



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

COUNTRY REPORT 2007

Belgium

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State of affairs up to 29 February 2008

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0.1 The national legal system

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

The complexity of the division of tasks between different levels of government in Belgium constitutes the most serious obstacle to the adequate implementation of the Racial and Employment Equality Directives in the Belgian legal order¹. The Council of State (general assembly of the legislative section) delivered an important opinion on 11 July 2006² where it essentially restates and clarifies the existing allocation of powers between the Federal State, the Regions and the Communities in the adoption of antidiscrimination legislation and policy. This may be summarized as follows.

In Belgium's federal system, the competence to legislate on discrimination in the areas covered by the Racial and Employment Equality Directives is divided between the Federal State, the three Communities³ and the three Regions⁴, to which extensive legislative powers have been attributed since 1970, and especially since the constitutional reforms of 1980 and 1988, in the fields of education, culture and socio-economic policy⁵. According to the Council of State⁶, even where higher-ranking norms (including international obligations imposed on the Belgian State) place obligations on all the organs and powers of the Belgian State, the implementation of those norms must comply with the division of competences regulated by the Constitution⁷: the various entities may not legislate beyond their competences, even under the pretext of ensuring compliance with the State's international obligations.

- *With respect to the implementation of the principle of equal treatment in the fields to which only Directive 2000/43/EC applies* (social protection, including social security and healthcare; social advantages; education; access to and supply of goods and services which

¹ For an excellent review of the issue, see S. Van Drooghenbroeck and J. Velaers, "La répartition des compétences dans la lutte contre la discrimination", in C. Bayart, S. Sottiaux and S. Van Drooghenbroeck (eds), *Les nouvelles lois luttant contre la discrimination*, Brussels, La Chartre, 2008, pp. 103 and sq.

² Council of State, opinions no. 40.689/AG, 40.690/AG, and 40/691/AG, of 11 July 2006. These opinions are appended to the governmental bill presented to the House of Representatives on 26 October 2006 (doc. 51 2720/001) which led to federal statutory law on 10 May 2007 (see *infra*, section 0.2). Following a number of changes to the original bill, a second text was presented to the Council of State on 2 October 2006. However, the second opinion of the Council of State did not reexamine the question of the division of competences.

³ French-speaking Community (*Communauté française*), Flemish Community (*Vlaamse Gemeenschap*), German-speaking Community (*deutschsprachigen Gemeinschaft*).

⁴ Walloon Region (*Région wallonne*), Flanders (*Vlaams Gewest*), and Brussels-Capital (*Région de Bruxelles-capitale*).

⁵ Regions and Communities adopt Decrees. These Decrees are called Ordinances (*ordonnances*) with respect to the Region of Brussels-Capital. The federal legislature (Senate and House of Representatives) adopts *lois*, translated as "Federal Acts" or "Acts" in this report.

⁶ See *Conseil d'État (section de législation)*, Avis 28.197/1 du 16 février 1999, *Documents parlementaires, Chambre des Représentants, session ord. 1998-1999*, no. 2057/1 and 2058/1, pp. 34-36. This is confirmed in the opinion of 11 July 2006.

⁷ The Council of State has confirmed this position on a number of occasions, most recently in its opinion of 11 July 2006 mentioned above. But see also, for instance, the opinion delivered on 10 August 1994 by the Council of State when confronted with the Bill which would later become the Decree of 6 April 1995 on the integration of persons with disabilities (*Décret du 6 avril 1995 relatif à l'intégration des personnes handicapées*) (*Conseil d'État (section de législation)*, avis 23.478/2/V); the opinion delivered on 11 February 2004 on a preliminary version of the German-speaking Community's Decree on the guarantee of equal treatment in the labour market (*Conseil d'État (section de législation)*, avis 36.415/2); or the opinion delivered on 25 March 2004 on a preliminary version of the French-speaking Community's Decree on the implementation of the principle of equal treatment (*Conseil d'État (section de législation)*, avis 36.788/2).



are available to the public, including housing⁸), the Constitution and the Special Act of 8 August 1980 provide that:

- social security is a federal matter (Art. 6 § 1, VI, al. 4, 12° of the Special Act of 8 August 1980)
 - healthcare is essentially a competence of the Communities, except for certain matters including the adoption of framework legislation and health insurance, which remain matters of federal competence (Art. 5 § 1, I, 1°, of the Special Act of 8 August 1980)
 - with a few exceptions, social aid is a competence of the Communities. The exceptions include the adoption of framework legislation on public social assistance centres (*centres publics d'aide sociale*), which remains a federal competence (Art. 5 § 1, II, 2°, of the Special Act of 8 August 1980)
 - education is a competence of the Communities, including the status of school teachers and other civil servants or employees working in schools (Art. 127 § 1, 2° of the Constitution)
 - social housing is a competence of the Regions (Art. 6 § 1, IV of the Special Act of 8 August 1980), while the Federal State remains competent as regards the rules relating to the private housing market, in particular by regulating the conditions of rent (see Book III, Title VII, chap. II of the Civil Code, most recently amended by the Federal Act of 26 April 2007⁹)
 - prohibition of discrimination in the access to and supply of goods and services available to the public should be dealt with by each competent authority in the sphere of its powers (for instance, public transports fall within the competence of the Regions, apart from the national airport and the public railway company which fall within the competence of the Federal State) .
- *With respect to the implementation of the principle of equal treatment in the fields to which both the Racial and the Employment Equality Directives apply*, the Special Act of 8 August 1980 specifically reserves to the federal level the competence to legislate in employment law (Art. 6 § 1, VI, al. 5, 12); the Regions and Communities, however, have certain competences in the domain of employment policy. The Regions have been granted competences relating to the placement of workers (which includes vocational guidance) and the adoption of programmes for the professional integration of the unemployed¹⁰; the Communities have been granted competences relating to vocational training¹¹, although as explained below, in the French-speaking part of the State, vocational training has been regionalised – it has been transferred from the French-speaking Community to the Walloon Region and the Region of Brussels-Capital.
- In addition, the Council of State (section of legislation) confirmed that the rules governing the status of personnel of the Regions or Communities are the exclusive competence of the Regions and Communities, and may not be regulated at the federal level.

With respect specifically to the *professional integration of persons* with disabilities, the Special Act of 8 August 1980 transferred to the Communities competence in the field of

⁸ Art. 3(1), (e) to (h) of Directive 2000/43/EC.

⁹ *Loi portant des dispositions en matière de baux à loyer*, *Moniteur belge*, 5 June 2007.

¹⁰ Art. 6(1), IX, 1° and 2° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.

¹¹ Art. 4, 15° and 16° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.



disability policy (Art. 5 § 1, II, 4). There are vivid controversies related to which authority (Federal State or Communities) is competent to legislate with respect to reasonable accommodation. The widespread opinion today is that, although disability policy is allocated to the Communities, this does not prohibit the Federal State or the Regions to provide that denying reasonable accommodation to a person with a disability amounts to indirect discrimination.

Although the Constitution and the Special Act of 8 August 1980 implementing the Constitution have allocated competences between the Federal State, the Regions and the Communities, Article 138 of the Constitution gives the French-speaking Community the option of transferring certain competences to the Walloon Region and to the French Community Commission of the Region of Brussels-Capital (*Commission communautaire française - Cocof*). A Decree adopted on that basis¹² gives the Walloon Region and the French Community Commission in the Region of Brussels-Capital the authority to adopt measures to prohibit discrimination in the sphere of vocational training. On the basis of a similar delegation of competences, the German-speaking Community has exercised the competences allocated to the Walloon Region in the area of employment policy by Article 6 § 1, IX of the Special Act of 8 August 1980 on institutional reforms for the territory of the German-speaking Region since 1 January 2000¹³.

0.2 State of implementation

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

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

I. General legal framework

A. At the federal level:

Victims of discrimination, either in employment relationships or in the broader spheres to which the prohibition of discrimination under Directive 2000/43/EC applies, were afforded a certain level of protection in the Belgian legal order before Directives 2000/43/EC and 2000/78/EC were adopted in 2000. The protection was in particular afforded by the Federal Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (*Loi tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*) which was amended on several occasions to increase the scope of the legislation¹⁴. The Federal Act of 30 July 1981, however, forms part of criminal legislation, and the evidentiary burdens facing the prosecution in that context – or, indeed, an alleged victim of discrimination – often have appeared insuperable, because the perpetrator's intent has to be established.

¹² Art. 3, 4° of the Decree of 19 July 1993 attributing the exercise of certain competences of the French-speaking Community to the Walloon Region and the French Community Commission (*Décret attribuant l'exercice de certaines compétences de la Communauté française à la Région wallonne et à la Commission communautaire française*), *Moniteur belge*, 10 September 1993.

¹³ This results from the Decrees of 6 and 10 May 1999 concerning the exercise by the German-speaking Community of the competences of the Walloon Region in the areas of employment and excavations.

¹⁴ *Moniteur belge*, 8 August 1981.



In order to implement Directives 2000/43/EC and 2000/78/EC, the federal Parliament adopted the Act of 25 February 2003 on combating discrimination and amending the Act of 15 February 1993 setting up the Centre for Equal Opportunities and Opposition to Racism (*Loi tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme*)¹⁵. The Federal Act of 25 February 2003 was covering numerous grounds of discrimination (age, sexual orientation, civil status, birth, wealth/income (*fortune*, in French), religious or philosophical belief, actual or future state of health, disability, physical characteristic) and, to a certain extent, was going beyond the scope of application *ratione materiae* of Directive 2000/43/EC¹⁶. It was mostly a civil legislation but it enshrined several criminal sanctions.

The Federal Act of 25 February 2003 was, however, partially overruled by the Constitutional Court (at the time, called the Court of Arbitration - *Cour d'arbitrage*) in a ruling no. 157/2004 delivered on 6 October 2004¹⁷. To overcome the difficulties caused by this overruling and to meet the concerns expressed by the European Commission in its correspondence with the Belgian authorities about the state of implementation of Directive 2000/43/EC and Directive 2000/78/EC, the Federal Act of 25 February 2003 was repealed and new legislation was adopted.

Three major Acts were adopted on 10 May 2007 and published in the official journal (*Moniteur belge*) on 30 May 2007¹⁸:

- Federal Act amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia, hereafter the “**Racial Equality Federal Act**”. This Act aims at implementing both the Racial Equality Directive and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, in one single legislation prohibiting discrimination on grounds of alleged race, color, descent, national or ethnic origin, and nationality. This Act contains civil law provisions, and does not only address criminal law.
- Federal Act pertaining to fight against discrimination between women and men (*Loi tendant à lutter contre la discrimination entre les femmes et les hommes*), hereafter the “**Gender Equality Federal Act**”, which relates to sex and assimilated grounds, i.e. maternity, pregnancy and transsexualism. It provides for the modification of the Federal Act of 7 May 1999 on equal treatment between men and women in working conditions, access to employment and to promotion opportunities, access to self-employment and social security,¹⁹ in order to implement the directives adopted on the basis of Article 141 EC (Directive 76/207/EEC, as amended by Directive 2002/73/EC, is expressly mentioned, but not Directive 2006/54/EC) and Article 13 EC (Directive 2004/113/EC).
- Federal Act pertaining to fight certain forms of discrimination (*Loi tendant à lutter contre certaines formes de discrimination*), hereafter the “**General Anti-discrimination Federal Act**”. This Act explicitly states (Art. 2) that it seeks to implement Directive 2000/78/EC of 27

¹⁵ *Moniteur belge*, 17 March 2003

¹⁶ For instance, the Federal Act of 25 February 2003 was covering the reference in an official document.

¹⁷ For the reasons of the overruling, see *infra* in the report, section 0.3.

¹⁸ In addition, a fourth Act, also adopted on 10 May 2007, seeks to amend the Code of civil procedure as regards litigation based on the three new anti-discrimination Acts (*Loi adaptant le Code judiciaire à la législation tendant à lutter contre les discriminations et réprimant certains actes inspirés par le racisme ou la xénophobie*).

¹⁹ Federal Act on equality of treatment between men and women concerning working conditions, access to employment, opportunities for promotion, access to self-employment and social security (*Loi sur l'égalité de traitement entre hommes et femmes en ce qui concerne les conditions de travail, l'accès à l'emploi et aux possibilités de promotion, l'accès à une profession indépendante et les régimes complémentaires de sécurité sociale*), *Moniteur belge*, 19 June 1999.



November 2000. It provides for the prohibition of discrimination on all the grounds other than those dealt with by the Racial Equality Federal Act and the Gender Equality Federal Act which either 1° were already present in the former Federal Antidiscrimination Act of 25 February 2003 (age, sexual orientation, civil status, birth, wealth/income (*fortune*, in French), religious or philosophical belief, actual or future state of health, disability, physical characteristic), or 2° were added in order to take into account the concern expressed by the Constitutional Court in its ruling of 6 October 2004 that the list should not arbitrarily exclude certain grounds which are found in international human rights instruments (political opinion and language), or 3° were added to the list originally mentioned in the 2003 Act for other reasons (genetic characteristic, social origin).

Several actions aiming at partially overruling the Racial Equality Federal Act and the General Anti-discrimination Federal Act are currently pending before the Constitutional Court. One has been launched by the Flemish Human Rights League (*Liga*) against Article 21 of the Racial Equality Federal Act which criminalises the public spreading of ideas advocating racial superiority or racial hatred. This action, which is not endorsed by the French speaking Human Right League (*Ligue des droits de l'homme*), is based on an alleged breach of the right to free speech as it is traditionally construed in the US. A second one is supported by trade unions which consider that excluding trade union membership from the list of grounds of discrimination is arbitrary. A third action has been launched by the *Vlaams Belang*, an extreme right wing political party, with much influence in the Flemish part of Belgium, which is altogether against anti-discrimination law.

In addition to statutory law, there is also an important Collective Agreement at federal level. On 6 December 1983, Collective Agreement no. 38 relating to the recruitment and selection of workers (*Convention collective du travail no. 38 concernant le recrutement et la sélection de travailleurs*) was signed, and made obligatory in part in 1999²⁰. This Collective agreement seeks to protect the worker's right to private life in the process of recruitment, and it has been supplemented with a prohibition of discrimination²¹. Article 2*bis* of Collective Agreement no. 38 now reads: "The employer may not treat candidates in a discriminatory fashion. During the procedure²², the employer must treat all candidates equally. The employer may not make distinctions on the basis of personal characteristics, when such characteristics are unrelated to the function [to be performed by the prospective employee] or the nature of the undertaking, unless this is either authorised or required by law. Thus, the employer may in principle make no distinction on the basis of age, sex, marital status, medical history, race, colour, descent or national or ethnic origin, political or philosophical beliefs, membership of a trade union or of

²⁰ Made compulsory by Executive Regulation on 31 August 1999 (*Arrêté royal du 31 août 1999 rendant obligatoire la Convention collective du travail no. 38 quater du 14 juillet 1999, conclue au sein du Conseil national du travail, modifiant la convention collective du travail no. 38 du 6 décembre 1983, modifiée par les conventions collectives du travail n°38bis du 29 octobre 1991 et 38ter du 17 juin 1998, Moniteur belge*, 21 September 1999). The original text of 1983 was modified by Collective Agreements no. 38*bis* of 29 October 1991, no. 38*ter* of 17 July 1998 and lastly no. 38*quater* of 14 July 1999.

²¹ The most recent version of Article 2*bis* in the Collective agreement includes two new grounds of prohibited discrimination, sexual orientation and disability. This change, agreed upon by the most representative organisations of employers and workers on 14 July 1999, followed the ratification of the Treaty of Amsterdam of 2 October 1997 by the Federal Act of 10 August 1998 (*Moniteur belge*, 10 April 1999).

²² The term "procedure" refers both to "recruitment" (referring to all the activities performed by an employer relating to advertising a vacancy) and to "selection" (referring to all the activities performed by an employer relating to hiring a candidate): see Art. 2 of Collective agreement no. 38.



another organisation, sexual orientation or disability”. It should be stressed that in the interprofessional agreement 2007-2008, “diversity and non-discrimination” was one of the four policy issues especially under focus.

B. At the regional level:

To meet the concerns expressed by the European Commission about the state of implementation of Directives 2000/43/EC and 2000/78/EC, the legislative activity has also been intense at the regional level. Several legislative bills have been brought forward by the various Governments over the last year. All but two are still pending.

1. The Flemish Community/Region

The Flemish Community/Region adopted two legislative instruments in 2002 that fall in the field of Directives 2000/43/EC and 2000/78/EC without referring to them. The main one is the **Decree of 8 May 2002 on proportionate participation in the employment market** (*Decreet houdende evenredige participatie op de arbeidsmarkt*)²³, which seeks both to prohibit direct and indirect discrimination on the grounds listed in Article 13 EC²⁴, and to encourage the integration of target groups into the labour market by positive action measures (preparation of diversity plans and annual reports on progress made). This Decree has a limited scope of application, as it may only affect fields which fall under the competences of the Flemish Region or Community (vocational training, vocational guidance, integration of persons with disabilities in the labour market, public authorities of the Flemish Region/Community, including those in the field of education)²⁵. The second is the **Decree of 28 June 2002 on equal opportunities in the education field** (*Decreet betreffende gelijke onderwijskansen*)²⁶. It seeks to guarantee equal opportunities to the pupils at school (primary, secondary, technical and professional) by taking into account some indicators linked to the background of their parents (mother tongue, Travellers, family with a minimal income, etc.) and by allowing additional financial means to the schools in due proportion. However, this Decree does not entail as such an anti-discrimination provision on the ground of race or ethnic origin.

As different shortcomings and gaps in the implementation of both Directives 2000/43/EC and 2000/78/EC were pointed out, a new legislative bill was drafted and has been approved in February 2008 by the Flemish Government. The **bill aims at establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy** (*Ontwerp van decreet houdende een kader voor het Vlaamse gelijkekansen en gelijkebehandelingsbeleid*). It is presently under discussion before the Flemish Parliament²⁷. It was presented to the media as an initiative dedicated to transpose the European Directives but also to go one step further and to give a clear signal, i.e. “Flanders does not tolerate discrimination”. The draft Decree falls into two parts. The first part creates a general framework for the implementation of a proactive and preventive policy on equal opportunities. The second part relates to equality of

²³ *Moniteur belge*, 26 July 2002, p. 33262.

²⁴ This limitation to the seven grounds listed in Article 13 EC is the result of an amendment to the Decree adopted on 9 March 2007 in order to take into account the decision of the Constitutional Court of 2004 regarding the list of criteria of the Federal Act adopted in 2003 (Decree of 9 March 2007 modifying the Decree on proportionate participation in the employment market (*Décret modifiant le décret du 8 mai 2002 relatif à la participation proportionnelle sur le marché de l'emploi*), *Moniteur belge*, 6 April 2007).

²⁵ In contrast to the French-speaking part of Belgium, the Region and Community are merged in the Flemish part.

²⁶ *Moniteur belge*, 14 September 2002, p. 40909.

²⁷ Flemish Parliament, session 2007-2008, doc no. 1578/1.



treatment and encompasses the provisions against discrimination. A political choice was made in favour of a single legal instrument including all the prohibited criteria : the closed list of discrimination grounds enshrined in this bill is almost exactly the same as the combination of the lists of the three Federal Acts of 2007. The draft Decree has a general material scope limited to the competences of the Flemish Community and Region : Flemish employment policy, education, goods and services (i.e. housing, energy, cultural services), economical, social, cultural and political activities. This framework could be completed by more specialised regulations in certain areas such as housing, education, etc. As regards employment, it is explicitly provided that the future framework Decree does not repeal the Decree of 8 May 2002 on proportionate participation in the employment market which is not specific to equal treatment²⁸. As regards remedies and enforcement, the draft Framework Decree is very similar to the Federal Acts of 2007 on issues such as the burden of proof, victimisation, legal standing of organizations, injunction procedure (*action en cessation*), criminal provisions, etc. The Flemish Government is in charge of assigning one or several Equality bodies whose missions would be in line with the requirements of Directive 2000/43/EC²⁹. There is one important innovation in the draft which is the establishment of “Equal treatment bureaus” (*Gelijkebehandlingsbureau*) in the main Flemish cities³⁰. Those Equal treatment bureaus are designed to have a proactive role in the fight against discrimination and to give advice to the victims of discrimination and help them to launch a complaint or to suggest a mediation. This draft Framework Decree once adopted would fill the gaps in the implementation of both Directives as regard the Flemish Community/Region.

2. The French-speaking Community

The French-speaking Community adopted a **Decree on the principle of equal treatment** (*Décret relatif à la mise en œuvre du principe de l'égalité de traitement*) on **19 May 2004**³¹. This text prohibits direct and indirect discrimination, including instruction to discriminate, and enshrines an open list of criteria among which those of Directives 2000/43/EC and 2000/78/EC are expressly named (race, ethnic origin, religion or belief, disability, age or sexual orientation). It applies to 1° public servants in the French-speaking Community administration, 2° the personnel of certain institutions of public interest attached to the Community, 3° all levels of education in the French-speaking Community and 4° the general hospital of Liège (*Centre hospitalier universitaire de Liège*), which is attached to the Community (Art. 3 § 1). It extends the prohibition of discrimination to the associations funded or otherwise recognised by the French-speaking Community (Art. 3 § 2). The Decree provides that it applies in the fields of competences of the French-speaking Community, as defined in the Belgian Constitution and the Special Act of 9 August 1980 on institutional reforms. There are several shortcomings regarding the conformity of this Decree with the requirements of both Directives that were highlighted by the European Commission in its formal notice to Belgium on 23 March 2007. The Decree adopted by the French-speaking Community does not comply with the requirement set forth in Article 7(2) of Directive 2000/43/EC or Article 9(2) of Directive 2000/78/EC, and lacks any provision giving appropriate organisations the power to engage, on behalf or in support of the complainant, in

²⁸ Art. 19 of the draft Framework Flemish Decree.

²⁹ Art. 39 of the draft Framework Flemish Decree.

³⁰ Art. 41-42 of the draft Framework Flemish Decree. Even before the adoption of the Decree, it is worth stressing that the first 'bureau' has already been established in Antwerp (a major town of the North of Belgium), in May 2008.

³¹ *Moniteur belge*, 7 June 2004.



judicial or administrative procedures provided for the enforcement of the guarantee of equal treatment set out by this Decree (*infra*, section 6.2). Moreover, it contains no provision on victimisation.

Currently, a **draft Framework Decree on the fight against certain forms of discrimination** (*Avant-projet de décret de la Communauté française relatif à la lutte contre certaines formes de discrimination*) was approved by the French-speaking Community Government on 30 May 2008 but it has not yet been submitted to the parliamentary Assembly. It is still too early to enter into the details of this draft but it must be stressed that it has been very carefully drafted by expert consultancy with the purpose of implementing correctly all the relevant Directives and to adopt a framework instrument to tackle discrimination. The result at this stage seems to be in line with the requirements of Directives 2000/43/EC and 2000/78/EC. The draft goes even further by prohibiting discriminations based on additional criteria (the grounds covered are those of the three Anti-discrimination Federal Acts of May 2007) and by providing a large material scope for all these grounds (including all the fields covered by Directive 2000/43 which are under the competences of the French-speaking Community): employment, education, health policy, social advantages, membership of, and involvement in an professional organisation funded by the French-speaking Community, access to goods and services at disposal of the public. The legislative improvements chiefly concern sanctions and remedies and the equality body where the main shortcomings were denounced.

3. The Walloon Region

On 27 May 2004, the **Walloon Region** adopted a **Decree on equal treatment in employment and vocational training** (*Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle*)³². The grounds of discrimination covered are “religious or philosophical belief, disability, physical characteristic, actual or future state of health, age, civil status, sex, gender, sexual orientation, national or ethnic origin, family situation and socio-economical situation” (Art. 4). The material scope of this Decree is limited to some competences of the Walloon Region, including those attributed to it by the French-speaking Community in 1993³³ in the area of vocational training: the prohibition of discrimination therefore applies to vocational guidance, socio-professional integration, placing of workers, funding for the promotion of employment and vocational training, in the public and the private sectors. Until now the Walloon Region is in breach with the EU Directives in several respects :

- The material scope of the Directives is not fully covered. Chiefly, the Decree of 27 May 2004 does not apply to the own staff of the Walloon Region³⁴ and social housing is not covered.
- In the material fields covered, there are shortcomings such as the lack of provision on victimisation or on legal standing of associations.
- There are also shortcomings with regard to Articles 7(2) and 13 of Directive 2000/43/EC as well as Article 9(2) of Directive 2000/78/EC. The Decree of 27 May

³² *Moniteur belge*, 23 June 2004.

³³ Art. 3, 4° of the Decree of 19 July 1993 attributing the exercise of certain competences of the French-speaking Community to the Walloon Region and the French Community Commission (*Décret attribuant l'exercice de certaines compétences de la Communauté française à la Région wallonne et à la Commission communautaire française*), *Moniteur belge*, 10 September 1993.

³⁴ Although this is one of the exclusive competences of the Walloon Region, as confirmed by the Council of State in its opinion of 11 July 2006 (see *supra*).



2004 provides for a form of monitoring of the Decree by a special Institute, IWEPS, (*Institut wallon de l'évaluation, de la prospective et de la statistique*) but the latter must essentially report on the implementation of the Decree and make recommendation. In addition, the conciliation procedure (Art. 12) and the services entrusted with monitoring the Decree (Art. 13) do not fully meet the requirements of the race and the Employment Equality Directives.

A **draft Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training** (*Avant-projet de décret relatif à la lutte contre certaines formes de discrimination, en ce compris la discrimination entre les femmes et les hommes, en matière d'économie, d'emploi et de formation professionnelle*) should repeal the Decree of 27 May 2004. It was approved by the Walloon Government on 30 May 2008 but debates before the parliamentary Assembly have not started yet. Although it is too early to comment this legislative bill in details, it is worth stressing that it has been carefully drafted and that the shortcomings as regards the EU Directives have been removed. There is a closed list of prohibited criteria of discrimination which is larger than the one adopted at federal level because it also includes the belonging to a national minority, trade union membership³⁵ and criminal record. Sanctions and remedies are modelled on what was recently done at the federal level. As regards the monitoring of the Decree and the conciliation procedure, the previous system is maintained but completed by a 'capacitation provision' which states that a Cooperation Agreement between the Walloon Government and the Federal Government may be concluded to allow the Centre for Equal Opportunities and Opposition to Racism and the Institute for the Equality of Women and Men to file a suit relying on the Decree. Moreover, a **draft Framework Decree on equal treatment** was also adopted by the Walloon Government on 30 May 2008. It covers the remaining fields of competences of the Region such as social housing, public transportation and civil servants (Art. 5). After the adoption of both draft Decrees, the implementation of the European Directives will be achieved in the Walloon Region.

4. The German-speaking Community

The German-speaking Community adopted the **Decree on the guarantee of equal treatment on the labour market** (*Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt*) on 17 May 2004³⁶. The Decree implements Directives 2000/43/EC, 2000/78/EC and 2002/73/EC, only with respect to bodies or persons who fall under the competence of the German-speaking Community. Therefore, *ratione personae*, the Decree applies to the civil servants of that Community, to other staff employed in the Community's educational system, to intermediaries (*zwischenengeschalteten Dienstleister*) with respect to the services they offer, and to employers with respect to the provision of reasonable accommodation (*angemessenen Vorkehrungen*) to persons with disabilities (Art. 3). Article 4 of the Decree defines its scope of application *ratione materiae*. The Decree is to apply in particular to vocational guidance, professional counselling, vocational training and retraining (*Berufsorientierung, der Berufsberatung, beruflichen Aus- und Weiterbildung, Umschulung, Berufsbegleitung, Arbeitsvermittlung und des Zugangs zur Bildung*). In June 2007, it was

³⁵ It seems that there is strong reluctance within the Government to maintain trade union membership as a ground of discrimination.

³⁶ *Moniteur belge*, 13 August 2004.



amended through the adoption of a Decree in order to comply with EU law in different respects (modification of the definitions of discrimination, victimisation, legal standing of organisations, etc.)³⁷. There is, however, still a gap as discrimination based on race or ethnic origin in the field of education is not outlawed.

5. The Region of Brussels-Capital

An Ordinance was adopted by the Region of Brussels-Capital on 26 June 2003 (*Ordonnance relative à la gestion mixte du marché de l'emploi dans la Région de Bruxelles-Capitale*)³⁸. Although this legislative instrument relates to labour market intermediaries and does not aim at implementing Directives 2000/43/E and 2000/78/EC, it compels public (ORBEM: *l'Office régional bruxellois de l'emploi*) or private (authorised private temp agencies) organisations to comply with a general clause of non-discrimination (Art. 4 § 2)³⁹. However, the remainder of the Ordinance is silent about the prohibition of discrimination⁴⁰.

Two new draft Ordinances are actually under discussion before the parliamentary Assembly of the Region of Brussels-Capital. The **first draft bill relates to the fight against discrimination and equal treatment in the employment field** (*Projet d'ordonnance relative à la lutte contre la discrimination et à l'égalité de traitement en matière d'emploi*)⁴¹. The main objective is clearly to ensure the implementation of the EU anti-discrimination Directives in the field of Employment as regards Brussels-Capital. The grounds of discrimination encompass all those of the three Federal Anti-discrimination Acts of May 2007⁴². The definition of the concepts of discrimination are in line with the Directives requirements. The civil and criminal enforcement mechanisms are very close to those implemented at the federal level. There is a provision dedicated to the designation of one or several bodies whose mission is to promote the equality of treatment. This could be done through a Cooperation Agreement with the Federal Government to allow the Centre for Equal Opportunities and Opposition to Racism and the Institute for the Equality of Women and Men to act at regional level. The **second draft** is more recent and **deals specifically with the promotion of diversity and the fight against discrimination in the civil service of the Region of Brussels-Capital** (*Projet d'ordonnance visant à promouvoir la diversité et à lutter contre la discrimination dans la fonction publique bruxelloise*)⁴³. Although both drafts seem

³⁷ Programmatic Decree (*Décret programme*), 25 June 2007, *Moniteur belge*, 26 October 2007.

³⁸ *Moniteur belge*, 29 July 2003.

³⁹ The French text of the provision reads: "*ne pas pratiquer à l'encontre des chercheurs d'emploi de discrimination fondée sur la race, la couleur, le sexe, l'orientation sexuelle, la langue, la religion, les opinions politiques, ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance, le statut matrimonial ou familial, l'appartenance à une organisation de travailleurs, ou tout autre forme de discrimination telle que l'âge ou le handicap. Par dérogation à l'alinéa précédent, des actions positives au besoin de certains chercheurs d'emploi appartenant à un groupe à risques sont toutefois autorisées par le Gouvernement*" ("not to exercise vis-a-vis job applicants discrimination based on race, colour, sex, sexual orientation, language, religion, political or other opinions, national or social origin, membership of a national minority, wealth, descent, marital or family status, membership of an employees' organisation or all other forms of discrimination such as age or disability. In derogation of the preceding line, positive actions in favour of certain job applicants who belong to a vulnerable group are however permitted by the Government").

⁴⁰ Note that Article 4 § 4 states that labour market intermediaries must abide by legislation concerning the protection of private life vis-à-vis the processing of personal data.

⁴¹ Parliamentary Assembly of the Region of Brussels-Capital, Session 2006/2007, doc. A-402/1. The draft is presently discussed in the Commission of Economic Affairs of the parliamentary Assembly.

⁴² Note that there are explicit references to pregnancy, birth and maternity as well as to transgender.

⁴³ Parliamentary Assembly of the Region of Brussels-Capital, Session 2007/2008, doc. A-467/1. The draft is presently discussed in the Commission of Economic Affairs of the parliamentary Assembly.



in line with the EU Directives, there is still a gap as regards their material scope because social housing is, to our knowledge, still not covered.

6. The *Commission communautaire française (Cocof)*

Finally, the *Commission communautaire française*, to which the French-speaking Community has transferred its competences concerning vocational training in 1993, adopted a **Decree on equal treatment between persons in vocational training** on 22 March 2007 (*Décret relatif à l'égalité de traitement entre les personnes dans la formation professionnelle*)⁴⁴. This legal instrument is designed to implement Directives 97/80/CE, 2000/43/CE, 2000/78/CE, 2002/207/CE and 2006/54/CE) in the field of vocational training – including vocational guidance, learning, advanced vocational training and retraining (*orientation, formation, apprentissage, perfectionnement et recyclage professionnel*) - in the Region of Brussels-Capital⁴⁵. This piece of legislation prohibits direct, indirect discrimination, injunction and harassment based on an open list of suspect criteria (“or any other ground of discrimination”). In this list, are explicitly named those referred to in the Federal Anti-discrimination Acts of 10 May 2007⁴⁶. It states that reasonable accommodation should be provided in order to implement the principle of equal treatment towards persons with disabilities (Art. 7). As regards remedies and enforcement, some provisions are in line with the EU Directives: legal standing of association (Art. 14), burden of proof (Art. 13), equality body (Art. 12). The implementation of EU law is, however, not fully comprehensive. There are no provision on victimisation, nor on making void discriminatory contractual provisions⁴⁷. The only sanctions expressly provided are, on the one hand, a disciplinary procedure in case of direct or indirect discrimination committed by a staff member of one of the public bodies in charge of vocational training named in the Decree and, on the other hand, the suspension or suppression of the official assent given to the public body whose discriminatory practice has been judicially established. Moreover, the *Cocof*, still has to take action in order to ensure implementation of Directives 2000/43/EC and 2000/78/EC, with respect to its own staff. Finally, under the chapter “Promotion of equality”, Article 12 states that the Executive of the *Cocof* shall designate institutions (equality body) that will have the mission to assist victims of discrimination, to write reports, studies and make recommendations and exchange information with other institutions in Europe. To our knowledge, such a designation has not taken place yet.

In short, the state of implementation of Directives 2000/43/EC and 2000/78/EC may be summarized as follows :

- **At federal level**, since the adoption of the three Federal Anti-discrimination Acts of 10 May 2007, most of the shortcomings or gaps in the implementation of both Directives have disappeared. Nevertheless, the ‘safeguard provision’ (Art. 11 of the General Antidiscrimination Federal Act and the Racial Equality Federal Act) might be problematic regarding the requirements to repeal statutory law contrary to the equal treatment principle (Art. 16 a) of Directive 2000/78 and Art. 14 a) of Directive

⁴⁴ *Moniteur belge*, 24 January 2008, p. 3786.

⁴⁵ Art. 11 of the Decree of 22 March 2007.

⁴⁶ Art. 3 of the Decree of 22 March 2007.

⁴⁷ Note that Article 11 of the Decree of 22 March 2007 provides that it is “forbidden to allude to” a ground of discrimination in the terms which relate to vocational training as defined in the Decree.



2000/43). This ‘safeguard provision’ provides that these Federal Acts do not, *per se*, apply to differences in treatment enshrined in any other piece of legislation. The idea is to ensure that national courts will not refuse to apply existing legislation only because it would be in violation with antidiscrimination legislation. This does not have the effect to immunize any statutory law which violates the principle of equal treatment. In such a case, the procedure should remain the classical one (i.e. a referral to the Constitutional Court or, more exceptionally, a direct application of an international human rights instrument in order to move aside the legislation in breach of that instrument). Whether this classical procedure will be satisfactory remains to be seen. It might be necessary, therefore, to launch a full-scale screening of the existing legislation in order to ensure that any discriminatory provisions are identified and removed, since a purely *ad hoc* case-to-case approach might be insufficient.

