we have already mentioned, it penalizes the cases of discrimination referred to in Article 454 where they consist of refusing the supply or enjoyment of goods – which also encompasses the housing market -, refusing the supply of services, subjecting the supply of goods or services to one of the conditions referred to in Article 454 or operating any other kind of discrimination when supplying goods or services, indicating in an advertisement the intention to refuse goods or services or to operate discrimination when supplying goods or services on the basis of one of the conditions enumerated in Article 454.

In other respects, and even though it gives a particularly broad interpretation of some of its terms, Article 455 of the Penal Code does not meet the requirements of the Directive: although it expressly covers discrimination that consists in obstructing the normal exercise of any given economic activity, refusing to hire a person, sanctioning and dismissing a person, subjecting an offer of employment to one of the conditions enumerated in Article 454, it makes no mention whatsoever of promotion, vocational training, advancement and retraining, conditions of employment and occupation, including remuneration, membership of and involvement in a trade union organisation, etc.

Apart from Article 455 of the Penal Code, we should also mention Article 456, which concerns discrimination committed by a person holding public authority or discharging a public service mission in the course of his duties or his mission, and consisting in refusing the benefit of a right conferred by the law or obstructing the normal exercise of a given economic activity.

Article 457 – 1 of the Penal Code penalizes all public incitement to the acts of discrimination referred to in Article 455 of the Penal Code, as well as any incitement to hatred or violence against a natural or legal person, group or community on any one of the grounds referred to in Article 454, including sexual orientation. Also penalized are membership of an organisation whose objectives or activities consist in such public incitement, as well as acts connected with the

⁶⁰ Article 66 of the Penal Code has been interpreted in the case law as concerning any moral authority that is sufficient to consider the will of the subordinate as being dominated by that of the superior, such as in the case of a father, guardian, master or minister of religion. An order given by a minister of religion to his parishioners to desecrate a grave thus constitutes a direct provocation by abuse of power within the meaning of the said Article, particularly since that order was the determining cause of the offence (Court of Diekirch, 29 March 1933, *Pasicrisie luxembourgeoise* 13, p. 157)

printing, production, possession, transport etc. of written or printed documents, drawings, paintings, posters, photographs, films, images or any other written, spoken or visual medium liable to incite to the acts enumerated in Article 455, hatred or violence against a natural or legal person, group or community on any one of the grounds referred to in Article 454, including sexual orientation. It should be noted that the first case law application of the above-mentioned Act of 19 July 1997 concerns Article 457 – 1 of the Penal Code, namely a judgment of the Magistrates' Court of 27 November 2000, which however is not concerned with sexual orientation⁶¹.

The bill for the transposition of Directive 2000/78/EC should make it possible to meet the requirements of the Directive in question since it applies to:

- conditions of access to employment, unremunerated activities or occupation, including selection criteria and recruitment conditions, irrespective of the type of activity and at all levels of the professional hierarchy, including in matters of promotion;
- access to all types and all levels of career guidance, advancement and retraining, including the acquisition of practical experience;
- employment and working conditions, including conditions of dismissal and remuneration;
- membership of and involvement in a trade union or employers' organisation, or any organisation whose members practise a given occupation, including the advantages obtained by this type of organisations.

Nevertheless, it should be pointed out that Article 2 of the bill, as it is formulated, substantially restricts the scope of the forthcoming legislation. Workers under 'public law or comparable status, such as public officials and public service workers' are thus expressly excluded. Where in the private sector it was the Ministry for Employment and Labour that was in charge of the process of transposition of Directive 2000/78/EC, it is the Ministry for the Civil Service which is charged with its transposition for statutory employees. To our knowledge, no comprehensive bill or this transposition in the public sector has been tabled yet. On the basis of the necessity of transposing Directive 2000/78/EC, government amendments have been made to the bill determining the terms and conditions for the appointment of certain public officials holding senior positions in the government departments and services. However, they are only concerned with transposing the European requirements in connection with non-discrimination on grounds of age⁶². As for the self-employed, their situation is not clearly regulated at all by the bill for the transposition of Directive 2000/78/EC: where Article 2 of the bill appears to reduce the scope of the forthcoming Act to workers who are employees in private law, other provisions deal with the self-employed, such as Article 11 of the bill, according to which provisions that are contrary to the principle of equal treatment and that appear in the articles of independent occupations are to be considered null and void⁶³.

⁶¹ On this judgment, see Spielmann, 2001, p. 142.

⁶² See for the initial bill, House of Representatives, Ordinary Session 2002-2003, 12 June 2003, n°5149 and for the government amendments, House of Representatives, Ordinary Session 2002-2003, 16 October 2003 n°5149. The fact that no other reform has been undertaken in this matter was confirmed to us by a letter from the Ministry for the Civil Service and Administrative Reform of 8 April 2004.

⁶³ For an analysis of the bill in this sense, see the opinion of the Chamber of Labour of 17 February 2004, p. 2.

12.2.8 *Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition*

With the exception of the aforementioned new Article 456 concerning acts of discrimination committed by a person holding public authority or discharging a public service mission in the course of his duties or his mission⁶⁴ (see above under 12.2.7), the Act of 19 July 1997 gives no details about the perpetrators of discrimination. Thus none of its provisions makes reference to the criminal liability of legal persons. This reticence is perfectly logical since, except in certain specific areas, Luxembourg law as it stands now does not provide for criminal liability of legal persons. It only makes reference to the liability of natural persons⁶⁵. It should be noted, however, that the principle of criminal liability of legal persons is set to be introduced into Luxembourg law. According to information obtained from the Ministry of Justice, the relevant department is actually finalizing a draft bill on this subject.

The bill for the transposition of Directive 2000/78/EC does not specify whether the prohibition of discrimination which it establishes applies to legal persons as well as to natural persons. Article 1 §2 b ii) uses the wording '[...] the employer or any person or organisation to which the present Act applies [...]'].

