



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

**COUNTRY REPORT 2008**

**BELGIUM**

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**State of affairs up to 31 December 2008**

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## INTRODUCTION

### 0.1 The national legal system

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

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 order<sup>1</sup>. The Council of State (general assembly of the legislative section) delivered an important opinion on 11 July 2006<sup>2</sup> 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 the Belgian 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 Communities<sup>3</sup> and the three Regions<sup>4</sup>, 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 policy<sup>5</sup>. According to the Council of State<sup>6</sup>, even where higher-ranking norms (including international obligations imposed on the Belgian State) place obligations on all the institutions and powers of the Belgian State, the implementation of those norms must comply with the division of competences regulated by the Constitution<sup>7</sup>: the various entities may not legislate beyond their competences, even under the pretext of ensuring compliance with the State's international obligations.

<sup>1</sup> 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.

<sup>2</sup> 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.

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

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

<sup>5</sup> 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. .

<sup>6</sup> 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.

<sup>7</sup> 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'Etat (section de législation)*, *avis 36.415/2*); and 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'Etat (section de législation)*, *avis 36.788/2*).

• 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 are available to the public, including housing<sup>8</sup>), 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 Centres for Social Assistance (*Centres publics d'aide sociale -CPAS*), 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 2007<sup>9</sup>)
- 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 unemployed<sup>10</sup>; the Communities have been granted competences relating to vocational training<sup>11</sup>, 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.

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

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

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

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





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 *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 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 basis<sup>12</sup> 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 2000<sup>13</sup>.

## 0.2 Overview/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.*

*Please clearly and briefly indicate whether the Member State had taken advantage of the option to defer implementation of Directive 2000/78 EC to 2 December 2006 in relation to age and disability?*

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

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

*Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.*

<sup>12</sup> 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.

<sup>13</sup> 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.



## 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 legislation<sup>14</sup>. 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.

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*)<sup>15</sup>. 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/EC<sup>16</sup>. 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 2004, notably because the non-inclusion of political opinion and language as protected grounds of discrimination was deemed to be in breach of the constitutional principle of equality and non-discrimination<sup>17</sup>. 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 in 2007.

Three major Acts were adopted on 10 May 2007 and published in the official journal (*Moniteur belge*) on 30 May 2007<sup>18</sup>:

- The Federal Act amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia, hereafter the “**Racial Equality Federal Act**”.

<sup>14</sup> *Moniteur belge*, 8 August 1981.

<sup>15</sup> *Moniteur belge*, 17 March 2003

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

<sup>17</sup> For more details on the reasons of the overruling, see the 2007 report on Belgium (section 0.3.).

<sup>18</sup> 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*).





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.

- The 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,<sup>19</sup> 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).

- The 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 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 Federal Anti-discrimination 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 were launched before the Constitutional Court and four extensive decisions were issued at the beginning of 2009<sup>20</sup>. The applicants were successful chiefly to the extent that the Court considered that the exclusion of the trade union opinion<sup>21</sup> (*conviction syndicale*) from the discrimination grounds listed in the General Anti-discrimination Federal Act was in breach of the constitutional principle of equality and non-discrimination. However, contrary to its decision no. 157/2004 regarding the Anti-discrimination Federal Act of 25 February 2003, the Court made sure that the General Anti-discrimination Federal Act of 10 May 2007 could remain effective (see, *infra*, section 0.3).

<sup>19</sup> 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.

<sup>20</sup> Decision no. 17/2009 of 12 February 2009; decision no. 39/2009 of 11 March 2009; decision no. 40/2009 of 11 March 2009 and decision no. 64/2009 of 2 April 2009. A thorough overview of these decisions is available *infra*, in section 0.3.

<sup>21</sup> Note that « trade union opinion » is a larger concept than “trade union membership” because one could be discriminated on this ground without being strictly a member of a trade union and only by sharing the (political) beliefs and goals of a trade union.



In addition to statutory law, there are also two important Collective Agreements 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 1999<sup>22</sup>. 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 discrimination<sup>23</sup>. Article 2bis of Collective Agreement no. 38 now reads: "The employer may not treat candidates in a discriminatory fashion. During the procedure<sup>24</sup>, 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 another organisation, sexual orientation or disability".

In the interprofessional agreement 2007-2008, "diversity and non-discrimination" was one of the four policy issues especially under focus. In line with this commitment, a new Collective agreement was signed on 10 December 2008 and made obligatory by the Royal Decree of 11 January 2009 : **Collective Agreement no. 95 relating to equality of treatment at all stages of the employment relationship** (*Convention collective du travail no. 95 concernant l'égalité de traitement durant toutes les phases de la relation de travail*). The principle of equality of treatment (i.e. prohibition of discrimination based on the same grounds as those enshrined in the Collective agreement no. 38) must be implemented at all stages of the employment relationship (access to employment, working conditions and dismissal).

## 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 very intense at the regional level for the past couple of years. Most of the legislative bills brought forward by the various Governments have been adopted in 2008, but some 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 formally referring to them.

<sup>22</sup> Made compulsory by Executive Regulation on 31 August 1999 (*Arrêté royal du 31 août 1999 rendant obligatoire la Convention collective du travail no. 38quater 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. 38bis of 29 October 1991, no. 38ter of 17 July 1998 and lastly no. 38quater of 14 July 1999.

<sup>23</sup> The most recent version of Article 2bis 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).

<sup>24</sup> 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.



The main one is the Decree of 8 May 2002 on proportionate participation in the employment market (*Decreet houdende evenredige participatie op de arbeidsmarkt*)<sup>25</sup>, which seeks both to prohibit direct and indirect discrimination on the grounds listed in Article 13 EC<sup>26</sup>, 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)<sup>27</sup>. The second is the Decree of 28 June 2002 on equal opportunities in the education field (*Decreet betreffende gelijke onderwijskansen*)<sup>28</sup>. 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 Act was adopted on 10 July 2008, establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (*Decreet houdende een kader voor het Vlaamse gelijkekansen en gelijkebehandelingsbeleid*)<sup>29</sup>. Its scope relates to the area of competences of the Flemish Region and the Flemish Community: employment policy, health care, education, goods and services available to the public (i.e. housing, energy, cultural services), social advantages, economical, social, cultural and political activities outside the private sphere (Art. 20). 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 framework Decree does not repeal the Decree of 8 May 2002 on proportionate participation in the employment market, which is not specific to equal treatment<sup>30</sup>. Beyond the general provisions (Chapter 1) and the objectives (Chapter 2), the Decree falls into two main parts. The first part (Chapter 3) creates a general framework for the implementation of a proactive and preventive policy on equal opportunities. The second part (Chapter 4) relates to equality of 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 17 discrimination grounds enshrined in this Decree (Art. 16 § 3) is almost exactly the same as the combination of the lists of the three Federal Acts of 2007. As regards remedies and enforcement, the 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.

<sup>25</sup> *Moniteur belge*, 26 July 2002, p. 33262.

<sup>26</sup> 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).

<sup>27</sup> In contrast to the French-speaking part of Belgium, the Region and Community are merged in the Flemish part.

<sup>28</sup> *Moniteur belge*, 14 September 2002, p. 40909.

<sup>29</sup> *Moniteur Belge*, 23 September 2008, pp. 49410-49424.

<sup>30</sup> Art. 20, 8° of the Framework Flemish Decree.

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/EC<sup>31</sup>. There is one important innovation in the Decree which is the establishment of “Equal treatment offices” or “contact points” (*Gelijkebehandlingsbureau* or *Meldpunten*) in the main Flemish cities<sup>32</sup>. Although the objective is the creation of 13 contact points, only seven were effectively in place by March 2009<sup>33</sup>. Those Equal treatment offices are designed to have a proactive and preventive role in the fight against discrimination. They give advice to victims of discrimination and help them to launch a complaint or suggest a mediation. This Framework Decree fills most gaps in the implementation of both Directives as regard the Flemish Community/Region. Nevertheless, there are still lacunae regarding the implementation of Article 13 of Directive 2000/43/EC. First, at this stage, all the contact points are not effective and therefore some parts of the Flemish territory are not covered by this decentralised system of monitoring. Second, for the time being, the only centralised Equality body in the Flemish Community/Region is the Department for Equal Opportunities in Flanders (*Cel Gelijke Kansen in Vlaanderen*). As part of the Flemish public service, it does not meet the independence requirement in the meaning of Directive 2000/43. In the opinion of the authors, it would be opportune to give this competence to the federal bodies for the promotion of equal treatment already working at the federal level, namely the Centre for Equal Opportunities and Opposition to Racism (*Centre pour l'égalité des chances et la lutte contre le racisme*), and the Institute for Equality between Women and Men (*Institut pour l'égalité entre hommes et femmes*). A cooperation agreement between the federal and the community/ regional levels will have to be adopted to do so.

On 24 March 2009, a trade union, the National Central of Employees, launched an action in partial annulment of the Flemish Framework Decree of 10 July 2008. This action is chiefly based on the exclusion of the trade union opinion (*conviction syndicale*) from the discrimination grounds listed in the Flemish Decree.

## 2. The French-speaking Community

The French-speaking Community adopted a Decree on 12 December 2008 on the fight against certain forms of discrimination (*Décret de la Communauté française du 12 décembre 2008 relatif à la lutte contre certaines formes de discrimination*)<sup>34</sup>, implementing European Directive 76/207/EC as modified by Directive 2002/73/EC, Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC. This Decree, which repeals the Decree of 19 May 2004 on the principle of equal treatment (*Décret relatif à la mise en œuvre du principe de l'égalité de traitement*) of 19 May 2004<sup>35</sup>, applies, in the scope of the competences of the French-speaking Community, to the selection, promotion, working conditions, including dismissals and pay regarding the public service of the French-speaking Community, education and vocational training, health policy, social advantages, membership of and involvement in any professional organisation funded by the French-speaking Community, access to goods and services available to the public. It must be stressed that the Decree has been very carefully drafted with the purpose of implementing correctly all the relevant Directives and to adopt a framework instrument to tackle discrimination.

<sup>31</sup> Art. 40 of the Framework Flemish Decree.

<sup>32</sup> Art. 42-43 of the Framework Flemish Decree.

<sup>33</sup> Antwerpen, Genk, Gent, Leuven, Mechelen, Sint-Niklaas and Turnhout. More information is available at <http://www.gelijkekansen.be/meldpunten.html>

<sup>34</sup> *Moniteur Belge*, 13 January 2009, pp. 974-987.

<sup>35</sup> *Moniteur belge*, 7 June 2004.



The result is in line with the requirements of Directives 2000/43/EC and 2000/78/EC. The Decree goes even further by prohibiting discriminations based on additional grounds, i.e. those covered at federal level by the 2007 Anti-discrimination Acts (Art. 3) and by providing a large material scope for all these grounds (including the fields covered by Directive 2000/43 which fall within the competences of the French-speaking Community). The legislative improvements chiefly concern sanctions and remedies where the main shortcomings were previously present. As to the equality body, the Decree enables the Centre for Equal Opportunities and Opposition to Racism and the Institute for Equality between Women and Men to fulfil, with respect to its scope of application, the same tasks that these bodies are undertaking under the 2007 Federal Anti-discrimination Acts (Art. 37).

### 3. The Walloon Region

A new Decree was adopted by the Walloon Region on 6 November 2008 on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (*Décret de la Région wallonne du 6 novembre 2008 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*)<sup>36</sup>. This Decree repeals the Decree of 27 May 2004 on equal treatment in employment and vocational training (*Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle*)<sup>37</sup> and implements, but only to a certain extent in light of the competences of the Walloon Region, the European Directive 76/207/EC as modified by Directive 2002/73/EC, Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC. It applies to economy, employment and vocational training as long as they fall into the competences of the Walloon Region and covers, more precisely, vocational guidance, socio-professional integration, placing of workers, funding for the promotion of employment, funding for employment and financial incentives to companies in the framework of the economic policy, including social economy and vocational training, in the public and the private sectors (Art. 5). The Decree has been carefully drafted and the shortcomings as regards EU law have been removed. It applies to the same grounds of discrimination as the 2007 Federal Anti-discrimination Acts (Art. 3). Sanctions and remedies are modelled on what was recently done at the federal level. The Decree provides for a form of monitoring by a public authority, the IWEPS (*Institut wallon de l'évaluation, de la prospective et de la statistique* – Walloon Institute for Evaluation, Prospection and Statistic) in collaboration with the socio-economical Council of the Walloon Region and the Walloon Council for Equality between Women and Men. Thoses bodies are essentially in charge of reporting on the implementation of the Decree and issuing recommendations (Art. 33). The Walloon Government is in the process of entrusting the Centre for Equal Opportunities and Opposition to Racism and the Institute for the Equality of Women and Men with the mission of providing independent assistance to victims (as to conciliation: Art. 16; as to legal standing: Art. 30).

This Decree will be amended through the adoption of a new Decree extending its material scope to all the fields of competences of the Walloon Region and renaming it as the Decree on the fight against certain forms of discrimination<sup>38</sup>.

<sup>36</sup> *Moniteur Belge*, 19 December 2008, pp. 67338-67344.

<sup>37</sup> *Moniteur belge*, 23 June 2004.

<sup>38</sup> The Decree of 19 March 2009 was published in the *Moniteur belge* of 10 April 2009 (p. 28 557).



The remaining fields of competences of the Region, including those transferred by the French-speaking Community (vocational training), which were not covered by the Decree of 8 November 2008, will be included in the material scope (Art. 5 as modified by the new Decree): social protection, including health care (1°), social advantages (2°), supply of goods and services which are available to the public and outside private and family sphere, including social housing (9°), access, participation or any exercise of an economic, cultural or political activity open to the public (10°) and statutory relationships in departments of the Walloon Government, public authorities depending on the Walloon Region, decentralised bodies (such as provinces, municipalities, etc.), public Centres for social assistance. With the entering into force of this Decree, 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 2004<sup>39</sup>. 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 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.)<sup>40</sup>. There seems, however, to be still a gap in the implementation as discrimination based on race or ethnic origin in education is not covered.

#### 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*)<sup>41</sup>. 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). However, the remainder of the Ordinance is silent about the prohibition of discrimination<sup>42</sup>.

Two new Ordinances fighting against discrimination were adopted in September 2008.

<sup>39</sup> *Moniteur belge*, 13 August 2004.

<sup>40</sup> Programmatic Decree (*Décret programme*), 25 June 2007, *Moniteur belge*, 26 October 2007.

<sup>41</sup> *Moniteur belge*, 29 July 2003.

<sup>42</sup> 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.



The first Ordinance, adopted on 4 September 2008, relates to the fight against discrimination and equal treatment in the employment field (*Ordonnance relative à la lutte contre la discrimination et à l'égalité de traitement en matière d'emploi*)<sup>43</sup>. 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 employment field covers, at the regional level, the worker placement policies and policies aimed at unemployed persons, as defined in article 4, 9° of the Ordinance. The grounds of discrimination encompass all those of the three Federal Anti-discrimination Acts of 2007<sup>44</sup>. The definition of the concepts of discrimination are in line with the Directives. 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 equality of treatment (Art. 15). As long as this is not done, Article 13 of the Directive 2000/43/EC cannot be considered implemented. This should 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. It is worth noting that the Ordinance provides for public allowances and labels for business implementing diversity plans (Art. 28). This seems to be a positive incentive to put in place more preventive and pro-active equality measures. But, to the knowledge of the authors, the Government has not yet defined the conditions and details concerning those diversity plans and labels. The second Ordinance, also adopted on 4 September 2008, relates to the promotion of diversity and the fight against discrimination in the civil service of the Region of Brussels-Capital (*Ordonnance visant à promouvoir la diversité et à lutter contre la discrimination dans la fonction publique régionale bruxelloise*)<sup>45</sup>. This Ordinance implements Directives 2000/43/EC, 2000/78/EC and Directive 76/207/EEC (as modified by Directive 2002/73/EC). It applies to the employment field in the civil service of the Region of Brussels-Capital and covers, as defined in Article 4 1°, access conditions, criteria selection, promotion, work conditions, including dismissals and pay. Article 4 13° defines the public institutions of the Region of Brussels-Capital falling within the scope of this Ordinance. The Ordinance puts in place a broader policy of equal treatment than the mere fight against discrimination. It encourages public institutions to adopt diversity plans, as defined in Articles 5 and 6. As regards the anti-discrimination provisions, the content of this Ordinance is quite similar to the one adopted in the field of employment. According to Article 24, the Government of the Region of Brussels-Capital has to designate a body responsible for the promotion of equality. As long as this is not done, Article 13 of Directive 2000/43/EC is not implemented. It would be opportune to give this competence to the Federal bodies for the promotion of equality, namely the Centre for Equal Opportunities and Opposition to Racism and the Institute for Equality between Women and Men. As to the conciliation procedure, Article 26 provides that the Government can designate persons or institutions competent to receive complaints and to make recommendations. This “conciliation service” has to submit a report on an annual basis. In the opinion of the authors, the mission of the conciliation service and that of the equality bodies would need to be coordinated.

<sup>43</sup> *Moniteur belge*, 16 September 2008, pp. 48144-48150.

<sup>44</sup> Note that there are explicit references to pregnancy, birth and maternity as well as to transgender.

<sup>45</sup> *Moniteur Belge*, 16 September 2008, pp. 48150-48157.

After the entry into force of those two Ordinances in 2008, there was still a gap in implementation as social housing was not covered. An Ordinance modifying the Brussels Housing Code was adopted on 19 March 2009<sup>46</sup> and has filled this last gap regarding the material scope of protection in the Region of Brussels-Capital.

## 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*)<sup>47</sup>. 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-Capital<sup>48</sup>. 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, those referred to in the Federal Anti-discrimination Acts of 2007<sup>49</sup> are explicitly named. 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 provisions<sup>50</sup>. 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 the knowledge of the authors, 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.