- **At regional level**, most of the Regions/Communities have adopted (*Cocof*, German-speaking Community) or are in the process of adopting (Flemish Community/Region, Region of Brussels-Capital, French-speaking Community, Walloon Region) new statutory law fighting against discrimination in order to better implement the Directives. It is still too early to assess the strict conformity of these drafts with the Directives, but some points should already be underlined:
 - **Flemish Community/Region** : the adoption of the draft Decree creating a framework for the Flemish equal opportunities and equal treatment policy should ensure full implementation of Directives 2000/43/EC and 2000/78/EC.
 - **French-speaking Community** : the adoption of the draft Framework Decree on the fight against certain forms of discriminations should ensure full implementation of Directives 2000/43/EC and 2000/78/EC. However, this draft Decree, as the Federal Acts of 10 May 2007 enshrines a “safeguard provision” which might be problematic (see observations *supra*).
 - **Walloon Region** : the legislative process is at a very early stage but the draft Decrees adopted by the Government in their current version seem in line with the Directives. Moreover, the draft legislation, as the Federal Acts of 10 May 2007 enshrines a “safeguard provision” which might be problematic (see observations *supra*).
 - **German-speaking Community** : the Decree on the guarantee of equal treatment on the labour market of 17 May 2004, as amended in 2007, has been put in conformity with the Directives requirements as to the material field covered. There are nevertheless still some gaps concerning the staff of the German-Speaking Community (Directives 2000/43/EC and 2000/78/EC) and education (Directive 2000/43/EC).
 - **Region of Brussels-Capital** : with respect to employment and civil service, the implementation should be in line with the Directives after the adoption of the two draft Ordinances relating, on the one hand, to the fight against discrimination and equal treatment in the employment field and, on the other hand, to the promotion of diversity and the fight against



discrimination in the civil service of the Region of Brussels-Capital. There is, however, a remaining gap in the material scope as social housing is still not covered. In addition, this draft Decree, as the Federal Acts of 10 May 2007 enshrines a “safeguard provision” which might be problematic (see observations *supra*).

- **Commission communautaire française (Cocof)** : the adoption of the Decree on equal treatment between persons in vocational training in March 2007 filled some gaps regarding the implementation of the Directives in the field of vocational training. However, there are still shortcomings (no protection against victimisation, no provision making void discriminatory contractual provisions). Moreover, the *Cocof*, still has to take action in order to ensure implementation of Directives 2000/43/EC and 2000/78/EC with respect to its own staff.
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- The **competences of the Centre for Equal Opportunities and Opposition to Racism** (the equality body under Art. 13 of the Racial Equality Directive) should be extended to allow this body to contribute to the monitoring and implementation of the legislative instruments adopted by the Regions and the Communities. This body is currently competent at federal level as it is a federal agency, created initially by the Federal Act of 15 February 1993. It is not institutionally linked to any Regions or Communities. In order to empower the Centre for Equal Opportunities to play a role at regional level, a Cooperation Agreement has to be concluded between the Federal Government and the Government of each Region and Community. A draft Cooperation Agreement has been under discussion under the previous federal legislature but no further step has been taken since June 2007. To add to the complexity of the overall picture, the different Regions and Communities are not in the same position in this respect:
 - The Centre for Equal Opportunities and Opposition to Racism should be competent to contribute to the enforcement of the Flemish Decree of 8 May 2002 on proportionate participation in the employment market, using the same mechanisms as those available at federal level⁴⁸. The Decree on the guarantee of equal treatment on the labour market (adopted by the German-speaking Community on 17 May 2004 also provides in Article 15 that the Executive of the German-speaking Community may entrust one or more institutions with the promotion of the principle of equal treatment, including assistance to the victims of discrimination under the Decree and the production of reports and recommendations. With regard to monitoring compliance with these two instruments, a Cooperation Agreement may be concluded in order to entrust

⁴⁸ Art. 8 al. 1 of the Executive Regulation implementing the Decree of 8 May 2002 stipulates in this respect that the Flemish Government shall conclude a convention with the Centre for Equal Opportunities and the Fight against Racism: see Regulation of 30 January 2004 of the Flemish Government concerning the execution of the Decree of 8 May 2002 on proportionate participation in the employment market regarding professional orientation, vocational training, career counseling and the action of labour market intermediaries (*Besluit van 30 Januari 2004 van de Vlaamse regering tot uitvoering van het decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling*), *Moniteur belge*, 4 March 2004, p. 12050.



the Centre for Equal Opportunities and Opposition to Racism with the tasks defined in Article 13 of the Racial Equality Directive.

- By contrast, the Decree on the implementation of the principle of equal treatment adopted on 19 May 2004 by the French-speaking Community does not set up any specific enforcement body to monitor the effectiveness of its implementation. On the other hand, although the Walloon Decree of 27 May 2004 provides for a form of monitoring of the Decree (see *supra*), it appears insufficient to meet the requirements of Directive 2000/43/EC.
- Finally, it is worth mentioning that some of the draft regional Decrees/Ordinances explicitly provide for the adoption of a Cooperation Agreement⁴⁹ that would empower the Centre for Equal Opportunities and Opposition to Racism to fulfil the tasks defined under Article 13 of the Racial Equality Directive, also with respect to legislation adopted at regional and community level.

0.3 Case-law

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

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

➔ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the 2 Directives, even if it does not relate to the legislation transposing them (e.g. if it concerns previous legislation unrelated to the transposition of the Directives)

The judgments are presented in chronological order:

Judgment no. 157/2004 of the Constitutional Court, delivered on 6 October 2004

- Name of the court: Constitutional Court (*Cour d'arbitrage*)
- Judgment no. 157/2004 of the Constitutional Court, delivered on 6 October 2004 – see <http://www.arbitrage.be/public/f/2004/2004-157f.pdf>
- Name of parties: actions of annulment lodged against the Federal Act of 25 February 2003 combating discrimination and modifying the Federal Act of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism, by members of the Parliament from the extreme-right “Vlaams Blok” party (now renamed “Vlaams Belang”), and by Mr Storme, who professes his sympathies for this party.
- Brief summary of the key points of law:

⁴⁹ Cf. Art. 14 § 2 of the draft Ordinance of the Region of Brussels-Capital relating to the fight against discrimination and equal treatment in the employment field; Art. 36 § 1 of the draft Framework Decree of the French-speaking Community on the fight against certain forms of discriminations; Art. 30 of the draft Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training.



The judgment annuls three provisions of the Federal Act of 25 February 2003 (the main piece of legislation implementing at the time Directives 2000/78/EC and 2000/43/EC) and certain words in five other provisions, and it offers a restrictive interpretation of six other provisions of the Anti-discrimination Act. Essentially, the judgment limits the scope of the criminal provisions of the Anti-discrimination Act, but extends the scope of its civil provisions in order to cover a broader range of discriminatory acts, beyond the list of grounds originally contained in the Federal Act. The most striking aspect of the judgment is that the Court decided to extend the scope of application of the Federal Act to all discrimination, direct or indirect, *whichever the ground* on which it is based. Indeed, when the Anti-discrimination Federal Act was adopted, the choice had been made to *limit* the list of prohibited grounds of discrimination: the prohibition of discrimination therefore extended only to discrimination on the grounds of sex, race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, wealth, age, religious or philosophical conviction, actual or future state of health, disability or a physical characteristic. The Constitutional Court considered however that there is no reasonable justification for excluding the applicability of the civil provisions of this piece of legislation to discrimination practiced, in particular, on grounds of language or political opinion: in the view of the Court, the choice made by the legislature creates the false impression that other forms of discrimination, based in particular on language or political opinion, but which could also be based on other, non-enumerated grounds, would be less worthy of protection (B.5 to B.15). As a consequence, the definitions of direct and indirect discrimination contained in the Federal Act were broadened to prohibit discrimination based on any ground, including – but not limited to – the long list already contained in the original version of the Act, and language and political opinion.

Judgment of 7 December 2004 delivered by the First Instance Court of Antwerp (criminal division)

- a. Name of the Court: First Instance Court of Antwerp (criminal division) in the case of the Public Prosecutor and Centre for Equal Opportunities and Opposition to Racism v. H. Neuville
- b. Judgment of 7 December 2004 (ref. 4918 – AN56.99.441-03) (available on the website of the Centre for Equal Opportunities and Opposition to Racism: www.diversiteit.be / www.diversité.be)
- c. Name of the parties: Public Prosecutor and Centre for Equal Opportunities and Opposition to Racism v. H. Neuville
- d. Brief summary of the key points of law:

This judgment found the defendant, Mr Neuville, guilty of direct discrimination on the ground of race for having refused to rent his apartment to a Belgian couple of Congolese origin (Masudi-Makiadi) put forward by the rental agency despite the fact that the couple had sufficient income (both had permanent employment) and proposed to show references as proof of their reliability as tenants. The conviction is based on the Federal Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (*Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*), the extension of which by the Act of 12 April 1994 (mentioned in section 0.2, above) made the conviction of Mr Neuville possible. The judgment delivered on 7 December 2004 found that the defendant had committed the offence defined by Article 2 al. 1 of the Federal Act of 30 July 1981⁵⁰, but the



conviction was suspended for three years (the defendant also had to pay 250 euros in damages to the Centre for Equal Opportunities and Opposition to Racism as a civil party in these proceedings). The court considered that these provisions implied a restriction to the freedom of contract, which is not unlimited, but which, when it leads to a refusal to contract, must have an objective and reasonable justification.

Judgment of 19 April 2005 of the president of the First Instance Court (*Tribunal de première instance*) of Nivelles (emergency proceedings)

- a. Name of the court: First Instance Court (*Tribunal de première instance*) of Nivelles
- b. Judgment of 19 April 2005 of the President of the First Instance Court ref. T. no.. 3643/05, case no. 04/2400/A (not available electronically).
- c. Name of the parties: Centre for Equal Opportunities and Opposition to Racism and others v. X
- d. Brief summary of the key points of law:

The judgment applied the Federal Anti-discrimination Act of 25 February 2003 in a context where a homosexual couple had expressed their interest in renting a house but were finally rejected by the owner for discriminatory reasons: the owner chose to rent the house to a “traditional couple” with whom the owner was familiar, and the rental agency passed on this information to the homosexual couple. The judgment considered that the rental agency did not itself commit a discriminatory act, insofar as it simply gave to the couple against whom the discrimination was committed the information that the house had been rented. However the judgment did conclude with an injunction addressed to the other defendants (the owners of the property) not to repeat the discrimination in the future, under the threat of a fine of 100 euros per violation of that injunction.

Judgment of 14 June 2005 delivered by the Antwerp Court of Appeal (*Hof van Beroep te Antwerpen*)

- a. Name of the court: Antwerp Court of Appeal (*Hof van Beroep te Antwerpen*)
- b. Judgment of 14 June 2005 (ref. AR/2004/2811) (available on http://www.diversiteit.be/CNTR/NL/racism/jurisdiction/r05-06-14_antwerpen.htm).
- c. 9 appellants v. Province of Limburg (*Provinciebestuur van Limburg*)
- d. Brief summary of the key points of law:

The appeals followed the adoption of new regulations by a professional school in Hasselt (*Provinciale Handelsschool* of Hasselt, which is attached to the Province of Limburg), stating that after 1 September 2004 the wearing of headscarves would be prohibited in classrooms, study rooms and eating areas. Those regulations were then approved by the provincial authorities (*Besluit van de Bestendige Deputatie van de Provincieraad van Limburg*) on 1 July 2004. They were then challenged by the parents of nine girls who wore headscarves on two grounds: the action alleged that the Federal Act of 25 February 2003 had been violated, and that the regulations are in violation of freedom of religion. A first decision was adopted on 5 October 2004 in summary proceedings, denying the injunction sought by the applicants. On 14 June 2005, the Antwerp Court of Appeal decided to reject the appeal filed against this initial decision. It considered that Article 2 § 4 of the Federal Act of 25 February 2003 (which defines the material scope of the application of the prohibition of discrimination) may not be interpreted as including education within its material scope of application: indeed, although the last indent of this provision states that the prohibition of discrimination applies to “access



to and participation in, as well as the exercise of, an economic, social, cultural or political activity open to the public”, the Court of Appeal noted that this formulation is less explicit than that of Article 3(1) of Directive 2000/43/EC which, by way of contrast, explicitly refers to education under g). The Court of Appeal moreover noted that the freedom of religion as guaranteed under Article 9 ECHR is not an absolute right, but instead may be restricted under certain conditions as specified under Article 9(2) ECHR, and that these conditions were met by the circumstances of the case: indeed, it found that the school regulations were both precise and accessible, that they sought to pursue the legitimate aim of preserving order in the teaching institution and of protecting the rights of others, in particular against unwanted proselytism, and that any restriction to the applicants’ freedom of religion was narrowly tailored to achieve that objective, thus respecting the condition of necessity. The Court of Appeal did not examine the regulations challenged in the light of the non-discrimination clause of the ECHR (Art. 14, in combination with Art. 9 ECHR) or the equality clause of the Belgian Constitution (Art. 10 and 11).

Judgment of 8 July 2005 delivered by the President of the First Instance Commercial Court (*Rechtbank van Koophandel*) of Brussels (emergency proceedings)

a. Name of the court: First Instance Commercial Court of Brussels (*Rechtbank van Koophandel te Brussel*)

b. Judgment of 8 July 2005 delivered by the *Brussels Rechtbank van Koophandel* (first instance court which has special competences with regard to businesses) (ref. V.S. 2353/04) (available on the website of the Centre for Equal Opportunities and Opposition to Racism: www.diversiteit.be / www.diversité.be).

c. Van den Brande and the Centre for Equal Opportunities and Opposition to Racism v. N.V. Pizza Belgium and others

d. Brief summary of the key points of law:

Article 19 § 3 of the Federal Anti-discrimination Act of 25 February 2003 provides that where the alleged victim produces certain facts which may lead to a presumption of discrimination, it will be for the defendant to establish that no such discrimination has in fact taken place. In this case, the alleged victim had entered a Pizza Hut restaurant on 6 October 2003 accompanied by four friends. She also had her guide dog with her as she is visually impaired. When the group entered the restaurant, the initial reaction of the staff was to state that dogs were not allowed in the establishment. According to the alleged victim and her friends, the employees and the manager of the restaurant confirmed their refusal, finally obliging them to leave the restaurant. The defendants on the other hand insisted that they offered to seat the group at one, and then at another table, which the plaintiffs refused. The asserted policy of Pizza Hut is to prohibit dogs in their restaurants with the exception of guide dogs for the blind.

The President of the Court held that the conditions for shifting the burden of proof were not met. Indeed, the parties presented two strikingly contrasting versions of events and, according to the judgment, the “facts” which must be adduced in order to justify a shift of the burden of proof should constitute “established events” (“vaststaande gebeurtenis”); mere declarations by the parties do not suffice. Therefore, concluding that the plaintiffs had not proved their case, the President dismissed their complaint.



Judgment of 24 August 2005 of the President of the First Instance Court (*Tribunal de première instance*) of Charleroi (emergency proceedings)

- a. Name of the court: First Instance Court (*Tribunal de première instance*) of Charleroi
- b. Judgment of 24 August 2005 of the President of the First Instance Court of Charleroi (ref. REFE 05/454/C-24/08/2005) (not available electronically).
- c. Miriem Balil and others v. the French-speaking Community (*Communauté française*)
- d. Brief summary of the key points of law:

The judgment denied the injunction sought by the applicants against the modification to the internal regulations of the Vauban Royal Atheneum of Charleroi prohibiting the wearing of headware “ostensibly” expressing a political or religious affiliation in the institution. This decision simply found that the new regulations had not been definitively approved yet, and that there was therefore no urgency justifying the use of the summary procedure. A similar judgment was adopted on the same day concerning another educational institution also in Charleroi (Royal Atheneum of Gilly). These judgments, based on procedural grounds, did not examine the substance of the claims presented by the parents who argued that their children would be denied the possibility to pursue their education at those schools due to the change in dress code.

Judgment no. 152/2005 of the Constitutional Court, delivered on 5 October 2005

- a. Constitutional Court (*Cour d'arbitrage*)
- b. Judgment no. 152/2005 of the Constitutional Court, delivered on 5 October 2005 (available on www.arbitrage.be).
- c. A. Geensens and others v. Flemish Region
- d. Brief summary of the key points of law:

The judgment annulled articles 10 and 126 of the Decree of 7 May 2004 adopted by the Flemish Region on the material organisation and functioning of recognised religions, which stipulated that an elected or appointed member of a church council will be automatically be considered as having resigned when they reach 75 years of age. Church councils are created in order to ensure the proper functioning of churches and, in particular, to manage their finances; the public authorities have to compensate for any situation where a church faces a budgetary deficit, which justifies a certain level of control by the authorities on the way these finances are managed. While rejecting the claim that these provisions constitute an interference with the freedom of religious organisation and the autonomy of churches (Articles 19 and 21 of the Constitution, Article 9 ECHR, and Article 18 of the International Covenant on Civil and Political Rights, in combination with Articles 10 and 11 of the Constitution), the Constitutional Court nevertheless considered that they constituted discrimination on grounds of age. The Court based its conclusion (point B.8) on the finding that imposing such an age limit, although it pursues the legitimate aim of encouraging the renewal of the membership of church councils, and thus more effective and efficient management, nevertheless it is disproportionate insofar as it is based on an absolute presumption that members of church councils aged 75 years of age would no longer be capable of ensuring good management.



Judgment of 30 November 2005, Court of Appeals (*Hof van Beroep*) of Ghent

a. Court of Appeals of Ghent (*Hof van Beroep*)

b. Judgment of 30 November 2005 (see

http://www.diversiteit.be/CNTR/NL/racism/jurisdiction/d05-11-30_gent.htm)

c. Centre for Equal Opportunities and Opposition to Racism and André D. v. DD, CD and FD

d. Brief summary of the key points of law:

After André D. and his same-sex partner, who sought to rent an apartment through the intermediary of a rental agency, were told by the agency that the owner did not wish to rent her apartment to “two men or two women” – a statement which was repeated in the presence of a legal officer (*huissier de justice*), a few days afterwards. The Centre for Equal Opportunities and Opposition to Racism and André D. sought to obtain a judicial injunction ordering the cessation of what they considered to constitute discrimination on grounds of sexual orientation. A first judgment, adopted by the President of the Court of First Instance of Ghent on 31 December 2003, denied the application, since the magistrate considered that there was no sufficient evidence of discrimination for it to be justified to shift the burden of proof to the defendants under Article 19 § 3 of the Federal Act of 25 February 2003. In the judgment of 30 November 2005, the Court of Appeals considers that, although discrimination may in principle be proven through such means (the fact that the Government has not adopted a decree specifying the conditions under which “testing” may take place in order to prove discrimination is not an obstacle to establishing a presumption of discrimination by other means), in the instant case, there is no evidence that the actual owners of the property had knowledge of, or intended to practice, discrimination, since the rental agency was in relation only with their mother and not directly with the actual owners. As to the rental agency itself, the Court considers that it has not committed a discrimination : indeed, André D. and his friend were proposed another apartment for rent by the same agency.

Judgment of 30 November 2006 by the First instance Labour Court (*Tribunal du travail*) of Brussels

a. First instance Labour Court (*Tribunal du travail*) of Brussels

b. Judgment delivered on 30 November 2006 by the First instance Labour Court

c. Ms D and Centre for Equal Opportunities and Opposition to Racism v. public Centre for social aid (CPAS) of Evere

d. Brief summary of the key points of law:

This judgment is the first application Article 19 § 3 of the Federal Act of 5 February 2003 which provides for the shifting of the burden of proof in civil actions alleging discriminatory practices. of the judgment finding that such discrimination has been taking place in that administration. Ms D, an epileptic, was not proposed a vacant position after her temporary contract of employment as an ergotherapist had expired in a residence for elderly persons. Although she had been found fit to be employed by the occupational physician (with one reservation: the physician considered that she should not be allowed to drive a service van with passengers), she was told that the refusal to hire her was attributable to her state of health (disability). Despite this, the administration, defendant in this case, alleged that the refusal to recruit Ms D was not attributable to her state of health, although it was ready to admit that the refusal it opposed to Ms D was a result of her lack of ‘frankness’ by not openly discussing her epileptic condition with the direction and which accommodations were required, and that therefore the relationship of confidence was broken between the two parties. Ms D considered



that she was not under any obligation to divulge to the administration that she was an epileptic. The Labour Court concludes that, since Ms D had indeed to right to keep her disability secret, she could not be reproached to have refused to provide further information on her condition, which moreover was known to the direction. And the Court considers that the refusal to hire Ms D was in fact based on her state of health (the fact that she is an epileptic), and is thus discriminatory under Article 2 of the Federal Act of 25 February 2003.

Judgment of 24 January 2007 by the Labour Court (*Cour du travail*) of Brussels

a. Labour Court of Brussels (*Cour du travail*)

b. Judgment of 24 January 2007 by the Labour Court of Brussels

c. Centre for Equal Opportunities and Opposition to Racism v. NV Firma Feryn

d. Brief summary of the key points of law:

In this case where the defendant firm (Feryn) had stated that it did not wish to recruit Moroccans, arguing that its clients did not wish to be served by foreigners or workers of foreign origin, and then did not abide by its pledge to take remedial action, the Labour Court initially concluded (in a judgment of 26 June 2006) that there had been discrimination, but did not impose any financial sanctions on the firm, taking the view instead that the finding of discrimination should constitute sufficient reparation. The Centre for Equal Opportunities and Opposition to Racism appealed. On appeal, the Labour Court considers that an interpretation of the Racial Equality Directive is necessary for the case to be decided, and it asks the ECJ the following questions. **First**, is there “direct discrimination”, within the meaning of Article 2(2)(a) of the Racial Equality Directive, where an employer seeks to justify apparently discriminatory practices by the alleged tastes of his clients, who, according to that employer, would be unwilling to be served by persons of a foreign origin ? **Second**, is the existence of “direct discrimination” proven sufficiently by the use of selection criteria (in recruitment processes) which are discriminatory on their face (i.e., even without there being an identified victim of the discrimination)? **Third**, may the discrimination practiced by an employer in one of his undertakings be proven by taking into account the fact that in another of this employer’s undertakings (a subsidiary company), the recruitment process results in a situation where only persons of Belgian origin are being recruited? **Fourth**, what is the meaning of Article 8 of the Racial Equality Directive’s expression ‘facts from which it may be presumed that there has been direct or indirect discrimination’, and in particular: a) to what extent is the past behaviour of a particular respondent (in the case at hand, the fact that in April 2005 the firm Feryn had publicly stated that it did not wish to recruit workers of foreign origin) relevant in establishing a presumption of discrimination? b) may the mere fact that the respondent has exhibited discriminatory behaviour in the past, be deemed sufficient to establish a presumption that the discrimination has persisted? c) may such a presumption be established on the basis of a press communiqué, published jointly by the respondent and the national Equality Body, which contains at the very least an implicit admission of discrimination? d) does the fact that an employer has no employees of foreign origin lead to the presumption of the existence of indirect discrimination on grounds of race or ethnic origin, where the employer has in the past experienced difficulties in recruiting workers in sufficiently high numbers, and moreover proclaimed publicly his unwillingness to recruit workers of foreign origin in the undertaking? e) is one fact sufficient to establish a presumption of discrimination, or is more than one fact required? f) may a presumption of discrimination be established on the basis of the fact that in another company of the same



employer, no single person of foreign origin is employed? **Fifth**, under which circumstances must the national court consider that a presumption of discrimination has been rebutted successfully by the respondent? In particular, is such a presumption rebutted by a public declaration in the media from the respondent employer, that he is not discriminating, and that any candidate for the job is welcome to apply for a position in the company? Is it successfully rebutted by the affirmation by the employer that all the positions of garage-door-placers are now filled in his company (although not in the subsidiary company owned by the same employer)? Is it successfully rebutted by the circumstance that the respondent company has a woman (in charge of cleaning) of Tunisian origin within its service? Is it successfully rebutted by the recruitment, as garage-door-placers, of one or more employees of foreign origin, or by the establishment of a diversity plan for the undertaking and the commitment to send all job advertisements to the public employment agency, as initially stated in the joint press communiqué of 27 May 2005? **Sixth**, what implications follow from Article 15 of the Racial Equality Directive, stating that discrimination must be combated through ‘effective, proportionate and dissuasive sanctions’? In particular, is it compatible with this requirement that a national court finds discrimination to have occurred, without imposing any sanction, even in the form of a civil compensation? Or must the court order the cessation of the discriminatory practice it has found to exist, as Belgian courts are allowed under the Federal Act of 25 February 2003? Must the court order the publication of the judgment, since this might be considered a proportionate and dissuasive measure sanctioning the finding of discrimination?

On 12 March 2008, Advocate General Maduro delivered his opinion on the case. He mainly focuses on the concept of direct discrimination and aims at convincing the Court of Justice that, in themselves, words cannot only hurt, they can also amount to discrimination: “a public statement made by an employer in the context of a recruitment drive, to the effect that applications from persons of a certain ethnic origin will be turned down, constitutes direct discrimination”⁵¹. Based on the values underlying the anti-discrimination Directives, this interesting position removes much of the significance of the issue of proof to solve the present case. In this respect, the Advocate General considered, as does the Commission, that the burden of proof should shift because there is an array of indications pointing to a discriminatory practice: “in circumstances where it is established that an employer has made the kind of public statements about its own recruitment policy that are at issue in the main proceedings, and where, moreover, the actual recruitment practice applied by the employer remains opaque and no persons with the ethnic background in question have been recruited, there will be a presumption of discrimination (...). It falls to the employer to rebut that presumption”⁵².

On 10 July 2008, the European Court of Justice delivered a judgment in line with the opinion of Advocate General Maduro. It held the “The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim” (par. 25). The Court also gave interesting indications with respect to the shift

⁵¹ Opinion of Advocate General Maduro delivered on 12 March 2008, Case C-54/07, par. 19.

⁵² *Ibidem*, par. 23.



of the burden of proof: “public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking’s actual recruitment practice does not correspond to those statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer’s contentions that it has not breached the principle of equal treatment” (par. 34). Finally, as to appropriate sanctions, in a case where there is no direct victim, the Court held that those sanctions may include “a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings” (par. 39).

Judgment of 26 March 2007 of the President of the First Instance Labour Court (*Tribunal du travail*) of Ghent (emergency proceedings)

a. First Instance Labour Court of Ghent

b. Judgment of 26 March 2007

c. Caliskan Murat and Centre for Equal Opportunities and Opposition to Racism v. Delgouffe Yves and Euro-Lock (here after “Euro-Lock”)

d. Brief summary of the key points of law:

The defendant firm “Euro-Lock” refused to hire someone because of his national origin. This was held directly discriminatory by the President of the Labour Court of Ghent in an injunction procedure (*action en cessation*). This was an application of the shift of the burden of proof in civil procedures (Art. 19(3) of the Federal Anti-discrimination Act of 25 February 2003 applicable at the time). An internal e-mail that the employer had sent to one of his employees saying “Could you get rid of this person? A foreigner selling security: this has never been seen!” was considered as a presumption of discrimination. The defendant had therefore to demonstrate that, contrary to that presumption, no discrimination had occurred. The defendant was unable to establish that the refusal of the application was not related to the nationality of the applicant. The president of the Labour Court held that it was directly discriminatory and addressed an injunction to the firm to stop this practice and to examine each future application without any reference to the nationality or origin of the applicants.

Judgment of 10 October 2007 of the Court of Assizes (*Cour d’assises*)⁵³ of Antwerp

a. Court of Assizes (*Cour d’assises*) of Antwerp

b. Judgment of 10 October 2007

c. R. with the Centre for Equal Opportunities and Opposition to Racism v. Hans Van Themsche

d. Brief summary of the key points of law:

On 11 May 2006, Hans Van Themsche, a Flemish man aged of 19 and coming from a family close to the extreme Flemish right wing party – *Vlaams Belang*, shot at three persons in the

⁵³ The *Cour d’assises* is a criminal Court with a popular jury which decides whether the accused is guilty or not guilty.



street. He wounded a Turkish woman wearing the Islamic headscarf and killed a pregnant African nanny and the two years old ‘white’ child she was taking care of. A few days before the killing, he said to some friends that he intended to commit suicide after killing some “macaques”⁵⁴. This event was largely commented in the media and raised the question of the responsibility of the *Vlaams Belang* which has been feeding for years a climate of hate against foreigners. In a decision referred to as historical by the Centre for Equal Opportunities and Opposition to Racism, the Court of Assizes condemned the accused to life imprisonment. Racism was considered as an aggravating circumstance of the murders (Art. 405*quater* of the Penal Code). The Centre for Equal Opportunities and Opposition to Racism sees in this decision an implied application of the concept of discrimination by association with respect to the ‘white’ little girl.

Judgment no. 175.886 of 18 October 2007 of the administrative section of the Council of State (*Conseil d’Etat, section du contentieux administratif*)⁵⁵

- a. The administrative section of the Council of State (*Conseil d’Etat, section du contentieux administratif*)
- b. Judgment no. 175.886 of 18 October 2007, available on the website of the Council of State (www.raadvst-consetat.be)
- c. X v. de Vlaamse Gemeenschap and het Gemeenschapsonderwijs
- d. Brief summary of the key points of law:

A teacher of Islamic religion in a primary public school was dismissed for “heavy infringement” (*motif grave*) because she refused to take off her headscarf when leaving her classroom and while still being in the school’s premises. In application of the principle of neutrality of public education, the school regulation forbids the wearing of religious symbols at school except for the teachers of religion in their classrooms. The teacher launched an action in emergency proceedings before the Council of State to suspend and subsequently overrule her dismissal. On 18 October 2007, the Council of State admitted the action in suspension because the piece of legislation proclaiming the principle of neutrality in the Flemish part of Belgium was not sufficiently precise to infer a general prohibition of religious symbols in any school. The action in suspension, which has been admitted by the Council of State, concerned an appeal by the teacher against her dismissal. At this stage, the decision of the Council of State is still provisional.

Judgment no. 137/2007 of 7 November 2007 of the Constitutional Court (*Cour constitutionnelle*)

- a. Constitutional Court (*Cour constitutionnelle*)
- b. Judgment no. 137/2007 of 7 November 2007, available on the website of the Constitutional Court (www.arbitrage.be)
- c. Marc Vercruysse v. the federal Council of Ministers
- d. Brief summary of the key points of law:

The case concerned an action in annulment, introduced by an applicant for a promotion as First President of a Court, against a piece of legislation (Federal Act of 18 December 2006) excluding persons aged of more than 62 from such a promotion. The Constitutional Court held that there was no violation of the principle of equal treatment based on age for the reason

⁵⁴ In slang “monkeys”.

⁵⁵ The Council of State (administrative section) is the highest administrative Court in Belgium.



that there was (1) a legitimate objective - the need for a management plan submitted by the candidate and the need for the candidate to stay in position longer enough to achieve it - and that (2) this difference of treatment was proportionate with regard to this objective.

Judgment no. 148/2007 of 28 November 2007 of the Constitutional Court (*Cour constitutionnelle*)

a. Constitutional Court (*Cour constitutionnelle*)

b. Judgment no. 148/ 2007 of 28 November 2007, available on the website of the Constitutional Court (www.arbitrage.be)

c. Brigitte Moucheron v. the Federal Belgian State

d. Brief summary of the key points of law:

The federal Tax Code (*Code des impôts sur les revenus*) exempts persons with heavy disabilities from the road tax providing that the person with disabilities drives the car himself/herself. In a case where a woman with heavy disabilities did not get the exemption because her husband was always driving the car as she was unable to drive it herself, the Court of Appeals of Liège addressed a preliminary reference to the Constitutional Court wondering whether this provision was not discriminatory. The Constitutional Court held that it was in breach of the constitutional principle of equal treatment because there is no justification to refuse the tax exemption when the request concerns the sole car of the family and therefore the car that the person with disabilities is using, independently of who is actually driving it.

Judgment no. 153/2007 of 12 December 2007 of the Constitutional Court (*Cour constitutionnelle*)

a. Constitutional Court (*Cour constitutionnelle*)

b. Judgment no. 153/2007 of 12 December 2007, available on the website of the Constitutional Court (www.arbitrage.be)

c. Dominique Kolaczinski v. the Federal Belgian State

d. Brief summary of the key points of law:

A Us citizen, who has lived in Belgium for more than 40 years and who has the status of person with disabilities for obtaining fiscal and social advantages in the country, did not get special allowances provided for in a federal legislation of 1987 because she did not fall within the category of foreigners mentioned in this Act. She brought the case before the First Instance Labour Court of Liège which referred it for preliminary ruling to the Constitutional Court. The latter largely relied upon the decision of the European Court of Human Rights in *Koua Poirrez v. France* (30 September 2003). In this line, the Court concluded that there was no “very strong considerations” to exclude categories of foreigners from the benefit of the requested allowances while at the same time allowing some of them to reside on the Belgian territory for an indefinite time or for a significant period of time.

Judgment of 15 January 2008 of the Labour Court (*Cour du travail*) of Brussels

a. Labour Court (*Cour du travail*) of Brussels

b. Judgment of 15 January 2008 published in the *Journal des Tribunaux du travail*, June 2008, p. 140

c. E.F. v. Club corp.



d. Brief summary of the key points of law:

In 2004, the well established book shop “Club” fired a sale woman who, after several years on sick leave, came back to work wearing the Islamic headscarf and did not comply with her employer’s order not to wear it at work. The employee was sacked with not compensation and no advanced warning for heavy infringement (*motif grave*). She launched judicial proceedings and lost her case before the first instance Labour court of Brussels (*Tribunal du travail*) on 21 March 2006. On appeals, the Labour Court (*Cour du travail*) confirmed the first instance decision on 15 January 2008. The Court based its ruling on several grounds. First, freedom of religion is not really at stake in the case because what the company blamed its employee for is not her belonging to the Islamic faith but her coming to work while wearing an ostentatious religious symbol despite the fact that there are clear guidelines within the company according to which workers should not only wear an uniform with the brand of the company but should also refrain themselves from wearing any symbols or clothes likely to undermine the corporate image (described as an “open, available, sober, family-based and neutral” image). Second, the freedom to manifest one’s religion is not absolute: restrictions are allowed where the religious practices are “likely to lead to chaos”. In the present case, the Labour Court of Appeal considered that the company could justify the firing on objective consideration linked to its corporate image. Third, there is no discrimination as the company policy applies to all workers without any distinction.

Judgment of 31 January 2008 of the Court of Appeals (*Hof van Beroep*) of Antwerp

a. Court of Appeals (*Hof van Beroep*) of Antwerp

b. Judgment of 31 January 2008 (ref 2008/451)

c. R. with F. Altunbas, K. Uludogan, M. Kara, M. Bütuner, B. Uludogan and the Centre for Equal Opportunities and Opposition to Racism v. Bart Debie

d. Brief summary of the key points of law:

On 31 January 2008, Bart Debie, the ex superintendent of Antwerp police (and representative in the municipal Council of Antwerp as a member of the *Vlaams Belang*, a radical right wing political party), was sentenced to four years imprisonment (of which one year is definite), a fine amounting to 1.250 Euros and the loss of his civil and political rights for 5 years (meaning that during 5 years, he cannot be a civil servant, nor be elected, nor sit in representative bodies). The victims received damages. The Antwerp Court of Appeals held that Bart Debie was guilty of incitement to racism, intentional blows and injuries and report forgery.

The proceedings started in 2003 following a complaint of five members of a family originating from Turkey. On the day of the Muslim celebration Aïd-el-Kebir, they were arrested by Bart Debie and some of his colleagues. During the examination, they were violently hit and Bart Debie incited his subordinated to use violence. Racist insults were also said: “*the five little sheep are inside, the Sheep Festival can begin*” (*Les cinq petits agneaux sont rentrés. La fête du mouton peut commencer*). In first instance, Bart Debie had not been convicted of incitement to racism because of persisting doubts on the identity of the policeman who pronounced the racist insults.



