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Country report

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Country report

Gender equality

How are EU rules transposed into national law?

Luxembourg

Nicole Kerschen

Reporting period 1 January 2020 – 01 January 2021

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1 Introduction

1.1 Basic structure of the national legal system

Luxembourg is a parliamentary representative democracy headed by a constitutional monarch, the Grand-Duke. The Constitution dates back to 1868¹ and was last amended in 2016. It organises a separation of powers between the executive (the Grand-Duke and the Government) and the legislative (the Parliament), with the judiciary watching over the execution of laws. The principle of equality between men and women has had a constitutional value since 2006, when it was introduced in Article 11(2) of the Constitution.

The executive power is exercised by the Grand-Duke and, in practice, by the Government, which consists of the Prime Minister and 16 ministers. In 1995, the Ministry for the Promotion of Women was created with the aim of fighting against the discrimination of women. From 2004 on, the policy was based on the concept of 'gender mainstreaming', taking into the account gender equality in all fields of law and policy making. The Ministry for the Promotion of Women became the Ministry for Equal Opportunities (MEGA). Three Gender Equality Plans were implemented between 2006 and 2018. The Gender Equality Plan 2015-2018, called 'Making gender equality reality' (MEGA 2015), was based on the governmental programme of 2013 of the first 'Gambia' coalition Government (*DP-LSAP-De Grëng*) (*Gouvernement* 2013), which made gender equality one of its policy priorities by declaring in the preamble that 'efficiency, effectiveness, sustainability, social coherence and equal opportunities' were the guiding principles that characterised the action of the Government. It also took into account the conclusions of the evaluation of the previous Gender Equality Plan 2009-2014.²

In terms of governance, the procedure for preparing the National Action Plan on equality involved several ministerial departments in a direct and concrete manner and, as a consequence, the plan had to be regarded as a collective and transversal responsibility. Each ministerial department was asked to identify three to five specific objectives, which had to be achieved between 2015 and 2018. Each minister was responsible for the implementation of measures for which she/he was functionally competent. MEGA coordinated the work through the inter-ministerial Committee for Gender Equality, established in 1996, in which each ministry was represented. Equality delegates were listed within the Ministries and administrations. They had an information provision and consulting task on gender equality policy and, in addition, were the contact persons in the event of gender-based professional and sexual harassment within the administrations. MEGA organised training programmes for them³ and proposed regular meetings for them as part of a network of exchange of good practices taking place in the positive action programmes organised in the public sector.

After the general elections of October 2018, the second 'Gambia' coalition Government (*DP-LSAP-De Grëng*)⁴ replaced the Ministry for Equal Opportunities with a Ministry for Gender Equality (although the acronym MEGA remained unchanged). The change of name was justified by the desire of the new Government to strengthen the fundamental value of gender equality and to ensure equal recognition of social and economic rights. The work of the ministry was divided into four areas: education (as a priority), employment, society and municipalities. The slogan 'Making gender equality a reality' remained unchanged. It

¹ Website: <http://data.legilux.public.lu/file/eli-etat-leg-recueil-constitution-20161020-fr-pdf.pdf>.

² Professor Robert Plasman of the Free University of Brussels, as an external expert, accompanied the implementation process of the national action plan on equality 2009-2014 and made recommendations to the parties involved. In particular, he recommended improving the cooperation of MEGA with the other ministries, to create a consensus on equality and a culture of gender equality, in order to implement a policy of gender mainstreaming and to adapt the gender training offer for the officials of the ministries and administrations according to the challenges.

³ Since 2011, all civil servants and public employees who enter the State and communal administrations must undergo six hours of compulsory training on gender equality.

⁴ <https://mega.gouvernement.lu/fr.html>.

was noted that the legal basis for gender equality had been established, but that much remained to be done to achieve an equal sharing of responsibilities at all levels.

Taina Bofferding, the Minister for Gender Equality, is in charge of co-ordinating the implementation of the governmental programme 2018-2023,⁵ which declared gender equality as a transversal political priority for all ministries and administrations. In order to draw up the Gender Equality Plan for 2019-2022, the ministry carried out extensive consultation with all stakeholders as well as the general public. The opinions of the stakeholders and the results of the public consultation will be presented throughout this report. The new National Action Plan for Gender Equality was finalised in July 2020.

The legislative power is vested in the Parliament, (*Chambre des députés*),⁶ a unicameral Parliament of 60 Members, elected to five-year terms from four constituencies. Since 2010, questions about gender equality have been integrated into the impact assessment form to be mandatorily enclosed in every bill submitted to the Parliament. A second body, the State Council, (*Conseil d'Etat*), composed of 21 ordinary citizens appointed by the Grand-Duke on proposal of the Parliament, advises the Parliament and the Government by drafting opinions. Legislation voted on in the Parliament only becomes law after being formally enacted by the Grand-Duke. Enacted law is published in the official journal, called 'Memorial'.⁷

The court system⁸ is a two-tier system with one branch, the civil, criminal and labour jurisdictions, and another branch, the administrative jurisdictions. The first branch includes three lower tribunals (*tribunaux de paix*), two district tribunals (*tribunaux d'arrondissement*) and a High Court of Justice (Cour Supérieure de Justice), which includes the Court of Appeal (Cour d'appel) and the Court of Cassation (Cour de Cassation). The other branch includes an Administrative Tribunal (Tribunal administratif) and an Administrative Court (Cour administrative). Case law from the Court of Cassation⁹ and administrative case law¹⁰ are published online. Luxembourg has also a Constitutional Court (Cour Constitutionnelle). Constitutional case law is also published online.¹¹ Last but not least, there are social jurisdictions, which deal only with social security affairs. They include, at the lower level, the Social Security Board of Referees (Conseil arbitral de la sécurité sociale) and at the higher level, the Social Security Supreme Council (Conseil supérieur de la sécurité sociale).

In Luxembourg, there was an ongoing problem concerning access to case law, which was only published in part online. The situation greatly improved in 2019 and 2020. Two new online case law databases were established in 2019: JUDOC, a database in the form of summary sheets of all the jurisdictions;¹² and the database of the Social Security Supreme Council.¹³ Further case law databases and bulletins were put online in 2020.¹⁴

⁵ *Accord de coalition* 2018-2023 ('Coalition Agreement 2018-2023') especially point 20, pp. 112 to 114. Website: <https://gouvernement.lu/dam-assets/documents/actualites/2018/12-decembre/Accord-de-coalition-2018-2023.pdf>.

⁶ <https://www.chd.lu/wps/portal/public/Accueil/Actualite>.

⁷ <http://legilux.public.lu/>.

⁸ <https://justice.public.lu/fr/organisation-justice.html>.

⁹ <https://justice.public.lu/fr/jurisprudence/cour-cassation.html>.

¹⁰ <https://justice.public.lu/fr/jurisprudence/juridictions-administratives.html>.

¹¹ <https://justice.public.lu/fr/jurisprudence/cour-constitutionnelle.html>.

¹² <https://justice.public.lu/fr/jurisprudence/jurisprudence-judoc.html>.

¹³ <https://justice.public.lu/fr/jurisprudence/conseil-superieur-securite-sociale.html>.

¹⁴ The *Juridictions Judiciaires* database publishes important decisions in full:

<https://justice.public.lu/fr/jurisprudence/juridictions-judiciaires.html>. Several case law bulletins also publish summaries of decisions: <https://justice.public.lu/fr/jurisprudence/resumes-de-jurisprudence.html>.

1.2 List of main legislation transposing and implementing the directives

Legislation on gender equality and prohibition of sex discrimination is available on the Legilux website.¹⁵

The following laws are relevant for the topic of gender equality:

- Grand-Ducal Regulation of 10 July 1974 on equal pay between men and women¹⁶ and the Law of 15 December 2016 introducing Chapter V 'On equal pay between men and women'¹⁷ into Book II, Title II 'On remuneration', of the Labour Code, implementing Article 157 of TFEU and the recast Directive;
- The Law of 15 December 1986 on the progressive implementation of the principle of equal treatment for men and women in matters of social security¹⁸ implementing Council Directive 79/9/EEC of 19 December 1978;
- Article 16 of the Law of 8 June 1999 on supplementary pension regimes¹⁹ amended by the Law of 1 August 2018 transposing the Directive 2014/50/EU of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights²⁰ implementing Chapter 2 of Directive 2006/54/EC;
- The Law of 21 December 2007 implementing Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services;²¹
- Amended Law of 13 May 2008 implementing Directive 76/207/EEC amended by Directive 2002/73 EC on equal treatment between women and men as regards access to employment, vocational training and promotion, and working conditions;²²
- The Law of 3 November 2016 on parental leave,²³ the Law of 15 December 2017 on paternity leave and leave for family reasons²⁴ implementing Directive 92/85/EEC, Directive 2006/54/EC and Directive 2010/18/EU on work-life balance for workers.

In the field of employment and professional life, the rules can be found in the Labour Code, in Book II, Title IV 'On Equal treatment between men and women' (Articles L. 241-1 to L. 245-8 of the Labour Code).²⁵

1.3 Sources of law

The main sources of gender equality law in Luxembourg are Article 11(2) of the Constitution and the above-cited national legislation. The latter has been adopted mainly to implement European directives.

¹⁵ <http://legilux.public.lu/>.

¹⁶ Memorial A No. 56 of 22 July 1974, p. 1275. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-1974-56-fr-pdf.pdf>.

¹⁷ Memorial A No. 264 of 21 December 2016. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2016-264-fr-pdf.pdf>.

¹⁸ Memorial A No. 101 of 22 December 1986, p. 2343. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-1986-101-fr-pdf.pdf>.

¹⁹ Memorial A No. 74 of 17 June 1999. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-1999-74-fr-pdf.pdf>.

²⁰ Memorial A No. 708 of 21 August 2018. Website: <http://legilux.public.lu/eli/etat/leg/loi/2018/08/01/a708/jo>.

²¹ Coordinated text published in Memorial A No. 137 of 5 July 2012. Website: <http://legilux.public.lu/eli/etat/leg/tc/2012/07/05/n1/jo>.

²² Memorial A No. 70 of 26 May 2008. Website: <http://legilux.public.lu/eli/etat/leg/loi/2008/05/13/n3/jo>.

²³ Memorial A No. 224 of 10 November 2016. Website: <http://legilux.public.lu/eli/etat/leg/loi/2016/11/03/n1/jo>.

²⁴ Law of 15 December 2017 repealing the amended Law of 12 February 1999 creating parental leave and leave for family reasons, Memorial A No. 1082 of 18 December 2018. Website: <http://data.legilux.public.lu/file/eli-etat-leg-loi-2017-12-15-a1082-jo-fr-pdf.pdf>.

²⁵ <http://legilux.public.lu/eli/etat/leg/code/travail/20190716>.

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

The Luxembourgish Constitution prohibits sex discrimination in Article 11(2).

Since July 2006, Article 11(2) of the Constitution provides that 'women and men are equal regarding rights and duties. The State has to actively promote the elimination of any existing obstacles to equality between women and men'.

In response to the consultation organised by MEGA for the preparation of the Gender Equality Plan 2019-2022, the Chamber of Employees (Chambre des Salariés, CSL) proposed a modification of Article 11(2) of the Constitution:²⁶

'Women and men are equal regarding rights and duties. The State has to guarantee equality between women and men by ensuring the elimination of any existing obstacles to equality and by adopting specific measures which promote equal treatment' (CSL 2019, first opinion).

2.1.2 Other constitutional protection of equality between men and women

There is no other constitutional protection of equality between women and men.

2.2 Equal treatment legislation

Equal treatment in employment and occupation

In the 1970s, Luxembourg adopted a Grand-Ducal Regulation on equal pay between men and women (Grand-Ducal Regulation of 10 July 1974).²⁷ By the Law of 15 December 2016,²⁸ equal pay was integrated into the Labour Code, Book II, Title II 'Remuneration', Chapter V 'On equal pay between men and women'.

Since the Law of 13 May 2008 implementing Directive 76/207/EEC amended by Directive 2002/73 EC on equal treatment between women and men as regards access to employment, vocational training and promotion, and working conditions,²⁹ the Labour Code explicitly prohibits sex discrimination and provides for equal treatment between men and women according to Articles 241-1 to 245-8 (Book II, Title IV 'On equal treatment between men and women'). Direct or indirect discrimination on the grounds of sex, by reference in particular to marital or family status, is prohibited. Discrimination on the grounds of gender reassignment is deemed to be discrimination on the grounds of sex (Article L. 241-1(1) LC). Moral or sexual harassment is deemed to be a form of discrimination on the grounds of sex and is as such prohibited (Article L. 241-1(3) LC).

Other discrimination grounds are covered. The Law of 28 November 2006 implemented Council Directive 2000/43/EC of 20 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origins and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. It amended the Labour Code by introducing a new title in Book II: Title V 'On equal treatment in employment and occupation'

²⁶ CSL, Opinion of 19 July 2019.

²⁷ Memorial A No. 56 of 22 July 1974, p. 1275. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-1974-56-fr-pdf.pdf>.

²⁸ Memorial A No. 264 of 21 December 2016. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2016-264-fr-pdf.pdf>.

²⁹ Memorial A No. 70 of 26 May 2008. Website: <http://legilux.public.lu/eli/etat/leg/loi/2008/05/13/n3/jo>.

(Articles L. 251-1 to 254-1 of the Labour Code).³⁰ Direct and indirect discrimination on the grounds of religion or belief, disability, age, sexual orientation or actual or supposed membership or non-membership of a nationality³¹ or a race or a particular ethnic group is prohibited (Article L. 251-1(1) LC). Sexual and moral harassment is deemed to be a form of discrimination when unwanted conduct related to any of the grounds referred to takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment (Article L. 251-1(3) LC).

Equal treatment in matters of social security

The Law of 15 December 1986 on the progressive implementation of the principle of equal treatment for men and women in matters of social security implemented Council Directive 79/9/EEC of 19 December 1978.³² According to Article 1, the principle of equal treatment between men and women applies to (a) statutory schemes, which provide protection against the risks of sickness, invalidity, old age, accidents at work, occupational diseases and involuntary unemployment and to (b) social assistance in so far as it is intended to supplement or replace the schemes referred to in (a). The principle applies to the active population including self-employed workers; workers whose activity is interrupted due to sickness, accident or involuntary unemployment; jobseekers; old age pensioners and beneficiaries of an invalidity pension. The Law does not apply to the provisions concerning survivors' benefits or family benefits except in the case of family benefits granted by way of increases of benefits due in respect of the risks referred to in (a).

Equal treatment in the access to and supply of goods and services

The Law of 21 December 2007 implementing Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services³³ aims in Article 1 to combat discrimination on the grounds of sex outside the scope of employment and occupation in order to implement the principle of equal treatment between women and men. Direct or indirect discrimination on the grounds of sex, including less favourable treatment of women due to pregnancy or maternity, is prohibited (Article 2(2) LC). Moral or sexual harassment is deemed to be discrimination and as such, prohibited (Article 2(3) LC).

Miscellaneous

The fight against domestic violence, which is one of the main concerns of MEGA, was regulated in the Law of 8 September 2003 on domestic violence³⁴ and amended by the Law of 20 July 2018 approving the European Council Convention on domestic violence.³⁵

Regarding political parties, the Law of 15 December 2016 promoted equality between women and men by amending Article 2 of the Law of 21 December 2007 regulating the

³⁰ Memorial A No. 207 of 6 December 2006. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2006-207-fr-pdf.pdf>.

³¹ Nationality has been added by Law of 7 November 2017 amending Law of 28 November 2006, Article 4. Memorial A No. 964 of 8 November 2017. Website: <http://data.legilux.public.lu/file/eli-etat-leg-loi-2017-11-07-a964-jo-fr-pdf.pdf>.

³² Memorial A No. 101 of 22 December 1986, p. 2343. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-1986-101-fr-pdf.pdf>.

³³ Memorial A No. 232 of 21 December 2007. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2007-232-fr-pdf.pdf>.

³⁴ Coordinated text published in Memorial A No. 195 of 14 November 2013. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2013-195-fr-pdf.pdf>.

³⁵ Memorial A No. 631 of 30 July 2018. Website: <http://data.legilux.public.lu/file/eli-etat-leg-loi-2018-07-20-a631-jo-fr-pdf.pdf>.

financial aspects of political parties.³⁶ According to the Law of 21 December 2007, political parties are granted by the State, under certain conditions, an annual allocation, which consists of a fixed grant of EUR 100 000, a supplementary grant of EUR 11 500 for each percentage of votes cast in the last general elections and a supplementary grant of EUR 11 500 for each percentage of votes cast in the last European elections.³⁷ The Law of 15 December 2016 introduced a new condition regarding the attribution of this annual allocation. Each political party has to present, at general elections, a list of at least 24 candidates of each sex, which means 40 % of the candidates, and, at European elections, a list of 3 candidates of each sex, which means that 50 % of the candidates must be women and 50 % men. If these conditions are not fulfilled, the annual allocation is reduced according to a progressive schedule inscribed in the law.

It must be noted that the Ministry for Family and Integration is competent for the promotion of diversity and fight against discrimination based on grounds other than sex and for the defence of the rights of LGBTI people.

³⁶ Memorial A No. 264 of 21 December 2016. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2016-264-fr-pdf.pdf>.

³⁷ Memorial A No. 237 of 28 December 2007. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2007-237-fr-pdf.pdf>.

3 Implementation of central concepts

3.1 General (legal) context

3.1.1 Surveys on the definition, implementation and limits of central concepts of gender equality law

No specific survey on the definition, implementation and limits of central concepts of gender equality law has been published in Luxembourg.

In 2011, in his book *Discrimination au travail* (Discrimination at work), Jean-Luc Putz stated that there were only limited resources regarding discrimination in Luxembourg: one major publication by François Moïse; legislation; parliamentary documents and case law.³⁸ He noticed that the number of cases which had been submitted to the courts was also very limited. Eight years later, the situation remains unchanged.

In the introduction of his book, Jean-Luc Putz presented the concepts of equality and non-discrimination and their differences.

3.1.2 Other issues

There are no other issues to be reported.

3.1.3 General overview of national acts

National acts are highlighted throughout the different sections.

3.1.4 Political and societal debate and pending legislative proposals

Since 2006, four inter-ministerial plans for equality between women and men were launched to ensure the effectiveness of rights: the first one from 2006 to 2008; the second one from 2009 to 2014;³⁹ the third one from 2015 to 2018;⁴⁰ and the fourth one from 2020 onwards.⁴¹

External experts assessed the implementation of the three first equality plans. The expert who assessed the first gender equality plan in 2009 issued a very positive report, welcoming the creation of the inter-ministerial Committee on Gender Equality within the Ministry for Equal Opportunities, the creation of strong ties with the United Nations, the EU and the Council of Europe regarding gender equality and the fact that 81 % of the 97 measures of the equality plan had already been realised or were in progress. His conclusions and recommendations were used during the preparation of the second gender equality plan together with the political commitments Luxembourg made at the national level, especially in the governmental programme of July 2009, and at the international level, within the United Nations, the EU and the Council of Europe.⁴²

³⁸ Putz, J-L. (2010) *Discrimination Au Travail* (Promoculture: Luxembourg).

³⁹ There is some information regarding the first and the second action plans for equality between women and men on the following website: <http://mega.public.lu/fr/societe/politique-niveau-national/action-national-femmes-hommes/index.html>.

⁴⁰ The third action plan for equality between women and men from 2015 to 2018 is available on the website of MEGA in English: http://mega.public.lu/fr/publications/publications-ministere/2015/pan-egalite-2015/06385_Broch_Plan_Egalite_Femmes_Hommes_2015-2018_Enq_06-2015-Web.pdf.

⁴¹ The fourth action plan for gender equality applies from 2020 onwards. It is available on the website of MEGA in French: <https://mega.public.lu/content/dam/mega/fr/publications/publications-ministere/2020/MEGA-plan-action-nation-egalite-WEB.pdf>.

⁴² There is some information regarding the first and the second action plans for equality between women and men on the following website: <http://mega.public.lu/fr/societe/politique-niveau-national/action-national-femmes-hommes/index.html>.