<sup>46</sup> Ordinance modifying the Ordinance of 17 July 2003 creating the Brussels housing Code of 19 March 2009 (*Ordonnance modifiant l'ordonnance du 17 juillet 2003 portant le Code bruxellois du Logement*), *Moniteur belge*, 7 April 2009, p. 26032.

<sup>47</sup> *Moniteur belge*, 24 January 2008, p. 3786.

<sup>48</sup> Art. 11 of the Decree of 22 March 2007.

<sup>49</sup> Art. 3 of the Decree of 22 March 2007.

<sup>50</sup> 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.

If one excepts the omission of trade-union opinion from the list of prohibited criteria (which is not required by EU law), the constitutionality of the 2007 Federal Acts was confirmed by the Constitutional Court in its four extensive decisions issued on February, March and April 2009 (*infra*, section 0.3). Nevertheless, as a result of the conform interpretation handed down by the Constitutional Court in those decisions, at least one issue is still troublesome: as explained below (section 0.3), the Court stated that it is not enough to establish through statistics that a neutral criterion disadvantages persons characterised by a protected ground of discrimination. According to the Court, it must also be shown that the defending party was *aware* of that situation. In the opinion of the authors, that statement of the Court is in complete breach of EC law and in complete contradiction with the intention of the Belgian legislator. As a matter of fact, that interpretation would imply that an indirect discrimination should be intentional and would be a deterrent to challenging involuntary indirect discriminations, under criminal or civil law. Moreover, 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 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, all the Regions/Communities (*Cocof*, German-speaking Community, Flemish Community/Region, Region of Brussels-Capital, French-speaking Community, Walloon Region) have now adopted new statutory law fighting against discrimination in order to fully implement the Directives. They have tried to harmonize their content to the Federal Anti-discrimination Acts and are generally in line with the Directives.
  - Flemish Community/Region : apart from article 13 of Directive 2000/43/EC (equality body), the adoption of the Framework Decree for the Flemish equal opportunities and equal treatment policy (10 July 2008) ensures full implementation of Directives 2000/43/EC and 2000/78/EC.
  - French-speaking Community : the adoption of the Framework Decree on the fight against certain forms of discriminations (12 December 2008) ensures full implementation of Directives 2000/43/EC and 2000/78/EC.



However, the conclusion of a cooperation agreement (or a protocol) between the Government of the French Community and the federal Government is required to legalize the transfer of competences to the Federal equality bodies. Moreover, this Decree, like the Federal Acts of 2007 enshrines a “safeguard provision”, which might be problematic (see observations *supra*).

- Walloon Region : the adoption of the Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (6 November 2008) was a first positive step towards the implementation of the EU Directive. Apart from the issue of the equality body, once the new Decree of 19 March 2009 extending its material scope to all the fields of competences of the Walloon Region (and renaming it the Decree on the fight against certain forms of discrimination) enters into force (on 20 April 2009), the implementation of the EU Directives will be achieved in the Walloon Region. Nevertheless, the legislation enshrines a “safeguard provision” similar to the one included in the Federal Acts of 2007, 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 mostly been put in conformity with the Directive’s requirements. As to the material field covered, there are nevertheless still some gaps concerning the staff of the German-Speaking Community, ‘social advantages’, the ‘supply of goods and services available to the public’ as well as education. As to sanctions, one must also highlight a possible shortcoming because the Decree provides only for penal sanctions, and only when a person publicises his/her intention to discriminate, within the conditions provided by article 444 of the Penal Code.
- Region of Brussels-Capital : with respect to employment and civil service, the implementation is in line with the Directives since the adoption of the two 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. The gap in the material scope concerning social housing will soon be filled with the amendment of the Ordinance of 17 July 2003 creating the Brussels Housing Code.  
There seems, however, still to be remaining gaps in implementation as regards the material scope: the lack of an express provision covering ‘social advantages’ and ‘supply of goods and services available to the public’ (except regarding social housing, which is covered by an Ordinance adopted on 19 March 2009). Moreover, those Ordinances, like the Federal Acts May 2007, enshrine 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). As to sanctions, one must also highlight a possible shortcoming because the Decree only provides 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 judicial ruling. Moreover, the *Cocof* still has to take action in order to cover 'social advantages', 'supply of goods and services available to the public' and its own staff.

- The situation is still patchy regarding equality bodies in Belgium. The competences of the Centre for Equal Opportunities and Opposition to Racism (the equality body under Art. 13 of the Racial Equality Directive) will most probably be soon extended to the monitoring and implementation of most 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 Protocol of Collaboration or a Cooperation Agreement has to be concluded between the Federal Government and the Government of each Region and Community concerned. According to the information the authors were able to gather, two Protocols of Collaboration were signed in 2009, with the Walloon Region and the French-speaking Community. These Protocols allow the Centre to fulfil all its traditional missions<sup>51</sup>, apart from filing legal suits, in the fields covered by the Decrees of the Walloon Region and of the French-speaking Community. At the moment of drafting the report, such a Protocol was under discussion with the Region of Brussels-Capital, but the formalisation of the latter depends on the results of the Regional elections (June 2009). There is presently no Protocol with the Flemish Community/Region, which has nevertheless given public funding to the Centre for Equal Opportunities to participate in the creation of 13 contact points in the more larger cities of Flanders (training, exchanges of good practices, etc.). To the knowledge of the authors, the German-speaking Community and the *Cocof* have not yet designated any equality body in relation to their anti-discrimination law nor have they contacted the Centre in this respect. In the future, there could be a formal Cooperation Agreement between the Federal Government and the Government of each Region and Community that would revise the missions, funding and organisation of the Centre for Equal Opportunities and Opposition to Racism which would formally become an Interfederal Centre.

<sup>51</sup> These traditional missions are providing assistance to victims, conducting surveys, publishing reports and issuing recommendations.





### 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**

**Name of the parties**

**Reference number** (or place where the case is reported).

**Address of the webpage** (if the decision is available electronically)

**Brief summary** of the key points of law and of the actual facts (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 two 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)

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

The judgments are presented in chronological order:

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

**Name of the court:** Constitutional Court (*Cour d'arbitrage*)

**Date of decision:** 5 October 2005

**Name of the parties:** A. Geensens and others v. Flemish Region

**Reference number:** Judgment no. 152/2005 of the Constitutional Court

**Address of the webpage:** [www.arbitrage.be](http://www.arbitrage.be)

**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

**Name of the court:** Court of Appeals of Ghent (*Hof van Beroep*)

**Date of decision:** 30 November 2005

**Name of the parties:**

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

**Address of the webpage:** <http://www.diversiteit.be>

**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 judge 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 acted in a discriminatory manner: indeed, André D. and his friend were offered another apartment for rent by the same agency.

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

**Name of the court:** First instance Labour Court (*Tribunal du travail*) of Brussels

**Date of decision:** 30 November 2006

**Name of the parties:** Ms D and Centre for Equal Opportunities and Opposition to Racism v. public Centre for social aid (CPAS) of Evere

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

This judgment is the first application of Article 19 § 3 of the Federal Anti-discrimination Act of 25 February 2003 which provides for the shifting of the burden of proof in civil actions alleging discriminatory practices. 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 management 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 management. 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 Appeal Court (*Cour du travail*) of Brussels and the preliminary ruling of the European Court of Justice of 10 July 2008 (Case C-54/07)

**Name of the court:** Labour Appeal Court of Brussels (*Cour du travail*)

**Date of decision:** 24 January 2007

**Name of the parties:** Centre for Equal Opportunities and Opposition to Racism v. NV Firma Feryn

**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 Appeal 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”<sup>52</sup>. 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”<sup>53</sup>.

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” (para. 25).

<sup>52</sup> Opinion of Advocate General Maduro delivered on 12 March 2008, Case C-54/07, para. 19.

<sup>53</sup> *Ibidem*, para. 23.

The Court also gave interesting indications with respect to the shift 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” (para. 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” (para. 39). No decision of the Labour Appeal Court of Brussels has yet been issued following the preliminary ruling of the European Court of Justice.

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

**Name of the court:** First Instance Labour Court of Ghent

**Date of decision:** 26 March 2007

**Name of the parties:** Caliskan Murat and Centre for Equal Opportunities and Opposition to Racism v. Delgouffe Yves and Euro-Lock (hereafter “Euro-Lock”)

**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). 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 national origin 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*)<sup>54</sup> of Antwerp

**Name of the court:** Court of Assizes (*Cour d’assises*) of Antwerp

**Date of decision:** 10 October 2007

**Name of the parties:** R. with the Centre for Equal Opportunities and Opposition to Racism v. Hans Van Themsche

<sup>54</sup> The *Cour d’assises* is a criminal Court with a popular jury which decides whether the accused is guilty or not guilty.



### **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 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 “monkeys” (“*macaques*”). This event was largely commented upon 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<sup>quater</sup> 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. On 19 February 2008, the Court of Cassation dismissed the action of Hans Van Themsche according to which his right to a fair trial had been violated before the Court of Assizes due to excessive media coverage of the case.

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

**Name of the court:** The administrative section of the Council of State (*Conseil d’Etat, section du contentieux administratif*)

**Date of decision:** 18 October 2007

**Name of the parties:** X v. de Vlaamse Gemeenschap and het Gemeenschapsonderwijs

**Reference number:** Judgment no. 175.886

**Address of the webpage:** [www.raadvst-consetat.be](http://www.raadvst-consetat.be)

### **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 on 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*)

**Name of the court:** Constitutional Court (*Cour constitutionnelle*)

**Date of decision:** 7 November 2007

**Name of the parties:** Marc Vercruysse v. the Federal Council of Ministers

**Reference number:** Judgment no. 137/2007

**Address of the webpage:** [www.arbitrage.be](http://www.arbitrage.be)

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





### **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 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*)

**Name of the court:** Constitutional Court (*Cour constitutionnelle*)

**Date of decision:** 28 November 2007

**Name of the parties:** Brigitte Moucheron v. the Federal Belgian State

**Reference number:** Judgment no. 148/ 2007

**Address of the webpage:** [www.arbitrage.be](http://www.arbitrage.be)

### **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 serious 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*)

**Name of the court:** Constitutional Court (*Cour constitutionnelle*)

**Date of decision:** 12 December 2007

**Name of the parties:** Dominique Kolaczinski v. the Federal Belgian State

**Reference number:** Judgment no. 153/2007

**Address of the webpage:** [www.arbitrage.be](http://www.arbitrage.be)

### **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 were 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 14 January 2008 of the Labour Appeal Court (*Arbeidshof*) of Antwerp

**Name of the court:** Labour Appeal Court (*Arbeidshof*) of Antwerp

**Date of decision:** 14 January 2008

**Name of the parties:** Centre for Equal Opportunities and Opposition to Racism v. nv G4S Security Services and Samira Achbita

**Reference number:** no. 53282

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

A woman, working as a receptionist at the reception desk of a firm, informed her hierarchical superior that, for religious reasons, she was going to wear a headscarf in the workplace. Several meetings with the firm's superiors were organised and she was told that the wearing of any visible religious symbol was contrary to the principle of absolute neutrality of the firm, applying inside as well as outside the firm, with respect to any contact the employees might have with the clients. In addition, she received several letters stating that, from now on, all the receptionist staff would be required to wear a particular uniform, without exception. As she persisted in her intent to wear a headscarf, the Centre for Equal Opportunities and Opposition to Racism acted as a mediator to find a solution and stressed that an absolute ban of any religious sign was illegal. The Centre brought to the knowledge of the employer that a distinction of treatment based on religion had to amount to a genuine and determining occupational requirement. The mediation failed and the woman was made redundant with three months indemnity (the usual notice in general Belgian employment law). Her trade union asked for her reinstatement on the basis of the Federal Anti-discrimination Act of 25 February 2003, but the firm considered that this piece of legislation was wrongly referred to in the case. A couple of weeks later, the firm's working rules were modified to insert the prohibition of the wearing, at the workplace, of any political, philosophical or religious sign. One month later, a bailiff certified that two women working at the reception desk of the firm were not wearing any particular uniform.

With the support of the Centre, the fired woman lodged an action in emergency proceedings before the President of the Labour Tribunal on the basis of the injunctive procedure (*action en cessation*). Both actions were declared inadmissible. On appeal, both actions were again dismissed. Regarding the action lodged by the employee, the Labour Court considered that she had no current interest to launch it because the discriminatory act (refusal to allow the wearing of the headscarf at work) had ceased and because there were really few probabilities that she could find herself one day in the same situation again, so the danger of repetition was not present. Strikingly enough, the Court did not address the issue of the commission of a discriminatory act. This is, having in mind the facts of the case, very questionable. But that decision shows the limits of the injunction procedure (*action en cessation*) enshrined in Belgian Anti-discrimination law when the discriminatory act has already ceased. One has, however, to keep in mind that under the 2007 General Anti-discrimination Act, the Court would have had to decide the question of damages according to the lump sum system of civil liability (described *infra*, section 6.1). In addition, the action launched by the Centre was dismissed for a really questionable reason: the Centre had, supposedly, modified its initial request in a way not allowed by the Code of Civil Procedure. Much more than a lack of understanding of anti-discrimination law, this decision shows that some judges are still strongly reluctant to apply it, maybe even more when an issue of religious discrimination is at stake.



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

**Name of the court:** Labour Appeal Court (*Cour du travail*) of Brussels

**Date of decision:** 15 January 2008

**Name of the parties:** E.F. v. Club corp.

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

In 2004, the well established book shop “Club” fired a saleswoman 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 advance warning for serious 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 was 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 a uniform with the logo of the company but should also refrain 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

**Name of the court:** Court of Appeals (*Hof van Beroep*) of Antwerp

**Date of decision:** 31 January 2008

**Name of the parties:** 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

**Reference number:** no. 2008/451

**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 subordinates to use violence. Racist insults were also uttered: “*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.



On 27 May 2008, the Court of cassation dismissed the action of Bart Debie who considered that his right to a fair trial had been violated and that the Racial Equality Act had been construed too broadly by the Court of Appeal.

Judgment of 29 February 2008 of the Labour Appeal Court (*Arbeidshof*) of Brussels

**Name of the court:** Labour Appeal Court (*Arbeidshof*) of Brussels

**Date of decision:** 29 February 2008

**Name of the parties:** Barbry Geert v. VZW Koninklijke Belgische Voetbalbond

**Reference number:** no. 087518

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

This case concerns a football referee, directly discriminated against on the ground of age by the Royal Belgian Football Union. The referee was following a training course to become a referee in the first division and when he was 38 years old, the Union took the decision that, because of his age and his future career prospects, he could not continue the training. That decision was taken in conformity with a working plan endorsed by a trade union association, which fixed 36 years old as the limit to be admissible to that kind of training.

In emergency proceedings, the President of the Labour Tribunal ruled that the decision was not discriminatory. This decision was reversed on appeal as the Labour Court ruled that an unjustified discrimination on the ground of age occurred. As a matter of fact, the decision was clearly based on the age of the referee (it was mentioning the age of the future referee, his career prospects and the working plan of the trade union association) and the Union could not rely on the genuine and determining occupational requirement's justification, as far as the Court considered that no argument that the referee's situation did fall in the scope of that justification, had been brought by the Union. As a consequence of its finding, the Court ordered the suspension of the Union's decision and ruled that the referee should be entitled to carry on his training. For a similar case and a similar decision, see Labour Appeal Court of Brussels (*Arbeidshof te Brussel*), 11 April 2008<sup>56</sup>.

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

**Name of the court:** Court of Assizes (*Cour d'assises*) of Mons

**Date of decision:** 14 March 2008

**Name of the parties:** R. v. X

**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 in 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 suffered severe burns over her entire body. Another one was hit by the Molotov cocktail but 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 an extinguisher at them. One of them answered back and threw 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.

<sup>56</sup> Ref. no. 08/857: *De W.Z.W. Koninklijke Belgische Voetbalbond v. Pieter Vandevenne*.



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

**Name of the court:** First instance Criminal Court (*Tribunal correctionnel*) of Liège

**Date of decision:** 5 May 2008

**Name of the parties:** R. with the Centre for Equal Opportunities and Opposition to Racism v. X

**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 6 months probation). The first assaulter is linked to extreme right and Nazi movements.

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

**Name of the court:** Court of Cassation (*Cour de cassation*)

**Date of decision:** 25 June 2008

**Name of the parties:** Information unavailable

**Address of the webpage:** <http://www.juridat.be/cass>

**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.

Judgment of 25 June 2008 of the Labour Appeal Court (*Arbeidshof*) of Antwerp

**Name of the court:** Labour Appeal Court (*Arbeidshof*) of Antwerp

**Date of decision:** 25 June 2008 no. 54470.

**Name of the parties:** Centre for Equal Opportunities and Opposition to Racism v. B& G

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

A job applicant was told, on the phone, after having revealed his name (ethnically connoted), that the job was not vacant anymore. Another person called afterwards for the same job, presenting himself with a Flemish name and talking with a Flemish accent. As he got an interview appointment, there was a strong presumption that the first person had been discriminated against on the ground of his ethnic origin. The Centre for Equal Opportunities and Opposition to Racism (the Centre) joined the victim in his claim.

In Appeal, the Court ruled that mere phone conversations, whose content is confirmed, on the one hand, by a third party (under oath) whose credibility is not in doubt and, on the other hand, by data from the extract of the invoice of the phone, are sufficiently serious and relevant to be considered as facts to establish a *prima facie* case of discrimination and to reverse the burden of proof. As to the employer’s argument according to which persons of foreign origin were working in the company so he could not be deemed to discriminate people on this ground, the Court considered that the fact that a company employs several employees of other nationality or of foreign origin, does not prevent the employer from, at other times, discriminating against candidates because of their nationality or origin and, therefore, is insufficient to prove the absence of discrimination. Moreover, the Court made an interesting statement on the range of the injunction procedure (*action en cessation*). It considered that the Centre could request the ending of a discriminatory practice against a defined group of people who may, in the future, be discriminated against. This involves the recognition of a kind of collective injunction procedure. The scope of the collective injunction procedure is, however, limited to the person (or the entity) who discriminates or who is responsible for the discrimination and to the practice or the measure that the judge considered in breach of the equal treatment principle.

