

Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity

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Executive summary

Implementation of Employment Directive 2000/78/EC

The Employment Directive was transposed into the Luxembourg Law of 28 November 2006 on equal treatment (the "Law"). It introduced the notions of direct and indirect discrimination, as well as that of harassment with respect to sexual orientation into Luxembourg law. The Law amends the Labour and Criminal Codes, following very closely the provisions of the Employment Directive. By transposing both the Employment Directive and the Racial Equality Directive in the same piece of legislation, the Law broadens the Employment Directive's material scope of application.

Freedom of movement

Directive 2004/38/EC was effectively transposed by the Law of 29 August 2008 on free movement and immigration. The new immigration law replaces the Temporary Regulation in effect prior to its entry into force. The new law provides specifics on several immigration issues, especially in determining who can be considered a family member. An EU Member State citizen as well as a third-country national can, under certain conditions, be accompanied or have their family members come to Luxembourg. The new law also provides that the spouse can join the resident in Luxembourg, whether that resident is an EU Member State citizen or third-country national.

Asylum and subsidiary protection

Luxembourg's law of 5 May 2006 on the right to asylum and complementary forms of protection, as amended (the 'Asylum Law'), has been modified and integrated into the immigration law. It still provides for the granting of refugee status to any third-country national or stateless person.⁴ Under the Asylum Law, persecution on the grounds of sexual orientation may in theory lead Luxembourg to grant asylum. Moreover, the Luxembourg legal system appears to accept LGBT persons as family members in the context of asylum and/or subsidiary protection because the Asylum Law defines as a family member the unmarried partner of the beneficiary of international protection when that partner is engaged in a shared community of life (*vie commune*) recognized by the country of origin of one of the partners. But the law's modifications still do not allow for

the fact that some countries do not recognize any civil union or registered partnership, thus the couple would not be in a position to substantiate any long-standing officially recognized relationship. No relevant changes concerning the LGBT community are to be mentioned.

Family reunification

Directive [2003/86/EC](#) on the right to family reunification provides that the host State can authorise the entry and stay of a third-country national who is bound to a sponsor by a registered partnership.⁵ This means that couples of which one partner is a third-country national, but who have registered their partnership abroad in France, German or especially outside of the EU, for example, can now receive a Luxembourg residence permit. However, the new immigration law does not consider as family members partners who are not officially registered..

Freedom of assembly

Article 25 of the Luxembourg Constitution guarantees the right to peaceful, unarmed assembly that respects the laws governing the exercise of that right without being subject to prior authorisation. However, the constitutional provision does not apply to outdoor, political, religious or other gatherings. Those gatherings remain entirely subject to the laws and regulations adopted under the police powers of the State.⁷ The Luxembourg LGBT community has had no problems obtaining the necessary governmental authorisations for those uses of public space.

Hate speech and criminal law

Luxembourg's Criminal Code provides for sanctions for inciting discrimination, hate or violence against a natural or legal person or a group or community of persons, on the basis of their sexual orientation. The law neither specifically includes nor excludes homophobic hate crimes, thus the issue would be left to the court's interpretation.

Transgender issues

Transgender issues are not specifically mentioned under Luxembourg law. If they are interpreted to be included in the Employment Directive's broad definition of sexual orientation as implemented in Luxembourg legislation, they would effectively be dealt

with. If not, then only the criminal law provisions would apply, as transgender individuals would be considered as belonging to a particular social group. There are no legal provisions specifically addressing the change of name or sex with the Luxembourg Civil Status and Population Administration (*Etat civil et population du Luxembourg*) following an individual's gender reassignment surgery. Also, 'forced divorce' for couples when one spouse has undergone gender reassignment surgery is currently a contested issue.

Miscellaneous

The opening of civil marriage to homosexual couples is now considered a priority in the coalition government's 2009-2014 programme created in 07.2009. According to numerous appearances in the media by the Justice Minister, a law allowing gay marriage should be sent to the Chamber of Deputies in the next few months. Other anticipated changes include allowing simple adoption by same-sex couples, as well as adoption by one partner of the other spouse's child should become possible through amendment to the adoption law. As yet, however, not specific legislation has been proposed and there has been no indication as to when such amending legislation will be proposed

Good practices

While some work environments are adopting practices that include the LGBT community, the extent to which those practices will actually be carried out remains to be seen and any improvements appear to be isolated cases for the time being.

A. Implementation of Employment Directive 2000/78/EC

The Employment Directive was transposed into the Luxembourg Law of 28 November 2006 on equal treatment (the “Law”).⁸ The Law’s definitions of direct and indirect discrimination includes all of the elements in the definitions of the concept given in the Employment Directive, in particular less favourable treatment because of an individual’s sexual orientation as grounds for a finding of direct or indirect discrimination. Under the Law, harassment related to an individual’s sexual orientation that has the effect of undermining the dignity of the individual and creates an intimidating, hostile, degrading, humiliating or offensive environment, is also considered a form of discrimination. Moreover, any behaviour that consists of ordering or enjoining any other person to discriminate against someone else on the grounds of sexual orientation is itself considered discrimination.

The notions of direct and indirect discrimination, as well as that of harassment in a sense broader than that traditionally used in the sexual harassment context were not integrated into Luxembourg law prior to the passage of the Law.⁹

Retaliation for any form of protest against discriminatory treatment on the grounds of sexual orientation, including the bringing of legal action to enforce equal treatment or any testimony on unequal treatment related to sexual orientation, is prohibited. In particular, any firing of personnel in relation to the above is null and void under the Labour Code.

Likewise, any provision in a contract or agreement that contravenes the equal treatment principle as defined in the Law is deemed null and void. This includes provisions in internal company, non-profit association, self-employed individual, worker or employee organisation regulations.

The Law amends the Labour Code by providing it with a new Title V entitled ‘Equal Treatment in Employment and Occupation’ that includes the definitions of direct and indirect discrimination based on sexual discrimination, as well as the provisions prohibiting harassment or the ordering of someone to discriminate based on sexual orientation. The provisions apply to all salaried employees as defined in Title II, Book I, of the Labour Code in all areas of employment set forth in the Employment Directive, and include the defence of rights provisions, with specific provisions applicable to unions. The appropriate Labour and Mine Inspection Authority (*Inspection du Travail et des Mines*) is charged with the application of the Law’s provisions, including those related to the exceptions, dismissals and labour contract terminations.

⁸ Luxembourg/Loi du 28 novembre 2006 sur l’égalité de traitement (28.11.2006).

⁹ Government Commission for Foreigners (2005) *Discrimination at work, Summarised version*, pp. 6-7, available at <http://www.cge.etat.lu/> (5 February 2007).

The Labour Code amendments also contain the exception to the equal treatment principle whereby a difference of treatment based on sexual orientation will not constitute discrimination when, for reasons of the exercise of a professional activity, or related conditions, the characteristic in question is a genuine and determining professional requirement, and to the extent that the objective is legitimate, and the necessity of the requirement proportional to the degree in which the particular characteristic is necessary to the profession.

The Law amends the Criminal Code to include the definition of discrimination on the basis of sexual orientation as a distinction made between natural persons, and any distinction made between legal persons, groups or communities of persons on the basis of sexual orientation. The Law also includes sanctions of imprisonment of eight (8) days to two (2) years, and a fine of 251 EUR to 25,000 EUR, for any discrimination against a natural or legal person, or a group or community of persons, when that discrimination affects a person's access to employment, vocational training, employment conditions, and affiliation with or membership in a worker or employers organisation.

There has been little implementation of the Law thus there is no case law issued from, or any currently before, the Luxembourg courts as a result of the Law at this time. The request to the Appeals Court Documentation Centre revealed no cases.¹⁰

There are two main gaps in the Law. First, the Law does not specify the period for which the judicial/administrative procedures for the enforcement of obligations under the Directive 'are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them'. The Employment Directive provides that such period shall continue 'even after the relationship in which the discrimination is alleged to have occurred has ended'.¹¹ And second, the Law does not include specific measures for engaging in social dialogue and dialogue with non-governmental organizations.

The complaints procedure includes two possible means of resolving the dispute. The first is through a friendly settlement procedure that includes all means of alternative dispute resolution, and the second is through litigation.

