



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

**COUNTRY REPORT 2010**

**BELGIUM**

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**State of affairs up to 1 January 2011**

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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 among 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 anti-discrimination 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>.

<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.

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: the various entities may not legislate beyond their competences, even under the pretext of ensuring compliance with the State's international obligations.

With respect to the implementation of the principle of equal treatment in the fields to which only Directive 2000/43/EC applies (social protection, including social security and healthcare; social advantages; education; access to and supply of goods and services which are available to the public, including housing<sup>7</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>8</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) .

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

<sup>8</sup> *Loi portant des dispositions en matière de baux à loyer, Moniteur belge, 5 June 2007*.

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>9</sup>; the Communities have been granted competences relating to vocational training<sup>10</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.

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>11</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>12</sup>.

<sup>9</sup> Art. 6(1), IX, 1° and 2° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.

<sup>10</sup> Art. 4, 15° and 16° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.

<sup>11</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>12</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.





## 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.*

*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 (if at all) national law has given rise to complaints or changes, including possibly 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 bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the domestic society (such as immigration law issues) are not appropriate for inclusion in this report.*

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

### 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>13</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>14</sup>.

<sup>13</sup> *Moniteur belge*, 8 August 1981.

<sup>14</sup> *Moniteur belge*, 17 March 2003.



The Federal Act of 25 February 2003 was covering numerous grounds of discrimination (age, sexual orientation, civil status, birth, property, 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>15</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>16</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>17</sup>:

- 1 The Federal Act amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia, hereafter the "Racial Equality Federal Act". This Act aims at implementing both the Racial Equality Directive and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, in one single legislation prohibiting discrimination on grounds of alleged race, color, descent, national or ethnic origin, and nationality. This Act contains civil law provisions, and does not only address criminal law.

<sup>15</sup> For instance, the Federal Act of 25 February 2003 was covering the reference in an official document.

<sup>16</sup> For more details on the reasons of the overruling, see the 2007 report on Belgium (section 0.3.).

<sup>17</sup> In addition, a fourth Act, also adopted on 10 May 2007, seeks to amend the Judicial Code 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*).

- 2 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>18</sup> in order to implement the directives adopted on the basis of Article 157 Treaty on the Functioning of the European Union (TFEU) (Directive 76/207/EEC, as amended by Directive 2002/73/EC, is expressly mentioned, but not Directive 2006/54/EC) and Article 19 FEU (Directive 2004/113/EC).
- 3 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 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 Anti-discrimination Act of 25 February 2003 (age, sexual orientation, civil status, birth, property, 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>19</sup>.

The applicants were successful chiefly to the extent that the Court considered that the exclusion of the trade union opinion<sup>20</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.

<sup>18</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>19</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>20</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.

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). On 30 December 2009<sup>21</sup>, the General Anti-discrimination Federal Act was amended in order to include the trade union opinion among the discrimination grounds, pursuant to the decisions of the Constitutional Court.

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 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 2*bis* 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<sup>25</sup>. In line with this commitment, a new Collective agreement was signed on 10 October 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<sup>26</sup>.

<sup>21</sup> Articles 107 to 119 of the *loi portant des dispositions diverses*, *Moniteur belge*, 31 December 2009, p. 82925.

<sup>22</sup> *Convention collective du travail no. 38 concernant le recrutement et la sélection de travailleurs*, made compulsory by Executive Regulation on 31 August 1999 (*Arrêté royal du 31 août 1999 rendant obligatoire la Convention collective du travail no. 38* quater du 14 juillet 1999, conclue au sein du Conseil national du travail, modifiant la convention collective du travail no. 38 du 6 décembre 1983, modifiée par les conventions collectives du travail n°38*bis* du 29 octobre 1991 et 38*ter* du 17 juin 1998, *Moniteur belge*, 21 September 1999). The original text of 1983 was modified by Collective Agreements no. 38*bis* of 29 October 1991, no. 38*ter* of 17 July 1998, no. 38*quater* of 14 July 1999, no. 38*quinquies* of 21 December 2004, and lastly no. 38*sexies* of 10 October 2008.

<sup>23</sup> The most recent version of Article 2*bis* in the Collective agreement includes two new grounds of prohibited discrimination, sexual orientation and disability. This change, agreed upon by the most representative organisations of employers and workers on 14 July 1999, followed the ratification of the Treaty of Amsterdam of 2 October 1997 by the Federal Act of 10 August 1998 (*Moniteur belge*, 10 April 1999).

<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 the Collective agreement no. 38.

<sup>25</sup> This is not the case in the interprofessional agreement 2009-2010 (see <http://www.cnt-nar.be/DOC-DIVERS/IPA-AIP/IPA%202009-2010-FR.pdf>).

<sup>26</sup> *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)<sup>27</sup>.

## **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.

### **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. 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>28</sup>, which seeks both to prohibit direct and indirect discrimination on the grounds listed in Article 19 TFEU<sup>29</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>30</sup>. The second is the Decree of 28 June 2002 on equal opportunities in the education field (*Decreet betreffende gelijke onderwijskansen*)<sup>31</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.

<sup>27</sup> Note that there is also the Collective Agreement no. 26 on the level of pay of workers with disabilities fulfilling a normal job of 15 October 1975 (*Convention collective du travail no. 26 concernant le niveau de rémunération des travailleurs handicapés occupés dans un emploi normal*), as amended by Collective Agreement no. 99 of 20 February 2009. It aims at providing workers with disabilities a salary equivalent to this allocated to other workers.

<sup>28</sup> *Moniteur belge*, 26 July 2002, p. 33262. This Decree was lastly modified on 30 April 2009, *Moniteur belge*, 26 May 2009, p. 38704.

<sup>29</sup> This limitation to the seven grounds listed in Article 19 TFEU 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>30</sup> In contrast to the French-speaking part of Belgium, the Region and Community are merged in the Flemish part.

<sup>31</sup> *Moniteur belge*, 14 September 2002, p. 40909.

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>32</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>33</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. The Flemish Government created several Equality bodies whose missions are in line with the requirements of Directive 2000/43/EC<sup>34</sup>. There is one important innovation in the Decree which is the establishment of “Equal treatment offices” or “contact points” (*Gelijkebehandelingsbureau* or *Meldpunten*) in the main Flemish cities<sup>35</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 one shortgap regarding the implementation of Article 13 of Directive 2000/43/EC: 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/EC.

<sup>32</sup> *Moniteur belge*, 23 September 2008, pp. 49410-49424.

<sup>33</sup> Art. 20, 8° of the Framework Flemish Decree.

<sup>34</sup> Art. 40 of the Framework Flemish Decree.

<sup>35</sup> Art. 42-43 of the Framework Flemish Decree. These 13 contact points are located in Aalst, Antwerpen, Brugge, Genk, Gent, Hasselt, Kortrijk, Leuven, Mechelen, Roeselare, Sint-Niklaas, Turnhout and Willebroeck. More information is available in Dutch at <http://www.gelijkekansen.be/Meldpunten%20discriminatie/>. See also the website of the CECLR: <http://www.diversite.be/?action=onderdeel&onderdeel=50&titel=Links>.