Professor Robert Plasman of the Free University of Brussels accompanied, as an external expert, the implementation process of the second national action plan on equality 2009-2014. He made recommendations on governance. In particular, he recommended improving the cooperation of MEGA with the other ministries, to create a consensus on equality and a culture of gender equality in order to implement a policy of gender mainstreaming and to adapt the gender training offer for the officials of the ministries and administrations according to the challenges.⁴³

The third national action plan on equality 2015-2018 has not yet been assessed.

Throughout 2019, MEGA carried out a broad consultation with stakeholders and the general public for the preparation of the Gender Equality Plan 2019-2022. It started with the presentation of the general objectives by the minister in Parliament on 28 March 2019 and was followed by a substantive debate, in which all the political parties participated. In particular, the minister informed MPs about the changing nature of the national plan, which would become 'an open document, dynamic and adaptable *en route*'. Between 17 June 2019 and 7 July 2019, a public consultation was held online. During the summer and the autumn, different committees and institutions involved in the promotion of gender equality were consulted and delivered an opinion to the public authorities. The Chamber of Crafts (CMD) and the Chamber of Employees (CSL) published opinions on their websites (CMD 2019; CSL 2019 (first opinion); CSL 2019 (second opinion)). The fourth gender equality plan was finalised at the beginning of 2020.

On 17 July 2020, the Minister for Gender Equality presented the new National Action Plan for Gender Equality, entitled *Putting equality into practice*.⁴⁴ The ambition of this action plan is to transform equal rights into substantive equality. It is a roadmap with targeted measures and actions promoting equality by taking into account all the priorities. It takes a gender mainstreaming approach and appeals for shared responsibility among the members of the Government and other bodies in society. It is an open-ended action plan, which will be adapted periodically after an assessment procedure at three-years intervals, the first being in 2022.

The follow-up of the implementation work will be accomplished by the inter-ministerial Committee on Gender Equality.

There are 48 guidelines, which are grouped into 7 political priorities:

- encourage and support civic and political engagement (3);
- combat stereotypes and sexism (7);
- promote equality in education (9);
- advance equality in the workplace (12);
- promote equality at local level (5);
- combat domestic violence (6);
- encourage the development of a more equal society (6).

The most important measures and actions will be addressed in the relevant sections of the report.

3.2 Sex/gender/transgender

3.2.1 Definition of 'gender' and 'sex'

There is no definition of 'gender' and 'sex' in the Luxembourg legislation.

⁴³ Part I of the Gender Equality Plan 2015-2018, p. 2.

⁴⁴ MEGA (2020) *Putting equality into practice* (National Action Plan for Gender Equality), available at: <https://mega.public.lu/content/dam/mega/fr/publications/publications-ministere/2020/MEGA-plan-action-nation-egalite-WEB.pdf>.

3.2.2 Protection of transgender, intersex and non-binary persons

Since 2016, 'discrimination on the grounds of gender reassignment has to be regarded as gender discrimination'.⁴⁵

This sentence has been introduced into the Labour Code (Article L. 241-1 section 1), the Law of 28 November 2006 implementing Council Directives 2000/43/EC and 2000/78/EC (Article 9), the Law of 13 May 2008 implementing Council Directive 76/207/EEC (Article 1), the special status of civil servants and the special status of municipality employees.

Since the Law of 10 August 2018 regarding the change of the reference to gender and to the first name in the civil status and amending the Civil Code,⁴⁶ gender reassignment happens upon a person's declaration of intimate and stable conviction that his/her gender does not correlate with the sex indicated on their birth certificate. The declaration has to be made to the Minister of Justice.

3.2.3 Specific requirements

Following the Labour Code, gender reassignment is needed for a trans person to benefit from the gender non-discrimination protection.

3.3 Direct sex discrimination

3.3.1 Explicit prohibition

Direct sex discrimination is explicitly prohibited under Article L. 241-1 of the Labour Code and by Article 1 of the Law of 21 December 2007 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Luxembourg's legislation is in accordance with the European definition.

In Article L. 241-1 of the Labour Code and in all legislation mentioned under 1.2, direct discrimination is defined in the following way: 'direct discrimination is when one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation'.

3.3.2 Prohibition of pregnancy and maternity discrimination

Articles L. 331-1 to 332-4 of the Labour Code concern the 'employment of pregnant workers, workers having given birth recently and breastfeeding workers'. They are part of the Book III 'on protection, security and health of the workers' of the Labour Code. Article L. 337-1 of the Labour Code prohibits dismissal due to pregnancy.

Article L. 241-4(1) states that the provisions regarding the protection of pregnancy and maternity do not constitute discrimination, but a condition for the implementation of gender equality. It must be noted that prohibition of gender discrimination is regulated in Book II 'on labour conditions' of the Labour Code.

3.3.3 Specific difficulties

There are no specific difficulties to be reported.

⁴⁵ Law of 3 June 2016. Memorial A No. 102 of 14 June 2016. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2016-102-fr-pdf.pdf>.

⁴⁶ Memorial A No. 979 of 12 September 2018. Website: <http://legilux.public.lu/eli/etat/leg/loi/2018/08/10/a797/1o>.

3.4 Indirect sex discrimination

3.4.1 Explicit prohibition

Indirect sex discrimination is explicitly prohibited under Article L. 241-1 of the Labour Code and by Article 1 of the Law of 21 December 2007 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Luxembourg's legislation is in accordance with the European definition.

In Article L. 241-1 of the Labour Code and in all legislation mentioned under 1.2, indirect discrimination is defined in the following way:

'indirect discrimination is when an apparently neutral provision, criterion or practice would put a person of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.'

3.4.2 Statistical evidence

Statistical material is not mentioned in the equal treatment legislation and there is no publicly available case law on the question.

3.4.3 Application of the objective justification test

There is no case law concerning indirect gender discrimination that clarifies the question of the application of the objective justification test.

3.4.4 Specific difficulties

There are no specific difficulties to be reported.

3.5 Multiple discrimination and intersectional discrimination⁴⁷

3.5.1 Definition and explicit prohibition

The concepts of multiple discrimination and intersectional discrimination are not used, and consequently not defined, by any legislation in Luxembourg. This means that every element of a situation of multiple discrimination has to be challenged separately in the light of one or more laws.

3.5.2 Case law and judicial recognition

In Luxembourg, there is no case law or judicial recognition of multiple discrimination and intersectional discrimination.

In its annual activity report, the Centre for Equal Treatment (CET) indicated that, in 2018, it received 14 cases of multiple discrimination, which represented 8 % of all cases. However, the report does not deliver more information about the grounds and the action taken by the CET to resolve these cases. In its annual activity report for 2019, the CET indicated that it had received 18 cases of multiple discrimination, which represented 12 %

⁴⁷ See for more information Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

of all cases. In its recommendations, it asked the public authorities to enshrine in law an explicit prohibition of multiple discrimination.⁴⁸

3.6 Positive action

3.6.1 Definition and explicit prohibition

Positive action is allowed according to Article 11(2) of the Constitution, which states that the State has to actively promote the elimination of any existing obstacles to equality between women and men.

Articles L. 243-1 to L. 243-5 of the Labour Code (Book II, Title IV, Chapter III) concern positive action in the private sector. It must be noted that there is no legal basis regarding positive action in the public sector.

Positive action measures are defined, in Article L. 243-1 LC, as:

‘concrete measures conceding specific advantages in order to enable the underrepresented sex to pursue a professional activity or to prevent or compensate for disadvantages in the professional career path’.

This definition is followed by a list of seven measures, including restructuring of work organisation, hiring, special training, profession changes, career promotion, access of the underrepresented sex to responsibility and decision-making positions, and better reconciliation between family life and professional life. This list of measures is of an indicative nature and by no means exhaustive. All other measures, which fit into the goals assigned to positive action measures by Article L. 243-1 LC, have to be considered.

Since the publication of the national action plan for gender equality from 2015 to 2018, positive action measures have focused on three thematic pillars:

- Equal treatment of women and men (in the recruitment process, in remuneration and in the valuation of qualifications);
- Gender equality in decision making (promotions, access to continuous vocational training, equal participation in decision making)
- Gender equality in work-life balance (after taking parental leave, organisation of work tasks, achievement and enhancement of work-life balance).

This definition complies with the EU definition found in Article 157(4) TFEU.

Positive action is monitored, through a special procedure, by a service of the Ministry for Gender Equality (MEGA).

The new National Action Plan for Gender Equality included the announcement of a refocussing of the positive action programme (Guideline 4.5).

In September 2020, the Ministry for Gender Equality presented a ‘modernised’ positive action programme. A new website dedicated to positive action measures was created.⁴⁹ There are new themes on telework and career evolution for women and men after parental leave and new tools regarding equality in wages and training.

Positive action is a voluntary certification programme. However, when companies in the private sector engage in positive action, they must commit themselves to following the process as described below. In the public sector, administrations may also engage on a

⁴⁸ CET (2020) *Annual Report 2019* p. 39.

⁴⁹ See: <https://actionspositives.lu>.

voluntary basis. However, there are no commitments between the Ministry for Gender Equality and the administration and no contract is signed between them.

Any positive action programme consists of four phases:⁵⁰

First phase – Preparation of the collaboration

Companies may apply, on a voluntary basis, to participate in a positive action programme. The request is submitted, for advisory opinion, to the Committee for Positive Action, created by the Grand-Ducal Regulation of 25 October 1999.⁵¹ If a favourable opinion is delivered by the committee, the conditions of the participation of the company in the positive action project are written down in a contract, which is signed between the ministry and the company. The ministry will assist the company during the development and implementation of the project through financial support and guidance provided by external consultants.

Second phase – Analysis of the company's current situation

The analysis of the current situation of the company is carried out in collaboration with an external consultant, who is chosen and paid by the Ministry for Gender Equality. The analysis is based on the three thematic pillars of: equal treatment between women and men, gender equality in decision making and gender equality in work-life balance. The results of this analysis are then further developed in a working group composed, on the one side, of executive members, human resources staff and the delegate for equality of the company and, on the other side, of staff of the Ministry for Gender Equality and external consultants.

The Ministry for Gender Equality places special instruments at the disposal of the company: a computer program called Logib⁵² for the analysis of wage equality and a self-assessment checklist on the three thematic pillars regarding equal treatment between women and men, gender equality in decision-making and gender equality in work-life balance.⁵³

Third phase – Drafting of the equality action plan

On the basis of the analysis of the current situation of the company, the working group formalises the company's commitments regarding seven proposals of action allocated freely to the three thematic pillars of the programme. The chosen measures are the direct result of the analysis carried out by the external consultants. The representatives of the ministry may provide advice. Each company sets its own action plan according to its own current situation.

Each project is submitted, for an advisory opinion, to the Committee for Positive Action. Finally, if the project fulfils all the conditions, the positive action plan is granted ministerial approval. Part of the implementation costs are subsidised.

Fourth phase – Implementation of the equality action plan, evaluation and award
Ministerial approval for the plan is granted for 12 months. The company commits itself to implement the different measures of its action plan. Progress and achievement are documented and assessed in order to award the 'positive action' label. Each year,

⁵⁰ See: <https://actionspositives.lu/actions>.

⁵¹ See: <http://legilux.public.lu/eli/etat/leg/rgd/1999/10/25/n7/jo>. The following ministries are represented in this committee: Gender Equality, Labour, Economy, National Education and Professional Training, Budget. The Public Employment Service (ADEM) is also part of it. The other members of the Committee are representing the Board of Trade (Chambre de Commerce), the Board of Craft (Chambre des Métiers), the Board of Workers (Chambre des Salariés) and the Board of Agriculture (Chambre de l'Agriculture). This Committee is chaired by the representative of the Ministry for Gender Equality.

⁵² See: <https://actionspositives.lu/logib>.

⁵³ See: https://actionspositives.lu/docs/Fiche_dAuto-Evaluation.pdf.

companies which have fully transposed their action plan in the context of their participation in the programme are awarded the 'positive action' label during a public ceremony, with press coverage.⁵⁴ During this event, companies have the opportunity to present their achievements. Over the last 10 years, more than 80 companies shared their best practices.⁵⁵

3.6.2 Conceptual distinctions between 'equal opportunities' and 'positive action' in national law

Positive action measures are regarded as a way of fulfilling the equal treatment principle between men and women, inscribed in Article 11(2) of the Constitution.

3.6.3 Specific difficulties

Positive action is considered as the main soft instrument of MEGA to promote gender equality in companies in the private sector. There are no economic or political objections to positive action in Luxembourg. On the contrary, economic arguments are used to promote positive action measures.

In the 'modernised' positive action programme introduced in September 2020, positive action is still voluntary for companies in the private sector and public administrations and they are not obliged to engage in positive action. Currently, after implementing a voluntary positive action plan, private sector companies are presented with an award by the Minister for Gender Equality. In contrast, there are no sanctions if companies do not respect their commitments. What may happen is that a company that does not respect the commitments negotiated in the four phase process would not receive the financial support from the Ministry. For example, if a commitment of the company is to provide for an in-house childcare service, the financial support will not be paid if no such service is offered to the staff at the date stated in the positive action plan.

In the consultation organised by MEGA for the preparation of the Gender Equality Plan 2019-2022, the Chamber of Employees (CSL) and the Chamber of Craft (CMD) addressed the issue of MEGA's positive action programme. The CSL requested an evaluation of the long-term effects of the positive actions carried out in the past by participating companies (CSL 2019). It also asked for sanctions where the commitments are not respected. In contrast, the CMD rejected compulsory disposals and advocated in favour of proactive measures (CMD 2019). The requests of the CSL were not followed up by the 'modernised' positive action programme. At the most, more power has been given, throughout the process, to the professional chambers through the interventions of the Committee of Positive Action.

3.6.4 Measures to improve the gender balance on company boards

There are quantitative objectives regarding a gender-balanced representation of both sexes to be reached on the boards of companies partially funded by the State. This was an issue inserted by the coalition partners in the governmental programme of 2013-2018.

For example, Article 7(4) of the Law of 3 December 2014 on Public Research Institutes states that 'the proportion of the members of the board of both sexes cannot be less than 40 %. It must be noticed that the members of the board of Public Research Institutes are appointed by the Government. Since 2015, the target has been achieved regarding the boards of the three public research institutions (LISER, LIST and LIH), the University of Luxembourg and the National Fund for Research (FNR).

⁵⁴ Positive Action Awards 2020: <https://actionspositives.lu/news/taina-bofferding-remet-les-labels-actions-positives-2020>.

⁵⁵ See: <https://actionspositives.lu/laureats>.

At the end of 2018, 40.19 % of the representatives of the State in State-owned companies or companies partially funded by the State were women, 34.69 % of all the members of the administrative boards of State-owned companies or companies partially funded by the State and 30.58 % of the representatives of the State in Private Companies.⁵⁶

In its response to the consultation organised by MEGA for the preparation of the Gender Equality Plan 2019-2022, the Chamber of Craft (CDM) rejected the introduction of quantitative quotas for a gender-balanced representation of both sexes on the boards of companies in the craft sector. Quotas would not be applicable in family-owned SMEs (CMD 2019).

In the new National Action Plan for Gender Equality, the target of at least 40 % of representatives of each gender to be reached on the boards of companies partially funded by the State has been maintained (Guideline 4.9). A permanent monitoring procedure will be implemented by the Ministry of Economy. However, no quantitative quotas have been introduced in the private sector (see section 3.6.5 below).

3.6.5 Positive action measures to improve the gender balance in other areas

National law does not stipulate any measures for the promotion of women to middle or senior management levels. There are private regulations, for example in the banking sector, which fix objectives regarding the promotion of women to senior management in top management and human resources management. They are considered by the Ministry for Gender Equality as best practice.⁵⁷

Two guidelines of the new National Action Plan for Gender Equality address equality in decision making. Private Companies will be encouraged to promote equality in decision making (Guideline 4.10). Since 2016, the setting of concrete quantified targets in decision making has been one of the requirements for obtaining ministerial approval in the positive action programme. Moreover, female talent in decision making will be made visible through advocacy and outreach efforts targeting company managers (Guideline 4.11). Therefore, MEGA has developed the professional profiles of talented women.

The financing of political parties is linked to the representation of women and men at the national and European level. This does not concern the local level. Political parties have to ensure a gender quota of 40 % on lists of candidates for national elections and a quota of 50 % for European elections. The sanction for non-compliance will be a reduction in the public financial support granted to the political party for the pre-electoral campaign. The new legislation applied for the first time for general elections in October 2018.

3.7 Harassment and sexual harassment

3.7.1 Definition and explicit prohibition of harassment

Harassment is defined, in Article L. 241-1(2) of the Labour Code, in the following way:

‘harassment is when unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of this person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment’.

This is, for example, the definition provided by Article 1 of the amended Law of 13 May 2008 on equal treatment between women and men in employment and occupation.

⁵⁶ MEGA, decision making. Website: <http://mega.public.lu/fr/travail/prise-decision-economique/situation-actuelle/index.html>.

⁵⁷ For example, positive action measures in the banking sector (BGL – BNP Paribas). Website: <http://mega.public.lu/fr/travail/programme-actions-positives/bonnes-pratiques/bgl/index.html>.

The definition complies with the EU definition.

Such behaviour is regarded as a form of discrimination on the grounds of sex and prohibited as such (Article L. 241-1(3) LC).

3.7.2 Scope of the prohibition of harassment

In addition to Article 1 of the amended Law of 13 May 2008 on equal treatment between women and men in employment and occupation, Article 2 of the amended Law of 21 December 2007 on equal treatment of women and men also prohibits harassment in the field of access to and supply of goods and services. Article 1 of the amended Law of 16 April 1978 concerning the general status of civil servants prohibits harassment in the public service including National Education.

3.7.3 Definition and explicit prohibition of sexual harassment

The prohibition of sexual harassment in the workplace was introduced at the national level by the Law of 26 May 2000.⁵⁸

Sexual harassment is defined, in Article L. 245-2 of the Labour Code, in the following way:

'any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment'.

Sexual harassment is deemed to be a form of discrimination on the grounds of sex and is as such prohibited (Article L. 241-1(3) LC).

It is specifically laid down in the law that employers have to abstain from any sexual harassment in employment relationships. Employers also have to ensure that any reported act of sexual harassment stops immediately and they have to take preventive measures to ensure the protection and the dignity of their employees.

In the case law of *L'Estrade Barthelemy v. Etat* (2003),⁵⁹ the High Court of Justice recognised the employer's responsibility for acts committed by a manager, arguing that the manager was the physical representative of the employer. In *Rausch v. Luxair* (2006),⁶⁰ which was also decided by the Supreme Court of Justice, it was held that the employer is not obliged to start a formal investigation before suspending a worker, who is accused of having engaged in sexual harassment.

3.7.4 Scope of the prohibition of sexual harassment

In addition to Article 1 of the amended Law of 13 May 2008 on equal treatment between women and men in employment and occupation, Article 2 of the amended Law of 21 December 2007 on equal treatment of women and men also prohibits sexual harassment in the field of access to and supply of goods and services. Article 1 of the amended Law of 16 April 1978 concerning the general status of civil servants prohibits sexual harassment in the public service including National Education.

⁵⁸ Memorial A No. 50 of 30 June 2000, p. 1110. Website: <http://legilux.public.lu/eli/etat/leg/loi/2000/05/26/n1/jo>.

⁵⁹ C.S.J. 30 January 2003 No. 26327.

⁶⁰ C.S.J. 29 June 2006 No. 30051.

3.7.5 Understanding of (sexual) harassment as discrimination

Both harassment of Article L. 241-1(2) and sexual harassment of Article L. 245-2 of the Labour Code are regarded as a form of discrimination on the grounds of sex and prohibited as such (Article L. 241-1(3) LC).