Judgment of 10 July 2008 of the Constitutional Court (*Cour constitutionnelle*)

**Name of the court:** Constitutional Court (*Cour constitutionnelle*)

**Date of decision:** 10 July 2008

**Name of the parties:** Government of the French Community v. Government of the Flemish Community

**Reference number:** Judgment no. 101/2008

**Address of the webpage:** [www.arbitrage.be](http://www.arbitrage.be)

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

The Constitutional Court examined a petition, initiated by the Government of the French Community and two interested associations, one active in the field of human rights (the Flemish Human Rights League) and the other in social housing (the *Vlaams Overleg Bewonersbelangen*), to overturn the Flemish Housing Code.



The Housing Code, as modified in 2006, imposes a condition when applying for social housing: the applicant has to demonstrate his or her intention to learn Dutch, for example by the enrolment to gratis courses organised by the Flemish Region. This intention has to be demonstrated continuously, i.e. when the applicant submits the application, when s/he receives the house and when s/he occupies it<sup>57</sup>. It is important to stress that the language requirement is not that of speaking Dutch but that of showing the will to learn it at a basic level. The announced aim of this requirement is to improve the quality of life in social housing structures by an easier and better communication in Dutch between the tenant and the owner and among residents and to promote integration and equal opportunities for all.

The plaintiffs in the case argued that this requirement was discriminatory against non-Dutch speakers and contrary to the right to housing as provided by Article 23 of the Belgian Constitution, in particular, the obligation of standstill enshrined in this article. The Constitutional Court considered that the requirement, which is not that of speaking Dutch, but only that of having the intention to learn it, and which therefore, cannot be considered as a stringent obligation, but only as a soft one, was not disproportionate with the aim targeted by the Flemish Government. However, the Court added that this applied under the following requirements: first, the sanctions in case of non respect by the tenant of his/her obligations should be proportionate to the gravity of the violation and must be pronounced by a judge. Second, this requirement to demonstrate the intention to learn Dutch cannot be imposed on the French speakers living in the municipalities with linguistic facilities<sup>58</sup>. In fact, in these municipalities, the tenant can require that the speaking and writing communication with the owner be conducted in French, so the aim of having good communication and thus a better quality of life in social housing can be reached by this mean; consequently there was no need to implement another one. The Court considerably restricted, in this sense, the scope of the Housing Code.

This judgment, which has been welcomed by the two linguistic sides of Belgium, also established that the possibility for the owner to annul unilaterally the housing contract, in case of major violation by the tenant of the obligations put in place by the Housing Code, was contrary to the right to housing, therefore it annulled this provision of the Decree.

It should be kept in mind that the *Wooncode* (Flemish Housing Code) case is highly political in Belgium. Concerns have even been raised by the League of Human Rights before the Committee on the Elimination of Racial Discrimination (CERD) in February 2008. In its considerations issued on the fourteenth and fifteenth periodic reports of Belgium, the Committee stressed that the language requirement enshrined in the *Wooncode* could amount to indirect discrimination on grounds of national or ethnic origin.

<sup>57</sup> For more information on the relevant linguistic requirements, proving, control and sanction, please refer to the Executive Regulation of 12 October 2007 of the Flemish Government regulating social housing in implementation of Title VII of the Flemish housing Code (*Besluit van de Vlaamse Regering tot reglementering van het sociale huurstelsel ter uitvoering van Titell VII van de Vlaamse Wooncode*), *Moniteur belge*, 7 December 2007, p. 60.428

<sup>58</sup> The municipalities with linguistic facilities are located around Brussels and along the linguistic border which divides Belgium. Some are located in the French-speaking part of Belgium and others in the Dutch-speaking part. The residents of the Flemish municipalities with linguistic facilities (where, sometimes, the French speaking community is larger than the Flemish) have a constitutional right to interact with the public authorities in French although Dutch is the official language of the municipality. The reverse is true with respect to the Dutch speaking residents of the Walloon municipalities with linguistic facilities.



The Committee expressed worries that this statute has been endorsed by the State Council and that the Municipality of Zaventem, near Brussels, adopted a regulation restricting the acquisition of public lands to Dutch speakers or to persons committing themselves to learn it<sup>59</sup>.

Judgment of 18 December 2008 of the Court of Cassation (*Cour de cassation*)

**Name of the court:** Court of Cassation (*Cour de cassation*)

**Date of decision:** 18 December 2008

**Name of the parties:** Lejeune v. *Congrégation chrétienne des Témoins de Jéhovah* (Christian Congregation of Jehovah's Witnesses)

**Address of the webpage:** <http://www.juridat.be/cass>

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

The applicant was expelled from the Christian Congregation of Jehovah's Witnesses for not having behaved by the rules of the Congregation (although the precise reasons for the exclusion were kept from him). He chiefly put into question, not his ban as such, but the instructions given to the members of the Congregation to refrain as much as possible from seeing expelled members, even if they are family members. According to the applicant, community members affected by the ban find themselves without social fabric as they are required not to develop any relation with the external world while being part of the Congregation. Before the Court, the applicant relied on the injunction procedure, asking the judge to order the Congregation to cease requiring its members (among whom some are part of his family) to keep away from him.

The First Instance Judge misunderstood the notion of suitable comparator and considered that no discrimination had occurred as all the members banned from the Congregation were treated in the same way. On appeal, the Court of Liège considered that the instructions given to the members of the Congregation to refrain as much as possible from seeing expelled members are in nature likely to lead to discriminatory treatment, all the more so because of the moral pressure applied to the members and the threat they face to be banned in turn. However, the Court dismissed the action on the ground that the applicant did not prove the discrimination as he did not establish that the alleged discriminatory treatment was not objectively and reasonably justified by a legitimate aim<sup>60</sup>. On 18 December 2008, the Court of Cassation quashed the decision of the Appeal Court of Liège for the reason that it was in breach of the principle of the reversal of the burden of proof as enshrined in the Federal Anti-discrimination Act of 25 February 2003 (Article 19 § 3). The case has been remanded to another Court of Appeal.

Judgments of the Constitutional Court, delivered on 12 February 2009, 11 March 2009 and 2 April 2009

**Name of the court:** Constitutional Court (*Cour constitutionnelle*)

**Date of decision:** 12 February 2009, 11 March 2009 and 2 April 2009

**Reference numbers:** Judgment no. 17/2009, no. 39/2009, no. 40/2009, no. 64/2009

**Address of the webpage:** [www.arbitrage.be](http://www.arbitrage.be)

<sup>59</sup> Consideration by the Committee on the Elimination of Racial Discrimination (CERD) of the fourteenth and fifteenth periodic reports of Belgium, CERD/C/BEL/CO/15, 7 March 2008 (<http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-BEL-CO-15.pdf>).

<sup>60</sup> Appeal Court (Cour d'appel) of Liège, 6 February 2006, *Jurisprudence Liège, Mons et Bruxelles*, 2006/15, p. 661664.



### Overview of the four decisions

On 12 February 2009, the Constitutional Court (the Court) issued its first decision (no. 17/2009) regarding several actions in annulment launched against the Federal Anti-discrimination Acts of 10 May 2007 (the Racial Equality Federal Act, the General Anti-discrimination Federal Act and the Gender Equality Federal Act). Mathias Storme, a lawyer and a controversial law professor, initiated the action, which was rejected by the Constitutional Court in an unusually long decision of 150 pages. The applicants asked for the annulment of almost all the provisions of the three Acts.

On 11 March 2009, the Constitutional Court issued two more rulings regarding the Federal Anti-discrimination Acts. Decision no. 39/2009 concerns the action launched by many members of the *Vlaams Belang*, an extreme right wing party from the North of Belgium, against the general Anti-discrimination Federal Act. Decision no. 40/2009 joined the cases brought by the same applicants of the *Vlaams Belang* against the Racial Equality Federal Act and by the *Liga voor Mensenrechten* (Flemish Human Rights League) against Article 21 of the Racial Equality Federal Act which criminalises the dissemination of ideas based on racial superiority or hatred. In this respect, the action was based on an alleged breach of the freedom of speech.

The Court rejected all three actions, but gave significant guidelines for interpretation with respect to numerous provisions of the Federal Anti-discrimination Acts in relation to the Belgian Constitution. Those guidelines for interpretation fall in two categories: (1) conform interpretations (*interprétations conciliantes*) meaning that the statutory provisions have to be construed in the way indicated by the Constitutional Court not to be in breach of the Constitution (most of these conform interpretations are enshrined in decision no. 17/2009); (2) mere guidelines of interpretation, which are not binding as such and are not summarised at the end of the ruling as the conform interpretations are, but which are likely to be referred to by ordinary courts in future anti-discrimination cases.

On 2 April 2009, the Constitutional Court issued one more decision (no. 64/2009) following some applications launched by trade union organisations. That decision is decisive to the extent that it annuls some provisions of the General Anti-Discrimination Federal Act and adds trade union opinion (*conviction syndicale*) to the closed list of discrimination grounds.

Six issues are worth mentioning when analysing these four decisions of the Constitutional Court which are of key importance for further developments in Belgian anti-discrimination law: (1) horizontal application of the principle of equal treatment (2) grounds of discrimination, (3) concepts of discrimination, (4) civil sanctions, (5) criminal penalties and (6) burden of proof.

### **I. Horizontal application of the principle of equal treatment**

A significant pitfall encountered in the implementation of anti-discrimination law in Belgium, as in other civil law countries, has been the lack of horizontal application of the principle of equal treatment. Traditionally, the principle of equality and non-discrimination had only to be respected by public authorities in relation to citizens. The 2007 Anti-discrimination Acts made that principle mandatory also between private parties.



According to some applicants (case no. 17/2009 and cases no. 39/2009 and 40/2009 to the extent of the action of the *Vlaams Belang* members) treating public authorities and private citizens in the same way, while they are in different situations, is a breach of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution). The Court stressed that the fact that private parties do not have either a normative power, or other characteristics of public authorities, does not exempt them from respecting the principle of equality, which is fundamental in a democratic society. The Court went further and held that the criterion for the application of the equal treatment principle is not linked to the exercise of public power, but to the dominant position that a person enjoys, in fact or in law (decision no. 17/2009, paras. B.10.3 and B.10.4; decision no. 39/2009, para. B.45.2; decision no. 40/2009, para. B.90.2).

## **II. Grounds of discrimination**

In case no. 64/2009 launched by trade union organisations, the Court first decided on the very principle of a closed list of discrimination grounds, as the applicants argued that a closed list was discriminatory against all the victims of discrimination based on another ground than those listed in the 2007 General Anti-discrimination Federal Act. The Court was convinced that the justifications put forward for having a closed list of discrimination grounds during parliamentary works were reasonable, and chiefly that the legislator had the power to evaluate which grounds had to be listed in statutory law as the most degrading ones (decision no. 64/2009, para. B.7.5.). In addition, to the extent that the legislation enshrines criminal sanctions, the Court considered that a closed list of criteria was the only way to respect the principle of legality in criminal matters (decision no. 64/2009, para. B.7.6.). Finally, the Court stressed that victims of discrimination on grounds other than those listed in the 2007 Federal Acts are not left without any remedy in Belgian law.

After having ruled that a closed list of discrimination grounds in statutory law was in compliance with the Constitution, the Court had to decide whether the exclusion of the trade union opinion from the discrimination grounds listed in the General Anti-discrimination Federal Act was discriminatory<sup>61</sup>. In the Court's view, this was the case: as far as the statute had been adopted in order to give effective protection to victims of discrimination, and as far as the legislator had recognised the importance of that ground of discrimination (decision no. 64/2009, para. B.8.7), importance reinforced by the fact that it is included in many international treaties on human rights, its intentional exclusion from the statutory list was unreasonable and not justified (decision no. 64/2009, para. B.8.15). According to the defending party, the criterion of trade union opinion had not been included in the Act because persons discriminated against in that respect were already protected by other pieces of national legislation (decision no. 64/2009, paras. B.8.7 and B.8.8). However, the Court stressed that those pieces of legislation do not offer the same effective protection as the 2007 General Anti-discrimination Federal Act (decision no. 64/2009, para. B.8.9). In this respect, the Court focused especially on the protection against victimisation and on the injunction procedure (*action en cessation*) (decision no. 64/2009, paras. B.8.10, B.8.12).

<sup>61</sup> Let us recall that this piece of legislation covers the following grounds: 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.



Consequently, the Court annulled Articles 3 and 4, 4° of the General Anti-Discrimination Federal Act, which contain the list of discrimination grounds, but only so far as they do not target the ground of trade union opinion (decision no. 64/2009, para. B.8.16). Contrary to its approach in its decision no. 157/2004 against the now repealed General Anti-Discrimination Federal Act of 25 February 2003, the Court endeavoured to limit the consequences of the annulment. It stated that, as far as the annulment is precise and comprehensive, while waiting for a legislative modification, the civil judge confronted with a claim of discrimination on the ground of trade union opinion, has to apply the partially annulled provisions in conformity with Articles 10 and 11 of the Constitution (which endorse the principle of equality and non-discrimination) and, therefore, has to rule as if the criterion of trade union opinion had been enshrined from the beginning in the closed list of discrimination grounds (decision no. 64/2009, para. B.8.17). Conversely, with respect to the criminal provisions of the Act, the Court stressed that the principle of legality does not allow the criminal judge to fill the legislative gaps in such a way (decision no. 64/2009, para. B.8.17).

Short analysis: The consequences of this annulment are quite unusual in Belgian Constitutional law, because the Court has actually been adding to and not annulling a legislative provision. The Court's approach is certainly due to its concern to avoid a condemnation of Belgium by the European institutions, as had been the case after Court decision no. 157/2004, which had made void the entire closed list of discrimination grounds enshrined in the General Anti-Discrimination Federal Act of 25 February 2003 because the exclusion of political belief and language was considered to be in breach of the constitutional principle of equal treatment. However, the Court's approach also raises some concerns. For instance, should the Centre for Equal Opportunities and Opposition to Racism, which is competent with respect to all the discrimination grounds enclosed in the 2007 General Anti-discrimination Federal Act except for language, considered itself competent as well regarding discrimination based on trade union opinion before the adoption of a piece of legislation to that effect?

### **III. Concepts of discrimination**

#### **III.1 Indirect discrimination and the issue of intention in criminal matters**

With respect to criminal provisions, the Court is discussing the concept of "intentional indirect discrimination", as the intention (*mens rea*) is required to establish the offence of indirect discrimination. Although the Court's considerations concern criminal matters, they are stated in a way that may be misleading regarding the definition of indirect discrimination in civil actions.

First, the Court is not clear when defining the concept of intentional indirect discrimination. In some parts of its judgment, the Court stresses that indirect discrimination is based on the grounds of discrimination listed in the legislation ("protected grounds" - *critères protégés*) and, in other parts of its judgment, the Court states that indirect discrimination is grounded on an apparently neutral provision, criterion or practice that would put persons characterised by a protected ground at a particular disadvantage compared with other persons (decision no. 17/2009, paras. B.51.1, B.51.2, B.51.3, B.51.5).



Short analysis: This lack of clarity is likely to puzzle many practitioners and ordinary judges. It is, however fair to say that it finds its roots in the definition in two stages used in the legislation. Indeed, Article 4, 7° of the 2007 General Anti-discrimination Federal Act defines *indirect discrimination* as an indirect distinction based on a protected ground, that cannot be reasonably justified, while it defines *indirect distinction* as the situation where an apparently neutral provision, criterion or practice would put persons characterised by a protected ground at a particular disadvantage compared with other persons.

Second, it is worth keeping in mind that the Court is issuing some conform interpretations with the Constitution with respect to the concept of intentional indirect discrimination (decision no. 17/2009, para. B.51.6; decision no. 39/2009, para. B.21.4; decision no. 40/2009, para. B.29.4):

- There can be intentional indirect discrimination only when another ground of discrimination than those listed in the 2007 Federal Anti-discrimination Acts is used for the distinction;
- That discrimination ground has to be used in order to make a distinction based on a protected ground listed in the 2007 Federal Anti-discrimination Acts;
- There can be intentional indirect discrimination only when there is no reasonable and objective justification for the distinction of treatment;
- The intention element (*mens rea*) of the offence of intentional indirect discrimination has to be established in conformity with the general principles of proof in criminal law. In this line, one has firstly to establish that the alleged perpetrator knew that, by using such a neutral provision, criterion or practice, persons characterised by a protected discrimination ground would be principally targeted. One has also to establish convincingly that the alleged perpetrator wanted to disadvantage persons characterised by a protected ground of discrimination.

Short analysis: As to the first conform interpretation issued by the Constitutional Court (there can be intentional indirect discrimination only when another ground of discrimination than those listed in the 2007 Federal Anti-discrimination Acts is used for the distinction), one may doubt whether there is not a breach of EU law. With the Court's phrasing, one has to conclude that a distinction based on a protected discrimination ground could *never* amount to an indirect discrimination. For example, a distinction based on nationality (enshrined in the General Anti-discrimination Federal Act) will *always* be considered as a direct discrimination and could *never* be considered as an indirect discrimination (on the ground of ethnic origin, for instance). That limitation is not in conformity with the definition of indirect discrimination in Directives 2000/43/EC and 2000/78/EC and could, potentially, limit the protection offered to the discrimination victim.

### III.2 Public or private organisations the ethos of which is based on religion or belief

With respect to Article 13 of the General Anti-discrimination Federal Act, which makes an exception to prohibited distinctions of treatment for public or private organisations the ethos of which is based on religion or belief, the Court issued a conform interpretation in line with the principle of legality in criminal matters. The Court asserts first that, in employment, complementary social security schemes and membership in trade unions, those organisations the ethos of which is based on religion or belief, can make a distinction on the ground of religion or belief if that is necessary in regard to the context or the nature of the activity.