The means of alternative dispute resolution include use of the Equal Treatment Centre, assignment of a public mediator, hiring a lawyer to mediate between the parties and

¹⁰ Letter of 8 February 2010, requesting a case law search using the following search terms: 'discrimination based on sexual orientation', 'homosexual', 'homosexuality', 'sexual orientation', 'sexuality', 'immigration and homosexuality', 'immigration and sexual orientation', 'asylum and homosexuality', 'asylum and sexual orientation', 'transgender', 'transsexual person' and 'transsexuality'.

¹¹ Under the Luxembourg Labour Code, the statute of limitations for bringing a court action for unfair employment contract termination is three months, unless the employee has requested a written explanation of the termination from the employer within one month of the duly received termination notice. If the employee requests the explanation within one month, the statute of limitations is one year. Luxembourg/*Code du Travail* – 2008, Art. L- 124-11(2) (05.02.2008). For all other matters, the common law statute of limitations of 30 years would apply.

notifying the Labour and Mine Inspection Authority. Alternatively, a party could take legal action.

The use of litigation may take the form of filing a criminal complaint, with or without acting jointly with the public prosecutor, and filing separate, purely civil or administrative actions. The civil and administrative proceedings protect against retaliation by allowing for the annulment of any action that discriminates against a person on the basis of sexual orientation, particularly dismissals. Those provisions also allow for the annulment of discriminatory clauses in labour contracts, collective agreements, internal company regulations, non-profit or for-profit association articles of association, articles for self-employed workers and those for worker and employer organisations.

The remedies available when litigation is used include the ability to request a reinstatement to one's position in the event of a dismissal, and file an action for damages and interest.

When an employment contract has been unfairly terminated, the worker or private employee to whom the appropriate Labour Code provisions apply can, request annulment of the dismissal and an order for the contract's continuation, or if necessary, reinstatement under the applicable Labour Code provisions. This must be done within 15 days of notice of the termination, and by direct petition to the president of the labour tribunal deciding on summary matters provided that the parties are duly convened. The labour tribunal's order is provisionally enforceable and, within 40 days of notice being given by the court clerk, may be appealed by direct petition to the magistrate presiding the appeals court chamber sitting in labour law appeal matters. When the parties are duly convened, the matter is decided in emergency proceedings.

In Luxembourg, the Employment Directive 2000/78/EC regarding discrimination on the grounds of sexual orientation was transposed into the same domestic law as the Racial Equality Directive 2000/43/EC, thus the Law of 28 November 2006 on equal treatment deals with a range of areas of application, including employment, social welfare benefits, social security, health care, education, access to and provision of public goods and services, including those related to housing. However, as authorized under the Employment Directive, the Luxembourg Law provides that discrimination with respect to all social security payments and benefits provided by public or assimilated entities is not within the Law's scope as regards the elements listed in the definition of discrimination (religion or belief, physical or mental disability, age, sexual orientation, real or assumed belonging or non-belonging (*de l'appartenance ou la non appartenance, vraie ou supposée*) to a particular race or ethnicity), but rather only as regards discrimination based on race or ethnicity. Nonetheless, the transposition of the two directives into a single law has operated to broaden the field of application of the non-discrimination provisions in the Employment Directive.

The Law also provides for the establishment of a *Centre pour l'égalité de traitement* [Centre for Equal Treatment] (CET), which began to set up the elements necessary to its operation at the end of 2007. The CET's purpose is to promote, analyse and supervise equal treatment of all persons without discrimination on the basis of race, ethnic origin,

sex, religion or beliefs, disability and age. The text of the Law does not specifically refer to the CET's mission as it relates to sexual orientation, but rather the broader rubric of discrimination based on sex that may be interpreted to include discrimination based on sexual orientation. The CET is empowered to publish reports, opinions, recommendations and carry out studies regarding discrimination issues, as well as any other form of information and documentation useful to its mission. The CET can also assist persons who consider themselves victims of discrimination as defined in the amended Labour Code, and provide those individuals with counselling and information services on their individual rights, the applicable legislation and case law as well as the means available to enforce their rights. The CET's members can request any information or documentation necessary to accomplish their mission with the exception of that subject to medical or other professional obligations of confidentiality. The CET's members are themselves subject to a confidentiality obligation, but that obligation does not prohibit communication with legal authorities that would allow the CET to assist an individual in building a case for discrimination. When the CET begins to exercise its functions, it will do so without actually intervening in legal proceedings. Thus, another weakness in the Law is that it does not provide for the CET to intervene directly in legal proceedings against discriminatory action, or unfair treatment, based on sexual orientation. And, in its 2009 annual report, the CET explicitly regrets that its mission provides it with no binding powers on institutions or private persons that do not wish to collaborate with it. The CET will not request the power to go before the courts, but clearly states that it lacks means of persuasion and authority vis-à-vis third parties sufficient to make those third parties feel bound to comply with its demands in a discriminatory situation.¹²

In 2009, the CET registered 7 cases of discrimination based on sexual orientation. Procedural errors or infractions too general under the law with respect to discriminating parties often take priority over arguments based on homophobic behavior. In the future, the LGBT association CIGALE will make an effort to establish more precise statistics allowing it to access more faire and trustworthy numbers. The website search of STATEC's site, Luxembourg's Central Service for Statistics and Economic Studies revealed no information on the CET's effectiveness or discrimination based on sexual orientation. The information on actions adjudicated is presented in the aggregate and classified solely by adjudicating body and type of action (e.g., civil, commercial or criminal). The request to the Labour and Mines Inspection Authority (labour inspectorate) regarding discrimination based on sexual orientation has thus far received no response.¹³ Neither is there any case law available for the same reason as the request to the Court of Appeals Documentation Centre revealed.¹⁴

¹² CET (2009) 2009 Annual Report, at p. 35, available in French at <http://www.cet.lu/en/Home-Page> (17.02.2010). This is the CET's first annual report. The CET's website is in Luxembourgish, French, German, English and Portuguese.

¹³ Search of website (www.statec.lu) of 17.02.2010. Letter of 09.02.2009 to *Inspection du Travail et des Mines*.

¹⁴ Letter of 8 February 2010, requesting a case law search using the following search terms: 'discrimination based on sexual orientation', 'homosexual', 'homosexuality', 'sexual orientation', 'sexuality', 'immigration and homosexuality', 'immigration and sexual

The Law gives nationally-recognized non-profit associations the object of which is to combat discrimination as defined by the Law, who obtained their legal personality at least five (5) years prior to the date of the facts giving rise to the discrimination allegation, and have Ministry of Justice accreditation,¹⁵ the power to exercise the rights of a victim of discrimination. This includes the exercise of victims' rights with respect to the facts constituting a direct or indirect violation of the collective rights the association is statutorily empowered to defend, even when that association has no material or moral interest in those rights. However, if the violation is committed against persons the rights of whom are to be considered individually (e.g., not under a collective bargaining agreement), the non-profit association can only exercise those rights through the main legal channels when the affected persons expressly and in writing declare their non-opposition to that exercise of their rights. Until now, no LGBT association has requested the ministerial accreditation allowing it to bring discrimination cases before a court.¹⁶

Both parties share the burden of proof in civil proceedings, When a person directly or indirectly through a duly competent non-profit association or union establishes facts permitting the presumption of an act of direct or indirect discrimination, thus establishing a *prima facie* case of discrimination, it is incumbent upon the defending party to prove that there has been no breach of the principle of equal treatment. This shifting of the burden of proof does not apply in criminal cases, or those in which it is for the court or competent body to investigate the facts of the case. While this may appear to provide an incentive for a party to chose to file a civil rather than a criminal suit, in a criminal suit the public prosecutor has more means at his or her disposal to introduce evidence than would an individual filing a civil suit.

Moreover, the Law's Labour Code amendments provide for legal representation and intervention by union organisations when the harmful action is carried out by a person associated through a collective bargaining contract or agreement concluded under the relevant Labour Code provisions, when the settlement of that litigation would serve the collective interest of its members, unless the person filing the action duly expresses written disagreement. The union organisations may carry out such representation and intervention without proof of any material or moral interest in the matter. Thus, in the specific context of upholding collective rights under a collective bargaining agreement, the aggrieved employee's consent to the union organisation's action is presumed, but that consent can be withdrawn by the aggrieved employee's expresses written disagreement to the union organization's action.