Judgment of 14 March 2008 of the Court of Assizes (*Cour d'assises*)⁵⁶ of Mons

a. Court of Assizes (*Cour d'assises*) of Mons

b. Judgment of 14 March 2008

c. R. v. X

d. *Brief summary of the key points of law:*

During the night of 19 April 2006, three young people, one female and two males (from 17 to 19 years old), passing with their car in the prostitute area of Charleroi (a city located in the South of Belgium), threw a “Molotov cocktail” towards three Black prostitutes. One of them has suffered severe burns on all her body. Another one was hit by the Molotov cocktail but she had time to get undressed from her burning clothes. The third one was not hit. On the previous night, the three young people had already come into the area to insult the prostitutes and to throw on them an extinguisher. One of them answered back and thrown a dustbin which hit the young woman. The “Molotov cocktail” operation was designed as a “punitive expedition”. The three criminals were charged with murder attempts with racist intent. They were all convicted and sentenced to 15 (the young woman, pregnant and already mother of a three years old child), 18 and 20 years imprisonment. The proscribed intention was held to have been proved only in the case of the offender condemned to 20 years imprisonment. The jury was convinced that, according to his words, he wanted to “whiten those Black women”, and that he was going “to scorch those Negroes”. Since 2003, committing a crime with a racist intent amounts to an aggravating circumstance in criminal law, increasing the punishment.

Judgment of 5 May 2008 of the First instance Criminal Court (*Tribunal correctionnel*) of Liège

a. First instance Criminal Court (*Tribunal correctionnel*) of Liège

b. Judgment of 5 May 2008

c. R. with the Centre for Equal Opportunities and opposition to Racism v. X

d. *Brief summary of the key points of law:*

On the evening of 7 February 2008, in Liège, a major city located in the South of Belgium, two young women of Moroccan origin were physically assaulted in the town centre. To start with, the assaulters, uttered racist insults (“filthy Arabs”, “go home filthy race of shit”, etc.). The women answered back. They were then threatened with a firearm and assaulted. As they managed to follow their attackers while communicating with the police, the latter could be quickly apprehended. Informed of the case by the victims, the Centre for Equal Opportunities and Opposition to Racism intervened in the proceedings as a civil party. On 5 May 2008, the Criminal Court of Liège condemned the first assaulter to 15 months imprisonment (without any probation) and the second to 12 months imprisonment (with a 6 months probation). The first assaulter is linked to extreme-right and Nazi movements.

⁵⁶ The *Cour d'assises* is a criminal Court with a popular jury which decides whether the accused is guilty or not guilty.



Judgment of 25 June 2008 of the Court of Cassation (*Cour de cassation*)

a. Court of Cassation (*Cour de cassation*)

b. Judgment of 25 June 2008

c. information unavailable

d. Brief summary of the key points of law:

In a case of crime of passion, the *Chambre des mises en accusation* (the court in charge of deciding whether the accused should be prosecuted before a jury) denied access to the sister of the victim because she was wearing the Islamic veil. It should be stressed that the sister of the victim was a civil party in the case in the sense that she had launched a civil action against the accused. The reason of this refusal was based on Article 759 of the Code of Civil Procedure which provides that “Those attending a court hearing should not wear anything on his/her head and should have a respectful and silent attitude”. The case was brought before the Court of Cassation on the basis of a breach of freedom of religion and the principle of equal treatment as enshrined in the Belgian Constitution and the European Convention on Human Rights. The case was also based on a breach of the general principle of legal certainty because it was argued that this provision had never been construed to prevent anybody from wearing a religious symbol in court. For instance, in the famous criminal case concerning the Rwandese genocide before the *Cour d’assises* of Brussels, two catholic nuns were allowed to keep their veil during the hearings. During the hearing before the Court of Cassation, the sister was allowed in court with her headscarf. However, the Court of Cassation rejected the action as inadmissible because of technical reasons.

At the moment, the question of the construction of Article 759 of the Code of Civil Procedure is controversial with respect to its impact as to the wearing of religious symbols in court. In this case, the Court the Cassation seems in favour of a ‘tolerant’ interpretation of this provision. Nevertheless, because no formal ruling was actually held, the lawyer of the Muslim woman publicly announced the bringing of the case before the European Court of Human Rights.

Please note that more case law is available in the Annual Report 2007 (*Discrimination – Diversité*) of the Centre for Equal Opportunities and Opposition to Racism (www.diversite.be). Only some of the major cases are listed in this report.

Please describe trends and patterns in cases brought by Roma and Travellers , and provide figures – if available

*With regard to Travellers*⁵⁷. - The case-law is scarce but there exists a certain amount of cases related to difficulties encountered by Travellers in finding a place to stop with their caravan, either temporarily, during the travelling period, or permanently. Given the shortage of sites

⁵⁷ Among the Roma present in Belgium, a distinction is usually made between two sub-groups:

- “Travellers”: People of Roma origin who have been present in Belgium or neighbouring countries for several generations and who still lead a nomadic or semi-nomadic lifestyle. Some are Belgian nationals, other have the nationality of a neighbouring country and travel part of the year in Belgium. They are called “Travellers” (*Gens du Voyage* in French, *Trekkende bevolking* or *Woonwagenbewoners*, in Dutch).
- “Roma”: Roma who have recently arrived in Belgium, having emigrated from Central and Eastern European countries after 1989. They live in houses and do not pursue a nomadic lifestyle.



where Travellers are allowed to stop (especially in the Brussels' and Walloon Regions), they are regularly evicted from lands where they have parked their caravan without authorization. When they lodge complaints, tribunals generally hold that their stationing was illegal and the eviction therefore justified. However, in two cases, the judge decided in favour of the Travellers. In one decision, the *Juge de paix* (lowest-level judge) of Verviers, 30 June 2000⁵⁸: taking into account the right to housing which is recognised in the Belgian Constitution, held that in case of eviction of "gypsies", local communities are under an obligation to provide them with an adequate means of housing in an available land. Similarly, the President of the First instance Court of Nivelles stated that local communities were under an obligation to provide Travellers with a place to stop, in a provisional decision (emergency proceedings) dated 17 October 2003.

With regard to Roma.- Most post-1989 Roma live in very precarious situations. They are often asylum seekers or illegal migrants. Although civil society associations believe they are the victims of various discriminations, they rarely bring cases, for a set of reasons including the fear of being expelled from the country, general distrust of state institutions, lack of information and lack of means.

To the experts' knowledge, there are no figures available. However, it is worth stressing that although the Centre for Equal Opportunities and Opposition to Racism does not have a specific approach regarding Roma and Travellers, one member of the Centre is charged with dealing specifically with issues concerning Roma and Travellers.

Even though it is outside the scope of the Directive 2000/43/EC, it seems worth naming one decision of the European Court of Human rights concerning Roma in Belgium. In *Conka v. Belgium* (5 February 2002), the European Court of Human Rights held that Belgium, in arresting and deporting a group of Slovak Roma families to Slovakia, violated Article 4 of Protocol No. 4 to the European Convention on Human Rights, which prohibits collective expulsion of aliens. The European Court also acknowledges, in this case, that "[...] *acts whereby the authorities seek to gain the trust of asylum-seekers with a view to arresting and subsequently deporting them may be found to contravene the general principles stated or implicit in the Convention*".

⁵⁸ Published in *Echos du Logement* 2000, 119, obs. L. THOLOME.



1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

b) Are constitutional anti-discrimination provisions directly applicable?

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

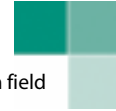
Articles 10 and 11 of the Constitution guarantee equality before the law and enjoyment without discrimination of the rights and freedoms accorded to all, without specifying a list of prohibited grounds of discrimination. These equality clauses are applicable generally, without any restriction either as to the grounds on which the discrimination is based (they require that the principle of equality be respected in relation to all grounds) or as to the situations concerned (they are applicable to all contexts, going beyond not only employment and occupation, but also the scope of Directive 2000/43/EC).

The notions of equality and non-discrimination under Articles 10 and 11 of the Constitution are interpreted in conformity with the classical understanding of non-discrimination in international law, especially as formulated by the European Court of Human Rights⁵⁹: the rules on equality and non-discrimination of the Constitution do not exclude a difference in treatment between certain categories of persons, provided that an objective and reasonable justification may be offered for the criterion of differentiation; the existence of such a justification must be assessed with regard to the aim and the effects of the contested measure and to the nature of the principles applying to the case; the principle of equality is violated where it is established that there is a lack of proportionality between the means used and the aim to be achieved⁶⁰. More recently, the Constitutional Court has elaborated its understanding of the constitutional requirement of non-discrimination by deciding that the legislature may have to offer a reasonable and objective justification for not making a distinction – i.e. offering the same treatment to – in situations which are “essentially different”⁶¹. This case-law interprets the Constitution as requiring the legislature not to commit indirect discrimination against certain categories. However, this prohibition of indirect discrimination remains relatively underdeveloped and can be invoked only in a limited manner. The requirement to treat distinct situations differently prohibits the adoption of across-the-board rules where this would place a particular disadvantage on certain groups of people. But the Constitutional Court will not systematically analyse the impact of different acts with the aim of repealing legislation that may disproportionately affect certain segments of the population.

⁵⁹ ECHR, 23 July 1968, *Belgian Linguistic Case* (Series A no. 6), § 10.

⁶⁰ *Cour d'arbitrage* (Constitutional Court), 8 July 1997, Case no. 37/97; *Cour d'arbitrage*, 13 October 1989, Case no. 23/89, *Sprl. Biorim, Moniteur belge*, 8 November 1989, B.1.3.

⁶¹ *Cour d'arbitrage*, 2 April 1992, Case no. 28/92, 5.B.4.



In principle, it should be possible to invoke these constitutional requirements in the context of private relationships. This has been the position in the doctrine⁶². It has been alluded to by the Belgian Constitutional Court, previously the *Cour d'arbitrage-Arbitrage Hof*⁶³. It should follow logically from the recognition by Belgian courts that other constitutional provisions may be invoked in the context of private relationships, for instance to void a contractual clause which contravenes a right which is constitutionally protected. However, because of their very general formulation and the delicate problems which would be entailed by their invocation in the field of private relationships, these provisions have never been used to protect an individual from private acts of discrimination by an employer. Their main importance lies in the fact that legislative norms adopted either by the Federal State (*Lois/Wetten*) or by the Regions or Communities (*Décrets/Decreten* or *Ordonnances/Ordonnanties*), and regulations adopted by the executive (*Arrêts royaux/Koninklijke besluiten* when adopted by the Federal Government, *Arrêts du gouvernement de la Région ou de l'Exécutif/Besluiten van de regering* when adopted by the Executives of the Region), must respect the constitutional principle of equality. The respect of the constitutional principles of equality and non-discrimination is ensured by the power accorded to every person with a legal interest to seek the annulment of a statutory law or an executive regulation, respectively, before the Constitutional Court or the Council of State (*Conseil d'Etat/ Raad van State* – supreme administrative court)⁶⁴. Moreover, if a jurisdiction entertains doubts as to the compatibility of a legislative norm (Federal Act or Decree), it may submit the question to the Constitutional Court by a referral procedure, and the Court may then consider a piece of legislation invalid if it is found to violate the constitutional principles of equality and non-discrimination.

⁶² See, e.g., M. Tison, “L'égalité de traitement dans la vie des affaires sous le regard du droit belge”, *J.T.*, 2002, p. 699; J.-Fr. Romain, “Des principes d'égalité, d'égalité de traitement et de proportionnalité en droit privé”, *Rev. Dr. ULB*, 2002, p. 225.

⁶³ See Constitutional Court judgment no.117/2003 of 17 September 2003, B.8.: “... si la réglementation générale d'un hôpital privé devait traiter ses médecins hospitaliers de manière discriminatoire, il appartiendrait à ceux-ci de faire valoir leurs droits devant le juge compétent” (“If the general regulations of a private hospital treat hospital doctors in a discriminatory manner, it is up to the latter to assert their rights before a competent judge”).

⁶⁴ For the competence of the Constitutional Court, see Art. 142 of the Constitution.



2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

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

Originally, the former Federal Act of 25 February 2003 prohibited discrimination on the grounds of sex, race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, wealth, age, religious or philosophical conviction, actual or future state of health, disability or a physical characteristic. This list, although long, remained limited. But following the judgment no. 157/2004 of the Constitutional Court (previously named the Court of Arbitration) of 6 October 2004, that restriction on the scope of the application of the Act of 25 February 2003 was removed: the rather extensive remedies provided for in that legislation could be invoked by the victims of any direct or indirect discrimination, whatever the ground of discrimination.

However, the judgment of 6 October 2004 did not question the choice of the legislator to have a closed list of prohibited grounds of discrimination; rather, the violation of Articles 10 and 11 of the Constitution resulted from the fact that this list was arbitrary, since it excluded two grounds (language and political opinion) which are found in anti-discrimination provisions of international human rights law such as, in particular, in Article 26 of the International Covenant on Civil and Political Rights. Accordingly, when the Federal Government proposed a reform of the existing antidiscrimination legislation, it chose to prohibit discrimination on a limited set of grounds, which however go beyond the grounds listed in the Racial and the Employment Equality Directives.

The Racial Equality Federal Act of 10 May 2007 prohibits discrimination on grounds of alleged race, color, descent, national or ethnic origin, and nationality.

The General Anti-discrimination Federal Act of 10 May 2007 covers

- age, sexual orientation, civil status, birth, wealth/income (*fortune*, in French), religious or philosophical belief, actual or future state of health, disability, physical characteristic (grounds already covered in the 25 February 2003 Anti-discrimination Act and which are not covered in the Racial Equality Federal Act or in the Gender Equality Federal Act of 10 May 2007),
- political opinion and language (grounds added to take into account the ruling no. 157/2004 of the Constitutional Court),
- genetic characteristic and social origin (grounds added in the course of the legislative process).

No reference was made to membership of a national minority, although it would have been justified by reference to the list of prohibited grounds of discrimination in Article 21 of the EU Charter of Fundamental Rights, because distinct legal regimes should have applied to such membership whether it is defined for instance on the basis of ethnicity, language or religion.⁶⁵

⁶⁵ The Gender Equality Federal Act of 10 May 2007 prohibits discrimination based on sex or on assimilated grounds (maternity, pregnancy, transsexualism).



It will be noted that, although only the former Federal Act of 25 February 2003 was presented to the Constitutional Court, the reasoning of the Court on the main point of the judgment – that discrimination on the grounds of political opinion or of language is no less deserving of protection than discrimination based on the grounds explicitly enumerated in the original version of the Act of 25 February 2003 – should logically be extended to the other legislation adopted in order to implement the European Community anti-discrimination Directives. For instance, the Flemish Decree on proportionate participation in the labour market adopted on 8 May 2002 by the Flemish Community (exercising its competences jointly with the Flemish Region) listed exhaustively the prohibited grounds of discrimination which it seeks to address (covering sex, alleged race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, wealth, age, belief or conviction, present or future state of health, disability or physical characteristic), but, after the ruling of the Constitutional Court adopted in 2004 (see *supra*) it should be read, in accordance with the constitutional requirement derived by the Constitutional Court from Articles 10 and 11 of the Constitution, as extending its protection to persons discriminated against on other grounds. This however does not extend to the definition of certain “groups” for the purposes of the positive action measures of the Flemish Decree⁶⁶. “Target groups” must be defined exhaustively, and positive action measures cannot benefit everyone claiming to be victims of discrimination on any ground which they may happen to present. In March 2007, the Flemish Decree on proportionate participation in the labour market was amended in order to limit the grounds of prohibited discrimination to those of Article 13 EC (gender, alleged race, ethnic origin, religion or belief, disability, age and sexual orientation). In June 2007, the Decree of the German-Speaking Community on the guarantee of equal treatment on the labour market was also amended to take into account the decision of the Constitutional Court. In this last case nevertheless it was decided to complete the list of prohibited criteria of discrimination with language and political belief.

It should be stressed that the list of grounds of discrimination tackled in the various pieces of legislation already adopted or still under discussion in the Communities and the Regions are not entirely consistent even if there is a general trend towards harmonisation (*supra*, section 0.2). As a matter of fact, the grounds embodied in Directives 2000/43/EC and 2000/78/EC are always expressly mentioned in these pieces of legislation.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?

Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43,

⁶⁶ These “target groups” have been identified by the Flemish government as “all categories of persons whose level of employment, defined as the percentage of the active population of that category who effectively work, are under the average level of employment for the total Flemish population” (Art. 2(2) al. 1, of the *Besluit van 30 Januari 2004 van de Vlaamse regering tot uitvoering van het decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling* (Executive Regulation of 30 January 2004 of the Flemish Government concerning the execution of the Decree of 8 May 2002 on equitable participation in the employment market concerning professional orientation, vocational training, career counselling and the action of intermediaries on the labour market), *Moniteur belge*, 4 March 2004, p. 12050.



according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

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

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

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

a) Definitions of the grounds of prohibited discrimination

None of the grounds mentioned in the Racial and Employment Equality Directives which are used in the Belgian legislation were provided with a definition when the implementation took place. These definitions, in effect, were considered as unnecessary, as these concepts – in the context at least of an act prohibiting discrimination – were seen as self-explanatory. Comments are made below, however, on the relationships which may exist between the lack of such definitions in anti-discrimination provisions and the use of such definitions in the context of positive action measures. In fact, because of the risks entailed in processing of such sensitive personal data as those on an individual's race or ethnic origin⁶⁷, such processing will be avoided even in the context of positive action measures. It will be noted for instance that the Executive Regulation adopted on 30 January 2004 by the Flemish Government to implement certain provisions of the Decree of 8 May 2002, although it details the procedures for implementing "diversity plans" which aim to ensure progress towards proportionate representation in the employment market of identified "target groups" with a view to combating discrimination on grounds of race and ethnic origin in particular, refers (in Article 2 paragraph 2, 1°) not to workers' race or ethnic origin but instead – as a substitute for race or ethnic origin – to "allochtones". These are defined as adult citizens legally residing in Belgium and whose socio-cultural background is of a country not part of the European Union, who may or may not have Belgian nationality and who either have arrived in Belgium as foreign workers or through family reunification, or have obtained the status of refugee or are asylum-seekers whose claims to asylum have not been considered inadmissible, or have a right to residence in Belgium because their situation has been regularised, and who, because of their poor knowledge of the Dutch language and/or their weak socio-economic position, whether or not reinforced by their poor level of education, are disadvantaged. The absence of any reference to the "racial" or "ethnic" background of the individual in such a definition of the "target group" is remarkable if we recall that these plans seek to implement the principle of equal treatment on the grounds of, inter alia, race and ethnic origin. However, processing of data on the race or ethnic origin of any individual would be in violation of the requirements

⁶⁷ See the Opinion no. 7/93 adopted on 6 August 1993 by the Commission for the Protection of Privacy (*Commission de protection de la vie privée*), which offers a strict interpretation of the limits imposed by the Belgian Federal Act of 8 December 1992 on the protection of private life vis-à-vis the processing of personal data. See www.privacycommissie.be.



of the data protection Act according to the Commission for the Protection of Private Life, which makes reliance on this kind of proxy inevitable.

Disability.- With respect to the ground of disability, a distinction should be made between the use of this notion in provisions simply outlawing discrimination on the one hand, and its use in provisions which arrange for certain special measures on the other. Indeed, whether or not described as positive action, such special measures benefiting persons with disabilities need to identify the beneficiaries with greater specificity (on the definition of disability in the context of positive action in favour of persons with disabilities, in particular in setting quantitative objectives for their improved representation in public administrations, see *infra*, section 5). Such is not the case, however, as regards a legislation simply prohibiting discrimination on grounds of disability (or assimilated characteristics such as state of health), where the behaviour targeted is the act of discrimination, whether or not the person victim of such behaviour falls under the definition of disability. The definition provided in Case C-13/05, *Chacón Navas*, might in the future be taken into account by the Belgian courts, since there exists no competing definition in national anti-discrimination legislation.

The General Anti-discrimination Federal Act provides for the prohibition of discrimination based on actual or future state of health, disability, physical characteristic or genetic characteristic. As in the previous 2003 legislation, no definition of these grounds is provided in the Act. The website of the Centre for Equal Opportunities and Opposition to Racism (the federal equality body, <http://www.diversiteit.be>) provides some indications:

- disability which is described as having evolved from a “medical concept” (in the 1980s) towards any “element preventing individuals from fully participating in life in society”,
- state of health: “actual or future state of health with respect to a physical or mental sickness”,
- physical characteristic encompasses the inborn characteristics or those which have appeared without the will of the individual (e.g. scars following a surgery, mutilation, burn, ...).

In the same line, the legislative instruments adopted at the level of the Regions and Communities to implement the Employment Equality Directive do not provide any definition of the discriminatory grounds. For instance, the Decree on proportionate participation in the labour market adopted on 8 May 2002 by the Flemish Region/Community simply listed among the prohibited grounds of discrimination “present or future state of health, a disability or a physical characteristic”, without offering a definition of disability. However, this latter Decree provides a more detailed notion of equal treatment and goes beyond a simple prohibition of discrimination to impose the adoption of diversity plans and annual reporting on the representation of “target groups” (“kansengroepen”) in the workforce of the administrations concerned, and the Executive Regulation adopted on 30 January 2004 by the Flemish Government to implement certain provisions of this Decree does identify persons with disabilities among these “target groups”, and defines them as “persons with a physical, sensory, mental or psychological disturbance or limitation which may constitute a disadvantage for an equitable participation in the employment market” (Art. 2(2), al. 2, 2°, of the Executive Regulation adopted on 30 January 2004) – a definition which, it will be noted,



is almost identical to the definition provided in Case C-13/05, *Chacón Navas*. Similarly, other legislation or regulations which afford advantages to persons with disabilities or encourage their professional integration by incentives to their employer must per necessity define persons with disabilities, in order to identify who will benefit from such advantages or to identify which employers, under which conditions, will be rewarded for the efforts they make in promoting the professional integration of persons with disabilities⁶⁸.

Religion.- With respect to the definition of “religion” in the context of the prohibition in Belgium of discrimination based on religion or belief, the Belgian courts will likely be guided by European Court of Human Rights case-law which, although it does not provide such a definition, has refused to extend the protection of Article 9 of the European Convention on Human Rights guaranteeing freedom of religion to professed beliefs which cannot be related to an existing religious faith⁶⁹. The protection from discrimination based on religion will most probably be denied to the members of groups defined as “sects” under the Federal Act of 2 June 1998, which describes these as “any group with a religious or philosophical vocation, or pretending to have such a vocation, which in its organisation or practice performs illegal and damaging activities, causes nuisance to individuals or to the community or violates human dignity”⁷⁰. On the other hand, it is clear that the prohibition of discrimination on grounds of religion will protect members of religious faiths beyond the six religions which, under the Belgian organisation of the relationship between State and Churches, are specifically recognised as being the most representative⁷¹.

Sexual orientation.- Heavily influenced by Canadian and Dutch precedents⁷², the Decree on equal participation on the labour market adopted by the Flemish Community/Region seeks not

⁶⁸ See, for example, the Act on the social rehabilitation of persons with disabilities (*Loi relative au reclassement social des handicapés*) of 16 April 1963, Art. 1 of which states that it is addressed to persons whose opportunities for employment are effectively reduced because of an insufficiency or an impairment (“une insuffisance ou une diminution”) of at least 30 % of their physical capacity or at least 20 % of their mental capacity; the Decree of 6 April 1995 of the Walloon Regional Council on the integration of disabled persons (*Décret relatif à l’intégration des personnes handicapées*) does not quantify the degree of severity of the impairment, but simply states that the impairment must be important enough to require an intervention of the collectivity (Art. 2); the *Décret relatif à l’intégration sociale et professionnelle des personnes handicapées*, adopted on 4 March 1999 by the *Cocof*, stipulates that to be granted the benefits set out by the Decree, the beneficiary must present a disability which results from an impairment of at least 30 % of physical capacity or at least 20 % of mental capacity (Art. 6 a).

⁶⁹ Eur. Comm. HR, *X v. the United Kingdom*, Appl. No. 7291/75, decision of 4 October 1977, DR, 11, p. 55; Eur. Comm. HR, *X v. Federal Republic of Germany*, Appl. No. 4445/70, decision of 1 April 1970, Rep. Vol. 37, p. 119. See C. Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford Univ. Press, 2001, pp. 57-59.

⁷⁰ Federal Act of 2 June 1998 creating a Centre for information and advice on sects (*Loi du 2 juin 1998 portant création d’un Centre d’information et d’avis sur les organisations sectaires nuisibles et d’une Cellule administrative de coordination de la lutte contre les organisations sectaires nuisibles*, *Moniteur belge*, 25 November 1998).

⁷¹ See the Federal Act of 4 March 1870 (*Loi du 4 mars 1870 sur le temporel des cultes*, *Moniteur belge*, 9 March 1870), as modified in 1974 (*Loi du 19 juillet 1974 portant reconnaissance des administrations chargées de la gestion du temporel du culte islamique*, *Moniteur belge*, 23 August 1974) and 1985 (*Loi du 17 avril 1985 portant reconnaissance des administrations chargées de la gestion du temporel du culte orthodoxe*, *Moniteur belge*, 11 June 1985). The religions recognised are the Roman Catholic, Anglican, Jewish, and Protestant faiths; more recently, the Muslim and Orthodox faiths have been added to the list. Recognition entails certain financial advantages in a system under which, the most representative religions receive financial support from the State although there is no official or State religion. Since the revision of Article 181 of the Constitution in 1993, delegates of recognised organisations offering moral guidance under a non-religious philosophical conception also have their salaries paid by the State.

⁷² The Flemish legislature was inspired by the Canadian 1995 Employment Equity Act as well as the Dutch legislation on the Promotion of Labour Participation of Ethnic Minorities (*Wet stimuleren arbeidsdeelname minderheden (SAMEN)*) of 29 April 1998, which improves on the previous Act on the Promotion of proportional labour participation of ethnic minorities (*Wet bevordering evenredige arbeidsdeelname allochtonen*) of 1 July 1994. The initiative was also stimulated by the desire to



only to prohibit direct and indirect discrimination in the areas falling under the competences of the Flemish Community/Region, on the grounds of, *inter alia*, sexual orientation, but also to improve the representation in the labour market of target groups (“kansengroepen”). These target groups are defined in general terms as all groups within the active segment of the population which are under-represented on the labour market. The Executive Regulation adopted on 30 January 2004 by the Flemish Government implementing the Decree of 8 May 2002⁷³ identifies certain groups which, “in particular”, fall under that definition: these groups are persons of non-EU origin and background (“allochtones”), persons with a disability, workers above 45 years of age, persons who have not completed their secondary education, or persons belonging to the under-represented sex in a specific profession (Art. 2(2), al. 2). Gay, lesbians and bisexuals are not mentioned. Persons of a non-heterosexual orientation are therefore not considered to form a target group for the purpose of the affirmative measures imposed on the administrations of the Flemish Community/Region, the education sector, and labour market intermediaries; in particular, these entities will not have to produce an annual report on the representation of gay, lesbian and bisexuals in their workforce⁷⁴. This obviously is to be explained by the difficulty pointed out by the Flemish Social and Economic Council (*Sociaal-Economische Raad van Vlaanderen (SERV)*) in an opinion it delivered on 24 April 2003 on the Decree of 8 May 2002 on proportionate participation in the labour market of quantifying such a representation, as this would only be possible by registering employees’ sexual orientation⁷⁵. Minority religious groups are not defined as a target group in the meaning of the Flemish Decree probably for the same reasons.

These examples illustrate that the need for such a definition – and for the invasion of privacy which may be required to verify whether individuals fall under that definition – does not exist in the same way as in the context of legislation simply prohibiting discrimination, although for an active labour policy promoting the integration of certain target groups into the labour market to be pursued, it may be necessary to adopt a definition of the beneficiaries.

b) Use of equivalent terms in national legislation

In general, neither the grounds covered by the Racial and the Employment Equality Directives, nor the additional grounds to which the General Anti-discrimination Federal Act applies, are defined in other parts of national legislation. However, legislation in the field of social security does provide that certain benefits will be attributed to persons which a certain

achieve the objectives set out in the conclusions of the Lisbon European Council, which aims to increase the level of employment within the active population up to 65 % by 2004 and 70 % by 2010.

⁷³ *Besluit van 30 Januari 2004 van de Vlaamse regering tot uitvoering van het decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling* (Executive Regulation of 30 January 2004 of the Flemish Government concerning the execution of the Decree of 8 May 2002 on proportionate participation in the employment market concerning professional orientation, vocational training, career guidance and the action of intermediaries on the labour market), *Moniteur belge*, 4 March 2004, p. 12050

⁷⁴ See Art. 5(1) of the Regulation of 30 January 2004.

⁷⁵ The independent authority instituted in Belgium to monitor legislation protecting private life vis-à-vis the processing of personal data delivered an opinion on the identification of members of “target groups” to fulfil the objectives of the Flemish Decree on proportionate participation in the labour market of 8 May 2002 (*Commission de protection de la vie privée*, Opinion of 15 March 2004, no. 032004, available on www.privacycommissie.be). However, as homosexuals or persons having a certain sexual orientation have not been identified as “target groups”, the Opinion does not specifically focus on the registration of certain persons, for instance in the composition of an undertaking’s workforce, according to that criterion.



degree of disability, which has to be medically certified. Recital 17 of Directive 2000/78/EC is not expressly reflected in the General Anti-discrimination Federal Act.

c) Scope of age-based discrimination

The prohibition of age-based discrimination is not limited to certain ages in current Belgian legislation. It may in principle protect both older and younger people from differences in treatment on grounds of age which cannot be reasonably and objectively justified.

d) Multiple discrimination

The authors of this report are not aware of any case-law or legal regulation which explicitly addresses or takes into account situations of multiple discrimination. In fact, the current set of three Federal Anti-discrimination Acts adopted on 10 May 2007, is based on the very opposite idea, according to which any discrimination must be categorized as relative to one identifiable ground, since different legal regimes are set up for each of the three following categories: 1° alleged race, color, descent, national or ethnic origin, and nationality ; 2° sex, or the assimilated grounds (pregnancy, maternity, transsexualism) ; 3° age, sexual orientation, civil status, birth, wealth/income (*fortune*, in French), religious or philosophical belief, actual or future state of health, disability, physical characteristic, genetic characteristic, political opinion, language and social origin. It may be presumed that the victim of multiple discrimination will turn towards the legislation which affords the highest level of protection, since it is very doubtful that the same discriminatory act can be challenged, under separate statutes, although that act might result in a discrimination on more than one ground. In this choice, the victim will also of course have to take into account the availability of evidence of discrimination on any of the possible grounds.

This does not mean that the question of multiple discrimination was not raised during the preparatory works (*travaux préparatoires*) that led to the Acts of 10 May 2007. In this respect, the option of a Single Equality Act was carefully considered but could not be achieved. In any case, even in one Single Equality Act, ethnicity and gender would have been more protected than other grounds as a result of past legislation.

It should, however, be stressed that, in the French-speaking Community the choice seems to be made to adopt a single equality Decree, especially because such a legislative framework is better suited to tackle multiple discriminations⁷⁶. The same is true with respect to the bill currently considered by the Flemish Parliament⁷⁷.

2.1.2 Assumed and associated discrimination

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

As in the Directives, discriminations based on assumed characteristics are not expressly forbidden in the Racial Equality Federal Act and in the General Anti-discrimination Federal

⁷⁶ See the draft Framework Decree on the fight against certain forms of discriminations described *supra*, section 0.2.

⁷⁷ See the Draft Framework Decree on equal opportunities, *Flemish Parliament* 2007-2008, Doc. 1578/1, p. 165



Act. However, the preparatory works (*travaux préparatoires*) clearly specify that these Acts apply to such discriminations.⁷⁸ The reference to “presumed race” in the Racial Equality Federal Act may be seen as implying *per se* that discrimination based on an assumed characteristic is prohibited.

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

As in the Directives, discriminations based on association with persons with particular characteristics are not expressly forbidden in the Racial Equality Federal Act and in the General Anti-discrimination Federal Act. However, the question was raised during preparatory works (*travaux préparatoires*). At the time, it was stressed that the European Court of Justice was considering a reference for preliminary ruling and that, as a matter of fact, the federal legislation would be construed in accordance with this decision.⁷⁹ As a result of the recent decision of the ECJ in *Coleman*⁸⁰, discriminations based on being associated with persons presenting a specifically protected characteristic are impliedly forbidden under federal law⁸¹.

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

a) How is direct discrimination defined in national law?

The Racial Equality Federal Act and the General Anti-discrimination Federal Act define direct discrimination as any ‘direct distinction’ (defined as ‘the situation which occurs whenever, on the basis of a protected ground, a person is treated less favourably than another is treated, has been treated, or would be treated in a comparable situation’) which cannot be justified under one of the exceptions provided for under the Act.⁸² As explained below -point b)-, these exceptions in turn are restrictively defined in order to ensure that the new legislative texts will be in compliance with the requirements of the Directives.

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

The Racial Equality Federal Act seeks to implement Directive 2000/43/EC (as well as the 1965 International Convention on the Elimination of All Forms of Racial Discrimination), by prohibiting discrimination on grounds of alleged race, color, descent, national or ethnic origin, and nationality.

A distinction is made between 1° differences in treatment based on alleged race, color, descent, national or ethnic origin, and 2° differences in treatment based on nationality:

⁷⁸ Report Libert, *Doc. Parl. Chambre* 2006-2007, no. 2720/009, pp. 41-42.

⁷⁹ Report Libert, *Doc. Parl. Chambre* 2006-2007, no. 2720/009, p. 42.

⁸⁰ Case C-303/06.

⁸¹ See also the Van Themsche case decided on 10 October 2007 by the Court of Assizes of Antwerp (*supra*, section 0.3).

⁸² Article 4, 6° and 7° of the General Anti-discrimination Federal Act; Article 4, 6° of the Racial Equality Federal Act.



- Discriminations based on nationality may be justified as means both appropriate and necessary for the fulfillment of legitimate objectives (Art. 7 § 2, al. 1), unless this would be in violation of the prohibition of discrimination on grounds of nationality under EU law (Art. 7 § 2, al. 2).
- By contrast, differences in treatment based on alleged race, color, descent, national or ethnic origin, are in principle absolutely prohibited (i.e., such differences may not be justified) (Art. 7 § 1), with three exceptions :
 - o In the field of employment and occupation, where such characteristics constitute a genuine occupational requirement (Art. 8);
 - o Where the difference in treatment is part of a positive action measure (Art. 10);
 - o Where the difference in treatment is imposed by, or by virtue of, another legislation (Art. 11, “safeguard clause”).

Since the first two exceptions are directly inspired by the Racial Equality Directive, they require no further explanation here. The third exception (called ‘safeguard provision’) is justified, according to the Government, by the need to avoid the challenge of legal provisions on the basis of the Racial Equality Federal Act. Needless to say that any legal provision allowing a difference of treatment based on alleged race, color, descent, national or ethnic origin, may be challenged on the basis of Articles 10 and 11 of the Constitution, or under European and international law. As regards the question of conformity of such a safeguard provision with the requirements of the EU Directives, see *supra*, section 0.2)

The General Anti-discrimination Federal Act seeks to implement Directive 2000/78/EC and prohibit discrimination based on age, sexual orientation, civil status, birth, wealth/income (*fortune*, in French), religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion, language, genetic characteristic and social origin. Differences in treatment based on one of the grounds listed are prohibited unless they are justified as means both appropriate and necessary to realize a legitimate objective (Art. 7). However, Article 8 adds that, in the field of employment and occupation, and concerning the grounds listed in Directive 2000/78/EC (age, sexual orientation, religious or philosophical conviction, or disability), only genuine occupational requirements may justify differences in treatment directly based on these grounds, unless the difference in treatment is justified as a form of positive action (Art. 10), or – like under the ‘safeguard provision’ enshrined in the Racial Equality Federal Act– unless it is imposed or authorized by another legislation (Art. 11). In addition, as regards differences in treatment on grounds of age, Article 12 provides for a wide range of situations where such differences may be allowed (in line with Article 6 of Directive 2000/78/EC). Finally, Article 13 provides that in the case of occupational activities within public or private organisations the ethos of which is based on religion or belief (churches are not explicitly mentioned, but must be considered included), a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos (in line with Article 4 (2) of Directive 2000/78/EC).