12.3 **What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?**

12.3.1 *Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour*

Although the preliminary work on the Act of 19 July 1997 is not very explicit in this connection, it would seem that discrimination on grounds of sexual orientation should be understood in the broadest sense, since at the parliamentary debates on this issue some had emphasized that discrimination on grounds of sexual orientation should not solely cover discrimination based on homosexuality but rather discrimination based on sexuality in general (see above under 12.2.2). To our knowledge, the courts have not yet had the opportunity to confirm or invalidate this interpretation.

The discrimination criteria referred to in the new Article 454 of the Penal Code introduced by the Act of 19 July 1997 include 'membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion'. Although it is true that the terms 'true or supposed' are not connected with the other criteria enumerated in this provision, this does not mean that the case law cannot apply them by analogy.

The bill for the transposition of Directive 2000/78/EC contains no information whatsoever on the concept of sexual orientation (see above under 12.2.2). Furthermore, it should be noted that, unlike the articles of the bill for the

⁶⁴ On the combined use of this provision with Article 151 of the Penal Code, which penalizes acts that are arbitrary and infringe the freedoms and rights guaranteed by the Constitution, and are ordered or performed by a public servant or officer or by an officer holding public authority, see the opinion of the Council of State of 23 January 1996.

⁶⁵ See on this subject Spielmann, 1994, pp. 127 et seq. and Spielmann & Spielmann, 2002, pp. 345 et seq. See also the following case law: Court of Cassation, 29 March 1962, *Pasicrisie luxembourgeoise* 18, pp. 451 et seq.

transposition of Directive 2000/43/EC, which stipulates, 'The principle of equal treatment applies regardless of whether the racial or ethnic origin is true or supposed'⁶⁶, the commentary on the articles of the bill for the transposition of Directive 2000/78/EC contains no such specification.

12.3.2 *Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation*

Even though it seems we are unable to draw any lesson in this connection from the preliminary work on the Act of 19 July 1997, protection may nevertheless be offered by Article 24 of the Constitution on the freedom to express one's views by all manners of speech.

Both the freedom to declare one's sexual orientation and the prohibition of revealing the sexual orientation of another person against his will may find a basis in the right to privacy. In Luxembourg this was established by the Act of 11 August 1982 on the protection of privacy (see below under 12.3.6).

12.3.3 *Discrimination between same-sex partners and different-sex partners*

With respect to the advantages that are granted to unmarried partners of employees in Luxembourg, there are no legal provisions we know of that discriminate against unmarried partners of the same sex. This was confirmed to us by various persons we had the opportunity of interviewing⁶⁷.

As far as collective labour agreements and company rules are concerned, we have found none that contain discriminatory provisions. None of the persons we interviewed mentioned a collective labour agreement or a set of company rules that contained such provisions. During our interviews, we were given examples of advantages that were granted to unmarried partners of employees, irrespective of whether they were known to be of the same sex or of the opposite sex. One example of such advantages is *Luxair*, which issues air tickets at reduced price to *any* person who is registered at the same address as the employee.

These considerations, however, do not mean that there is no more discrimination in Luxembourg in this area. It is true that certain persons we interviewed expressly assured us that there was no more discrimination of this kind in Luxembourg law and that the only differences in treatment that remained are those between married couples on the one hand and cohabiting couples on the other, irrespective of whether the latter are of the same sex or of the opposite sex. Others, however, expressly acknowledged that caution was recommended, that we should not rush to conclusions, and that they would not be surprised at all if such discrimination existed in Luxembourg. Finally, there

⁶⁶ See in this sense the commentary on Article 1, House of Representatives, Ordinary Session 2003-2004, n°5248, 10 December 2003, p. 5.

⁶⁷ The interviewees were drawn from the Permanent Representation of the Grand-Duchy of Luxembourg with the European Union, the Ministry of Employment and Labour, the Ministry for Family Affairs, Social Solidarity and Young People, the Ministry for Equal Opportunity, LCGB (trade union for labourers, private employees, public servants and pensioners), UEL (Union of Luxembourg Industries), FEDIL (Federations of Luxembourg Industrialists), the Luxembourg Railways and Luxair.

are others who emphasized that in practice discrimination on grounds of sexual orientation existed to a considerable degree⁶⁸.

Although some of the interviewees – notably the officials from the Ministry of Employment and Labour – considered that the differences in treatment between unmarried partners of the same sex and those of the opposite sex did not fall within the scope of the Directive, we consider that the prohibition of discrimination on grounds of sexual orientation established by the bill for the transposition of Directive 2000/78/EC covers these differences in treatment since it concerns, among other things, 'employment and working conditions, including conditions of dismissal and remuneration'.

In my view, indirect discrimination between same-sex couples and different-sex couples is the result of the fact that same-sex couples cannot marry⁶⁹ and, consequently, have no access to the rights linked to marriage⁷⁰.

Although it is true that in certain respects, because the law overlooks them, unmarried couples find themselves in a more favourable position than married couples⁷¹, in other respects they are disadvantaged. These differences in treatment are less problematical for heterosexual couples – since they have the choice of marrying – than for same-sex partners, who so far have been barred from marriage.

They raise all the more problems since, in terms of the legal recognition of unions outside marriage, Luxembourg law is very far behind that of several other Member States of the European Union.

A bill on the legal implications of certain partnerships was nevertheless tabled on 6 May 2002⁷². Despite the criticism that has been levelled at this bill, it is due to be adopted before the end of the term of office in June this year⁷³. It should also be noted that the Council of State, in the critical opinion it has delivered on

⁶⁸ It apparently concerns discrimination that goes well beyond the question of the granting of advantages to unmarried partners, but which touch upon equally fundamental aspects such as access to employment (in this sense, it was the LCGB or the Union of labourers, private employees, public servants and pensioners, which especially emphasized the existence of discriminatory practices in the hotel business).

⁶⁹ This impossibility is usually attributed to Articles 75 and 144 of the Civil Code. The first, which concerns marriage certificates, uses the terms 'husband and wife'. The second Article provides, 'No marriage may be contracted by a man before the age of eighteen and by a woman before the age of sixteen'.