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. The negotiations of such an agreement have not made any real progress as Belgium is under a caretaker Federal Government since the last federal elections, in June 2010<sup>36</sup>.

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 was chiefly based on the exclusion of the trade union opinion (*conviction syndicale*) from the discrimination grounds listed in the Flemish Decree. On 16 July 2009, the Constitutional Court issued a similar ruling as it had held with respect to the General Anti-discrimination Federal Act<sup>37</sup> and considered that the exclusion of the trade union opinion from the discrimination grounds listed in the Flemish Decree is in breach of the constitutional principle of equality and non-discrimination<sup>38</sup>.

## 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>39</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>40</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. The result is in line with the requirements of Directives 2000/43/EC and 2000/78/EC.

<sup>36</sup> A caretaker government operates in the interim period between the dissolution of parliament for the purpose of holding an election and the formation of a new government after the election results are known. The Caretaker government is usually expected to handle daily issues or emergency matters but is not expected to adopt important decisions or to introduce controversial bills. The problem is that this caretaker government is governing Belgium for nine months (1<sup>st</sup> March 2011).

<sup>37</sup> Case no. 64/2009, detailed *infra*, in section 0.3.

<sup>38</sup> Case no. 122/2009, detailed *infra*, in section 0.3.

<sup>39</sup> *Moniteur belge*, 13 January 2009, pp. 974-987.

<sup>40</sup> *Moniteur belge*, 7 June 2004.

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). Two Protocols of Collaboration were signed in February 2009 between the French-speaking Community, the Centre for Equal Opportunities and Opposition to Racism and the Institute for Equality of Women and Men, in order to make these equality bodies competent in the French-speaking Community. In the Centre for Equal Opportunities and Opposition to Racism, these have been implemented as five persons are especially in charge of the matters connected to the French-speaking Community and the Walloon Region.

### 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>41</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>42</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.

<sup>41</sup> *Moniteur belge*, 19 December 2008, pp. 67338-67344.

<sup>42</sup> *Moniteur belge*, 23 June 2004.



For instance, the victim, the Centre for Equal Opportunities and Opposition to Racism, the Institute for Equality between Women and Men and other organizations may issue an injunction to court in order to stop a discriminatory behaviour. Except in criminal proceedings, if the victim has a *prima facie* case of discrimination, the burden of proof then shifts to the defendant who has to prove the absence of discrimination. Furthermore, the victim can choose between full compensation for the damage or a lump-sum compensation fixed by the Decree. The Decree also 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).

In February 2009, two Protocols of Collaboration were signed between the Walloon Region and the Centre for Equal Opportunities and Opposition to Racism as well as the Institute for Equality of Women and Men, in order to entrust these equality bodies with the mission of providing independent assistance to victims (as to conciliation: Art. 16; as to legal standing: Art. 30).

In March 2009, this Decree was 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>43</sup>. 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 6 November 2008, are included in the material scope (Art. 5): 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 is achieved in the Walloon Region. However, in June 2009, a trade union launched an action in partial annulment of the Walloon Decree of 12 December 2008. This action was chiefly based on the exclusion of the trade union opinion (*conviction syndicale*) from the discrimination grounds listed in the Walloon Decree. On 22 April 2010, the Constitutional Court issued the same rulings as these held with respect to the General Anti-discrimination Federal Act (case no. 64/2009), the Flemish Decree of 10 July 2008 (no. 122/2009) and the Ordinance of the Region of Brussels-Capital of 4 September 2008 (no. 123/2009), i.e. considering that the exclusion of the trade union opinion from the discrimination grounds listed in the Walloon Decree is in breach of the constitutional principle of equality and non-discrimination<sup>44</sup>.

<sup>43</sup> The Decree of 19 March 2009 was published in the *Moniteur belge* of 10 April 2009 (p. 28 557).

<sup>44</sup> Case no. 35/2010, detailed *infra*, in section 0.3.

#### 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>45</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 (*zwischengeschalteten 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>46</sup>. There seems, however, to be still a gap in the implementation as discrimination based on race or ethnic origin in education and in access to goods and services 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>47</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 (ACTIRIS) 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>48</sup>.

Two Ordinances fighting against discrimination were adopted in September 2008. 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>49</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.

<sup>45</sup> *Moniteur belge*, 13 August 2004.

<sup>46</sup> Programmatic Decree (*Décret programme*), 25 June 2007, *Moniteur belge*, 26 October 2007.

<sup>47</sup> *Moniteur belge*, 29 July 2003.

<sup>48</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.

<sup>49</sup> *Moniteur belge*, 16 September 2008, pp. 48144-48150.

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>50</sup>. In this respect, it should be kept in mind that on 24 March 2009, a trade union, the National Central of Employees, launched an action in partial annulment of the Ordinance of 4 September 2008. This action was chiefly based on the exclusion of the trade union opinion (*conviction syndicale*) from the discrimination grounds listed in the Ordinance. On 16 July 2009, the Constitutional Court issued a similar ruling as it had held with respect to the General Anti-discrimination Federal Act<sup>51</sup> and considered that the exclusion of the trade union opinion from the discrimination grounds listed in the Ordinance is in breach of the constitutional principle of equality and non-discrimination<sup>52</sup>. On 9 December 2010<sup>53</sup>, the Ordinance was amended in order to include the trade union opinion among the discrimination grounds.

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. In January 2011, nothing has been achieved yet as the Federal Government has been a caretaker government since June 2010. 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. The Government has recently defined the conditions and details concerning those diversity plans and labels<sup>54</sup>.

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>55</sup>. This Ordinance implements Directives 2000/43/EC, 2000/78/EC and Directive 76/207/EEC (as modified by Directive 2002/73/EC).

<sup>50</sup> Note that there are explicit references to pregnancy, birth and maternity as well as to transgender.

<sup>51</sup> Case no. 64/2009, detailed *infra*, in section 0.3.

<sup>52</sup> Case no. 123/2009, detailed *infra*, in section 0.3.

<sup>53</sup> Ordinance of 9 December 2010 modifying Ordinance of 4 September 2008 on the fight against discrimination and equal treatment in the employment field, *Moniteur belge*, 17 December 2010, p. 77852.

<sup>54</sup> Executive Regulation of 7 May 2009 relating to the diversity plans and the diversity label (*Arrêté du gouvernement de la Région de Bruxelles-Capitale du 7 mai 2009 relatif aux plans de diversité et au label de diversité*), *Moniteur belge*, 2 June 2009, p. 39655, completed by two Ministerial Executive Regulations of 20 January 2010, *Moniteur belge*, 29 January 2010, pp. 4038 and 4199.

<sup>55</sup> *Moniteur belge*, 16 September 2008, pp. 48150-48157.

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 January 2011, no Executive Regulation has been adopted yet. In the opinion of the authors, the mission of the conciliation service and that of the equality bodies would need to be coordinated. 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>56</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* (hereinafter *Cocof*), to which the French-speaking Community has transferred its competences concerning vocational training, tourism, social advancement, school transport, health policy and assistance for people in 1993, adopted two Decrees aimed at implementing the EU Anti-discrimination Directives.

First, the Decree on equal treatment between persons in vocational training was adopted on 22 March 2007 (*Décret relatif à l'égalité de traitement entre les personnes dans la formation professionnelle*)<sup>57</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>58</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”).