The Flemish Decree, and the Decrees adopted by the German-speaking Community, the French-speaking Community, the Walloon Region and the Cocof all define direct discrimination in accordance with the Directives as instances where “one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any [prohibited] ground” (Art. 2(2)(a) of the Directives)⁸³. The Ordinance of the Region of Brussels-Capital of 26 June 2003 prohibits discrimination in the areas it covers and with respect to the persons it applies to, but offers no definition of discrimination.

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

None of the legislation implementing Directive 2000/78/EC specify how a distinction based on age is to be evaluated. This will be left to the courts to determine. The judgment of the Constitutional Court of 5 October 2005 is an encouraging sign⁸⁴.

2.2.1 Situation Testing

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

With the transposition of Directives 2000/43/EC and 2000/78/EC, situation testing has become a contentious issue. As an example of factors leading to a shifting of the burden of proof, the former Federal Anti-discrimination Act of 25 February 2003 referred to “facts, such as statistical evidence or situation testing” (Art. 19 § 3). An Executive Regulation (*Arrêté royal*) was proposed that expressly defined the conditions of admissibility for situation tests in the context of discrimination suits. However, the political debates were at times stormy and the consultations on the content of this Executive Regulation failed. The VLD (the Flemish right-wing party which was part of the coalition government) publicised criticism by employers’ organisations and the National Office for Landlords (*Office national des propriétaires*). In a major daily newspaper, the party declared its refusal “to set up a team of spies, send moles to infiltrate companies, open informer hotlines and sanction Big Brother”⁸⁵. The Prime Minister himself did not shrink from calling the testers “infiltrators” and “informers”, adding, “you do not send a naked woman to a man to see if he is adulterous”⁸⁶. These consultations also highlighted the difficulty in simultaneously pursuing two partially incompatible objectives. On one hand, the situation testing should be codified, and the methodology set out, in order to prevent feared abuses by potential victims of discrimination, but also to encourage judges to shift the burden of proof on the basis of the testing. On the other hand, to remain functional, it has to be possible to carry out situation tests in a reasonable manner.

⁸³ See Article 2, 8° of the Flemish Decree of 8 May 2002; Art. 4 al. 2 of the Decree of the Walloon Region; Article 2 § 1, 2° of the French-speaking Community’s Decree.

⁸⁴ See *supra*, section 0.3.

⁸⁵ *Le Soir*, 26, 27 and 28 March 2005.

⁸⁶ *De Standaard*, 25 March 2005.



The words “situation testing” became so problematical that they were eliminated in the 2007 Acts replacing the 2003 Federal Anti-discrimination Act. As examples of facts leading to a presumption of direct discrimination, the new statutes list (1) factors revealing a certain recurrence of unequal treatment, among which, repeated isolated complaints to the equality body and (2) factors revealing that the situation of the alleged victim is comparable to that of the individual of reference⁸⁷. These so-called “recurrence tests” (*test de récurrence*) and “comparability test” (*test de comparabilité*) are not easy to grasp. They seem to be the two sides of the coin of the situation test⁸⁸. What is sure is that, under current law, situation testing remains a legitimate way to reverse the burden of proof, whatever the ground of discrimination concerned, and as long as it is carried out with proper methodology and does not amount to provocation.

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

Any reluctance to generalize the use of situational testing in order to establish a presumption of discrimination would appear to come from the side of the potential defendants, in particular employers. This is entirely to be expected. There are no other specific concerns or reluctance. The Centre for Equal Opportunities and Opposition to Racism had intended to commission a study on this question, and the call for tenders explicitly called for a comparative analysis. However, the Centre received no proposals, and was not finally performed.

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

The Belgian courts traditionally have been quite open to a criminal offence being proven by methods similar to situational testing, unless the method used means someone incites the offence⁸⁹. This case-law may be considered questionable in the light of the requirements of Article 6 § 1 of the European Convention on Human Rights: whereas the European Court of Human Rights considers that the rights of the defendant are violated where the offence is committed because of the acts of the “agent provocateur”,⁹⁰ the Belgian Court of Cassation considers that if the “agent provocateur” simply creates the opportunity for the offence to be committed, in cases where the criminal intent pre-existed, the defendant’s rights are not violated. This case-law may probably be considered to apply also, *mutatis mutandis*, to situation testing in the context of civil suits.

There are at least two examples of “situational testing” under the former Federal Antidiscrimination Act of 25 February 2003, in which courts have accepted this mode of proof although the required implementing Executive Regulation has never been adopted to

⁸⁷ Article 28 of the General Anti-discrimination Federal Act; Article 29 of the Racial Equality Federal Act. See also Article 33 of the Gender Equality Federal Act.

⁸⁸ V. VAN DER PLANCKE, “Les tribulations du testing en Belgique: quels enseignements?”, *Horizons stratégiques*, 2007, issue 5, p. 12 ; I. RORIVE and V. VAN DER PLANCKE, “Quels dispositifs pour prouver les discriminations ?”, *Les lois fédérales du 10 mai 2007 luttant contre les discriminations*, Ch. Bayart, S. Sottiaux & S. Van Drooghenbroeck (eds), Brussels, La Charte, 2008, p. 447.

⁸⁹ Court of Cassation, 5 February 1985, *Gaddum, Pasicrisie*, 1985, I, 690; Court of Cassation, 7 February 1979, *Salerno, Pasicrisie*, 1979, I, 665.

⁹⁰ See for example ECHR, *Teixeira de Castro v. Portugal*, 9 June 1998, Rep. 1998-IV, p. 1463, § 63.



formalize the methodology. In June 2005, Article 19 § 3 of the former Act of 25 February 2003 was relied upon by a couple consisting of two persons of foreign origin, who requested information about an apartment advertised for lease by a rental agency. The agency requested from the couple evidence that they received a salary equivalent to at a minimum three times the amount of the monthly rent. An appointment was set for the next day, however on the same afternoon the couple was informed by the agency that the apartment had finally be rented to another person, an acquaintance of the owner. However, since the apartment was still advertised for rent, the couple asked a friend to contact the agency in order to enquire about the availability of the apartment. After the friend had told the agency that he was enquiring on behalf of friends who were Belgian nationals, an appointment was fixed. The agency then justified its attitude by insisting that the owner preferred older tenants in order to preserve quiet in the house where the owner was also resident. Confronted with these facts, the judge considered that the testimony of the couple and their friend were indeed facts which could establish a presumption of discrimination based on the foreign origin of the plaintiffs. The defendants did not manage to rebut the presumption; in the view of the judge, their asserted preference for an elderly tenant failed in the light of the fact that they finally chose tenants of approximately 40 years old, which does not correspond to “elderly”.⁹¹

The judgment adopted on 30 November 2005 by the Court of Appeals of Ghent provides another example (*supra*, section 0.3. for a detailed description). There, the statement by the rental agency that the owner did not wish to rent her apartment to “two men or two women” was first made before the plaintiff (a male individual seeking an apartment for himself and his male partner), before being repeated in the presence of a legal officer (*huissier de justice*), a few days later. Although it denied the application, the Court of Appeals considered that discrimination may in principle be proven through such means, notwithstanding the fact that the Government has not adopted a decree specifying the conditions under which “testing” may take place in order to prove discrimination.

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

NGOs have mostly used situation testing to reveal discriminatory practices. For instance, the Movement Against Racism Anti-Semitism and Xenophobia (*Mouvement contre le racisme, l'antisémitisme et la xénophobie*) ran a campaign targeting certain Brussels' night clubs called “Management reserves the right to refuse entry” (*La direction se réserve le droit d'entrée*)⁹². As a way to establish the occurrence of discrimination, testing has mostly been used in criminal cases. In such cases, any means of proof consistent with the principle of fairness of evidence should be allowed. In this respect, situation testing has to a large extent been used on an *ad hoc* basis, by victims acting spontaneously to strengthen their case.

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

a) How is indirect discrimination defined in national law?

⁹¹ Court of First Instance of Brussels (emergency proceedings), 3 June 2005, judgment no. 05/1289/A, ref. T no.1264/05, published in the *Revue de droit des étrangers*, 2005, no.133, p. 220.

⁹² This campaign took place in 2000 and 2001 (see www.mrax.be/article.php3?id_article=194). For a follow-up, see C. DELANGHE, “Encore et toujours”, paper published on 26 April 2005 (http://www.mrax.be/article.php3?id_article=67).



Article 4, 9° of the Racial Equality Federal Act defines indirect discrimination as an ‘indirect distinction’ on the basis of one of the protected grounds (alleged race, color, descent, national or ethnic origin, and nationality), which cannot be justified under title II of the Act⁹³. Article 4, 8° in turn defines ‘indirect distinction’ as the situation which occurs whenever an apparently neutral provision, criterion or practice, may result in (*‘est susceptible d’entraîner’*) a particular disadvantage for persons characterised by one of those protected grounds. The definition of indirect discrimination has thus been aligned with that of the Racial Equality Directive which it seeks to implement, although by the detour of the strange (and perhaps antonymous) notion of ‘indirect distinction’. It will be recalled that this Act also decriminalizes certain offences linked to discrimination on grounds of alleged race, color, descent, national or ethnic origin, and nationality, inter alia because the criminalization of indirect discrimination was considered to be problematic as regards the requirement of legal certainty.

Article 4, 9° of the General Anti-discrimination Federal Act defines indirect discrimination in the same way that the Racial Equality Federal Act: an ‘indirect distinction’ on the basis of one of the protected grounds (age, sexual orientation, civil status, birth, wealth/income (*fortune*, in French), religious or philosophical belief, political opinion, language, actual or future state of health, disability, physical characteristic, genetic characteristic, social origin), which cannot be justified under title II of the Act⁹⁴. Article 4, 8° in turn defines ‘indirect distinction’ as the situation which occurs whenever an apparently neutral provision, criterion or practice, may result in (*‘est susceptible d’entraîner’*) a particular disadvantage for persons characterised by one of those protected grounds. As a result, the definition of indirect discrimination has been aligned with that of the Employment Equality Directive which it seeks to implement, although again by the detour of the notion of ‘indirect distinction’.

According to the Decree adopted by the Walloon Region on 27 May 2004, there is an indirect discrimination where a provision, criterion or practice, while apparently neutral, produces a disadvantage for certain persons, unless this provision, criterion or practice has a reasonable and objective justification (Art. 4 al. 3). The Decree thus omits an explicit reference to the principle of necessity, which identifies the relationship between the aim of the provision, criterion or practice and the measure which seeks to fulfil the aim. Such an omission may be of little practical consequence, as the notion of “reasonable” justification implicitly refers to a requirement of proportionality and the judge will seek to conform his or her interpretation of Belgian law with the definition of indirect discrimination contained in the Directives. It should be stressed that the bill which should repeal this Decree defines indirect discrimination completely in line with the Directives.

The other regional and community instruments are generally closer to the Directives they seek to implement. Thus, under the Flemish Decree on proportionate participation in the employment market, indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons belonging to certain protected groups at a particular disadvantage compared with other persons, unless that provision, criterion or practice is

⁹³ Art. 9 of the Racial Equality Federal Act. See *infra* in the report, section 2.3.b.

⁹⁴ Art. 9 of the General Anti-discrimination Federal Act. See *infra* in the report, section 2.3.b.



objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary: Article 2(2)(b) of Directives 2000/43/EC and 2000/78/EC has been simply reproduced in Article 2 of the Decree, which defines the notion of indirect discrimination. Similarly, the Decree implementing the Directives for the German-speaking Community contains a definition of “indirect discrimination” which replicates precisely the formulation in German of the Employment Equality Directive, Article 2(2)(b) of which seems to provide a greater degree of protection than its English formulation. Article 2 of the *Dekret* defines indirect discrimination as occurring where an apparently neutral provision, criterion or practice “could” put a person⁹⁵ at a particular disadvantage compared with other persons, unless the measure is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (compare with the expression “would” in the English version of the Employment Equality Directive; the French version uses the expression “*est susceptible de*”). Article 2 § 1, 3° of the French-speaking Community’s Decree also reproduces the wording of the Directive, thus containing the requirement of necessity.

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

Articles 9 of the Racial Equality Federal Act and of the General Anti-discrimination Federal Act provide that such apparently neutral measures may only be justified if they are objectively justified by a legitimate objective which they seek to fulfill by means which are both appropriate and necessary.

Article 9 al. 2 of the General Anti-discrimination Federal Act adds that, as regards apparently neutral measures resulting in imposing a particular disadvantage on persons with disabilities, they may be justified by the fact that no reasonable accommodation can be adopted. Incidentally, this demonstrates that discrimination resulting from the failure to provide ‘reasonable accommodation’ is considered as indirect discrimination, rather than as direct discrimination, although Article 14 of the General Anti-discrimination Federal Act lists the denial of reasonable accommodation, along with direct discrimination, indirect discrimination, the instruction to discriminate and harassment as a form of discrimination.

In addition, ‘indirect distinctions’ (i.e., apparently neutral measures which may result in a particular disadvantage for persons characterised by one of those protected grounds) may be justified

- by the need to adopt positive action measures (Art. 10 of the Racial Equality Federal Act and of the General Anti-discrimination Federal Act);
- or by the fact that the adoption of such measures is imposed by, or by virtue of, other legislations (these are the ‘safeguard provisions’ referred to earlier, located in Article 11 of the Racial Equality Federal Act and of the General Anti-discrimination Federal Act).

c) Is this compatible with the Directives?

⁹⁵ Again, as a result of the judgment of the Constitutional Court of 6 October 2004, it seems justified to read the Decree as providing protection from discrimination, on whichever ground it is alleged to have occurred.



Yes, to the extent mentioned in point a) as to the Decree of the Walloon Region.

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

It does not.

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

In its ruling no. 157/2004 of 6 October 2004, the Constitutional Court considered that the exclusion of language from the list of prohibited grounds in the federal legislation was in itself discriminatory. As a result, language is now a ground of discrimination expressly prohibited in the General Anti-discrimination Federal Act, in the German-speaking Community antidiscrimination Act and in the Decree adopted in 2007 by the *Cocof*, as well as in all the bills currently pending before the regional Parliaments⁹⁶.

It should be stressed that in Belgium, the focus on language mostly concerns the complex relations between the French-speaking Community and the Dutch-speaking Community. For that matter, the birth of the ‘Communities’ (and the start of the federalisation of Belgium) was originally the result of requests from the Flemish-speaking Community to see its language and culture officially recognised.

The issue of language requirements which could amount to indirect discrimination on the grounds of racial or ethnic origin was recently highlighted by the Committee on the Elimination of Racial Discrimination. In the observations adopted at its meeting held on 5 March 2008⁹⁷, the Committee expressed concerns with the Flemish statute adopted on 15 December 2006 (‘wooncode’), restricting access to social housing to persons who speak Dutch, or make the commitment to learn it. The Committee specifically underlined that this language requirement could amount to indirect discrimination on grounds of national or ethnic origin. The Committee expressed also concerns about a regulation adopted by the Municipality of Zaventem, near Brussels, restricting the acquisition of public lands to Dutch speakers or to persons committing themselves to learn it⁹⁸.

2.3.1 Statistical Evidence

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

The Racial Equality Federal Act (Art. 30, § 3) and the General Anti-discrimination Federal Act (Art. 28, § 3) provide that, in civil cases, “among the facts from which it may be presumed that there has been indirect discrimination are included, although not exclusively, 1° general statistics concerning the situation of the group to which the victim of discrimination belongs or facts of general knowledge; or 2° the use of an intrinsically suspect criterion of distinction; or 3° elementary statistics which reveal adverse treatment”.

⁹⁶ *Supra*, sections 0.2 and 2.1.

⁹⁷ Available at <http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-BEL-CO-15.pdf>.

⁹⁸ See Flash report 5, 19 March 2008.



Preparatory works (*travaux parlementaires*) are not of great help. ‘General statistics’ are said to be those gathered at the macro-economic level (national or regional) and reference is made to their use by the European Court of Justice in gender discrimination⁹⁹. According to the Preparatory works, the shift of the burden of proof could also come from ‘specific’ (*‘concrètes’*) statistics’ related to the group to which the victim belongs (for instance, at the level of the company). ‘Elementary statistics’ are those which do not provide conclusive evidence about the disproportionate impact of a neutral provision, criterion or practice but which lead to a presumption of disproportionate impact¹⁰⁰.

The Decree on equal treatment in employment and professional training (adopted by the Walloon Region on 27 May 2004 expressly mention statistics among the facts from which it may be presumed that there has been discrimination (Art. 17)¹⁰¹. Although statistics as such are mentioned explicitly neither in the Flemish Decree of 8 May 2002 on proportionate participation on the labour market, nor in the Decree of 17 May 2004 of the German-speaking Community on equal treatment on the labour market, it would seem that this mode of proving discrimination is allowed under Article 14 of the Flemish Decree and Article 18 of the German-speaking Community Decree, both of which provide for shifting the burden of proof in civil cases¹⁰². The same is true with respect to the Decree of the *Cocof* 22 March 2007 (Art. 13). Such statistics have not so far been invoked in the context of judicial proceedings.

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

With respect to the grounds of discrimination listed in the Racial and Employment Equality Directives, statistical data have not so far been invoked in the context of judicial proceedings. This is to be explained by the fact that the data which should be relied upon are not available, due to the restrictions imposed by the legislation relating to the protection of personal data (and the interpretation thereof of the Commission for the protection of private life, the independent supervisory authority). The Centre for Equal Opportunities and Opposition to Racism is keeping this question under review. The interministerial conference, however, has still not authorized an experience which the Centre had proposed to lead in this regard, called ‘Socio-economic monitoring of origins’, which intended to test the feasibility of developing statistics in order to identify any situations of discrimination.

⁹⁹ For instance, Case *Lewark*, 6 February 1996, Case C-457/93, §§ 29-30.

¹⁰⁰ Report Libert, *Doc. Parl. Chambre* 2006-2007, no. 51-2720/0009, pp. 80-81.

¹⁰¹ No such provision, by contrast, may be found in the Decree on the implementation of the principle of equality of treatment, adopted on 19 May 2004 by the French-speaking Community (*Moniteur belge*, 7 June 2004). This may be attributable to the fact that the French-speaking Community considered that the matter of proving discrimination was a procedural question, relating to the definition of the powers of courts, which is a matter to be regulated at federal level.

¹⁰² Article 14 of the Flemish Decree of 8 May 2002 reads in its relevant part “Any person who can show an interest can bring an action to the competent jurisdiction in order to ensure the application of the provisions of this decree. When that person brings facts before that jurisdiction which lead to the presumption of direct or indirect discrimination, the burden of proof for the non-violation of the principle of equality of treatment reverts to the defendant” (“*Toute personne faisant preuve d'un intérêt peut intenter une action auprès de la juridiction compétente afin de faire appliquer les dispositions du présent décret. Lorsque cette personne invoque devant cette juridiction des faits faisant présumer l'existence d'une discrimination directe ou indirecte, la charge de la preuve quant à la non-violation du principe de l'égalité de traitement, incombe à la partie défenderesse*”). The wording of Article 18 of the Decree adopted on 17 May 2004 by the German-speaking Community is identical.



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

There exists no case-law in this area.

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

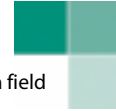
Data relating to race or ethnic origin, religion, disability (health) or sexual orientation are regarded as sensitive data (Art. 6 § 1 of the Federal Act of 8 December 1992 on the protection of the right to private life with respect to the processing of personal data¹⁰³) and their processing is prohibited under Belgian law unless – with respect to disability – this is justified by the employer’s need to comply with its obligations under social security legislation (Art. 6 § 2, h) of the Federal Act of 8 December 1992). There are exceptions to this general prohibition, however:

First, under Article 6 § 2, b), of the Act of 8 December 1992, the employer may process sensitive personal data relating to employees where this is required in order to comply with the employer’s obligations under labour law. This exception (as well as that provided under Art. 6 § 2, f) stating that the processing of sensitive personal data is permitted where this would be required in the context of judicial proceedings) may plausibly be invoked by the employer who could justify processing data considered sensitive in order to protect him- or herself from a suit alleging discrimination by seeking to improve diversity in the workforce in order to ensure that no statistics will be presented to demonstrate that the employer has been discriminating in recruitment or promotion¹⁰⁴.

This exception may be invoked by the public services of the Flemish-speaking Community, which are in an exceptional position in this respect. These services have to file annual reports and action plans on progress towards the proportionate representation of all target groups in

¹⁰³ *Loi du 8 décembre 1992 relative à la protection de la vie privée à l’égard des traitements de données à caractère personnel, Moniteur belge*, 18 March 1992. This legislation was amended by a Federal Act of 11 December 1998 (*Moniteur belge*, 3 February 1999) in order to implement Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23 November 1995, p. 31).

¹⁰⁴ It should be emphasised that, as recalled by the Commission for the Protection of Private Life (Opinion no.7/93 of 6 August 1993, cited above), even though Article 6 § 2 of the Act of 8 December 1992 allows the processing of sensitive data in certain well-defined circumstances, the other conditions stipulated by the Act of 8 December 1992 must be fully respected. Thus in particular, only data which are relevant and proportionate to a legitimate and well-defined objective may be processed (Art. 5 of the Act of 8 December 1992); and the data subject must be able to exercise the rights recognised in Art. 4 and 9 to 13 of the Act (right of access and rectification, right to a remedy). In accordance with Article 5 of the Act of 8 December 1992, although the consent of the data subject may legitimate the processing of personal data (including sensitive data where it is not prohibited) – with, however, the reservations mentioned below in this paragraph of the report, concerning the validity of consent in the context of the employment relationship – this is not necessarily required, if there is another objective legitimising the processing of personal data. To the knowledge of the author however, despite this being a theoretical possibility under the current state of Belgian legislation, neither ethnic monitoring nor other forms of monitoring of the composition of the workforce under the other categories protected from discrimination are as such performed by Belgian companies. The public services of the Flemish-speaking Community are an exception in this regard, as the next paragraph details.



the workforce, and thus they have to keep records of the representation of these different groups (Art. 7 of the Flemish Decree of 8 May 2002 on proportionate participation on the labour market). These target groups have been identified by the Flemish Government as “all categories of persons whose levels of employment, defined as the percentage of the active population of that category who effectively work, are under the average level of employment for the total Flemish population”¹⁰⁵; these groups are persons of non-EU origin and background (“*allochtonen*”), persons with a disability, workers above 45 years of age, persons who have not completed secondary education, and persons belonging to the under-represented sex in a specific profession (Art. 2(2), al. 2).

Second, under Art. 6 § 2, 1) and Art. 7 § 2, e) of the Act of 8 December 1992 (the latter provision concerning data relating to health) the processing of sensitive personal data may be justified by statutory law for any legitimate public interest. The Commission for the protection of privacy (*Commission de protection de la vie privée*), the independent authority monitoring compliance with this legislation, delivered an opinion where it considered that the processing of sensitive personal data in order to implement the affirmative duty to promote the equal treatment of certain target groups (under the system set up by the Flemish Decree of 8 May 2002) was authorised under these provisions. The Commission also confirmed an opinion no. 7/93 it had delivered on 6 August 1993, according to which the processing of personal data relating to membership of a cultural or ethnic minority was acceptable insofar as the objective is to grant certain specific advantages to those persons (under a positive action scheme) and if the data collected relate to the person’s country of birth, or to that of the parents or grand-parents. In this way, this opinion implicitly opposes the processing of personal data relating directly to racial or ethnic origin, whether for affirmative action purposes or otherwise¹⁰⁶. The Flemish Decree does not include racial or ethnic minorities as such among target groups, but only persons of foreign origin (“*allochtonen*”).¹⁰⁷

Third, under Belgian law, the written consent of the person concerned (the data subject) may also justify the processing of sensitive data (Art. 6 § 2, a), of the Act of 8 December 1992). However, this is not particularly easy to justify in the context of employment, due to the imbalance in the employer/employee relationship. Although the Commission for the protection of private life has repeatedly stated in three successive opinions that the employee’s consent should be considered a sufficient justification for the processing of sensitive personal data (see Opinion no. 8/99 of 8 March 1999, Opinion no. 25/99 of 23 July 1999, and Opinion no. 3/2004 of 15 March 2004), the Belgian Government preferred to adopt

¹⁰⁵ Art. 2(2), al. 1, of the *Besluit van 30 Januari 2004 van de Vlaamse regering tot uitvoering van het decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling* (Executive Regulation of 30 January 2004 of the Flemish Government concerning the execution of the decree of 8 May 2002 on equitable participation in the employment market concerning professional orientation, vocational training, career counselling and the action of intermediaries on the labour market), *Moniteur belge*, 4 March 2004, p. 12050.

¹⁰⁶ As a result of the limits imposed by the protection of private life vis-à-vis the processing of personal data, in the interpretation given to the Act of 8 December 1992 by the Commission for the Protection of Private Life, it would not be allowable for the Flemish Government to define the “Roma” or the “Sinti” as a target group, for instance; nor would it be permissible for an employer to monitor on his/her own initiative the representation of the Roma or the Sinti in the workforce.

¹⁰⁷ *Commission de protection de la vie privée, Projet de décret du gouvernement flamand autorisant certains membres du personnel de l'Administration de l'Emploi du Ministère de la Communauté flamande à traiter des données à caractère personnel relatives aux personnes issues des “kansengroepen” (“groupes à potentiel”) en vue de promouvoir une participation proportionnelle sur le marché de l'emploi* (Opinion no.3/2004, 15 March 2004).



the strict approach to the notion of “freely given consent” mentioned in Article 2, h) of Directive 95/46/EC, and thus took the view that consent could not constitute such a justification in an employment relationship, because we cannot presume in that the positions of the parties will be sufficiently equal. Therefore, Article 27 of the Executive Regulation of 13 February 2001 implementing the Act of 8 December 1992 excludes that written consent may constitute a justification for processing of sensitive data, in employment relationships or in other relationships where, due to the imbalance in the relationship between the parties, consent cannot be considered “freely given”¹⁰⁸. According to Article 27 al. 2, this rule does not apply however where processing of such data is justified by the need to grant an advantage to the workers concerned: the example is given of accommodating religious practices, however this exception presumably also could be invoked with regard to positive action programmes for instance. Whether a person seeking social housing or registering a child in school for example, also finds him- or herself in a situation of dependency in the sense of Article 27 of the Executive Regulation of 13 February 2001 and whether this person’s consent may suffice to legitimate the processing of data in situations where this would be otherwise allowable has not been decided yet. It will be noted however that, in the only situation other than employment where positive actions are being adopted in Belgium – where special measures are being taken by the French-speaking and Flemish Communities to promote the integration of the children of newly arrived immigrants – such measures have been targeted not on the basis of race or ethnic origin, or on the basis of any other sensitive data, but on the basis of the nationality of the parents¹⁰⁹.

2.4 Harassment (Article 2(3))

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

In the Federal Act of 4 August 1996 on the welfare of workers while carrying out their work (*Loi relative au bien-être des travailleurs lors de l'exécution de leur travail*) as lastly modified on 10 January 2007¹¹⁰, “moral harassment at work” is defined as “several unwanted conducts, of the same kind or not, external or internal to the company or the institution, which last over a certain period of time, with the purpose or the effect of violating the personality, the dignity or the physical or psychological integrity of a worker (...), during the time of work, of putting in jeopardy his/her work or of creating an intimidating, hostile, degrading, humiliating or offensive environment and which manifest themselves notably through words, intimidations, acts, gestures or unilateral writings. These conducts could notably be linked to religion or beliefs, disability, age, sexual orientation, sex, race or ethnic origin.

¹⁰⁸ Koninklijk besluit ter uitvoering van de wet van 8 december 1992 tot bescherming van de persoonlijke levenssfeer / Arrêté royal portant exécution de la loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel, *Moniteur belge*, 13 March 2001 (“lorsque la personne concernée se trouve dans une situation de dépendance vis-à-vis du responsable du traitement, qui l'empêche de refuser librement son consentement”, “when the person concerned is in a situation of dependency with regard to the person responsible for processing the data, which prevents him from freely refusing his consent”).

¹⁰⁹ These measures are described in further detail below.

¹¹⁰ *Moniteur belge*, 6 June 2007.



Article 442*bis* of the Penal Code introduced by the Federal Act of 30 October 1998 already criminalises harassment in general: Anyone who has harassed another when he/she knew, or should have known, that he/she would seriously affect the peace of mind of the person concerned by this behaviour”.

Both the Racial Equality Federal Act (Art. 12) and the General Anti-discrimination Federal Act (Art. 14) prohibit harassment as a form of discrimination and define it with the same wording as Directives 2000/43/EC and Directive 2000/78/EC.

Harassment is also defined in line with the Directives in the Decree adopted by the German-speaking Community on 17 May 2004 (Art. 5(2)) and by the *Cocof* in its Decree of 2007 (Art. 5). Neither the Decree adopted by the Walloon Region on 27 May 2004 nor the Decree adopted on 19 May 2004 by the French-speaking Community refer to harassment. This omission was deliberate. It was based on the idea that the prohibitions of harassment which already exist at federal level¹¹¹ should be considered sufficient, and that any further action would be redundant. Moreover, the Council of State had clearly stated that the adoption at federal level of the Act of 4 August 1996 on the welfare of workers when carrying out their work constituted an exercise by the federal legislature of its general competences in regulating the employment relationship, and that in principle the Regions and Communities could not legislate on the same subject-matter without exceeding their own competences¹¹². This reasoning is nevertheless only acceptable in the material scope of employment and not in the field of education, access to goods and services, housing, etc. This could be in breach of the requirements of the Directive 2000/43/CE. This is the reason why in all the draft bills presently under discussion at Regional level, harassment is expressly prohibited and defined in conformity with the EU requirements.

The coexistence of the notion of harassment in the former Federal Anti-discrimination Act of 25 February 2003 and in the Act of 4 August 1996 on the welfare of workers while carrying out their work as subsequently amended was creating legal uncertainty, as harassment in the workplace could fall under either Acts. In order to solve the problem, the Racial Equality Federal Act (Art. 6) and the General Anti-discrimination Federal Act (Art. 6) provide that in employment relationships, the sole Act of 4 August 1996 is applicable. This exclusion was justified during preparatory works (*travaux préparatoires*) on the fact that the 1996 Act puts in place detailed procedures in favour of victims and is especially tailored to tackle harassment at the workplace.

b) Is harassment prohibited as a form of discrimination?

¹¹¹ Or for the protection of the personnel of the French-speaking Community: see esp. the *Arrêté du gouvernement de la Communauté française du 26 juillet 2000 organisant la protection des membres du personnel des services du Gouvernement de la Communauté française et de certains organismes d'intérêt public contre le harcèlement sexuel ou moral sur les lieux de travail* (Executive Regulation of the French-speaking Community of 26 July 2000 on the protection of members of personnel in the services of the French-speaking Community's Administration and other public interest bodies against sexual or moral harassment in the workplace).

¹¹² See the Council of State Opinion on the section of legislation no. 24.143/1 of 16 March 1995 on the draft law which was later to become the Act of 4 August 1996; and, more recently, Opinion no. 36.415/2 delivered on 11 February 2004 on the draft Decree of the German-speaking Community on the guarantee of equal treatment in the employment market.



Harassment is prohibited as a form of discrimination in the Racial Equality Federal Act (Art. 12) and in the General Anti-discrimination Federal Act (Art. 14). It is considered as direct discrimination in the Decree adopted by the German-speaking Community on 17 May 2004 and in the Decree adopted by the *Cocof* on 22 March 2007.

It is not treated as a form of discrimination by the Flemish Decree of 8 May 2002, although this Decree sees it as part of the requirement of equal treatment: “[T]he principle of equal treatment implies the absence of any form of direct or indirect discrimination or of harassment in the employment market”¹¹³. In the Flemish Decree therefore, the concept of harassment remains analytically separate from that of discrimination. This categorisation could be of more than purely conceptual importance. In particular, Article 5(2) of the Flemish Decree presents a long list of (13) forms of conduct which are prohibited, but the definitions of these prohibitions systematically refer to conduct which may lead to discrimination, thereby seemingly excluding “harassment” from the forms of conduct which the Decree formally prohibits. Article 9 of the Decree, which concerns the establishment of an authority promoting proportionate participation and equal treatment, the two guiding principles of the Flemish Decree, mentions that such an authority will have the competence, in particular, to assist victims of discrimination in filing their complaints: should this be read as excluding assistance to victims of harassment, which the Decree distinguishes from discrimination *per se*? Perhaps more worryingly, Article 11 of the Decree provides that those who commit discrimination may be sentenced to a prison sentence and/or to the payment of a fine: would it not be in contradiction with the principle of strict interpretation of criminal provisions to extend this clause to acts of harassment? For these reasons, and because of the difficulties of interpretation it could create in the future, the choice to present harassment as a violation of the principle of equal treatment but as distinct from either direct or indirect discrimination may be criticized. It is worth to stress that in the draft Flemish Framework Decree presently under discussion, harassment is presented as a form of discrimination (Art. 14).

The other legislative instruments implementing the Directives do not include a reference to harassment, because of the existence at federal level of the Act of 4 August 1996 on the welfare of workers while carrying out their work which, since its amendment in 2002 and in 2007, contains a general prohibition of harassment in the workplace that was considered sufficient.

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

See references made in a).

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

Both the Racial Equality Federal Act (Art. 12) and the General Anti-discrimination Federal Act (Art. 14) list the instruction to discriminate as a form of prohibited discrimination.

¹¹³ Article 5(1), 2° of the Decree.



At the level of the Regions and Communities, Article 2, 10° of the Flemish Decree of 8 May 2002, Article 2(2) of the Decree of the French-speaking Community, Article 7 of the Decree adopted by the Walloon Region, Article 5(1) of the Decree adopted by the German-speaking Community of 17 May 2004 and Article 4 of the Decree of the *Cocof* of 22 March 2007 provide that the instruction to discriminate should be considered as a form of discrimination.

As to criminal liability for the acts of another person, Article 67, al. 2, of the Criminal Code (*Loi du 8 juin 1867 portant le nouveau Code pénal*) provides that those who gave instructions to commit a criminal offence shall be considered accomplices. This provision is in principle applicable to the criminal offences enshrined in the General Anti-discrimination Federal Act and the Racial Equality Federal Act (Art. 28), but the scope of applicability remains very limited. Moreover, under both Federal Acts (Art. 23), with respect to discrimination committed by a public servant in the exercise of his/her functions, obedience to an order received from a hierarchical superior excludes criminal liability of the individual public servant who has in fact committed the discriminatory act: if discrimination is indeed established, only these superiors will be fined or imprisoned in the terms provided by the law.