At this time, there is no available statistical data on the number of civil society organisations that can actually engage on behalf or in support of complainants. Neither is there any data on how often those organisations actually make use of that possibility. Our website search of STATEC's website, Luxembourg's Central Service for Statistics

orientation', 'asylum and homosexuality', 'asylum and sexual orientation', 'transgender', 'transsexual person' and 'transsexuality'.

¹⁵ Once obtained, this accreditation is valid for all legitimate interventions the association undertakes.

¹⁶ CIGALE representative communication of 13.02.2010.

and Economic Studies revealed no such statistical data.¹⁷ However, we are aware of one association, the Association for Support of Immigrant Employees (*Association de Soutien aux Travailleurs Immigrés*), or ASTI, that has requested permission from the Ministry of Justice to file an action on behalf of a homosexual employee. To our knowledge, the Ministry has not yet ruled on the request.

According to our information, there is one civil society organisation that provides psychological and support services primarily to the LGBT population but the purpose of that organization is not to seek government certification to engage on behalf or in support of complainants. The organisation, CIGALE, the Centre for Gay and Lesbian Information (*Centre d'information gay et lesbien*) was originally created to deal with issues associated with “coming out”. Following the formation of a working group to fight discrimination, made up of public actors such as Infant handicap, the Government Commission for Foreigners, the Red Cross Refugee Service, and some lawyers, among others, CIGALE has become increasingly active in the promotion and sensitisation aspect of the equal treatment principle as it relates to sexual orientation. However, there remains very little statistical data regarding this topic for two interconnected reasons. First, sexual orientation remains a taboo subject, thus individuals wishing to file a complaint against perceived discrimination will often not do so on the grounds of sexual orientation because they do not want their sexual orientation to be made public; they deem that type of complaint mechanism as making them too visible. Rather, they will file a complaint on some other grounds that can usually be found in the allegedly discriminatory act.

Additionally, as part of Luxembourg’s awareness-raising programme in the fight against discrimination, and in preparation for Luxembourg’s transposition into national law of the European Anti-discrimination Directives, Luxembourg’s Government Commission for Foreigners published a 2005 report on Discrimination at Work. The report contains a section dedicated exclusively to discrimination based on sexual orientation, but that section contains very little statistical information on the topic. The report cites an ESS (European Social Survey) finding that in Luxembourg, 66 inhabitants out of 1552, or 4.3%, stated they were part of a group that suffered from discrimination. Of that group, five (5) individuals stated that the discrimination they perceived was based on sexual orientation. The report concludes that there are few reported cases of discrimination based on sexual discrimination, and attributes that to (1) the low number of ‘minority sexual orientation’ individuals within the Luxembourg population, and (2) the fact that the practice remains ‘taboo’, and is thus less openly discussed.¹⁸

On 1 June 2009, the law on the hosting and integration of foreigners to the Grand Duchy of Luxembourg entered into force. Among other things, the law promotes the fight against discrimination. It expressly includes preventing and combating the denial of equal treatment to individuals on the basis of sexual orientation in its definition of the

¹⁷ Search of website (www.statec.lu) of 17.02.2010.

¹⁸ Government Commission for Foreigners (2005) *Discrimination at work, Summarised version*, pp. 8, 70, available at <http://www.cge.etat.lu/> (5 February 2007).

fight against discrimination. This indicates a strong policy in Luxembourg to include LGBT individuals, and particularly non-Luxembourg nationals that are members of the LGBT community. This position is consistent with the work done by CIGALE and what was then the Government Commission for Foreigners. Under the law, the Government Commission for Foreigners has become the *Office luxembourgeois de l'accueil et de l'intégration* [Luxembourg Office of Hosting and Integration] (OLAI), the mission of which includes the fight against all forms of discrimination. The OLAI will work in conjunction with local governments and civil society in the organisation of social assistance for foreigners and seekers of international protection who do not have the right to such assistance.²⁰

For the reasons cited above, there has been no case brought before a competent tribunal to date, and thus there is no case law or jurisprudence on the matter as revealed by the response to the request to the Appeals Court Documentation Centre.²¹ Neither are there any case statistics or complaints data. Our website search of and telephone call to STATEC, Luxembourg's Central Service for Statistics and Economic Studies revealed no relevant information. The information on actions adjudicated is presented in the aggregate and classified solely by adjudicating body and type of action (e.g., civil, commercial or criminal).²² The author is aware of only one out of court example.

²⁰ Luxembourg/*Loi du 16 décembre 2008 concernant l'accueil et l'intégration des étrangers au Grand-Duché de Luxembourg*, Mémorial A-N° 209, 24.12. 2008, at p. 3156.

²¹ Letter of 8 February 2010, requesting a case law search using the following search terms: 'discrimination based on sexual orientation', 'homosexual', 'homosexuality', 'sexual orientation', 'sexuality', 'immigration and homosexuality', 'immigration and sexual orientation', 'asylum and homosexuality', 'asylum and sexual orientation', 'transgender', 'transsexual person' and 'transsexuality'.

²² Search of website (www.statec.lu) of 17.02.2010.

B. Freedom of movement

Directive 2004/38/EC was effectively transposed by the Law of 29 August 2008 on free movement and immigration.²⁵ The new immigration law replaces the Temporary Regulation in effect prior to its entry into force.²⁶ The new law provides specifics on several immigration issues, especially in determining who can be considered a family member. An EU Member State citizen as well as a third-country national can, under certain conditions, be accompanied or have their family members come to Luxembourg.

The new law also provides that the spouse can join the resident in Luxembourg, whether that resident is an EU Member State citizen or third-country national. The new law does not specify whether that spouse could also be a same-sex spouse. It remains to be seen whether the law would allow same-sex couples married in Belgium, the Netherlands or Spain, for example, and of which one spouse is a third-country national, take advantage of the law's family reunification provision. In the past, those couples had to go through the courts to have their marriage officially recognized so that the third-country national spouse could obtain a residence permit.

The new law also allows Luxembourg residents (EU Member State Citizen or third-country national) to be joined by their partners, whatever their nationality, if they have a registered partnership under the conditions set forth in Luxembourg's registered partnership law.²⁷ This is also why there is a pending amendment to the partnership law with following wording: 'Partners having registered their partnership in a foreign country can send a request to the general prosecutor's office for registration of their partnership in the civil status registry, provided that on the date of entering into the partnership abroad, both parties fulfill the conditions in Article 4'. Article 4 requires that 1) they be capable of entering into the partnership according to Articles 1123 and 1124 of the Civil Code (be legally capable of entering into such a contract) ; 2) that they not be bound by a marriage or other partnership ; 3) that they not be related to the degree prohibited by

²⁵ Luxembourg/Luxembourg/Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, *Mémorial A-N*° 138, 10 September 2008, at p. 2024, available in French only at <http://www.legilux.public.lu/leg/a/archives/2008/0138/a138.pdf#page=2> (06.07.2009).

²⁶ Luxembourg/Règlement grand ducal du 28 mars 1972 relatif aux conditions d'entrée et de séjour de certaines catégories d'étrangers faisant l'objet de conventions internationales (RGD 28.03.1972), as amended and repealed by the Law of 29 August 2008 on free movement and immigration

²⁷ Luxembourg/Loi du 9 juillet relative aux effets légaux de certains partenariats (09.07.2004), *Mémorial A-N*° 143, 06.08.2004, Art 4.

the Civil Code ; and 4) that they reside legally in Luxembourg.²⁸ Here lawmakers went further in recognizing foreign partnerships than required by the European Directives.