<sup>56</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>57</sup> *Moniteur belge*, 24 January 2008, p. 3786.

<sup>58</sup> Art. 11 of the Decree of 22 March 2007.

In this list, those referred to in the Federal Anti-discrimination Acts of 2007<sup>59</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). However there are no provision on victimisation, nor on making void discriminatory contractual provisions<sup>60</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. 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. In this respect, some progress has been made in 2009 (see, *infra*, section 7).

The second Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment was adopted on 9 July 2010 (*Décret relatif à la lutte contre certaines formes de discrimination et à la mise en oeuvre du principe de l'égalité de traitement*)<sup>61</sup>. The purpose of this legal instrument is to lay down a general and harmonised framework for combating certain forms of discrimination and for promoting equal treatment in the fields of competences of the *Cocof*. The Decree is designed to implement Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC in the fields of (Art. 4 § 1) school transport and school building management (1°), municipal, provincial, inter-municipal and private facilities with regard to physical education, sports and outdoor life (2°), tourism (3°), social advancement (4°), health policy (5°), assistance for people<sup>62</sup> (6°), access to goods and services (7°), access, participation and any other exercise of economic, social, cultural or political activities publicly available (8°) and labour relations within public institutions of the *Cocof* (Art. 4 § 2). As regards the promotion of diversity within public institutions, each public institution of the *Cocof* is required to develop a diversity action plan (Art. 6). This piece of legislation prohibits direct, indirect discrimination, injunction and harassment based on a list of prohibited criteria in line with the Federal Anti-discrimination Acts (age, sexual orientation, civil status, birth, property, religious or philosophical belief, political or trade union opinion, language, actual or future state of health, disability, physical or genetic characteristic, sex, pregnancy, motherhood, childbirth, gender reassignment, nationality, alleged race, skin colour, descent and national, ethnic or social origin).

<sup>59</sup> Art. 3 of the Decree of 22 March 2007.

<sup>60</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.

<sup>61</sup> *Moniteur belge*, 3 September 2010, p. 56434.

<sup>62</sup> This competence covers social assistance, integration of migrants, policy dedicated to disabled persons or older persons.



The Decree also provides that denying reasonable accommodation to a person with a disability amounts to discrimination (Art. 9 § 2). It states that a difference in treatment which is based on a characteristic related to any of the grounds referred to in Article 5, 2°, with the exception of sex, does not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate (Art. 10). The Decree also provides that any provision contrary to the Decree or any contractual provision according to which one or several parties renounce to their rights under the Decree are declared null and void (Art. 15). As regards remedies and enforcement, the Decree is very similar to the Federal Acts of 2007 on issues such as the burden of proof (Art. 25), victimisation (Art. 26), legal standing of organizations (Art. 28), injunction procedure (*action en cessation*) (Art. 17), criminal provisions, etc. According to Article 27, the Executive of the *Cocof* has to designate one or several bodies whose missions are to bring actions to court in case of discrimination referred to in Article 5, 2°, to assist victims of discrimination and to write independent reports and studies, and make recommendations, about any topic with regard to discrimination.

**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. If one excepts the omission of trade-union opinion from the list of prohibited criteria (which is not required by EU law and which was anyway included in the General Anti-discrimination Federal Act on 30 December 2009), 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 Anti-discrimination 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 anti-discrimination legislation. This does not have the effect to immunize any statutory law that 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 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 (independence of the centralized 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, 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. With the entry into force (on 20 April 2009) of the 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), the implementation of the EU Directives is 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 was filled with the amendment, on 19 March 2009, of the Ordinance of 17 July 2003 creating the Brussels Housing Code. There are, however, still 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)<sup>63</sup>. 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 were still shortcomings (no protection against victimisation, no provision making void discriminatory contractual provisions, only disciplinary sanctions). With the adoption of a second Decree in July 2010 on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment, henceforth covering all the fields of competences of the *Cocof* and in line with the Federal Anti-discrimination Acts of 2007, the implementation of the EU Directives is achieved with regard to the *Cocof*. However, the 2010 Decree, like the Federal Acts of 2007 enshrines a "safeguard provision", which might be problematic (see observations *supra*).
- 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 some 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.

<sup>63</sup> In this line, see the opinion of the CECLR published on its website.

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>64</sup>, apart from filing legal suits, in the fields covered by the Decrees of the Walloon Region and of the French-speaking Community. A team of 5 people is currently working in the Centre for Equal Opportunities and Opposition to Racism under the umbrella of these Protocols. At the moment of drafting the report, such a Protocol has not yet been signed with the Region of Brussels-Capital and the *Cocof* as the Federal Government has been a caretaker government since June 2010.

### 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 (formerly *Cour d'arbitrage*, henceforth *Cour Constitutionnelle*)

**Date of decision:** 5 October 2005

<sup>64</sup> These traditional missions are providing assistance to victims, conducting surveys, publishing reports and issuing recommendations.

**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.const-court.be](http://www.const-court.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 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 10 October 2007 of the Court of Assizes (*Cour d'assises*)<sup>65</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

**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.

<sup>65</sup> The *Cour d'assises* is a criminal Court with a popular jury.

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. 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.const-court.be](http://www.const-court.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 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 Judicial Code. 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 sale woman who, after several years on sick leave, came back to work wearing the Islamic headscarf and did not comply with her employer's order not to wear it at work. The employee was sacked with not compensation and no 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 Appeal Court 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 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 this 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>66</sup>.

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

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<sup>66</sup> Ref. no. 08/857: *De W.Z.W. Koninklijke Belgische Voetbalbond v. Pieter Vandevenne*.

**Reference number:** 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.const-court.be](http://www.const-court.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>67</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>68</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.

<sup>67</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 Titel VII van de Vlaamse Wooncode*), *Moniteur belge*, 7 December 2007, p. 60.428

<sup>68</sup> The municipalities with linguistic facilities are located around Brussels and along the linguistic border that 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.

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. 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>69</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>70</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).

<sup>69</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>70</sup> Appeal Court (*Cour d'appel*) of Liège, 6 February 2006, *Jurisprudence Liège, Mons et Bruxelles*, 2006/15, p. 661664.

The case has been remanded to another Court of Appeal and was still pending in January 2011.

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:** Judgments nos. 17/2009, 39/2009, 40/2009, 64/2009

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

### **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>71</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).

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.

<sup>71</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.



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 legal uncertainties, some of them have been partially clarified since the General Anti-discrimination Federal Act was amended on 30 December 2009<sup>72</sup> in order to include the trade union opinion among the discrimination grounds, pursuant to the decisions of the Constitutional Court. However, the legislator missed the opportunity to amend the Federal Act of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism the same way. As a consequence, it remains unclear whether 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, should consider 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

#### 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.

<sup>72</sup> Articles 107 to 119 of the *loi portant des dispositions diverses*, *Moniteur belge*, 31 December 2009, p. 82925.

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.

## 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.

### 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.

#### 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.

#### 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

#### 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>73</sup> concerning the situation of unidentifiable victims.

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<sup>73</sup> Case C-54/07, 10 July 2008.

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*).