⁷⁰ In 1996, however, a private bill was tabled on the reform of marriage, rendering it open to same-sex partners and granting them exactly the same rights and obligations in that respect, including the right of adoption (private bill n°4162 on marriage reform, tabled on 9 May 1996 by Renée Wagener. See in connection with this private bill the Council of State opinion of 13 June 2000).

⁷¹ Social security law to a large extent overlooks cohabitants, which in certain situations may paradoxically lead to advantages over married couples. For instance, with respect to the payment of social security contributions, the amended Act of 27 November 1933 concerning the payment of direct contributions instituted a joint and several liability between spouses, regardless of the nature of their marriage settlement. Cohabitants therefore in this respect find themselves in a privileged position compared with married couples, even when the latter are married with separate estates. Similarly, we may also mention Articles 197 and 204 of the Social Insurance Code, which deprive the surviving spouse of the right to a survivor's pension in case of remarriage and make no provision in case of cohabitation.

⁷² Bill n°4946 on the legal implications of certain partnerships, tabled on 6 May 2002. It should be noted that this bill follows on a private bill on civil unions, dating from 1995 (Private bill n° 4110 on cohabitation, tabled on 7 December 1995 by Lydie Err, Socialist MP) of which the objectives were extremely limited. Bill n°4946 became the Law of 9 July 2004 on the legal implications of certain partnerships, *Mémorial A*, n° 143, 6 August 2004. It entered into force on 1 November 2004.

⁷³ The Luxembourg Prime Minister, Jean-Claude Juncker, in fact declared that it was a priority dossier (see his interview, *La voix du Luxembourg*, 31 December 2003).

the bill, has some very interesting things to say about making marriage open to same-sex couples. For instance, it argues, 'Having regard to the idea which lies at the basis of the bill under consideration, the question arises whether it would not be advisable to make marriage open to same-sex couples, following the example of the Belgian Act of 13 February 2003[...]'⁷⁴.

12.3.4 *Discrimination on grounds of a person's association with gay/lesbian/bisexual/heterosexual individuals, events or organisations*

We should recall in this connection Article 24 of the Constitution on the freedom to express one's views by all manners of speech and the freedom of the press, Article 25 on the right to assemble and Article 26 on the right of association.

12.3.5 *Discrimination against groups, organisations, events or information of/for/on lesbians, gays or bisexuals*

As regards groups and organisations, it should be noted that Article 454 of the Luxembourg Penal Code concerns discrimination against individuals as well as discrimination against legal persons, groups or communities of persons. The two last terms are important insofar as they also allow this instrument to cover discrimination against entities without legal personality⁷⁵.

Furthermore, we may refer here to a parliamentary question on the banning of an advertising campaign for a group of homosexuals called 'Reebou-Club' at certain technical schools⁷⁶. In the absence of a specific provision covering this type of situation, it seems to us that the principles established in Articles 24, 25 and 26 of the Constitution apply here.

12.3.6 *Discrimination on grounds of a person's refusal to answer, or answering inaccurately, a question about his or her sexual orientation*

The Act of 11 August 1982 concerns the protection of privacy⁷⁷. In accordance with the right to privacy, a person may refuse to answer certain questions. A job applicant may take legal action if he feels wronged by questions that invade the intimacy of his private life or if he believes he has been turned down for a job on account of certain details of his private life which he feels the employer had no right to demand⁷⁸.

The Act of 19 July 1997 is also relevant to this type of situations since it penalizes the refusal to hire a person on grounds of his or her sexual orientation. However, it would be difficult to establish the connection between the refusal to answer the question and the decision taken by the employer.

⁷⁴ Council of State opinion, 13 January 2004, House of Representatives, Ordinary Session 2003-2004, n°4946, 21 January 2004, pp. 2 et seq.

⁷⁵ See in this connection the Act complementing the Penal Code by criminalizing racism, revisionism and other acts based on unlawful discrimination, n° 4071, tabled on 3 July 1995 (J-1994-O-0521)). See also Spielmann, 2001, p. 135.

⁷⁶ See parliamentary question n°86 of 21 November 1994 by Renée Wagener and the reply of the Minister of Education, Marc Fischbach.

⁷⁷ Act of 11 August 1982 on the protection of privacy, *Mémorial A*, n°86, 12 October 1982, pp. 1840 et seq.

⁷⁸ On the subject of information which a company may ask job applicants to supply by means of recruitment questionnaires, see parliamentary question n°904 of 10 January 2001 by A. Bisdorff and the reply of the Minister of Employment and Labour, François Biltgen.

12.3.7 *Discrimination on grounds of a previous criminal conviction for the 'crime of homosexuality' for which there is no heterosexual equivalent*

The decriminalization of homosexual relations was completed in 1992 when the distinction between homosexual and heterosexual relations in terms of the age of sexual majority was abolished and fixed at 16 years for everybody.

12.3.8 *Harassment*

As we have already mentioned, sexual harassment is covered by the Act of 26 May 2000. This instrument is due to be complemented by a law on moral harassment and by provisions concerning harassment contained in the bill for the transposition of Directive 2000/78/EC (see above under 12.2.5).

In connection with the prohibition of revealing the sexual orientation of another person against his will, we should underline the importance of the Act of 2 August 2002 on the protection of personal data⁷⁹. According to this Act, 'The processing of data revealing racial or ethnic origin, political views, religious or philosophical beliefs, trade union membership, as well as the processing of data concerning health and sexual life, including the processing of genetic data, shall be prohibited'⁸⁰. It should be noted that this prohibition does not apply in a series of circumstances enumerated by the aforementioned Act⁸¹.