The European Free Movement Directive provides that the host State should consider a registered partner as a family member if that State treats the partnership as an equivalent to marriage. While this condition is fulfilled by the Luxembourg immigration law, the law has no mechanisms to recognize unregistered long-term, stable partnerships, or partnerships not recognized in the country from which the foreign partner comes (*de facto* cohabitants).²⁹

The immigration ministry can authorise unregistered partners of EU Member State citizens to stay in Luxembourg if in their countries of origin those partners were dependent on or were a member of an EU citizens' households, or if the EU Member State citizens must, for serious health reasons, take care of their partners. The new immigration law, thus does not incorporate the Directive's wording aimed at partners with whom sponsors are in a 'duly attested stable long-term relationship'.³⁰

There is virtually no quantitative or administrative data available to demonstrate the impact/social reality of relevant legislation for LGBT persons because Luxembourg's Law of 2 August 2002 on the protection of personal data, as amended, specifies that the 'processing of information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs and trade union affiliation, as well as data concerning health and sexual life, including genetic databases, are prohibited'. This was the response from the Ministry of Foreign Affairs and Immigration (MAE) to the request for statistics. While the MAE stated having received family reunification requests from LGBT partners, the data was too sensitive to be used to generate statistics.³² However, this argument appears a bit outdated as in its Third Report on Luxembourg ECRI states that Luxembourg's Personal Data Authority the *Commission Nationale pour la Protection des Données* [National Data Protection Commission] (CNPD) confirmed to it that the law authorised the collection of sensitive data. Such data collection simply required obtaining prior authorisation from the CNPD, and demonstrating the legitimacy and necessity thereof. In July of 2007, the data protection law was modified to allow the processing of sensitive data, not including genetic data, with only prior notification to the CNPD. This change in

²⁸ Luxembourg/*Projet de loi 5904 portant modification de la loi du 9 juillet 2004 relative aux effets légaux de certains partenariats* (15.07.2008).

²⁹ See also text on family member written by Rosa Lëtzebuerg president François Diderrich, available at: http://www.gay.lu/files/Definition_membre_famille_loi_immigration_5802.pdf (18.02.2009), and published in *La pie qui chante*, 12.2008, at pp. 2-4 (<http://www.gay.lu/?q=node/65>).

³⁰ Luxembourg/*Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration*, *Mémorial A-N° 138*, 10 September 2008, Art. 12, available in French only at <http://www.legilux.public.lu/leg/a/archives/2008/0138/a138.pdf#page=2> (06.07.2009).

³² Government Commission for Foreigners (2005) *Discrimination at work, Summarised version*, p.4, available at <http://www.cge.etat.lu/> (5 February 2007). Letter of 08.02.2010, and MAE response of 11.02.2010.

the data protection law was simply a procedural simplification, the *de facto* effect of which is to render sensitive data collection easier, including data on sexual orientation (*vie sexuelle*).³³

Our website search of STATEC's site, Luxembourg's Central Service for Statistics and Economic Studies revealed no such data.³⁴

There is no case law on the rights of LGBT partners in the context of the freedom of movement at this time as revealed by the response to the request to the Appeals Court Documentation Centre.³⁵

³³ ENAR (2008) Shadow Report 2007: Racism in the Grand Duchy of Luxembourg, at p. 3, available at <http://cms.horus.be/files/99935/MediaArchive/pdf/en/Luxembourg%20-%20SR%202007.pdf> (18.03.2009); Luxembourg/*Loi du 2 août 2002 relative à la protection des personnes à l'égard du traitement des données à caractère personnel*, Mémorial A-N° 91, (13.08.2002), at p. 1836, Article 6 ; ECRI (2006) Third Report on Luxembourg, at p. 23, English language version available at http://www.coe.int/t/dgh/monitoring/ecri/Country-by-country/Luxembourg/Luxembourg_CBC_en.asp (18.03.2009); Luxembourg/*Loi du 2 août 2002 relative à la protection des personnes à l'égard du traitement des données à caractère personnel*, Mémorial A-N° 91, (13.08.2002), at p. 1836, as amended, Article 6(2)(g); and, conversation of 23 March 2009 with CNPD jurist.

³⁴ Search of website (www.statec.lu) of 17.02.2010.

³⁵ Letter of 8 February 2010, requesting a case law search using the following search terms: 'discrimination based on sexual orientation', 'homosexual', 'homosexuality', 'sexual orientation', 'sexuality', 'immigration and homosexuality', 'immigration and sexual orientation', 'asylum and homosexuality', 'asylum and sexual orientation', 'transgender', 'transsexual person' and 'transsexuality'..

C. Asylum and subsidiary protection

Luxembourg's law of 5 May 2006 on the right to asylum and complementary forms of protection, as amended (the 'Asylum Law'), has been modified and integrated into the immigration law.³⁶ It still provides for the granting of refugee status to any third-country national or stateless person. A refugee is defined as any national from a third country that, because he or she rightfully fears persecution based on his or her race, religion, nationality, political opinions or belonging to a particular social group, finds him or herself outside of the country of which he or she is a citizen, and cannot or, because of that fear will not request protection from that country; or, any stateless person who, for the above-mentioned reasons finds him or herself outside of the country of his or her habitual residence, and cannot or, because of that fear, will not return to that country and who is not otherwise excluded from refugee status. The Asylum Law further provides for the granting of subsidiary protection, and Luxembourg's recognition of that legal status, provided certain conditions are met, to any third-country national or stateless person who is unable to obtain refugee status but is subject to serious human rights violations in his home country, or that of habitual residence for stateless persons. The human rights violations must be in the form of a death penalty or execution; torture or degrading or inhumane punishment or treatment; or, serious and individual threats to the person or life of a civilian due to indiscriminate violence in the event of a domestic or international armed conflict. Both refugee status and the status conferred by subsidiary protection are also referred to as international protection.³⁸ In order to be granted refugee status in Luxembourg, one must be in extreme danger and according to the case cited below, must not be able to flee to another region of one's own country. Thus, the mere fact that one is homosexual and that homosexuality is a criminal offence in one's own country would not be sufficient to protect one from deportation.

In principle, we see no basis for Luxembourg law to deny asylum and/or subsidiary protection to any LGBT persons persecuted for reasons of sexual orientation. However, we are aware of only one case on the subject involving a Nigerian homosexual male who was denied international protection in Luxembourg. In 2006, the man requested international protection in Luxembourg, after having been brutally beaten and imprisoned by his family when he declared his homosexuality. The family had been trying to get him to marry a girl from his rural community. At that time, he was in a relationship with a foreigner and did not wish to marry the girl. The man with whom he had entered into a relationship arranged for the Nigerian man to leave Nigeria and come to Europe. The

³⁶ Luxembourg/*Loi du 5 mai 2006 relative au droit d'asile et à des formes complémentaires de protection*, *Mémorial A-N° 78*, 9 May 2006, at p. 1402, available in French only at <http://www.legilux.public.lu/leg/a/archives/2006/0078/a078.pdf#page=2> (07.07.2009), and Luxembourg/*Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration*, *Mémorial A-N° 138*, 10 September 2008, at p. 2024, available in French only at <http://www.legilux.public.lu/leg/a/archives/2008/0138/a138.pdf#page=2> (06.07.2009)

³⁸ Luxembourg/*Loi du 5 mai relative au droit d'asile et à des formes complémentaires de protection* (05.05.2006), as last amended on 17.07.2007.

Nigerian man then requested asylum or subsidiary protection in Luxembourg. The administrative tribunal ruled that he did not prove persecution other than by his own family, and that while Nigerian law forbids and criminally sanctions homosexuality, the petitioner did not prove that he was at risk of any of the qualifying human rights violations by the Nigerian government such that he could be granted asylum or subsidiary protection under Luxembourg law. The decision further states that the individual did not fear persecution in the entire country and could therefore have fled his residence to live free from persecution in another part of the country.³⁹

There are no statistics, and neither is there any case law on the topic at this time. Our website search of STATEC's site, Luxembourg's Central Service for Statistics and Economic Studies revealed no such data. The STATEC website only lists requests for asylum by the requesting individual's country of origin.⁴⁰ The MAE had no statistics either.⁴¹ Further, the request to the Appeals Court Documentation Centre revealed no case law.⁴²

Under the applicable legislation, the Luxembourg legal system appears to accept LGBT persons as family members in the context of asylum and/or subsidiary protection because the Asylum Law defines as a family member the unmarried partner of the beneficiary of international protection when that partner is engaged in a shared community of life (*vie commune*) recognized by the country of origin of one of the partners. The Asylum Law further recognizes as family members the children of that couple provided that the children are dependent on one of the partners and unmarried, regardless of whether the children were born out of wedlock or adopted. However, in this context as in the freedom of movement context, the legislation as it is drafted does not allow for the fact that some countries do not recognize any civil union or registered partnership, thus the couple would not be in a position to substantiate any long-standing officially recognized relationship. The LGBT community would like to see the definition of "family member" under the Asylum Law broadened to include individuals that come from countries that do not recognize any civil union or registered partnership. The existing situation often leads to the eventual break-up of the couple because in some cases the non-Luxembourg national will stay in Luxembourg without receiving any official permission. The couple will thus not go out much for fear of being obligated to present their papers, and their life together does not receive the benefits provided to other couples.