## 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. 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

### 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).

## 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:** First, the 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)

### 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).

### 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 that 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**

### 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).

### 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.

### 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.

Judgment of 25 February 2009 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:** 25 February 2009**Name of the parties:** Joris Verbruggen v. Centre for Equal Opportunities and Opposition to Racism**Reference number:** no. 2009/1837

**Brief summary of the key points of law:** Mr. Verbruggen, manager of a gym called "Better Bodies" and located in Antwerp (Flanders), appealed against a decision of the President of the Court of First Instance of Antwerp of 25 September 2008. The action had been brought by the Centre for Equal Opportunities and Opposition to Racism on the basis of the former Federal Anti-discrimination Act of 25 February 2003 and the Federal Act of 30 July 1981 criminalising certain acts inspired by racism and xenophobia. The action was aimed in particular to establish that Mr. Verbruggen refused people the right to be members of the gym because of their supposed race, color, descent or national or ethnic origin. Many people of non-EU origin and background (*allochtones*), mostly men, had indeed been denied entry, allegedly because the gym was full, and they had filed a complaint. Various witnesses were heard at the beginning of 2007. Mr. Verbruggen claimed he only refused customers who would disturb other customers. Furthermore, he argued that a certain degree of confidence would be required to operate a fitness center, in order to achieve a harmonious group of customers, without "hecklers". In first instance, the judge nevertheless shared the Centre's opinion and ordered an end be put to the direct discrimination under penalty of 2,500 Euros fine per new offence. The judge based its decision not only on the corroborating statements of the witnesses called by the Centre, but also and especially on a situation test developed and broadcasted by the VRT (Flemish public television) in late 2005. In this test, an *allochtone* candidate appeared at the gym to enroll and was refused, whereas shortly after a white candidate could sign up without any difficulty. Consequently, the burden of proof had been shifted and Mr. Verbruggen had failed to prove he had not been discriminating.

On appeal, the Court reversed this decision by holding that:

- The former Federal Anti-discrimination Act of 25 February 2003 referred to "facts, such as statistical evidence or situation testing" (Art. 19 § 3; the words "situation testing" were deleted in the 2007 Acts). However, an Executive Regulation has not been adopted in order to define the conditions of admissibility for situation tests in the context of discrimination suits (cf. *infra*, section 2.2). According to the Court, there was no legal foundation for using situation testing as a way of shifting the burden of proof;
- The Centre had thus to prove the existence of direct discrimination while such evidence did not derive from the situation test;
- The police found the presence of *allochtones*, including veiled women, in the gym and on the membership list;

- Testimonies surrounding the making of the television programme are contradicted by Mr. Verbruggen's witnesses explaining that many *allochtones* regularly train in the gym;
- The fact that some *allochtones* find it difficult to register and must provide references does not imply the existence of a systematic discrimination issue.

The Centre for Equal Opportunities criticised this decision that misinterpreted the legislation by holding that situation testing could not be used notwithstanding the fact that the Government has not adopted the regulation specifying the conditions under which such testing may be proven, contrary to what had been decided by the Court of Appeals of Ghent in a 30 November 2005 judgment (cf. *infra*, section 2.2).

Ruling of 10 March 2009 of the European Court on Human Rights, *Cakir v. Belgium*

**Name of the Court:** European Court on Human Rights (ECtHR)

**Date of decision:** 10 March 2009

**Reference number:** application no. 44256/06

**Name of the parties:** *Cakir v. Belgium*

**Brief summary of the key points of law:** The case concerned a Belgian citizen of Turkish origin who claimed that he had been subjected to ill-treatment and racist insults by police forces, during his arrest and police custody. The facts were in dispute between the parties, but some elements could be established with certainty. The applicant's arrest happened on 17 March 1996, when three police officers came to the family's home to arrest his brother. The applicant intervened in a certain way in that arrest and he was pinned to the ground by the police forces. The police officers were surrounded by people who began to strike and insult them. The applicant was brought to the police headquarter. Finally he was brought in an ambulance to the hospital where he stayed for ten days. On the next day of his arrest, a medical certificate recorded many marks of ill-treatment on the applicant's body. Other medical certificates from 8 and 10 years after the incidents (2004 and 2006) recorded some serious after-effects for the applicant.

Regarding the subjective versions of the facts, the applicant alleged that he had been pinned to the ground, handcuffed and struck by three police officers. He had then been dragged along the ground to a vehicle, and had been subjected to racist threats and insults during the journey to the police station ("dirty wog (*mètèque*), you're nothing but a wog and you'll always be one", "you're nothing but a bloody towel-head (*bougnoule*), and you'll always be one"), where police officers had struck him again and hit him on the head with a seat and a telephone directory. While the Belgian Government alleged that the police officers had only pinned him to the ground using the necessary force to control the applicant who was under the influence of drugs. Moreover, he might have been kicked by the people surrounding the police officers "in the fire of the fight".

On 22 March 1996 the applicant initiated a criminal complaint together with an application to join the proceedings as a civil party for assault and battery, honour violation, and breach to the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia. In 1997, he asked for more preparatory inquiries to be done. At the end of those proceedings, the Belgian Court ruled in October 2000 that there was no case to examine. The applicant interjected appeal against that decision. He asked four times for the case to be adjudicated before the Appeal Court, which never occurred. As a result, the case has never been examined on appeal and eventually, in April 2006, the Appeal Court ruled that any prosecution was time-barred. In a letter dated of February 2006, the Minister of Justice admitted that the case had not been investigated with the due diligence required and claimed that it was due to a malfunctioning in the domestic proceedings. Before the ECtHR, the applicant relied on Articles 3 (prohibition of torture, inhuman or degrading treatment), 6 § 1 (right to a fair trial), 13 (right to an effective remedy) and 14 (prohibition of discrimination) in conjunction with Article 3 of the Convention, complaining that he had been ill-treated during his arrest and police custody and that the Belgian authorities had failed to conduct an effective investigation into these allegations. He also argued that this had been motivated by racial discrimination.

The ECtHR unanimously held that there had been a violation of Article 3 of the Convention on the basis of the ill-treatment inflicted on the applicant by the police and the ineffectiveness of the investigation conducted into the incident. It also held unanimously that there had been a violation of Article 3 in conjunction with Article 14, considering that the Belgian authorities had not carried out all the necessary measures to examine whether the police officers' conduct had been motivated by discriminatory behaviour. Belgium was condemned to the payment of 15 000 Euro to the victim as a just satisfaction.

Regarding the substantive branch of Article 3 of the Convention, the ECtHR recalled that the State is responsible for proving its innocence for injuries suffered by a person during police custody. Even if the versions of the parties differed substantially, the Court could not accept the argument that the injuries sustained by the applicant were the result of his fall to the ground and certain blows that he received in error from individuals taking part in the disruption, particularly knowing the consequences of the events (10 days hospital and after-effects 10 years after). Therefore, the Court considered that it had not been shown that the use of force by the police officers had been made strictly necessary by the applicant's conduct and concluded that there had been a violation of Article 3.

Regarding the procedural part of Article 3 of the Convention, the ECtHR recalled that, when a citizen alleges to have been ill-treated by the police forces of the State, the authorities have an obligation, under Article 3, to officially and effectively investigate into those allegations. Article 3 requires also the investigation to be done with diligence and in due time.