As to the context, the Court says that it is “the character linked to the ethos of the organisation” (*le caractère lié à la tendance de l’organisation*). The Court carries on by stating that, “in addition” (*pour le surplus*), a distinction on the ground of religion or belief implemented by such organisation, can be considered as objectively and reasonably justified having in mind the basis (*fondement*) of the organisation (decision no. 17/2009, para. B.47.3.; decision no. 39/2009, para. B.16).

Short analysis: The last addition of the Constitutional Court seems to welcome a justification broader than what is allowed in Directive 2000/78/EC, as any distinction on the ground of religion or belief appears justifiable, without taking into account the context or the nature of the activities of the organisation. It is nevertheless too early to conclude on a potential breach of the EC Directive in this respect because it could and should be interpreted in light of those requirements.

### III.3 Harassment

With respect to harassment, the Court issued a conform interpretation in line with the principle of legality in criminal matters which may raise an issue of lack of compliance with EC law. The Court states that Article 4, 10° of the General Anti-discrimination Federal Act and the Racial Equality Federal Act, which defines the notion of harassment, does not specify that this behaviour could be punished if it has the consequence to create an intimidating, hostile, degrading, humiliating or offensive environment, without any intention of the offender to create such an environment (decision no. 17/2009, para. B.53.4; decision no. 39/2009, para. B.25.4; decision no. 40/2009, para. B.33.4).

Short analysis: Once again, the Court is making that observation in a part of its decision looking at criminal sanctions, but, unfortunately, it seems that the Court requires an intention to be proven more generally, i.e. in civil matters as well. At the very least, the confusion is due to the fact that the Court bases its finding on Article 4, 10° of the General Anti-discrimination Federal Act and the Racial Equality Federal Act (located in the section “definitions” of the Acts).

The General Anti-discrimination Federal Act and the Racial Equality Federal Act define harassment in line with Directives 2000/43/EC and 2000/78/EC as an unwanted conduct related to a protected criterion, taking place with the purpose *or effect* of violating the dignity of a person and of creating an intimidating, etc environment. If a behaviour which has the effect of creating a bad environment amounts to a prohibited harassment, no specific intention is required under the Federal Acts.

The Court’s finding should therefore be qualified in light of the wording used in the Acts. The legislator, when it specified in the section related to criminal sanctions that those sanctions will apply to “intentional direct discrimination”, and “intentional indirect discrimination”, did not stipulate that they would apply to “intentional harassment”. On the contrary, the legislator merely used the wording “harassment”. Consequently, the conform interpretation of the Court should be strictly applied to criminal matters to be in compliance with EC law.



### III.4 Instruction to discriminate

With respect to the criminal offences linked to the instruction to discriminate, the Court stressed, without making a formal conform interpretation, that intention is required (decision no. 17/2009, para. B.52.3; decision no. 39/2009, para. B.24.3; decision no. 40/2009, para. B.32.3). In the Court's view, the applicant has to prove that the person giving the instruction "knew that the distinction that another one would execute under his or her order, was not objectively and reasonably justified".

Short analysis: In the opinion of the authors, the Court might go one step too far in its interpretation. At the end of the day, the assessment of the fact that a distinction based on a protected ground is justified rests with the judge. In its decisions, the Court seems to require the applicant to establish convincingly the unjustified character of the distinction.

### III.5 Intentional forms of discrimination

The Court ends the part of its first decision dedicated to the arguments taken from the principle of legality in criminal matters by a lapidary statement according to which the 2007 Federal Anti-discrimination Acts only prohibit intentional forms of discrimination and are, therefore, precise enough (decision no. 17/2009, para. B.57.2).

Short analysis: One can bewail the lack of care taken by the Court to make sure that its statement will not be understood too widely, i.e. outside the criminal field. In the view of the authors, this is a shame, considering the troubles some judges are still facing when looking at issues of indirect discrimination in civil matters.

## IV. Civil sanctions

### IV.1 Basic allowance (lump sum - *indemnité forfaitaire*)

Before the Constitutional Court, it was submitted that the basic allowance provided for in the Federal Anti-discrimination Acts was in breach of the constitutional equality principle to the extent that victims of discrimination would be better protected than other victims. The Court issued a conform interpretation according to which the relevant legal provision has to be construed as prohibiting any damages to be given to a person who would not be a victim of discrimination, as well as prohibiting any condemnation of a person who would not be the author of a discrimination (decision no. 17/2009, para. B.36.4.)

Short analysis: From the victims' point of view, such a statement should be put into perspective with the preliminary ruling of the European Court of Justice in the *Feryn* case<sup>62</sup> concerning the situation of unidentifiable victims. However, the Court made it clear that associations which have a legitimate interest in ensuring that Federal Acts are complied with are not entitled to receive the basic allowance (decision no. 39/2009, para. B.32.4 *in fine*).

### IV.2 Nullity of contractual clauses contrary to the principle of equal treatment

Following the request of the applicants, the Court circumscribed that sanction to *written and non-written* contractual clauses.

<sup>62</sup> Case C-54/07, 10 July 2008.

The applicants were also arguing that Article 15 of the General Anti-Discrimination Federal Act, which provides for the nullity of contractual clauses in breach of its provisions, does not comply with the constitutional principle of equality and non-discrimination as it refers only to clauses written before a discriminatory behaviour happened, and not to clauses written at the same time or after the occurrence of the discrimination. According to the Court, as far as the sanction of nullity is a matter of public order, there is no justification to limit it in such a way. Consequently, in order to avoid any legal insecurity, the Court annulled the words “in advance” (*par avance*) in Article 15 of the General Anti-Discrimination Federal Act (decision no. 64/2009, para. B.13.2 and B.13.3).

## **V. Criminal sanctions**

### **V.1 Reasonable accommodation denial**

Concerning criminal sanctions in case of a denial of reasonable accommodation, the Court issued a conform interpretation with the principle of legality in criminal matters according to which the concept of denial (*refus*) implies the proof of an intention. Actually, three sets of facts have to be proven to sentence the denial of a reasonable accommodation: (1) the intention of the perpetrator; (2) the reasonable character, *in concreto*, of the accommodation at the time of the denial; (3) the knowledge of the perpetrator that s/he had to put a reasonable accommodation in place (decision no. 17/2009, para. B.54.4; decision no. 39/2009, para. B.26.4).

Short analysis: That conform interpretation is properly limited to criminal matters, as can be seen by the wording used (*condamnation, prévenu*, etc), which clearly refers to criminal law. It is worth stressing that the Court gives some insight on the scope of the *reasonable* accommodation. According to the General Anti-discrimination Federal Act, an accommodation which is sufficiently compensated by public policy measures applying to persons with disabilities cannot be considered to be disproportionate (Article 4, 12°). In this respect, the Court stresses that there is compensation by public policy measures when the burden is in fact, counterbalanced by public policies (the burden is not counterbalanced when the public policies are purely incentive and not pecuniary). (decision no. 17/2009, para. B.54.3; decision 39/2009, para. B.26.3).

### **V.2 Dissemination of ideas based on racial superiority or hatred**

First the applicants (among which the Flemish Human Rights League) criticised the penalisation of the dissemination of ideas based on racial superiority or hatred enshrined in Article 21 of the Racial Equality Federal Act, as being in contradiction, *inter alia*, with freedom of speech. The Court recalled that freedom of speech is an essential value of democratic societies, but that the necessity to fight against the dissemination of ideas based on racial superiority or hatred has been recognised as essential by the international community. On the basis of the European Court of Human Rights’ case law, the Court ruled that the voluntary dissemination of ideas based on racial superiority or hatred, with the purpose of violating the dignity of persons, is not covered by Article 10 of the ECHR.

Moreover, the Court made clear, in a formal conform interpretation, that the incrimination requires a particular *mens rea (dol special)*, i.e. an intention to stir up hatred, discrimination or segregation.



In addition, the Court stressed that the speech has to have a disdainful or full of hateful range (*une portée méprisante ou haineuse*), excluding scientific or artistic speeches (decision no. 17/2009, para. B.74.5; decision no. 40/2009, para. B.70.2).

Short analysis: That exclusion, *in abstracto*, of the scientific or artistic speeches might well be too broad in light of the requirement of the International Convention for the Elimination of all Forms of Racial Discrimination (ICERD) that Belgium has ratified. A scientific or artistic speech which has a disdainful or full of hateful range, *in concreto*, should be criminalised as well.

Second, the applicants put into question the compliance of Article 21 of the Racial Equality Federal Act with Article 25 of the Constitution, which puts in place a system of responsibility in cascade (*responsabilité en cascade*) in case of press offense (*délit de presse*). In this respect, the Court issued another conform interpretation according to which Article 21 of the Racial Equality Federal Act (which criminalises the dissemination of ideas based on racial superiority or hatred) has to be construed as authorising criminal proceedings only in conformity with Article 25 of the Constitution. This was also confirmed in the preparatory works of the Racial Equality Federal Act.

Third, the Flemish Human Rights League argued that Article 21 of the Racial Equality Federal Act was in breach of the constitutional principle of equality and non-discrimination to the extent that the dissemination of ideas based on other grounds of discrimination could not be punished by criminal sanction (“equality of equalities”). The Court dismissed that argument, arguing that the legislator has the power of assessment to determine which behaviour has to be criminalised, even though this power has to be exercised proportionally. In light of the fact that the ICERD obliges State parties to criminalise the dissemination of ideas based on racial superiority or hatred, the limitation to the grounds listed in the Racial Equality Federal Act is reasonable (decision no. 40/2009, para. B.73; decision no. 40/2009, para. B.74.2).

### **V.3 Incitement to discrimination, segregation, hatred or violence**

Article 20 of the Racial Equality Federal Act, criminalising the incitement to discrimination, segregation, hateful or violence, was challenged by the *Vlaams Belang* members. On the first argument, taken from the violation of freedom of speech, the Court recalled that this offense requires a special *mens rea* (*dol special*), i.e. the intent of inciting or encouraging to discriminatory, full of hatred or violent behaviours (decision no. 40/2009, para. B.57-B.59). Without such an intention, the incitement has to be considered as the expression of an idea protected by the freedom of speech.

The second argument was taken from the violation of the constitutional principle of equality, in the sense that only the incitement to discriminate is criminalised and not the discrimination in itself. The Court considered that *some* acts of discrimination as such are criminalised and that it belongs to the legislator to define, in a reasonable fashion, which behaviours have to be criminalised or not.



As to the reasonable requirement in the legislator's action, the Court emphasised that the criminalisation of incitement to discrimination is made mandatory by the ICERD, that the legislator wanted to keep the established incriminations of the previous legislation and that decriminalising the acts of discrimination already prohibited in the previous statutory law might give a wrong signal to the offenders (decision no. 40/2009, paras. B.61-B.64.2).

As to Article 20 of the Racial Equality Federal Act, the *Vlaams Belang* members also argued that the meaning of "segregation" was not clear, so that the criminalisation of the incitement to segregation would violate the principle of legality. According to the Court, segregation has to be understood in its common interpretation, i.e. "the social separation of groups in a country where a mixed population lives" (decision no. 40/2009, para. B.36.1).

#### **V.4 Participation in organisations which promote and incite to racial discrimination**

As to Article 22 of the Racial Equality Federal Act which criminalises the participation in organisations which promote and incite to racial discrimination, the Court first stressed that an intentional element was required. To be sentenced, a member of an association or group advocating for racial discrimination has to know that the activity of the association or group is to advocate for racial discrimination, and has to have the will to participate in those activities (decision no. 17/2009, para. B.82.7; decision no. 40/2009, para. B.44.3). In other words, it has to be obvious for the accused that the association or group has, many times, incited to discrimination or segregation on the grounds listed in the Racial Equality Federal Act (decision no. 40/2009, para. B.43.2). But, the incrimination does not require that the accused repeatedly advocates, himself/herself, discrimination or segregation (decision no. 40/2009, para. B.44.3).

Second, the Court stated that the association or group has to be *punishable* (not punished) for incitement to discrimination in order for the member to be sentenced on the ground of Article 22 (decision no. 17/2009, para. in B.79.5).

### **VI. Burden of proof**

#### **VI.1 Indirect discrimination proven by statistics**

The Court stressed that the facts leading to the reversal of the burden of proof cannot be of general character but must be attributed specifically to the author of the distinction. As to statistics, the Court stated that it is not enough to establish through statistics that a neutral criterion disadvantages persons characterised by a protected ground of discrimination. According to the Court, it must also be shown that the defending party was *aware* of that situation (decision no. 17/2009, para. B.93.3; decision no. 39/2009, para. B.52; decision no. 40/2009, para. B.97).

Short analysis: The Court did not present that point as an express interpretation, but it has to be considered as a very troublesome point of the Court's decisions. *In the opinion of the authors, that statement of the Court is in complete breach of EC law and in complete contradiction to the intention of the Belgian legislator.* That interpretation implies that an indirect discrimination should be intentional and prevents an individual from challenging involuntary indirect discrimination, under criminal or civil law (for instance, indirect discrimination which is inherited from the past or structural to society).





## VI.2 Assessment by the judge in allowing the reversal of the burden of proof

The Court invokes the judge's power of assessment to allow the reversal of the burden of proof as if the judge had a discretionary power to allow such a reversal or not (decision no. 17/2009, para. B.93.4; decision no. 39/2009, para. B.53; decision no. 40/2009, para. B.98).

Short analysis: This is again in clear breach of EC law. The judge can assess whether the facts are sufficient to constitute a presumption of discrimination (*prima facie* case), but not to decide or not to reverse the burden of proof in such a case..

## VI.3 Influence of civil proceedings on criminal proceedings

One of the worries about the sharing of the burden of proof was that, even if it is not applicable in criminal proceedings, it would have an effect in cases where criminal and civil proceedings were both launched. The Court stressed that, in a case in which the sharing of the burden of proof in civil proceedings could influence, subsequently, the proof in criminal proceedings, the penal judge would have to assess the evidence in concrete terms so as to respect the presumption of innocence (decision no. 40/2009, para. B.100.2).

General comment: Contrary to its decision no.157/2004 regarding the General Anti-discrimination Federal Act of 25 February 2003, the Court made sure that the General Anti-discrimination Federal Act of 10 May 2007 could remain effective. Its four rulings spread, however, some confusion in the field of anti-discrimination law which is already a challenging one for judges and practitioners.

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

With regard to Travellers<sup>63</sup>. 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. When they lodge complaints, tribunals generally hold that their parking 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 2000<sup>64</sup>: 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.

<sup>63</sup> 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.

<sup>64</sup> Published in *Echos du Logement* 2000, 119, obs. L. THOLOME.



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 authors' 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*”.



## 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?*

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 Rights<sup>65</sup>: 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 achieved<sup>66</sup>. 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”<sup>67</sup>. 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.

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

The constitutional anti-discrimination provisions are directly applicable.

<sup>65</sup> ECHR, 23 July 1968, *Belgian Linguistic Case* (Series A no. 6), § 10.

<sup>66</sup> *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.

<sup>67</sup> *Cour d'arbitrage*, 2 April 1992, Case no. 28/92, 5.B.4.



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)<sup>68</sup>. 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.

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

In principle, it should be possible to invoke these constitutional requirements in the context of private relationships. This has been the position in the doctrine<sup>69</sup>. It has been alluded to by the Belgian Constitutional Court, previously the *Cour d'arbitrage-Arbitrage Hof*<sup>70</sup>. 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 or another private person.

<sup>68</sup> For the competence of the Constitutional Court, see Art. 142 of the Constitution.

<sup>69</sup> 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.

<sup>70</sup> 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").



## 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 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<sup>71</sup>.

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 (equality and non-discrimination) 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 far beyond the grounds listed in the Racial and the Employment Equality Directives.

- The Racial Equality Federal Act of 2007 prohibits discrimination on grounds of alleged race, color, descent, national or ethnic origin, and nationality.
- The General Anti-discrimination Federal Act of 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 2003 Federal Anti-discrimination Act and which are not covered in the Racial Equality Federal Act or in the Gender Equality Federal Act of 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).

<sup>71</sup> As a consequence of the Constitutional Court's decision, 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.



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.<sup>72</sup> This new list of discrimination grounds enshrined in the 2007 General Anti-discrimination Federal Act was again challenged before the Constitutional Court as trade union organisations argued that the lack of inclusion of “trade union opinion” (*conviction syndicale*) in the list of prohibited grounds was discriminatory. In its decision no. 64/2009 of 2 April 2009, the Court confirmed the constitutionality of a closed list of discrimination grounds but held that the non inclusion of trade union opinion in the list of protected grounds was contrary to Articles 10 and 11 of the Constitution. As a consequence, the Court held that the civil judge, confronted with a claim of discrimination on the ground of trade union opinion, has to rule as if this criterion were part of the General Anti-discrimination Federal Act. (see details *infra*, section 0.3).

The list of grounds of discrimination tackled in the various pieces of regional legislation is not entirely consistent, but has been, in most cases (Flemish Community/Region, French-speaking Community, Walloon Region, Region of Brussels-Capital), aligned with the Federal legislation (*supra*, section 0.2). The grounds embodied in Directives 2000/43/EC and 2000/78/EC are always expressly mentioned in these pieces of legislation.

As to trade union opinion, it should be kept in mind that the reasoning of the Constitutional Court in its decision no. 64/2009 of 2 April 2009 should logically be applied to regional anti-discrimination law.

### 2.1.1 Definition of the grounds of unlawful discrimination within the Directives

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

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 were considered 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.

<sup>72</sup> The Gender Equality Federal Act of 10 May 2007 prohibits discrimination based on sex or on assimilated grounds (maternity, pregnancy, transsexualism).

*Race or ethnic origin.* In fact, because of the risks entailed in processing of such sensitive personal data as those on an individual's race or ethnic origin<sup>73</sup>, 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 (proxy) 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 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:

<sup>73</sup> 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](http://www.privacycommissie.be).

- 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 disabilities<sup>74</sup>.

*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 faith<sup>75</sup>.

<sup>74</sup> 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).

<sup>75</sup> 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.