According to some sources that provided information which we cannot independently confirm, there appears to be an unofficial practice in Luxembourg of placing in detention an unmarried male that requests asylum on grounds of persecution in his home country due to his sexual orientation. The same practice would not hold true for a female.

³⁹ Luxembourg/Tribunal administratif du Grand-Duché de Luxembourg/22023 (03.05.2007).

⁴⁰ Search of website (www.statec.lu) of 17.02.2010.

⁴¹ Letter of 08.02.2010, and MAE response of 11.02.2010..

⁴² Letter of 8 February 2010, requesting a case law search using the following search terms: 'discrimination based on sexual orientation', 'homosexual', 'homosexuality', 'sexual orientation', 'sexuality', 'immigration and homosexuality', 'immigration and sexual orientation', 'asylum and homosexuality', 'asylum and sexual orientation', 'transgender', 'transsexual person' and 'transsexuality'..

Apparently, the individual would be told to return to his home country, or that the processing of his asylum request would take three (3) months. Should the individual decide to pursue his request for asylum, the Luxembourg government would then take that male into detention for the three-month period.

There are no statistics, and neither is there any case law on the topic. Our search of the website of STATEC', Luxembourg's Central Service for Statistics and Economic Studies, revealed no such data. The STATEC website only lists requests for asylum by the requesting individual's country of origin.⁴³ The MAE cannot provide statistics either. In the MAE's response to a request for statistics, it asserted that Luxembourg's Law of 2 August 2002 on the protection of personal data, as amended, specifies that the 'processing of information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs and trade union affiliation, as well as data concerning health and sexual life, including genetic databases, are prohibited'. While the MAE stated having received asylum requests from LGBT individuals based on persecution due to their sexual orientation, the data was too sensitive to be used to generate statistics.⁴⁴

Further, the request to the Appeals Court Documentation Centre revealed no case law.⁴⁶

To our knowledge there is no use of 'phallometry' or 'phallometric testing' in Luxembourg.

⁴³ Search of website (www.statec.lu) of 17.02.2010.

⁴⁴ Government Commission for Foreigners (2005) *Discrimination at work, Summarised version*, p.4, available at <http://www.cge.etat.lu/> (5 February 2007). Letter of 08.02.2010, and MAE response of 11.02.2010.

⁴⁶ Letter of 8 February 2010, requesting a case law search using the following search terms: 'discrimination based on sexual orientation', 'homosexual', 'homosexuality', 'sexual orientation', 'sexuality', 'immigration and homosexuality', 'immigration and sexual orientation', 'asylum and homosexuality', 'asylum and sexual orientation', 'transgender', 'transsexual person' and 'transsexuality'.

D. Family reunification

Directive [2003/86/EC](#) on the right to family reunification provides that the host State can authorise the entry and stay of a third-country national who is bound to a sponsor by a registered partnership.⁴⁷ Luxembourg's immigration law recognizes as a family member a spouse or registered partner.⁴⁸ This means that couples of which one partner is a third-country national, but who have registered their partnership abroad in France, German or especially outside of the EU, for example, can now receive a Luxembourg residence permit.

Because Luxembourg does not recognize gay marriages, the immigration law does not expressly provide for recognition of same-sex spouses through marriage. However, recent case law provides that a same-sex marriages legally entered into outside of Luxembourg would have the same legal effect as a Luxembourg registered partnership.⁴⁹

However, there is no legal mechanism for recognition of de facto cohabitants and the new immigration law does not consider as family members partners who are not officially registered. Thus, residence permits for partners coming from third countries are not automatically given. Furthermore, unregistered partners are treated differently depending on whether the partners they wish to join in Luxembourg are EU Member State citizens (even Luxembourgers) or another third-party national.⁵⁰

For unregistered partners of third-country national Luxembourg resident sponsors, Article 78 of the immigration law (covering personal reason residence permits, including independent permits for family members falling under family reunification) only partially facilitates the right of entry and stay for unregistered third-country national partners. In contrast, the Family Reunification Directive clearly provides that EU Member States should facilitate the entry and stay of unregistered partners with whom the sponsor has a duly attested stable long-term relationship. While it is true that it is not easy to prove that a relationship is long-term and stable, Article 78 of the new law provides for a situation not contemplated by the Family Reunification Directive, and which will give rise to even more delicate matters in proving the relationship. Article 78 allows unregistered partners to request personal reason residence permits. In addition to the usual requirements of sufficient financial resources, health insurance coverage and appropriate housing, partners wishing to come to Luxembourg must also prove that the 'personal or familial

⁴⁷ Directive 2003/86/CE, Art. 4(3).

⁴⁸ Luxembourg/*Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration*, *Mémorial A-N° 138*, 10 September 2008, Art. 12, available in French only at <http://www.legilux.public.lu/leg/a/archives/2008/0138/a138.pdf#page=2> (06.07.2009).

⁴⁹ *Tribunal administrative du Grand-Duché de Luxembourg* [Administrative Tribunal of the Grand Duchy of Luxembourg], Docket No. 19509, 03.10.2005, Appeal my Mr. ... against a decision of the Ministry of Foreign Affairs and Immigration regarding a residence permit application.

⁵⁰ Cigale representative communication of 13.02.2010.

relationships, particularly with respect to their intensity, seniority and stability, are such that refusal of residence on family reunification grounds would violate their right to privacy and family disproportionate to the grounds for denial of such residence'. Thus granting of a personal residence permit will still remain at the mercy of the current ministry.⁵¹

The stability and long-term nature of a relationship are almost impossible to establish for recent couples. Given that in most countries, individuals rarely make their homosexuality public, a couple would often have trouble supporting their assertions regarding the nature of their relationship by testimony from friends or family. Thus, it will not be easier than before to bring a partner (registered or unregistered) to Luxembourg.⁵²

There are no statistics, and neither is there any case law on the topic. Administrations assert that Luxembourg's Law of 2 August 2002 on the protection of personal data, as amended, specifies that the 'processing of information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs and trade union affiliation, as well as data concerning health and sexual life, including genetic databases, are prohibited'.⁵³ This was the response from the Ministry of Foreign Affairs and Immigration (MAE) to the request for statistics. While the MAE stated having received family reunification requests from LGBT partners, the data was too sensitive to be used to generate statistics.⁵⁴

Our website search of STATEC's site, Luxembourg's Central Service for Statistics and Economic Studies revealed no such data.⁵⁵ The MAE had no statistics either.⁵⁶ Further, the request to the Appeals Court Documentation Centre revealed no case law.⁵⁷

We did, however, find one 2005 case before the Administrative Tribunal in which the tribunal reversed an MAE denial of a residence permit to a Madagascar citizen who had married a Belgian citizen prior to requesting a residence permit to join that same Belgian citizen living in Luxembourg. The petitioner had requested the residence permit under the status of registered partner to Belgian citizen, but the MAE had denied the permit on

⁵¹ Luxembourg/*Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration*, *Mémorial* A-N° 138, 10 September 2008, Arts. 12 and 78, available in French only at <http://www.legilux.public.lu/leg/a/archives/2008/0138/a138.pdf#page=2> (06.07.2009).

⁵² See also text on family member written by Rosa Lëtzebuerg president François Diderrich, available at: http://www.gay.lu/files/Definition_membre_famille_loi_immigration_5802.pdf (18.02.2009), and published in *La pie qui chante*, 12.2008, at pp. 2-4 (<http://www.gay.lu/?q=node/65>).