As regards negative remarks made to homosexuals, it is worth noting that the freedom to express one's views by all manners of speech (Article 24 of the Luxembourg Constitution) is not unlimited. In this connection we should recall Article 457 – 1 of the Penal Code (see above under 12.2.6). It is also worth mentioning that Article 444 of the Penal Code on slander and libel has been complemented by the aforementioned Act of 19 July 1997. This Act introduced severer penalties where charges are brought for unlawful discrimination as defined by the new Article 454 of the Penal Code, including discrimination on grounds of sexual orientation⁸².

12.4 **Exceptions to the prohibition of discrimination**

The Act of 19 July 1997 provides for various exceptions to the principle of non-discrimination. According to Article 457 of the Penal Code, the provisions of Articles 455 and 456 are not applicable to various cases of discrimination on grounds of state of health, handicap and nationality. None of these exceptions expressly include discrimination on grounds of sexual orientation.

12.4.1 *Objectively justified indirect disadvantages (Art. 2(2)(b)(i) Directive)*

There are none in the law. This is the logical result of the absence of express references to indirect discrimination in the Act of 19 July 1997.

The bill for the transposition of Directive 2000/78/EC, which establishes the concept of indirect discrimination, specifies in Article 1, §2, b) i) that there is no

⁷⁹ Act of 2 August 2002 on the protection of personal data, *Mémorial A*, n°91, 13 August 2002, pp. 1836 et seq.

⁸⁰ Article 6(1) of the Act of 2 August 2002.

⁸¹ Article 6(2) of the Act of 2 August 2002.

⁸² Article 444, par. 2 of the Penal Code.

such discrimination if the provision, criterion or practice in question is objectively justified by a legitimate objective and the means to achieve this objective are appropriate and necessary.

12.4.2 Measures necessary for public security, for the protection of rights of others, etc. (Art. 2(5) Directive)

To our knowledge, no exception of this type exists in the law or in the bill for the transposition of Directive 2000/78/EC.

12.4.3 Social security and similar benefits (Art. 3(3) Directive)

Article 2, §3 of the bill for the transposition of Directive 2000/78/EC is intended to transpose Article 3 §3 of the Directive by excluding from the scope of the bill all types of payments made by public or similar agencies, including social security or social protection agencies. It should be remembered, however, that all individuals, whether they be homosexual or heterosexual, in principle enjoy the same social rights. Nevertheless, a difference in treatment results from the fact that gays and lesbians are debarred from marriage or any similar status. However, a bill containing a section on social security has been tabled on the legal implications of certain partnerships (see above under 12.3.3).

12.4.4 Occupational requirements (Art. 4(1) Directive)

Although to our knowledge there is currently no express stipulation that considers sexual orientation as an essential occupational requirement constituting an exception to the prohibition of discrimination, Article 3 §1 of the bill for the transposition of Directive 2000/78/EC provides that, as an exception to the principle of equal treatment, a difference in treatment based on a characteristic linked to one of the grounds referred to in Article 1 §1 of the bill – including sexual orientation – does not constitute discrimination where, because of the nature of a particular occupational activity or the conditions of its practice, the characteristic in question constitutes an essential and decisive occupational requirement, insofar as the objective is legitimate and the requirement is proportionate.

12.4.5 Loyalty to the organisation's ethos based on religion or belief (Art. 4(2) Directive)

There is at present no express exception of this type in Luxembourg law. Article 3 §2 of the bill for the transposition of Directive 2000/78/EC, however, makes use of the possibility of derogation offered by Article 4(2) of this Directive. It provides that 'in accordance with the existing general principles of employment law, a difference in treatment on grounds of the religion or beliefs of a person does not constitute discrimination in the case of the occupational activities of churches and other public or private organisations whose ethic is based on religion or beliefs, only when, by the nature of these activities or by the context in which they are carried out, religion or beliefs constitute an essential, legitimate and justified occupational requirement.' According to the information provided in the commentaries on the provisions of the bill, it thus legally

consolidates the existing national practices without changing the current situation⁸³.

12.4.6 *Positive action (Art. 7(1) Directive)*

Although Luxembourg law is not unaware of this type of measure and notably provides for positive action in favour of the underrepresented sex⁸⁴, it does not, to our knowledge, expressly provide for positive action based on sexual orientation. Article 5 of the bill for the transposition of Directive 2000/78/EC is intended to transpose Article 7(1) of the Directive. It provides that discrimination must be prohibited without prejudice to the preservation or adoption of measures aimed at preventing or compensating for disadvantages suffered by a group of persons presenting a characteristic linked to one of the grounds referred to in Article 1 §1 of the bill, including sexual orientation.

12.4.7 *Exceptions beyond the Directive*

Article 457 §5 of the Penal Code establishes a general exception covering 'differences in treatment provided for by or resulting from another legal provision'. It is true that it emerges from the parliamentary proceedings that this exception should be interpreted restrictively. However, this does not alter the fact that it is an extremely broad clause. Following numerous criticisms from the Luxembourg Council of State and the European Commission for Combating Racism and Intolerance, Article 7 of the bill for the transposition of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin is intended to amend the aforementioned provision of the Penal Code. Its purpose is to confine the scope of Article 457 §5 to differences in treatment based on nationality provided for by or resulting from another legal provision, as well as to differences based on the provisions and conditions relating to the entry and residence of third country nationals and stateless persons on the territory of Member States and to differences connected with the legal status of the third country nationals and stateless persons in question.

12.5 Remedies and enforcement

12.5.1 *Basic structure of enforcement of employment law*

Employment law in the private sector falls within the jurisdiction of the industrial tribunals. Every office of the Justice of the Peace also has an industrial tribunal for disputes concerning employment contracts, apprenticeship contracts, supplementary pension schemes and insolvency insurance⁸⁵. The competent tribunal is that of the place of work. Appeals against judgments delivered in the

⁸³ See in this sense the commentary on Article 3, House of Representatives, Ordinary Session 2003-2004, 10 December 2003, n°5249, p. 35.