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

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

Federal State.- The General Anti-discrimination Federal Act provides that the refusal to put in place reasonable accommodations for a person with a disability is a form of prohibited discrimination along with direct discrimination, indirect discrimination and the instruction to discriminate (Art. 14)¹¹⁴. The notion of reasonable accommodation does not extend beyond the situation of persons with disabilities. Article 4, 12° of the General Anti-discrimination Federal Act reproduces almost word to word the definition of "reasonable accommodation" enshrined in Article 5 of the Employment Equality Directive, although with one major difference: Whereas the Directive only refers to reasonable accommodation in employment (in line with its scope of application), the General Anti-discrimination Federal Act refers to all the fields to which it shall apply (*les domaines pour lesquels cette loi est d'application*), which go far beyond employment (*supra*, section 0.2).

Flemish Region/Community.- In the Decree adopted on 8 May 2002 by the Flemish Region/Community, reasonable accommodation is described as a requirement entailed by the principle of equal treatment, however the reasonable accommodations mentioned in Article 5 § 4 do not appear under the definitions either of direct discrimination, or of indirect

¹¹⁴ Note also that Article 9 of the General Anti-discrimination Federal Act demonstrates incidentally that discrimination resulting from the failure to provide 'reasonable accommodation' is considered as indirect discrimination.



discrimination¹¹⁵, which may be attributed both to the vague character of the “reasonable accommodations” (*redelijke aanpassingen*) called for by this Decree, and to the broad definition of the concept of reasonable accommodation, which is mentioned without specific reference to disability, but as a *general* requirement of equal treatment. According to Article 5 § 4 of the Decree, the concept entails that the employer to whom the Decree applies (or persons or organisations acting as labour market intermediaries) should take appropriate measures where needed in a particular case to enable a person to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden, according to the same clause, shall not be disproportionate when it is sufficiently remedied by existing measures. The wording of this provision is of course borrowed from Article 5 of Directive 2000/78/EC, except for its extension beyond persons with disabilities. The new bill aiming at establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy currently pending before the Flemish Parliament (*supra*, section 0.2) defines the denial of reasonable accommodation as a form of prohibited discrimination.

Region of Brussels-Capital.- Article 26, 4° of the Decree on the social and professional integration of persons with disabilities (*Décret relatif à l'intégration sociale et professionnelle des personnes handicapées*) adopted on 4 March 1999 by the *Cocof*¹¹⁶ provides that the Executive of that institution will stipulate the conditions under which its administration will be authorised to compensate the employer for the costs of any accommodation of the employee which is considered necessary. The compensation should cover the full cost of the accommodation provided, if it is deemed necessary (Art. 31). However, the employer is under no obligation to provide this form of reasonable accommodation to his/her disabled employee. Nevertheless, this legislation make it possible for employers to draw upon public grants for providing reasonable accommodation, and they indirectly impact on the employer's level of obligation to provide this kind of accommodation. Indeed, under the General Anti-discrimination Federal Act, the Flemish Decree of 8 May 2002 and the Decree of the German-speaking Community adopted on 17 May 2004 (see *infra*), the burden imposed on the employer as a result of the obligation to provide reasonable accommodation will not be considered disproportionate if the employer may apply for public funds.

German-speaking Community.- The Decree adopted by the German-speaking Community on 17 May 2004 embodies a provision on the obligation to provide reasonable accommodation for persons with disabilities (Art. 13), the wording of which paraphrases that of Directive 2000/78/EC (Art. 5).

French-speaking Community.- Article 8 of the Decree on the implementation of the principle of equal treatment adopted on 19 May 2004 provides that reasonable accommodation should be provided to persons with disabilities “in whatever form is appropriate”. Implementation of Directive 2000/78/EC is, however, not comprehensive. Article 8 of the Decree states that reasonable accommodation should be provided “in order to make it possible for the person with a disability to receive training, unless this imposes a disproportionate burden”. The emphasis on training is regrettable. Read *a contrario*, it is unclear if this would imply that a

¹¹⁵ Compare with Art. 2 § 2, b), ii) of the Employment Equality Directive.

¹¹⁶ *Moniteur belge*, 3 April 1999.



failure to provide other forms of necessary accommodation would not be considered to constitute a form of discrimination under the terms of Article 8 of the Decree. Nevertheless, the French-speaking Community is now writing a new Framework Decree on the fight against certain forms of discrimination (*supra*, section 0.2). Article 3, 9° of this bill reproduces almost word to word the definition of “reasonable accommodation” enshrined in Article 4, 12° of the General Anti-discrimination Federal Act and in Article 5 of the Employment Equality Directive.

Walloon Region.- Article 6 of the Decree on equal treatment in employment and professional training adopted on 27 May 2004 provides that reasonable accommodations must be made, implying that the employer must take the appropriate measures, according to needs identified in a specific situation, in particular to allow for training or support to socio-professional integration to be given to a person with disabilities, unless this would impose a disproportionate burden. This formulation may be criticised for the same reasons as the one presented by the French-speaking Community’s Decree, mentioned above. There appears to be no reason to restrict the forms under which effective accommodation may have to be provided. Although the definition in the Decree of the Walloon Region is slightly broader, as it refers not only to training but also to assistance in order to facilitate socio-professional integration, it is doubtful whether this extends, for instance, to the removal of certain architectural barriers impeding access to the workplace or occupation within a particular occupation. Of course, this restrictive approach is to be explained by the limited scope of application, *ratione materiae*, of the Decree, which restricts itself to implementing the principle of equal treatment as defined in the Racial Equality Directive and the Employment Equality Directive with respect to the employment policy of the Region¹¹⁷. However, to the extent that the Decree applies to certain persons, whether private (for instance private employment agencies) or public administrations, it would have been preferable to stipulate that these persons are committing discrimination where they do not provide any accommodation which may be required for the integration of persons with disabilities, where this would not impose on them a disproportionate burden. The current situation may create a source of confusion, as those to whom the Decree of the Walloon Region is addressed may be led to believe that the form of accommodation they must provide should not go beyond training and assistance¹¹⁸. The draft Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (*supra*, section 0.2) defines the denial of reasonable accommodation in line with Directive 2000/78/EC and provides that it is a form of prohibited discrimination.

¹¹⁷ See Article 8 of the Decree.

¹¹⁸ See also Title VIII of the Executive Regulation of 5 November 1998 on promoting the equality of opportunities of persons with disabilities on the employment market (*Arrêté du Gouvernement wallon du 5 novembre 1998 visant à promouvoir l’égalité des chances des personnes handicapées sur le marché de l’emploi*) which is based on Article 15 of the Decree of 6 April 1995 on the integration of persons with disabilities states that the *Agence wallonne pour l’intégration des personnes handicapées* (AWIPH) may financed, under the conditions defined by the Walloon Government, the acquisition, the construction or the transformation of infrastructure or equipment for persons with disabilities. Note that under this legislation, there is no *obligation on the employer to provide any reasonable accommodation* but only a possibility for the employer to request compensation for costs of adapting a disabled person’s work post in so far as such an adaptation is considered necessary.



Due to the fact that the concept of “reasonable accommodations” appears in different legislations, the Federal Government, the Regions and the Communities have sought to reach a common understanding of this notion, in order to ensure that it will be uniformly applied throughout the country, whatever the legal basis on which the person with a disability may seek to rely. With that aim in mind, a Protocol was produced by the Interministerial conference on persons with disabilities (*Conférence interministérielle en faveur des personnes handicapées*) on 10 May 2004. This Protocol had the status of a memorandum. On 19 July 2007, one step further was made as a Cooperation Agreement (which is compulsory) was concluded between the relevant public authorities¹¹⁹. This Cooperation Agreement defines the concept of reasonable accommodation as a “concrete measure aimed to neutralize the limitative impact of a non appropriate environment on the participation of a person with disabilities”. The motivation of the agreement gives examples and details on such measures, that could be material or not, as well as collective or individual. It also provides that the reasonable accommodation must be efficient, must ensure an equal participation of the person with disabilities as well as an autonomous participation, and must assure the security of the person. The agreement then defines a non comprehensive list of criteria to determine if the measure is reasonable or not. This takes into account the financial impact of the measure, as well as its organizational impact, the frequency of use of the accommodation, the impact on the quality of life of others persons with disabilities, the impact on the general environment or other people, the lack of appropriate alternatives, and the non application of existent compulsory rules. Finally, the agreement puts in place a monitoring mechanism, requiring from each authority to collect information on reasonable accommodation and examples of best practices.

It should also be noted that the Federal Public Service (Ministry) of Employment, Work and Social Dialogue published, in March 2005, a brochure with the collaboration of the Centre for Equal Opportunities and Opposition to Racism which describes in detail, with a number of concrete examples, what the obligation to provide reasonable accommodation may entail¹²⁰. This is clearly an example of a good practice from which other States could seek inspiration, as it constitutes a most useful tool, especially for businesses, clarifying their legal obligations and providing illustrations of which steps should be taken in order to ensure compliance.

Finally, it should be mentioned that on 31 March 2006, the Council of Ministers (at federal level) adopted a legislative bill seeking to ensure, as a matter of principle, the admittance of guide dogs in public places. In June 2006, the Council of State considered that the Federal State was incompetent to deal with the matter. In this line, the Walloon Region adopted a Decree on 23 November 2006 concerning the accessibility of persons with disabilities being with a guide dog to public places¹²¹. Moreover, a draft cooperation agreement on the issue is currently under discussion between the Walloon Region, the Flemish Community, the German-speaking Community and the *Cocof*.

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

¹¹⁹ *Moniteur belge*, 20 September 2007, p. 49653.

¹²⁰ The brochure may be downloaded from <http://www.meta.fgov.be>

¹²¹ *Moniteur belge*, 8 December 2006.



As regards fields which are a federal competence, the failure to meet the duty to provide reasonable accommodation constitutes a form of discrimination. For details and for an explanation of the situation under the instruments adopted by the Regions and Communities, the reader is referred to the preceding paragraph.

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

As mentioned in the answer to the preceding question, the Flemish Decree of 8 May 2002 on proportionate representation does not restrict the notion of “reasonable accommodations” to persons with disabilities and could therefore also apply in principle to persons of a particular religion or ethnic origin. This Decree however has a limited scope of application (*supra*, section 0.2).

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

The Framework Act (*loi cadre*) of 17 July 1975¹²² first introduced the requirement for buildings accessible to the public to be accessible to the persons with disabilities. The implementing Executive Regulations were adopted on 9 May 1977¹²³; they define norms for the construction of new buildings or for their renovation. However, since 1980, legislation on construction is a competence of the Regions¹²⁴.

In the *Walloon Region*, a Code on the Land and Urban Planning was adopted in 1984. This legislation has been modified on a number of occasions, and most recently by a Decree of the Walloon Government of 25 January 2001 stipulating that a building permit will only be issued if the buildings concerned¹²⁵ (in fact, all buildings which are not private habitations) are made accessible to persons with disabilities. The Decree of the Walloon Government of 20 May 1999 defines the norms to which these buildings must conform (these norms relate to parking lots, the size and characteristics of entrances, the size of doors, the characteristics of staircases and elevators, etc.). Certain deviations may be authorised, in particular for architectural reasons, for transformations to an existing building.

¹²² Act of 17 July 1975 on the access of persons with disabilities to buildings accessible to the public, *Moniteur belge*, 19 August 1975.

¹²³ *Koninklijk Besluit van 9 mei 1977 genomen in uitvoering van de wet van 17 juli 1975 betreffende de toegang van gehandicapten tot gebouwen toegankelijk voor het publiek*, *Belgisch Staatsblad*, *Moniteur belge*, 8 June 1977.

¹²⁴ However the Federal Government still is competent for the rules on traffic on public roads. See for example the Ministerial circular of 3 April 2001 on reserved parking for persons with disabilities, *Moniteur belge*, 5 May 2001, as amended on 25 April 2003.

¹²⁵ The list comprises buildings for the care of aged or disabled persons, hospitals and clinics, cemeteries and buildings for religious worship, centres offering social, medical or familial aid, buildings meant for sport or tourism activities, cultural buildings, playing grounds, schools and higher education institutions, all public services including courts and tribunals, post offices, train stations, airports, subway stations, banks, office buildings, commercial buildings, restaurants and cafés, communal areas of apartment buildings, car parks of at least 10 places, public toilets and so on.



In the *Region of Brussels-Capital*, apart from the Federal Act of 17 July 1975 mentioned above, buildings accessible to the public must comply with Title IV “Accessibility of buildings by persons with limited mobility” of the Regional Regulation on urbanism approved by the Decree of the Government of the Region of Brussels-Capital on 21 November 2006. Both the buildings concerned and the norms which apply to their construction and renovation roughly correspond to what is prescribed for the territory of the Walloon Region.

In the Flemish Region, the Framework Act of 1975 and its implementing “Executive” Regulations of 1977 are still in force. In the area of Western Flanders, the federal legislation is, since 1 April 2007, supplemented by a recent provincial regulation (*ordonnance provinciale*) of “town planning as regards accessibility”¹²⁶. This regulation provides that a building permit for buildings open to the public will only be issued if the buildings concerned are made accessible to persons with disabilities. The rules regarding accessibility are much stricter than those included in the Federal Act of 1975.

The three regional Codes on the Land and Urban Planning¹²⁷ give competence to the qualified civil servants to control the respect of town-planning regulations and the conditions of the building permit. They also provide for sanctions in cases of non-observance of these regulations or conditions. Moreover, it cannot be ruled out that a violation of the legislative provisions which have been cited will be considered as discrimination for failure to provide reasonable accommodation in the sense of the anti-discrimination legislation adopted either at federal, regional or community level¹²⁸. However, to our knowledge there is no case available where the question of the relationship between these two sets of norms has been raised. All the norms mentioned (*federal, regional and provincial*) *oblige* any person or entity which ask for a building permit to carry out a new construction open to the public or important restorations in existing buildings open to the public, to respect standards established for promoting the access of the people with reduced mobility. *Conversely, with regard to existing buildings*, there is no legislation requiring accessibility. Consequently, a lot of *public* buildings such as *borough councils*, courts, police stations, schools or hospitals, remain inaccessible to persons *with disabilities*. Moreover, except in the Region of Brussels-Capital (*with the new RRU*), the current legislation do not apply to mental and sensory handicaps (*blindness, deafness, ...*), but only to physical disability. Finally, legislation regarding accessibility is abundant but little known and little respected.

After noting that 20 to 30% of the complaints based on disability which it received concern accessibility issues, the Centre of Equal Opportunities and Opposition to Racism undertook, in 2007, a study on the “accessibility of public buildings for persons with reduced mobility”¹²⁹. Based on the result of this inquiry, the Centre made numerous recommendations and, especially, the adoption of more effective regulations, the adoption of a legal obligation

¹²⁶ *Moniteur belge*, 19 January 2007.

¹²⁷ *Code Wallon de l'Aménagement du Territoire, de l'Urbanisme et du Patrimoine* (CWATUP), *Code Bruxellois de l'Aménagement du Territoire* (COBAT), and *Decreet houdende de Organisatie van de Ruimtelijke Ordening* (DORO).

¹²⁸ The contribution to this debate of the NGO GAMAH (*Groupe d'action pour une meilleure accessibilité aux personnes handicapées asbl*) should be underlined. In particular, they have developed an indicator of the accessibility of public buildings, called ‘*indice passe-partout*’ (www.ipp-online.org).

¹²⁹ The report of the study (*Accessibilité des bâtiments ouverts au public pour les personnes à mobilité réduite*, 2007, 81 p.) is available on the website of the Centre for Equal Opportunities and Opposition to Racism (www.diversite.be).



to increase accessibility of existing public buildings and a better collaboration between the Regions.

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

As a matter of fact, national and regional law provide for special rights for people with disabilities. Given the structure of Belgium, each Government has the power to take action. It is, therefore, impossible to summarise consistently the issue. However, the reader will find very useful information in both sections 2.1.1. and 5.

2.7 Sheltered or semi-sheltered accommodation/employment

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

In Belgium, the notion of sheltered employment has existed since the Act of 16 April 1963 created the National fund for the social rehabilitation of the persons with disabilities (*Fonds national de reclassement social des handicapés*). This legislation created sheltered workplaces (then known as *ateliers protégés*, now called *entreprises de travail adapté* (ETA)).¹³⁰ These are entreprises which offer persons with disabilities the opportunity to work in adapted conditions. In the Walloon Region for instance¹³¹, all disabled workers whose ability is considered to be at least 20% (mental disability) or 30% (physical disability) of that of a non-disabled worker may work in these structures¹³². Moreover non-disabled workers may also be employed, provided that the proportion of such workers in the company does not exceed 30%¹³³. The workers in these structures are fully covered by legislation on employment and the Collective Agreements in force; from the legal point of view, only the conditions under which their salaries are paid (a minimum of 35% of minimum wage paid by the sheltered workplace or the *Centre de Distribution de Travail à Domicile*, Centre for the Distribution of Work at Home, a maximum of 55% paid by the State) differ from the conditions applicable to all other workers.

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

¹³⁰ In the Walloon Region, a Government Decree of 23 January 1997 defines the conditions under which such ETAs may be recognised. In 2000, 61 ETAs were recognised and supported by the Walloon Agency for the Integration of Persons with Disabilities (*Agence wallonne pour l'intégration des personnes handicapées* - AWIPH), a total of 5786 workers were employed in those ETA on 30 September 1999. In Brussels, 15 companies are recognised as ETAs, constituted as non-profit organisations. It may be noted that, apart from the ETAs, there are also Centres for the distribution of work at home (*Centre de Distribution de Travail à Domicile* - CDTD).

¹³¹ See *Arrêté du Gouvernement wallon du 7 novembre 2002 relatif aux conditions auxquelles les entreprises de travail adapté sont agréées et subventionnées*, *Moniteur belge*, 7 January 2003 (Executive Regulation of the Walloon Government of 7 November 2002 on the conditions according to which ETAs are accepted and subsidised).

¹³² The *Commission Technique d'Orientation et de Reclassement Professionnel* (COTOREP) evaluates whether an individual worker fulfils this condition.

¹³³ Art. 3 of the *Arrêté du Gouvernement wallon du 7 novembre 2002 relatif aux conditions auxquelles les entreprises de travail adapté sont agréées et subventionnées*, cited above.



Such activities would clearly be considered to constitute employment under national law if the question was asked in these terms. For instance, these employees receive unemployment benefits if they lose their job¹³⁴.

¹³⁴ *Arrêté royal du 24 juin 1971 relatif aux allocations de chômage accordées aux travailleurs handicapés* (Executive Regulation of 24 June 1971 on unemployment benefits paid to disabled workers).



3. PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

No such requirements have been formulated in the statutory law implementing the Directives.

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

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

The ‘persons’ protected.- Whether the antidiscrimination Federal Acts of 10 May 2007 will be interpreted so as to protect not only natural persons but also legal persons, where such persons are victims of a discrimination based on one prohibited ground, may be doubted. The Acts refer to “persons”, without mentioning explicitly groups, communities or their members. But the terminology is not entirely consistent. For instance, reproducing in this regard the EU Directives, the “instruction to discriminate” is defined as “any behaviour consisting in enjoining any person to commit a discrimination, on the basis of one of the protected grounds, against a person, a group, a community or one of its members” (Art. 4, 13°). In Article 23 of the General Anti-discrimination Federal Act, which defines as a criminal offence the discrimination committed by a civil servant in the exercise of his or her duties, the discrimination prohibited may be against a person or a group, a community or its members (see Art. 23, al. 2, of the General Anti-discrimination Federal Act)¹³⁵. These arguments are not decisive, however, as regards the possibility for groups as such (in particular groups which are recognized to be legal persons and, thus, potentially have a capacity to sue) to complain that they have been discriminated on the basis of one of the protected grounds – for instance, because they defend gay rights, or ethnic minorities. This will need to be tested in court. Moreover, it is uncertain whether the instruments adopted by the Regions or Communities in order to implement Directives 2000/43/EC and 2000/78/EC will be similarly interpreted to protect not only natural persons but also legal persons, although the term of “persons” which these piece of legislation use is broad enough to be construed in this way by the courts. Although the preparatory works are silent on this point, it may be presumed that this broader interpretation shall prevail.

The ‘persons’ liable for discrimination.- Both natural and legal persons are prohibited from committing the types of discrimination defined in the instruments implementing the

¹³⁵ It should be noted that the Racial Equality Federal Act criminalises discrimination in access to goods and services as well as discrimination at work not only when committed against natural persons, but also when committed against “a group, a community or its members”, which would seem to extend the prohibition to discrimination against legal persons (Art. 24 and 25).



Directives (Art. 5 § 1 1 of both Federal Acts of 10 May 2007). This requires no specific explanation where civil liability is concerned: although the applicable Acts are silent on this issue, this seems to be the only plausible interpretation in line with the courts' existing practice. With respect to the criminal clauses contained in the relevant instruments, Belgian criminal law has extended to legal persons all offences which could be committed by natural persons through the Federal Act of 4 May 1999¹³⁶.

3.1.3 Scope of liability

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

Civil liability of the employer for discrimination committed by the employee.- Following the general principles of civil liability, the employer may be held liable when an employee commits a fault which causes the damage for which the victim seeks reparation (the rule is codified in Art. 1384, al. 3 of the Civil Code). Thus, the employer would be liable for any discrimination practiced by his/employee following this general rule because of the existence of a hierarchical link between the employee and the employer, and whether or not any fault may be found to have been committed by the employer. The purpose of this presumption of responsibility by the employer is to ensure that victims of the faults committed by employees carrying out their jobs will be compensated, as the employer will have to be ensured against the risk of any such liability. According to Article 18 of the Act of 3 July 1978 on employment contracts¹³⁷, the employer will have to support the cost of the damages granted to the victim of the discrimination caused by his/her employee, unless the employer proves that the employee has acted intentionally or recklessly.

Civil liability of service-providers for the acts of third parties.- Although Article 1384 al. 2 of the Civil Code provides in principle that a person may be held civilly liable not only for the damage they have caused by their own behaviour, but also for the damage caused by persons for whom they are responsible, service providers will only be liable for the acts of third parties in one specific instance: schoolteachers may be held responsible for the damage caused by their pupils when under their surveillance (Art. 1384 al. 4 of the Civil Code). For instance, teachers or the school management could be held liable for the racial harassment of a child on the premises of a school. This would not extend to a landlord's responsibility for the discriminatory acts of tenants, or to a restaurant owner for the discriminatory acts of his/her patrons, with whom no such relationship of subordination exists.

¹³⁶ On the sanctions which can be imposed on legal persons where they are criminally liable, see Article 7bis of the Penal Code, inserted by the Act of 4 May 1999.

¹³⁷ *Loi du 3 juillet 1978 relative aux contrats de travail*, *Moniteur belge*, 22 August.1978 (Act of 3 July 1978 on employment contracts).



Criminal liability for the acts of another person.- Article 67, al. 2, of the Criminal Code (*Loi du 8 juin 1867 portant le nouveau Code pénal*) provides that those who gave instructions to commit a criminal offence shall be considered accomplices. This provision is in principle applicable to the criminal offences currently described in both Federal Acts of 10 May 2007, but the scope of applicability remains very limited. Moreover, under both Federal Acts of 10 May 2007 (Art. 23), with respect to discrimination committed by a public servant in the exercise of his/her functions, obedience to an order received from a hierarchical superior excludes criminal liability of the individual public servant who has in fact committed the discriminatory act: if discrimination is indeed established, only these superiors will be fined or imprisoned in the terms provided by the law.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

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

Under the legislative framework, not all these situations are covered by antidiscrimination legislation. In particular, the Walloon Region, the Region of Brussels-Capital and the *Cocof* have not legislated in order to implement the Racial and the Employment Equality Directives as regards their own staff. The Federal Acts adopted on 10 May 2007 are not sufficient to remedy this, since these shortcomings can only be filled by the Regions and the French Community Commission concerned.

The current situation is the following:

Criminal provisions.- Article 25 of the Racial Equality Federal Act defines discrimination as a criminal offence, whether deliberate or not, which consists in denying a person access to employment or to occupational training, in creating working conditions in the execution of the contract of employment, or in dismissing a person, on the basis of alleged race, color, descent, national or ethnic origin, and nationality. This extends to public and private employment and occupation, without any restriction.

Civil provisions.- The legislative instruments adopted in order to implement Directives 2000/43/EC and 2000/78/EC have a scope of applicability limited to the respective competences of each entity (Federal State, Region or Community), which makes it very difficult to describe in summary form the overall material scope of application of these instruments. The Racial Equality Federal Act and the General Anti-discrimination Federal Act prohibit direct and indirect discrimination, *inter alia*, with regard to access to employment or self-employment, and working conditions, in both the private and the public sector (Art. 5, par. 1, 5°)¹³⁸.

¹³⁸ Both Acts refer to “working relationships” which is described in their Articles 5 § 2.



The prohibition of discrimination formulated in the Flemish Decree of 8 May 2002 on proportionate participation in the employment market extends *ratione materiae* to access to employment (including self-employment) and vocational guidance and training. This Decree, however, applies only to situations which fall under the competences of the Flemish Region or Community. The Decree forbids: making reference to the grounds it enumerates in the description of conditions or criteria in employment intermediation, or to other criteria which could lead to discrimination on the basis of the prohibited grounds (Art. 5 § 2, 1°); presenting certain employment opportunities as better suited to persons presenting one of the prohibited characteristics (2°); impeding access to placement services on the basis of justifications which, explicitly or implicitly, relate to one of the prohibited grounds of discrimination (3°); mentioning or alluding to one of the prohibited grounds in job advertisements (4°); using one of the prohibited grounds as an access or selection criterion for any function, in whichever sector of industry including access to self-employed activities, or resorting to conditions which could lead to discrimination on any of these grounds (5°); denying or discouraging access to employment on the basis of either of the prohibited grounds or on the basis of reasons which implicitly refer to such grounds (6°); referring to either of the prohibited grounds in the description of conditions or criteria for access to vocational guidance, vocational training or career guidance (7°); referring in information or publicity to vocational guidance, vocational training or career guidance as better suited to persons defined by reference to such prohibited grounds (8°); denying access to vocational guidance, vocational training or career guidance, on the basis of a prohibited ground or for reasons which implicitly refer to such a ground (9°); imposing conditions for the award and delivery of titles, diplomas, etc., which are defined differently according to one's race, colour, etc. (10°); referring to either of the prohibited grounds in the definition of working conditions or conditions of dismissal, or referring to conditions and criteria which, although not referring explicitly to these grounds, may lead to discrimination on the basis of such grounds (11°); defining or applying criteria or conditions in employment and dismissal which are based on any of the prohibited grounds (12°); and using techniques or tests in vocational guidance, vocational training, career guidance or employment intermediation which may lead to direct or indirect discrimination (13°).

The Decree on the principle of equal treatment adopted by the French-speaking Community on 19 May 2004¹³⁹ prohibits direct and indirect discrimination, including the instruction to discriminate 1° by public servants of the administration of the French-speaking Community; 2° by the staff of certain public interest bodies which are attached to the Community; 3° at all levels of education in the French-speaking Community; and 4° with respect to the *Centre hospitalier universitaire de Liège*, which attached to the Community (Art. 3 § 1). It extends the ban on discrimination to associations subsidised or otherwise recognised by the French-speaking Community (Art. 3 § 2).

The Decree on equal treatment in employment and professional training adopted on 27 May 2004 by the Walloon Region has a scope of application limited to the Region's competences in the domains of employment policy and retraining: the prohibition of discrimination under its Articles 8 and 9 therefore, applies to vocational guidance, socio-professional integration, the placement of workers, the allocation of aids for stimulating employment, and vocational

¹³⁹ *Moniteur belge*, 7 June 2004.



training, in both the public and the private sectors. The material scope of the prohibition of discrimination formulated in this Decree remains limited, which may be partly attributed to the fact that the Walloon Region may not legislate against discrimination beyond its competences. It is clear, however, that with respect to access to statutory office within the Region, it is for the Region to act. The Decree of the Walloon Region fails to do so. It may be said therefore that, in this respect, the Walloon Region has not implemented Directives 2000/43/EC and 2000/78/EC to the full extent of its competences.

The Decree adopted by the German-speaking Community extends its scope of application, *ratione personae*, to the Community's administration, staff employed in the Community's education system, intermediaries with respect to the services they offer, and employers with respect to their provision of reasonable accommodation for persons with disabilities as prescribed by Article 13 of the Decree (Art. 3). Article 4 of the Decree defines its scope of application *ratione materiae*. The Decree is to apply in particular to vocational guidance, professional counselling, vocational training and retraining. The programmatic Decree of 25 June 2007¹⁴⁰ further specifies this material scope.

Although some relationships or situations are arguably covered by more than one instrument, which may create co-ordination problems, we should pay careful attention to other situations which remain insufficiently covered by the existing instruments combating discrimination. In particular, it would seem that, despite the adoption by the Region of Brussels-Capital of the Ordinance of 26 June 2003, there is no guarantee that the principle of equal treatment as defined in Directives 2000/43/EC and 2000/78/EC is fully implemented with regard to the competences allocated to the Region of Brussels-Capital. The scope of application of the prohibition of discrimination in the Ordinance is restricted to "employment activities" defined as including¹⁴¹:

- activity consisting of matching supply and demand on the employment market (intermediaries in the strict sense);
- the activity of temporary recruitment agencies who employ people to be put at the disposal of other "users" on a temporary basis;
- lastly, other services facilitating access to employment.

Under the Belgian constitutional scheme, however, the Regions have been granted competence in the field of employment policy (including placement and professional integration)¹⁴², which implies that any positive action measures – as authorised although not compulsory under the Directives – should be adopted at the level of the Regions rather than at federal level. More importantly when examining compatibility with the requirements of the Directives, the Regions alone are competent to regulate the employment relationship between the Region and the staff of the regional administrations¹⁴³. Nor the Region of Brussels-Capital, neither the French Community Commission (*Cocof*) have implemented Directives 2000/43/EC and 2000/78/EC with respect to their own statutory staff.

¹⁴⁰ *Supra*, section 0.2.

¹⁴¹ Article 2, 1 of the Ordinance.

¹⁴² Article 6 § 1, IX of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.

¹⁴³ See Article 87 of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.



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

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

The reader is referred to the remarks made in the preceding paragraph. Although the legislative instruments adopted in order to implement the Racial and Employment Equality Directives apply, in principle, both to the public and the private sectors, the Council of State (general assembly of the legislative section) has confirmed in its opinion on 11 July 2006¹⁴⁴ that although, in principle, the Federal State is responsible for regulating employment contracts¹⁴⁵ and for adopting general rules of civil and criminal law, the Regions and Communities are exclusively competent to define the status of their staff (this follows from Articles 9 (public bodies) and 87 (staff of the Governments) of the Special Act on institutional reforms of 8 August 1980). Therefore, the general rules adopted at federal level, currently under the General Anti-discrimination Federal Act and the Racial Equality Federal Act will not suffice to remedy the lacunae identified above concerning the statutory staff of the Walloon Region, the Region of Brussels-Capital and the *Cocof*.

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

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

See paragraph 3.2.1 above, and the qualification made in 3.2.2 which applies here.

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

Occupational pensions are regulated by a set of regulations, the most important of which is the Executive Regulation no. 50 of 21 December 1967 (*Arrêté royal n° 50 du 24 octobre 1967 relatif à la pension de retraite et de survie des travailleurs salariés*), modified a very large number of times since it was initially adopted.¹⁴⁶ The compatibility with the requirements of non-discrimination and equality of treatment of these regulations is to be ensured by the Constitutional Court, or (as regards executive regulations) by the Council of State, on the basis both of Articles 10 and 11 of the Constitution and of the applicable international human rights treaties (in particular, as regards the requirement of non-discrimination, Article 14 of

¹⁴⁴ Council of State, opinions no. 40.689/AG, 40.690/AG, and 40/691/AG, of 11 July 2006. These opinions are appended to the governmental bill presented to the House of Representatives on 26 October 2006 (doc. 51 2720/001). Following a number of changes to the original bill, a second text was presented to the Council of State, on 2 October 2006. However, the second opinion of the Council of State did not reexamine the question of the division of competences.

¹⁴⁵ With regard to employment law, see Art. 6 § 1, VI, al. 4, 12° of the Special Act on institutional reforms of 8 August 1980 (*Loi spéciale de réformes institutionnelles*, *Moniteur belge*, 15 August 1980).

¹⁴⁶ A recent amendment was achieved through the Executive Regulation of 15 September 2006 : see *Arrêté royal du 15 septembre 2006 modifiant l'arrêté royal du 21 décembre 1967 portant règlement du régime de pension de retraite et de survie des travailleurs salariés*, *Moniteur belge*, 29 September 2006.



the European Convention on Human Rights and Article 26 of the International Covenant on Civil and Political Rights).

Each of the three legislative Acts contains a ‘safeguard provision’, referred to above (section 0.2), stipulating that these laws will not, *per se*, apply to differences in treatment imposed by another legislation, or by virtue of another legislation : they will only apply to administrative practices in the fields they cover, and not to laws or regulations which define the legal regime, for instance, for the allocation of pensions. Whether these means of ensuring that the requirement of equal treatment be complied with will suffice to weed out existing regulations in the field of occupational pensions from any discriminatory clause remains to be seen.

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

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

In the Belgian federal system, *vocational guidance* (as part of employment policy) is a competence of the Regions¹⁴⁷, although the Walloon Region has delegated that competence to the German-speaking Community for the territory of the German-speaking Region as of 1 January 2000. The Flemish Region/Community (on 8 May 2002), the Walloon Region (on 27 May 2004) and the German-speaking Community (on 17 May 2004) have adopted Decrees in order to prohibit discrimination in vocational guidance. The Region of Brussels-Capital should still legislate in order to do so.

Vocational training extends presumably, to advanced vocational training and retraining, but probably not to practical work experience, which is a competence of the Regions under employment policy. Vocational training is a competence of the Communities¹⁴⁸, although the French-speaking Community has delegated that competence to, respectively, the Walloon Region (for the population of that Region) and the French Community Commission (*Cocof*) of the Region of Brussels-Capital (for the French-speaking population of the Region of Brussels-Capital). This latter body adopted the Decree on equal treatment on 22 March 2007 in order to implement the relevant European Directives in the field of vocational training – including vocational guidance, learning, advanced vocational training and retraining (see *supra*, section 0.2).

Finally, *education* is a competence of the Communities. All the three Communities have acted in order to prohibit discrimination in this field, at all levels of education, including the University level.

¹⁴⁷ Article 6 § 1, IX of the Special Federal Act of 8 August 1980 on institutional reforms.

¹⁴⁸ Article 4, 15° and 16° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.



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

This is an area for which the federal level is competent to a large extent. The Racial Equality Federal Act and the General Anti-discrimination Federal Act explicitly include the membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided by such organisations (Art. 3(1), (d), of the Directive), in their scope of application (see Art. 5 § 1, 7°).

In order to fully implement the Directives, it appears necessary to include in the material scope of the Regional Decrees ‘membership of, and involvement in, an organisation of workers or employers or any organisation whose members carry on a particular profession’ that is financed by the relevant Community or Region.

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

Social security is in principle regulated by legislation adopted at federal level (Art. 6 § 1, VI, al. 4, 12° of the Special Federal Act of 8 August 1980). Healthcare and social aid, on the other hand, are essentially a competence of the Communities (Art. 5 § 1, I, 1°, and II, 2°, of the Special Federal Act of 8 August 1980). But whether discrimination results from a statutory scheme adopted by an Act (federal) or a Decree (Community), the Constitutional Court may find that it violates Articles 10 and 11 of the Constitution, and if necessary overrule the discriminatory provision. As illustrated by Constitutional Court judgment no.152/2005 on 5 October 2005, the case-law on discrimination based on sex should be transposed, without any major difficulty, to the other grounds mentioned in Article 13 EC. The Council of State (section of administration) has the same competence with respect to Executive regulations (*Arrêtés*) implementing the relevant legislation.