⁵³ Luxembourg, *Loi du 2 août 2002 relative à la protection des personnes à l'égard du traitement des données à caractère personnel, telle que modifiée* (02.08.2002)

⁵⁴ Government Commission for Foreigners (2005) *Discrimination at work, Summarised version*, p.4, available at <http://www.cge.etat.lu/> (5 February 2007). Letter of 08.02.2010, and MAE response of 11.02.2010.

⁵⁵ Search of website (www.statec.lu) of 17.02.2010.

⁵⁶ Letter of 08.02.2010, and MAE response of 11.02.2010.

⁵⁷ CIGALE letter of 8 February 2010, requesting a case law search using the following search terms: 'discrimination based on sexual orientation', 'homosexual', 'homosexuality', 'sexual orientation', 'sexuality', 'immigration and homosexuality', 'immigration and sexual orientation', 'asylum and homosexuality', 'asylum and sexual orientation', 'transgender', 'transsexual person' and 'transsexuality'..

the grounds that he was married, and his marriage prevented him from entering into a partnership. The Administrative Tribunal annulled the MAE's denial and remanded the file to the MAE for issuance of the permit on the grounds that their marriage could not be interpreted as denying them the legal effects of a partnership under Luxembourg law. The case is a bit outdated given recent legislation, but indicates the discrimination in recognition of same-sex marriages.⁵⁸

⁵⁸ *Tribunal administratif du Grand-Duché de Luxembourg*, No. 19509.

E. Freedom of assembly

Article 25 of the Luxembourg Constitution guarantees the right to peaceful, unarmed assembly that respects the laws governing the exercise of that right without being subject to prior authorisation. However, that constitutional provision does not apply to outdoor, political, religious or other gatherings. Those gatherings remain entirely subject to the laws and regulations adopted under the police powers of the State.⁵⁹ Nonetheless, as explained in section F below, Luxembourg criminal law provides sanctions for the incitation of discrimination, hate or violence through the making available, in public places or meetings, of any form of verbal, written or graphic communication or materials. Thus, homophobic demonstrations, assemblies or similar events could lawfully be banned in Luxembourg to the extent that they incite the proscribed discrimination, hate or violence, or otherwise threaten public order.

The Luxembourg LGBT community has opted for street fairs instead of gay pride marchers or parades. There have been no problems with their receiving the necessary governmental authorisations for those uses of public space. The City of Luxembourg has been quite open in this respect.

There are no statistics, and neither is there any case law on the topic. Our website search of STATEC's site, Luxembourg's Central Service for Statistics and Economic Studies revealed no such data.⁶⁰ Further, the request to the Appeals Court Documentation Centre revealed no relevant case law.⁶¹

⁵⁹ Luxembourg/*Constitution du Grand-Duché du Luxembourg, texte à jour au 1^{er} septembre 2006, Service Central de Législation, Art. 25 (01.09.2006)*

⁶⁰ Search of website (www.statec.lu) of 17.02.2010.

⁶¹ Letter of 8 February 2010, requesting a case law search using the following search terms: 'discrimination based on sexual orientation', 'homosexual', 'homosexuality', 'sexual orientation', 'sexuality', 'immigration and homosexuality', 'immigration and sexual orientation', 'asylum and homosexuality', 'asylum and sexual orientation', 'transgender', 'transsexual person' and 'transsexuality'..

F. Criminal law

Luxembourg's Criminal Code provides for imprisonment of eight (8) days to two (2) years and or a fine of 251 EUR to 25,000 EUR, when anyone through any form of verbal, written or graphic communication or materials that are made available in public places or meetings, incites discrimination, hate or violence against a natural or legal person or a group or community of persons. This also includes the incitation of discrimination, hate or violence that relates to the furnishing of a good or service, impedes access to employment and vocational training, or the normal exercise of one's employment based on sexual orientation. Anyone who belongs to an organization the purpose of which is to commit one of those acts is also subject to that punishment, as is anyone who prints or causes to be printed, circulated in Luxembourg, or put in the mail, the any type of image, written or spoken communication or materials with the same effect.

The Criminal Code also provides that any defamation of gravesites and corpses because of a supposed or real membership or non-membership of the deceased in a particular ethnicity, nation, race or religion, is punishable by imprisonment of six (6) months to three (3) years and/or a fine of 251 EUR to 37,500 EUR. The gravesite and corpse defamation provision does not specifically include sexual orientation as a basis for these heightened sanctions, so any gravesite or corpse defamation carried out because of the deceased's sexual orientation would fall under the regularly applicable provision. That provision provides for imprisonment of one (1) month to two (2) years and a fine of 251 EUR to 25,000 EUR. However, if the gravesite defamation is accompanied by defamation of the corpse, the crime would be punishable by imprisonment of three (3) years and a fine of 37,500 EUR, the equivalent of the maximum heightened penalty for the discriminatorily-motivated defamation cited above.⁶² The Criminal Code table of contents lists these crimes under racial discrimination.

The civil and criminal law provisions relating to harassment are discussed above.

There are no statistics, and neither is there any case law on the topic at this time. It appears, however, that because the homosexual community decreasingly frequents public areas such as parks, there are less homophobic-motivated beatings, for example. Contrary to earlier practices among the LGBT populations, the "younger generation" engages in activities in places other than public areas. Our website search STATEC's site, Luxembourg's Central Service for Statistics and Economic Studies revealed no such data. The information on actions adjudicated is presented in the aggregate and classified solely by adjudicating body and type of action (e.g., civil, commercial or

⁶² Luxembourg/*Code Pénal Grand-Duché de Luxembourg*, 01.09.2007, Arts. 453-455, 457-1 and 457-2 (01.09.2007)

criminal).⁶³ Further, the request to the Appeals Court Documentation Centre revealed no case law.⁶⁴

Luxembourg law neither includes nor excludes homophobic hate crimes, thus the issue would be left to the court's interpretation. Luxembourg has no legal provisions specifically making homophobic discrimination an aggravating factor in the punishment of a crime, as in the neighbouring countries of France and Germany. However, as mentioned above, the Criminal Code now provides sanctions for inciting discrimination, hate or violent crimes based on sexual orientation discrimination. There is currently no jurisprudence on the issue. Neither are there any statistics. Our website search of STATEC's site, Luxembourg's Central Service for Statistics and Economic Studies revealed no such data.⁶⁵ Further, the request to the Court of Appeals Documentation Centre revealed no case law.⁶⁶

We are unaware of any legal instruments or laws that could be interpreted as 'institutionalising' homophobia.

⁶³ Search of website (www.statec.lu) of 17.02.2010.

⁶⁴ Letter of 8 February 2010, requesting a case law search using the following search terms: 'discrimination based on sexual orientation', 'homosexual', 'homosexuality', 'sexual orientation', 'sexuality', 'immigration and homosexuality', 'immigration and sexual orientation', 'asylum and homosexuality', 'asylum and sexual orientation', 'transgender', 'transsexual person' and 'transsexuality'.

⁶⁵ Search of website (www.statec.lu) of 17.02.2010.

⁶⁶ Letter of 8 February 2010, requesting a case law search using the following search terms: 'discrimination based on sexual orientation', 'homosexual', 'homosexuality', 'sexual orientation', 'sexuality', 'immigration and homosexuality', 'immigration and sexual orientation', 'asylum and homosexuality', 'asylum and sexual orientation', 'transgender', 'transsexual person' and 'transsexuality'.

G. Transgender issues

Transgender issues are not specifically addressed under Luxembourg law. If they are interpreted to be included in the Employment Directive's broad definition of sexual orientation as implemented in Luxembourg legislation, they would effectively be dealt with. If not, then only the criminal law provisions would apply, as transgender individuals would be considered as belonging to a particular social group. There are neither statistics, nor is there any case law to provide guidance on the issue at this time. Our website search of STATEC's site, Luxembourg's Central Service for Statistics and Economic Studies revealed no such data.⁶⁷ Further, the request to the Appeals Court Documentation Centre revealed no case law.⁶⁸

The legislation discussed above has as yet no particular applicability to transgender individuals, and there is no legislation that specifically affects those individuals. There are neither statistics, nor is there any case law to provide guidance on the issue at this time. Our website search of STATEC's site, Luxembourg's Central Service for Statistics and Economic Studies revealed no such data.⁶⁹ Further, the request to the Appeals Court Documentation Centre revealed no case law.⁷⁰

According to the information gathered in an informal context, Luxembourg has no doctors specialised or experienced in any form of gender reassignment surgery. Thus, a Luxembourg national would be forced to seek that surgery outside of Luxembourg. First, however, the individual would be required to undergo psychiatric evaluation and treatment in order to request that the surgery be paid for by the Luxembourg healthcare system. Once an affirmative response is received, the individual would usually go to Belgium or Germany, and to a lesser extent France. Following the surgery, the individual would undergo psychological treatment with the foreign medical team as a member of the newly-assigned sex.