3.7.6 Specific difficulties

In June 2018, the NGO 'Mobbing' presented an alarming report,⁶¹ which stated that the number of reported cases quadrupled from 2016 to 2017. 201 new cases were reported in 2017. Two thirds of the persons affected were women between the age of 30 and 59. 85 % of the claimants were working in the private sector. For 49 % of them, seniority in the company was below five years. 52 % of the victims of harassment were on sickness leave with an average duration of seven weeks. The NGO's 2019 report confirmed the high number of claimants working in the private sector (91 %).⁶² In 2019, the number of reports of harassment dropped to 132 and women of all ages were victims of harassment. The NGO's 2020 report gave more details regarding the occupational sectors and the victims. Three occupational sectors dominated: community, social and personal services (17 %), trade (14 %) and health and social work (12 %). The report states that 60 % of the victims were women, 65 % were between the ages of 30 and 49 and 26 % were on sick leave as a result of the harassment they experienced.⁶³

In light of these figures, it is a paradox that legal challenges regarding moral or sexual harassment are not more developed in Luxembourg. Some experts think that the small size of the country and its particular labour market are obstacles to legal challenges.

It must be noted that sexual harassment in the workplace has not yet been criminalised. There are urgent requests in this direction. Meanwhile, the Court of Appeal, decided by its judgment of 20 February 2013 (No. 102/13X), that sexual harassment in the workplace may fall under the Article 442-2 of the Criminal Code, which applies to obsessional persecution (stalking). The material scope of this Article is broad and covers any conduct of this nature, regardless of the place where it was committed. However, the application of Article 442-2 CC requires the victim to lodge a complaint. The victim may also seek redress for damage to her physical integrity (incapacities) and for moral and material damages.⁶⁴ Seven years after the first judgment, a victim of sexual harassment in the workplace obtained EUR 55 000 of damages on the basis of medical examinations.

3.8 Instruction to discriminate

3.8.1 Explicit prohibition

An instruction to discriminate on the grounds of gender constitutes discrimination. Provisions reproducing EU law have been implemented in all the laws on equal treatment between women and men. In this regard, Luxembourg's law complies with EU law.

Instruction to discriminate is included in Article L. 241-1(4) of the Labour Code and Article 2 of the amended Law of 21 December 2007 on equal treatment between men and women in access to and supply of goods and services.

⁶¹ Website: <https://www.mobbingasbl.lu/fr/publication-francais/statistiques-statistiken/46-statistiques-2017/file>.

⁶² Website: https://www.mobbingasbl.lu/images/_mobbing/docs/18/Statistiques_mobbing_2019.pdf.

⁶³ Website: https://www.mobbingasbl.lu/images/_mobbing/docs/18/Rapport_dactivite_2020_et_statistiques_2020.pdf.

⁶⁴ Website: https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/CSJ/10_Chambre%20correctionnelle/2013/20130220-CA10-102a-accessible.pdf.

3.8.2 Specific difficulties

There are no specific difficulties to report.

3.9 Other forms of discrimination

There are no other forms of discrimination in the Luxembourg legislation.

3.10 Evaluation of implementation

The implementation of the third national action plan on gender equality 2015-2018 has not yet been evaluated.

3.11 Remaining issues

There are some major remaining issues, such as:

- the lack of the concepts of multiple discrimination and intersectional discrimination in the legal framework(see under 3.5). In its annual report 2019, the CET recommended that the public authorities enshrine in law an explicit prohibition of multiple discrimination (CET 2019 p. 39);
- the voluntary nature of positive action in the public and private sectors (see under 3.6). It has been maintained in the 'modernised' positive action programme introduced by MEGA in September 2020. The Chamber of Employees requested a switch from a voluntary scheme to a compulsory one (CSL 2019, first opinion), which was explicitly rejected by the Chamber of Craft (CMD 2019);
- the gap between the low number of court proceedings regarding harassment and the rising number of cases reported by the NGO 'Mobbing' in its annual reports of 2018, 2019 and 2020 (see section 3.7.6 above). Solutions need to be found to bridge this gap. One solution would perhaps be to criminalise sexual harassment in the workplace. Currently, sexual harassment in the workplace is punishable under Article 442-2 of the Criminal Code on obsessive persecution ('stalking'). But, in this case, the victim must lodge a complaint against the perpetrator, who may be the employer or another employee.

4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)

4.1 General (legal) context

4.1.1 Surveys on the gender pay gap and the difficulties of realising equal pay

On the International Women's Day 2018, Eurostat published figures on the gender pay gap in the EU Member States. Luxembourg performed very well. It was classified third of the EU Member States with an average wage difference of 5.5 % between women and men. From 2011 to 2016, Luxembourg reduced its pay gap by 2.4 points.

4.1.2 Surveys on the difficulties of realising equal treatment at work

There are no surveys on the difficulties in realising equal treatment at work.

4.1.3 Other issues

There are no other issues to be reported.

4.1.4 Political and societal debate and pending legislative proposals

The governmental programme 2018-2023, which declared gender equality as a transversal political priority for all Ministries and Administrations, raised the following issues regarding pay gap:

'Necessary means will be put into place in order to terminate, as far as possible, the pay gap between women and men, which remains up to 5.4 % in the private sector. Equal pay "by law" should lead to "de facto" wage equality in the labour market in accordance with the provisions set out in the Labour Code. In this context, it is particularly important to reinforce the means of the control of the Labour and Mines Inspectorate (ITM)'.⁶⁵

ITM's daily mission is to supervise the implementation of legislation by companies and to advise employers and employees in the domain of working conditions.

In response to the consultation organised by MEGA for the preparation of the Gender Equality Plan 2019-2022, the Chamber of Employees (CSL) cited the lack of wage transparency in the private sector as a barrier to promoting equal pay (CSL 2019, first opinion) (see below for details).

Advancing equality in the workplace is one of the seven priorities of the new National Action Plan for Gender Equality (see section 3.1.4 above).

4.2 Equal pay

4.2.1 Implementation in national law

Equal pay for women and men for the same work, or for work to which an equal value is attributed, was introduced by the Grand-Ducal Regulation of 10 July 1974 on equal pay between men and women.⁶⁶ Since then, provisions appearing in collective agreements, wage scales, wage agreements or individual work contracts, which were contrary to the

⁶⁵ *Accord de coalition 2018-2023* ('Coalition Agreement 2018-2023') especially point 20, p. 113. Website: <https://gouvernement.lu/dam-assets/documents/actualites/2018/12-decembre/Accord-de-coalition-2018-2023.pdf>.

⁶⁶ Memorial A No. 56 of 22 July 1974, p. 1275. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-1974-56-fr-pdf.pdf>.

principle of equal pay, were declared null and void. The highest remuneration was automatically substituted, when pay was not equal.

By the Law of 15 December 2016,⁶⁷ equal pay was integrated into the Labour Code, Book II, Title II 'Remuneration', Chapter V 'On equal pay between men and women', under Articles L. 225-1 to L. 225-5.

In the new National Action Plan for Gender Equality, four guidelines focus on equal pay.

MEGA notes that, at the end of 2019, there was a difference of 5.5 % of the average gross hourly wage between women and men. However, little has been done to combat this difference. The Labour and Mines Inspectorate has only dealt with one case on gender pay inequality out of 4 312 labour law files and there has been no case law on this topic.⁶⁸

Therefore, the first aim of MEGA is to strengthen political commitment in favour of equal pay by joining the International Coalition for Equal Pay (Guideline 4.1). The second aim of MEGA is to better inform and raise awareness on equal pay (Guideline 4.2). Therefore, it decided to republish, together with the Ministry of Labour, a brochure on equal pay. It reminded the social partners of their responsibility to assist workers complaining about unequal pay. It also reminded gender equality delegates of their mission to prevent conflicts inside companies and to refer inequality pay problems to the Labour and Mines Inspectorate. The third aim of MEGA is to follow the discussions on pay transparency at European level and to launch a debate on this issue in Luxembourg (Guideline 4.3). The fourth aim of MEGA is to promote self-regulation of wages among enterprises in the context of the positive action programme (Guideline 4.4).

4.2.2 Definition in national law

The concept of pay, regarding equal pay, is defined in Article L. 225-2 LC. It means:

'the ordinary basic or minimum wage and any other advantage, which the worker receives directly or indirectly, in cash or in kind, in respect of his/her employment, from his/her employer'.

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

4.2.3 Explicit implementation of Article 4 of Recast Directive 2006/54

Since the adoption of the Law of 15 December 2016, Article 4 of the Recast Directive 2006/54 is implemented in the Labour Code in Articles L. 225-3(2), which states that:

'the different elements composing the remuneration are established in accordance to equal standards for men and women. Categories and criteria of classification and professional promotion, as well as all other bases for calculating the remuneration, especially the system of job evaluation, must be common to all employees of both sexes'.

4.2.4 Related case law

There is no case law related to this issue.

⁶⁷ Memorial A No. 264 of 21 December 2016. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2016-264-fr-pdf.pdf>.

⁶⁸ Labour and Mines Inspectorate (2020), *Annual Report 2019*, p. 45.

4.2.5 Permissibility of pay differences

The Law of 15 December 2016 does not allow any pay differences.

4.2.6 Requirement for comparators

Comparators are not required in Luxembourg legislation.

4.2.7 Existence of parameters for establishing the equal value of the work performed

According to Article L. 225-3(1) LC:

'... are considered of equal value, works requiring from workers a comparable set of professional knowledge, enshrined in a qualification, a diploma or professional practice, of capacities resulting from experience, responsibilities and physical or nervous burden ...'.

4.2.8 Other relevant rules or policies

There are no other relevant rules or policies.

4.2.9 Job evaluation and classification systems

There are no examples of good practice or guidance in job evaluation or classification systems other than those carried out as part of the positive action programme (see 3.6 above).

4.2.10 Wage transparency

In response to the consultation organised by MEGA for the preparation of the Gender Equality Plan 2019-2022, the Chamber of Employees (CSL) cited the lack of wage transparency in the private sector as a barrier to promoting equal pay (CSL 2019, first opinion). According to Article L. 414-3(2) LC, each semester, employers have to provide statistics, disaggregated by sex, on wages to the staff delegation. However, CSL stated that in its opinion, this duty was not implemented. Therefore, employees cannot base their claims on specific details that would enable them to have pay inequality punished and redressed. CSL requested in particular that:

- communication of more detailed information, disaggregated by sex, to employees and the staff delegation, should be made compulsory;
- the powers and checks of the Labour and Mines Inspectorate (ITM) should be reinforced;
- the CET should be given new powers to allow it to perform on-site checks and to impose penalties.

4.2.11 Implementation of the transparency measures set out by European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women

According to Article L. 414-3(2) LC, each semester, employers have to provide statistics, disaggregated by sex, on wages to the staff delegation.

4.2.12 Other measures, tools or procedures

The Ministry for Gender Equality offers a digital tool to companies that want to analyse their situation regarding equal pay. The Logib⁶⁹ is a calculating instrument based on Excel, which allows identification of the causes of disparities regarding remuneration between men and women in a company. After receiving the relevant data, the company gets a report on the remuneration structures within the company. The causes thereof are identified. The report will establish if the gender pay gap is justified by objective factors or if it indicates indirect discrimination based on sex. It will also indicate methods of improving equal pay. It must be noted that companies are not obliged to communicate the results of the report to MEGA. If they used Logib in the procedure on positive action (see section 3.6 above), they must only document that they used it to check equal pay.

4.3 Access to work, working conditions and dismissal

4.3.1 Definition of the personal scope (Article 14 of Recast Directive 2006/54)

Article L. 241-2 LC states that all workers in the private sector are covered by the prohibition of discrimination on grounds of sex. Luxembourg's legislation does not define what a worker is. The relationship of subordination is the criterion applied by the courts. According to Article L. 127-2 LC, a worker is 'an individual, who is employed by an employer to provide paid services, which are carried out in a relationship of subordination'. This Article explicitly excludes civil servants and public employees.

In the public sector, Article 1a of the statute of civil servants also prohibits discrimination on grounds of sex.

4.3.2 Definition of the material scope (Article 14(1) of Recast Directive 2006/54)

Article L. 241-2 LC states that the ban on discrimination on grounds of sex will apply to the following domains:

1. 'conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
2. access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
3. employment and working conditions, including dismissals, as well as pay;
4. membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations'.

4.3.3 Implementation of the exception on occupational activities (Article 14(2) of Recast Directive 2006/54)

Article L. 241-3 LC states that:

'as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex does not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate'.

⁶⁹ See: <https://actionspositives.lu/logib>.

The State did not publish an assessment of the occupational activities referred to in Article L. 241-3 LC.

4.3.4 Protection against the non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity

The Labour Code only protects pregnant women against dismissal (see under 5.2.8 below). There is no specific protection against the non-hiring, non-renewal of a fixed-term contract or non-continuation of a contract.

4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (Article 28(1) of Recast Directive 2006/54)

Article L. 241-1 LC bans all discrimination on grounds of sex. It mentions that it focuses 'especially on discrimination regarding marital and family status'. According to Article L. 241-4 LC, 'measures, which relate to the protection of pregnancy and maternity, do not constitute discrimination, but are a condition for the realisation of equal treatment between men and women'.

4.3.6 Particular difficulties

There are no particular difficulties in the Luxembourg legislation.

4.3.7 Positive action measures (Article 3 of Recast Directive 2006/54)

Luxembourg's legislation allows the adoption of positive actions (as mentioned below in section 3.6).

4.4 Evaluation of implementation

In the absence of case law and opinions by equality bodies, it is difficult to assess the implementation of legislation.

4.5 Remaining issues

In 2020, the 'Quality of Work Index Luxembourg' focused on the impact of the COVID-19 crisis on workers. It must be noted that the global quality of work index decreased significantly from 55.4 points (2019) to 53.5 points (2020), especially for those who could not benefit from telework. The trend of increased telework in 2020 was the same for women and men. The average of actual weekly working time rose for all workers to 43.5 hours for people on telework and 42.9 hours for other workers. People in face-to-face work have expressed concerns about physical stress and risk to their health, whereas people on telework were complaining of mental stress due to time pressure, emotional demands and conflicts between work and private life. Women declared a higher risk of depression (13 %) than men (9 %).⁷⁰

Even if the employment rate of women is constantly growing, it remains low (60.4 %) compared with the employment rate of women in other Western European countries. Recent reforms promoting 'family policy in favour of employment' (see under section 5) are supposed to favour work-life balance for both parents and to support their employment.

Regarding the minimum social wage, there is an ongoing labour dispute in the cleaning sector, where 83 % of the workforce are women (2019). Most of them work as 'cleaning

⁷⁰ CSL and INFAS (2020) *Quality of Work Index Luxembourg 2020*, available at: <https://www.csl.lu/fr/travail-sante-et-bien-etre/quality-of-work-index-luxembourg/enquetes-et-rapports>.

workers' and are paid the minimum social wage, which is EUR 2 141.99 per month (2020). After having acquired professional experience for several years, they requested requalification of their position as qualified employees and, as a consequence, access to the social minimum wage for qualified employees, which is EUR 2 570.39 per month (2020). This case was lost in the Court of Cassation in 2020.⁷¹

⁷¹ Court of Cassation, decision of 2 July 2020, No. 93/2020. Website: <https://justice.public.lu/content/dam/justice/fr/jurisprudence/cour-cassation/travail/2020/07/20200702-CAS-2019-00103-93a.pdf>.

5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158)⁷²

5.1 General (legal) context

5.1.1 Surveys and reports on the practical difficulties linked to work-life balance

In 2012, the Chamber of Employees (CSL) established the 'Quality of Work Index' with the INSIDE research unit (Integrative Research Unit on Social and Individual Development) of the University of Luxembourg. Each year, a survey is carried out by INFAS, (the Institut für angewandte Sozialwissenschaft) in Bonn, which measures the evaluation by employees of their quality of work and well-being. The study is based on a representative sample of all workers employed in Luxembourg, including frontier (cross-border) workers residing in Belgium, France and Germany. Participants are interviewed either by phone or through a questionnaire online. The annual report on the 'Quality of Work Index' presents a general part and a special focus.

In 2018, the 'Quality of Work Index Luxembourg' focused on the work-life balance of workers. It revealed a heterogeneous picture. 60 % of the people interviewed stated that they never or rarely had problems with their work-life balance. When they were asked about the contributions made by their company, they stated that:

- 36 % of them had the option to work part-time;
- 39 % had an option to take unpaid leave;
- 48 % had the option to return from a part-time position to full-time employment.

However, telework was only possible for 18 % of them.

Regarding working hours, two fifths of the workers could shape their daily start time and end time in a variable way. Two thirds had the possibility of taking, on short notice, a day off. However, only 1 in 10 workers could split the weekly hours to less than the regulated weekly days. One of the main conclusions of the report was that there was a serious need for companies to expand family-friendly offers. For example, company-run day-care centres were available only for 9 % of the workers employed in Luxembourg.

In 2019, the 'Quality of Work Index Luxembourg' focused on working time and rest time. The global index of the quality of work rose from 2018 to 2019. The report showed a trend of women moving to full-time jobs. In 2014, 56 % of women worked full time, whereas in 2019, the figure was 65 %. Likewise, the working time per week for part-time employees has also increased. In respect of work-life balance, 57 % of the participants stated that they never or rarely had problems (3 % less than in 2018) and 35 % of the participants working full time wanted a reduction in weekly working hours (53 % of women, 32 % of men). Telework was considered a way to reduce stress.

5.1.2 Other issues

There are no other issues to be reported.

⁷² See Masselot, A. (2018), *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A. (2015), *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

5.1.3 Overview of national acts on work-life balance issues

National acts are highlighted throughout the section.

5.1.4 Political and societal debate and pending legislative proposals

During the last years, the political and societal debate was about the reform of 2016 on parental leave and gender neutrality.

A completely new system of parental leave was introduced by the Law of 3 November 2016,⁷³ which replaced the lump-sum benefit granted to the beneficiary of the parental leave with an income-related one. The lump-sum benefit was considered as a disincentive for fathers to take up parental leave. In the new system, each parent, after the birth or the adoption of one child or several children, can benefit from full-time parental leave of 4 or 6 months or from part-time parental leave (under special conditions) of 8 or 12 months, as long as the children are under the age of 6 or 12, regarding adopted children. During parental leave, an income-related benefit is granted to the beneficiary. It is calculated on the average of the professional income from the 12 months preceding the beginning of parental leave. Its lower limit is EUR 1 922.96 per month, equal to the social minimum wage for non-qualified workers, and its upper limit is EUR 3 204.93 per month, equal to the social minimum wage increased by two thirds. After the reform by the law of 2016, there is no longer a disadvantage for employees whose wages are between EUR 1 922.96 and EUR 3 204.93 per month. However, people whose wages are over the upper limit continue to be adversely affected by the payment of the parental leave.

The effect of this reform was significant from the first year. The number of parents, who benefited from parental leave increased by 16.3 % (2018/2017). Fathers in particular have shown an interest in the new parental leave. In 2018, they represented 49 % of the beneficiaries versus 25 % in 2016. They opted as much for the full-time leave as for the half-time parental leave. However, the flexible leave is less favoured by men, representing 43 % of all the parental leave taken by fathers.⁷⁴ It is obvious that the Law of 3 November 2016 has favoured progress towards gender neutrality.

There are no pending legislative proposals.

5.2 Pregnancy and maternity protection

5.2.1 Definition in national law

Article L. 331-2.1. LC defines a pregnant woman as 'a female worker, who is pregnant and who has informed the employer of her pregnancy by sending a medical certificate by registered mail'. Article L. 331-2.2. LC defines a breastfeeding woman as 'a female worker breastfeeding beyond the period of 12 weeks after childbirth and who has informed the employer by sending a medical certificate by registered mail'. There is no legal definition regarding a woman who has recently given birth. However, Article L. 331-2.3. LC defines premature birth as 'a birth happening before the completion of the 37th week of pregnancy'.

5.2.2 Obligation to inform employer

The pregnant worker has to produce a medical certificate attesting her pregnancy. The information must be sent by registered mail. The same obligation exists for a worker who is breastfeeding. In a ruling of 19 December 2019, the Court of Appeal stated that 'in the

⁷³ Memorial A No. 224 of 10 November 2016. Website: <http://legilux.public.lu/eli/etat/leg/loi/2016/11/03/n1/jo>.