⁸⁴ See the Act of 12 February 1999 on the implementation of the national action plan for employment, of which Article XXVII is devoted to positive actions in the private sector (*Mémorial A*, n°13, 23 February 1999, pp. 190 et seq.) and the Grand-Ducal Regulation of 25 October 1999 establishing the composition and functioning of the Committee for Positive Action (*Mémorial A* n°140, 25 November 1999, pp. 2561 et seq.).

⁸⁵ Article 56 – 1 of the Act of 7 March 1980 on the organisation of the judiciary, as amended (notably Article 100).

first instance may be lodged with the Court of Appeal, while judgments delivered in the last instance, which are not open to appeal, may be referred to the Court of Cassation for infringement of the law and for violation of the substantial or prescribed forms, on pain of nullity⁸⁶.

The law of the public service falls within the jurisdiction of the administrative courts, namely the administrative tribunal and the Administrative Court, which have replaced the Litigation Committee of the Council of State⁸⁷.

12.5.2 *Specific and/or general enforcement bodies*

Attention should be drawn to the fundamental role played by the Labour Inspectorate and the Department of Employment. They are charged, each within its own remit, with supervising the protection of workers, and particularly the application of the Act of 8 December 1981 on equal treatment between men and women⁸⁸. The general mission of the Labour Inspectorate is to prevent and settle industrial disputes before they are brought before the industrial tribunals.

It is also the Labour Inspectorate which the bill for the transposition of Directive 2000/78/EC entrusts with the task of ensuring the application of the future Act (Article 9 of the bill).

12.5.3 *Civil, penal, administrative, advisory and/or conciliatory procedures (Art. 9(1) Directive)*

Since the right to non-discrimination on grounds of sexual orientation is at present essentially contained in the Act of 19 July 1997, or in Articles 454 and following of the Penal Code and, except as otherwise provided⁸⁹, the penalties provided for are imposed by the magistrates' courts (see below under 12.5.4)⁹⁰, the acts of discrimination referred to are essentially offences⁹¹, and therefore fall within the jurisdiction of the magistrates' chambers of the District Court⁹².

In accordance with the Luxembourg Code of Criminal Procedure, public action may be instituted by magistrates, by relevant public officials in pursuance of the law, and by the injured party claiming damages⁹³. It should be pointed out, however, that as regards the offences covered by the Act of 19 July 1997 which are committed against private individuals, public action is subject to the filing of a complaint by the allegedly injured party⁹⁴.

Regardless of how it was instituted, the action must be brought by the public prosecution⁹⁵, represented before the magistrates' court by the Public

⁸⁶ Articles 144 et seq. of the Code of Civil Procedure.

⁸⁷ Article 95b of the Constitution; Act of 7 November 1996 organizing the administrative courts, *Mémorial*, A, n°79, 19 November 1996, pp. 2262 et seq. and Act of 21 June 1999 regulating the procedure before the administrative courts, *Mémorial* A, n°98, 26 July 1999, pp. 1892 et seq. For an overview of the administrative case law of the Luxembourg Council of State on the public service in particular, prior to the reform of the administrative courts in 1996, see Spielmann, Thewes and Reding, 1996.

⁸⁸ Article 10 of the Act of 8 December 1981.

⁸⁹ Article 131-1 of the Code of Criminal Procedure.

⁹⁰ See Articles 14 et seq. of the Penal Code.

⁹¹ In accordance with its Article 1, the Luxembourg Penal Code adopted the tripartite division of offences, namely, by decreasing order of seriousness: crimes, offences and contraventions. The criterion that determines the intrinsic seriousness of the offence is the punishment attached to a particular offence.

⁹² Article 179 of the Code of Criminal Procedure.

⁹³ Article 1 of the Code of Criminal Procedure.

⁹⁴ Article 450 of the Penal Code.

⁹⁵ On public action, see a.o. Vogel, 2001, n°588 et seq.

Prosecutor⁹⁶. The Act of 6 May 1999 on criminal arbitration⁹⁷ allows the latter, before deciding on the public action, to take recourse to arbitration if such a measure seems capable of repairing the damage caused to the victim, or of putting an end to the disruption resulting from the offence, or of contributing to the rehabilitation of the perpetrator of the offence⁹⁸. If the victim refuses all arbitration, as it is entitled to, the Public Prosecutor will have the right to pursue the public action.

It should be noted that Luxembourg has a system of legal aid for persons who cannot find a counsel or who have insufficient means for the defence of their interests⁹⁹.

The bill for the transposition of Directive 2000/78/EC does not transpose Article 9, §1 of this Directive, given that such procedures already exist in Luxembourg law (see above for the penal procedure; for the other procedures see above under 12.5.1 and 12.5.2).

12.5.4 *Civil, penal and/or administrative sanctions (Art. 17 Directive)*

At present, the only sanctions provided for by law for discrimination on grounds of sexual orientation are penal sanctions. As we have seen earlier, the right to non-discrimination on grounds of sexual orientation is essentially contained in the Act of 19 July 1997, or in Articles 454 and following of the Penal Code. The acts of discrimination referred to in Article 455 and the acts of incitement covered by Article 457-1 are punished by eight days' to two years' imprisonment and a fine of 251 to 25,000 euros or one of these penalties only. Acts of discrimination covered by Article 456, notably those committed by a person holding public authority or discharging a public service mission during the exercise or as a result of the exercise of his duties or mission are liable to severer penalties, notably a prison sentence of one month to three years and a fine of 251 to 37,500 euros or one of these penalties only. The perpetrators of acts covered by Articles 455, 456 and 457-1 may, in addition, be deprived of certain rights in accordance with Article 24 of the Penal Code¹⁰⁰.

At the civil level, the common law of liability, notably Article 1382 of the Luxembourg Civil Code, applies. In accordance with this Article, 'Any act committed by a person that causes damage to another person shall render the person by whom the act was committed liable to offer compensation for the damage'. An action for damages may in principle be pursued at the same time and before the same court as a public action (a criminal procedure brought by the Public prosecutor). In this respect, it should be specified that the criminal courts can only take cognizance of an action for damages incidentally to a public action, since the sole object of the claim for damages is to secure compensation for the prejudice caused by the offence in question.