Regarding the ruling of the Appeals Court of April 2006, the Court held that in cases of police violence, the proceedings or conviction should not be allowed to lapse by becoming time-barred, and the application of measures such as an amnesty or pardon should not be authorised. Therefore, the Court concluded that the investigation had been ineffective, establishing the violation of Article 3.

Regarding Article 14 in conjunction with Article 3, the ECHR confirmed its Grand Chamber ruling in *Nachova v. Bulgaria* (6 January 2005), considering that allegations of racial discrimination by State agents have to be investigated effectively by the State authorities. It observed that the applicant had made special references to racist insults in his criminal complaint and had specifically referred to an infringement of Articles 1 and 4 of the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia. Yet, the Prosecutor considered those offences equivalent to those covered by the other charges, so he did not express an opinion on this part of the complaint. In consequence, the Court considered that the Belgian authorities had not taken all the necessary measures to ascertain whether discriminatory conduct could have played a role in the events in question, and therefore concluded that there had been a violation of Article 14 taken in conjunction with Article 3.

Having in mind its conclusions on the procedural part of Article 3, the Court considered not necessary to examine separately the complaints under Article 6 § 1 and Article 13 of the Convention.

The importance of this condemnation was highlighted by the Belgian League for Human Rights and the MRAX (Movement against Racism Antisemitism and Xenophobia). It denounces the unacceptable impunity of police agents in Belgium. It is worth mentioning that even if the facts happened in 1996, the situation does not seem better nowadays. Actually, in November 2008, Belgium was criticized by the United Nations Committee against Torture because of the high number of ill treatments by the police agents (e.a. racist insults) and the absence of sanctions. Since 2003, when 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 (Article 33-42 of the 2007 General Anti-discrimination Federal Act)<sup>74</sup>. This strengthens the conclusion of the Strasbourg Court that allegations of racial discrimination by State agents have to be investigated effectively by the State authorities.

Judgment of 2 July 2009 of the administrative section of the Council of State (*Conseil d'Etat, section du contentieux administratif*)

<sup>74</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 honour 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*).



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

**Date of decision:** 2 July 2009

**Reference number:** Judgment no. 195.044

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

**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 (ruling no. 175.886), 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 all the schools. The action in suspension, which has been admitted by the Council of State, concerned an appeal by the teacher against her dismissal.

On 2 July 2009, the Council of State (Flemish Chamber of the administrative section) confirmed the preliminary decision adopted on 18 October 2007. It overruled the dismissal of the Islamic teacher in a well-argued decision. First of all, the Council states that the schools were not competent to forbid the wearing of religious symbols in their school regulation because the Flemish Decree on Education of 1998 expressly entrusts the Flemish Central Council of Education with the task of drafting the Declaration of neutrality in Education. Contrary to what was argued by the schools, it was not possible to infer directly a prohibition of wearing religious symbols at school from the Declaration of neutrality in Education. Moreover, as far as proselytism was not proved by the school, the Islamic teacher could have rightly interpreted the Declaration of neutrality as not prohibiting *per se* the wearing of her headscarf.

This is an important decision because it is the first time in Belgium that a Court gives a ruling on the merits in a case concerning the wearing of headscarf at school. This was, however, not the last step of this important controversy that has been lasting for ten years now. On 11 September 2009, the Flemish Education Council (a public authority at the head of 700 public primary and secondary schools in the Flemish Region) decided to prohibit the wearing of visible (*zichtbare*) religious and philosophical symbols at school. This prohibition targets the staff, the professors and the students and concerns primary as well as secondary schools. An exception is admissible during religious or philosophical courses. For the schools of the Flemish Region, which have not yet prohibited religious symbols, the prohibition was suppose to enter into force in September 2010. However, this Flemish Education Council decision was suspended by the Council of State on 18 March 2010, in a ruling no. 202.039 (see *infra*, in section 0.3).

Judgment of 15 July 2009 of the President of the First Instance Court (*Tribunal de première instance – Rechtbank van eerste aanleg*) of Ghent (emergency proceedings)

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

**Date of decision:** 15 July 2009

**Name of the parties:** Marie Gerday (representing her son Dylan Moens) v. Sint-Bavohumaniora and the Flemish Community ; Ronny Van Landuyt and Carine Van De Ginste (representing their daughter Sylvie Van Landuyt) v. Maria Assumpta and the Flemish Community ; Yalçin Batur and Sandra Roose (representing their daughter Charlotte Batur) v. Schoolcomité van het Sint-Franciskusinstituut and the Flemish Community.

It may further be noted that the plaintiffs' procedure was supported by the Flemish Deaf Association (FEVLADO).

**Brief summary of the key points of law:** Dylan, Sylvie and Charlotte are three deaf (but otherwise capable) children attending regular Flemish secondary schools. Because there exists only two suitable special schools for deaf children and because regular schools are the only place where they can get a secondary diploma, they each benefit from a certain amount of hours of deaf interpreting at school (from 195 to 320 hours per academic year, that is 5 to 9 hours a week). However, their parents consider this amount to be insufficient, as it would make it difficult, if not impossible, for their children to follow the courses. Therefore, they filed a suit against both their children's respective schools and the Flemish Community, arguing that the refusal to grant their children more interpreting hours amounts to a denial of reasonable accommodation. Furthermore, they claimed that the current procedure established by the Flemish Government in order to ask for interpreting hours constitutes in itself such a denial. Their action was brought under Article 29 of the Flemish Framework Decree of 10 July 2008 and sought to obtain a judicial injunction ordering the cessation of the denial of reasonable accommodation, the allocation of more interpreting hours, the reform of the procedure and the award of damages to the victims.

The judge began by stating that the financial burden is only one of the elements that must be considered in order to assess whether an accommodation may be deemed reasonable, and is to be set against the advantages of such accommodation. In this regard, the judge referred to the American case *Vande Zande v. State of Wisconsin Department of Administration*<sup>75</sup>, which was cited by the plaintiffs. While the judge completely discharged the schools, he held, on the other hand, that the Flemish Government was wrong in alleging its discretionary competence in this case, as this competence is limited by the legal obligation to provide reasonable accommodations, which the court must enforce.

<sup>75</sup> Court of Appeals, 7<sup>th</sup> Circuit, *Vande Zande v. State of Wisconsin Department of Administration*, 44 F. 3d 538, 5 January 1995, 3 A.D. Cas. 1636.

Then, the judge noted that 1) in the past, a greater amount of interpreting hours had been granted; that 2) in the Netherlands, a hearing-impaired child studying in a regular school has in principle a right to an interpreter during 100% of school hours, and that 3) the Flemish Government does not contest that more support for deaf children is to be wished. As a consequence, the judge stated that there was a presumption that reasonable accommodation had been denied, resulting in the shift of the burden of proof to the Government. As to the arguments of the latter, the judge held that 1) the Flemish Government failed to demonstrate that the limited amount of interpreting hours is only due to a shortage of interpreters or that this shortage could not be dealt with through appropriate measures, and that 2) the fact that the three children concerned are successful at school does not prove that the accommodations currently provided are reasonable. As a result, the Government failed to overturn the presumption that it had denied reasonable accommodation to the plaintiffs.