The Racial Equality Federal Act and the General Anti-discrimination Federal Act state explicitly that they apply to social security (Art. 5 § 3). But the practical impact of this may be limited by the ‘safeguard provision’ referred to above, which states that any measures contained in a law or adopted by virtue of a law should not be subordinated to these antidiscrimination legislations, but only to the Constitution and international law. Therefore, only administrative practices are covered by the prohibitions contained in both Federal Acts of 10 May 2007. To the extent that any contested measure in the field of social security is contained in a legislative instrument or implements a legislative provision, it should only be verified that it complies with Articles 10 and 11 of the Constitution, and equality clauses of international instruments. Although the Constitutional Court sanctions both direct and indirect forms of discrimination, it is uncertain whether the broad clauses of the Constitution present the required clarity and precision which an adequate implementation of the Directives would seem to require.



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

Belgium has not sought to rely on this exception.

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

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

Social advantages are explicitly mentioned in the Racial Equality Federal Act and the General Anti-discrimination Federal Act (Art. 5 § 1, 3°). Therefore they are clearly covered by the legislation. But there is an important proviso. As a result of the ‘safeguard provision’ which both Federal Acts of 10 May 2007 include (Art. 11), the prohibition of discrimination will only apply to administrative practices (i.e. the implementation, by the public authorities, of the existing regulations), and not to statutory law or regulations which stipulate the level of advantages each individual or family shall be allowed.

Nevertheless, in order to fully implement the Racial Equality Directive, it is necessary that the Communities and Regions prohibit discrimination relating to social advantages that fall within their competences. In this line, the Flemish Community and the French Community have explicitly included social advantages in the material scope of the legislative bills currently under discussion (*supra*, section 0.2)

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

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

Education is a competence of the Communities in the Belgian federal system¹⁴⁹. The Communities are therefore exclusively competent to adopt legislation prohibiting discrimination in the field of education, as has been explicitly confirmed by the Council of State in his opinion of 11 July 2006. Certain measures have been adopted which prohibit discrimination in education, but in general terms and without this being related to the implementation of the EU directives. Rather, these measures seek to facilitate the integration of newly arrived migrant children; and to encourage access of children with disabilities in the mainstream education system :

¹⁴⁹ Article 127, § 1, al. 1, 2° of the Constitution.



- Article 88 of the Decree adopted on 24 July 1997 by the French-speaking Community on education at the primary and secondary level (*Décret du 24 juillet 1997 définissant les missions prioritaires de l'enseignement fondamental et de l'enseignement secondaire et organisant les structures propres à les atteindre*¹⁵⁰) prohibits the refusal to accept a child on the basis of social origin, sex or race. Both the French-speaking and the Flemish Community have adopted innovative Decrees¹⁵¹ seeking to promote equal opportunities for all children, whatever their socio-economic background, thus developing a policy of positive action seeking to remedy deficiencies of the least fortunate children. Moreover, both the French-speaking and the German-speaking Community have developed special measures in favour of the integration of the children of newly arrived immigrants¹⁵². Comparable measures have also been adopted by the Flemish Community¹⁵³.
- In order to promote the integration into mainstream educational system of children with intellectual disability, the Flemish Government has adopted a Decree supporting supplementary hours in teaching institutions (in order to ensure the provision of pedagogical support to children with intellectual disability) and subsidies for institutions organising “type 2” (specially adapted) classes¹⁵⁴. Similarly, a Cooperation Agreement (approved by a Decree of 1 March 2004 of the French-speaking Community) between the French-speaking Community and the French-speaking Community Commission (*Cocof*) seeks to support teaching institutions (in either the mainstream or the special educational system) which welcome children with disability¹⁵⁵. And a Decree of 3 March 2004 of the French-speaking Community seeks to reorganise the special educational system for children and adolescents with specific needs¹⁵⁶.

In addition, the staff of the education sector, as they are Community public servants from a statutory point of view, are protected under the Flemish Decree of 8 May 2002¹⁵⁷ and the

¹⁵⁰ *Moniteur belge*, 23 September 1997.

¹⁵¹ *Décret de la Communauté française du 27 mars 2002 modifiant le décret du 30 juin 1998 visant à assurer à tous les élèves des chances égales d'émancipation sociale, notamment par la mise en œuvre de discriminations positives et portant diverses mesures modificatives*, *Moniteur belge*, 16 April 2002 (Decree of the French-speaking Community of 27 March 2002 modifying the Decree of 30 June 1998 aiming to ensure all pupils equal opportunities for social emancipation, notably by applying positive discrimination and various modification measures); *Décret de la Communauté flamande du 26 juin 2002 relatif à l'égalité des chances en éducation-I (1)*, *Moniteur belge*, 14 September 2002 (Decree of the Flemish Community of 26 June 2002 on equality of opportunity in education).

¹⁵² *Décret de la Communauté française du 14 juin 2001 visant à l'insertion des élèves primo-arrivants dans l'enseignement organisé ou subventionné par la Communauté française*, *Moniteur belge*, 17 July 2001 (erratum, 12 September 2001) (Decree of the French-speaking Community of 14 June 2001 on the integration of first-generation immigrant pupils into education organised or subsidised by the French-speaking Community); *Décret de la Communauté germanophone du 17 décembre 2001 visant la scolarisation des élèves primo-arrivants*, *Moniteur belge*, 4 April 2002 (Decree of the German-speaking Community of 17 December 2001 on schooling for first-generation immigrant pupils).

¹⁵³ *Décret de la Communauté flamande du 28 février 2003 relatif à la politique flamande d'intégration civique*, *Moniteur belge*, 8 May 2003 (Decree of the Flemish Community of 28 February 2003 on the Flemish civil integration policy); *Décret du 28 juin 2002 sur l'égalité des chances dans le domaine de l'éducation*, *Moniteur belge*, 14 September 2002 (Decree of 28 June 2002 on equal opportunities in the education field).

¹⁵⁴ Executive Regulation of the Flemish Government on the integration of children with a moderate or severe mental disability in primary and secondary education (*Arrêté du Gouvernement flamand relatif à l'intégration d'élèves présentant un handicap intellectuel modéré ou sévère dans l'enseignement primaire et secondaire ordinaire*), *Moniteur belge*, 2 March 2004.

¹⁵⁵ *Moniteur belge*, 3 June 2004.

¹⁵⁶ *Décret du 3 mars 2004 de la Communauté française organisant l'enseignement spécialisé*, *Moniteur belge*, 3 June 2004 (Decree of 3 March 2004 of the French-speaking Community on special education).

¹⁵⁷ See Art. 3, 2° and Art. 2, 6° of the Flemish Decree of 8 May 2002.



Decree adopted on 17 May 2004 by the German-speaking Community¹⁵⁸. In implementing the Racial and Employment Equality Directives, the French-speaking Community has chosen to extend the prohibition of direct and indirect discrimination stipulated by the Decree of 19 May 2004 to the field of education (this comprises all levels: primary, secondary, higher)¹⁵⁹.

There is still an important gap concerning the protection of schoolchildren from discrimination on the grounds of race or ethnic origin. Neither the Flemish nor the German-speaking Communities have adopted specific legislation to implement the Racial Equality Directive in education nor, of course, has such legislation been adopted to protect from discrimination on the other Article 13 EC grounds.

The Racial Equality Federal Act and the General Anti-discrimination Federal Act specify that they do not regulate areas which fall under the competences of the Regions and Communities, and – as has been confirmed by the opinion delivered by the Council of State on 11 July 2006 – this excludes education from their scope of application.

School absenteeism and dropout constitute a serious problem among the Roma, Sinti and Traveller communities, in Belgium, particularly in secondary education. A large number of children do not complete secondary school. According to a survey carried out in 1994 in the Flemish Region among Travellers and Gypsies, the large majority of children (94.6% for the former category, 81% for the latter) were enrolled at school, yet absenteeism increased with age. Only 67.8% of Gypsy children attended secondary school¹⁶⁰. The situation was particularly worrying among the Roma of Belgian nationality: only 18.8% of these children attended primary school and none attended secondary school. A survey carried out in 2004 on the Brussels Roma who had recently arrived from Eastern Europe also revealed a problem of school absenteeism and dropout among this population¹⁶¹. Moreover, according to figures for 2001 from the Flemish Centre for Minorities (VMC), the majority of children from these communities were directed towards technical and vocational education, in the way children from disadvantaged social backgrounds generally are. These figures remain patchy and make it difficult to identify the precise causes of the dropout and absenteeism of the Roma communities, although they do suggest that the lack of measures to assist Roma children in mainstream educational institutions may be the main reason why the dropout figures are so high.

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

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

¹⁵⁸ See Art. 2 § 1, 4° and Art. 3 of the Decree of the German-speaking Community of 17 May 2004.

¹⁵⁹ See Art. 3 § 3 of the Decree of 19 May 2004.

¹⁶⁰ T. Machiels, *Keeping the Distance or Taking the Chances, Roma and Travellers in Western Europe*, Brussels, ENAR, March 2002, (www.enar-eu.org/en/publication/Romaengl.pdf), p.17

¹⁶¹ *Les Roma de Bruxelles*, publication of the Regional Integration Centre, Foyer Bruxelles asbl, September 2004, pp. 36 et seq.



Civil provisions.- The Racial Equality Federal Act and the General Anti-discrimination Federal Act apply, *inter alia*, to the access to and supply of goods and services available to the public (Art. 5, § 1, 1°). Both Acts do not specify what this expression refers to, but it is clear from their preparatory works that this refers to all situations where goods or services are offered on the market, i.e. not reserved to a closed group.

Criminal provisions.- Article 24 of the Racial Equality Federal Act criminalises discrimination when committed in the provision of goods and services. Although the UN Convention on the Elimination of All Forms of Racial Discrimination of 1965, explicitly mentions “the right of access to any place or service *intended for use by the general public*, such as transport, hotels, restaurants, cafes, theatres and parks” (Art. 5, f – authors’ emphasis), it does not seem that the goods and services concerned are only those available to the public. For instance, private leases are certainly included.

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

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

The Racial Equality Federal Act and the General Anti-discrimination Federal Act cover housing (apart from social housing) as this area is included in goods and services (*supra*, section 3.2.9). In addition, since 1994, discrimination based on alleged race, color, descent, national or ethnic origin, and nationality is a criminal offence (Art. 24 of the Racial Equality Federal Act). This is exemplified by the judgment of 7 December 2004 delivered by the First Instance Court of Antwerp (criminal division) in the case of *Neuville* (see above in this report, section 0.3).

Social housing exclusively falls within the competences of the Regions¹⁶². At present, the Regions are taking action in this regard (*supra*, section 0.2). With regard to Travellers : The case-law is scarce but there exists a certain amount of cases related to difficulties encountered by Travellers in finding a place to stop with their caravan, either temporarily, during the travelling period, or permanently. Given the shortage of sites where Travellers are allowed to stop (especially in the Brussels’ and Walloon regions), they are regularly evicted from lands where they have parked their caravan without authorization.

The core of the problem is that the specific lifestyle of Travellers is not (or not sufficiently) taken into account in planning regulation. Moreover, many local authorities are unwilling to accommodate them in their territory. Thus:

- Given the shortage of stopping sites, many Travellers do not have other possibility than stationing illegally on a land, where they live under constant threat of eviction. Thanks to the efforts of Flemish authorities, caravan sites have been developed in the Flanders and can accommodate at present around half of the Flemish Travellers population. By contrast, only one site exists in the Walloon Region. Local authorities are reluctant to construct sites for Travellers. Moreover, a growing number of local

¹⁶² Article 6, § 1er, IV, of the Special Act of 8 August 1980; Article 4, al. 1, of the Special Act of 12 January 1989 on the institutions of Brussels.



authorities are taking regulations prohibiting the stationing of caravans more than 24 hours.

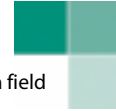
- In addition, when Travellers attempt to place a caravan on a land they have bought or rented, and where they would like to stay part of the year, the required planning permit is almost systematically refused to them by local authorities.
- In consequence, many Travellers who wish to keep their traditional lifestyle are compelled to move constantly from one place to the other, which obviously hampers their access to education, employment and social assistance.

When Travellers lodge complaints, tribunals generally hold that their stationing was illegal and the eviction therefore justified. However, in two cases, the judge decided in favour of the Travellers:

- In one decision, the *Juge de paix* (lowest-level judge) of Verviers, 30 June 2000¹⁶³: taking into account the right to housing which is recognised in the Belgian Constitution, held that in case of eviction of “gypsies”, local communities are under an obligation to provide them with an adequate means of housing in an available land.
- Similarly, the tribunal of Nivelles stated that local communities were under an obligation to provide Travellers with a place to stop, in a provisional decision (*ordonnance de référé*) dated 17 October 2003.

No much information exists on the situation of Roma (i.e. post-1989 Roma) in the field of housing, except that they usually live in very poor areas and in miserable conditions. Given that many are illegal migrants, they rarely apply for social housing.

¹⁶³ Juge de paix Verviers 30 juin 2000, *Echos du Logement* 2000, 119, note L. THOLOME.



4. EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

Federal State.- The General Anti-discrimination Federal Act and the Racial Equality Federal Act provide for the possibility of justifying certain differences in treatment directly based on one of the protected grounds where genuine and determining occupational requirements are concerned, in employment and occupation (the exception does not apply to the other areas covered by these texts) (Art. 8). The definition of genuine and determining occupational requirements corresponds to that offered in Article 4 of Directive 2000/43/EC and Article 4(1) of Directive 2000/78/EC. However, to the extent that no exhaustive list of such requirements is drawn – it is left to the judge to decide, on a case-by-case basis, whether the conditions are satisfied in order for the exception to apply, although the King (i.e., the Government) is authorized to adopt an Executive Regulation providing a list of examples in order to offer guidance to courts –, it remains debatable whether this is a fully satisfactory solution¹⁶⁴.

Regions and Communities.- The instruments adopted by the Regions and Communities contain similar formulations. Thus, Article 5 of the Decree on the implementation of the principle of equal treatment adopted on 19 May 2004 by the French-speaking Community mentions that there will be no direct discrimination where a difference in treatment is made on the basis of a prohibited ground “where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate” – a formulation which replicates that of Article 4 of Directive 2000/43/EC or Article 4(1) of Directive 2000/78/EC. Article 5 al. 1 of the Decree on equal treatment in employment and professional training adopted by the Walloon Region on 27 May 2004 contains an identical provision.

While it stipulates that the prohibition on reference to certain characteristics may be removed in certain cases, Article 6 of the Flemish Decree on proportionate participation in the employment market of 8 May 2002 entrusts the Flemish Government with the task of identifying which positions in particular are concerned by this “genuine occupational

¹⁶⁴ Recital 18 of the Preamble of the Racial Equality Directive and Recital 23 of the Preamble of the Employment Equality Directive state that “In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. *Such circumstances should be included in the information provided by the Member States to the Commission*” (on the requirement that the Member States report to the European Commission, see Article 18 of the Framework Directive). This last sentence suggests that the notion of “genuine and determining occupational requirement” should not be left to a case-by-case identification under judicial control, but should be given a precise definition beforehand, such situations being described by the Member State as part of the reporting requirements of the implementation of the Framework Directive. The implementation of Article 6 of the Flemish Decree shows that the requirement to identify with precision, *ex ante*, the occupational requirements which are concerned by the exceptions of Article 4 of the Racial Equality Directive and of Article 4(1) of the Framework Directive, by no means imposes a burden impossible to meet.



requirements” exception, after consultation with the Flemish Socio-Economic Council. However, although Article 4 of the Executive Regulation of 30 January 2004 of the Flemish Government implementing the Decree of 8 May 2002 on proportionate participation in the employment market does identify in which professional occupations sex may constitute such a genuine occupational requirement – and thus the reference to sex may be justified – no such list is proposed in the Executive Regulation with respect to the other grounds. Article 6 of the Flemish Decree of 8 May 2002 clearly seems to limit this exception to situations identified by the Executive. Therefore it would seem that, in the domains covered by the Flemish Decree, the exception for “genuine occupational requirements” will have no role to play with respect to the grounds covered by the Racial and the Employment Equality Directives.

4.2 Employers with an ethos based on religion or belief

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

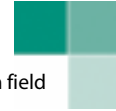
Federal State.– The General Anti-discrimination Federal Act contains a provision (Art. 13) which almost follows word to word Article 4(2) of the Employment Equality Directive. Without prejudging its interpretation by the courts, it should therefore in principle be seen as compatible with the Directive.

Regions and Communities.– Neither the Flemish Decree of 8 May 2002 on the proportionate participation on the employment market, the Decree on the implementation of the principle of equal treatment adopted on 19 May 2004 by the French-speaking Community, the Decree adopted on 17 May 2004 by the German-speaking Community, the Decree of the *Cocof*, nor the Decree of the Walloon Region of 27 May 2004 contain any clause using the exception in Article 4(2) of Directive 2000/78/EC.

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

In the specific context of religious educational institutions, the legislature has occasionally stipulated that these institutions were free to choose the curriculum and values on which teaching would be based. This implies a corresponding obligation for members of these institutions to respect these curricula and values. However, the distinction between the private and the professional spheres should be respected, and disproportionate restrictions should not be imposed on the fundamental freedoms of the staff¹⁶⁵. The courts have only very rarely

¹⁶⁵ For instance, Article 21 of the Decree adopted on 27 July 1992 by the French-speaking Community (*Décret de la Communauté française du 27 juillet 1992 fixant le statut des membres du personnel subsidiés de l'enseignement libre subventionné*, Decree of the French-speaking Community of 27 July 1992 on the status of subsidised staff in free, subsidised education) provides that the personnel of educational institutions must comply with the obligations defined in their employment contract, which result from the specific character of the curriculum of the teaching institution in which they are recruited; however, the same Decree states in Article 27 that the right to respect for private life of the employees should not be interfered with.



been given the opportunity to decide on these issues, and they have not established a clear boundary between these conflicting requirements.

4.3 Armed forces and other specific occupations

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

The General Anti-discrimination Federal Act is silent on this. However, it appears from the explanatory memorandum (*exposé des motifs*) that the Government understands the notion of genuine and determining occupational requirements as including situations where the ability for the armed forces to fulfil their duties would be at stake. Therefore the understanding is that this exception is covered under Article 13 of the General Anti-discrimination Federal Act, mentioned under 4.2. a) above.

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

No.

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

The Belgian Constitution provides that “The State does not have the right to intervene either in the nomination or in the installation of ministers of any religion whatsoever, nor to forbid these ministers from corresponding with their superiors, from publishing their acts, except, in the latter case, taking into consideration normal responsibilities in matters of press and publication” (Art. 21, § 1). It is worth noting that religion courses are compulsory in public school. Pupils’ parents have to choose between one of the six recognised cults or secularism (*morale laïque*). Religion teachers are selected and nominated exclusively by their own hierarchy. There is one interesting case worth mentioning decided on 12 June 2007 by the President of the Court of Appeals of Liège in emergency proceedings (*X v. Eglise protestante unie de Belgique*)¹⁶⁶. The Protestant Unified Church of Belgium (*Eglise protestante unie de Belgique*) dismissed a pastor. In emergency proceedings, he asked to be reinstated before a First instance Court. He lost his case because of Article 21 of the Constitution in line with previous decisions that the Court of cassation held on 20 October 1994 and 3 June 1999. On appeal, he argued that Articles 6, 9 and 13 of the European Convention on Human Rights should prevail on Article 21 of the Belgian Constitution. The appeal judge dismissed the case on several grounds. First, according to the judge there is no contradiction between Article 21 of the Constitution and the alleged provisions of the ECHR. Secondly, no civil court is entitled to order the reinstatement of a minister of a religion whatever violation of human

¹⁶⁶ The decision is available on the website of the Centre for public law of the *Université libre de Bruxelles* (<http://dev.ulb.ac.be/droitpublic/>).



rights occurred. Thirdly, the judge held that this does not mean that arbitrary dismissals are allowed. In such a case, the only remedy is the payment of damages, not a reinstatement which amounts to a positive injunction.

Note that there is no agreement with the Holy See on this issue.

4.4 Nationality discrimination

Both the Racial Equality Directive and the Employment Equality Directive include exceptions relating to difference of treatment based on nationality (Art 3(2) in both Directives).

a) How does national law treat nationality discrimination? Does this include stateless status? What is the relationship between ‘nationality’ and ‘race or ethnic origin’, in particular in the context of indirect discrimination?

Is there overlap in case law between discrimination on grounds of nationality and ethnicity (ie where nationality discrimination may constitute ethnic discrimination as well) ?

The Constitutional Court has considered (since a judgment of 14 July 1994) that non-nationals are protected by Articles 10 and 11 of the Constitution prohibiting discrimination. Any difference of treatment between Belgians and non-nationals should be reasonably and objectively justified, i.e. justified as a measure necessary to achieve a legitimate aim and proportionate to that aim. In principle therefore, non-nationals benefit from the same legal protection as Belgians. The exceptions concern the exercise of political rights (Art. 8 al. 2 of the Constitution) and access to public services (Art. 10 of the Constitution), as well as access to the national territory and the right to reside; moreover, specific administrative authorisations must be obtained by a non-national who wishes to enter a profession, either in the context of an employment contract or self-employment.

The Racial Equality Federal Act further reinforces the protection of foreigners from discrimination, by defining nationality as a prohibited ground. However, the nature of this prohibition is slightly more flexible than for the other grounds covered by the Act (alleged race, colour, descent, ethnic or national origin) : whereas, for the latter grounds, differences in treatment may only be justified in certain, limitative enumerated situations, differences of treatment based on nationality may be justified if they seek to fulfil legitimate objectives by means which are both appropriate and necessary . Nevertheless, this provision expressly states that direct discrimination based on nationality prohibited by European law will never fall under this exception (Art. 7 (2)). Among the pieces of legislation adopted at regional level, only the Decree of the German-speaking Community and the Decree of the *Cocof* expressly outlaw discrimination based on nationality. The other ones only mention national origin.

To the knowledge of the experts, there is no relevant case law where nationality discrimination constitutes ethnic discrimination as well. This could be due to the fact that, since 1981, the Racial Equality Federal Act also prohibits discrimination based on nationality.

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

No.



4.5 Work-related family benefits

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

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

Articles 10 and 11 of the Constitution prohibits discrimination on grounds of civil status, including marriage¹⁶⁷. It is one of the prohibited grounds of discrimination under the General Anti-discrimination Federal Act.

Thus, a difference in treatment made by an employer between married employees and non-married employees would be found invalid if not objectively and reasonably justified, i.e. made in order to pursue a legitimate objective and by appropriate and proportionate means. Paradoxically, it may be easier to justify differences in treatment between married and non-married couples in Belgium, as marriage has been extended to same-sex couples¹⁶⁸, than in countries which do not extend marriage to same-sex couples, since in Belgium, partners who remain unmarried have in principle chosen to do so, and the advantages recognized to marriage should not be considered a potential indirect discrimination against gays or lesbians (unless same-sex marriage would not be available to the persons concerned). Similar reasoning may apply concerning a difference in treatment which an employer might apply between employees who are only cohabiting de facto on the one hand, and those who are either married or “legal cohabitants”¹⁶⁹ on the other. Although it should have a reasonable

¹⁶⁷ See, e.g., Constitutional Court, 15 July 1999, Case no. 82/99 (action for annulment of a Decree of the Flemish Region of 15 July 1997 fixing the tariff of succession rights of cohabitants (*samenwonende, personnes vivant ensemble*)). However, the Constitutional Court considered that the legislature could legitimately favour marriage above other forms of (stable) relationships, thereby demonstrating its attachment to the institution of marriage: see Constitutional Court, Case no. 128/98 of 9 December 1998, Arr. C.A. 1998, p. 1565, point B.15.3. (“*En traitant différemment ces catégories de personnes en matière de droits de succession, le législateur décréte est resté cohérent avec le souci, manifesté en droit civil, de protéger une forme de vie familiale qui, à son estime, offre de meilleures chances de stabilité. Les mesures fondées sur cette conception sont compatibles avec la Constitution, étant donné que, compte tenu du régime de l’impôt sur les revenus applicable selon qu’il y a ou non mariage, elles ne sont pas disproportionnées à l’objectif légitime poursuivi*”) “By treating differently these categories of persons in respect of succession rights, the legislature has shown consistency in its concern, demonstrated in civil law, to protect a type of family life which, in its estimation, gives better chances of stability. Measures based on this concept are compatible with the Constitution, given that, taking into consideration the tax regime which applies depending on if there is a marriage or not, they are not disproportionate to the legitimate aim pursued”). It should be added that, neither in that case nor in other cases presented to the Constitutional Court, was the argument raised – or, for that matter, met – that favouring marriage would constitute a direct or indirect discrimination against homosexual couples, who have no access to that institution. This controversy now is moot in the Belgian legal order since the institution of marriage is open to same sex couples.

¹⁶⁸ Act of 13 February 2003 extending marriage to persons of the same sex (*Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil*), *Moniteur belge*, 28 February 2003.

¹⁶⁹ In Belgium, “legal cohabitation” was created by the Federal Act of 23 November 1998 (*Loi instaurant la cohabitation légale*, *Moniteur belge*, 12 January 1999; this legislation entered into force after the adoption of the Executive Regulation



justification if it is not to be considered discriminatory, such a difference in treatment may not be denounced as indirect discrimination against homosexuals.

Discrimination based on marital status may also be challenged under the Decree adopted by the German-speaking Community, the Decree adopted on 27 May 2004 by the Walloon Region or the Decree adopted by the *Cocof*, as all these pieces of legislation identify marital status (*état civil, burgerlijke stand, Zivilstand*) as a prohibited ground of discrimination. The Ordinance of 26 June 2003 adopted by the Region of Brussels-Capital contains a similar prohibition (Art. 4). The Decree adopted on 19 May 2004 by the French-speaking Community does not explicitly provide for such a prohibition, however this Decree contains a non-exhaustive list of prohibited grounds of discrimination¹⁷⁰ and therefore any difference of treatment based on marital status should be examined for its potentially discriminatory character in the situations covered by the Decree. Following its amendment in 2007, the Flemish Decree of 8 May 2002 does not anymore identify marital status as a prohibited ground of discrimination.

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

This would be in clear violation not only with Articles 10 and 11 of the Constitution, but also of the statutory law which seek to implement the Employment Equality Directive in Belgium. I cannot see how it could possibly be justified under these texts.

4.6 Health and safety

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

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

There are no such explicit exceptions in the legislative instruments adopted in order to implement the Directives. Nevertheless, the regulation on health and safety at work in Belgium makes it an obligation for the occupational physician to identify which solutions may be devised in order to promote access to employment for workers whose physical condition makes them unsuitable for certain jobs or for work on certain premises, and therefore the question of whether health and safety exceptions could be invoked by an employer to justify a difference in treatment on grounds of disability or health will depend exclusively on the attitude of the occupational physician, not on that of the employer¹⁷¹. It is not possible in the context of this report to enter into the details of this regulatory framework.

(*Arrêté royal*) of 14 December 1999, *Moniteur belge*, 23 December 1999). This is an institution open to all, including in particular same-sex or different-sex couples.

¹⁷⁰ See Art. 2 § 1, 1° of the Decree.

¹⁷¹ See especially *Arrêté royal du 28 mai 2003 relatif à la surveillance de la santé des travailleurs* (Executive Regulation of 28 May 2003 on monitoring the health of workers), *Moniteur belge*, 16 June 2003.



4.7 Exceptions related to discrimination on the ground of age

4.7.1 Direct discrimination

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

Federal State.- Article 12 of the General Anti-discrimination Federal Act provides for a special system for the justification of differences of treatment based on age. The Mangold case stands for the proposition that cannot be reconciled with Article 6(1) of the Employment Equality Directive a national legislation which applies age limits ‘regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned’, without showing that such age limit is objectively necessary to the attainment of a legitimate objective such as the vocational integration of unemployed older workers (para. 65). Since Article 12 § 1 of the General Anti-discrimination Federal Act does not provide for age limits, but instead requires a case-to-case examination of any difference of treatment based on age, which should be justified as appropriate or necessary for the attainment of a legitimate objective, this seems compatible both with the letter of Article 6(1) of the Employment Equality Directive and with the Mangold case.

*Regions and Communities.- The Flemish Decree of 8 May 2002 does not create a special system for justifying differences of treatment based on age, as would be authorised under Article 6 of Directive 2000/78/EC. But the Walloon Region, the German-speaking Community, the French-speaking Community and the *Cocof* have made use of this option in their implementation of Directive 2000/78/EC.*

Article 6 of the French-speaking Community’s Decree on the principle of equal treatment states that, with respect to differences of treatment based on age, no discrimination will be deemed to exist where there exists an objective and reasonable justification for the difference in treatment, i.e. where the difference in treatment pursues a legitimate objective by means which are appropriate and necessary. Similarly, Article 14 of the Decree adopted on 17 May 2004 by the German-speaking Community states, in a wording identical to that of Article 6 of Directive 2000/78/EC, that differences in treatment based on age may be justified as appropriate and necessary to fulfil a legitimate objective. This is the same with respect to Article 8 of the Decree of the *Cocof*. The wordings of these instruments follow that of Article 6(1), al. 1, of Directive 2000/78/EC, and it is in conformity with the approach adopted by the European Court of Justice in *Mangold*.

In contrast, in the Walloon Region, the wording chosen creates a potential incompatibility with that provision of the Directive. Article 5 al. 2 of the Decree adopted on 27 May 2004 by the Walloon Region in order to implement Directives 2000/43/EC and 2000/78/EC – although inserted in an Article the first intent of which related to essential occupational requirements – provides for the possible justification of differences in treatment based on age, in particular where this favours the socio-professional integration of certain categories or corresponds to



positive action measures. The wording of this clause does not contain the requirement that the objective pursued must be legitimate; nor does it require that the measure creating the difference in treatment be appropriate and necessary for fulfilling that objective. As clearly highlighted by the *Mangold* case, this creates a problem of compatibility with Articles 2(2)(a) and 6 of Directive 2000/78/EC.

It will be recalled that, in its judgment no. 152/2005 of 5 October 2005 referred to above (*supra*, section 0.3.), the Constitutional Court found discrimination on grounds of age on the basis of Articles 10 and 11 of the Constitution, following a reasoning quite similar that of the European Court of Justice in *Mangold* – which, indeed, simply applies to age the traditional criteria for establishing whether a particular difference in treatment is discriminatory. Therefore Article 5 al. 2 of the Decree adopted on 27 May 2004 by the Walloon Region is not immune from being held unconstitutional, even within the Belgian legal order.

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

The amount of items of legislation and regulations which refer to age is overwhelming. After Belgium notified the Commission its intention to make use of the option offered by Article 18 al. 2 of the Directive, it prepared for the entry into force of the requirements relating to age in line with Directive 2000/78/EC on 2 December 2006 by making a compilation of the pieces of legislation and regulations imposing differences of treatment on grounds of age (coordinated by the Federal Public Service of Employment, Labour and Social Dialogue). These pieces of legislation and regulations are now being screened in order to identify which differences in treatment based on age may be justified and remain in force, and which have to be removed under the Directive.

For special measures adopted in order to promote the integration of young or older workers, see *infra*, section, 4.7.2.

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

Yes, national legislation does allow for this. While the legislation is extremely complex and has been modified on a large number of occasions, the basic rule is that men may take pension at 65 years of age, and women at 64 (if the pension begins between 1 January 2006 and 31 December 2008) or 65 (after 1 January 2009). Other ages apply in specific sectors, such as employees of the civil aviation (55 years, even less under certain conditions of seniority), of the commercial navy (60 years), underground mining (55 years) or surface mining (60 years). In addition, after one attains 60 years of age, it may be possible to be pensioned provided one has a minimum of 35 years of employment, with at least 1/3 occupation for each year.



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

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

Older workers.- As is well known, the economic activity rate of people aged between 55 and 64 is particularly low in Belgium (28.1%, compared to an EU average of 40.2%; only Poland, Slovenia and Slovakia have a lower rate). The average career of Belgian employees is relatively short: 36.6 years against the EU-15 average of 41.1. The current situation is the legacy of a period where the main objective was to limit the number of job-seekers by discouraging potential workers from seeking employment and by encouraging early retirement¹⁷². Moreover, the labour market is not particularly welcoming for older workers, both because potential employers doubt their efficiency, and because sectoral agreements guarantee minimum wages based on seniority or age, making older workers expensive to hire. In order to redress this situation, the Regions and Communities developed in 2003-2004 a system of “competence validation”, meaning that workers may have the skills acquired through professional experience checked and certified through “competence centres”¹⁷³. Moreover, all Regions (employment policy being a competence of the Regions) have put in place schemes facilitating the smooth transition from full-time active employment to retirement. These schemes include : financial incentives to remain active part-time while receiving remuneration with a less-than-proportionate reduction; “tutoring” initiatives, encouraging older workers to transmit their knowledge to younger workers (a task for which older workers may be trained); so-called “landing jobs”, the purpose of which is to encourage older workers to remain active in the voluntary sector as well as training younger workers (this latter formula was devised by the Flemish Region for workers above 45 years of age). A number of efforts, which include financial incentives, have been made in order to encourage the continued vocational training and retraining of older workers. These schemes and incentives are generally available to workers above 45 years of age or above 50 years of age. In the framework of the European initiative EQUAL with the support of the European Social Fund, campaigns have also been organised in order to improve the image of older workers (initiative “45+” in the German-speaking Community).

Belgium has also sought to encourage the return to work of older workers, in particular by allocating a bonus of 159 euros per month to older unemployed workers taking up employment¹⁷⁴. Moreover, the Federal Act of 5 September 2001 gave workers aged 45 years or more who are made redundant the right to receive an “outplacement” payment from their employer, which discourages the laying off of older workers. The procedures for exercising this right were defined by collective bargaining concluded at the national level within the National Council for Work (*Conseil national du travail*)¹⁷⁵. In order to further discourage

¹⁷² See the Belgian National Action Plan for Employment 2004, paragraph 5.1.1.

¹⁷³ This was the subject of a Cooperation Agreement between the Regions and Communities concluded on 24 July 2003.

¹⁷⁴ Executive Regulation of 11 June 2002. This measure is in force since 1 July 2002; the level of the bonus was increased in 2004.

¹⁷⁵ *Convention collective du travail* (no. 82) of 10 July 2002.



such redundancies, employers pay reduced social contributions for workers aged 58 years or more (since 2004: 55 years or more)¹⁷⁶. The recruitment of older workers is greatly rewarded, with reductions in remuneration costs which may total 10,000 Euros per year. In 2003 an Executive Regulation was adopted, providing subsidies for certain investments made by employers in order to improve the working conditions of older workers (55 years or more)¹⁷⁷. Moreover, an Executive Regulation (*Arrêté royal*) of 5 June 2002 encourages persons aged over 50 years to become self-employed through support to starting a business.

It is clear that these measures are required in order to combat the structural and combined effects of a number of measures which had been taken in order to resolve the question of unemployment by encouraging and facilitating departure from the employment market¹⁷⁸. Early retirement is open to laid-off workers after 58 years of age (50 years when they have been laid off from enterprises considered to be in difficulty); 107,915 workers took early retirement in 2003. Unemployed people of 58 years of age or above may not register as job seekers, and yet receive full unemployment benefit; there were 146,417 unemployed in this situation in 2003. Moreover, seniority implies a number of advantages, in particular higher remuneration, which discourage employers from taking on older workers and, when they are employed, to retain them, for instance by not including them in layoff procedures. Only recently have these advantages been compensated by specific incentives to recruit older workers, making their recruitment or retention more attractive to the employer.