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”<sup>76</sup>. 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 representative<sup>77</sup>.

*Sexual orientation.*- Heavily influenced by Canadian and Dutch precedents<sup>78</sup>, the Decree on equal participation on the labour market adopted by the Flemish Community/Region in 2002 seeks not 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 2002<sup>79</sup> 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 (Holebi’s) are not mentioned.

<sup>76</sup> 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).

<sup>77</sup> 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.

<sup>78</sup> 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 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.

<sup>79</sup> *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

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 workforce<sup>80</sup>. 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 orientation<sup>81</sup>. 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) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion'; or a "disability", sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national legislation against discrimination?*

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 degree of disability, which has to be medically certified.

Recital 17 of Directive 2000/78/EC is not expressly reflected in the Anti-discrimination Federal or Regional Acts.

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

The 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.

<sup>80</sup> See Art. 5(1) of the Regulation of 30 January 2004. It is worth mentioning that Holebi's are nevertheless identified as one of the target groups of the Flemish Equal opportunity policy (see <http://www.gelijkkansen.be/doelgroepen.html>). This means that Holebi's should be targeted through positive actions in order to achieve full equality.

<sup>81</sup> 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](http://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.





- 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. This includes the way equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*
- *Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

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<sup>82</sup>. 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 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.

It is worth highlighting that there are obstacles to tackling situations of multiple discrimination which are linked to the institutional architecture of equality bodies and the way they are working. At the federal level, there are two distinct equality bodies: the Institute for Equality between Women and Men, dealing with gender, and the Centre for Equal Opportunities and Opposition to Racism, dealing with all the other protected grounds (apart from language). Additionally, the Centre, partly due to historical reasons, has a department competent for racial discriminations and a department competent for the “other grounds”. Under the present system of complaints, each individual case must be encoded under one single ground of discrimination and is then directed to the competent department. Difficulties could arise from this system, for instance, when the Centre has to deal with cases of discrimination alleged by Muslims of foreign origin because in such cases it is difficult to determine if the alleged discrimination is based on religion or ethnic origin. Therefore, this encoding system is going to be revised to allow the linkage with one main discrimination ground and one secondary discrimination ground, which could lead to a better adjudication of cases of multiple discrimination. Despite the imperfections of the present system in addressing multiple discrimination, there is no recommendation from the Centre regarding the need for a specific national or European legislation dealing with multiple discrimination in order to facilitate the adjudication of such cases.

<sup>82</sup> 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 legislation already existing.



It should, finally, be stressed that, at regional level, most of the Communities/Regions have made the choice of adopting a framework equality Decree including all the prohibited criteria. According to the French-speaking Community or the Flemish Community/Region<sup>83</sup>, such a legislative framework was chosen, to a certain extent, because it is better suited to tackle multiple discrimination.

- e) *How have multiple discrimination cases involving one of Art. 13 grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

According to the information gathered from the Centre of Equal Opportunities, there is no Belgian case-law dealing with multiple discrimination cases involving one of the grounds listed in Article 13 EC and gender. In one case introduced against Fortis Insurance Belgium, supported by the Institute for Equality between Women and Men, multiple discrimination based on gender, state of health and age in the group insurance pension scheme could have been pleaded. Nevertheless, the First Instance Labour Court of Brussels rejected the action because there was, in its opinion, no discrimination based on gender, which was the only ground of discrimination alleged<sup>84</sup>. In this case, the Institute did not initiate contacts with the Centre to extend the action to other grounds of discrimination.

### 2.1.2 Assumed and associated discrimination

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or 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 Act. However, the preparatory works (*travaux préparatoires*) clearly specify that these Acts apply to such discriminations.<sup>85</sup> 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. It is worth highlighting that, in the Flemish framework Decree of 10 July 2008, the definition of direct discrimination expressly states that it is applicable in case of discrimination based on an assumed characteristic (art. 16).

- b) *Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

<sup>83</sup> See the Draft Framework Decree on equal opportunities, *Flemish Parliament* 2007-2008, Doc. 1578/1, p. 165.

<sup>84</sup> First Instance Labour Tribunal of Brussels (23<sup>rd</sup> Chamber), 12 December 2008, *Institute for Equality between Women and Men and De Maeyer v. Fortis Insurance Belgium*, not published.

<sup>85</sup> Report Libert, *Doc. Parl. Chambre* 2006-2007, no. 2720/009, pp. 41-42.

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.<sup>86</sup> As a result of the decision of the ECJ in *Coleman*<sup>87</sup>, discriminations based on being associated with persons presenting a specifically protected characteristic are impliedly forbidden under federal law<sup>88</sup>. It is worth highlighting that, in the Flemish Framework Decree of 10 July 2008, the definition of direct discrimination expressly states that it is applicable in case of discrimination by association (art. 16).

## 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.<sup>89</sup> As explained below -point b)-, these exceptions in turn are restrictively defined in order to ensure that those legislative texts will be in compliance with the requirements of the Directives. All the Regional Anti-discrimination pieces of legislation now define direct discrimination in line with EU requirements<sup>90</sup>.

### b) *Are discriminatory statements or discriminatory job vacancies announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn)*

This was precisely one of the questions addressed to the European Court of Justice by the Brussels Labour Appeal Court on 24 January 2007 in the famous *Feryn* case (*supra*, section 0.3). The case is still pending before the Appeal Labour Court. In the opinion of the authors, it is likely that the Court will follow the position of the ECJ in recognising that such a discriminatory statement in a recruitment campaign amounts to direct discrimination. At least there is no legal obstacle to such finding in Belgian law.

### c) *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).*

<sup>86</sup> Report Libert, *Doc. Parl. Chambre* 2006-2007, no. 2720/009, p. 42.

<sup>87</sup> Case C-303/06.

<sup>88</sup> See also the Van Themsche case decided on 10 October 2007 by the Court of Assizes of Antwerp (*supra*, section 0.3).

<sup>89</sup> Article 4, 6° and 7° of the General Anti-discrimination Federal Act; Article 4, 6° of the Racial Equality Federal Act.

<sup>90</sup> Even if direct discrimination is correctly defined by the Flemish Decree of 10 July 2008 (*supra*, section 0.2) as happening when “someone is treated less favourably than another person is, has been or would be treated in a comparable situation”, it is worth mentioning that there is an error in the French translation of the Decree published in the *Moniteur belge* (official journal) where it is stated that direct discrimination occurs when “someone is treated less favourably than another person in a comparable situation”.

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:

- 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).

All the Regional Anti-discrimination legislations have a justification system regarding direct discrimination that takes into account EU requirements.

*d) 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 clearly 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 sign<sup>91</sup>. It is nevertheless worth noting that the General Anti-discrimination Federal Act contains a quite detailed provision specifying for each material scope, in which cases direct distinction based on age does not amount to discrimination (i.e. the fixation of an admission age or the complementary regimes of social security, except if it amounts to sex discrimination)<sup>92</sup>.

### 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 not all grounds are 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"<sup>93</sup>. 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"<sup>94</sup>. These consultations also highlighted the difficulty in simultaneously pursuing two partially incompatible objectives.

<sup>91</sup> See *supra*, section 0.3.

<sup>92</sup> For more details in this respect, see art. 12 of the General Anti-discrimination Federal Act.

<sup>93</sup> *Le Soir*, 26, 27 and 28 March 2005.

<sup>94</sup> *De Standaard*, 25 March 2005.





On the 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.

The words “situation testing” became so problematical that they were deleted 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 reference<sup>95</sup>. 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 test<sup>96</sup>. 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.

With respect to the Regional Anti-discrimination legislations, the situation is uneven. While they all provide for the reversal of the burden of proof, only some of them list the recurrence tests and the comparability tests as facts leading to a presumption of direct discrimination. None of these pieces of legislation refer explicitly to situation testing as such.

*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 and landlords (see the stormy political debates referred to in point a). As shown in point c), such reluctance is sometimes supported by the courts.

*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 offence<sup>97</sup>.

<sup>95</sup> 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.

<sup>96</sup> 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.

<sup>97</sup> Court of Cassation, 5 February 1985, *Gaddum, Pasicrisie*, 1985, I, 690; Court of Cassation, 7 February 1979, *Salerno, Pasicrisie*, 1979, I, 665.

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”,<sup>98</sup> 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 several 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 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 been 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”.<sup>99</sup>

The judgment adopted on 30 November 2005 by the Court of Appeals of Ghent provides another example<sup>100</sup>. 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 to a tester in the presence of a bailiff (*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 the regulation specifying the conditions under which “testing” may take place in order to prove discrimination. It is worth noting that the opposite solution – impossibility to prove discrimination through such means – was adopted by the Appeal Court of Antwerp in a case decided on 25 February 2009<sup>101</sup> concerning a Fitness Centre (*Better Bodies*) which was refusing candidate members on the basis of the colour of their skin or their foreign origin.

<sup>98</sup> See for example ECHR, *Teixeira de Castro v. Portugal*, 9 June 1998, Rep. 1998-IV, p. 1463, § 63.

<sup>99</sup> 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.

<sup>100</sup> For the details of this case, see the *Belgian Report 2007*, section 0.3.

<sup>101</sup> Ref. no. 2008/AR/2681, unpublished.



The Centre for Equal Opportunities has strongly criticised this decision which clearly misinterpreted the legislation.

As an application of a phone testing, see the judgment of the Labour Appeal Court of Antwerp of 25 June 2008 detailed *supra*, in section 0.3.

d) *Outline how situation-testing is used in practice and by whom (e.g. NGOs, equality body, etc)*

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*)<sup>102</sup>. 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.

The Centre for Equal Opportunities and Opposition to Racism has never relied on situation testing to build a case in court. From the information that the authors were able to gather, it appears that this is mostly due to two reasons. First, there is rarely a need to use situation testing in practice because the presumptions of discrimination included in the file are often sufficient to allow the reversal of the burden of proof. Second, the issue is politically so touchy that the Centre decided to adopt a very cautious attitude. In this line, the project of drafting a note gathering guidelines and conditions under which situation testing must be practiced does not seem to have been achieved.

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

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

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 Act<sup>103</sup>. 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.

<sup>102</sup> This campaign took place in 2000 and 2001 (see [www.mrax.be/article.php3?id\\_article=194](http://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](http://www.mrax.be/article.php3?id_article=67)).

<sup>103</sup> Art. 9 of the Racial Equality Federal Act. See *infra* in the report, section 2.3.b.



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 Act<sup>104</sup>. 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’.

All the Regional Anti-discrimination legislations now define indirect discrimination in line with the EU requirements.

*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).

Similar justification systems are inserted in the Regional Anti-discrimination legislations.

<sup>104</sup> Art. 9 of the General Anti-discrimination Federal Act. See *infra* in the report, section 2.3.b.



c) *Is this compatible with the Directives?*

Yes.

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 and in all the regional anti-discrimination legislations, but the Decree adopted in 2007 by the *Cocof*, that nevertheless includes language implicitly because it has an open list of criteria<sup>105</sup>.

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 2008<sup>106</sup>, the Committee expressed concerns with the Flemish statute adopted on 15 December 2006 (Flemish Housing Code - *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 it<sup>107</sup>.

In its decision no. 101/2008 of 10 July 2008, the Constitutional Court rejected an action for annulment introduced by the Government of the French Community, the Flemish Human Rights League and an NGO active in social housing rights, against the Flemish Housing Code (detailed *supra*, section 0.3). The Belgian Court considered that the linguistic requirement at stake, which is not that of speaking Dutch, but only that of having the intention to learn it, was not disproportionate to the aim targeted by the Flemish Government, i.e. to improve the quality of life in social housing structures by easier and better communication in Dutch between tenants and owners and among residents. It gave, in this sense, the green light to the *Wooncode*. But, the Court said that it was so to the extent of two conform interpretations.

<sup>105</sup> *Supra*, sections 0.2 and 2.1.

<sup>106</sup> Available at <http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-BEL-CO-15.pdf>.

<sup>107</sup> See Flash report 5, 19 March 2008.



First, the sanctions in case of non-respect by the tenant of his/her obligations must be proportionate to the gravity of the violation and must be pronounced by a judge. Second, this requirement to demonstrate the intention to learn Dutch cannot be implemented for the French speakers living in the municipalities with linguistic facilities<sup>108</sup>. It is worth noting that, contrary to the statement of the Committee on the Elimination of Racial Discrimination, the Constitutional Court did not examine the issue of potential indirect discrimination based on race or ethnic origin.

### 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”.

Preparatory works 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 discrimination<sup>109</sup>. 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 impact<sup>110</sup>.

It is worth keeping in mind that in its 2009 rulings concerning several actions in annulments against the Federal Anti-discrimination Acts (*supra*, section 0.3), the Constitutional Court stressed that the facts leading to the reversal of the burden of proof cannot be of general character but must be attributed specifically to the author of the distinction. Consequently, the Court stated that it is not enough to establish through statistics that a neutral criterion disadvantages persons characterised by a protected ground of discrimination. According to the Court, it must also be shown that the defending party was *aware* of that situation (decision no. 17/2009, para. B.93.3; decision no. 39/2009, para. B.52; decision no. 40/2009, para. B.97). In the opinion of the authors, that statement of the Court is in complete breach of EC law and in complete contradiction to the intention of the Belgian legislator.

The new Anti-discrimination legislations adopted by the Flemish Community/Region, the French-speaking Community and the Walloon Region have all been harmonised with the Federal Acts regarding the express reference to statistical evidence to establish indirect discrimination.

<sup>108</sup> See *supra*, section 0.3., in footnote 57.

<sup>109</sup> For instance, Case *Lewark*, 6 February 1996, Case C-457/93, §§ 29-30.

<sup>110</sup> Report Libert, *Doc. Parl. Chambre* 2006-2007, no. 51-2720/0009, pp. 80-81.



Although statistics as such are not mentioned explicitly in the other Regional pieces of legislation (Decree of 17 May 2004 of the German-speaking Community, Decree of the *Cocof* of 22 March 2007, the two Ordinances of the Region of Brussels-capital of 4 September 2008), it seems that this mode of proving discrimination is allowed under the provisions providing for shifting the burden of proof in civil cases.

- b) *Is the use of such evidence widespread? 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?*

To the knowledge of the authors, 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.

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

To the knowledge of the authors, there exists no case-law in this area.

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

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 data<sup>111</sup>) 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.

<sup>111</sup> *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).

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 promotion<sup>112</sup>.

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 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”<sup>113</sup>: 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.

<sup>112</sup> 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.

<sup>113</sup> 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.

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 otherwise<sup>114</sup>. The Flemish Decree does not include racial or ethnic minorities as such among target groups, but only persons of foreign origin ("allocthonen").<sup>115</sup>

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 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"<sup>116</sup>. 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.

<sup>114</sup> 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.

<sup>115</sup> *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).

<sup>116</sup> *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").



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 parents<sup>117</sup>.

## 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 2007<sup>118</sup>, “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.

Article 442bis 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. It is, however, worth keeping in mind the conform interpretation of the Constitutional Court in its decisions nos. 17/2009, (para. B.53.4) 39/2009 (para. B.25.4) and 40/2009 (para. B.33.4) (*supra*, section 0.3).

Harassment is also now defined in line with the Directives in all the Regional Anti-discrimination legislations.

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.

<sup>117</sup> These measures are described in further detail below.

<sup>118</sup> *Moniteur belge*, 6 June 2007.





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?*

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. All the other Regional Anti-discrimination legislations have been harmonised with the Federal ones, prohibiting harassment as a form of discrimination.

*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 (including case-law) prohibit instructions to discriminate?*

*If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*

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.

At the level of the Regions and Communities, all the anti-discrimination legislation provides 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? Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.*

*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)<sup>119</sup>. 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 discrimination<sup>120</sup>, 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 Flemish Framework Decree on the Flemish equal opportunities and equal treatment policy of 10 July 2008 (*supra*, section 0.2) defines the denial of reasonable accommodation as a form of prohibited discrimination but limits the duty to provide reasonable accommodation to persons with disabilities.

<sup>119</sup> 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.

<sup>120</sup> Compare with Art. 2 § 2, b), ii) of the Employment Equality Directive.



*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 3, 9° of the Decree of 12 December 2008 reproduces almost word for 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.* The Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training of 6 November 2008 (*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 (Art. 3, 13°).

*Region of Brussels-Capital.* The two Ordinances adopted on 4 September 2008 define reasonable accommodation for person with disabilities in line with EU requirements.

*Cocof.* The Decree on equal treatment between persons in vocational training of 22 March 2007 defines correctly the duty of reasonable accommodation for persons with disabilities. Moreover, 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*<sup>121</sup> 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 and all the regional anti-discrimination acts, 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.

In the Anti-discrimination Acts listed above, there is no specific definition of disability for the purpose of claiming a reasonable accommodation or for the purpose of claiming protection from other forms of discrimination.

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.

<sup>121</sup> *Moniteur belge*, 3 April 1999.

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 authorities<sup>122</sup>. 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, Labour 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 entail<sup>123</sup>. 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. Since then, some pieces of legislation have been adopted at the regional level. For instance: (1) the Walloon Region adopted a Decree on 23 November 2006 concerning the accessibility of persons with disabilities being with a guide dog to public places<sup>124</sup> and the Executive Regulation to that Decree was finally adopted on 2 October 2008<sup>125</sup>; (2) the Region of Brussels-Capital adopted an Ordinance to the same effect on 18 December 2008<sup>126</sup>.

- b) *Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of “disproportionate burden” in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

<sup>122</sup> *Moniteur belge*, 20 September 2007, p. 49653.

<sup>123</sup> The brochure may be downloaded from <http://www.meta.fgov.be>

<sup>124</sup> *Moniteur belge*, 8 December 2006.

<sup>125</sup> *Arrêté du Gouvernement wallon portant exécution du décret du 23 novembre 2006 relatif à l’accessibilité aux personnes handicapées accompagnées de chiens d’assistance des établissements et installations destinés au public*, *Moniteur belge*, 29 October 2008, p. 57345.