As far as the procedure is concerned, the judge first held, referring to an opinion of the Dutch Commission for Equal Treatment (*Commissie Gelijke Behandeling*) of 9 February 2005<sup>76</sup>, that the way of handling a request for reasonable accommodation may in itself amount to a denial of such accommodation. According to him, this is the case here, notably because the procedure established by the Flemish Government does not take into account the individual needs of each child for the distribution of interpreting hours among the children.

The judge consequently ordered the Flemish Community to stop the above-mentioned denials of reasonable accommodation and, within five months after the notification of the judgment, to provide the plaintiffs with a package of interpreting hours corresponding to 70% of their school time. The plaintiffs were also awarded 650 Euros of fixed-rate moral damages. The Flemish Community launched an appeal against this decision.

Note: On 27 July 2009, the President of the First Instance Court of Leuven dismissed a similar action brought by a fourth deaf student (Vasco Van Landuyt) against his school and the Flemish Community. The arguments put forward by the plaintiff, who was represented by the same lawyers as in the previous case, were identical. However, the judge dismissed the claim, arguing essentially that the defendants are dependent on the availability of interpreters for the provision of interpreting hours. As a result, the number of these hours should, in his opinion, be seen as reasonable. However, this decision is far shorter and less convincing than that of the Court of Ghent summarily argued.

#### Ruling of 16 July 2009 of the European Court on Human Rights, *Féret v. Belgium*

**Name of the Court:** European Court on Human Rights (ECtHR)

**Date of decision:** 16 July 2009

**Reference number:** application no. 15615/07

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<sup>76</sup> Opinion no. 2005-18, available on the website of the Commission: <http://www.cgb.nl>.

**Name of the parties:** *Féret v. Belgium*

**Brief summary of the key points of law:** At the time of the case, Mr. Féret was the chairman of the extreme-right wing political party “Front National-Nationaal Front” (hereafter, the “Front National”), the editor in chief of the party’s publications and the owner of its website, as well as a member of the House of Representatives (one of the two Chambers of the federal parliament). Between July 1999 and October 2001, the distribution of leaflets and posters by his party, in connection with the election campaigns of the Front National, led to numerous complaints by individuals, associations and the Centre for Equal Opportunities and Opposition to Racism for incitement to hatred, discrimination and violence, filed under the Act of 30 July 1981 which criminalised certain acts inspired by racism or xenophobia.

After several proceedings, the Brussels Court of Appeal held a trial on the merits on 18 April 2006 and sentenced Mr Féret to 250 hours of community service related to the integration of immigrants, together with a 10-month suspended prison sentence. It declared him ineligible to be an electoral contestant in parliamentary or local elections for ten years and it ordered him to pay one euro to each of the civil parties. The Court found that the offending conduct on the part of Mr Féret had not fallen within his parliamentary activity and that the leaflets contained parts that represented a clear and deliberate incitement to discrimination, segregation or hatred, and even violence, for reasons of race, colour or national or ethnic origin. On 4 October 2006, the Court of Cassation dismissed an appeal on points of law submitted by Mr Féret. Mr. Féret lodged an application to the ECtHR on 29 March 2007. He alleged that his conviction for the content of his political party’s leaflets represented an excessive restriction on his right to freedom of expression (art. 10 ECHR).

On 16 July 2009, the ECtHR held that the interference with Mr Féret’s right to freedom of expression had been provided for by law (Act of 30 July 1981 on racism and xenophobia) and had the legitimate aims of preventing disorder and protecting the rights of others (§§ 58 and 59). The ruling chiefly focused on the issue of the necessity of the interference in a democratic society (§§ 60 & sq.). While freedom of expression is important for everybody, it is especially so for an elected representative of the people: he represented the electorate and defended their interests. Only stringent reasons could lead to constrain the political debate. However, the Court reiterated that it is crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. The impact of racist and xenophobic discourse is magnified in an electoral context, in which arguments naturally become more forceful. To recommend solutions to immigration-related problems by advocating racial discrimination was likely to cause social tension and undermine trust in democratic institutions. In the present case there had been a compelling social need to protect the rights of the immigrant community, as the Belgian courts had done. The Court underlined the tremendous importance of fighting against racial discrimination. The Court also considered that incitation of hatred does not necessarily require inciting to commit a peculiar act of violence: to insult, make a fool of or libel specific groups as well as to incite of discrimination is enough.

With regard to the penalty imposed on Mr Féret, the Court noted that the authorities had preferred a 10-year period of ineligibility rather than a penal option, in accordance with the Court's principle of restraint in criminal proceedings. As to article 17 ECHR (abuse of rights), the Court considered that no violation occurred.

The decision of the Court was a tricky one as freedom of speech in the political discourse was weighted against the need of an effective policy of non-discrimination in Europe. This is clearly underlined in the dissenting opinion of three of the 7 judges of the Court.

### Judgments of the Constitutional Court, delivered on 16 July 2009

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

**Name of the parties:** *Landelijke Bediendencentrale – Nationaal Verbond voor Kaderpersoneel* and al. v. Region of Brussels-Capital and Flemish Region/Community.

**Date of decision:** 16 July 2009

**Reference numbers:** Judgments nos. 122/2009 and 123/2009

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

The same trade union organisation ("*Landelijke Bediendencentrale – Nationaal Verbond voor Kaderpersoneel*" and "*Centrale nationale des employés*") which launched an action in annulment against the Federal Anti-discrimination Act of 10 May 2007, launched, for similar reasons, an action in annulment against some regional pieces of legislation. Without any surprise, the Constitutional Court issued the same ruling as the one it issued in the case no. 64/2009 and expressly referred to it.

On the very principle of a closed list of discrimination grounds, as the applicants argued that a closed list was discriminatory against all victims of discrimination based on another ground than those listed in the Flemish Decree (decision no. 123/2009) and in the Ordinance of the Region of Brussels-Capital (decision no. 122/2009), the Court held that the legislator had the power to appreciate which grounds should be listed in statutory law and benefit from a particular legal protection (decisions nos. 122/2009 and 123/2009, para. B.3.2.). Moreover, the Court stressed that the victims of discrimination on other grounds than those listed in the Decree and in the Ordinance are not left without any remedy in Belgian law. On the exclusion of the trade union opinion from the closed list of grounds of the Decree and the Ordinance, the Court referred to its decision no. 64/2009 to rule that this was discriminatory (decisions nos. 122/2009 and 123/2009, para. B.4.3). Consequently, the Court cancelled Article 4, 2° and 3° of the Ordinance of the Region of Brussels-Capital of 4 September 2008, and Article 16, § 3 of the Flemish Decree of 10 July 2008, which contain the list of discrimination grounds, but only as far as they do not target the ground of trade union opinion.