⁷⁴ General Inspectorate of Social Security (IGSS) (2020) *Rapport Général sur la Sécurité Sociale 2019* (General Report on Social Security 2019), p.180.

event that a pregnant employee is fired before she informed the employer of the pregnancy, she must produce a medical certificate to her employer within 8 days to annul the dismissal'.⁷⁵

5.2.3 Case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding

There is no case law nor any opinion of an equality body regarding the definitions.

5.2.4 Implementation of protective measures (Articles 4-6 of Directive 92/85)

In a judgment of 26 November 2020, the Court of Appeal considered that 'employees under a fixed-term labour contract are not in a similar situation to employees under a permanent labour contract, so that divergent legal rules regarding the probationary period in cases of pregnancy do not violate the principle of equality of all citizens before the law'.⁷⁶

An employee, under a fixed-term labour contract, was dismissed the day after the end of the maternity leave. She asked for the justification of the dismissal and the employer stated that he did not have to justify the breach of the contract, because she was still in the probationary period.

Article L. 337-1 LC prohibits an employer from notifying the breach of a labour contract to an employee, who is pregnant and during a period of 12 weeks following childbirth. This provision applies in case of an open-ended contract and a fixed-term contract. But, according to Article L. 337-2 LC, this prohibition of dismissal does not prevent the end of a fixed-term contract. Moreover, Article L. 337-3 LC provides that, if the open-ended contract includes a clause of a probationary period, this clause is suspended from the submission of the medical certificate on pregnancy until the end of the maternity leave. Article L. 337-3 LC expressly covers only open-ended labour contracts and, as a consequence, does not cover fixed-term contracts, for which no similar provision exists.

For the Court of Appeal, the fixed-term contract terminates in any event at the end of the labour contract and it is not possible to suspend the probationary clause during the entire period of pregnancy and until the end of the prohibition period of dismissal, at the risk of prolonging the probationary period beyond the end of the contract.

Articles L. 333-1 to L. 333-4 LC implement Article 7 on night work, of Directive 92/85/EEC. Article L. 333-4 LC defines night work as work between 10 pm to 6 am. Article L. 333-1 LC states that a pregnant woman does not have to work between 10 pm and 6 am, if this is necessary for her security and safety according to a medical certificate established by the occupational doctor. The same rule applies to breastfeeding women until the child is one year old. In this case, according to Article L. 333-3 LC, the employer must transfer the pregnant or breastfeeding worker to daytime work. The remuneration paid prior to this transfer has to be maintained. Therefore, the employer has to pay beforehand, on behalf of the sickness and maternity insurance, the difference of the remuneration resulting from the transfer from night job to daytime work. Article L. 333-4 LC states that if a transfer is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the employer must grant her leave for the whole period.

Articles L. 334-1 to L. 334-4 LC implement Articles 4 and 5 on specific risks of exposure to the agents, processes or working conditions of Directive 92/85/EC.

⁷⁵ Court of Appeal, 19 December 2019, No. 127/19. Comments on this judgment were made in *InfosJuridiques* No. 1-2020 p. 6, available at: <https://www.csl.lu/fr/publications-newsletters/newsletters/infosjuridiques/2020>.

⁷⁶ Court of Appeal, 26 November 2020, No. 132/20, Website: https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/CSJ/08_Chambre/2020/20201126_CAL-2019-00795_132a-accessible.pdf. Comments on this judgment were made in *InfosJuridiques* No. 11-2020, p. 7, available at: <https://www.csl.lu/fr/publications-newsletters/newsletters/infosjuridiques/2020>.

For all activities liable to involve a specific risk of exposure to the agents, processes or working conditions which are listed in Annex 1 of the LC,⁷⁷ Article L. 334-2 LC obliges employers to assess the nature, degree and duration of exposure in order to assess any risk to the safety and health and any possible effect on the pregnant or breastfeeding worker and to decide what measures should be taken. If the results of the assessment reveal a risk to the safety and health or an effect on the pregnancy or breastfeeding of the worker, the employer must, with the assent of the occupational doctor, take the necessary means to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided (Article L. 334-3(1) LC). If the adjustment of the working conditions and/or the working hours is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the employer must, with the assent of the occupational doctor, move the woman to another job (Article L. 334-3(2) LC). The remuneration paid prior to the adjustment has to be maintained. If moving the woman to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the employer must, with the assent of the occupational doctor, grant her leave for the whole period (Article L. 334-3(3) LC).

According to Article L. 334-4(2) LC, a pregnant woman can under no circumstances be obliged to perform duties for which the assessment revealed a risk of exposure which could jeopardise safety or health to the agents or working conditions listed in Annex II A of the LC.⁷⁸ According to Article L. 334-4(3) LC, a breastfeeding woman can under no circumstances be obliged to perform duties for which the assessment revealed a risk of exposure which could jeopardise safety or health to the agents or working conditions listed in Annex II B of the LC. If the adjustment of the working conditions and/or the working hours is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the employer must, with the assent of the occupational doctor, move the woman to another job (Article L. 334-3(2) LC). The remuneration paid prior to the adjustment has to be maintained. If moving the woman to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the employer must, with the assent of the occupational doctor, grant her leave for the whole period (Article L. 334-3(3) LC).

5.2.5 Case law on issues addressed in Articles 4 and 5 of Directive 92/85/EEC

There is no case law and no opinion of an equality body regarding Articles 4 and 5 of Directive 92/85/EC.

5.2.6 Prohibition of night work

According to Article L. 333-4 LC, 'a pregnant woman cannot be obliged to work between 10 pm and 6 am, if, in the occupational doctor's opinion, this measure is necessary in order to protect her security and health'.

5.2.7 Case law on the prohibition of night work

There is no case law on the prohibition of night work.

5.2.8 Prohibition of dismissal

According to Article L. 337-1(1) LC, the dismissal of a pregnant woman is forbidden from the moment when her pregnancy has been medically established and during 12 weeks after the date of childbirth. Any dismissal, which has been notified in violation of the prohibition, is null and void. Within 15 days of the dismissal, the employee may request (...) from the President of the Labour Court, who ruling urgently (...) will declare the

⁷⁷ Annex I reproduces Annex I referred to in Article 4 of the Directive 92/85/EC.

⁷⁸ Annex II A and B reproduces Annex II referred to in Article 6 of the Directive 92/85/EC.

dismissal void and order the reinstatement of the employee (...) [Article 337-1(1)(4) LC]. In a judgment of 23 July 2020, the Court of Appeal held that 'an appeal from a judgment of the President of the Labour Court, ruling on an application for annulment of a dismissal of a pregnant employee, must be brought to the President of the Court of Appeal'.⁷⁹

However, in the case of serious misconduct by the pregnant woman, the employer has the ability to pronounce an immediate lay-off pending the final decision of a labour court on his request of termination of the labour contract (Article L. 337-1(2) LC).

Article L. 337-1(1) LC prohibits the dismissal of pregnant women who work under a labour contract or an apprenticeship contract, or who are students employed during school holidays. A woman, who worked under a job traineeship contract (*'contrat d'initiation à l'emploi'*), an active employment policy measure offering jobseekers theoretical and practical training in companies, was fired. As she was pregnant, she appealed to the president of the Labour Court and asked for the application of Article L. 337-1(3) LC. The judge declared himself incompetent arguing that he was only competent in cases involving a labour or apprenticeship contract or for students working during school holidays. She appealed the decision to the president of the Court of Appeal, who decided to pose a preliminary question to the Constitutional Court: Is the exclusion of pregnant women working under a job traineeship contract from the prohibition of dismissal of Article L. 337-1(1) LC discriminatory? In other words, is Article L. 337-1(1) LC inconsistent with Article 10a of the Constitution, which states that 'all Luxembourg citizens are equal before the law'?

On 14 December 2018, the Constitutional Court decided that Article L. 331-1 of the Labour Code, combined with Article L. 337-1, did not conform with the principle of equality before the law embodied in Article 10a of the Constitution, arguing that 'these articles introduce between categories of women, who are in comparable situations, a difference in treatment which does not proceed from existing clear differences between them and which is neither rationally justified nor adequate or proportionate to the aim sought'.⁸⁰

5.2.9 Redundancy and payment during maternity leave

According to Article L. 337-1(3) LC, in the case of notification of irregular redundancy or immediate lay-off, the pregnant woman can, within 15 days, appeal to a labour court, which will decide on the maintenance or suspension of the remuneration pending the final decision. In the case of illegal redundancy without lay-off, the president of the labour court will order the reinstatement of the worker.

5.2.10 Employer's obligation to substantiate a dismissal

According to Article L. 124-5(1) and (2) LC, within one month from the notification of the dismissal, the worker can request by registered mail the justifications of the dismissal. The employer is obliged to communicate the justifications of the dismissal within one month by registered mail. Justifications have to be based on real and serious grounds, which are left to the decision of the judges.

5.2.11 Case law on the protection against dismissal

See section 5.2.8 above.

⁷⁹ Court of Appeal 23 July 2020, No. 66/20. Website: https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/CSJ/03_Chambre/2020/20200723_CAL-2019-00791_66_ARRET_a-accessible.pdf.

Comments on this judgment were made in *InfosJuridiques* No. 8-2020 p. 2, available at: <https://www.csl.lu/fr/publications-newsletters/newsletters/infosjuridiques/2020>.

⁸⁰ Case law No. 00142 of 14 December 2018, Memorial A No. 1149 of 19 December 2018. Website: <http://legilux.public.lu/eli/etat/leg/memorial/2018/a1149>; *Infos Juridiques* No. 1/2019 of 30 January 2019. Website: https://www.csl.lu/single_newsletter/63ffd96c4a.

5.3 Maternity leave

5.3.1 Length

According to Article L. 332-1 LC, a pregnant woman cannot be required to work during the eight weeks preceding the expected date of childbirth. This period, called 'prenatal leave', is attested by a medical certificate indicating the expected date of childbirth. If childbirth happens before the expected date, the period of the prenatal leave not taken is added to the postnatal leave. If childbirth happens after the expected date, the prohibition to employ the pregnant woman is extended until childbirth, but without reducing the postnatal leave.

According to Article L. 332-2 LC, the woman who gave birth cannot be employed during the 12 weeks following childbirth. This period, which is called 'postnatal leave' is attested by a medical certificate indicating the date of the childbirth.

5.3.2 Obligatory maternity leave

Maternity leave is compulsory and not flexible. According to Articles L. 332-1 and L. 332-2 LC, the entire period of leave has to take place as mentioned above.

5.3.3 Legal protection of employment rights (Articles 5, 6 and 7 of Directive 92/85)

If there is a risk to the security and health of the pregnant or breastfeeding woman, the employer has to protect her, either by adapting the workplace, by transferring her temporarily to another position with maintenance of the remuneration or by releasing her from work (Article L. 334-3(1), (2) and (3) LC).

5.3.4 Legal protection of rights ensuing from the employment contract

For workers under an employment contract, no remuneration is due during maternity leave. Instead, statutory social security benefits are made available under the sickness and maternity insurance scheme, organised by Article 25 of the Social Security Code. This provision concerns the conditions for entitlement and the amount of benefits available during various periods related to the protection of maternity.

Maternity cash benefits are due for the following periods:

- during prenatal and postnatal leave;
- during release from work due to security and health risks;
- in case of loss of remuneration due to a temporary transfer from night work to day work.

5.3.5 Level of pay or allowance

According to Article 25 of the Social Security Code, the maternity allowance in cash is the same as the sickness allowance in cash. The employer must maintain the remuneration of the worker.

5.3.6 Additional statutory maternity benefits

There are no additional statutory maternity benefits.

5.3.7 Conditions for eligibility (Article 11(4) of Directive 92/85)

Women must have been compulsorily affiliated as employed or self-employed workers under the sickness and maternity insurance for at least six months during the year preceding the maternity leave.⁸¹

5.3.8 Right to return to the same or an equivalent job (Article 15 of Directive 2006/54)

During maternity leave, the employee's job has to be preserved. The worker has the right to return to the same job or to an equivalent job corresponding to her qualifications and accompanied by a remuneration at least equivalent (Article L. 332-3(1) LC).

The period of maternity leave is taken into account for the determination of the rights linked to seniority (Article L. 332-3(2) LC).

The period of the maternity leave is also regarded as active service qualifying for annual leave (Article L. 332-3(3) LC).

5.3.9 Legal right to share maternity leave

There is no legal right to share maternity leave.

5.3.10 Case law

In a preliminary ruling procedure introduced by the Social Security Supreme Council, the Constitutional Court had to decide if Article 29 of the Law of 30 June 1978 regarding unemployment – which foresaw that a pregnant woman registered as a jobseeker at the Employment Administration (ADEM) was not entitled to the maternity allowance in cash of Article 25 of the Social Security Code and could not benefit from the maintenance of the jobseeker allowance during maternity, because she had not been affiliated as an employed or self-employed worker under the sickness and maternity insurance for at least six months during the year preceding maternity – was contrary to the Constitution and especially to Article 11(2).

The Constitutional Court stated that, even if this provision prevented pregnant jobseekers, who did not fulfil the affiliation condition, from receiving maternity allowance in cash (and also from receiving the jobseeker allocation), it could not be considered as contrary to Article 11(2) of the Constitution. The Court justified its decision by the fact that this provision did not reduce the chances of the pregnant women to find a new job compared to non-pregnant women and to men.⁸²

5.4 Adoption leave

5.4.1 Existence of adoption leave in national law

According to Article L. 234-56(1) LC, if a child under the age of 12 is adopted by two spouses, the parent employed under a labour contract by an employer of the private sector is entitled to 'adoption leave' of 12 weeks, under presentation of a certificate delivered by the court to which the adoption procedure was introduced. If both parents are employed under a labour contract by an employer of the private sector or if one parent is self-employed, they must determine by common agreement the parent who will request the adoption leave. Only one of the parents can be entitled to the adoption leave.

⁸¹ Only people who were compulsorily insured are entitled to an allowance. People who were voluntarily insured are not entitled.

⁸² Constitutional Court, decision No. 100/13 of 12 July 2013. Memorial A No. 135 of 26 July 2013. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2013-135-fr-pdf.pdf>.

According to Article L. 234-56(2) LC, if there is only one adoptive worker, he/she is entitled to the adoption leave, except if the child under the age of 12 already lives in the common household of the adoptive parent or if the child is the child of his/her spouse or partner.

Adoption leave has the same legal effects as maternity leave. During the adoption leave, the workers receive maternity benefits, which are paid by the sickness and maternity insurance, if he/she fulfils the conditions for entitlement (Article 25 of the Social Security Code). The workers are also protected against dismissal.

Workers who cannot benefit from Article L. 234-56 LC are entitled to an extraordinary leave under Article L. 233-16 point (7) LC, if they adopt a child under the age of 16. They have an unconditional right to 10 days of leave (similar to the paternity leave, see under 5.6 below).

5.4.2 Protection against dismissal (Article 16 of Directive 2006/54)

An employee on adoption leave is protected against dismissal during the period of the adoption leave.

5.4.3 Case law

There is no case law regarding adoption leave.

5.5 Parental leave

5.5.1 Implementation of Directive 2010/18

The parental leave legislation, which was first introduced in 1999, was amended by the Law of 3 November 2016.⁸³ The main changes are the following: Flexible parental leave was introduced. The worker can either reduce the working time by 20 % per week over a period of 20 months or split parental leave into four periods of 1 month during a maximum period of 20 months. The legal nature of the social security allowance also changed. It made a shift from a flat-rate allowance towards an income-related one, more favourable for workers, especially for women.

Parental leave is regulated in Articles L. 234-43 to 234-48 of the Labour Code.

5.5.2 Applicability to public and private sectors (Clause 1 of Directive 2010/18)

Parental leave is applicable to public and private sectors.

5.5.3 Scope of the transposing legislation

According to Article L. 234-44 LC, part-time workers are included. Current fixed-term contract workers are also included.

See case law regarding access conditions in section 5.5.23 below.

5.5.4 Length of parental leave

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

There are three types of paid parental leave:

- full-time parental leave of 4 or 6 months;

⁸³ Memorial A No. 224 of 10 November 2016. Website: <http://legilux.public.lu/eli/etat/leg/loi/2016/11/03/n1/jo>.

- half-time parental leave of 8 or 12 months;
- flexible parental leave, which can either be split into four periods of 1 month over a maximum of 20 months or represent a reduction of 20 % of the working time per week over 20 months.

Half-time parental leave and flexible parental leave rely on the employer's agreement (Article L. 234-44(2) and (3) LC).

5.5.5 Age limits

The age limit for children is six years. This limit is extended to 12 years in the case of adoption of one or more children (Article L. 234-43(1) LC).

5.5.6 Individual nature of the right to parental leave

The right to parental leave is individual for each of the parents.

5.5.7 Transferability of the right to parental leave

As parental leave is an individual right, no part of it can be transferred from one working parent to the other (Article L. 234-47(2) LC).

5.5.8 Form of parental leave

Parental leave may be full-time (4 or 6 months), part-time (8 or 12 months) or flexible (see under 5.5.4).

5.5.9 Work and/or length of service requirements (Clause 3(b) of Directive 2010/18)

Each parent must have been compulsorily affiliated to the Luxembourg social security at the date of childbirth or adoption during at least 12 months without interruption preceding the beginning of the parental leave. They must have been affiliated either under one or more labour contracts totalling at least 10 working hours per week or as an apprentice or as a beneficiary of a cash allowance replacing wages for which contributions for sickness and maternity insurance have been paid (Article L. 234-43(1) LC).

5.5.10 Notice period

According to Article L. 234-45(2) LC, the period of notice is two months before maternity leave for the parent who takes the 'first parental leave'. The parent, who takes the 'second parental leave', is subject to at least a four-month period of notice (Article L. 234-46(2) LC).

5.5.11 Postponement of parental leave (Clause 3(c) of Directive 2010/18)

In principle, the employer cannot refuse or postpone the 'first parental leave'. According to Article L. 234-45 LC, one of the parents is obliged to take parental leave directly after maternity or adoption leave. There is an exception regarding the parent who lives alone with their child or children and who has the right to defer parental leave. In the case of first full-time parental leave, the employer is bound to grant the first parental leave, if it takes the form of full-time leave. They can only refuse this demand if it violates formal requirements. If the parent requests a different form of parental leave - a half-time or a flexible one - the employer has to give their agreement.

Regarding the 'second parental leave' which the other parent has to take before the child turns 6 years old (12 years, in the case of adoption), the same rules apply. However,

according to Article L. 234-46(3), the employer can, in exceptional cases, postpone the second parental leave by a decision sent to the parent within four weeks from the request.

The second parental leave can be postponed in the following cases:

- when a significant proportion of a company or of a department of a company requests parental leave simultaneously and when this seriously affects the organisation of the work;
- when the replacement of the person cannot be organised during the period of notification due to the specificity of the work done by the applicant or to the shortage of labour force in the professional sector;
- when the work is of a seasonal nature and the request concerns a period which is situated within a period of seasonal nature;
- when the worker is a senior executive who participates in the management of the company;
- when the company regularly employs fewer than 15 workers.

Nevertheless, no postponement can be justified if a serious event occurs with consequences in relation to the child – such as an accident, sickness, schooling problems or behaviour disorder – and the presence of the parent is absolutely necessary.

In the case of postponement, the employer must propose a new date to the parent within one month from the notification. The beginning of the new parental leave cannot be extended more than two months after the beginning of the requested parental leave.

5.5.12 Special arrangements for small firms (Clause 3(d) of Directive 2010/18)

There are no special arrangements for small firms.

5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3(3) of Directive 2010/18)

There are no special rules or exceptional conditions for parents of children with a disability or long-term illness.

5.5.14 Measures addressing the specific needs of adoptive parents (Clause 4 of Directive 2010/18)

The age limit for children is extended to 12 years in the case of adoption of one or more children (Article L. 234-43(1) LC).