<sup>126</sup> *Ordonnance relative à l’accès des chiens d’assistance aux lieux ouverts au public*, *Moniteur belge*, 14 January 2009, p. 1527.



At the federal level, the duty to provide reasonable accommodation for persons with disabilities extends to all the fields to which the General Anti-discrimination Federal Act shall apply (Art. 4, 12°), which go far beyond employment (*supra*, section 0.2). The definition is the same whether reasonable accommodation is implemented within or outside the employment field. The Anti-discrimination Decrees adopted by the Flemish Community/Region on 10 July 2008 and the French-speaking Community on 12 December 2008 similarly define the scope of the duty of reasonable accommodation as applying to all the material areas they cover. The Decree of the Walloon Region of 6 November 2008 seems also to extend the duty of reasonable accommodation beyond employment (Art. 3, 13°). The Walloon Government is in charge of defining more precisely the notion of reasonable accommodation and its modality of application (Art. 13).

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

As regards fields which are a federal competence, the failure to meet the duty to provide reasonable accommodation constitutes a form of discrimination. For more details and for a description of the law in the Regions and Communities, the reader is referred to paragraph a).

- d) *Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?*

As mentioned in the answer to paragraph a), 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 has, however, a limited material scope of application (*supra*, section 0.2).

- e) *Does the national law clearly provides for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

At the federal level, articles 27 and 28 of the General Anti-discrimination Federal Act provide expressly for the shift of the burden of proof, when claiming the right to reasonable accommodation. This is also the case for the regional anti-discrimination acts that have been drafted in line with the Federal Act in this respect (Walloon Region, Flemish Community/Region, French-speaking Community, *Cocof*). The situation is less clear as regards the Decree of the German-speaking Community because there is no clear relationship between the duty of reasonable accommodation in order to ensure the effectiveness of the principle of Equal treatment (art. 17) and the shift of the burden of proof happening in case of the establishment of facts from which it may be presumed that there has been discrimination (art. 24).

- f) *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?*





In 2007, the Centre for Equal Opportunities and Opposition to Racism (federal equality body) carried out an inventory of the legislation and regulations regarding accessibility of the “built environment” and the possible problems of application of those norms, as well at the federal level as on the level of the three Regions of the country<sup>127</sup>. Through the complaints which it receives, the Centre is often confronted with the difficulty, even with the impossibility, for disabled people to access certain buildings such as administration buildings, arts centers, banks and post-offices, schools, cinemas, sport centers, supermarket cash points, health care services, transport... The Centre thus focused on this general issue of the accessibility of buildings open to the public (public and private sectors) by people with “reduced mobility”.

The Framework Act (loi cadre) of 17 July 1975<sup>128</sup> 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 1977<sup>129</sup>; they define norms for the construction of new buildings or for their renovation. However, since 1980, legislation on construction is a competence of the Regions<sup>130</sup>.

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 concerned<sup>131</sup> (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.

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.

<sup>127</sup> Centre for Equal Opportunities and Opposition to Racism, “Accessibilité des bâtiments ouverts au public pour les personnes à mobilité réduite”, July 2007, 81 p. The report is available on the website of the Centre: [http://www.diversite.be/?action=publicatie\\_detail&id=14&thema=3](http://www.diversite.be/?action=publicatie_detail&id=14&thema=3).

<sup>128</sup> Act of 17 July 1975 on the access of persons with disabilities to buildings accessible to the public, *Moniteur belge*, 19 August 1975.

<sup>129</sup> 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.

<sup>130</sup> 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.

<sup>131</sup> 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 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”<sup>132</sup>. 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 Planning<sup>133</sup> 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 level<sup>134</sup>. However, to the knowledge of the authors, 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 does 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”<sup>135</sup>. 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 to increase accessibility of exiting public buildings and a better collaboration between the Regions.

- g) *Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*

<sup>132</sup> *Moniteur belge*, 19 January 2007.

<sup>133</sup> *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).

<sup>134</sup> 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](http://www.ipp-online.org)).

<sup>135</sup> 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](http://www.diversite.be)).

The several Belgian Anti-discrimination Acts do not impose a general obligation of accessibility. Those Acts make it possible to tackle the question of accessibility only following the claim of a disabled person who alleges a particular discrimination in the material fields covered (education, goods and services,...). The judge will be able to examine *a posteriori* (and not anticipatory) a particular situation for one alleged victim (or for a group of victims), and this, in certain cases and providing some conditions (for example, insofar as reasonable accommodation does not constitute a disproportionate burden), without solving all the problems of accessibility encountered by other users of a building.

*h) 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)).<sup>136</sup> These are enterprises which offer persons with disabilities the opportunity to work in adapted conditions. In the Walloon Region for instance<sup>137</sup>, 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 structures<sup>138</sup>. Moreover non-disabled workers may also be employed, provided that the proportion of such workers in the company does not exceed 30%<sup>139</sup>.

<sup>136</sup> 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).

<sup>137</sup> 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).

<sup>138</sup> The *Commission Technique d'Orientation et de Reclassement Professionnel* (COTOREP) evaluates whether an individual worker fulfils this condition.

<sup>139</sup> 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.



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?*

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 job<sup>140</sup>.

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<sup>140</sup> *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?*

Such requirements are not embodied 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 Anti-discrimination 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)<sup>141</sup>. 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 legislative 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 are referring to 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 Directives (Art. 5 § 1 1° of both Federal Acts of 10 May 2007).

<sup>141</sup> 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).





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 1999<sup>142</sup>. All Regional pieces of legislation also impose their obligations on both natural and legal persons.

### 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 contracts<sup>143</sup>, 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.

*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.

<sup>142</sup> 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.

<sup>143</sup> *Loi du 3 juillet 1978 relative aux contrats de travail*, *Moniteur belge*, 22 August.1978 (Act of 3 July 1978 on employment contracts).



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.

The Regional Anti-discrimination pieces of legislation contain similar provisions.

## 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 Belgian legislative framework, all these situations are nearly covered by anti-discrimination legislation. Although the legislative instruments adopted in order to implement the Racial and Employment Equality Directives apply, in principle, to both the public and the private sectors, the Council of State (general assembly of the legislative section) has confirmed, in its opinion on 11 July 2006<sup>144</sup>, that although, in principle, the Federal State is responsible for regulating employment contracts<sup>145</sup> 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). The only remaining gap is related to the *Cocof*, which has not legislated yet in order to implement the Racial and the Employment Equality Directives as regards its own staff. The Federal Acts adopted on 10 May 2007 are not sufficient to remedy this, since this shortcoming can only be filled by the *Cocof*.

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.

<sup>144</sup> 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.

<sup>145</sup> 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).

*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°)<sup>146</sup>.

The prohibition of discrimination enshrined 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 (*supra*, section 0.2). The Decree forbids: (1) making any reference to the protected grounds of discrimination in the description of conditions or criteria in employment intermediation, or to other criteria which could lead to discrimination on the basis of the protected grounds (Art. 5 § 2, 1°); (2) presenting certain employment opportunities as better suited to persons presenting one of the prohibited characteristics (Art. 5 § 2, 2°); (3) impeding access to placement services on the basis of justifications which, explicitly or implicitly, relate to one of the prohibited grounds of discrimination (Art. 5 § 2, 3°); (4) mentioning or alluding to one of the prohibited grounds in job advertisements (Art. 5 § 2, 4°); (5) 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 (Art. 5 § 2, 5°); (6) 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 (Art. 5 § 2, 6°); (7) referring to either of the prohibited grounds in the description of conditions or criteria for access to vocational guidance, vocational training or career guidance (Art. 5 § 2, 7°); (8) 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 (Art. 5 § 2, 8°); (9) 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 (Art. 5 § 2, 9°); (10) imposing conditions for the award and delivery of titles, diplomas, etc., which are defined differently according to one's race, colour, etc. (Art. 5 § 2, 10°); (11) 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 (Art. 5 § 2, 11°); (12) defining or applying criteria or conditions in employment and dismissal which are based on any of the prohibited grounds (Art. 5 § 2, 12°); (13) and using techniques or tests in vocational guidance, vocational training, career guidance or employment intermediation which may lead to direct or indirect discrimination (Art. 5 § 2, 13°).

The Decree adopted by the French-speaking Community on 12 December 2008 (*supra*, section 0.2) applies to the selection, promotion, working conditions, including dismissals and pay regarding its own public service (Art. 8).

<sup>146</sup> Both Acts refer to "working relationships" which is described in their Articles 5 § 2.



More precisely, it applies to the statutory employment relationships present in the public bodies that the French-speaking Community has created or is funding (1°), the education institutions (2°), the civil service and governmental institutions (3°).

The Decree adopted by the Walloon Region on November 2008 (*supra*, section 0.2) has a scope of application limited to the Region's competences in the area of employment policy and retraining: the prohibition of discrimination therefore applies to vocational guidance, socio-professional integration, placing of workers, funding for the promotion of employment, funding for employment and financial incentives to companies in the framework of the economic policy, including social economy and vocational training, in the public and the private sectors (Art. 5). The new Decree adopted on 19 March 2009, once in force, will fill the gap concerning non-discrimination in the statutory employment relationship present in departments of the Walloon Government, public authorities depending on the Walloon Region, decentralised bodies (such as provinces, municipalities, etc.), and public Centres for social assistance (Art. 5 § 2 as modified by the Decree of 19 March 2009).

The Decree adopted by the German-speaking Community in 2004 (*supra*, section 0.2) 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 on 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 applies in particular to vocational guidance, professional counselling, vocational training and retraining. The programmatic Decree of 25 June 2007<sup>147</sup> further specifies this material scope.

In the Region of Brussels-Capital, the two new Ordinances fighting against discrimination adopted on 4 September 2008 fill the gap regarding anti-discrimination in the employment competences of the Region and its own staff. The first Ordinance relates to the fight against discrimination and equal treatment in the employment field (*supra*, section 0.2) which covers, at the regional level, the worker placement policies and the policies aimed at unemployed persons (as defined in Article 4, 9° of the Ordinance). The second Ordinance relates to the promotion of diversity and the fight against discrimination in the civil service of the Region of Brussels-Capital. It applies to the employment field in the civil service of the Region of Brussels-Capital and covers (as defined in Article 4, 1°) access conditions, criteria selection, promotion, work conditions, including dismissals and pay. Article 4, 13° defines the specific public institutions of the Region of Brussels-Capital falling within the scope of this Ordinance.

Since the statutory instruments have been adopted in most of the Region and Communities, the only remaining gap relates to the *Cocof*, which should still adopt an Anti-discrimination Decree to implement Directives 2000/43/EC and 2000/78/EC with respect to its own statutory staff.

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

<sup>147</sup> *Supra*, section 0.2.



### **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.

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

*In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.*

*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 section 3.2.1 *supra*.

Occupational pensions are dealt with in 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.<sup>148</sup> 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 the European Convention on Human Rights and Article 26 of the International Covenant on Civil and Political Rights).

Each of the three Federal Anti-discrimination Acts of 2007 contains a 'safeguard provision', referred to above (section 0.2), stipulating that these pieces of legislation 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 statutory law 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 is 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.*

<sup>148</sup> 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.





*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 Regions<sup>149</sup>, although the Walloon Region has delegated that competence to the German-speaking Community for the territory of the German-speaking Region from the 1<sup>st</sup> January 2000. The Flemish Region/Community (on 8 May 2002), the Walloon Region (on 6 November 2008), the German-speaking Community (on 17 May 2004) and the Region of Brussels-Capital (on 4 September 2008) have adopted Decrees/Ordinance in order to prohibit discrimination in vocational guidance.

*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 Communities<sup>150</sup>. The French-speaking Community has nevertheless delegated that competence (in the Belgian interpretation of the term that differs from the European conception of vocational training that has been extended to university courses or technical courses) 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 (*supra*, section 0.2). The Anti-discrimination Decree of the Walloon Region adopted on the 19 March 2009 (*supra*, section 0.2) includes vocational training and validation of competences in its material scope (Art. 5, 8° as modified by the Decree of 19 March 2009). The Decree of the French-speaking Community of 12 December 2008 includes also, in its material scope, vocational training but in the European understanding of the term (Art. 3, 14°).

Finally, *education* is a competence of the Communities. In 2008, the Flemish Community/Region and the French-speaking Community have adopted legislation in order to prohibit discrimination in this field, at all levels of education, including the University level. In the German-speaking Community, vocational training is expressly covered by the Decree of 2004 as modified in 2007 but education as such seems not to have been dealt with yet.

### **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°).

<sup>149</sup> Article 6 § 1, IX of the Special Federal Act of 8 August 1980 on institutional reforms.

<sup>150</sup> Article 4, 15° and 16° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.



In order to fully implement the Directives, it should be 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. This has only been done expressly by the French-speaking Community in its Decree of 12 December 2008 (Art. 4, 5°). Regarding the Walloon Region and the Flemish-speaking Community, one could consider that this is implicitly included in ‘the access, participation or whatever exercise of an economical, social, cultural or political activity open to the public’ which are referred to in both Decrees.

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

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

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

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 shown in the Constitutional Court judgment no. 152/2005 of 5 October 2005 (*supra*, section 0.3) concerning age discrimination, 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 (section 0.2), which states that any measures contained in a law or adopted by virtue of a law should not be subordinated to these anti-discrimination legislations, but only to the Constitution and international law. Therefore, only administrative practices are covered by the prohibitions contained in both Federal Acts of 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 checked that it complies with Articles 10 and 11 of the Constitution, as well as 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 should require.



### 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. As a result of the safeguard provision which both Federal Acts of 10 May 2007 include (Art. 11, see *supra*, section 0.2), 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.

Moreover, 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. This has been done, in 2008, by the Flemish Community/Region, the French-speaking Community and the Walloon Region, which have all explicitly included social advantages in the material scope of their Anti-discrimination Decree (*supra*, section 0.2). For the sake of full implementation of EU law, ‘social advantages’ should be added to the material scope of the Anti-discrimination pieces of legislation of the Region of Brussels-Capital, the German-speaking Community and the *Cocof*.

### 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 and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

*Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated “special” education is favoured and supported.*

Education is a competence of the Communities in the Belgian federal system<sup>151</sup>. 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.

A first set of measures has 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:

<sup>151</sup> 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*<sup>152</sup>) 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 Decrees<sup>153</sup> 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 immigrants<sup>154</sup>. Comparable measures have also been adopted by the Flemish Community<sup>155</sup>. 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) classes<sup>156</sup>. 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 disability<sup>157</sup>. 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 needs<sup>158</sup>.

To sum up, one must highlight the general trend to promote integration of children with disabilities in mainstream education across all relevant public authorities in Belgium.

<sup>152</sup> *Moniteur belge*, 23 September 1997.

<sup>153</sup> *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).

<sup>154</sup> *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).

<sup>155</sup> *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).

<sup>156</sup> 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.

<sup>157</sup> *Moniteur belge*, 3 June 2004.

<sup>158</sup> *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).



In addition, the staff of the education sector, as they are Community's public servants from a statutory point of view, are protected under the Flemish Decree of 8 May 2002<sup>159</sup> and the Decree adopted on 17 May 2004 by the German-speaking Community<sup>160</sup>.

Since 2008, the field of education (which comprises primary, secondary and higher education) is covered by the Anti-discrimination Framework Decree of 10 July 2008 adopted by the Flemish Community/Region (Art. 20, § 1, 5°) and by the French-speaking Community Decree of 12 December 2008 (Art. 3, 13° and 16 ss.). In the German-speaking Community, there seems nevertheless to be still a gap concerning the protection of schoolchildren from discrimination on the grounds of race or ethnic origin as no specific legislation was adopted to implement the Racial Equality Directive in education. This gap is partly filled by the fact that vocational training is covered. There are, however, still shortcomings as it seems difficult to include primary education and part of secondary education in the concept of vocational training even broadly construed.

The Racial Equality Federal Act and the General Anti-discrimination Federal Act of 2007 are of no help here as they specify that they do not regulate areas which fall under the competences of the Regions and Communities. As confirmed in the opinion delivered by the Council of State on 11 July 2006, education falls (almost entirely) outside the scope of competences of the federal institutions.

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 school<sup>161</sup>. 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 population<sup>162</sup>. 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.

<sup>159</sup> See Art. 3, 2° and Art. 2, 6° of the Flemish Decree of 8 May 2002.

<sup>160</sup> See Art. 2 § 1, 4° and Art. 3 of the Decree of the German-speaking Community of 17 May 2004.

<sup>161</sup> 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](http://www.enar-eu.org/en/publication/Romaengl.pdf)), p.17

<sup>162</sup> *Les Roma de Bruxelles*, publication of the Regional Integration Centre, Foyer Bruxelles asbl, September 2004, pp. 36 et seq.





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

- a) *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.*

*At the Federal level - 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.

*At the Federal level - 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.

Since 2008, access to and supply of goods and services available to the public are also partly covered at the regional level by the Decree of the Flemish Community/Region of 10 July 2008 (Art. 20, § 1, 6°), the Decree of 12 December 2008 of the French-speaking Community (Art. 4, 6°), the Decree of the Walloon Region as modified on 19 March 2009 (Art. 5, § 1, 9°). The full implementation of the Race Equality Directive would require the inclusion of supply of goods and services available to the public in the material scope of the Anti-discrimination legislation of the Region of Brussels-Capital (except regarding social housing, which is covered by an Ordinance adopted on 19 March 2009), the German-speaking Community and the *Cocof*.

- b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

To a large extent, financial services are under the competence of the Federal State. The General Anti-discrimination Federal Act prohibits direct and indirect discrimination based on age and disability regarding access to and supply of services available to the public (bank, insurances, etc.). As this is outside the scope of the Employment Equality Directive, the open system of justification applies regarding direct discrimination based on age or disability (Art. 7, see *supra*, section 2.2. b)), without any specification related to those grounds.



### 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 and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.*

The Racial Equality Federal Act and the General Anti-discrimination Federal Act cover housing (apart from social housing, which is a regional competence) 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).