Young workers.- In the Conclusions XVII-2 (2005) adopted concerning Belgium under Article 7 of the 1961 European Social Charter, the European Committee of Social Rights recalls that under Art. 7 paragraph 5 of the Charter (fair remuneration), salaries of 30% below the minimum salary for adults are acceptable for workers aged between 15 and 16 years old, and that a difference of 20% may be tolerated for workers between 16 and 18 years old. As to the apprentices, the Committee reads Article 7 paragraph 5 of the European Social Charter as requiring that they receive at least a third of the starting salary or minimum wage of an adult at the beginning of the apprenticeship, and at least two thirds at the end.

In its Conclusions XVII-2 (2005) concerning Belgium, the Committee notes that according to the report presented by Belgium, in 2001 the minimal pay for apprentices in the Region of Brussels-Capital (as defined by an Executive Regulation (*Arrête gouvernemental*)) corresponded to 19% of the minimum wage of an adult worker during the first year, 26% during the second year, and 34% during the third year. Although one should also take into account the fiscal and social exemptions benefiting the apprentices, the Committee concludes that Belgium does not comply with Article 7 paragraph 5 of the Charter as the level of remuneration is situated under the minimum level prescribed by the Charter in the Committee's understanding.

¹⁷⁶ This represented a gain of 1,600 euros per year per worker, which since 2004 has been increased to 4,000 euros.

¹⁷⁷ *Arrêté royal du 30 janvier 2003 fixant les critères, les conditions et les modalités pour l'octroi de la subvention de soutien des actions relatives à la promotion de la qualité des conditions de travail des travailleurs âgés et fixant le montant de cette subvention* (Executive Regulation of 30 January 2003 establishing the criteria, conditions and procedures for granting a subsidy for supporting actions relating to the promotion of good quality working conditions for older workers and fixing the amount of that subsidy), *Moniteur belge*, 7 February 2003.

¹⁷⁸ See also on this the OECD publications on Belgium, especially the report *Ageing and Employment Policies* (2005) and the *Economic Survey – Belgium 2005*.



The same Conclusions XVII-2(2005) note that Belgian law allows for certain exceptions to the general prohibition of night work of young workers. The Executive Regulation (*Arrêté royal*) of 4 April 1972 authorises night work for young workers in certain well-defined sectors – for instance, stage actors. Article 34*bis* of the Act of 16 March 1971 on work authorises work until 11pm in cases of force majeure. As Belgium could not provide the Committee with statistical information on how many young workers were concerned by these exceptions, the Committee concluded that Article 7 paragraph 8 of the European Social Charter had not been satisfactorily implemented, as it has not been demonstrated that the legal prohibition on night work applies to the large majority of young workers.

People with caring responsibilities.- A vast array of measures seek to improve the balance between family and working life. Most of these measures, which shall not be described here, seek to improve the chance for both mothers and fathers to take care of their children. Certain measures however deserve to be highlighted specifically in this report, as they seek to support the professional integration of people caring for children with disabilities. For example, in 2004 the Region of Brussels-Capital set up a new service of care at home in order to provide help to families with children with disabilities.

Perhaps even more significantly, an Executive Regulation (*Arrêté royal*) of 15 July 2005 modified the regulation on career interruptions for workers in the private sector who assist or provide care to a member of the family or the household who is seriously ill¹⁷⁹. For an “isolated” worker, i.e. a worker living alone with one or more children under his or her care, the interruption which may be taken when they have a child aged 16 or less is doubled: the period of interruption passes from 12 months (for complete interruption; 24 months where the worker switches to half-time or to 20%) to 24 months (complete interruption; 48 months where the worker continues working part time). Moreover, the same Decree provides for a rise in social security benefits to employees who choose to stop working in order to take care of a family or household member: the rise is 100 euros per month in situations where they completely suspend their career, 50 euros where a worker under 50 years switches to 50%, and 38.5 euros where an isolated worker under 50 years of age switches to 20%.

Other reforms.- The Federal Government has presented what it called the “Solidarity pact between generations in Belgium” (*Pacte de solidarité entre les générations en Belgique*). This set of reforms was initially presented on 11 October 2005 and recently led to the adoption of the Federal Act of 23 December 2005¹⁸⁰. Their main objective is to raise the level of activity among older workers, as the measures described above have not achieved the desired results. The main measures in the “Solidarity Pact” are as follows:

¹⁷⁹ *Arrêté royal du 15 juillet 2005 modifiant l'arrêté royal du 10 août 1998 instaurant un droit à l'interruption de carrière pour l'assistance ou l'octroi de soins à un membre du ménage ou de la famille gravement malade* (Executive Regulation of 15 July 2005 modifying the Executive Regulation of 10 August 1998 instituting the right to career interruption in order to assist or provide care to a seriously ill household or family member), *Moniteur belge*, 28 July 2005.

¹⁸⁰ *Loi du 23 décembre 2005 relative au pacte de solidarité entre les générations* (Federal Act of 23 December 2005 on the solidarity pact between the generations), *Moniteur belge*, 30 December 2005.



1. Encouraging the professional integration of younger workers by a) fiscal incentives to the employer and by a specific “tutorial bonus” granted to the employer, and by b) paying a bonus to young workers who have completed training;
2. Encouraging a longer career a) by raising the level of revenue which workers may receive in addition to their pension; b) by raising the level of pensions which workers working beyond 60 years of age may receive, targeting especially workers over 62 who continue to work until the official pension age (65 years); c) by cutting from 16.5% to 10% the tax on complementary pensions paid by the employer where the worker has worked until 65 years of age; d) by making it easier for workers of 55 years or more to reduce their working time by 20 % (as this should encourage older workers to remain in employment); and e) by creating financial incentives for recruiting workers aged 50 years or more.
3. Discouraging early departure from employment: after 2008, the normal age for pre-retirement will be 60 years (it is currently 58 years) (with the exception of the heaviest jobs), and moreover men should have at least 30 years of work before retiring (35 years in 2012), 26 years for women (this limit will be raised by two years every four years until it equals the limit imposed for men);
4. Reform of the mechanisms on collective redundancies decisions in the context of restructurations of undertakings.

In this line, social partners acknowledge that salary schedules relying on age should be tested against the principle of equal treatment. They seem ready to conclude agreements in line with Directive 2000/78/EC in 2009 at the latest¹⁸¹. The federal minister for Employment adopted a directive (*circulaire ministérielle*) listing conditions with respect to age under which a Collective Agreement (*Convention collective de travail*) could become compulsory in order to comply with EC law. As a result, the social partners are screening the existing Collective social agreements¹⁸².

4.7.3 Minimum and maximum age requirements

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

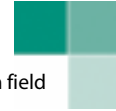
The list of exceptions where minimum or maximum age requirements are imposed in relation to access to employment is a very long one. Any systematic analysis of this information (even listing the regulations implied occupies some 40 pages) would require many weeks of work.

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory

¹⁸¹ See the *Inter-professional agreement 2007-2008 for an innovative economy and for employment*, 2 February 2007, available on the website of the National Council for Employment (www.cnt-nar.be).

¹⁸² See, the Annual report of the Centre for Equal Opportunities and Opposition to Racism 2007 (*Discrimination – Diversité*), p. 102 and sq, available on the website of Centre (www.diversite.be).



retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

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

Since 1 January 2003, the normal retirement age for women has been 63 years. The legal age of retirement of men is 65 years. These ages are being progressively equalised in accordance with the requirements of EC Law: every three years, the age of retirement of women is postponed of one year, and full equalisation with the situation of men will be achieved in 2009 at an age of 65 years.

This "normal" retirement age is not necessarily the age where retirement is required. In the private sector, workers may work beyond normal pension age, and their employer may not force them to retire; the employer may do so only by following the usual procedure of dismissal, which requires the employer to provide a reason for the dismissal. If the worker does continue to work after having reached the normal retirement age, the pension will be calculated on the basis of the most favourable years, i.e. those during which pay was highest. In the public sector however, retirement is automatic and compulsory, and fixed at 65 years for both men and women.

An individual may be in receipt of a pension and still work, within certain limits. One of the changes brought about by the Federal Act of 23 December 2005 on the Solidarity Pact between generations mentioned above is that these limits have been relaxed somewhat in order to encourage workers receiving a pension to maintain a certain level of economic activity.

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

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

There is no state-imposed mandatory retirement age in the private sector; public servants however retire automatically at 65 years. The authors are not aware of any plans to modify this in the future. This is likely to constitute one of the items for discussion in the process of screening Belgian legislations and regulations for potential age-based discrimination, referred to above.

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



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

The law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment.

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

4.7.5 Redundancy

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

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

Redundancy procedures are regulated in Belgian law by Collective Agreement (*Convention collective du travail*) no. 10 of 8 May 1973 on collective layoffs, Collective Agreement no. 24 of 2 October 1975 on informing and consulting workers' representatives in collective layoffs; the Executive Regulation (*Arrêté royal*) of 24 May 1976 on collective layoffs; the Act of 13 February 1998 containing provisions promoting employment, and the Executive Regulation (*Arrêté royal*) of 30 March 1998 implementing Articles 63 and 66 § 2 of chap. VII, Collective Layoffs, of the Act of 13 February 1998. Moreover account should be taken of Directive 98/59/EEC of 20 July 1998 when interpreting these provisions.

Age is only indirectly relevant to the selection of workers for redundancy. Indeed, the employer must make available a redundancy plan, indicating in particular the number of workers concerned, specifically divided by sex, age, and professional category, as well as the reasons for the decision. This means that the impact of the decision on older workers will be part of the collective discussion which takes place with workers' representatives. Moreover the employer must pay special compensation to workers affected by redundancy for a period normally of four months following the layoff. This compensation (as defined by Collective Agreement no. 10 of 8 May 1973 on collective layoffs, Collective Agreement no. 24 of 2 October 1975) is calculated as 50% of the difference between their previous remuneration and the unemployment benefit the workers laid off receive. It will be more expensive for the employer to lay off older workers because their level of remuneration will on average be higher.

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

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



See above, section 4.6.

4.9 Any other exceptions

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

There are no other exceptions in the General Anti-discrimination Federal Act and the Racial Equality Federal Act regarding the criteria covered in the Directives.



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

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

b) *Do measures of positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas or preferential treatment narrowly tailored.*

Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of disabled persons to the labour market and any related to Roma, any related to Roma and regarding minority rights based measures.

The Federal State.- The General Anti-discrimination Federal Act and the Racial Equality Federal Act provide that differences in treatment based on a protected ground do not amount to discrimination when a measure of positive action is concerned (Art. 10 § 1 of both Acts). Such a measure has to respect four conditions which are based on the case-law of the Constitutional Court¹⁸³ (Art. 10 § 2 of both Acts). First, any positive action should be a response to situations of *manifest inequality*, i.e. it must be based on a demonstration that a clear imbalance between the groups will remain in the absence of such action. Secondly, the removal of this inequality should be identified as a public goal to achieve. In this line, the King (the Federal Government) must authorize the adoption of positive action measures through an Executive Regulation (*Arrêté royal*) (Art. 10 § 3 of both Acts)¹⁸⁴. Thirdly, the “corrective measures” must be of a temporary nature: as a response to a situation of demonstrated manifest imbalance, these measures must be abandoned as soon as their objective – to remedy this imbalance – is attained. Fourthly, these corrective measures should not restrain uselessly the rights of others.

Regions and Communities.- Since the conditions defined by the Constitutional Court for the admissibility of positive action are derived from Articles 10 and 11 of the Constitution, rather than from rules specific to the federal level, they also must be complied with by the Regions and Communities. The Flemish Decree of 8 May 2002 on the proportionate representation of target groups in employment stands out in this respect, since its objective is achieved through action plans for diversity and annual reporting: one of its guiding principles, therefore, may be said to constitute a form of positive action, in the broad sense of this expression as used in the Racial and Employment Equality Directives. The German-speaking Community’s Decree does not adopt the same affirmative conception of equality as that of the Flemish Decree of 8 May 2002, but nevertheless does provide for positive action measures (*positiven Maßnahmen*), which are defined in conformity with the definition offered by the Employment Equality Directive (Art. 16). This is the same in the 2007 Decree of the *Cocof* (Art. 9) and in the Ordinance of 26 June 2003 of the Region of Brussels-Capital (Art. 4 § 2). Similarly,

¹⁸³ Constitutional Court (*Cour d'Arbitrage*), 27 January 1994, Case no. 9/94, recital B.6.2. The Council of State has aligned itself with this understanding of the constitutional limits imposed on positive action: see Opinion no. 28.197/1 on the Bill subsequently became the Act of 7 May 1999 on equal treatment between men and women in conditions of occupation, access to employment and promotion, access to a self-employed profession, and social security

¹⁸⁴ In addition, where positive action measures are adopted in the field of work and employment, the social partners are consulted, via the competent bodies established respectively in the private and the public sectors (Art. 10 § 4).



Article 7 of the Decree adopted on 19 May 2004 by the French-speaking Community mentions that the principle of equal treatment does not forbid the maintenance or adoption of measures with the objective of preventing or compensating for disadvantages linked to one of the grounds protected from discrimination. Article 10 of the Decree adopted by the Walloon Region on 27 May 2004 adopts a bolder formulation, as it states that the Walloon Government “maintains and adopts” positive action provisions, “in order to fulfil the principle of equal treatment”. Of course, the formulation remains too vague to identify an obligation imposed on the Walloon Government to take action in this regard; nevertheless the formulation is worth emphasising, as it presents the adoption of positive action as a consequence of the requirement for equal treatment, rather than as an exception to that principle. Any implementation of these provisions by the adoption of positive action measures should conform to the limits identified by the Constitutional Court from Articles 10 and 11 of the Constitution, as recalled above.

As a matter of fact, there are a fair amount of schemes of positive actions which either come from the federal level or the regional ones. It goes far beyond the framework of this report to list and describe all of them. As a result, this part of the report should not be considered as comprehensive. Below are some instances of positive actions mostly implemented in employment with respect to various target groups. In addition, there are examples of measures of positive actions regarding Roma and instances developed by the former Belgian reporter, Olivier de Schutter, concerning persons with disabilities which deserve a separate comment.

Positive action in employment.- The Flemish Decree of 8 May 2002 is the only piece of legislation that organises positive actions (preparation of diversity plans and annual reports on progress made) to encourage the integration in the labour market of ‘target groups’ (*groupes à potentiel*). These target groups were identified in 2004 by the Flemish government as “all categories of persons whose level of employment, defined as the percentage of the active population of that category who effectively work, are under the average level of employment for the total Flemish population”¹⁸⁵ (*supra*, section 2.1.1). In this line, a Flemish Action Plan fighting against discrimination in employment was adopted in December 2007. This Plan put emphasis on the link between diversity policy and the fight against discrimination. One aspect of the Plan worth mentioning is the setting up of an efficient socio-economical monitoring of the situation of target groups in the labour market in view of adopting suitable measures of equal opportunities and to gather data related to discrimination. The Plan indicates that an “indicator of discrimination” in the labour market should be designed with the collaboration of the Centre for Equal Opportunities and Opposition to Racism as well as the other Regions and Communities.

There are several other schemes developed either at the federal level or at regional ones which are based upon soft law initiatives. For instance, in September 2006, a pilot project “Equality

¹⁸⁵ Art. 2(2), al. 1, of the Regulation [of 30 January 2004] of the Flemish Government concerning the execution of the Decree of 8 May 2002 on equitable participation in the employment market concerning professional orientation, vocational training, career counselling and the action of intermediaries on the labour market (*Besluit [van 30 Januari 2004] van de Vlaamse regering tot uitvoering van het decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling*), *Moniteur belge*, 4 March 2004, p. 12050.



and Diversity Label” (*Label Egalité Diversité*) has been launched by the Employment Federal administration¹⁸⁶.

Positive action regarding Roma.- In the **Flemish Region and Community**, the Decree on the Flemish policy with regard to “ethno-cultural minorities” of the 28 April 1998¹⁸⁷, include the so-called “travelling populations” (*trekkende bevolking*) among the minorities concerned by this legislation. “Travelling populations”, as defined in this Decree, include both Travellers and Roma. The general goal of the policy delineated in this text is to promote participation of the concerned groups into the Flemish society as fully-fledged citizens. Yet, positive action programmes developed by Flemish authorities in the field of employment do not concern Travellers or Roma. In application of this 28 April 1998 Decree, the *Flemish Minority Centre* (*Vlaams Minderhedencentrum*) has been created. This semi-public institution is tasked, *inter alia*, with following the situation of Roma and Travellers and, where necessary, with organising a mediation between these populations and the authorities. In addition, five cells entrusted with dealing with Roma and Travellers issues, have been set up in the five “integration centres” created in the Flemish Region and funded by public authorities. In education, the 28 June 2002 Flemish Decree regarding equal opportunities in the field of education provides that schools may receive additional financial means, on the basis of the number of pupils enrolled in the school who belong to one of the disadvantaged groups listed in the Decree. The “travelling populations” are mentioned among these disadvantaged groups. Thus, schools where Roma or Travellers are enrolled can receive additional means from public authorities. Since 1990, when local communities decide to open a caravan site for Travellers, Flemish authorities provide them with funding amounting to 90 % of the costs of the construction of the site. Flemish authorities have issued explicit guidelines to local communities inviting them to build caravan sites for Travellers. As a result of this policy, around 30 sites for Travellers exist at present in the Flanders, which permits to accommodate around half of the Travellers population. It must be noted that the Flemish housing legislation (Housing Code or *Vlaamse Wooncode*) expressly recognises “mobile housing” as a form of housing (15 July 1997 Decree containing the Flemish housing Code¹⁸⁸). Since 2004, the objective of “improving the conditions of housing of inhabitants living in mobile housing” is part of the objectives of the Flemish housing policy as described in the Housing Code. In the **Walloon Region and French Community**, the Centre for mediation of Travellers in the Walloon Region (*Centre de Médiation des Gens du Voyage de la Région wallonne*) was created in 2001. It is tasked with organising a dialogue between Travellers on the one hand, and, regional and local authorities as well as sedentary dwellers’ associations, on the other hand. Moreover, under a 1st July 1982 regulation of the French Community’s government, local authorities which construct a site for “mobile housing”, may receive funding from the French Community to the rate of 60 % of the costs. In addition, under article 44 of the Walloon Housing Code (*Code wallon du logement*), when a local authority organises a site aimed at Travellers, the Walloon Region covers the costs of sewerage, public light and water supply equipments. But despite these measures, only one caravan site for Travellers presently exists in the Walloon Region. The **Region of Brussels-Capital** has not taken any measure yet

¹⁸⁶ For more details, see the Annual Report 2007 of the Centre for Equal Opportunities and Opposition to Racism (*Discrimination - Diversity*), pp. 86 and sq., available on the website of the Centre (www.diversite.be).

¹⁸⁷ *Moniteur belge*, 19 June 1998. It should be noted that this Decree is in the process of being revised.

¹⁸⁸ *Moniteur belge*, 19 August, 1997.



concerning Roma and Travellers. Some small-scale and temporary projects aimed at promoting schooling for Roma minors in Brussels, carried on by the Brussels-based association “*Le Foyer*”, receive funding from both the federal state and the Region of Brussels-Capital. These projects involve cooperation with mediators of Roma origin, whose task is to facilitate contacts between Roma families and school authorities.

Positive action benefiting persons with disabilities.– The Federal Act on the social reintegration of persons with disabilities (*Loi relative au reclassement social des handicapés*)¹⁸⁹ was adopted in 1963. Article 21 aimed to impose on certain employers, both in the private and in the public sector, an obligation to employ a certain number of workers with disabilities, resulting in system of quotas for recruiting disabled workers, both in the public sector and to a lesser extent in the private sector. In relation to the Federal administration, Article 25 of the Act of 22 March 1999 on various measures in public administration (*Loi portant diverses mesures en matière de fonction publique*)¹⁹⁰ now has abrogated Article 21 of the Act of 16 April 1963, and provides for the recruitment of persons with disabilities by the Federal authorities and certain public institutions¹⁹¹. The Federal Government has implemented Article 25 of the Act of 22 March 1999 by stipulating in a Executive Regulation (*Arrêté royal*) initially approved by the Council of Ministers in 25 February 1999 that in the future 2.5 % of the posts in the Federal Administration should be set aside for persons with disabilities, whom moreover will be supported by an “accompanying agent” (*agent d’accompagnement*) to guide them in adapting their working station and check that the working area is accessible.¹⁹² Similar measures have been adopted by the Walloon Region for the administrations and services within the Region’s remit (Art. 10, al. 2, of the Decree of 6 April 1995 on the integration of persons with disabilities¹⁹³), by the French-speaking Community Commission of the Region of Bruxelles-Capitale (Art. 32 of the Decree on the social and professional integration of persons with disabilities, adopted on 4 March 1999 by the *Cocof*), and by the Flemish Region/Community. It is unnecessary here to describe these schemes in detail.

A common problem in this area is that of effective enforcement, in both the public and the private sectors: in fact, reports show that quantitative objectives for the integration of persons

¹⁸⁹ *Moniteur belge*, 23 April 1963. This is a legislation adopted at federal level before the delegation of its subject matter to the Regions and Communities, and which therefore today is only partially applied, for example, some of its provisions have been superseded by legislation adopted in one Region but remaining valid in the others.

¹⁹⁰ *Moniteur belge*, 30 April 1999.

¹⁹¹ See Article 25 of the Act of 22 March 1999.

¹⁹² See also the Executive Regulation of 5 March 2007 organizing the recruitment of persons with disabilities in the federal administrative public service (*Arrêté royal du 5 mars 2007 organisant le recrutement des personnes handicapées dans la fonction publique administrative fédérale*), *Moniteur belge*, 16 March 2007 (providing for a positive action scheme aiming at achieving the goal of persons with disabilities representing 3% of the federal public service (they are estimated to represent 4.5 % of the total population), by obliging the departments which do not fulfil this benchmark to recruit qualified candidates who are considered ‘persons with disabilities’).

¹⁹³ *Décret (du Conseil régional wallon) du 6 avril 1995 relatif à l’intégration des personnes handicapées* (Decree (of the Walloon Regional Council) of 6 April 1995 on the integration of people with disabilities), *Moniteur belge*, 25 May 1995; implemented by the *Arrêté du 14 janvier 1999 du Gouvernement wallon relatif à l’emploi de personnes handicapées dans les Services du Gouvernement et dans certains organismes d’intérêt public* (Executive Regulation of 14 January 1999 of the Walloon Government on employment of people with disabilities in government services and in certain public interest bodies), *Moniteur belge*, 29 January 1999.



with disabilities are usually not met¹⁹⁴. Efforts in this direction nevertheless continue. On 6 October 2005, an Executive Regulation (*Arrêté royal*)¹⁹⁵ was adopted in order to encourage the effective integration of persons with disabilities within the federal administration. To this effect, the Executive Regulation defines the notion of “a person with a disability” (*personne handicapée*) in a more restrictive sense than the instruments implementing directive 2000/78 (Art. 1): a person with a disability is a person recognised as disabled by the relevant agencies (*Agence wallonne pour l'Intégration des Personnes handicapées*, *Vlaams Agentschap voor Personen met een Handicap*, *Service bruxellois francophone des Personnes handicapées*, *Dienststelle für Personen mit Behinderung*) or by the Flemish Employment Office (*Vlaamse Dienst voor Arbeidsbemiddeling en Beroepsopleiding (VDAB)*); a person receiving allowances or disability benefits on the basis of the Act of 27 February 1987 on allowances to persons with disabilities; a person holding a certificate from the relevant directorate of the Ministry for Social Security (*Service public fédéral Sécurité sociale*) for social or fiscal benefits; and the victim of an occupational injury whose incapacity has been recognised as being of 66% or more. Under Article 3 of the Decree, persons recognised as “with disabilities” may be put on reserve lists for access to jobs in the public administration for an unlimited period of time. During selection procedures, persons with disabilities will be put on separate list, which should allow the selection bureau for the public administration (*Selor*) to facilitate compliance by the public administration with legal obligations with regard to the quotas of persons with disabilities which they should employ. Moreover, it would appear from the answer to a parliamentary question that the Government plans to propose a Executive Regulation (*Arrêté royal*) imposing a 3% quota of persons with disabilities in all public services¹⁹⁶.

¹⁹⁴ See the figures presented in *AlterEchos* no.153 of 17 November 2003, p. 3, and commented in the *Report on the situation of fundamental rights in Belgium in 2003*, presented to the EU Network of Independent Experts on Fundamental Rights, pp. 124-125. This report is available (in French) on www.cedr.ucl.ac.be/cridho.

¹⁹⁵ *Arrêté royal du 6 octobre 2005 portant diverses mesures en matière de sélection comparative de recrutement et en matière de stage* (Executive Regulation of 6 October 2005 on various measures concerning comparative selection in recruitment and concerning work placements), *Moniteur belge*, 25 October 2005.

¹⁹⁶ See the request for explanations from Ms Anke Vandermeersch to the relevant Minister at the time (*Ministre de la Fonction publique, de l'Intégration sociale, de la Politique des grandes villes et de l'Égalité des chances*) on “positions open to persons with disabilities in public service” (no. 3-1100), Sénat, sess. ord. 2005-2006, *Annales*, 3-134.



6. REMEDIES AND ENFORCEMENT

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

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*
- b) *Are these binding or non-binding?*

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

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

Federal State.- The General Antidiscrimination Federal Act and the Racial Equality Federal Act provide for a civil and criminal procedural protection of victims of discrimination nearly identical for all the prohibited criteria. Alongside with one of the guiding principle of the reform that there should exist no hierarchy between grounds, only some criminal offences that are not in the General Antidiscrimination Federal Act were finally maintained in the Racial Equality Federal Act (discrimination in the provision of a good or a service – Art. 24.- or in access to employment, vocational training or in the course of a dismissal procedure – Art. 25) and are therefore specific to discrimination based on race and ethnic origin. *Victims of discrimination*, under both Acts, may a) seek a finding that discriminatory provisions in a contract are null and void (Art. 15 and Art. 13 respectively); b) seek a reparation (damages) according to the usual principles of civil liability (Art. 18 and 16 respectively), although the victim may opt for a payment of the lump sums defined in the Act (1300 euros, reduced to 650 euros if the defendant provides evidence that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element ; or, in the field of employment, 6 months' salary, reduced to 3 months if the employer demonstrates that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element) rather than for a damage calculated on the basis of the 'effective' damage (*infra*, section 6.5.) ; c) seek from the judge that he/she delivers an injunction imposing immediate cessation of the discriminatory practice, under the threat of financial penalties (Art. 19 and 20 and Art. 17 and 18 respectively)¹⁹⁷ ;d) seek from the judge that he/she imposes the publicity of the judgment finding a discrimination, by the posting of the judicial decision on the premises where the discrimination occurred, or by the publication of the judicial decision in newspapers (Art. 20 § 3 and 18 § 3 respectively). These actions are brought before civil tribunals (*tribunal de première instance*, *rechtbank van eerste aanleg*), or where an employment relationship is concerned, before specialised tribunals (*tribunal du travail*, *arbeidsrechtbank*). In addition, the Acts provide in limited circumstances for a criminal liability in cases of discrimination. First – but this goes beyond the scope of behaviours which the Racial or the Employment Equality Directives cover –, the incitement to commit a discrimination, or the incitement to hatred or violence against a group defined by

¹⁹⁷ It is a criminal offence to refuse to comply with a judgment delivered under this provision (Art. 24).



certain characteristics, is a criminal offence, if it is done under the conditions of publicity defined by Article 444 of the Penal Code (Art. 22 and 20 respectively). Second, civil servants who, in the exercise of their functions, commit a discrimination, may be criminally convicted (Art. 23 in both Acts). For the sake of completeness, it should be added that where certain offences defined in the Penal Code are committed with an “abject motive”, i.e. with discriminatory intent (hate crimes), this might be held as an aggravating circumstance (Art. 33-42 of the General Antidiscrimination Federal Act)¹⁹⁸. In most of these situations, a conciliation procedure is available, under the Act of 10 February 1994 which makes mediation possible for all offences punishable by an imprisonment of at a maximum of two years¹⁹⁹.

Regions and Communities.- The instruments adopted by the Regions and Communities are less developed in terms of the procedures they provide in order to uphold the right not to be discriminated against. This is at least partly to be attributed to uncertainties which remain about their competence to adopt such measures. Although the Regions and Communities may, when adopting Decrees²⁰⁰, adopt ancillary penal clauses to ensure that these Decrees contain effective sanctions, the extent of their competence in criminal matters is subject to controversies. For instance, there are serious doubts about the power of the Regions and Communities, when adopting Decrees in domains falling within their scope of competences, to include provisions about the competences of judicial courts or the conditions under which they will exercise these competences²⁰¹. This uncertainty has constituted a serious obstacle for the full implementation of Directives 2000/43/EC and 2000/78/EC in the Belgian legal order. In particular, it may explain the failure of the Walloon Region and the French-speaking Community to comply with Article 9(2) of Directive 2000/78/EC and Article 7(2) of Directive 2000/78/EC.

Another difficulty is due, more broadly, to various understandings concerning the level at which the different aspects of these Directives should be implemented in the Belgian legal order. For instance, to justify the fact that when adopting the Decree on the implementation of the principle of equal treatment of 19 May 2004 the French-speaking Community provided neither for civil nor for penal sanctions to ensure that any violations of the principle of equal treatment will be sanctioned effectively, the authors of the text mentioned that such civil or penal sanctions, to the extent they are required by Directives 2000/43/EC and 2000/78/EC, were provided for in the Federal Act of 25 February 2003 (former Federal Antidiscrimination Act, see section 0.2), which was sufficient in their understanding. The French-speaking

¹⁹⁸ These offences which may thus lead to stronger convictions if driven by such an “abject motives” are: sexual assaults (*attentats à la pudeur ou viols*: Art. 372 to 375 *Code pénal*); homicide (Art. 393 to 405bis *Code pénal*); refusal to assist a person in danger (Art. 422bis and 422ter *Code pénal*); deprivation of liberty (Art. 434 to 438 *Code pénal*); harassment (Art. 442bis *Code pénal*); attacks against the honor or the reputation of an individual (Art. 443-453 *Code pénal*); putting a property on fire (Art. 510-514 *Code Pénal*); destruction or deterioration of goods or property (Art. 528-532 *Code Pénal*). Except for the offence of harassment, these situations are not normally met in the field of employment and occupation.

¹⁹⁹ This legislation has inserted Article 216ter in the Code of Criminal Procedure (*Code d'instruction criminelle*) to create a form of *médiation pénale*.

²⁰⁰ “*Ordonnances*” for the Region of Brussels-Capital.

²⁰¹ For instance, Article 18 of the Flemish Decree on equal participation on the labour market of 8 May 2002 intended to modify the Judicial Code (*Code judiciaire*), specifically Article 581 of that Code listing the situations in which the labour court (*tribunal du travail*) may deliver injunctions on the basis of proceedings requesting the cessation of a practice considered *prima facie* illegal (*action en cessation*). A compromise had to be reached after the Federal Government planned to refer this to the Constitutional Court, considering that the Flemish Community may not on its own initiative modify this piece of legislation.



Community's Decree contains only one provision stipulating that discrimination committed by an agent of the Community will lead to disciplinary sanctions (Art. 9). However, this approach was based on the presumption that the Federal Act of 25 February 2003 applies to situations which in principle fall under the competences of the Communities – for instance, the relationship between the Community and staff in educational institutions – making it unnecessary for the Regions and Communities to further enact certain remedies against discrimination committed within their domains of competence. This presumption however is incorrect.

c) Can a person bring a case after the employment relationship has ended?

There is no difficulty in bringing a claim after the employment relationship has ended.

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

At present, there is no available statistics on the number of cases related to discrimination brought to justice. In its Annual Report 2007, the Centre for Equal Opportunities and Opposition to Racism highlights this shortcoming stating that “unhappily, the Centre has not yet a systematic record of all the judicial decisions relating to discrimination issues and is therefore limited when analysing the relevant case-law²⁰²”.

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

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

- a) in support of a complainant*
- b) on behalf of one or more complaints (please indicate if class actions are possible)*

Under Federal legislation

The legal standing of associations in criminal procedures.- It has long been realised in the field of anti-discrimination law that the combined action by the public prosecutor (who has the authority to prosecute criminal offences) and by the individual victim (who may seek damages by lodging a civil action claiming reparation, but also file a complaint to the public prosecutor or the investigating judge), may not suffice. The Act of 30 July 1981 criminalising certain acts inspired by racism and xenophobia therefore provided, rather exceptionally in Belgian procedural law²⁰³, that certain associations whose mission is to defend human rights and combat racism and discrimination could claim damage as a result of a violation of the

²⁰² Annual Report 2007 of the Centre for Equal Opportunities and Opposition to Racism (*Discrimination - Diversity*), p. 30, available on the website of the Centre (www.diversite.be).

²⁰³ Indeed, the principle is that the so-called “collective interest” asserted by an association which seeks to base its right to file a legal action on the basis of the mission defined in its internal statutes, will not suffice, if the rights of the association (to the protection of its property, its honour or reputation) are not violated as such. According to the Court of Cassation, if another solution were to prevail, citizens forming an association could impose on the authorities an obligation to prosecute, even in cases where the public prosecutor would find it not opportune to do so (Cour de Cassation, 24 November 1982, *Pasirisie*, 1983, I, p. 361)). This position has been confirmed since on a number of occasions by the Court of Cassation. See, most recently, Cour de Cassation, 19 September 1996, *Revue critique de jurisprudence belge*, 1997, p. 105).



provisions of this legislation (see at present Art. 32 of the Racial Equality Federal Act). This extension of legal interest has an important consequence: such an association acting as a private prosecutor may overcome both the inertia of the public prosecutor and the unwillingness of the victim to file a complaint by which, if he/she seeks damages, the victim obliges the investigating judge to commence an investigation. The Centre for Equal Opportunities and Opposition to Racism was later set up by the Act of 15 February 1993 as an agency which, although placed under the supervision of the Prime Minister, nevertheless functions independently (see section 6.5), and it received similar powers under criminal statutory law (now, the Racial Equality Federal Act). However, both the Centre for Equal Opportunities and Opposition to Racism and associations who have a recognised legal interest in combating racism may only launch proceedings on the basis of the Racial Equality Federal Act with the agreement of the individual victim for certain offences defined in the Act including discrimination in employment (but not, notably, discrimination in the provision of goods or services).

The legal standing of associations in civil procedures- The General Antidiscrimination Federal Act and the Racial Equality Federal Act provide for the legal standing of the Centre for Equal Opportunities and Opposition to Racism, of organizations with a legal interest in the protection of human rights or in combating discrimination, established since at least three years,²⁰⁴ and of representative unions, who may file a suit on the basis of the antidiscrimination legislation (Art. 29 and 30 respectively). However, where the victim of the alleged discrimination is an identifiable (natural or legal) person, their action will only be admissible if they prove that the victim has agreed to their action being filed (Art. 31). Thus, this legislation provides for associational standing to a certain extent (the concept of **class action** *stricto sensu*, understood as a mechanism implying that a “representative plaintiff” will sue in the name of the class and obtain a judgment binding on all the members of that class, is unknown in Belgian law).

Under Decrees adopted at Region/Community level

The Flemish Decree of 8 May 2002 (Art. 16), the Decree adopted by the German-speaking Community (Art. 20) and the Decree adopted by the *Cocof* (Art. 14) have solutions similar to that of the Antidiscrimination Federal Acts of 10 May 2007. The organisations which pursue the objective of protecting human rights and combating discrimination may engage in judicial actions to lodge a complaint about discrimination, although they may only do so with the consent of the victim if the discrimination has affected a particular legal or natural person. By way of contrast, it does not seem that the Decree adopted by the Walloon Region on 27 May 2004, nor the Decree adopted on 19 May 2004 by the French-speaking Community, accord with Article 9(2) of Directive 2000/78/EC. Indeed, these latter instruments do not provide for organisations which have a legally recognised interest in combating discrimination to engage in procedures in support of the victim.