The Court duplicated its ruling in decision no. 64/2009: as far as the annulment is precise and comprehensive, while waiting for a legislative modification, the civil judge faced with a claim of discrimination on the ground of trade union opinion, has to apply the partially cancelled provisions in conformity with Articles 10 and 11 of the Constitution (which endorse the principle of equality and non-discrimination) and, therefore, to act as if the criterion of trade union opinion had been enshrined from the beginning in the closed list of discrimination grounds (decisions nos. 122/2009 and 123/2009, para. B.4.4). 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 (decisions no. 122/2009 and 123/2009, para. B.4.4). The consequences of this annulment are slightly unusual in Belgian Constitutional law, because the Court has actually been completing rather than cancelling a legislative provision. The Court's approach is certainly due to its concern of avoiding a condemnation of Belgium by the European institutions, as it had been the case after the Court ruling no. 157/2004, which had made void the entire closed list of discrimination grounds enshrined in the former General Anti-Discrimination Federal Act of 25 February 2003, on the ground that the exclusion of political belief and language was considered to be in breach with the constitutional principle of equal treatment.

As to the nullity of contractual clauses contrary to the principle of equal treatment, the Court also followed its ruling no. 64/2009 (para. B.12.4), considering that the sanction was applicable to written *and non-written* contractual clauses. The applicants were also arguing that the Decree and the Ordinance, which provide for the nullity of a contractual clause in breach of their provisions, do not comply with the constitutional principle of equality and non-discrimination, as they refer only to clauses written *before* a discriminatory behaviour took place, and not to clauses written at the same time or after the occurrence of the discrimination. According to the Court, 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 cancelled the words "in advance" (*par avance*) in Article 27, § 1 of the Flemish Decree (decision no. 123/2009, para. B. 5.3) and in Article 21 of the Ordinance of the Region of Brussels-Capital (decision no. 122/2009, para. B.5.3).

Judgment of 28 August 2009 by the Labour Appeal Court (*Cour du travail*) of Brussels after 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:** 28 August 2009

**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 considered that an interpretation of the Racial Equality Directive was necessary for the case to be decided, and, on 24 January 2008, it asked the CJUE several questions chiefly related to the issue of the shift of the burden of proof.

On 12 March 2008, Advocate General Maduro delivered his opinion on the case. He mainly focused on the concept of direct discrimination and aimed 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>77</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 did 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>78</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). 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.

<sup>77</sup> Opinion of Advocate General Maduro delivered on 12 March 2008, Case C-54/07, para. 19.

<sup>78</sup> *Ibidem*, para. 23.

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).

On 28 August 2009, the Labour Court ruled that Mr. Feryn, by publicly declaring that his firm was not recruiting any employees of Moroccan origin, was directly discriminating. It ordered the cessation of the discriminatory practice and the publication of this judicial injunction in several newspapers. The decision of the Labour Court is entirely in line with the preliminary ruling of the ECJ. The Centre for Equal Opportunities and Opposition to Racism is particularly proud of this judicial victory and its incidence throughout Europe.

Judgments nos. 191.532 & 191.533 of 17 March 2009 and nos. 196.260 & 196.261 of 22 September 2009 of the administrative section of the Council of State (*Conseil d'Etat, section du contentieux administratif*)

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

**Date of decisions:** 17 March and 22 September 2009

**Name of the parties:** *Movement against Racism, Anti-Semitism and Xenophobia* (MRAX) v. French-speaking Community and *Athénée Royal Vauban*; MRAX v. French-speaking Community and *Athénée Royal de Gilly*; Karadogan, Yilmaz and Colak v. French-speaking Community; Tamarante and Moussaddaq v. French-speaking Community.

**Reference numbers:** Judgments nos. 191.532, 191.533, 196.260, 196.261

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

**Brief summary of the key points of law:** In 2005, two secondary public schools located in the French Community (South of Belgium) changed their internal regulations in order to forbid students to wear any kind of head covering in the school premises.

The NGO *Movement against Racism, Anti-Semitism and Xenophobia* (MRAX) and several parents of the schoolgirls wearing the Islamic headscarf brought applications before the Council of State in order to make void these new regulations (the MRAX has brought 2 actions in annulment (but no emergency proceedings) and the parents have brought 2 actions first in emergency proceedings and after in annulment). They also asked for their suspension during the procedure.

On 2 September 2005, the Council of State issued two decisions in emergency proceedings, one with respect to each school. It refused to suspend these new internal regulations on the ground that the legal requirement of a “serious harm which is likely to be hard to compensate” (*préjudice grave et difficilement réparable*) was not met. The Council of State stressed that the expelled schoolgirls could pursue their education in another school, admitting the wearing of religious symbols, located in the area. According to the Court, the loss of friendship and the tiredness due to a longer journey to go to school could not be deemed to seriously harm the teenagers.

On 17 March 2009, the Council of State issued two decisions on the merits of the cases brought by the MRAX, rejecting the applications in annulment as inadmissible. The Council of State stressed that the corporate aim of the MRAX is to fight against racism, anti-Semitism and xenophobia as well as to promote friendship and peace between nations or equality and fraternity between people. According to the Court, the new regulations “far from being in breach of the corporate aim of the MRAX are actually meeting and strengthening it”. In these decisions, the Council of State entirely overlooked the notion of indirect discrimination.

Finally, in the same case, the Council of State issued, on 22 September 2009, two decisions concerning the action launched by the parents of the girls wearing a headscarf. It, again, ruled that the actions were inadmissible on a purely procedural basis. Indeed, the actions were signed only by the fathers of the girls and not by the mothers as well, while the Civil Code requires, according to the Council of State, that children be represented by both parents. Once again, the Council of State eluded the substantial issue of the legality of banning the wearing of the headscarf at school. Its reasoning is very questionable. Concerning its decisions of 22 September 2009, the Belgian Civil Code (article 373) states that when parents live together, they both exercise, jointly, the parental authority over their child. However, regarding third parties who are of good faith (*“tiers de bonne foi”*), when one of them acts alone, he or she is supposed to act with the agreement of the other one. Without invoking any special rule, and without any explanation, the Council of State considers that, as a tribunal ruling on its regular seizure, it cannot be considered as a “third party of good faith”. So both parents had to launch the action jointly, which had not been done for financial reasons.

It is however obvious that the principle contained in article 373 of the Civil Code serves both the interest of the child and of the parents: in the case that one of the parents does not agree with the act of the other, s/he can complain. Here, the mothers did not complain about that action. On the contrary, they agreed with it and did not sign it for mere financial reasons. Moreover, the Council of State issued rulings in the opposite sense in cases related to child education in at least two previous decisions (no. 80.604, 2 June 1999; no. 132.048, 3 June 2004). It is therefore obvious that, once again, the Council of State did not want to rule on the merits of the case and on the sensitive issue of prohibiting the wearing of religious symbol at school, depriving the Muslim girls and their parents from an effective judicial remedy.

Judgment nos. 196.625 & 196.626 of 2 October 2009 of the administrative section of the Council of State (*Conseil d'Etat, section du contentieux administratif*)

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

**Date of decisions:** 2 October 2009

**Name of the parties:** Kheir v. *Commune de Dison*; Dakir v. *Commune de Dison*

**Reference number:** Judgment nos. 196.625 & 196.626

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

**Brief summary of the key points of law:** The Council of State refused to suspend the school exclusion of three primary schoolgirls who did not comply with the new prohibition of the wearing of conspicuous religious signs at school in a small Walloon town named Dison. The decision is based on the ground that the legal requirement of a "serious harm" (*préjudice grave*) was not met because the parents knew the school's internal regulation and had nevertheless decided to register their daughter in this school. This decision stands in the same line as the previous decision of the French section of the Council of State which unconvincingly rejected the claim for lack of any serious harm suffered by the young girls and their parents.