⁹⁶ Article 23 of the Code of Criminal Procedure.

⁹⁷ Act of 6 May 1999 on penal arbitration, *Mémorial A*, n°67, 11 June 1999, pp. 1440 et seq.

⁹⁸ Article 24 par. 5 of the Code of Criminal Procedure.

⁹⁹ See the Act and the Grand-Ducal Regulation of 8 August 1995 on legal aid, *Mémorial A*, n°81, 3 October 1995, pp. 1913 et seq.

¹⁰⁰ Article 457-4 of the Penal Code.

An action for damages may also be brought separately. In this case, the hearing of this action will be suspended until a judgment has been delivered in the public action¹⁰¹.

In terms of the relationship between the judgments passed at the civil and the penal level, there is the principle according to which judgments passed in criminal justice have the authority of *res judicata* at the civil level. The civil court is therefore on no account allowed to discount what has been necessarily and certainly decided by the criminal court. The fact that the civil liability of the presumed perpetrator of the act of discrimination could not be incurred in the absence of damage or of a causal connection between the act and the damage does not rule out the possibility of a criminal conviction of the perpetrator.

According to the Act of 8 December 1981 on equal treatment between men and women in access to employment, vocational training and advancement, and working conditions, any contractual, regulatory or statutory stipulation that is contrary to the principle of equal treatment is automatically null and void¹⁰². This Act also provides for penal sanctions, more particularly fines imposed by the magistrates' courts¹⁰³.

Considering that all cases of discrimination must be treated on an equal footing, irrespective of the origin or nature of the discrimination, the bill for the transposition of Directive 2000/78/EC refers to the penal provisions of the bill for the transposition of Directive 2000/43/EC (Article 10). This bill also adapts the penalties provided for by the Act of 19 July 1997. Its Article 6, §1 provides that acts of discrimination are punishable by eight days' to two years' imprisonment and/or a fine of between 251 and 25,000 euros. Given that both the Act of 19 July 1997 and the bill in question contain penal provisions, the question of the relationship between these two instruments, which do not give the same definition of the concept of discrimination, ought to be settled. Article 11 of the bill for the transposition of Directive 2000/78/EC adopts the wording of Article 16 b) of this Directive. For instance, it provides that all clauses contrary to the principle of equal treatment that appear in employment contracts or collective labour agreements, in company rules and in the statutes of independent occupations and organisations of workers and employers are to be considered null and void (see below under 12.6.3).

12.5.5 *Natural and legal persons to whom sanctions may be applied*

As we have seen above, only natural persons may at present be given penal sanctions under Luxembourg law (see above under 12.2.9). It should be remembered that the Act of 19 July 1997 provides for severer penalties when acts of discrimination are committed by a person holding public authority or discharging a public service mission, during the exercise or as a result of the exercise of his duties or mission (see above under 12.5.4).

12.5.6 *Awareness among law enforcers of sexual orientation issues*

Generally speaking, there seems to be very little awareness among law enforcers of sexual orientation issues, and this awareness will not be reinforced

¹⁰¹ Article 3 of the Code of Criminal Procedure.

¹⁰² Article 6 of the Act of 8 December 1981.

¹⁰³ Article 9 of the Act of 8 December 1981.

by the rare or even non-existent cases of recourse taken against discrimination based on this criterion.

12.5.7 *Standing for interest groups (Art. 9(2) Directive and Recital 29 of Directive)*

The Luxembourg legal system allows associations or groups with legal personality to bring cases before the national courts, which however retain an individualistic approach to the law and to legal action, and appear to interpret this right of access to legal action in a fairly restrictive way¹⁰⁴.

In accordance with Article VI of the Act of 19 July 1997, any association of national significance, having legal personality and recognized by the Minister of Justice, may exercise the rights granted to parties claiming damages in connection with acts constituting an infringement of Articles 444, par. 2, 455 456 and 457-1 in particular, and 'causing direct or indirect prejudice to the collective interests which they are meant to defend, even if they do not declare a material or moral interest and even if the collective interest in which they act is covered entirely by the social interest of which the defence is ensured by the public prosecution'. Nevertheless, if the infringement has been committed by persons considered individually, the association can principally only exercise the rights that are granted to a party claiming damages on condition that these persons declare expressly and in writing that they will not oppose them.

The bill for the transposition of Directive 2000/78/EC complements the above-mentioned penal clauses with a provision that gives non-profit associations of national significance whose statutory activity consists in combating discrimination within the meaning of Article 1 of the bill, which have had legal personality for at least 5 years at the moment of the offences, and which have been approved by the Ministry of Justice, the right to exercise before the civil courts the rights that are granted to victims of acts of discrimination that cause direct or indirect prejudice to the collective interests which they are meant to defend in accordance with their statutory purpose, even if they do not declare a material or moral interest. Nevertheless, like the provisions established in this matter by the Penal Code, the bill provides that, when the acts have been committed against persons considered individually, the non-profit association can principally only exercise the rights that are granted to victims of discrimination on condition that these persons declare expressly and in writing that they will not oppose them (Article 6, §1).

The bill in question also contains specific provisions relating to trade union organisations, which are to be interpreted in the same way as the provisions contained in the bill on collective labour relations and the National Office of Conciliation¹⁰⁵. It thus grants the same right of action which it has conferred on non-profit associations to trade unions which prove a general national representativeness or a representativeness in a particularly important sector of the economy in accordance with the future Act on collective labour relations and the National Office of Conciliation (Article 6, §3). The bill for the transposition of the Directive also provides that, where an action resulting from a collective

¹⁰⁴ On legal action brought by organisations in Luxembourg generally, see Thewes, 1995, pp. 39 et seq.