²⁰⁴ In the procedure it had launched against Belgium, the European Commission took the view that the requirement of being established since a minimum of five years was too heavy. The choice to lower the requirement to three years' existence is an answer to this concern.



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

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

Federal law

Civil procedures.- Both Federal Acts provide for shifting the burden of proof in all the jurisdictional procedures except the criminal ones. The victim seeking damages in reparation of the alleged discrimination, on the basis of Article 1382 *Code Civil*, will be authorised to produce certain evidence – such as “statistical data” or recurrence tests as two examples – which, when presented to a judge, could lead the judge to presume that discrimination has occurred, thus obliging the defendant to demonstrate that, contrary to that presumption, there has been no discrimination. Initially, the idea was that the conditions under which situation tests must be performed and may be considered valid were to be defined by a further Executive Regulation. Although a number of consultations have taken place on this executive regulation’s content both within the Ministry of Labour and Employment and within the Ministry of Justice, no agreement could be reached, due, in part,²⁰⁵ to a strong opposition from employers’ organisations (*supra*, section 2.2.1).

Criminal procedures.- The principle of the presumption of innocence in criminal law is mostly considered to exclude the introduction into criminal procedures of rules shifting the burden of proof from the victim or prosecution to the defendant. This, at least, is the reasoning guiding Art. 8(3) in Directive 2000/43/EC and Art. 10(3) in Directive 2000/78/EC. The provisions on the shift of the burden of proof included in the General Antidiscrimination Federal Act and in the Racial Equality Federal Act do not apply to their criminal provisions. The offence must be proven by the prosecution and the victim of the alleged discrimination (Art. 27 and 29 respectively).

Regions and Communities

The instruments of the Regions and Communities have adopted a variety of approaches. Their failure to fully implement the requirements of the Directives in this respect may be attributed, again, to their hesitation concerning rules relating to the evidentiary burden: if these are procedural rules contributing to defining the powers of courts, they are not competent; if they are substantive rules, defining the extent of protection from discrimination, they should act with respect to the areas in which they are competent. Thus, the Decree adopted by the French-speaking Community does not contain specific rules governing the proof of discrimination – a situation which is, in regard of Directive 2000/78/EC, problematic,

²⁰⁵ These consultations seem to have highlighted the difficulty there is in pursuing simultaneously two partially incompatible objectives: first, the situation tests should be strictly codified, and their methodology stipulated, to ensure that they will not lead to abuse by alleged victims of discrimination, but also to encourage the judge to accept that this will result in the reversal of the burden of proof; second however, such situation tests must not be too burdensome to perform, and they should remain a relatively accessible means by which a presumption of discrimination may be established.



although it is to be explained by the understanding of the French-speaking Community that all it could do within the scope of its competence was to impose obligations on the public servants of the Community, backed by the threat of disciplinary sanctions, whilst any civil or criminal sanctions for discrimination were already outlined by federal legislation.

The other instruments adopted at regional or community level go further, however. The Decree adopted by the Walloon Region contains (Art. 17) a rule on the burden of proof, drafted in accordance with Article 8(1) of Directive 2000/43/EC and Article 10(1) of Directive 2000/78/EC. Article 14 of the Flemish Decree of 8 May 2002 provides for the reversal of the burden of proof in the context of civil actions brought on the basis of the Decree – the mechanism will not apply in criminal procedures²⁰⁶ – although the Decree remains vague as to which facts should count as weighing sufficiently to impose the switch of the burden of proof. There will be, therefore, a great deal of room for judicial interpretation: the judge will have to consider what weight should be afforded to the facts presented by the victim, and whether these facts lead to a presumption that discrimination may have occurred. The same remark can be made concerning the Decree adopted by the German-speaking Community. Article 18 of this Decree provides for the possibility of certain facts being presented to the judge leading to the burden of proof shifting. This possibility is excluded with respect to criminal procedures. As in the Flemish Decree of 8 May 2002, the facts which may lead to this are not specified. The Decree of the *Cocof* provides for a very similar system (Art. 13 §§ 2-3).

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

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

Federal legislation

The General Antidiscrimination Federal Act and the Racial Equality Federal Act extend the protection against reprisals from victims filing a complaint, to any witness in the procedure (persons having otherwise assisted in the preparation or the filing of the complaint are not included, however, in the protection from reprisals). Article 17 of the General Antidiscrimination Federal Act provides for a protection of the employee who has filed a complaint for a discrimination in the field of employment, or on whose behalf a complaint has been filed. This protection is extended to witnesses (Art. 17 § 9). A similar protection from victimisation is provided in fields other than employment by Article 16 of the General Antidiscrimination Federal Act; in this context too, this protection extends to witnesses (Art. 16 § 5). The main difference between the two regimes is that, where the employment relationship is concerned, until a judicial decision has been adopted establishing that there has been a discrimination, the victim of reprisals under the form of a dismissal by the employer or the organisation of which the victim is a member (and who represents that victim) is to ask for the reintegration of that person, at the same level and under the same conditions as prior to the

²⁰⁶ See Art. 10(3) of Directive 2000/78/EC.



dismissal. Articles 14 (outside the employment field) and 15 (in the field of employment) of the Racial Equality Federal Act contain identical protections against reprisals.

Regions and Communities

It is uncertain whether Article 12 of the Flemish Decree of 8 May 2002 protects from reprisals not only the victim of a discrimination who has filed a complaint, but also witnesses or other persons who have helped file the complaint, although it would appear from the formulation of this provision that it cannot be excluded that, by judicial interpretation, the protection could be extended beyond the plaintiff, for instance to witnesses²⁰⁷.

Neither the Decree adopted by the French-speaking Community, the Decree adopted by the *Cocof*, nor the Decree adopted by the Walloon Region contain any provisions on reprisals. In the view of the authors of this report, this is in violation of Article 11 of Directive 2000/78/EC and of Article 9 of Directive 2000/43/EC. The Decree adopted by the German-speaking Community, as amended by the programmatic Decree in 2007, includes 2 provisions on victimisation (Art. 19*bis* and 19*ter*). The first one is dedicated to the protection of the employee in the field of employment and extends the protection to witnesses. The second provides a similar protection in fields other than employment.

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

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

Federal legislation

Under the General Antidiscrimination Federal Act and under the Racial Equality Federal Act, the victim of a discrimination may seek a reparation (damages) according to the usual principles of civil liability (Art. 18 and 16 respectively), although the victim now may opt for a payment of the lump sums defined in the law rather than for a damage calculated on the basis of the ‘effective’ damage. Damages will be payable every time discrimination is proven to have occurred; in line with the general rule in non-contractual civil liability, which will be applicable (Art. 1382 Civil Code). Moreover, the choice which is now open to the victim to seek the payment of damages either on the basis of the ‘effective’ damage, or on the basis of the lump sums defined in the law, should contribute to the effectiveness of the sanctions provided for instances of discrimination.

In addition, due to the insistence of certain non-governmental organisations, the limited range of discriminatory acts which might lead to criminal sanctions (racial discrimination in the provision of goods or services and in employment), remain considered criminal offences. These offences which fall under the scope of Directive 2000/43/EC may lead to imprisonment (one month to a year), fines (the equivalent of 250 to 5,000 euros), or to both sanctions combined and even to the loss of civil and political rights for a certain period of time (meaning that during this period the offender cannot be a civil servant, nor be elected, nor sit

²⁰⁷ See Article 12(1) of the Flemish Decree.



in representative bodies) (Art. 25 of the General Antidiscrimination Act and 27 of the Racial Equality Federal Act). Moreover the victim will have the option of claiming compensation for the damage caused by the offence. In addition, it will be noted that these criminal offences were only very rarely prosecuted and led to very few convictions because of the difficulties in finding a person criminally liable.

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

Not as such but the victim may opt for a payment of the lump sums defined in the law (1300 euros, reduced to 650 euros if the defendant provides evidence that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element ; or, in the field of employment, 6 months' salary, reduced to 3 months if the employer demonstrates that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element) rather than for a damage calculated on the basis of the 'effective' damage.

c) Is there any information available concerning:

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

There is no information available as to the average amount of compensation available to victims. Some indications are given in the following figures provided in the annual report 2007 of the Centre for Equal Opportunities and Opposition to Racism: Only 2 to 5 % of discrimination cases brought to the attention of the public prosecutor lead to criminal proceedings.

The new Federal Antidiscrimination Acts significantly improve the system of sanctions available to victims of discrimination, bringing Belgium nearer to a situation where discrimination leads to "effective, proportionate and dissuasive" sanctions. The fact that victims can opt for a fixed rate damages was presented by the federal legislator as a way to improve remedies' effectiveness.



	Prohibition to discriminate	Sanction
Criminal	Discrimination by public servant/official in the exercise of his/her functions	Imprisonment from 2 months to 2 years (10 to 15 years if discrimination is committed by forging the signature of a public official) (Art.23 of the General Antidiscrimination Federal Act (hereafter GAFA) and of the Racial Equality Federal Act (hereafter REFA))
Criminal	Harassment as defined under Art. 442bis of the Penal Code (Art. 37 of the GAFA)	The sanctions provided in Art. 442bis Penal Code (imprisonment from 15 days to 2 years of fine) may be doubled if the act has a discriminatory motive (Art. 442ter Penal Code)
Civil	Any form of direct or indirect discrimination, including harassment	<ul style="list-style-type: none"> • contractual clause incompatible with the prohibition may be made void (Art.15 GAFA and 13 REFA)²⁰⁸ • payment of damages either on the basis of the 'effective' damage, or on the basis of the lump sums may be sought before the judge (Art. 17 GAFA and 18 REFA) • discriminatory practice may be ordered to cease (judicial injunction) (Art. 20(1) GAFA and 18(1) REFA), the decision may be posted publicly (Art.20(3) GAFA and 18(3) REFA)), and the addressee (defendant) may be subject to fines (<i>astreintes</i>) in the case of non-compliance with a judicial order (Art. 19 GAFA and 17 REFA) + criminal condemnation for contempt of court (Art. 24 GAFA and 26 REFA)
Civil	Victimisation	Where a dismissal is proven to be a form of reprisal, the employer may have to reinstate the employee to his/her previous position, and back pay is due (Art.16-17 GAFA and 14-15 REFA); damages otherwise may be sought, presumed to be equivalent to 6 months' pay

Regions and Communities

For the same reasons as those mentioned previously in the context of the rules relating to the burden of proof (*supra*, section 6.3), the instruments adopted by the Regions and Communities are much less detailed on the question of sanctions. The Decree adopted on 19

²⁰⁸ See below, paragraph 8.2.



May 2004 by the French-speaking Community provides no sanctions, except disciplinary proceedings against the agents of the Community who have committed discrimination. The Decree adopted by the *Cocof* provides only for disciplinary sanctions against civil servants or for the suspension of the official approval of the public body which practice has been held discriminatory by a Court (Art. 16). The Decree adopted by the German-speaking Community provides for penal sanctions, but only when a person publicises his/her intention to discriminate, within the conditions provided by Article 444 of the Penal Code (Art. 17 of the Decree). The Decree adopted by the Walloon Region on 27 May 2004 provides that a person voluntarily or knowingly committing discrimination may be convicted to a prison term of eight days to a year and to a fine running from 100 to 1,000 euros, or to one of the penal sanctions given (Art.14). It also provides that in civil proceedings where discrimination is alleged, the competent judge may grant an injunction to ensure that the discrimination ceases (“*action en cessation*”) (Art. 15); the Decree refers to the procedure described in the Federal Anti-discrimination Act of 25 February 2003. There is a problem in this respect because this Federal Act has been made void since the adoption of the General Antidiscrimination Federal Act (*supra*, section 0.2). The draft Decree presently under discussion includes nevertheless a provision similar to the one adopted at the Federal level in 2007. The Flemish Decree of 8 May 2002 on proportionate participation in the labour market also contains a penal clause (Art. 11 – the author of a discriminatory act may be sentenced to a prison term from one month to one year or/and to a fine; in contrast, in the Walloon Decree, the imposition of a criminal sanction is not limited to instances of intentional discrimination, but rather it covers all forms of prohibited discrimination, even indirect and therefore possibly unintentional). It also provides that the competent jurisdiction may impose an order that the discrimination ceases (Art. 15). The duty of reporting under the Flemish Decree on proportionate participation in the labour market is part of the general duties to report of the entities to whom the Decree is addressed.

It could also be added that there are no specific sanctions to tackle the issue of structural discrimination, such as desegregation plans.



7. SPECIALISED BODIES

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

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

a) Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin?

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

Federal level

The Centre for Equal Opportunities and Opposition to Racism (*Centre pour l'égalité des chances et la lutte contre le racisme / Centrum voor Gelijkheid van Kansen en Racismebestrijding / Zentrum für die Chancengleichheit und die Bekämpfung des Rassismus*) was created by a Federal Act of 15 February 1993²⁰⁹. This Act was importantly modified in 2003 in order to extend its remit not only to all prohibited grounds defined in Article 13 EC, but also to the supplementary grounds stipulated in the original version of the Act of 25 February 2003 (Art. 23, 24²¹⁰ and 31 Act of 25 February 2003). The General Antidiscrimination Federal Act reaffirms the role of the Centre for Equal Opportunities and Opposition to Racism, which should be competent to file legal actions on the basis of all grounds mentioned in both the Racial Equality Federal Act and the General Antidiscrimination Federal Act, with the exception of language (Art. 43-44 GAFA).

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

Articles 2 and 3 of the Act of 15 February 1993, as amended, define both the tasks of the Centre and the means it may use in order to fulfil them. These provisions state that the Centre's objective to promote equal opportunities is fulfilled through producing studies and reports, making recommendations, helping any person seeking advice on his or her rights and obligations, taking legal action, collecting and analysing statistics and case-law relating to the application of the Racial Equality Federal Act and the General Antidiscrimination Federal Act, and obtaining information in order to make enquiries of the competent authority in cases where the Centre has reasons to believe that discrimination may have been committed, pursuant to those pieces of legislation.

²⁰⁹ *Moniteur belge*, 19 February 1993. The Act of 15 February 1993 is available, in English translation, from the Centre's website.

²¹⁰ These provisions modify Articles 2 and 3 of the Act of 15 February 1993 establishing the Centre for Equal Opportunities and Opposition to Racism. These modifications seek 1) to enlarge the competences of the Centre, beyond combating discrimination based on race, colour, descent, ethnic or national origin, to discrimination based on the other grounds now listed by the Act of 25 February 2003; and 2) to grant the Centre the right to file actions based on this latter legislation.



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

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

As already mentioned (section 6.2), the General Antidiscrimination Federal Act gives the Centre for Equal Opportunities and Opposition to Racism the power to file suits on the basis of legislative provisions, and thus to contribute to the defence of legal principles in the name of the public interest. Where the alleged violation has an identifiable victim (who can be a natural or legal person)²¹¹, the power of the Centre to file suit is conditional upon the consent of the victim. This mechanism appears to be in conformity with Art. 9(2) of the Employment Equality Directive.

In a typical case of an individual person asking to the Centre to intervene in an instance of discrimination, the Centre will appraise the facts given, and in most cases where the allegation is not ill founded it will seek to obtain an amicable settlement with the alleged discriminator. Because the discriminator may fear the bad publicity a suit for alleged discrimination would bring, he may be tempted to accept this, even in situations where it may be difficult to prove that discrimination has occurred. Where such an amicable settlement seems unsatisfactory, because the discrimination is flagrant or because the defendant does not co-operate, the Centre may propose to the victim to file a suit. If the victim consents, the Centre will proceed, as the law authorises it to do. The Centre for Equal Opportunities and Opposition to Racism is not alone in possessing this competence; other organisations who aim to fight discrimination and protect human rights and trade unions may also do so (*supra*, section 6.2).

The Centre for Equal Opportunities and Opposition to Racism (*supra*, section 6.5) has been particularly efficient in providing advice and legal assistance to victims of discrimination. It is particularly noteworthy for its practice of seeking to assist the victim in having the alleged perpetrator of the discrimination to agree to some form of amicable settlement, in which the Centre, albeit in a discrete fashion, has developed significant expertise²¹². In addition, anti-discrimination centres have been established in 18 towns and cities throughout Belgium, ensuring that day-to-day discriminatory practices can be combated in close consultation with local and provincial authorities and with local integration centres, associations, neighbourhood committees, etc.

f) Is the work undertaken independently?

The Centre is responsible to the Prime Minister of the Belgian Federal Government; however it fulfils its mandate in an independent fashion (see Art. 3, al. 1 of the Act of 15 February

²¹¹ In some cases, there is no victim, but the statutory law is nevertheless violated: this would be the case, for instance, if an employer publicly boasts that thanks to the “selective” recruitment procedures he has introduced no homosexual will ever be hired – this should be considered an offence as defined under Article 6(1) of the Act, and the associations or organisations listed in Article 31 will be considered to have an interest in filing a claim to initiate prosecution.

²¹² See Annex A to the activity report of the Centre for Equal Opportunities and the Fight against Racism (Report 2004, *Vers l'élargissement (Towards Enlargement)*), available from www.diversite.be



1993). The authors of this report have regular contacts with the Centre, and she have never formed the impression that this independence was limited in any way.

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

Although the Centre for Equal Opportunities and Opposition to Racism does not have a specific approach regarding Roma and Travellers, one member of the Centre is charged with dealing specifically with issues concerning Roma and Travellers.

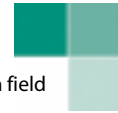
Regions and Communities

The Centre for Equal Opportunities and Opposition to Racism is a federal agency, not institutionally linked to either the Regions or the Communities. In order for regional or community decrees to be monitored by the Centre, a Cooperation Agreement must be concluded between the Federal Government and the Government of the relevant Region or Community. The Centre for Equal Opportunities and Opposition to Racism should be granted the competence to contribute to the enforcement of the Decree of 8 May 2002 under the same mechanisms as those available at federal level²¹³. The Decree adopted by the German-speaking Community provides in Article 15 that the Government of the German-speaking Community may entrust one or more organs with the promotion of the principle of equal treatment, including assistance to the victims of discrimination under the Decree and the production of reports and recommendations. A protocol should be concluded in order to assign this duty to the Centre for Equal Opportunities and Opposition to Racism at federal level.

The Decree adopted on 19 May 2004 by the French-speaking Community does not set up any specific enforcement body to monitor the effectiveness of its implementation. In fact, this Decree is silent about enforcement: in particular, it does not seem to comply with either Article 13 of Directive 2000/43/EC, Article 9(2) of Directive 2000/78/EC or Article 7(2) of Directive 2000/43/EC, given the absence of any provision regarding the right of certain eligible organisations to engage in judicial or administrative procedures on behalf or in support of the complainant, hence ensuring the enforcement of the guarantee of equal treatment afforded by the Decree, and given the absence of any role of the Centre for Equal Opportunities and Opposition to Racism in the implementation and monitoring of the Decree.

For the same reasons, although Article 11 of the Decree on equality of treatment in employment and professional training adopted by the Walloon Region on 27 May 2004 provides for a form of monitoring by the *Institut wallon de l'évaluation, de la prospective et de la statistique* (IWEPS): the IWEPS must report on the application of the Decree and make recommendations on the basis of its evaluations. Although the Decree contains clauses providing for a conciliation procedure (Art. 12) and specifies that the Walloon Government will designate which services will be entrusted with monitoring the Decree and its

²¹³ Article 8 al. 1 of the Executive Regulation implementing the Decree of 8 May 2002 stipulates in this respect that the Flemish Government shall conclude a convention with the Centre for Equal Opportunities and the Fight against Racism: see Regulation [of 30 January 2004] of the Flemish Government concerning the execution of the decree of 8 May 2002 on proportionate participation in the employment market concerning professional orientation, vocational training, career counselling and the action of intermediaries on the labour market, cited above.



implementing regulations (Art. 13), these provisions appear insufficient in comparison to the requirements of Article 9(2) of Directive 2000/78/EC or Articles 7(2) and 13 of Directive 2000/43/EC.

Finally, it is worth mentioning that some of the draft regional Decrees/Ordinances explicitly provide for the adoption of a Cooperation Agreement²¹⁴ that would empower the Centre for Equal Opportunities and Opposition to Racism to fulfil the tasks defined under Article 13 of the Racial Equality Directive, also with respect to legislation adopted at regional and community level

²¹⁴ Cf. Art. 14 § 2 of the draft Ordinance of the Region of Brussels-Capital relating to the fight against discrimination and equal treatment in the employment field; Art. 36 § 1 of the draft Framework Decree of the French-speaking Community on the fight against certain forms of discriminations; Art. 30 of the draft Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training.



8. IMPLEMENTATION ISSUES

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

Describe briefly the action taken by the Member State

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

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

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

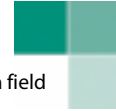
d) to specifically address Roma and Travellers

Federal level

The new piece of antidiscrimination legislation adopted at the Federal level has been widely publicized after it was adopted, in particular through brochures presenting the main provisions of the law and identifying a list of organisations and administrations involved in its implementation, also through the organization of seminars to explain more specifically the content of the law in the context of Employment (Those seminars took place from February to October 2007 in the framework of a European project dedicated to the dissemination of information about legal protection against discrimination. One must also highlight the translation of the Federal Antidiscrimination Acts in “sign language”²¹⁵. The Centre has also organized several informative afternoons in the major cities of the countries dedicated to the information of local actors (centres of integration, municipalities, lawyers, associations, etc.). In addition, on 22 March of each year, an “Anti-discrimination Day” is organized, which provides further opportunities to disseminate this information, and in which a range of social and human rights non-governmental organizations, as well as the social partners, engage on the issue of combating discrimination and promoting diversity.

Social partners have been actively involved. First, the Centre for Equal Opportunities and Opposition to Racism has regularly organised events with both employers’ and workers’ organisations, and has also set up training sessions in cooperation with these organisations. Second, as mentioned above, the social partners have concluded in 1999 the Collective Agreement no. 38 within the National Work Council (*Conseil National du Travail*), the main provisions of which have now been transposed and made compulsory through Executive Regulation (*Arrêté royal*). Third, within the Federal Public Service (Ministry) of Employment, a specific taskforce has been set up on this issue since July 2001 (*cellule entreprise multiculturelle*), with the active cooperation of the Centre for Equal Opportunities and Opposition to Racism, and in order to establish more systematic links with the social partners.

²¹⁵ For more details on those initiatives, see the Annual Report, 2007 of the Centre for Equal Opportunities and Opposition to Racism (*Discrimination - Diversity*), p. 122 and sq., available on the website of the Centre (www.diversite.be).



Regions and Communities

In the Flemish Region/Community, it is particularly remarkable that the Flemish Government concluded a number of agreements with businesses at the sectorial level which encourage diversity, promote specific measures for the integration of migrant workers, and provide for codes of conduct in favour of diversity and against discrimination at the level of the undertaking. In addition, the dialogue between social partners has taken place through the establishment of a ‘diversity’ committee within the Flemish Economic and Social Council, in which the most representation workers’ and employers’ unions are represented.

In addition, a range of initiatives have been taken in order to promote actively the employment of members of (traditionally underrepresented) ‘target groups’, in particular persons of non-native origin (*allochtones*) and persons with disabilities. Thus for instance, the ‘Jobkanaal’ project launched within the Flemish network of undertakings VOKA, or the ‘diversity’ focal point of the UNIZO (association of small and middle-size enterprises), contribute to diversity in employment. Diversity is also promoted actively by the workers’ unions, who have benefited from specialized consultants in diversity whose task it is to promote diversity and offer solutions to any resistance facing policies aiming at improving diversity within the workforce.

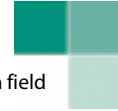
The other Regions and Communities have also adopted measures, some of which have actively involved social partners. The list of such initiatives is too long to be reproduced here.

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

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

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

The formulations of the General Antidiscrimination Federal Act and of the Racial Equality Federal Act comply better with Art. 16, b) of Directive 2000/78/EC and Article 14, b) of Directive 2000/43/EC. Indeed, Article 15 of the General Antidiscrimination Federal Act and Article 13 of the Racial Equality Federal Act mention not only that contractual clauses, but also any “provisions” contrary to the prohibition of discrimination, shall be considered null and void. However, this should be read in combination with the “safeguard provisions” (contained in Art. 11 in both texts) stating that they will not, *per se*, apply to differences in treatment imposed by another legislation, or by virtue of another legislation. As a result of this clause, national jurisdictions will not refuse to apply existing legislation because it would be in violation with antidiscrimination legislation, but they may (and indeed, they are under an obligation to) refer any potentially discriminatory legislation to the Constitutional Court so that this jurisdiction may find a legislation to be invalid if it is in violation of the equality and



non-discrimination clauses of Art. 10 and 11 of the Constitution. As a result, where discriminations (potentially violating the Racial Equality Directive or the Employment Equality Directive) have their source in legal provisions or in implementing regulations, they have not been nullified simply through the adoption of the antidiscrimination legislations; they will have to be found to be invalid, on an *ad hoc* basis, by the courts.

It is not possible to identify on a systematic basis which Acts, regulations or rules still in force may conflict with the principle of equal treatment. First, there are too many texts which would have to be screened to that effect, especially if we include undertakings' internal rules, for which the problem of accessibility also exists. Second, in many cases, the evaluation of the compatibility of these texts will require an interpretation of the requirements of the Directives which may be difficult to perform. Only the most overtly discriminatory legislation or regulations could be identified by such a screening.



9. OVERVIEW

The former Anti-discrimination Federal Act of 25 February 2003, was far from a perfect instrument, in part because it was adopted on the basis, not only of the need to implement Directives 2000/43/CE and 2000/78/CE, but also as a result of precedent attempts to improve the antidiscrimination legal framework in Belgium on the basis of entirely different premises. While the judgment of the Constitutional Court of 6 October 2004 partially annulling the 2003 Act was initially considered extremely problematic (since it made this Act almost inapplicable in certain respects, and led to a great amount of confusion as to its remaining scope), it now appears, in retrospect, that it has created a welcome opportunity to revise fundamentally the legislative framework adopted at federal level, in order to stick closer to the Directives and to take into account a number of observations made by the European Commission in correspondence with the Belgian authorities. Indeed, the General Antidiscrimination Federal Act and the Racial Equality Federal Act, answer almost all concerns raised by the adoption of the Act of 25 February 2003, and appear much more closely inspired by the EC Directives. However, a number of problems remain²¹⁶ :

1° The Council of State has failed in its opinion of 11 July 2006 to provide clear guidelines concerning the division of tasks between the federal level, the Regions and the Communities in the implementation of the EC directives, therefore a number of doubts remain as to the precise scope of competences of the latter. Yet, certain lacunae are by now clearly identified: they concern, in particular, the field of education (which is a competence of the Communities) or the statutory personnel of the Regions and Communities (*supra*, section 0.2).

2° The transposition of Directives 2000/43/EC and 2000/78/EC will not be achieved as long as important gaps remain in the Regions and the Communities. In this respect the legislative bills pending in the Flemish Community/region, the French-speaking Community, the Walloon Region and the Region of Brussels-Capital are very promising as most of these legislative bills have been carefully drafted, some of which with the assistance of academic experts in the field.

3° The competences of the Centre for Equal Opportunities and Opposition to Racism (the Equality Body under Art. 13 of the Racial Equality Directive) should as a matter of urgency be extended to allow this body to contribute to the monitoring and implementation of the legislative instruments adopted at Region and Community levels (*supra*, section 0.2 and 7).

4° The 'safeguard provision' (Art. 11 of both the General Antidiscrimination Federal Act and the Racial Equality Federal Act) implies that any statutory law (or regulation implementing a legislative provision) which might be considered discriminatory under the EC directives shall not be voided by the adoption of the antidiscrimination legislative framework currently under discussion. It may be necessary, therefore, to launch a full-scale screening of the existing legislation and regulations in order to ensure that any discriminatory provisions are identified and removed, since a purely ad hoc, case-to-case approach left in the hands of courts, might be insufficient (*supra*, section 8.2).

²¹⁶ A longer list is provided here above, under 0.2. State of implementation.



10. CO-ORDINATION AT NATIONAL LEVEL

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

At the *federal level*, antidiscrimination policy is in the hands of the Minister in charge of Employment and equal opportunities, at present Mrs Joelle Milquet (French-speaking centrist Party). His counterparts are, for the *Walloon Region*, the Minister of Health, of Social Action and of Equal Opportunities, Mr Didier Donfut (French-Speaking socialist Party); for the *Flemish Region/Community*, the Minister of Social Economy and Equal Opportunities : Mrs Kathleen Van Brempt. There is no equivalent member of the Government specifically in charge of equal opportunities in the other parts of the country (*French-speaking Community, German-speaking Community and Region of Brussels-Capital*). These authors of this report are convinced that the absence of a strong coordination taskforce between the different levels of the State in order to reach at a coherent implementation of the EC Directives in this field is the single most serious obstacle to full compliance of Belgium with its obligations under EC Law. There is some improvement in this respect as the Regions and Communities are showing a willingness to harmonise their draft legislative bills with federal legislation.

Annex

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



ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country BELGIUM

Date 1.8.2008

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/Criminal Law	Material Scope	Principal content
Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (<i>Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie</i>), as amended by the Acts of 12 April 1994, of 7 May 1999, of 20 January 2003 and of 10 May 2007 (available on the following website http://www.diversiteit.be)	9.06.2007 (entry into force of most recent amendments)	Alleged race, colour, descent, ethnic and national origin and nationality	Administrative, civil, criminal	access to employment, promotion, conditions of employment, dismissal and remuneration, both in the private and in the public sector; the nomination of a public servant or his/her assignment to a service; reference in an official document; access to goods or services including private housing, economic, social, cultural or political activities normally accessible to the public	prohibition of direct and indirect discrimination, including instruction to discriminate and harassment; civil remedies, and criminal provisions
Act of 15 February 1993 establishing the Centre for Equal Opportunities and Opposition to Racism (<i>Loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme</i>), amended most recently by the Act of 10 May 2007 (available on the following website http://www.diversiteit.be)	9.06.2007 (entry into force of the most recent amendments)	All grounds covered by the Racial Equality Federal Act and by the General Antidiscrimination Federal Act except language	Administrative, civil, criminal	Public and private employment, access to goods or services, all activities open to public	Setting up of an independent equality body

Act of 10 May 2007 pertaining to fight against certain forms of discrimination (<i>Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination</i>) (available on the following website http://www.diversiteit.be)	9.06.2007	age, sexual orientation, civil status, birth, wealth/income (<i>fortune</i> , in French), religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion and language, genetic characteristic and social origin	Administrative, civil, criminal	Provision of goods and services; access to employment, promotion, conditions of employment, dismissal and remuneration, both in the private and in the public sector; the nomination of a public servant or his/her assignment to a service; economic, social, cultural or political activities normally accessible to the public	Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment ; civil remedies, and criminal provisions
Flemish Region/Community: Decree of 8 May 2002 on proportionate participation in the employment market (<i>Decreet houdende evenredige participatie op de arbeidsmarkt</i>) (available on the following website http://www.diversiteit.be)	6.8.2002	gender, alleged race, ethnic origin, religion or belief, disability, age and sexual orientation (since March 2007)	Civil and criminal	Access to employment, vocational training, promotion, working conditions, but only applicable to a) labour market intermediaries; b) the public authorities of the Flemish Region/Community, including the field of education; c) the other employers with respect only to vocational training and integration of persons with disabilities in the labour market	Prohibition of direct and indirect discrimination, instruction to discriminate and harassment
French-speaking Community: Decree of 19 May 2004 on the implementation of the principle of equal treatment (<i>Décret relatif à la mise en œuvre du principe de l'égalité de traitement</i>) (available on the following website	17.6.2004	All grounds (open list of suspect criteria)	Civil and disciplinary	Applies to a) public servants in the French-speaking Community's administration, b) the personnel of certain public interest organs subject to the	Prohibition of direct and indirect discrimination, including instruction to discriminate

http://www.diversiteit.be				Community, c) all levels of education in the French-speaking Community, and d) <i>the Centre hospitalier universitaire de Liège</i>	
Walloon Region: Decree of 27 May 2004 on equal treatment in employment and professional training (<i>Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle</i>) (available on the following website http://www.diversiteit.be)	3.7.2004	religious or philosophical belief, disability, physical characteristic, actual or future state of health, age, civil status, sex, gender, sexual orientation, national or ethnic origin, family situation and socio-economical situation	Civil and criminal	Vocational guidance, socio-professional integration, the placement of workers, the allocation of funding for stimulating employment, and vocational training, in both the public and the private sectors	Prohibition of direct and indirect discrimination, including instruction to discriminate
German-speaking Community: Decree of 17 May 2004 on the guarantee of equal treatment on the labour market (<i>Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt</i>) as amended by the Programmatic Decree (<i>Décret programme</i>) of 25 June 2007 (published on the 26 October 2007) (available on the following website http://www.diversiteit.be)	23.8.2004	Gender, colour, descent, ethnic and national origin, sexual orientation, civil status, birth, wealth/income, age, religious or philosophical belief, actual or future state of health, disability, physical characteristic and political opinion and language (added in 2007)	Civil and criminal	Vocational guidance, professional counselling, vocational training and retraining, applies to the administration of the German-speaking Community; staff employed in the Community's education system; employment intermediaries; and employers with respect to the provision of reasonable accommodation to people with disabilities	Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment
Region of Brussels-Capital: Ordinance of 26 June 2003 on the joint management of the labour market in the Region of Brussels-Capital. (<i>Ordonnance relative à la gestion</i>	1.7.2004	race, colour, gender, sexual orientation, language, religion, political or other opinions, national or	Administrative	Access to employment	Prohibition of discrimination imposed on labour market intermediaries.

<i>mixte du marché de l'emploi dans la Région de Bruxelles-Capitale</i> (available on the following website http://www.ejustice.just.fgov.be/doc/rech_f.htm)		social origin, membership of a national minority, wealth, descent, marital or family status, membership of an employees' organisation, age or disability			
<i>Commission communautaire française (Cocof):</i> Decree on equal treatment between persons in vocational training of 22 March 2007 <i>(Décret relatif à l'égalité de traitement entre les personnes dans la formation professionnelle)</i> (available on the following website http://www.juridat.be/cgi_loi/loi_F.pl?cn=2007032251)	24.01.2008	All grounds (open list of suspect criteria)	Administrative and disciplinary	Vocational training, including vocational guidance, learning, advanced vocational training and retraining	Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment



ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country BELGIUM

Date 01.08.2008

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	yes	yes 14.6.1955	no	N/A	yes
Protocol 12, ECHR	yes	no		N/A	
Revised European Social Charter	yes	yes 2.3.2004		Protocol on collective complaints ratified 23.6.2003	
Framework Convention on the Protection of National Minorities 1995	yes	no			
International Covenant on Civil and Political Rights	yes	yes 21.4.1983	no	Ratified Optional Protocol on 17.5.1994	yes
International Covenant on Economic, Social and Cultural Rights	yes	yes 21.4.1983	no	N/A	no
Convention on the Elimination of All Forms of Racial Discrimination	yes	yes 7.8.1975	no		yes



Convention on the Elimination of Discrimination Against Women	yes	yes 10.7.1985	no	Optional protocol signed 12.1999	yes
ILO Convention No. 111 on Discrimination	yes	yes 22.3.1977	no		yes
Convention on the Rights of the Child	yes	yes	no	N/A	yes
Convention on the Rights of Persons with Disabilities	Yes 30.3.2007	no	no	Signed Optional Protocol on 30.3.2007	