Concurrently with this treatment, the individual would attempt to change his/her identity under Luxembourg law. However, there are no legal provisions specifically addressing this issue to be applied by the *Etat civil et population du Luxembourg* [Luxembourg Civil Status and Population Administration]. The most urgently needed provisions are those allowing a change of sex and name on public records. In practice, the individuals

⁶⁷ Search of website (www.statec.lu) of 17.02.2010.

⁶⁸ Letter of 8 February 2010, requesting a case law search using the following search terms: 'discrimination based on sexual orientation', 'homosexual', 'homosexuality', 'sexual orientation', 'sexuality', 'immigration and homosexuality', 'immigration and sexual orientation', 'asylum and homosexuality', 'asylum and sexual orientation', 'transgender', 'transsexual person' and 'transsexuality'.

⁶⁹ Search of website (www.statec.lu) of 17.02.2010.

⁷⁰ Letter of 8 February 2010, requesting a case law search using the following search terms: 'discrimination based on sexual orientation', 'homosexual', 'homosexuality', 'sexual orientation', 'sexuality', 'immigration and homosexuality', 'immigration and sexual orientation', 'asylum and homosexuality', 'asylum and sexual orientation', 'transgender', 'transsexual person' and 'transsexuality'.

concerned have addressed their name change request to the competent ministry which has referred them to an attorney to commence divorce proceedings and then be able to request a name change. However, this appears to be changing given a recent jurisprudence of which we have no details as yet.⁷¹

One extremely important issue in this context is 'forced divorce' of individuals having undergone gender reassignment surgery prior to being able to change their identity documents to reflect the name of the newly assigned gender. Given that currently civil marriage is reserved exclusively for heterosexual couples, transsexual individuals who have not divorced before filing their request to change identity documents are refused the name change on their identity documents. In some cases, couples in which one spouse undergoes gender reassignment surgery wish to stay together for financial or social security reasons.⁷²

According to our unofficial sources, the Justice Ministry was in 2009 charged with clarifying and facilitating the request procedures for such individuals. However, we know of no official steps taken to date.

Also, our unofficial sources are aware of a case under appeal in which a couple, one spouse of which underwent gender reassignment surgery, contested the 'forced divorce'. The court appears to have found in favour of the couple, but we cannot have access to the caselaw until the deadline for filing an appeal has passed. We will inform you once we have received the jurisprudence.

⁷¹ Interview of 03.06.2010 with CIGALE representative.

⁷² Interview of 09.02.2010 with CIGALE representative.

H. Miscellaneous

Generally, the LGBT community is concerned with having rights equal to those of the heterosexual community. Those rights would best be given if same-sex marriage were authorized in Luxembourg, and if joint adoption by the two same-sex spouses were authorized,

The opening of civil marriage to homosexual couples is now considered a priority in the coalition government's 2009-2014 programme created in 07.2009. According to numerous appearances in the media by the Justice Minister, a law allowing gay marriage should be sent to the Chamber of Deputies in the next few months. Other anticipated changes include allowing simple adoption by same-sex couples, as well as adoption by one partner of the other spouse's child should become possible through amendment to the adoption law. As yet, however, not specific legislation has been proposed and there has been no indication as to when such amending legislation will be proposed.⁷³

Another double issue of concern in the fight against discrimination is first, the lack of jurists specialising in the topic, and second, the few financial resources of which certain victims dispose. This is also the case for the majority of NGOs of which assistance is requested in these situations. According to unofficial sources, the creation of a 'Progress' European Action Program could soon partially resolve the second issue. Another major gap is the inability to take advantage of professional and rapid legal expertise given the lack of financial resources of the different actors.⁷⁴

According to several sources, there is no administrative data available on the sexual orientation because the Law of 2 August 2002 on personal data protection supposedly did not allow for the collection of data other than that related to nationality. However, in its Third Report on Luxembourg ECRI states that Luxembourg's Personal Data Authority the *Commission Nationale pour la Protection des Données* [National Data Protection Commission] (CNPD) confirmed to it that the law authorised the collection of sensitive data. Such data collection simply required obtaining prior authorisation from the CNPD, and demonstrating the legitimacy and necessity thereof. In July of 2007, the data protection law was modified to allow the processing of sensitive data, not including genetic data, with only prior notification to the CNPD. This change in the data protection law was simply a procedural simplification, the *de facto* effect of which is to render sensitive data collection easier, including data on sexual orientation (*vie sexuelle*).⁷⁵

⁷³ Translation of Prime Minister Jean-Claude Juncker's 29.07.2009 governmental statement to the Chambre of Deputies, available in French at: <http://www.gouvernement.lu/gouvernement/programme-2009/declaration-fr/index.html> (18.02.2010).

⁷⁴ Interview of 11.02.2010 with CIGALE representative

⁷⁵ Government Commission for Foreigners (2005) *Discrimination at work, Summarised version*, p. 4, available at <http://www.cge.etat.lu/> (18.03.2009) ; ENAR (2008) Shadow Report 2007:

I. Good practices

According to the Government Commission for Foreigners, good practices include employment of transsexuals in the public service and assimilated sectors; the positive reactions of co-workers when a colleague decides to come out in the workplace; and employers' inviting all employees and their *partners*, as opposed to the employees and their *wives*, to the year-end meal.⁷⁶ These practices all represent a marked change from traditional patterns of behaviour. Formerly, transsexuals would not have readily been employed in the public service sector. Moreover, an employee would never have dared to come out in the workplace. And finally, when employers traditionally invited all employees and their *wives* only to the year-end meal, the employee involved in a same-sex relationship participate in the meal alone.

While the good practices may appear on paper to develop tolerance in Luxembourg, the reality is that in practice this is not necessarily the case. However, at the end of the day, it appears to be the professional capabilities of an individual that govern his or her employment situation. Generally, unofficial sources note that there have been appreciably positive changes in employers' perception of the LGBT employees' needs. It would also seem that there is a slight increase in awareness in the work world, especially regarding transsexuals. However, LGBT associations like CIGALE remain cautious about pronouncing any widespread improvement, and judges those to be isolated cases.⁷⁷

The new law on the hosting and integration of foreigners in Luxembourg provides for the creation of the *Office luxembourgeois de l'accueil et de l'intégration* [Luxembourg Office of Hosting and Integration] (OLAI) (formerly known as the Government Commission for Foreigners) the mission of which includes the fight against all forms of discrimination. The OLAI will work in conjunction with local governments and civil society in the organisation of social assistance for foreigners and seekers of international protection who do not have the right to such assistance. Those seekers could include individuals

Racism in the Grand Duchy of Luxembourg, at p. 3, available at <http://cms.horus.be/files/99935/MediaArchive/pdf/en/Luxembourg%20-%20SR%202007.pdf> (18.03.2009); Luxembourg/Loi du 2 août 2002 relative à la protection des personnes à l'égard du traitement des données à caractère personnel, Mémorial A-N° 91, (13.08.2002), at p. 1836, Article 6 ; ECRI (2006) Third Report on Luxembourg, at p. 23, English language version available at http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Luxembourg/Luxembourg_CBC_en.asp (18.03.2009); Luxembourg/Loi du 2 août 2002 relative à la protection des personnes à l'égard du traitement des données à caractère personnel, Mémorial A-N° 91, (13.08.2002), at p. 1836, as amended, Article 6(2)(g); and, conversation of 23 March 2009 with CNPD jurist.

⁷⁶ Government Commission for Foreigners (2005) *Discrimination at work, Summarised version*, p.69, available at <http://www.cge.etat.lu/> (5 February 2007).