5.5.15 Provisions protecting workers against less favourable treatment or dismissal (Clause 5(4) of Directive 2010/18)

According to Article L. 234-47(8) LC, the dismissal of beneficiaries of parental leave is prohibited from the moment of the notification of the request and during the period of parental leave. Any dismissal which has been notified in violation of the prohibition is null and void. In the case of dismissal, the parent can, within 15 days, appeal to the president of a labour court, who will make a decision on this as a matter of urgency, declare the dismissal null and order the maintenance of the labour contract (see case law in section 5.5.23, below).

This provision does not prevent dismissal on serious grounds rising from an action or misdeed on the part of the worker (Article L. 234-47(14) LC).

5.5.16 Right to return to the same or an equivalent job (Clause 5(1) of Directive 2010/18)

According to Article L. 234-47(9) LC, during parental leave, the employer has to preserve the job of the worker. The worker has the right to return to the same job or, if this is not possible, to a similar job corresponding to her/his qualifications and with at least an equivalent salary. The period of parental leave is taken into account for the determination of the rights linked to seniority.

5.5.17 Maintenance of rights acquired or in the process of being acquired by the worker (Clause 5(2) of Directive 2010/18)

According to Article L. 234-47(9) LC, all rights acquired or in the process of being acquired by the worker are maintained until the end of the parental leave

5.5.18 Status of the employment contract or relationship during parental leave

According to Article L. 234-47(5) LC, the labour contract is suspended throughout full-time parental leave. During half-time or flexible parental leave, the labour contract is partially or proportionally suspended.

5.5.19 Continuity of entitlement to social security benefits

According to Article L. 234-47(12) LC, the period of the parental leave is regarded as active service qualifying for a maternity benefit in cash, an unemployment benefit or further parental leave.

5.5.20 Remuneration

The beneficiary of full-time parental leave does not receive any remuneration from the employer.

5.5.21 Social security allowance

Social security benefits are granted during the parental leave. The allowance for parental leave (Articles 306 to 308 SSC) is provided by the Fund for the future of the children (*Caisse pour l'avenir des enfants*). It is income-related. In 2020, the gross minimum is EUR 2 141.99, while the gross maximum is EUR 3 569.99 per full month.

5.5.22 More favourable provisions (Clause 8 of Directive 2010/18)

There are no more favourable provisions for disabled children or twins.

5.5.23 Case law

Regarding conditions of access to parental leave, the Court of Cassation, by judgment of 27 February 2020, submitted a preliminary ruling to the European Court of Justice.⁸⁴

The Fund for the future of the children refused to grant the parental leave allowance to an employee arguing that she did not fulfil the compulsory social security affiliation requirement at the time of the birth of the child as provided by the Labour Code and the Public Service Status. The parent appealed to the Social Security Board of Referees arguing that the affiliation condition was a supplementary condition not set out by the European framework agreement on parental leave and Directive 1996/34/EC. The Board of Referees agreed with her and overturned the decision by its judgment of 27 October 2017. However,

⁸⁴ Court of Cassation, No. 33/2020. Website: <https://justice.public.lu/content/dam/justice/fr/jurisprudence/cour-cassation/social/2020/02/20200227-CAS-2019-00020a.pdf>.

the Fund for the future of the children appealed against the judgment of the Board of Referees. By its judgment of 17 December 2018, the Supreme Social Security Court ruled in favour of the Fund for the future of the children. The parent made a further appeal to the Court of Cassation, which decided to submit a preliminary ruling to the European Court of Justice (C-129/20).⁸⁵

The result of this ECJ preliminary ruling will be of great importance for Luxembourg. It may increase the number of beneficiaries and include workers who previously worked outside Luxembourg.

Regarding the protection against dismissal, the President of the Labour Court ruled, by order of 23 December 2019, that 'a dismissal announced during the application period for a parental leave is void. The back-calculation starts the day before the first day of the parental leave so that the protection against dismissal starts the last day for submitting the application for the parental leave'.⁸⁶ In a case concerning a dismissal, the High Court of Justice held that the prohibition of a dismissal does not exclude a dismissal due to the reorganisation of the company involving the removal of the work/position where the employee worked before his/her parental leave.⁸⁷ After the period of protection during parental leave, a dismissal due to these reasons remains valid. The worker in question had been dismissed on the day after the end of her parental leave.

5.6 Paternity leave

5.6.1 Existence of paternity leave in national law

Paternity leave is a short period of mandatory leave for fathers. The duration of the leave granted to male employees by Article L. 233-16 point (2) LC for the birth of a child – either born within wedlock or outside wedlock – is of 10 days, since the Law of 15 December 2017.⁸⁸

Two months before childbirth, the father must inform the employer that he wants to benefit from paternity leave. Therefore, he must produce a medical certificate. Paternity leave must be taken during the two months following childbirth and it may be split with the employer's consent.

Wages during the paternity leave are paid by the employer, who is entitled to reimbursement by the state for the days which exceed the first two days. Reimbursement is limited to five times the social minimum wage.

⁸⁵ Court of Cassation, No. 33/2020, <https://justice.public.lu/content/dam/justice/fr/jurisprudence/cour-cassation/social/2020/02/20200227-CAS-2019-00020a.pdf>. Question: 'Must clauses 1.1, 1.2, 2.1 and 2.3(b) of the framework agreement on parental leave concluded on 14 December 1995 between the general cross-industry organisations UNICE, CEEP and the ETUC, which was implemented by [Directive 96/34], be interpreted as precluding the application of a provision of national law, such as Article 29*bis* of the amended Law of 16 April 1979 laying down the general regulations applicable to State officials in the version resulting from the Law of 22 December 2006 (Mémorial A 2006, [p.] 4838), which makes the grant of parental leave subject to the twofold condition that the worker is lawfully employed in a workplace and affiliated in that regard to the social security scheme, first, without interruption for a continuous period of at least 12 months immediately preceding the start of the parental leave and, secondly, at the time of the birth or of the reception of the child or children to be adopted, compliance with that second condition being required even if the birth or reception occurred more than 12 months before the start of the parental leave?'

See also CJEU, judgment of 25 February 2021, C-129/20, ECLI:EU:C:2021:140. Website: <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=226324&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2111072>.

⁸⁶ Comments on this judgment were made in *InfosJuridiques* No. 3-2020 p.5. Website: <https://www.csl.lu/fr/publications-newsletters/newsletters/infosjuridiques/2020>.

⁸⁷ Judgment C.S.J. 6 December 2007 No. 32095.

⁸⁸ Law of 15 December 2017 repealing the amended Law of 12 February 1999 creating parental leave and leave for family reasons, Memorial A No. 1082 of 18 December 2018. Website: <http://data.legilux.public.lu/file/eli-etat-leg-loi-2017-12-15-a1082-jo-fr-pdf.pdf>.

5.6.2 Protection against unfavourable treatment and/or dismissal (Article 16 of Directive 2006/54)

There is no specific provision regarding paternity leave. This leave of 10 working days falls under the common rules regarding periods of leave which are a right of the worker.

5.6.3 Case law

There is no case law regarding paternity leave.

5.7 Time off for *force majeure*

5.7.1 Time off for *force majeure*

The legislation regarding leave for family reasons (see section 5.8 below) is applicable in the event of *force majeure*.

5.7.2 Case law

There is no case law regarding time off for *force majeure*.

5.8 Care leave

5.8.1 Existence of care (or carers') leave in national law

The legislation regarding leave for family reasons has been amended by the Law of 15 December 2017 mentioned before. Prior to this law, two days of leave per year could be requested by a parent whose child was sick.

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

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

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

It must be noted that the period of the leave for family reasons is regarded as a period of incapacity to work due to a disease or an accident. The parent must produce a medical certificate concerning the condition of the child. The period of the leave for family reasons is not regarded, like other forms of leave, as a period of active service. The employer is obliged to maintain the worker's wages during the period of the leave. The wage is paid by the employer, who will be reimbursed 100 % by the sickness insurance scheme. During the period of the leave for family reasons, all legal provisions regarding social security matters apply to the beneficiaries. As a consequence, pension rights are guaranteed.

Statistics from 2014 to 2018 regarding the beneficiaries of the leave for family reasons under the legislation in force prior to the 2017 reform and after it, show a persistent imbalance between women and men. In 2014, 5.5 % of workers were granted a leave for family reasons – 3.5% of male workers and 8.6 % of female workers. In 2018, 31 942

workers benefited from leave for family reasons, i.e. 7 % of the employed population – 4.5 % of male workers and 10.5 % of female workers.⁸⁹

During the COVID-19 pandemic, leave for family reasons was used as the main tool for compensating the loss of parents' income in the event of an interruption to work due to the quarantine of a child, school closure or any other measure applicable to the children in relation with the health crisis. A new form of care leave, 'leave for care support', was also created during this period. The costs for such leave were the responsibility of the National Health Fund.⁹⁰

Leave for family reasons and leave for family support during the COVID-19 pandemic

According to Article 32(4) of the Constitution, the Grand-Duc can take emergency measures in the event of actual threats to the vital interests of the population and where it is impossible for the Parliament to legislate within the relevant time limits. At the outbreak of the COVID-19 pandemic, on 18 March 2020, a 'state of crisis' was declared by the Grand-Duc and the first emergency measures were issued. By the Law of 24 March 2020, the Parliament extended the state of crisis for three months.

Extension of the leave for family reasons during the 'state of crisis'

During the hard lockdown, from 18 March 2020 to 4 May 2020, the regulation on leave for family reasons was adapted to the evolution of the pandemic.

The entitlement to the leave for family reasons was extended to include quarantine⁹¹ and isolation, eviction and home care measures for children, for compelling grounds of public health security,⁹² that were decided by the public authorities with the objective to limit the spread of the pandemic. A parent applying for a leave for family reasons had to produce a certificate issued by the competent public authorities, which replaced the medical certificate normally required by the regulation. The 'hospitalisation condition', which applies to the entitlement of a leave for family reasons for a child over 13 and under 18, was removed.⁹³

However, at the end of March 2020, it was decided to prohibit, during the state of crisis, the ability to take leave for family reasons at the same time as short-time working. Employees might apply for the leave only if they, the other parent or any other member of the household did not fall under the eligibility for short-time working during the period of the leave for family reasons and provided that no other means of care were available.⁹⁴

⁸⁹ General Inspectorate of Social Security (IGSS) (2020) *Rapport Général sur la Sécurité Sociale 2019* (General Report on Social Security 2019), p. 86, available at: <https://igss.gouvernement.lu/fr/publications/rg/2019.html>.

⁹⁰ In November 2020, a law was passed in Parliament, which approved a state grant of EUR 386 million covering the costs of the sickness benefit in cash, leave for family reasons and leave for family support in relation to the COVID-19 pandemic. The funding will be spread over four budget years.

⁹¹ Grand-Ducal Regulation of 12 March 2020 amending Grand-Ducal Regulation of 10 May 1999 applying Article 15(2) of the Law of 12 February 1999 on parental leave and leave for family reasons, Memorial A No. 146 of 13 March 2020, available at: <http://data.legilux.public.lu/file/eli-etat-leg-rqd-2020-03-12-a146-jo-fr-pdf.pdf>.

⁹² Grand-Ducal Regulation of 18 March 2020 amending Grand-Ducal Regulation of 10 May 1999 applying Article 15 of the Law of 12 February 1999 on parental leave and leave for family reasons, Memorial A No. 163 of 18 March 2020, available at: <http://data.legilux.public.lu/file/eli-etat-leg-rqd-2020-03-18-a163-jo-fr-pdf.pdf>.

⁹³ Grand-Ducal Regulation of 25 March 2020 amending Article L. 234-52 of the Labour Code, Memorial A No. 191 of 25 March 2020, available at: <http://data.legilux.public.lu/file/eli-etat-leg-rqd-2020-03-25-a191-jo-fr-pdf.pdf>.

⁹⁴ Grand-Ducal Regulation of 27 March 2020 derogating from Article L. 234-51 of the Labour Code, Memorial A No. 203 of 27 March 2020, available at: <http://data.legilux.public.lu/file/eli-etat-leg-rqd-2020-03-27-a203-jo-fr-pdf.pdf>.

With the gradual strategy to phase-out of the lockdown and the reopening of the schools in May 2020, the emergency regulation regarding leave for family reasons was amended. Leave for family reasons was extended to three new situations:

- vulnerable children provided that their vulnerability was proven by a medical certificate;
- children born after 1 September 2015;
- children of school age under 13 in the event of temporary closure or alternate opening of their schools or care facilities, in relation to the COVID-19 pandemic, proven by a certificate from the Ministry of National Education. If the children resided in another country, the certificate had to be established by a competent authority of the state of residence.⁹⁵

Creation of a leave for family support during the 'state of crisis'

A new care leave was created by Grand-Ducal regulation of 3 April 2020 with retroactive effect from 18 March 2020.⁹⁶ An employee or a self-employed person may apply for leave for family support if she/he cares at home for a disabled adult or an elderly person, whose care institution shutdown partially or totally its activities in the context of the pandemic, given that she/he or any other member of the household does not fall under the application of short-time working during the period of the leave for family support and provided that no other means of care are available. In May 2020, this right was extended to the closure of similar institutions abroad.⁹⁷

Beneficiaries of leave for family support enjoy the same legal protection as beneficiaries of leave for family reasons. The applicant must produce a certificate from the competent care institution, which replaces the medical certificate.

Evolution after the 'state of crisis'

The state of crisis ended on 24 June 2020, which meant that emergency measures were void from this date. The Parliament enshrined in law several disposals issued during the hard lockdown and the period of progressive easing of restrictions. Thus, the extension of leave for family reasons and the new leave for family support were enshrined in two laws of 20 June 2020.⁹⁸ The application of the regulation regarding the leave for family support was limited to five months. It was further extended from 25 November 2020 to 25 May 2021.⁹⁹

In December 2020, changes were introduced to the regulation regarding the extension of the leave for family reasons. Parents of children belonging to the following three categories are eligible for the leave:

⁹⁵ Grand-Ducal Regulation of 20 May 2020 providing for a derogation from Articles L. 234-51 and L. 234-53 of the Labour Code. Memorial A No. 427 of 22 May 2020, available at: <http://data.legilux.public.lu/file/eli-etat-leg-rgd-2020-05-20-a415-jo-fr-pdf.pdf>.

⁹⁶ Grand-Ducal Regulation of 3 April 2020 introducing a leave for family support in the context of the COVID-19 pandemic, Memorial A No. 237 of 3 April 2020, available at: <http://data.legilux.public.lu/file/eli-etat-leg-rgd-2020-04-03-a237-jo-fr-pdf.pdf>.

⁹⁷ Grand-Ducal Regulation of 15 May 2020 amending Grand-Ducal Regulation of 3 April 2020 introducing a leave for family support in the context of the COVID-19 pandemic, Memorial A No. 404 of 15 May 2020, available at: <http://data.legilux.public.lu/file/eli-etat-leg-rgd-2020-05-15-a404-jo-fr-pdf.pdf>.

⁹⁸ Law of 20 June 2020 providing for a derogation from Articles L. 234-51 and L. 234-53 of the Labour Code. Memorial A No. 512 of 21 June 2020, available at: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2020-512-fr-pdf.pdf> and Law of 20 June 2020 amending the amended Grand-Ducal Regulation of 3 April 2020 introducing a leave for family support in the context of the COVID-19 pandemic. Memorial A No. 533 of 25 June 2020, available at: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2020-533-fr-pdf.pdf>.

⁹⁹ Law of 23 November 2020 amending Law of 20 June 2020 on leave for family support in the context of the COVID-19 pandemic. Memorial A No. 922 of 23 November 2020, available at: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2020-922-fr-pdf.pdf>.

- COVID-19 at-risk children, provided that the parent produces a medical certificate attesting the vulnerability of the child and the contraindication to attend school or any care facility;
- children under the age of 13, who, due to reasons in relation to the COVID-19 health crisis, cannot attend school or any care facility or who benefit from distance learning, provided that the parent produces a certificate issued by the Ministry of National Education (the age limit of 13 does not apply to disabled children);
- children born after 1 September 2016.¹⁰⁰

The amended regulation was applicable until 20 January 2021.

5.8.2 Case law

There is no case law regarding unfavourable treatment and/or dismissal related to care leave.

5.9 Leave in relation to surrogacy

There is no leave in relation to surrogacy, as surrogacy is not legal in Luxembourg.

5.10 Flexible working time arrangements

5.10.1 Right to reduce or extend working time

According to Article L. 123-1 LC, part-time workers are 'persons whose usual hours of work are less than the normal working hours'. Before the creation of part-time jobs in a company, the employer must consult the staff delegation. Persons must be volunteers for a part-time job. There is no right to reduce or extend working time. If a person working full-time wants to switch to a part-time job, they need the consent of the employer. Consent is also necessary for the change from a part-time job to a full-time job (Articles L. 123-6 and -7 LC).

Part-time workers and full-time workers have equal rights, for example regarding seniority.

5.10.2 Right to adjust working time patterns

Article L. 211-8 LC allows employers to introduce flexible working hours. However, they must get consent from the workers, either through a collective agreement with trade unions or a common agreement with the staff delegation. Employees have the option to arrange their work schedule and daily work hours according to their personal convenience, but in compliance with the needs of the department and the justified wishes of the other workers. In the framework of these provisions, employees have a right to adjust working time patterns.

5.10.3 Right to work from home or remotely

Telework is regulated in Luxembourg by collective agreement of 21 February 2006,¹⁰¹ which was renewed by collective agreement of 15 July 2011¹⁰² and collective agreement of 15 December 2015.¹⁰³

¹⁰⁰ Law of 24 December 2020 providing for a derogation from Articles L. 234-51 and L.234-53 of the Labour Code. Memorial A No. 1083 of 24 December 2020, available at: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2020-1083-fr-pdf.pdf>.

¹⁰¹ Memorial A No. 189 of 6 November 2006. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2006-189-fr-pdf.pdf>.

¹⁰² Memorial A No. 44 of 14 March 2012. Website: <http://legilux.public.lu/eli/etat/leg/rqd/2012/03/01/n2/fo>.

¹⁰³ Memorial A No. 45 of 23 March 2016. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2016-45-fr-pdf.pdf>.

There is no right for employees to work from home. Telework is established by common consent between the employer and the employee. The parties must agree to sign an addendum to the labour contract in which the workplace, tasks to perform, etc, must be described in detail. If the teleworker wants to stop working from home, they must inform the employer.

5.10.4 Other legal rights to flexible working arrangements

There are no other legal rights to flexible working arrangements.

5.10.5 Case law

There is no case law regarding these issues.

5.11 Evaluation of implementation

Part-time work remains a feminised phenomenon. Women represent 46 % of the labour force, whereas they are 81.6 % of the labour force who are working part time (Eurostat 2020).¹⁰⁴ An online brochure on discrimination in employment, published by the Chamber of Employees (CSL), states that 'a regulation, which disadvantages part-time workers, may be considered as an indirect discrimination based on sex, because statistically a significant majority of employees working part-time are women'.¹⁰⁵

The MEGA is aware of this problem. In the new National Action Plan for Gender Equality, one guideline addresses the flexibility of working time arrangements (Guideline 4.7). It proposes integrating a gender-based perspective into the negotiations between the Government and the social partners to improve the reconciliation of work and private life, especially regarding part-time work.

There is an ongoing labour dispute in the cleaning sector,¹⁰⁶ where lots of women work (83 % of the workforce in 2019)¹⁰⁷ and work part-time. Workers have sought wage arrears for overtime pay. Article L. 123-1 (2) and (3) of the Labour Code states that part-time workers may work hours in excess of the daily and weekly limits fixed in their labour contract provided that the average weekly working time calculated on a working period of four weeks does not exceed the normal working hours. Case law has to decide what is meant by 'supplementary working time beyond the limits' for which an overtime bonus must be paid by the employer (Article L.123-5 LC).

The adjustment of working time patterns is gaining ground. The development of telework is the most widely discussed issue in Luxembourg, in particular because of the dramatic mobility problems. Each day, more than 200 800 frontier (cross-border) workers travel to Luxembourg, mainly by car: 105 100 from France, 48 200 from Germany and 47 500 from Belgium (STATEC 2019).¹⁰⁸ The development of telework, especially for frontier workers, could be one of the solutions to tackle the mobility problems.