There are numerous initiatives in Belgium to promote the availability of housing which is accessible to people with disabilities and older people. It is nevertheless impossible to describe them in the framework of this report because the measures differ from one Community/Region to another. It is worth mentioning one national association very active in this field: the National Association for housing of persons with disabilities (*Association nationale pour le logement des personnes handicapées*)<sup>163</sup>.

Social housing exclusively falls within the competences of the Regions<sup>164</sup>. Since 2008, it is covered by the Framework Anti-discrimination Decree of the Flemish Community/Region (Art. 20, § 1er, 6°) and since 2009 it has been included in the Anti-discrimination Decree of the Walloon Region (Art. 5, § 1er, 9°, as modified in 2009) and in a specific Ordinance of the Region of Brussels-Capital (*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 authorities are taking regulations prohibiting the stationing of caravans for 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.

<sup>163</sup> See their annual report 2008 available on their website : <http://www.anlh.be>.

<sup>164</sup> 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.



- 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 2000<sup>165</sup>: 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.

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<sup>165</sup> 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 solution<sup>166</sup>.

*Regions and Communities.-* The instruments adopted by the Regions and Communities contain similar provisions that are in line with the EU requirements<sup>167</sup>.

In this respect, Article 10 of the Decree of the French-speaking Community of 12 December 2008 is worth mentioning. On the one hand, it obliges the Government of the French-speaking Community to determine the situations in which gender may be held as a genuine and determining occupational requirement and, on the other hand, regarding the remaining grounds of discrimination enshrined in Article 13 EC, it leaves it to the judge to decide, on a case-by-case basis, whether the conditions are satisfied in order for the exception to apply.

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

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

<sup>166</sup> 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.

<sup>167</sup> See, for instance, Article 7, § 2 of the Walloon Anti-discrimination Decree of 6 November 2008.



*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.- Recently, most of the Community/Regions have introduced the exception of Article 4(2) of Directive 2000/78/EC as drafted at the Federal level (Walloon Region, French-speaking Community, Flemish Community/Region but with a less precise formulation, nevertheless in line with the EU requirements). Neither the Decree adopted on 17 May 2004 by the German-speaking Community, the Decree of the Cocof, nor both Ordinances of the Region of Brussels-Capital of 4 September 2008 contain any clause using the exception embodied 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? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground.)*

In the specific context of religious educational institutions, the legislator has occasionally provided 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 staff<sup>168</sup>. The courts have only very rarely 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 (Art. 3(4) and Recital 18 Directive 2000/78)**

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

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 section 4.2. a).

<sup>168</sup> 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.





- 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 (e.g. 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 decided on 12 June 2007 by the President of the Appeal Court of Liège in emergency proceedings (*X v. Eglise protestante unie de Belgique*)<sup>169</sup>. 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 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 (Art. 3(2))**

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

- a) *How does national law treat nationality discrimination? Does this include stateless status?*

<sup>169</sup> 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/>).



*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 – including stateless persons – benefit from the same legal protection as Belgians in comparable situations (in some cases, the illegality of the residence on the territory will be deemed to put non-nationals in a different situation). 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 third-country 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)).

All the pieces of legislation adopted at Regional level now expressly outlaw discrimination based on nationality. Similarly to the Racial Equality Federal Act, there is an open system of justification of direct discrimination based on this discrimination ground. The Decree of the *Cocof* and the Decree of the German-speaking Community do not provide for a justification system of direct discrimination. Nevertheless, Article 7 of the Decree of the German-speaking Community states that the prohibition of discrimination based on nationality does not apply to the public service of the German-speaking Community “as long as the activity performed implies a direct or indirect participation to the exercise of public authority and that this exercise implies missions aiming at the safeguard of general interests of the State, the Community or the Region”.

To the knowledge of the authors, 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 Article 3(2)?*

No.

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

*Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) 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 marriage<sup>170</sup>. Moreover, 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 couples<sup>171</sup>, 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”<sup>172</sup> on the other.

<sup>170</sup> 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.

<sup>171</sup> 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.

<sup>172</sup> 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 (*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.



Although it should have a reasonable 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 directly under all the Anti-discrimination statutes adopted at Regional level.

*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 breach of Articles 10 and 11 of the Constitution (principles of equal treatment and non-discrimination), but also of the statutory law which seek to implement the Employment Equality Directive in Belgium.

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

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

*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 employer<sup>173</sup>. It is not possible in the context of this report to enter into the details of this regulatory framework.

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

##### **4.7.1 Direct discrimination**

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

<sup>173</sup> 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.



*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 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’ cannot be reconciled with Article 6(1) of the Employment Equality Directive, without showing that such an age limit is objectively necessary to the attainment of a legitimate objective such as the vocational integration of unemployed older workers (§ 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 may 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 10 July 2008 (Art. 23), the Decree of the Walloon Region (Art. 11), the Decree of the French-speaking Community of 12 December 2008 (Art.12), the Ordinance of Brussels-Capital (Employment) of 4 September 2008 (Art. 13), the Decree of the German-speaking Community of 2004 (Art. 19) and the Decree of the *Cocof* of 2007 (Art. 8) have all made use of this option in their implementation of Directive 2000/78/EC. The wordings of these instruments follow that of Article 6(1), al. 1, of Directive 2000/78/EC, and are in conformity with the approach adopted by the European Court of Justice in *Mangold*.

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

The number of items of legislation and regulations which refer to age is overwhelming. After Belgium notified the Commission of 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 items 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 items of legislation and regulations are still in the process of screening 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 in civil aviation (55 years, even less under certain conditions of seniority), in 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 retirement<sup>174</sup>. 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”<sup>175</sup>. 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 employment<sup>176</sup>. 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.

<sup>174</sup> See the Belgian National Action Plan for Employment 2004, paragraph 5.1.1.

<sup>175</sup> This was the subject of a Cooperation Agreement between the Regions and Communities concluded on 24 July 2003.

<sup>176</sup> Executive Regulation of 11 June 2002. This measure is in force since 1 July 2002; the level of the bonus was increased in 2004.

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*)<sup>177</sup>. In order to further discourage such redundancies, employers pay reduced social contributions for workers aged 58 years or more (since 2004: 55 years or more)<sup>178</sup>. The recruitment of older workers is greatly rewarded, with subsidies to 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)<sup>179</sup>. Moreover, an Executive Regulation (*Arrêté royal*) of 5 June 2002 encourages persons aged over 50 years to become self-employed through support in 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 market<sup>180</sup>. 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 these advantages have 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 (*Arrêté 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.

<sup>177</sup> *Convention collective du travail* (no. 82) of 10 July 2002.

<sup>178</sup> This represented a gain of 1,600 euros per year per worker, which since 2004 has been increased to 4,000 euros.

<sup>179</sup> *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.

<sup>180</sup> See also on this the OECD publications on Belgium, especially the report *Ageing and Employment Policies* (2005) and the *Economic Survey – Belgium 2005*.



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.

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 ill<sup>181</sup>. 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 2005<sup>182</sup>. 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:

<sup>181</sup> *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.

<sup>182</sup> *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 latest<sup>183</sup>. 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 agreements<sup>184</sup>.

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

<sup>183</sup> 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](http://www.cnt-nar.be)).

<sup>184</sup> 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](http://www.diversite.be)).



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

- 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.

- 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?*

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.

- 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?*

The “normal” retirement age referred to sub b) 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. According to the Act of 3 July 1978 on employment contracts, contractual clauses providing that the mere fact of reaching mandatory retirement ages ends the contract are void (Art. 36). When an employee reaches the mandatory retirement age, the employer still has to put an end to the contractual relationship and to give formal notice in this respect.





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.

- 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.

#### 4.7.5 Redundancy

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

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.

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

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 Framework Employment Directive?*



There are no such explicit exceptions in the Anti-discrimination legislative instruments adopted in order to implement the Directives. Nevertheless, regarding “health and safety” requirements, see *supra* (section 4.6). Moreover, the anti-discrimination provisions must be interpreted in line with other fundamental rights and freedoms enshrined in the Belgian Constitution and in the European Convention on Human Rights.

#### **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 specific exceptions in the General Anti-discrimination Federal Act and the Racial Equality Federal Act regarding the criteria covered in the Directives. It is nevertheless worth highlighting that positive action measures are dealt with in those Federal Acts as a “general motive of justification” (see *infra*, section 5). The so called “safeguard provision”, as referred to in section 0.2, is also mentioned under the Chapter “general motives of justification”.



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

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

*The 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 Court<sup>185</sup> (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)<sup>186</sup>. 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. Similarly to the Federal Acts, these conditions, under which positive actions are admitted, have been expressly included in the Flemish Framework Decree of 10 July 2008 (Art. 26), the Decree of the Walloon Region of 6 November 2008 (Art. 12 and 14) and the Decree of the French-speaking Community of 12 December 2008 (Art. 6), the two Anti-discrimination Ordinances adopted by the Region of Brussels-Capital on 4 September 2008 (Art. 11 of the Employment Ordinance and Art. 12 of the Ordinance relating to the public service). It is worth highlighting that the Ordinance of Brussels-Capital for the promotion of diversity and the fight against discrimination in the civil service is not only dedicated to the fight against discrimination but also to the promotion of diversity in the public bodies of the Region of Brussels-Capital, in particular through the elaboration of diversity action plans (see Art. 5 and 6).

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.

<sup>185</sup> 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

<sup>186</sup> 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).



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).

- 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 people with disabilities to the labour market, any related to Roma and regarding minority rights based measures.*

As a matter of fact, there is 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.* Until recently, the Flemish Decree of 8 May 2002 was 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"<sup>187</sup> (*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. Currently, there are plenty of initiatives being taken by the Flemish public authorities to increase diversity in the labour market<sup>188</sup> which involve public funding available to employers (between 2500 to 10.000 Euros for the implementation of a plan of diversity)

<sup>187</sup> 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.

<sup>188</sup> For more details, see [www.werk.be/diversiteit](http://www.werk.be/diversiteit).

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 and Diversity Label” (*Label Egalité Diversité*) has been launched by the Employment Federal administration<sup>189</sup>.

*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 1998<sup>190</sup>, 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 (Flemish Housing Code or *Wooncode*) expressly recognises “mobile housing” as a form of housing (15 July 1997 Decree containing the Flemish Housing Code<sup>191</sup>). 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 1<sup>st</sup> 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.

<sup>189</sup> 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](http://www.diversite.be)).

<sup>190</sup> *Moniteur belge*, 19 June 1998. It should be noted that this Decree is in the process of being revised.

<sup>191</sup> *Moniteur belge*, 19 August, 1997.





The Region of Brussels-Capital has not taken any measure yet 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*)<sup>192</sup> 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*)<sup>193</sup> 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 institutions<sup>194</sup>. 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.<sup>195</sup> 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 disabilities<sup>196</sup>), by the French-speaking Community Commission of the Region of Brussels-Capital (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.

<sup>192</sup> *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.

<sup>193</sup> *Moniteur belge*, 30 April 1999.

<sup>194</sup> See Article 25 of the Act of 22 March 1999.

<sup>195</sup> 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’).

<sup>196</sup> *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.



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 with disabilities are usually not met<sup>197</sup>. Efforts in this direction nevertheless continue. On 6 October 2005, an Executive Regulation (*Arrêté royal*)<sup>198</sup> 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 services<sup>199</sup>.

<sup>197</sup> 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.cpd.r.ucl.ac.be/cridho](http://www.cpd.r.ucl.ac.be/cridho).

<sup>198</sup> *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.

<sup>199</sup> 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)

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

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

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

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

*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 be 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)<sup>200</sup> ;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.

<sup>200</sup> It is a criminal offence to refuse to comply with a judgment delivered under this provision (Art. 24).



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 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)<sup>201</sup>. 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 years<sup>202</sup>.

*Regions and Communities.* Until recently, the instruments adopted by the Regions and Communities were much less developed in terms of the procedures they provide in order to uphold the right not to be discriminated against. This was at least partly to be attributed to remaining uncertainties about their competence to adopt such measures but the resulting situation was in breach of the Directives in several respects.

Those gaps have been filled in with the adoption of the new Anti-discrimination statutes in 2008-2009. To a large extent, the systems of remedies put in place in the various Regions and Communities copy those of the Federal Anti-discrimination Acts and are in line with the European requirements<sup>203</sup>.

*b) Are these binding or non-binding?*

All the civil and criminal remedies described sub a) are binding procedures. Nevertheless, some Regional Anti-discrimination statutes provide expressly for a conciliation procedure. This is the case of the French-speaking Community, whose Government has still to set up a public service of conciliation (Art. 60). In the Decree of the Walloon Region, a conciliation procedure is also provided for (Art. 16), which will be dealt with, according to their respective competences, by the Federal Centre for Equal Opportunities and Opposition to Racism or the Institute for the Equality of Women and Men, under the conditions established in a specific protocol. Moreover, equality bodies have developed non-binding procedures in their assistance to victims to reach an amicable settlement.

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

<sup>201</sup> 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.

<sup>202</sup> This legislation has inserted Article 216ter in the Code of Criminal Procedure (*Code d'instruction criminelle*) to create a form of *médiation pénale*.

<sup>203</sup> The system of remedies put in place at regional level are described in detail in the Flash Reports reporting and commenting on these different pieces of legislation.



There is no difficulty under Belgian anti-discrimination law bringing a claim after the employment relationship has ended. If there is no criminal aspect, it has to be brought in the year following the ending of the employment relationship.

## **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*

*At the Federal level:*

*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 law<sup>204</sup>, 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 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 (*infra*, section 7), 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.

*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,<sup>205</sup> and of representative unions, who may file a suit on the basis of the antidiscrimination legislation (Art. 29 and 30 respectively).

<sup>204</sup> 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, *Pasicriste*, 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).

<sup>205</sup> 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.



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).

*At the Regional 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. Since 2008-2009, it is also the case for the Decree of the Flemish Community/Region of 10 July 2008 (Art. 41), the Decree of the Walloon Region of 6 November 2008 (Art. 31), the Decree of the French-speaking Community of 12 December 2008 (Art. 39)<sup>206</sup> and both Ordinances adopted by the Region of Brussels-Capital on 4 September 2008.

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

The Federal anti-discrimination legislation provides for *legal standing of associations* to a certain extent. But, the concept of *class action*, 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.

### **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).*

*At the Federal level:*

*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.

<sup>206</sup> Article 38 specifies that the Centre for Equal Opportunities and Opposition to Racism and the Institute for Equality between Women and Men are competent to file a suit on the basis of the Decree.

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,<sup>207</sup> to a strong opposition from employers' organisations (*supra*, section 2.2.1).

In its decisions issued in 2009 on several actions of annulment against the 2007 Federal Anti-discrimination Acts, the Constitutional Court gave a misleading insight on the shift of the burden of proof mechanism (*supra*, section 0.3). The Court referred to the judge's power of assessment to allow the reversal of the burden of proof as if the judge had a discretionary power to allow such a reversal or not (decision no. 17/2009, para. B.93.4; decision no. 39/2009, para. B.53; decision no. 40/2009, para. B.98).

*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).

#### *At the Regional level:*

The new Regional Anti-discrimination statutes adopted in 2008 and 2009 all include a provision dealing with the shifting of the burden of proof directly inspired by the Federal Acts and are therefore in line with the EU requirements. It is nevertheless worth highlighting that there is a formal error in the French official translation of Article 36 (burden of proof) of the Flemish Decree of 10 July 2008. As a matter of fact, while the Flemish text refers rightly to "facts that make presume the existence of a discrimination" (*feiten die het bestaan van een discriminatie kunnen doen vermoeden*), the French translation adds a word referring wrongly to "facts that make presume the existence of a *direct* discrimination" (*faits qui peuvent faire supposer l'existence d'une discrimination directe*)<sup>208</sup>.

The previous instruments adopted at regional or community level are less detailed in this respect. 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 procedures<sup>209</sup> – 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.

<sup>207</sup> 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.

<sup>208</sup> To the knowledge of the authors, nothing has been done yet in order to correct this erroneous translation.

<sup>209</sup> See Art. 10(3) of Directive 2000/78/EC.



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)*

*At the Federal level:*

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 against 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 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. All those regimes of protection imply a reversal of the burden of proof.

*At the Regional level:*

The Decree adopted by the German-speaking Community, as amended by the programmatic Decree in 2007, includes two provisions on victimisation (Art. 19<sup>bis</sup> and 19<sup>ter</sup>). 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 similar protection in fields other than employment.

It was 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 witnesses<sup>210</sup>.

<sup>210</sup> See Article 12(1) of the Flemish Decree.



This has been solved through the adoption of the Framework Decree of the Flemish Community/Region of 10 July 2008, which provides for quite extensive protection against reprisals because it applies with respect to the whole material scope of the Decree and not only to the employment area. Moreover, it concerns not only the victims but also witnesses and legal representatives of the victims (Art. 37 and 38).

All the other regional Anti-discrimination statutes provide for protection against victimisation, in their respective material scope, following the model of the Federal Anti-discrimination Acts, and are therefore in line with the European requirements.

## **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.*

*At the Federal level:*

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 each 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 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<sup>211</sup> ; 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.

|                 | <b>Prohibition to discriminate</b>  | <b>Sanction</b>   |
|-----------------|---|---|
| <b>Criminal</b> | 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))   |
| <b>Criminal</b> | 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)  |
| <b>Civil</b>    | Any form of direct or indirect discrimination, including harassment             | <ul style="list-style-type: none"> <li>• contractual clause incompatible with the prohibition may be made void (Art.15 GAFA and 13 REFA)<sup>212</sup></li> <li>• payment of damages either on the basis of the 'effective' damage, or on the basis of the lump sums may be seek before the judge (Art. 17 GAFA and 18 REFA)</li> </ul> |

<sup>211</sup> Even if the amount of the fixed rate damages is not very high, it was presented by the federal legislator as a way to improve the remedies' effectiveness and one should not forget that the victim keeps the possibility to opt for damages calculated on the basis of the 'effective' damage, without any ceiling.