⁷⁷ CIGALE Communication of 13.02.2010.

who have been persecuted in their countries of origin based on their sexual orientation or identity. The benefits of the OLAI's work in this respect remain to be seen.⁷⁸

⁷⁸ Luxembourg/*Loi du 16 décembre 2008 concernant l'accueil et l'intégration des étrangers au Grand-Duché de Luxembourg* (16.12.2008), Mémorial A-N° 209, 24 December 2008, at p. 3156.

Annex 1 – Case law

Chapter A, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 1

Case title	NONE AVAILABLE
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 2

Case title	NONE AVAILABLE
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 3

Case title	NONE AVAILABLE
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 4

Case title	NONE AVAILABLE
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 5

Case title	NONE AVAILABLE
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

Chapter B, Freedom of movement, case law relevant to Directive 2004/38/EC, case 1

Case title	<table border="1"> <tr> <td data-bbox="575 315 1709 375">Appeal by Mr. ... against a decision of the Ministry of Foreign Affairs and Immigration regarding a residence permit application</td> </tr> <tr> <td data-bbox="575 375 1709 418">03.10.2005</td> </tr> </table>	Appeal by Mr. ... against a decision of the Ministry of Foreign Affairs and Immigration regarding a residence permit application	03.10.2005
Appeal by Mr. ... against a decision of the Ministry of Foreign Affairs and Immigration regarding a residence permit application			
03.10.2005			
Decision date	<i>Tribunal administrative du Grand-Duché de Luxembourg</i> [Administrative Tribunal of the Grand Duchy of Luxembourg], Docket No. 19509		
Reference details (type and title of court/body; in original language and English [official translation, if available])	Petitioner, a native of Madagascar appealed MAE's denial of his Luxembourg residence permit application. The MAE denied his application on the grounds that he did not fulfil the partnership law requirement that he not be married in order to enter into a partnership. Petitioner had married a Belgian national in Belgium approximately 6 months prior and was seeking a Luxembourg residence permit to live with that same Belgian national in Luxembourg. The MAE cited their marriage as an obstacle to their properly entering into a partnership recognised under Luxembourg's partnership law.		
Key facts of the case (max. 500 chars)	Petitioner argued that the MAE should have recognised the legal effects of their marriage in Belgium and granted them partnership status so that the petitioner could receive his permit.		
Main reasoning/argumentation (max. 500 chars)	Legal effects of marriage outside of Luxembourg sufficient to allow same individuals to receive partnership status, and benefit from legal effects therefrom.		
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)			
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Administrative Tribunal annulled the MAE's denial decision and remanded the file to the MAE for issue of a residence permit.		

[copy template for next four cases]

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 1

Case title	Appeal by Mr. X against two Foreign Affair and Immigration Minister decisions on refugee claim (<i>Recours formé par Monsieur ... contre deux décisions du ministre des Affaires étrangères et de l'immigration en matière de réfugié</i>)
Decision date	03.05.2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Grand Duchy of Luxembourg Administrative Tribunal, docket number 22023 (<i>Tribunal administrative du Grand-Duché de Luxembourg, Numéro 22023 de rôle</i>)
Key facts of the case (max. 500 chars)	In 2006, a Nigerian homosexual male requested international protection in Luxembourg, after having been brutally beaten and imprisoned by his family when he declared his homosexuality. The family had been trying to get him to marry a girl from his rural community. At that time, he was in a relationship with a foreigner and did not wish to marry the girl. The man with whom he had entered into a relationship arranged for the Nigerian man to leave Nigeria and come to Europe. The Nigerian man then requested asylum or subsidiary protection in Luxembourg.
Main reasoning/argumentation (max. 500 chars)	The Nigerian was denied international protection in Luxembourg. The administrative tribunal ruled that he did not prove persecution other than that by his own family, and that while Nigerian law forbids and criminally sanctions homosexuality, the petitioner did not prove that he was at risk of any of the qualifying human rights violations by the Nigerian government such that he could be granted asylum or subsidiary protection under Luxembourg law. The decision further states that the individual did not fear persecution in the entire country and could therefore flee his residence to live free from persecution in another part of his home country.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Application/interpretation of the concept of persecution defined as a death penalty or execution; torture or degrading or inhumane punishment or treatment; or, serious and individual threats to the person or life of a civilian due to indiscriminate violence in the event of a domestic or international armed conflict.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Nigerian man was denied international protection in Luxembourg.

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Chapter C, Asylum and subsidiary protection, case law relevant to art 2/h of Council Directive 2004/83/EC, case 1

Case title	NONE AVAILABLE
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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Chapter D, Family reunification, case law relevant to art 4/3 of the Council Directive 2003/86/EC, case 1

Case title	NONE AVAILABLE
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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Chapter E, Freedom of assembly, case 1

Case title	NONE AVAILABLE
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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Chapter F, Hate speech, case 1

Case title	NONE AVAILABLE
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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Chapter F, Hate crimes, case 1

Case title	NONE AVAILABLE
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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Chapter G, Applicability of legislation on trans gender issues, case 1

Case title	NONE AVAILABLE
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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Chapter G, Name change and/or sex change of trans gender people, relevant case law, case 1

Case title	NONE AVAILABLE
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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Chapter I, Case law relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation, case 1

Case title	NONE AVAILABLE
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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Annex 2 – Statistics

Chapter A, Implementation of Employment Directive 2000/78/EC in relation to sexual orientation

NONE AVAILABLE	2000	2001	2002	2003	2004	2005	2006	2007
Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								
Total finding of Discrimination confirmed (by equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								
National Number of sanctions/compensation payments issued (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								
National range of sanctions/compensation payments (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								

Chapter B, Freedom of movement of LGBT partners

NONE AVAILABLE	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of EU citizens residing in your country falling under Directive 2004/38/EC (i.e., LGBT partners having exercised their freedom of movement as granted to family members of EU citizens, whether under Directive 2004/38/EC or under previous instruments)								
Number of LGBT partners who claimed their right to residence but were denied this right								

Chapter C, Asylum and subsidiary protection, protection due to persecution on the grounds of sexual orientation

NONE AVAILABLE	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT individuals benefiting from asylum/ subsidiary protection due to persecution on the ground of sexual orientation.								
Number of LGBT individuals who were denied the right to asylum or to subsidiary protection despite having invoked the fear of persecution on grounds of sexual orientation								

Chapter C, Asylum and subsidiary protection, protection of LGBT partners

NONE AVAILABLE	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of persons enjoying refugee/ subsidiary protection status residing in your country falling under Art 2/h Directive 2004/83/EC								
Number of LGBT partners of persons enjoying refugee/subsidiary protection status who were denied the possibility to stay with their partner								

Chapter D, LGBT partners benefiting family reunification

NONE AVAILABLE	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of third country nationals residing in your country benefiting from family reunification.								
Number of LGBT partners of third country nationals residing in your country who were denied the right to benefit from family reunification								

Chapter E, LGBT people enjoyment of freedom of assembly

NONE AVAILABLE	2000	2001	2002	2003	2004	2005	2006	2007
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades, etc								

Number of demonstrations against tolerance of LGBT people.								
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Chapter F, Homophobic hate speech

NONE AVAILABLE	2000	2001	2002	2003	2004	2005	2006	2007
Number of criminal court cases regarding homophobic hate speech initiated (number of prosecutions)								
Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)								
Range of sanctions issued for homophobic hate speech								
Number of non-criminal court cases initiated for homophobic statements								
Number of non-criminal court cases initiated for homophobic statements which were successfully completed (leading to a decision in favour of the plaintiff, even if no sanctions other than symbolic were imposed)								

Chapter F, Homophobic motivation of crimes as aggravating factor

NONE AVAILABLE	2000	2001	2002	2003	2004	2005	2006	2007
Number of criminal court decisions in which homophobic motivation was used as an aggravating factor in sentencing								

Chapter G, Transgender issues

NONE AVAILABLE	2000	2001	2002	2003	2004	2005	2006	2007
Number of name changes effected due to change of gender								
Number of persons who changed their gender/sex in your country under the applicable legislation								

**Chapter I, Statistics relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation
[presentation according to the templates above]**