¹⁰⁴ Eurostat (2020) 'Full-time and part-time employment by sex, age and occupation (1000)' (fourth quarter of 2019). Website: <https://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>.

¹⁰⁵ Website: <https://www.csl.lu/fr/vos-droits/droit-du-travail/la-discrimination>.

¹⁰⁶ The Court of Cassation quashed – by decision of 22 March 2018 No. 27/2018 – the judgment of the Court of Appeal of 2 March 2017 No. 43656. Website: https://justice.public.lu/content/dam/justice/fr/jurisprudence/cour-cassation/travail/2018/03/3925/TRAV20180322_3925a-27.pdf.

¹⁰⁷ The majority of women working in the cleaning sector are Portuguese or French.

¹⁰⁸ See:

https://statistiques.public.lu/stat/TableViewer/tableView.aspx?ReportId=12928&IF_Language=fra&MainTheme=2&FldrName=3&RFPPath=92.

5.12 Remaining issues

The most important issue at stake is the development of telework. Telework is not well developed in Luxembourg because of its special labour market, in which 50 % of the workers of the private sector are frontier (cross-border) workers. Frontier workers are covered by the social security system and must pay income taxes in Luxembourg. If they work at home in their country of residence, the social security system of their resident Member State applies and they must pay income taxes relating to telework in their country of residence.

By bilateral conventions with Belgium, France and Germany, tolerance thresholds have been established:

- 24 days per year for frontier workers from Belgium;
- 29 days per year for frontier workers from France;
- 19 days per year for frontier workers from Germany.

If frontier workers telework in the framework of these limits, they remain under the Luxembourg income tax legislation and social security system.

It is commonly accepted that this regulation limits the development of telework in Luxembourg.

In the context of the outbreak of the COVID-19 pandemic, it was decided by mutual agreements that the spread of COVID-19 was a case of *force majeure* and that telework by frontier workers would not be counted under the rules of tolerance thresholds. From 14 March 2020 on, the presence of a frontier worker at home to do telework has not been taken into account within the limit of 24 days (Belgium), 29 days (France) or 19 days (Germany). In particular, frontier workers remained affiliated to the Luxembourg social security system. This disposal applies until further notice.

Mutual agreements between Luxembourg and Belgium, France or Germany were initially extended until 31 August 2020 and later until 31 December 2020. Frontier workers, who worked at home during the COVID-19 pandemic, were considered as if they were working in Luxembourg. Finally, the Minister of Social Security announced in December 2020 that bilateral agreements regarding the telework of frontier workers from the three neighbouring countries had been extended to 30 June 2021.

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

6.1 General (legal) context

6.1.1 Surveys and reports on the practical difficulties linked to occupational and/or statutory social security issues

There are no surveys or reports on the practical difficulties linked to occupational and/or statutory social security issues.

The General Inspectorate of Social Security (IGSS) has a special service dedicated to supplementary pensions.¹⁰⁹ Each year, a chapter of the annual report published by IGSS relates to information about its activities. One of the missions of this service is to register the supplementary pension schemes and to verify full compliance with the law. The IGSS report of 2018 did not address gender equality issues.¹¹⁰

6.1.2 Other issues related to gender equality and social security

There are no other issues related to gender equality and social security.

6.1.3 Political and societal debate and pending legislative proposals

When Luxembourg transposed the Directive 2014/50/EC by Law of 1 August 2018, there was no debate on gender equality issues.

6.2 Direct and indirect discrimination

In Luxembourg, there are only occupational pension schemes, which provide protection against old age, death, invalidity or widowhood. There are no occupational social security schemes providing protection against other risks, like sickness and maternity, industrial accidents and occupational diseases or unemployment.

The Law of 8 June 1999 on supplementary pension regimes¹¹¹ introduced the principle of equal treatment between men and women into the regulation on supplementary pensions. Article 16 stated that:

'according to the Council Directive 96/97/EC of 20 December 1986 amending Directive 86/358/EEC, a provision of a supplementary pension regulation violating the principle of equal treatment between men and women, which means resulting in direct or indirect discrimination on the grounds of sex, by reference in particular to marital or family status, is null'.

The Law of 1 August 2018 transposing the Directive 2014/50/EU of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights¹¹² amended the Law of 8 June 1999 and replaced in Article 16 the reference to the Council Directive 96/97/EC with the reference to Directive 2006/54/EC.

¹⁰⁹ Website: <https://igss.gouvernement.lu/fr/service/service-pencom.html>.

¹¹⁰ Website: <https://igss.gouvernement.lu/fr/publications/CSS/2018.html>.

¹¹¹ Memorial A No. 74 of 17 June 1999. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-1999-74-fr-pdf.pdf>.

¹¹² Memorial A No. 708 of 21 August 2018. Website: <http://legilux.public.lu/eli/etat/leg/loi/2018/08/01/a708/fo>.

6.3 Personal scope

According to Article 1, the amended Law of 1999 applies to the workers or certain categories of workers of companies, which put into place supplementary pension schemes for their workers.

The Law of 1 August 2018 extended the protection under the provisions of Directive 2014/50/EU and of Directive 2006/54/EC to the self-employed. It applies to them from 1 January 2019 onwards.

6.4 Material scope

According to Article 1, the amended Law of 1999 applies only to occupational pension schemes, which provide protection against old age, death, invalidity or widowhood.

Article 16 of the same law enumerates examples of discrimination by stating that:

'provisions contrary to the principle of equal treatment include those based on sex, either directly or indirectly for:

- (a) determining the persons who may participate in a supplementary pension scheme;
- (b) fixing the compulsory or optional nature of participation in a supplementary pension scheme;
- (c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;
- (d) laying down different rules, except as provided for in points (h) and (i) for the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing a deferred right to long-term benefits;
- (e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;
- (f) fixing different retirement ages;
- (g) suspending the retention or acquisition of rights during periods of maternity leave, parental leave or leave for family reasons which are granted by law or agreement;
- (h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined contribution schemes.

In the case of funded defined-benefit schemes, certain elements, like

- the lump-sum commutation of a portion of the pension;
 - the transfer of pension rights;
 - a survivor's pension payable to a dependent in return for the abandonment of a part of the annual pension;
 - a reduced pension when an employer chooses to take early retirement;
- may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented;
- (i) setting different levels for workers' contributions;
 - (j) setting different levels for employers' contributions, except
 - in the case of defined-contribution schemes if the aim is to equalise the amount of the final benefits or to make them more equal for both sexes;
 - in the case of funded defined-benefit schemes where the employers' contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined;

- (k) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in points (h) and (j), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme’.

6.5 Exclusions

The following exclusions are mentioned in Article 16:

- (h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined contribution schemes.

In the case of funded defined-benefit schemes, certain elements, like

- the lump-sum commutation of a portion of the pension;
- the transfer of pension rights;
- a survivor’s pension payable to a dependent in return for the abandonment of a part of the annual pension;
- a reduced pension when an employer chooses to take early retirement may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme’s funding is implemented;

- (j) setting different levels for employers’ contributions, except
 - in the case of defined-contribution schemes if the aim is to equalise the amount of the final benefits or to make them more equal for both sexes;
 - in the case of funded defined-benefit schemes where the employers’ contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined;
- (k) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in points (h) and (j), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme’.

6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54

There are no laws or case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54.

6.7 Actuarial factors

There is no information available regarding the use of actuarial factors.

6.8 Difficulties

There are no difficulties to be reported.

6.9 Evaluation of implementation

No evaluation of implementation has been published.

6.10 Remaining issues

There is nothing relevant to report.

7 Statutory schemes of social security (Directive 79/7)

7.1 General (legal) context

7.1.1 Surveys and reports on the practical difficulties linked to statutory schemes of social security (Directive 79/7)

There are no surveys or reports on the practical difficulties regarding gender equality linked to statutory schemes of social security.

7.1.2 Other relevant issues

In February 2020, the Ministry of Social Security together with the National Pension Insurance Fund published a brochure on pension careers, entitled 'As of now, top up your pension insurance', with detailed information on continued and optional pension insurance, supplementary pensions, retroactive purchase of pension rights, repayment of contributions and pension rights in case of divorce. The aim of this brochure is to raise awareness about pension rights, especially for women, in the event of changes in their professional and private life.¹¹³

7.1.3 Overview of national acts

Luxembourg's social security system has Bismarckian origins. It is compulsory and covers all workers who are employed or self-employed in Luxembourg and their family members against the following risks: sickness and maternity, accidents at work and occupational disease, old age, invalidity and long-term care needs. Family benefits and social assistance are also granted.

Regulation is available in the Social Security Code:¹¹⁴

- Sickness and maternity – Book I, Articles 1 to 84;
- Accidents at work and occupational disease – Book II, Articles 85 to 165;
- Old age and invalidity pensions – Book III, Articles 170 to 268;
- Family benefits and parental leave allowance – Book IV, Articles 268 to 346;
- Long-term care insurance – Book V, Articles 347 to 395a.

Social assistance is regulated under the Law of 28 July 2018 regarding social inclusion income (REVIS).¹¹⁵

Unemployment benefits are part of the Labour Code, Book V 'Employment and Unemployment', Title II 'Jobseeker's allowance', under Articles L. 521-1 to 521-18 LC.¹¹⁶

7.1.4 Political and societal debate and pending legislative proposals

There is no political and societal debate on gender neutrality regarding social security schemes.

Just over 20 years ago, there was a discussion about the need to modify derived rights granted to family members (Bismarckian approach). Proposals regarding individualisation of social rights and the creation of universal social rights were on the table. They took place in the framework of the Communication of the European Commission on the Modernisation of Social Security Schemes (1997).

¹¹³ Ministère de la sécurité sociale (MSS) (2020) 'As of now, top up your pension insurance'.

¹¹⁴ Website: http://legilux.public.lu/eli/etat/leg/code/securete_sociale/20190101.

¹¹⁵ Website: <http://legilux.public.lu/eli/etat/leg/loi/2018/07/28/a630/jo>.

¹¹⁶ Website: <http://data.legilux.public.lu/file/eli-etat-leg-code-travail-20190201-fr-pdf.pdf>.

In recent years, family benefits were turned into individual rights of the children. However, derived rights for family members regarding sickness insurance and pensions were not replaced by universal rights.

7.2 Implementation of the principle of equal treatment for men and women in matters of social security

The aim of the Law of 15 December 1986 concerning the progressive implementation of the principle of equal treatment between men and women regarding social security¹¹⁷ was to eliminate all inconsistencies of the Luxembourg social security legislation with European regulation, especially regarding marital and family status. Therefore, the Government conducted a systematic review of all legislation targeted by the material scope of the Council Directive 79/9/EEC of 19 December 1979.

7.3 Personal scope

Article 1 paragraph 1 of the Law of 15 December 1986 states that the principle of equal treatment between men and women applies to the working population – including self-employed persons, workers whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment – retired workers and invalidated workers. The personal scope, defined in Article 1, is identical to Article 2 of Directive 79/7/EEC.

7.4 Material scope

Article 1 paragraph 1 of the Law of 15 December 1986 states that the principle of equal treatment between men and women applies to statutory schemes which provide protection against sickness, invalidity, old age, accidents at work and occupational diseases, unemployment, as well as to provisions regarding social assistance in so far as it is intended to supplement or replace the aforementioned schemes. The material scope is identical to Article 3 of Directive 79/7/EEC.

7.5 Exclusions

Article 1 paragraph 2 excludes the provisions concerning survivors' benefits and family benefits, except in the case of family benefits granted by way of increases or benefits due in respect of the risks referred to in paragraph 1.

7.6 Actuarial factors

There are no provisions regarding actuarial factors.

7.7 Difficulties

Recently, there has been case law regarding survivor pensions, especially Article 196 of the Social Security Code.

In March 2017, the Social Security Supreme Council submitted a question to the Constitutional Court for a preliminary ruling: 'Is Article 196 section 2(c) of the Social Security Code in accordance with Article 10a section 1 of the Constitution?', which states that 'Luxembourgers are equal before the law.'

¹¹⁷ Memorial A No. 101 of 22 December 1986, p. 2343. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-1986-101-fr-pdf.pdf>.

Article 196 section 1 states that:

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

Article 196 section 2 states that:

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

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

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

The Constitutional Court decided on 7 July 2017 that Article 186 section 2(c) was not contrary to Article 10a of the Constitution, which states that 'Luxembourgers are equal before the law.'¹¹⁸

The arguments were the following:

- The exception foreseen in Article 196 section 2 must be implemented in compliance with the principle of equality enshrined in the Constitution.
- The principle of equality means that people in comparable situations cannot be treated differently, unless a difference in treatment is due to existing clear differences between them, and is rationally justified, adequate and proportional to the aim sought.
- The age difference between spouses or partners is in itself an objective criterion.
- Through the setting of a limit to the age difference, the legislator aimed to restrict the situations in which not only is a pension granted to an insured person who has paid contributions, but also a survivor's pension to a surviving spouse or partner without the payment of direct or indirect contributions.
- A large age difference between spouses or partners would be likely to risk distorting the financial basis of the pension scheme.
- The limit of 15 years does not appear to be clearly unreasonable and inappropriate and must be considered as being reasonably proportional to the aim pursued.

7.8 Evaluation of implementation

No evaluation of the implementation has been published.

¹¹⁸ Case law No. 129 of 7 July 2017. Memorial A No. 638 of 14 July 2017. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2017-638-fr-pdf.pdf>.

7.9 Remaining issues

Universal rights for the resident population regarding sickness insurance remain an issue. They would allow equal access to benefits in kind.

Individualisation of old age pension rights also remains an issue, because the number of divorces increased dramatically leaving women who did not work, or worked only part-time during marriage, without pensions or with 'poor' pensions.

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

8.1 General (legal) context

8.1.1 Surveys and reports on the specific difficulties of self-employed workers

No surveys or reports addressing the specific difficulties of self-employed workers have been published. Nevertheless, in the National Plan on Gender Equality 2015-2018, it was stated that a study on the advantages and disadvantages of the self-employed status in relation to the status of employees would be conducted by the Ministry for Economy.

8.1.2 Other issues

Information regarding the status of self-employed workers is on the Website of the House of Entrepreneurship powered by the Luxembourg Chamber of Commerce.¹¹⁹ There is no special section on female entrepreneurship or on gender equality.

8.1.3 Overview of national acts

According to the Law of 2 September 2011, which regulates the access to the professions of craftsman, merchant, businessman and to some liberal professions,¹²⁰ each person who wants to perform an activity as a craftsman, merchant, businessman, or to practise a liberal profession in Luxembourg, must be in possession of an establishment permit issued by the Ministry of Economy. Gender equality is not addressed in this law.

8.1.4 Political and societal debate and pending legislative proposals

In its response to the consultation organised by MEGA for the preparation of the Gender Equality Plan 2019-2022, the Chamber of Crafts (CMD) denounced the difference of treatment between self-employed workers and employees regarding old age pensions, and more precisely the social security status of spouses and life-partners assisting the activities of self-employed workers in their personal capacity.¹²¹ Assisting spouses and life-partners are compulsorily insured and contributions have to be paid up to a ceiling of twice the minimum social wage, whereas the ceiling for contributions of employees is five times the minimum social wage. As a consequence, the pension rights will also be very limited (CMD 2019).

Moreover, the Luxembourg legislation provides for opt-outs regarding assisting-spouses and -life-partners, which does not ensure equal treatment between women and men.

8.2 Implementation of Directive 2010/41/EU

There is no specific legislation which transposes Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC.

Regarding social security, self-employed workers have the same rights and duties as employees. There are no specific laws or social security regimes for self-employed workers. Self-employed persons are required to affiliate themselves to the social protection system and they have to pay the contributions which are normally due from both the employer and employee.

¹¹⁹ Website: <https://www.houseofentrepreneurship.lu/>.

¹²⁰ Memorial A No. 198 of 22 September 2011. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2011-198-fr-pdf.pdf>.

¹²¹ CMD, Opinion of 24 July 2019.

8.3 Personal scope

Self-employed workers are defined in Articles 1(4) (sickness insurance) and 171(2) (pensions) of the Social Security Code in the following way:

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

8.3.1 Scope

The legislation covers:

- (a) self-employed workers, namely persons pursuing a gainful activity for their own account under the conditions laid down in Articles 1(4) and 171(2) of the SSC.
- (b) under certain conditions, the spouse and the legal partner of self-employed workers and, in the agricultural sector, parents and allies in direct line up to the third degree inclusive.

8.3.2 Definitions

Definitions of Article 3 of the Directive were not introduced in the legislation.

8.3.3 Categorisation and coverage

The legislation on the self-employed is the same for all categories of self-employed workers.

8.3.4 Recognition of life partners

'Life partners' have been recognised in Articles 1(5) and 171(6) of the SSC. Under certain conditions, they are compulsorily insured in the sickness and maternity insurance and in the old age and invalidity insurance. They are entitled to direct rights (see also section 8.1.4 above).

According to Articles 1(5) and 171(6) SSC:

'the spouse or the legal partner and, regarding the agricultural sector, the parents and allies in direct line up to the third degree inclusive of a self-employed worker'

are compulsorily insured

'provided that the spouse, the legal partner, the parents and allies are at least 18 years old and that they provide necessary services to the self-employed worker to such an extent that they can be considered as a principal activity'.

8.4 Material scope

8.4.1 Implementation of Article 4 of Directive 2010/41/EU

The principle of equal treatment has not been introduced explicitly into the legislation.

8.4.2 Material scope

The principle of equal treatment is not explicitly contained in the regulation regarding the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.

8.5 Positive action

The government supports self-employed women's networks, for example, the ASBL (non-profit organisation) '*Maison du coaching, mentoring et consulting*' (MCMC)¹²² by giving them financial support. This support aims to give self-employed women more visibility. As an example, the Federation of Female Entrepreneurs¹²³ organises exhibitions on the subject of women's entrepreneurship. Female entrepreneurs are requested for interviews on a regular basis and they promote entrepreneurship of women. It is, of course, not possible to measure the exact impact of such measures, but in general, the topic of women's entrepreneurship is more visible than some years ago.

8.6 Social protection

The social protection system is the same for the self-employed and for employees. It is mandatory and is regulated by the Social Security Code.

In particular, self-employed workers – namely persons pursuing a gainful activity for their own account – are compulsorily insured under Article 1(4) SSC (sickness) and Article 171(2) SSC (pensions).

According to Article 1(5) SSC (sickness) and Article 171(6) SSC (pensions):

'the spouse or the legal partner and, regarding the agricultural sector, the parents and allies in direct line up to the third degree inclusive of a self-employed worker'

are also compulsorily insured

'provided that the spouse, the legal partner, the parents and allies are at least 18 years old and that they provide necessary services to the self-employed worker to such an extent that they can be considered as a principal activity'.

8.7 Maternity benefits

Maternity benefits in cash are regulated by Article 25 of the SSC. The conditions and benefits are the same for self-employed persons as for employees.

According to Article 25 section 4 SSC, self-employed women must have been compulsorily affiliated under the sickness and maternity insurance for at least six months during the year preceding the maternity leave, to be entitled to the maternity allowance. The maternity allowance is calculated according to the reference amount for contribution used at the moment when the maternity leave starts.

8.8 Occupational social security

8.8.1 Implementation of provisions regarding occupational social security

The Law of 1 August 2018 transposing the Directive 2014/50/EU of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights amending the Law of 1 June 1998 concerning the supplementary pension regimes¹²⁴ applies to self-employed workers.

¹²² See: <http://www.mcmc.lu/>.

¹²³ See: <http://ffcel.lu>. The mission of the '*Fédération des femmes cheffes d'entreprise du Luxembourg*' is to reinforce the impact and the influence of women in the business world and to promote entrepreneurship '*au féminin*'.

¹²⁴ Memorial A No. 708 of 21 August 2018. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2018-708-fr-pdf.pdf>.

8.8.2 Application of exceptions for self-employed persons regarding matters of occupational social security (Article 11 of Recast Directive 2006/54)

There are no exceptions for self-employed persons.