¹⁰⁵ See the bill on collective labour relations, the settlement of collective labour disputes and the National Office of Conciliation, House of Representatives, Ordinary Session 2002-2003, n° 5045, 21 November 2002.

labour agreement or from the agreement concluded in pursuance of the future Act on collective labour relations and the National Office of Conciliation¹⁰⁶ and falling within the scope of the Act for the transposition of Directive 2000/78/EC is brought by a person bound by one of these collective contracts, any trade union organisation that is a party to these contracts may intervene in the proceedings that have been instituted if the settlement of the dispute is not restricted to having an individual impact on the situation of the person who brought the action, but may present a collective interest for all the members of the trade union, and the person who brought the action has not marked his disagreement in writing (Article 6, §2).

12.5.8 *Burden of proof of discrimination (Art. 10 Directive and Recitals 15, 31 and 32 of Directive)*

We need to distinguish the burden of proof in penal law and in civil or administrative law.

In penal law, since the accused benefits from one of the pillars of fundamental rights that is called the presumption of innocence, the burden of proof of discrimination rests with the prosecuting party¹⁰⁷. The principle is the freedom of proof¹⁰⁸.

It should be noted that a sharing of the burden of proof is established by the Act of 28 June 2001 in cases of gender-based discrimination (see above under 12.2.4). According to this Act, 'When a person who considers he or she has been prejudiced by a non-observance of the principle of equal treatment establishes, before a court or any other competent authority, facts which allow the presumption of direct or indirect discrimination, it is up to the respondent to prove that there has been no infringement of the principle of equal treatment'¹⁰⁹. It should be emphasized that this Act only covers cases of gender-based discrimination and only applies to disputes in the context of a civil or administrative action of the public and private sectors concerned with access to employment, remuneration, vocational training and advancement opportunities, access to an independent occupation, working conditions and occupational social security systems¹¹⁰.

In the area of sexual harassment (see above under 12.2.5), it is worth noting that, while the Act of 26 May 2000 does not as such provide for a reversal of the

¹⁰⁶ In accordance with Article 49 (1) of this bill on collective labour relations and the National Office of Conciliation, the possibility is in fact provided for trade union organisations whose general national representativeness is recognized and national or sectorial employers' organisations or organisations representing one or several branches, occupations, types of activity or declaring to form an association specially to this end, may conclude national or interprofessional agreements on the following matters: Transposition of collective labour agreements adopted by the social partners at the European level in accordance with the provisions of the Treaty on European Union; Transposition of the European Directives providing for a transposition at the national level subject to an agreement between the national social partners; National or interprofessional agreements on subjects which the said partners have agreed upon and which may be measures for the implementation of the principle of non-discrimination, measures to be taken against moral and sexual harassment at work, etc. It should be noted that the above provisions are obviously essential for the transposition of Article 13 of Directive 2000/78/EC on social dialogue.

¹⁰⁷ See in this connection Spielmann & Spielmann, 2002, pp. 163 et seq.

¹⁰⁸ See in this connection G. Vogel, 2001, n°807 et seq.; see also Court of Cassation, 12 July 1984, *Pasicrisie luxembourgeoise* 26, pp. 127 et seq.

¹⁰⁹ Article 3 of the Act of 28 June 2001.

¹¹⁰ Article 2 of the Act of 28 June 2001.

burden of proof, it nevertheless stipulates that the intentional element of the behaviour is presumed¹¹¹. Furthermore, while the bill on protection against moral harassment at work does not provide for a complete reversal of the burden of proof either, it nevertheless stipulates that the burden of proof be shared¹¹².

Article 7 of the bill for the transposition of Directive 2000/78/EC deals with the burden of proof in connection with the application of the principle of non-discrimination. The principle stated by this provision (Article 7, §1), of which it is expressly specified that it does not apply to criminal proceedings (Article 7, §2), is the same as that established by the Act of 28 June 2001 on the burden of proof in cases of gender-based discrimination: if a person considers he or she has been prejudiced by a non-observance of the principle of equal treatment and establishes facts which allow the presumption of discrimination within the meaning of the present instrument, it is up to the respondent to prove that there has been no infringement of the principle of equal treatment.

12.5.9 *Burden of proof of sexual orientation (Recital 31 of Directive)*

In accordance with Recital 31 of Directive 2000/78/EC, the commentary on the articles of the bill for the transposition specifies that the principle regarding the burden of proof of discrimination (see above under 12.5.8) does not mean that it is up to the respondent to prove that the plaintiff has a given religion, set of beliefs, handicap, age or sexual orientation or that he is of a particular racial or ethnic origin¹¹³.

12.5.10 *Victimisation (Art. 11 Directive)*

The Act of 19 July 1997 does not contain any provision covering possible reprisals against a person who denounced a prohibited act of discrimination. Such provisions, however, exist in the Act of 8 December 1981 on equal treatment between men and women in access to employment, vocational training and advancement, and working conditions¹¹⁴. They also appear in the Act on sexual harassment¹¹⁵ and in the bill on protection against moral harassment at work¹¹⁶.

The bill for the transposition of Directive 2000/78/EC also contains provisions aimed at protecting the victims of discrimination against possible reprisals. In accordance with Article 8 §1 of this bill, no reprisals shall be taken against a worker on account of his objections to or refusal of an act or behaviour that is contrary to the principle of equal treatment or in response to a complaint lodged with the company or to legal action taken with a view to enforcing the principle of equal treatment. Paragraph 2 of the same Article complements these stipulations by providing that no reprisals shall be taken against a worker for having testified to acts that are contrary to the future Act or for having given an

¹¹¹ Article 2 of the Act of 26 May 2000.

¹¹² Article 7 of bill n°4979: 'When a person who declares an interest establishes before the competent court facts that allow the presumption of moral harassment at work, the burden of proof that there has been no moral harassment shall rest with the respondent'.

¹¹³ See in this sense the commentary on Article 7, House of Representatives, Ordinary Session 2003-2004, 10 December 2003, n°5249, p. 37.

¹¹⁴ Article 8 of the Act of 8 December 1981.

¹¹⁵ See Article 5 of the Act of 26 May 2000.