<sup>212</sup> See below, paragraph 8.2.



|              |               |  |
|--------------|---------------|--|
|              |               | <ul style="list-style-type: none"> <li>●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)</li> </ul> |
| <b>Civil</b> | 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   |

*At the Regional level:*

The new anti-discrimination instruments adopted by the Regions and Communities in 2008 and 2009 are directly inspired by the system of sanction provided for in the Federal Anti-discrimination Acts. Those sanctions must therefore also be held as effective, proportionate and dissuasive. The situation is less clear regarding the “older” regional Decrees. As a matter of fact, 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). 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 which the Decree is addressed. 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 only for penal sanctions, and 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). In the case of those two last Decrees, one might doubt that the European requirements are fulfilled regarding sanctions.

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) for the promotion of equal treatment, 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? (Body/bodies that corresponds to the requirements of article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so)*

*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 1993<sup>213</sup>. 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, 24<sup>214</sup> 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 of the General Anti-discrimination Act).

*Regional level.* The Centre for Equal Opportunities and Opposition to Racism 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 Protocol of Collaboration or a Cooperation Agreement has to be concluded between the Federal Government and the Government of each Region and Community concerned. According to the information the authors were able to gather, two Protocols of Collaboration were signed in 2009, with the Walloon Region and the French-speaking Community. These Protocols allow the Centre to fulfil all its traditional missions<sup>215</sup>, apart from filing legal suits, in the fields covered by the Decrees of the Walloon Region and of the French-speaking Community. At the moment of drafting the report, such a Protocol was under discussion with the Region of Brussels-Capital, but its formalisation depends on the results of the Regional elections (June 2009). There is presently no Protocol with the Flemish Community/Region which has nevertheless given public funding to the Centre for Equal Opportunities to participate in the creation of 13 contact points in the larger cities of Flanders (training, exchanges of good practices, etc.).

<sup>213</sup> *Moniteur belge*, 19 February 1993. The Act of 15 February 1993 is available, in English translation, from the Centre's website.

<sup>214</sup> 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.

<sup>215</sup> These traditional missions are providing assistance to victims, conducting surveys, publishing reports and issuing recommendations.



To the knowledge of the authors, the German-speaking Community and the *Cocof* have not yet designated any equality body in relation to their Anti-discrimination law nor have they contacted the Centre in this respect. In the future, there could be a formal Cooperation Agreement between the Federal Government and the Government of each Region and Community that would revise the missions, funding and organisation of the Centre for Equal Opportunities and Opposition to Racism, which would formally become an *interfederal* Centre.

- 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.*

The Centre for Equal Opportunities and Opposition to Racism has the status of an “independent public service” (*service public autonome*). It is governed by a Board which is deemed to be “pluralist”. This Board consists of a Federal Government Commissioner, 21 active members and 21 deputy members. Among the members are candidates who are suggested by the Federal Government and the Regional/Community Governments. The Board members are appointed for six years by the Council of Ministers of the Federal Government. Even if one could say that, in practice, the Centre is able to function independently, some political pressures are not excluded on touchy issues (for instance, in the migration field).

In 2008, its budget was around 4 350 000 euros plus some funds from the National Lottery.

- 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.

The Centre is competent to deal with all the protected grounds listed in the Racial Equality Federal Act and the General Anti-discrimination Act, apart from language (i.e. alleged race, color, descent, national or ethnic origin, nationality, 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, genetic characteristic and social origin). Following decision no. 64/2009 issued on 2 April 2009 by the Constitutional Court, it remains uncertain whether the ground of trade union opinion should be added to this list before the adoption of an explicit legal provision in that sense (*supra*, section 0.3).

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



Yes.

As explained on their own website, the Centre receives reports on a daily basis about discrimination. The attention which the Centre devotes to these reports from the first contact is essential for proper monitoring. A large number of requests for intervention are rapidly answered by providing information or referral to other authorities or organisations. Other questions require more work: racist or homophobic attacks, conflicts between employer and employee, discrimination in domestic leases, racist remarks and incitement to hatred on the Internet, etc. In such situations, the personnel at the Centre actively intervene and provide practical support to the victims.

Moreover, the Centre collaborates on a regular basis with associations in the field of discrimination issues, Belgian and European universities and institutions such as the King Baudouin Foundation. In the framework of this cooperation it organises studies, seminars and programs for the exchange of information and practical experience.

The Centre formulates recommendations to all levels of government. These recommendations focus on improving the legislation and developing action plans or seek a better understanding by the political leaders of specific new phenomena (e.g. the new migration patterns). In addition, the federal, regional and community authorities increasingly rely on the Centre for analysis and advice in matters within their competence<sup>216</sup>.

*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)<sup>217</sup>, 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.

<sup>216</sup> For a more detailed presentation of those activities of the Centre, see their website : <http://www.diversiteit.be/>

<sup>217</sup> 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.



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 expertise<sup>218</sup>. 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 / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions)*

No.

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

h) *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. Currently, this person is only answering questions that may be raised by or with respect to Roma and Travellers.

In the near future, there is a clear will to address the issue of discrimination encountered by Roma and Travellers in a more proactive way. To this end, the Centre is planning to organise a seminar in 2009, at which the representative associations should be present.

<sup>218</sup> 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](http://www.diversite.be)





## 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)*

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 (In particular, 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”<sup>219</sup>. 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, the Federal Minister in charge of Equal Opportunities has funded the creation, in 2007-2008 and 2008-2009, of an inter-universities Chair on “Law and discrimination”, involving academics from three universities for the French-speaking part of the project. Each year, there have been 30 hours of training given by scholars coming from those universities on anti-discrimination law. Attendance was free and it was part of the continuing training of lawyers and judges.

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, a range of initiatives has 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.

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.

- 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*

<sup>219</sup> 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](http://www.diversite.be)).



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.

- 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)*

Social partners have been actively involved in dissemination activities. 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*). In the interprofessional agreement 2007-2008, “diversity and non-discrimination” was one of the four policy issues especially under focus. In line with this commitment, a new Collective Agreement was signed on 10 December 2008 and made obligatory by the Royal Decree of 11 January 2009 : Collective Agreement no. 95 relating to equality of treatment at all stages of the employment relationship. 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.

In the Flemish Community/Region, 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 representative workers’ and employers’ unions are represented. Diversity is also promoted actively by the workers’ unions, who have benefited from specialized consultants in diversity whose task is to promote diversity and offer solutions to any resistance facing policies aiming at improving diversity within the workforce.

- d) *to specifically address Roma and Travellers*

To the knowledge of the authors, there was no specific initiative adopted to specifically address Roma and Travellers, except what has been mentioned about the Centre for Equal Opportunities and Opposition to Racism (*supra*, section 7).

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

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



The 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<sup>220</sup>. 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 Articles 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.

All the regional anti-discrimination Acts adopted in 2008 and 2009 have inserted a provision similar to the one inserted in the Federal Acts to make void discriminatory contractual clauses or any discriminatory provisions, and are therefore in line with the Directives if one excepts the problem referred to above of the “safeguard provision”, on the same model as the federal one (see *supra* for a critical appreciation of those provisions). The Decree of the German-speaking Community of 2004 and the Decree of the Cocof of 2007 do not have any provision regarding the nullity of discriminatory contractual clauses or provisions and should be amended for the sake of completing the implementation of the Directives in this respect.

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

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.

<sup>220</sup> On 2 April 2009, the Constitutional Court cancelled the words “in advance” (*par avance*) in Article 15 of the General Anti-Discrimination Federal Act (decision no. 64/2009, para. B.13.2 and B.13.3). For more details, see *supra*, section 0.3.



## 9. 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?*

*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*). The 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 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 has been significant improvement in this respect as the Regions and Communities have shown a willingness to harmonise their statutory law 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    01 March 2009

| <b>Title of Legislation (including amending legislation)</b>  | <b>In force from:</b>                                  | <b>Grounds covered</b>  | <b>Civil/Administrative / Criminal Law</b> | <b>Material Scope</b>   | <b>Principal content</b>   |
|---|--|---|--|---|--|
| This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.   | Please give month / year                               |   |  | e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education  | e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body                |
| 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 <a href="http://www.diversiteit.be">http://www.diversiteit.be</a> ) | June 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, | Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment; civil remedies, and criminal provisions |

| Title of Legislation (including amending legislation)   | In force from:   | Grounds covered   | Civil/Administrative / Criminal Law | Material Scope  | Principal content   |
|---|--|---|-------------------------------------|---|---|
|   |  |   |                                     | economic, social, cultural or political activities normally accessible to the public  |   |
| 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 <a href="http://www.diversiteit.be">http://www.diversiteit.be</a> ) | June 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 <a href="http://www.diversiteit.be">http://www.diversiteit.be</a> )   | June 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 | 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 | Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment ; civil remedies, and criminal provisions |

| Title of Legislation (including amending legislation)   | In force from: | Grounds covered  | Civil/Administrative / Criminal Law | Material Scope   | Principal content   |
|---|----------------|--|-------------------------------------|--|---|
|   |                | and social origin (+ trade union belief < conform interpretation of the Constitutional Court, April 2009)          |                                     | his/her assignment to a service; economic, social, cultural or political activities normally accessible to the public  |   |
| 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 <a href="http://www.diversiteit.be">http://www.diversiteit.be</a> ) | August 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 |

| Title of Legislation (including amending legislation)   | In force from: | Grounds covered  | Civil/Administrative / Criminal Law | Material Scope  | Principal content   |
|---|----------------|--|-------------------------------------|---|---|
| Flemish Region/Community: Decree of 10 July 2008, establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy ( <i>Decreet houdende een kader voor het Vlaamse gelijkekansen en gelijkebehandlingsbeleid</i> ) (available on the following website <a href="http://www.diversiteit.be">http://www.diversiteit.be</a> ) | October 2008   | All grounds of article 13 EC plus colour, ancestry or national origin, civil status (married/non married), birth, wealth/income, state of health, physical or genetic characteristics, political opinions, language, social position, nationality. (obs.: pregnancy, childbirth, maternity leave, and transgender are assimilated to the ground of gender) | Administrative, civil, criminal     | In the field of competences of the Flemish Community/Region : employment policy, health care, education, goods and services available to the public (i.e. housing, energy, cultural services), social advantages, economical, social, cultural and political activities outside the private sphere. | Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment ; civil remedies, and criminal provisions                                     |
| French-speaking Community: Decree on 12 December 2008 on the fight against certain forms of discrimination ( <i>Décret relatif à la lutte contre certaines formes de discrimination</i> ) (available on the following website <a href="http://www.diversiteit.be">http://www.diversiteit.be</a> )   | January 2009   | All grounds listed in article 13 EC plus nationality, colour, ancestry and national or social origin, pregnancy, childbirth, maternity leave and transgender, civil status (married/non married), birth, wealth/income, political opinion,   | Administrative, civil, criminal     | Selection, promotion, working conditions, including dismissals and pay regarding its own public service, education and vocational training, health policy, social advantages, membership of, and involvement in a   | Prohibition of direct and indirect discrimination, instruction to discriminate, harassment and sexual harassment and the failure to provide reasonable accommodation for persons with |

| Title of Legislation (including amending legislation)  | In force from: | Grounds covered  | Civil/Administrative / Criminal Law | Material Scope   | Principal content   |
|--|----------------|--|-------------------------------------|--|---|
|  |                | language, present or future state of health, physical or genetic characteristics   |                                     | professional organisation funded by the French-speaking Community, access to goods and services at disposal of the public as long as they fall into the field of competence of the French Community.   | disabilities; civil remedies, and criminal provisions   |
| Walloon Region: Decree of the Walloon Region of the 6 November 2008 on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training ( <i>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</i> ) (available on the following website: <a href="http://www.ejustice.just.fgov.be/c">http://www.ejustice.just.fgov.be/c</a> ) | December 2008  | All grounds listed in article 13EC plus nationality, colour, ancestry and national or social origin, civil status (married/non married), birth, wealth/income, political opinion, language, present or future state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave and transgender | Administrative, civil, criminal     | Economy, employment and vocational training as long as they fall into the competences of the Walloon Region and, more precisely, vocational guidance, socio-professional integration, placing of workers, funding for the promotion of employment, funding for employment and financial incentives to companies in the framework of the economic policy, | Prohibition of direct and indirect discrimination, instruction to discriminate, harassment and sexual harassment and the failure to provide reasonable accommodation for persons with disabilities; civil remedies, and criminal provisions |





| Title of Legislation (including amending legislation)   | In force from: | Grounds covered   | Civil/Administrative / Criminal Law | Material Scope   | Principal content   |
|---|----------------|---|-------------------------------------|--|---|
| gi/welcome.pl)  |                |   |                                     | including social economy and vocational training, in the public and the private sectors.   |   |
| 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 (Décret programme) of 25 June 2007 (published on the 26 October 2007) (available on the following website <a href="http://www.diversiteit.be">http://www.diversiteit.be</a> ) | August 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 the Region of Brussels-Capital adopted on 4  | September 2008 | All grounds listed in article 13 EC plus political opinion, civil   | Administrative, civil, criminal     | Employment field which covers, at that regional level, the   | Prohibition of direct and indirect discrimination,  |

| Title of Legislation (including amending legislation)  | In force from: | Grounds covered   | Civil/Administrative / Criminal Law | Material Scope  | Principal content   |
|--|----------------|---|-------------------------------------|---|---|
| September 2008 related to the fight against discrimination and equal treatment in the employment field ( <i>Ordonnance relative à la lutte contre la discrimination et à l'égalité de traitement en matière d'emploi</i> ) (available on the following website: <a href="http://www.ejustice.just.fgov.be/cgi/welcome.pl">http://www.ejustice.just.fgov.be/cgi/welcome.pl</a> )  |                | status (married/non married), birth, wealth/income, language, state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave, transgender, nationality, colour, ancestry, national or, social origin.   |                                     | placement of workers policies and the policies dedicated to unemployed persons.   | harassment and sexual harassment and instruction to discriminate; civil remedies, and criminal provisions.  |
| Region of Brussels-Capital: Ordinance related to the promotion of diversity and the fight against discrimination in the civil service of the Region of Brussels-Capital adopted on 4 September 2008 ( <i>Ordonnance visant à promouvoir la diversité et à lutter contre la discrimination dans la fonction publique régionale bruxelloise</i> ) (available on the following website: <a href="http://www.ejustice.just.fgov.be/cgi/welcome.pl">http://www.ejustice.just.fgov.be/cgi/welcome.pl</a> ) | September 2008 | All grounds listed in article 13 EC plus political opinion, civil status (married/non married), birth, wealth/income, language, state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave, transgender, nationality, colour, ancestry, national or, social origin. | Administrative, civil, criminal     | Employment field in the civil service of the Region of Brussels-Capital: access conditions, criteria selection, promotion, work conditions, including dismissals and pay. | Prohibition of direct and indirect discrimination, harassment and sexual harassment and instruction to discriminate; civil remedies, and criminal provisions. |



| Title of Legislation (including amending legislation)  | In force from: | Grounds covered                             | Civil/Administrative / Criminal Law | Material Scope   | Principal content   |
|--|----------------|---|-------------------------------------|--|---|
| <i>Commission communautaire française (Cocof):</i><br>Decree on equal treatment between persons in vocational training of 22 March 2007<br><i>(Décret relatif à l'égalité de traitement entre les personnes dans la formation professionnelle)</i><br>(available on the following website<br><a href="http://www.juridat.be/cgi_loi/loi_F.pl?cn=2007032251">http://www.juridat.be/cgi_loi/loi_F.pl?cn=2007032251</a> ) | January 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 March 2009

| <b>Instrument</b>   | <b>Signed<br/>(yes/no)</b> | <b>Ratified<br/>(yes/no)</b> | <b>Derogations/ reservations<br/>relevant to equality and non-<br/>discrimination</b> | <b>Right of<br/>individual<br/>petition<br/>accepted?</b>     | <b>Can this instrument be<br/>directly relied upon in<br/>domestic courts by<br/>individuals?</b> |
|---|----------------------------|------------------------------|---|---|---|
| European Convention<br>on Human Rights<br>(ECHR)                          | Yes                        | Yes, 14<br>June<br>1955      | No  | N/A   | Yes   |
| Protocol 12, ECHR   | Yes                        | No                           |   | N/A   |   |
| Revised European<br>Social Charter  | Yes                        | Yes, 2<br>March<br>2004      |   | Protocol on<br>collective<br>complaints ratified<br>23.6.2003 |   |
| International Covenant<br>on Civil and Political<br>Rights                | Yes                        | Yes, 21<br>April<br>1983     | No  | Ratified Optional<br>Protocol on<br>17.5.1994                 | Yes   |
| Framework<br>Convention<br>for the Protection of<br>National Minorities   | Yes                        | No                           |   |   |   |
| International<br>Convention on<br>Economic, Social and<br>Cultural Rights | Yes                        | Yes, 21<br>April<br>1983     | No  | N/A   | No  |

| <b>Instrument</b>   | <b>Signed<br/>(yes/no)</b> | <b>Ratified<br/>(yes/no)</b> | <b>Derogations/ reservations<br/>relevant to equality and non-<br/>discrimination</b> | <b>Right of<br/>individual<br/>petition<br/>accepted?</b> | <b>Can this instrument be<br/>directly relied upon in<br/>domestic courts by<br/>individuals?</b> |
|---|----------------------------|------------------------------|---|---|---|
| Convention on the Elimination of All Forms of Racial Discrimination | Yes                        | Yes, 7 August 1975           | No  |   | Yes   |
| Convention on the Elimination of Discrimination Against Women       | Yes                        | Yes, 10 July 1985            | No  | Optional Protocol signed 12.1999                          | Yes   |
| ILO Convention No. 111 on Discrimination                            | Yes                        | Yes, 22 March 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 March 2007         | No                           | No  | Signed Optional Protocol on 30.3.2007                     |   |