8.9 Prohibition of discrimination

Article 16 states that:

'a provision of a supplementary pension regulation violating the principle of equal treatment between men and women, which means resulting in direct or indirect discrimination on the grounds of sex, by reference in particular to marital or family status, is null'.

This Article applies to all supplementary pension schemes (see also under 6.4 and 6.5).

8.10 Evaluation of implementation

No evaluation of the implementation has been published.

8.11 Remaining issues

During the COVID-19 pandemic, leave for family reasons was used as the main tool for compensating the loss of parents' income in the event of an interruption to work due to the quarantine of a child, school closure or any other measure applicable to the children in relation to the health crisis. A new care leave, 'leave for care support', was also created during this period. The costs of these types of leave were the responsibility of the National Health Fund. Self-employed workers could benefit from both types of leave under the same conditions as employees (see section 5.8 above on care leave).

9 Goods and services (Directive 2004/113)¹²⁵

9.1 General (legal) context

9.1.1 Surveys and reports about the difficulties linked to equal access to and supply of goods and services

There are no surveys or reports about the difficulties linked to equal access to and supply of goods and services.

9.1.2 Specific problems of discrimination in the online environment/digital market/collaborative economy

See under 9.1.3.

9.1.3 Political and societal debate

In particular, it was mentioned in the National Plan on Gender Equality 2015-2018, that according to the new legislation:

'the representation of women and men in video games, songs and advertising in particular and in the media in general (newspapers, TV, radio, etc.) will be analysed and observed in order to raise public awareness of the consequences of an unbalanced, even discriminatory or manipulative representation and to obtain a greater neutrality in gender representation (including advertisements for toys)'.¹²⁶

In the new National Action Plan for Gender Equality, three guidelines address issues such as sexist advertising, gender representation in the media and practices in gender marketing.

MEGA aims to combat sexist advertising by building on the Code of professional conduct of the Advertising Council (Guideline 2.3). It will reopen discussions with the Advertising Ethics Committee on its role and the impact of its activities.

Regarding gender representation in the media, Luxembourg will participate in the Global Media Monitoring Project. MEGA will assess, in collaboration with media professionals, and, in particular, the Press Council, the current situation and discuss improved pathways (Guideline 2.4).

MEGA will also address problematic practices of gender marketing, focusing in the first instance on toys (Guideline 2.5).

9.2 Prohibition of direct and indirect discrimination

The Law of 21 December 2007 implemented Directive 2004/113/EC.¹²⁷ Direct and indirect discrimination on grounds of sex in access to goods and services are prohibited by Article 2, which states that 'any direct or indirect discrimination based on gender, including a less favourable treatment of women due to pregnancy or maternity, is prohibited'.

¹²⁵ See e.g. Caracciolo di Torella, E., and McLellan, B. (2018), *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

¹²⁶ NAP on equality 2015-2018 p. 6 (MEGA 2015).

¹²⁷ <http://www.legilux.public.lu/leg/a/archives/2007/0232/a232.pdf>.

9.3 Material scope

According to Article 3(1), the law applies to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies.

According to Article 3(2), the law does not apply to goods and services which are offered in the area of private and family life and the transactions carried out in this context.

9.4 Exceptions

There are no more restrictions regarding the content of media, advertising and education since the Law of 19 June 2012¹²⁸ amended Article 3(4) of the Law of 21 December 2007. Media, advertising and education are no longer excluded from the scope of the legislation.

9.5 Justification of differences in treatment

According to Article 4 of the law, differences in treatment are not considered contrary to the law, if the provision of the goods and services exclusively or primarily applying to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

9.6 Actuarial factors

The Law of 12 April 2015 amending the Law of 21 December 2007 replaced sections (1) and (2) of Article 6.¹²⁹

According to Article 6(1) of the Law of 21 December 2007, in all new contracts concluded after 21 December 2007, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services is prohibited.

According to Article 6(2) of the Law of 21 December 2007, proportionate differences in individuals' premiums and benefits are permitted where the use of sex is a determining factor in the assessment of the risk based on relevant and accurate actuarial and statistical data.

Both paragraphs were replaced by the Law of 12 April 2015 by the following sentence: 'In all new contracts, sex cannot be used as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services'.

9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113

The exception was removed by the Law of 12 April 2015 previously mentioned (see under 9.6).

9.8 Positive action measures (Article 6 of Directive 2004/113)

Luxembourg does not implement positive action measures.

¹²⁸ Memorial A No. 137 of 5 July 2012. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2012-137-fr-pdf.pdf>.

¹²⁹ Memorial A No. 73 of 16 April 2015. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2015-73-fr-pdf.pdf>.

9.9 Specific problems related to pregnancy, maternity or parenthood

Article 3(5) of the Law of 21 December 2007 states that the law will be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity.

Article 6(3) of the law states that in all new contracts concluded after 20 December 2009 the costs related to pregnancy and maternity cannot result in differences in individuals' premiums and benefits and the associated financial services.

9.10 Evaluation of implementation

No evaluation of the implementation has been published.

9.11 Remaining issues

There seem to be no remaining issues.

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

10.1 General (legal) context

10.1.1 Surveys and reports on issues of violence against women and domestic violence

In 2015, the Luxembourg Institute on Health (LIH) produced a research report on the causes of domestic violence in Luxembourg, called '*Violence domestique au Luxembourg: études des causes pour une prévention ciblée*' (LIH 2015),¹³⁰ commissioned by the Ministry for Equal Opportunities.

Each year, the Cooperation Committee of Professionals in the Fight against Domestic Violence publishes a report for the Government.¹³¹ Its mission is to supervise the application of the legislation and to collect statistics. In its report for 2019, the committee published data on domestic violence, including on police intervention (849 cases), eviction from the home (265 cases) and offences related to the eviction (464 cases of which 173 were assault and battery without incapacity for work). The vast majority of victims were women (64 %), whereas perpetrators were mainly men (68 %). One chapter focused on psychological counselling for children and young men and on the intervention programme for perpetrators of violence.¹³²

10.1.2 Overview of national acts on violence against women, domestic violence and issues related to the Istanbul Convention

The law of 8 September 2003 was the first law on domestic violence issued in Luxembourg.¹³³ When the Istanbul Convention was signed, Luxembourg considered that its legislation on domestic violence was already in line with the main disposals of the Istanbul Convention. However, Luxembourg wanted to reinforce the Law of 2003, especially regarding direct or indirect violence against children.

The Cooperation Committee of Professionals in the Fight against Domestic Violence drew the attention of the Government to the fact that children who were victims of domestic violence were not supported by assistance services for victims because of a decision of the custodial parent. Therefore, one of the disposals of the bill in Parliament was to make the intervention of the assistance services for children compulsory.¹³⁴

The Council of Europe Convention on preventing and combating violence against women and domestic violence entered into force by Law of 20 July 2018.¹³⁵ The Ministry for Gender Equality launched a Website on the Istanbul Convention.¹³⁶

¹³⁰ Website: http://mega.public.lu/fr/publications/publications-ministere/2015/etude-violence-domestique/Fr-Version-courte-finale-12_2_2015.pdf.

¹³¹ See Report 2017 on Website: <http://mega.public.lu/fr/publications/publications-ministere/2018/rapport-comite-violence/>.

¹³² Comité de coopération entre les professionnels dans le domaine de la lutte contre la violence (Cooperation Committee of Professionals in the Fight against Domestic Violence) (2020) *Rapport au Gouvernement 2019* (Report for the Government 2019), available at: <https://mega.public.lu/fr/publications/publications-ministere/2020/Rapport-au-gouvernement-2019-Comite-Violence/Brochure-Rapport-au-gouvernement-2019-Comite-Violence.html>.

¹³³ Memorial A No. 148 of 3 October 2003. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2003-148-fr-pdf.pdf>.

¹³⁴ Parliamentary Documents regarding Bill No. 7167, explanatory memorandum, p. 4. Website: [https://chd.lu/wps/PA_ArchiveSolR/FTSShowAttachment?mime=application%2fpdf&id=5634D490DD79A7B8846DE5C949B5466D\\$404401D9DC0393F0935F11B8B7A94DB5&fn=5634D490DD79A7BB846DE5C949B5466D\\$404401D9DC0393F0935F11B8B7A94DB5.pdf](https://chd.lu/wps/PA_ArchiveSolR/FTSShowAttachment?mime=application%2fpdf&id=5634D490DD79A7B8846DE5C949B5466D$404401D9DC0393F0935F11B8B7A94DB5&fn=5634D490DD79A7BB846DE5C949B5466D$404401D9DC0393F0935F11B8B7A94DB5.pdf).

¹³⁵ Memorial A No. 631 of 30 July 2018. Website: <http://data.legilux.public.lu/file/eli-etat-leg-loi-2018-07-20-a631-jo-fr-pdf.pdf>.

¹³⁶ Website: <http://convention-istanbul.lu/>.

10.1.3 National provisions on online violence and online harassment

Online harassment may be punished by Article 442-2 of the Criminal Code on obsessive persecution (stalking). Anyone who repeatedly harassed a person even though he or she knew or ought to have known that by his or her behaviour he or she would seriously interfere with the victim's peace may be punished by imprisonment for a term of 15 days to 2 years and/or a fine of EUR 251 to EUR 3 000.

In an important case,¹³⁷ a 35-year-old man harassed two minor girls (under the age of 16), via Facebook. One of the girls and her father lodged a complaint against him.

By Prosecutor's citation, the perpetrator was prosecuted for obsessive persecution (Article 441-2 CC), an offence against private life (Law of 11 August 1982) and grooming (Article 385-2 CC).

The court held that there were three elements of the case amounting to obsessive persecution (stalking). The perpetrator harassed the two minor girls by sending messages via Facebook several times a day ('repeated acts of harassment'). His behaviour interfered seriously with the victims' peace. The court stated that 'peace is a subjective concept that needs to be appreciated *in concreto* taking into account the effect of the acts of harassment on the victim'. One of the girls got scared, talked to her father and they complained against the perpetrator. The perpetrator admitted that he knew that his behaviour would seriously interfere with the minors' peace (moral element).

The court also applied Article 6 of the Law of 11 August 1982 on the protection of private life, which punishes anyone who has deliberately worried or annoyed a person by repeated unwanted phone calls or who harassed her/him by written messages or any other messages, as an offence. The court noted that the messages sent via Facebook were written, repeated and unwanted messages, which annoyed the minors. These were voluntary acts. The court concluded that 'it was a process that annoyed the minors'.

The court upheld also grooming. Article 385-2 of the Criminal Code considers that grooming is when an adult makes sexual proposals to a minor under the age of 16 years or a person claiming to be under 16 by electronic means of communication. The court noted that the perpetrator used electronic means of communication and that he knew that he was using Facebook for exchanges with minors under the age of 16 years. The age of one minor was indicated on Facebook and one of the girls made the perpetrator aware of the age difference between him and the minors.

Hate speech online is also punishable by Articles 454 and 457-1 of the Criminal Code, if the two following elements are met:

- incitement to hatred or violence regarding a physical or moral person, who is discriminated on the basis of sex, sexual orientation, sex reassignment or gender identity;
- incitement to hatred is realised by speeches, screams or threats in public spaces or meetings.

Case law on hate speech considers Facebook or other social media as 'public space'. It should be noted that there is no case law regarding hate speech on the basis of sex.

There are telephone helplines specialised in 'Cybermobbing', such as:

- BEE-Secure Helpline 8002 1234;

¹³⁷ District Court of Luxembourg, criminal matters, 10 November 2016, No. 2912/2016. Website: https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/Tribunal%20d%27arrondissement%20luxembourg%20p%C3%A9nal/18_Chambre%20correctionnelle/2016/20161110-TALux18-2912a-accessible.pdf.

- *Kanner Jugend Telefon* 116 111 (for children and young people).

10.1.4 Political and societal debate

The fight against domestic violence is one of the political priorities of MEGA. The Ministry has signed a cooperation agreement with a dozen NGOs which are active in the fight against domestic violence, for an annual budget of EUR 13 million.¹³⁸

MEGA commissioned media campaigns, especially campaigns targeting foreign communities residing in Luxembourg, such as the campaign 'Domestic violence hurts the whole family' (2016),¹³⁹ which explained the legal framework of regulation and informed about help services.

Several telephone helplines have been set up by the Police and NGOs:

- 113 is a telephone helpline of the police specialised in domestic violence;
- 12321 *Aktioun Bobby* is a telephone helpline of the police for children and young people who are victims of violence, including domestic violence;
- VISAVI and the Family Centre Bethlehem are NGOs specialised for women in distress;
- *Meederchershaus* is specialised for young women in distress;
- *Riicht eraus* offers consultations for perpetrators of domestic violence;
- Mobbing ASBL Luxembourg is an NGO specialised in mobbing, etc.;
- 2060 1060 is a telephone helpline on domestic violence: <http://helpline-violence.lu/>;
- Log-In is a consultation centre on domestic violence of the National Council of Luxembourg Women (CNFL): <http://cnfl.lu>.

An online public consultation, run by MEGA between 17 June 2019 and 7 July 2019, on the Gender Equality Plan 2019-2022, confirmed the need to fight against violence in general, as well as harassment and abuse: 71 % of participants (74 % of women and 61 % of men) considered it an absolute emergency.¹⁴⁰

The fight against domestic violence is one of the seven political priorities listed in the new National Action Plan for Gender Equality published in July 2020, by the Ministry for Gender Equality (MEGA). Four guidelines address domestic violence.

A working group comprising representatives of the Ministry for Gender Equality, the Ministry of Justice, the Ministry of National Security, the State Prosecutor and the Police was established to analyse the current legislation and its implementation and to provide recommendations to the Government (Guideline 6.1). It was also invited to thematise new forms of violence like cyber-violence.

In order to break from gender stereotypes, prejudices and clichés, in a sustainable manner, the MEGA will invest in prevention policies (Guideline 6.2). For example, it issued a national programme on emotional and sexual health and launched an online awareness campaign under www.violence.lu.

Moreover, the MEGA is considering the creation of an observatory for gender equality, whose main mission will be to improve data collection and processing of data on domestic violence and violence related to sex (Guideline 6.3).

¹³⁸ Website: <http://mega.public.lu/fr/acteurs/partenaires/partenaires-conventionnes/index.html>.

¹³⁹ Website: <http://mega.public.lu/fr/publications/publications-ministere/2017/violence-domestique/06953-MEGA-Dep-Violence-ENG-04-2016-Web.pdf>.

¹⁴⁰ Website: <https://gouvernement.lu/dam-assets/documents/actualites/2019/07-juillet/Resultats-d-une-consultaion-publique-dediee-a-l-egalite-entre-les-femmes-et-les-hommes.pdf>.

The MEGA will also pay close attention to the management of victims of domestic violence (Guideline 6.4). The aim is to guarantee emergency housing to all victims.

In a press conference on 11 June 2020, the Minister for Gender Equality commented on the report for 2019 of the Cooperation Committee of Professionals in the Fight against Domestic Violence and gave a detailed description of the various instruments to prevent domestic violence, to help the victims and to monitor the perpetrators. She also announced that, since the beginning of the COVID-19 pandemic, cooperation between the police, judicial institutions and help services has been strengthened, in particular, by the setting up of a new helpline and a special website on violence in several languages.¹⁴¹

10.2 Ratification of the Istanbul Convention

The Law of 20 July 2018 approved the Istanbul Convention and amended the Criminal Code, the Code of Criminal Procedure, the Law of 8 September 2003 on domestic violence and the Law of 29 August 2008 on the freedom of movement of persons and migration as described below.¹⁴²

Main provisions

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

Modification of the Criminal Code (CP)

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

A new Article 410 was introduced into the Criminal Code. Female genital mutilation has been criminalised. The following provisions apply:

- (a) Two essential elements constitute the offence: mutilation of the reproductive organs in any form, on the one hand, and a female victim, on the other;
- (b) Consent or the absence of consent by the victim will have no impact on the offence;
- (c) The moral element of the offence will be the fact that a person deliberately wanted to perform, encourage or facilitate this practice;
- (d) The perpetrator of the mutilation and all persons who encouraged and facilitated it will be punished;
- (e) An attempt will also be punishable;
- (f) The sentences for these offences will be more severe than the sentences foreseen in general law regarding intentional bodily harm;
- (g) There are special measures aiming to expand prosecution opportunities and to guarantee their effectiveness (see below);

¹⁴¹ Website:

https://mega.gouvernement.lu/fr/actualites.gouvernement%2Bfr%2Bactualites%2Btoutes_actualites%2Bcommuniques%2B2020%2B06-juin%2B11-bofferding-violence.html.

¹⁴² Memorial A No. 631 of 30 July 2018. Website: <http://legilux.public.lu/eli/etat/leg/memorial/2018/a631>.

- (h) The new Article considers aggravating circumstances linked to the identity of the perpetrator, the severity of the harm, the minority age or the vulnerability of the victim, the use of force, etc.

Modification of the Code of Criminal Procedure (CCP)

Article 5-1 CCP was amended in accordance with Article 44 section 3 of the Convention. Extraterritorial jurisdiction has been extended in order to cover the offences of forced abortion, forced marriage and female genital mutilation.

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

Modification of the Law of 8 September 2003 on domestic violence

The legislation already complies with the Convention but Luxembourg wants to progress in preventing and combating domestic violence. Luxembourg especially aims at preventing violence among persons living together in the family home and protecting children who are direct or indirect victims of domestic violence.

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

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

Article III provides that the Cooperation Committee of Professionals in the Fight against Domestic Violence (*Comité de coopération entre les professionnels dans le domaine de la lutte contre la violence*) has to collect data in accordance with Article 11 of the Convention.

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

In accordance with Article 59 section 4 of the Convention on victims of forced marriage, Article 40 section 4 foresees that a victim of a forced marriage who has left the territory of Luxembourg under coercion for more than six months and has therefore lost her residence permit, must still have the right to reside in Luxembourg.

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

11 Compliance and enforcement aspects (horizontal provisions of all directives)

11.1 General (legal) context

11.1.1 Surveys and reports about the particular difficulties related to obtaining legal redress

There are no surveys or reports about the particular difficulties related to obtaining legal redress but the Centre for Equal Treatment (CET) addressed this issue in its annual activity reports of 2018 and 2019.

11.1.2 Other issues related to the pursuit of a discrimination claim

There are no other issues related to the pursuit of a discrimination claim.

11.1.3 Political and societal debate and pending legislative proposals

There is no political or societal debate on these issues, except the requests formulated by the Centre for Equal Treatment in its annual report previously mentioned (see under 11.3.1).

11.1.4 Gender mainstreaming

Gender mainstreaming is at the heart of the new National Action Plan on Gender Equality, which considers gender equality as a cross-cutting priority for all policies.

It is explicitly stated in the national action plan that, 'in practice, each ministerial department must respect gender equality in policymaking and in the drawing up of legal texts, programmes, action plans and all other measures in accordance with the principle of the respect for the systematic consideration of the gender dimension'. Moreover, 'in line with the incorporation of the gender dimension into all policies, equality between women and men must be considered as a cross-cutting priority for all other strategies and thematic action plans adopted by the Government' as for example the national action plan for the promotion the lesbian, gay, bisexual, transgender and intergender rights and the national action plan on sustainable development implementing the UN programme 'Transforming our world: the 2030 Agenda for Sustainable Development'.¹⁴³

11.2 Victimisation

Regarding victimisation, national equal treatment laws guarantee protection against adverse treatment for complainants as well as for witnesses. This applies to the field of access to and the supply of goods and services (Article 10 of the amended Law of 21 December 2007) and to the field of work and employment (Article L. 241-8 LC).

Field of access to and supply of goods and services

According to Article 10(1) and (2) of amended Law of 21 December 2007, no person can be subject to reprisals either by the protests or refusals opposed to an act or a behaviour contrary to the principle of equal treatment or as a reaction to a complaint or any legal proceedings aimed at enforcing compliance with the principle of equal treatment between women and men. Likewise, no person can be subject to reprisals for having testified with regard to such actions or for having recounted them.