¹¹⁶ See Article 4 of bill n°4979.

account of such acts. Paragraph 3 specifies that any stipulation or act contrary to the two preceding paragraphs shall automatically be null and void. Any contrary act, such as dismissal, shall be deemed never to have occurred. In case of nullity of a dismissal, the industrial tribunal shall order that the employee concerned be retained in the company if the employee demands to be reinstated. If the employee does not demand to be reinstated, he is entitled to a compensatory cancellation indemnity and to severance payment, as well as to damages in keeping with the loss he has suffered on account of his dismissal¹¹⁷.

12.6 Reform of existing discriminatory laws and provisions

12.6.1 Abolition of discriminatory laws

The only legal provisions which the bill for the transposition of Directive 2000/78/EC seeks to repeal concern handicapped persons (Articles 12 and 13).

12.6.2 Abolition of discriminatory administrative provisions

We have no knowledge of discriminatory administrative provisions that need to be repealed.

12.6.3 Measures to ensure amendment or nullity of discriminatory provisions included in contracts, collective agreements, internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations

Article 11 of the bill for the transposition of Directive 2000/78/EC adopts the wording of Article 16 b) of this Directive. It stipulates that 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 independent occupations and professions and workers' and employers' organisations are to be considered null and void.

12.6.4 Discriminatory laws and provisions still in force

To our knowledge there are none. The absence of discriminatory provisions was confirmed to us by various interviewees, such as from the Luxembourg Ministry of Employment and Labour.

12.7 Concluding remarks

In conclusion, we wish to emphasize the 'interim' character of the present report. It is true that an essential stage has been completed since a bill has been tabled for the transposition of Directive 2000/78/EC. This transposition

¹¹⁷ See in this sense the commentary on Article 8, House of Representatives, Ordinary Session 2003-2004, 10 December 2003, n°5249, p. 38.

work, however, is still in progress. At this stage we can therefore only draw provisional conclusions.

Generally speaking, we can say that the bill in question is satisfactory inasmuch as it adopts the wording of most of the Directive's provisions. More particularly, it should make it possible to complement the existing Luxembourg legislation in the area of non-discrimination on grounds of sexual orientation, and this in several ways:

- by not being solely of a penal nature. The Luxembourg legislation on non-discrimination on grounds of sexual orientation is at present essentially penal. There are many who, during the preliminary work on the Act of 19 July 1997, insisted on the necessity of developing other aspects of anti-discrimination policy¹¹⁸. Penal law does not regulate everything, particularly in the area of labour and employment law. The transposition of the Directive into Luxembourg law should provide an opportunity to change the hitherto essentially repressive nature of the regulations in this matter;
- by introducing into Luxembourg law the concept of indirect discrimination in other areas than equality between men and women;
- by expressly prohibiting the instruction to practise discrimination;
- by extending the material scope of prohibited discrimination so that it encompasses all the areas covered by points b), c), d) of Article 3 of the Directive;
- by making certain adjustments with respect to the burden of proof and by putting in place a system for protection against victimization.

Moreover, the above-mentioned bill should not be interpreted alone but should be linked to the bill for the transposition of Directive 2000/43/EC. Some of this Directive's provisions in fact also tend to have an impact in the area of discrimination on grounds of sexual orientation. We refer in this respect in particular to the fact that it aims to very firmly restrict the scope of the exception to the prohibition of discrimination provided for by Article 457 §5 of the Penal Code. This scope is presently so broad as to be problematical.

As the two above-mentioned bills show, as well as other elements such as the campaign conducted by the Government Commissioner for Aliens against discrimination in the area of employment, which addresses the five grounds for discrimination covered by the Directive, including sexual orientation, things are moving in Luxembourg¹¹⁹. However, there is still a long way to go. Besides the fact that the fate of the contents of the two bills in question is uncertain and that the timeframe for their adoption is not known, they do not regulate everything as they stand now. In this connection, it should be noted in particular that, in the bill

¹¹⁸ See in particular in this connection the additional opinion of the Council of State of 18 March 1997, J-1996-O-0326.

¹¹⁹ The campaign in question, entitled 'In the workplace, too, the difference is in the eye of the beholder', was launched on 23 July 2003. Co-funded by the European Commission, this campaign comprises 5 posters and 5 leaflets, addressing the 5 grounds for discrimination covered by the Directive. At the press conference for the launch of the campaign, the Minister for Family Affairs, Social Solidarity and Young People and the Minister of Labour emphasized that this campaign is intended to provide a survey of the situation, to inform and increase the awareness of employers and employees of the rights and obligations they have under the European and Luxembourg regulations. It is meant to reflect a policy of prevention, since repression alone would not be sufficient. Details about this campaign can be found at the website www.gouvernement.lu.

for the transposition of Directive 2000/78/EC, the situation of the self-employed is unclear, that the bill does not cover the public sector and that this sector does not seem at this moment to be covered by all the necessary transposition measures, and that the private and public sectors are therefore treated differently, which is obviously unacceptable.

List of literature used in footnotes

- Krickler, K., 'Luxembourg', in Ilga Europe, *Egax en droits. Les homosexuel/les dans le dialogue civil et social*, 1998, pp. 81 and 82.
- Spielmann, A., 'Le Luxembourg face au racisme et à l'extrémisme', *Annales du droit luxembourgeois*, 2001.
- Spielmann, D., Thewes, M., and L. Reding, *Recueil de la jurisprudence administrative du Conseil d'État luxembourgeois (1985-1995)*, Brussels, Bruylant, 1996.
- Spielmann, D., 'La responsabilité des personnes morales en droit pénal luxembourgeois', *Annales du droit luxembourgeois*, 1994.
- Spielmann, D., and Spielmann, A., *Droit pénal général luxembourgeois*, Brussels, Bruylant, 2002.
- Thewes, M., 'Les actions en justice des groupements en droit comparé', *Annales du droit luxembourgeois*, 1995.
- Vogel, G., *Lexique de procédure pénale de droit luxembourgeois*, Brussels, Larcier, 2001.