Article 10(3) states that 'any provision or act contrary to (1) and (2) is void ipso jure'.

¹⁴³ Website: <https://mega.public.lu/content/dam/mega/fr/publications/publications-lu-ministere/2020/MEGA-plan-action-nation-egalite-WEB.pdf>.

Field of work and employment

According to Article L. 241-8 sections 1 and 2 LC, no employee can be subject to reprisals either by the protests or refusals opposed to an act or a behaviour contrary to the principle of equal treatment or as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment. Likewise, no employee can be subject to reprisals for having testified with regard to such actions or for having recounted them.

Article L. 241-8 section 3 LC states that 'any provision or act contrary to sections 1 and 2, and especially any provision violating these provisions, is void ipso jure'. Emergency court proceedings are foreseen by the law.

11.3 Access to courts

In response to the consultation with stakeholders organised by MEGA in preparation of the Gender Equality Plan 2019-2022, the Chamber of Employees (CSL) called for a major change to the legislation, especially regarding Articles L. 241-5 to 241-7 of the Labour Code.¹⁴⁴ It asked the public authorities to widen the scope of legal action for NGOs and trade unions and to create an important new lever for action by allowing them to take legal proceedings even if there is no claim made by an individual person (CSL 2019, second opinion).

Legal actions instigated by NGOs

In amended Law of 21 December 2007 implementing Directive 2004/113/EC on equal treatment between men and women in the access to and supply of goods and services, Article 7(1) foresees the right for NGOs to forward claims regarding direct and indirect sex discrimination, moral harassment and sexual harassment.

Any NGO can exercise in civil and administrative courts the rights of the victim of direct or indirect sex discrimination under the following requirements:

- the NGO must be of national significance;
- it must have a legitimate interest to ensure that the provisions of the law of 21 December 2007 are respected;
- it must have legal status for at least one year at the date of the facts;
- it must have been previously accredited by the Ministry of Justice (Law of 21 April 1928);
- discrimination must harm directly or indirectly common interests, which the NGO defends according to its status, even if it does not provide proof of a material or moral injury.

Article 7(2) states that, when acts of discrimination have been committed against individual persons, NGOs can only exercise the rights granted to the victim of discrimination, if the victim has given explicitly and in writing his/her consent. It means that, in this case, NGOs need the consent of the victim.

The amended Law of 13 May 2008 implementing Directive 76/207/EEC amended by Directive 2002/73/EC on equal treatment between women and men as regards access to employment, vocational training and promotion, and working conditions introduced a new chapter into the Labour Code, namely Chapter 1 of Title IV of Book II 'Principle of equal treatment' (Articles L-241-1 to Article L-241-11 LC).

¹⁴⁴ CSL, Opinion of 12 November 2019.

Article 241-5 LC foresees the right for NGOs to forward claims regarding direct and indirect sex discrimination and sexual harassment.

Any NGO can exercise in civil and administrative courts the rights of the victim of direct or indirect sex discrimination under the following requirements:

- the NGO must be of national significance;
- its statutory activity must be to combat direct and indirect gender discrimination and sexual harassment at the workplace;
- it must have legal status for at least one year at the date of the facts;
- it must have been previously accredited by the Ministry of Justice (Law of 21 April 1928);
- discrimination must harm directly or indirectly common interests, which the NGO defends according to its status, even if it does not provide proof of a material or moral injury.

Article L. 241-7 LC states that, when acts of discrimination have been committed against individual persons, NGOs can only exercise the rights granted to the victim of discrimination, if the victim has declared explicitly and in writing that he/she is not opposed to the proceedings. It means that, in this case, NGOs need an explicit document from the victim declaring that he/she is not opposed to the proceedings.

- Legal action instigated by trade unions.

Article 241-6(1) LC foresees that, when an action arising out of a collective agreement applying the principle of equal treatment is challenged by a person concerned, any trade union party to the collective agreement may intervene in the proceedings, if the solution of the conflict is of common concern for its members, except if the person who brought in the action disagrees in writing.

Article 241-6(2) LC also foresees the right for trade unions to forward claims regarding direct and indirect sex discrimination.

Any trade union can exercise in civil and administrative courts the rights of the victim of direct or indirect sex discrimination under the following requirements:

- The trade union must provide proof of a general national representation or representation in a sector, which is particularly important for the Luxembourg economy.
- Discrimination must harm directly or indirectly common interests, which the trade union defends according to its status, even if it does not provide proof of a material or moral injury.

Article L. 241-7 LC states that, when acts of discrimination have been committed against individual persons, trade unions can only exercise the rights granted to the victim of discrimination, if the victim has declared explicitly and in writing that he/she is not opposed to the proceedings. It means that, in this case, trade unions need an explicit document from the victim declaring that he/she is not opposed to the proceedings.

11.3.1 Difficulties and barriers related to access to courts

Regarding litigation, the Centre for Equal Treatment (CET) stated in its annual activity report of 2018¹⁴⁵ that, since the entry into force of the Laws (mentioned above), 'case law is almost inexistent'. Therefore, the CET 'invited the Government to study the reasons of

¹⁴⁵ Website: <http://cet.lu/fr/2019/05/rapport2018/>.

this evolution and to address the situation' (p. 40). It must be noted that one of the missions of the CET is:

'to give an aid to the persons, who consider that they have been discriminated against by offering them a counselling and guidance service with the objective to inform the victims regarding their individual rights, the legislation, case law and the means of asserting their rights'.

In its annual activity report of 2018, the CET asked for 'the setup of a network of lawyers specialised in anti-discrimination matters and the possibility to collaborate with them' (p. 43).¹⁴⁶

As regards trade unions, they offer free legal aid in labour law and social security to their members, including discrimination matters.¹⁴⁷

In general, people do not seek judicial redress for damages caused by direct or indirect discrimination. Maybe this is due to the fact that in a small country like Luxembourg, people do not want to take the risk of being tarnished as a potential claimer and they do not want to hinder their professional career.

11.3.2 Availability of legal aid

No special legal aid is available. To ensure the access to courts for people with low income, the Luxembourg State puts at their disposal a free and complete legal aid for the defence of their interests. The legal aid is granted in judicial and extrajudicial affairs, in demand or in defence. This is a general assistance. It is not specifically for cases of discrimination.¹⁴⁸

By Grand-Ducal Regulation of 29 July 2020, the hourly rate of compensation for legal aid was raised by 10 %, from EUR 58 to EUR 64 or from EUR 87 to EUR 96, depending on the type of lawyer.¹⁴⁹ Furthermore, the Minister of Justice will introduce a bill in Parliament in 2021 with the aim of reforming legal aid.

11.4 Horizontal effect of the applicable law

11.4.1 Horizontal effect of relevant gender equality law

There is no difficulty with regard to the horizontal effect of gender equality law.

11.4.2 Impact of horizontal direct effects of the charter after *Bauer*

There is nothing to report on the impact of horizontal direct effects of the charter after *Bauer*.

11.5 Burden of proof

Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex was implemented by the Law of 28 June 2001,¹⁵⁰ which deals with direct and indirect discrimination based on sex. The Law applies to civil law proceedings and the

¹⁴⁶ Centre pour l'Égalité de Traitement (CET) (2018). *Rapport d'activités* (Annual Activity Report). Website: <http://cet.lu/wp-content/uploads/2019/05/Rapport-annuel-2018.pdf>.

¹⁴⁷ For example: OGB-L: <http://www.ogbl.lu/services-aux-membres/services-individuels/>. LCGL: <https://lrgb.lu/assistance-au-travail/assistance-juridique-gratuite/>.

¹⁴⁸ Grand-Ducal Regulation of 29 October 2004 regarding judicial aid. Memorial A No. 188 of 29 November 2004. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2004-188-fr-pdf.pdf>.

¹⁴⁹ Memorial A 650 of 29 July 2020. Website: <http://data.legilux.public.lu/file/eli-etat-leg-rgd-2020-07-29-a650-jo-fr-pdf.pdf>.

¹⁵⁰ Memorial A No. 86 of 31 July 2001. Website: <http://legilux.public.lu/eli/etat/leg/loi/2001/06/28/n1/jo>.

administrative procedure concerning the public or private sector in relation to access to employment, pay, professional promotion, access to independent work, working conditions and occupational social security schemes. According to this Law, respondents have to prove that there has been no violation of the principle of equal treatment between women and men if claimants establish, before the court or another competent authority, facts from which it may be presumed that there has been direct or indirect discrimination. Since 2007, the same rules apply in the field of access to and the supply of goods and services.

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

According to Article 10(3) of the Law of 2007 and to Article L. 241-8 section 3 LC, reprisals are void ipso jure. In the event of a dismissal by an employer, the worker can call for the dismissal to be nullified in order to retain his/her job, or if necessary, to be reinstated through emergency proceedings.

Concerning job offers, employers who make a job offer which is not in conformity with the principle of equality between women and men is punishable by a fine ranging from EUR 251 to EUR 2 000. If the offence is repeated, the fine may be doubled (Article L. 241-11 LC).

Article 9 of the Law of 21 December 2007 implementing Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services has introduced an innovative provision by allowing victims to choose between either:

- a lump-sum of EUR 1 000 compensating moral harm. In this case, the claimant does not have to prove the extent of the damage;
- or
- the compensation commensurate with the damage actually suffered. In this case, he/she has to prove the extent of the moral harm.

11.6.2 Effectiveness, proportionality and dissuasiveness

Effectiveness, proportionality and dissuasiveness seem guaranteed by Article 10(3) of the Law of 2007 and by Article L. 241-8 section 3 LC, which declare reprisals void ipso jure.

Regarding fines and compensation, the amount of money fixed in the legislation seems to be of low value. It is not certain whether they are truly dissuasive.

However, it is impossible to reach conclusions due to the current lack of case law.

11.7 Equality body

There is a national equality body, the Centre for Equal Treatment (Centre pour l'égalité de traitement, CET), which was established by law on 28 November 2006.¹⁵¹ It is competent to cover EU gender equality law. The CET is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. It is supervised by a board of five members, who are appointed by the Parliament. One of the missions of the CET is:

`to give an aid to the persons, who consider that they have been discriminated against by offering them a counselling and guidance service with the objective to

¹⁵¹ Memorial A No. 207 of 6 December 2006. Website: <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2006-207-fr-pdf.pdf>.

inform the victims regarding their individual rights, the legislation, case law and the means of asserting their rights’.

It has no authority to make decisions. It has only the faculty to release non-binding opinions, for example, through its annual report.

In its annual activity report for 2019, the CET regrets its lack of legal status and means of coercion (CET 2019). In this battle, it is supported by the Chamber of Employees (CSL), which has called for more resources for the CET and for public authorities to allow the CET to perform on-site checks and to impose penalties (CSL 2019).

In its annual activity report for 2020, the CET pointed out that only 12 % of the complaints were on gender discrimination and that 12 % were on multiple discrimination.¹⁵² It made two recommendations in particular:

- the implementation of its annual recommendations must be followed up by an independent institution;
- prohibition of multiple discrimination has to be enshrined in law, for example as an aggravating circumstance.

11.8 Social partners

The social partners have no official role in the enforcement of gender equality law except for collective agreements (see under 11.3 Access to courts, above). In 2007, MEGA published a legal analysis on gender equality in collective agreements (MEGA 2007).

The social partners can negotiate collective agreements. These can be declared ‘of general obligation’, which means that all companies and all employees of a special sector are covered by the collective agreement. Any provision, which is contrary to the principle of equality between women and men, is formally prohibited. According to Article L. 162-12 LC, collective agreements must include the principle of equal pay and methods to prevent sexual and gender-based moral harassment.

One recent example is the collective labour agreement for hospital employees, signed by the Federation of Hospitals and the trade unions OGB-L and LCGB, on 24 July 2019, and declared of general obligation by Grand-Ducal Regulation of 4 November 2019.¹⁵³ A preambular article enshrines in the agreement the principle of equal pay and the principle of equal treatment between women and men regarding access to employment, training and career development and working conditions under the provisions of Book II Title IV of the Labour Code concerning equal treatment between women and men.

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

In the new National Action Plan for Gender Equality, the MEGA reminded the social partners of their responsibility regarding equal pay (Guideline 4.2). The ministry asked them to assist workers complaining about unequal pay. It also reminded gender equality delegates of their mission to prevent conflicts inside companies and to refer pay inequality problems to the Labour and Mines Inspectorate.

¹⁵² Website: <https://cet.lu/wp-content/uploads/2020/04/Rapport-activites-2019.pdf>. See pp. 37 and 39 respectively.

¹⁵³ Memorial A No. 837 of 13 December 2019. Website: <http://data.legilux.public.lu/file/eli-etat-leg-rgd-2019-12-04-a837-jo-fr-pdf.pdf>.

11.9 Other relevant bodies

The Grand-Ducal Regulation of 17 September 2017 amended the Grand-Ducal Regulation of 5 March 2014 laying down the terms of the designation, rights and duties of the gender equality delegates in the ministerial departments and administrations.¹⁵⁴ It refocused the main missions of the gender equality delegates on the organisation of the work, training and professional development. The Minister for Equal Treatment has been designated as their special interlocutor. On 1 December 2017, 116 gender equality delegates were appointed to the civil service, 89 women and 27 men.¹⁵⁵ A plenary meeting of all the delegates was organised on 14 December 2017 under the auspices of the Ministry for Equal Treatment.

According to Article L. 414-15 LC, each staff delegation in private companies has to designate a gender equality delegate, who has to defend equality between men and women by exercising precise missions prescribed by law. Therefore, he/she benefits from a specific legal status.

11.10 Evaluation of implementation

The main issue concerns the current lack of case law. In its annual activity report for 2018, the CET requested a study on the reasons for this situation and asked the Government to set up a network of lawyers specialised in anti-discrimination matters. No such study has, however, been conducted so far.

11.11 Remaining issues

Another issue concerns the nature of the 'decisions' of the Equality body, the Centre for Equal Treatment (CET). It has currently no power to make decisions. Given the lack of case law, one of the solutions could perhaps be the change of the authority of the CET from a non-binding opinion to binding decisions. However, it is not certain whether that would fit into the Luxembourg legal system.

¹⁵⁴ Memorial A No. 876 of 3 October 2017. Website: <http://legilux.public.lu/eli/etat/leg/rgd/2017/09/17/a876/jo>.

¹⁵⁵ Annual Activity Report 2017 by the Ministry for Equal Opportunities (MEGA), p. 14.

12 Overall assessment

Luxembourg implemented the gender equality directives and Treaty provisions and its legislation is consistent with European law. Recent reforms have also improved the work-life balance of working parents.

The following transposition problems were mentioned in this report:

1. Prohibition of dismissal in case of pregnancy (section 5.2.8).
The scope of the prohibition of dismissal in case of pregnancy set out in Article L. 337-1(1) LC did not include the traineeship contract (*contrat d'initiation à l'emploi*), which is an active employment policy measure offering jobseekers theoretical and practical training in companies. The Constitutional Court by decision of 14 December 2018, declared this Article inconsistent with Article 10a of the Constitution. Article L. 337-1(1) LC has not been amended since then.
2. Prohibition of dismissal in case of paternity leave (section 5.6.2).
Contrary to what is provided in Article 12 of Directive 2019/1158, the Luxembourg legislation does not protect the beneficiaries of paternity leave from dismissal.
3. Social protection for spouses or life-partners, who participate in the activities of self-employed workers (section 8.1.4).
According to Article 7 of Directive 2010/41/EU, spouses and life-partners, who habitually participate in the activities of self-employed workers can benefit in Luxembourg from social protection. However, there is a difference of treatment between spouses and life-partners, on the one hand, and employees, on the other hand, regarding the ceiling of the contributions and, as a consequence, the pension rights. The applicable legislation also provides for opt-outs.
4. Standards of equality bodies (section 11.7).
Luxembourg has no transposition problems in respect of equality bodies. However, by implementing the EC Recommendation of 22 June 2018 on standards of equality bodies [C(2018) 3850 final], it could improve the competencies of the CET, especially regarding assistance to victims, and its independence and effectiveness.
5. Conditions for access to parental leave (section 5.5.23).
In February 2020, the Court of Cassation submitted a preliminary ruling to the ECJ on this topic in relation to Directive 1996/34/EC. The result of the preliminary ruling will be of great importance for Luxembourg, especially regarding the rights of the frontier workers (cross-border workers).¹⁵⁶

There seems to continue to be a gap between the laws and their implementation. Successive Governments have tried, through multi-annual action plans on equality between women and men, to bridge the gap. Positive action is one of the main instruments used by the Ministry for Gender Equality, but it remains of a voluntary nature.

Nevertheless, implementation of the principle of equal treatment between women and men remains a 'black box'. On the one hand, there are no comprehensive studies, for example, on employers' compliance with the principle of equal treatment. However, gender equality is gradually becoming a priority in the field of public research. For example, the MEGA commissioned studies on the fight against gender stereotypes in theory and practice from Luxembourg University and the Luxembourg National Research Fund supports 'Women in Science'.¹⁵⁷ Furthermore, a sociologist at the Luxembourg Institute for Socio-Economic Research (LISER), Carole Blond-Hanten, won the 2020 FNR Award in the category of

¹⁵⁶ ECJ caselaw C-129/20.

¹⁵⁷ Website: <https://www.fnr.lu/>.

'outstanding promotion of science to the public' for the board game she developed to raise awareness of gender stereotypes in society. In one year, she visited around 40 institutions and presented her game to more than 500 children, young people and adults.¹⁵⁸

On the other hand, there is currently a lack of case law. Since November 2019, there are new online databases on the case law of the judicial courts regarding criminal law, labour law, social security matters, family affairs etc.¹⁵⁹ Previously, only case law from the Constitutional Court, the Court of Cassation and the administrative courts was available online. It is now possible to affirm that there are few cases on gender equality. Most of the cases concern either criminal matters (physical violence, stalking, breach of privacy etc.) or labour disputes on protection of pregnant women or parental leave issues. The reasons for the lack of case law on gender equality have not yet been studied. The Centre for Equal Treatment (CET) seems to imply that it is partly due to a lack of lawyers specialised in anti-discrimination matters.

2019 was an intermediate year. The adoption of a priority objective of 'equality between women and men' by the second 'Gambia' coalition Government after the general elections of October 2018 was marked by the change of the name of the ministry and the arrival of a new minister. It coincided with the preparation of the fourth Gender Equality Plan (for 2019-2022). The consultations with stakeholders and the general public, organised by MEGA throughout the year, revived important issues, which had faded into the background. Thus, 2019 may also be perceived as a fresh start for the promotion of equality between women and men.

When the minister introduced the new National Action Plan for Gender Equality, she characterised 2020 as 'a key year'. Indeed, 2020 appears to be a key year for two main reasons. On the one hand, the launch of a new national action plan based on 7 priorities and 48 guidelines marks the start of a new era (section 3.1.4), the positive action programme has already been modernised (section 3.6.1), and equal pay and domestic violence are of the highest importance. On the other hand, new challenges are emerging with the COVID-19 health crisis, such as the enormous extension of telework (section 5.12) and the extensive use of different forms of care leave (section 5.8). First results are documented in the annual 'Quality of Work Index' report (section 5.1.1), but the long-term impact of these measures on gender equality will be revealed in the coming years.

¹⁵⁸ Website: <https://www.fnr.lu/research-with-impact-fnr-highlight/play-the-gg/>.

¹⁵⁹ The JUDOC database contains decision sheets, which reproduce extracts of decisions of legal interest.

Website: <https://justice.public.lu/fr/jurisprudence/jurisprudence-judoc.html>.

The *Juridictions Judiciaires* database publishes important decisions in full. Website:

<https://justice.public.lu/fr/jurisprudence/juridictions-judiciaires.html>.

The *Conseil supérieur de la sécurité sociale* database has started publishing important decisions on social security matters. Website: <https://justice.public.lu/fr/jurisprudence/conseil-superieur-securite-sociale.html>.

Several case law bulletins also publish summaries of decisions. Website: <https://justice.public.lu/fr/jurisprudence/resumes-de-jurisprudence.html>.

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