Judgment of 22 October 2009 of the First instance Criminal Court (*Correctionele rechtbank*) of Antwerp

**Name of the court:** First instance Criminal Court (*Correctionele rechtbank*) of Antwerp

**Date of decision:** 22 October 2009

**Name of the parties:** Centre for Equal Opportunities and Opposition to Racism v. Robert Peys

**Reference number:** no. 2009/4737

**Brief summary of the key points of law:** Mr. Peys is the manager of a company called "L.A. Gym" that has three facilities in Antwerp (Flanders). Mr. Peys was prosecuted for discrimination in the access to and supply of goods and services against a person or a group because of their nationality, race, colour, descent or national or ethnic origin. An anonymous complaint that turned out to have been filed by an employee in 2005 claimed that a discriminatory system had been put in place in L.A. Gym facilities in order to deter *allochtones* from becoming customers.

First, candidates of foreign origin who fill in an information form would never or rarely be contacted back; in this regard, the searches revealed that the register contained annotations like "swarthy". Secondly, the gym would have two different price lists, one of them offering only an "all-in" subscription method, namely by paying a 12-months membership, cash and in advance. This list would be applied only to *allochtones*, while the other, which comprises a whole variety of subscription methods, would only be offered to candidates *autochtones* (who look like they are of Belgian origin or whose name sounds Belgian). The Court discharged the defendant, holding that the evidence is insufficient for the following reasons:



- Only one price list was found during the searches and different employees testified that they did not know of any difference of treatment towards *allochtones*;
- There is no evidence that the defendant gave instructions as to the annotations on the forms, let-alone that he wrote them himself;
- The folder containing the information forms of non-selected candidates was put together by the employee who filed a complaint, and who admits she made a selection, so that this file may not be considered trustworthy.

The Court also took into account the fact that the alleged practices were reported for only one of the three L.A. Gym facilities and that many people of foreign origin were members of this facility. The Centre for Equal Opportunities and Opposition to Racism criticised the decision by recalling that it is legally sufficient, for the existence of a discrimination, that one person is denied entry to one of the facilities because of her/his origin. It is not necessary to prove that the discriminatory practice is systematic.

Judgment of 13 January 2010 of the Court of Appeals (*Cour d'appel*) of Mons

**Name of the court:** Court of Appeals (*Cour d'appel*) of Mons

**Date of decision:** 13 January 2010

**Name of the parties:** Centre for Equal Opportunities and Opposition to Racism v. O. Delcourt

**Brief summary of the key points of law:** The defendant, Olivier Delcourt, was prosecuted on the basis of the Act of 30 July 1981 criminalising certain acts inspired by racism and xenophobia for making the fascist salute during his oath-taking as a city councillor in December 2006. The appeal was filed by the defendant and the prosecution against the judgment of 15 June 2009 of the First Instance Criminal Court (*Tribunal correctionnel*) of Charleroi. The latter judgment had, on the criminal level, condemned Olivier Delcourt to a 1,000 Euros fine for encouraging "discrimination, segregation, hatred or violence towards a group, a community or their members, because of the race, the colour, the ascent or the national or ethnic origin of these members or of some of them" and for giving a publicity to its intention to stir up discrimination, segregation, hatred or violence towards such a group (but not towards a person in particular). In addition, the First Instance Court had sentenced the defendant to the loss of his civil and political rights (notably the right to be elected and to sit in representative bodies) for 5 years. Lastly, on the civil level, the Court had condemned the defendant to pay a lump sum of 1,000 Euros to the Centre for Equal Opportunities and Opposition to Racism.

In appeal, the defendant did not appear. On 13 January 2010, the Court confirmed the above-mentioned ruling, noting that filmed sequences of the installation of Charleroi city council showed Olivier Delcourt taking oath with his arm raised to the vertical and wearing a black glove.

According to the Court, this constitutes an intentional reference to the Nazi salute, which was knowingly carried out in a public place with the intention to stir up hatred, discrimination, violence or racial segregation. The gesture is unambiguous, since the mayor invited the defendant to take oath again and the room expressed its total disapproval with the defendant's behaviour. The Court further noted that the defendant showed his endorsement of the Nazi regime with the following remark, intended for a member of the prosecution office of Charleroi: "Sir, your place is in the camps".

Consequently, the Court confirmed the first instance decision except as to the fine which it increased to 2,200 Euros "in order to take account of the completely unacceptable nature of the message that this individual gesture conveys, of the sinister values that it exhorts and of the attack carried by its publicity on the dignity of an assembly concerned with life in society". The Court finally held that the loss of the defendant's civil and political rights is "essential in order to protect the society from behaviours that are likely to endanger the rule of law aimed at protecting everyone's fundamental rights and freedoms". This decision was confirmed on 30 June 2010 by another judgment of the Court of Appeal of Mons rendered in the presence of both parties.

Judgment of 10 March 2010 of the Court of Appeals (*Cour d'appel*) of Mons

**Name of the court:** Court of Appeals (*Cour d'appel*) of Mons

**Date of decision:** 10 March 2010

**Name of the parties:** Ms T. Nuran v. the City of Charleroi

**Reference number:** Judgment no. 2009/RF/221

**Brief summary of the key points of law:** Ms T., a teacher of mathematics, works in three subsidised public secondary schools of the City of Charleroi. The former headmaster of the school "La Garenne", where Ms T. had taught for three consecutive years until 2009 with her headscarf on, wrote a glowing report about her, emphasising her open-mindedness, her discretion and her teaching method in line with the City of Charleroi's educational scheme. The latter does not explicitly forbid the wearing use of visible religious symbols, and neither do the regulations enacted by the schools where Ms T. works. However, in September 2009, the new headmaster of the school "La Garenne" as well as the headmasters of the other schools asked her to take off her headscarf when entering the schools premises, arguing she would otherwise not comply with the principle of neutrality comprised in the 17 December 2003 Decree on the neutrality inhering in subsidised public schools. The Court of Appeals decision shows that the City of Charleroi endorsed this opinion on the same basis. Returning back from a first sick leave caused by the prohibition of wearing her headscarf, Ms T. was denied entry to one of the schools for refusing to take off her headscarf. Ms T. filed a suit against the City of Charleroi before the Court of First Instance (*Tribunal de première instance*) and asked, in expedited proceedings, to be authorised in the meantime to teach with her headscarf. She cumulatively launched an action before the Council of State to suspend and subsequently overrule the above-mentioned decisions.

The President of the Court of First Instance of Charleroi dismissed Ms T.'s claim, while the action before the Council of State was still pending. In appeal, the Court acknowledged the emergency allowing temporary measures before the definitive ruling. It was thus for the Court to decide whether the defendant's decision was manifestly illegal (*prima facie*) and needed to be provisionally put aside. The Court's ruling may be summarised as follows:

- The ban on the headscarf is to be considered as a restriction to the freedom of religion in the meaning of Article 9.2 ECHR, which must in principle be incorporated into a legislative Act;
- The neutrality to which the Decree of 17 December 2003 refers is aimed at guaranteeing the pupils' and their parents' freedom of thought (Art. 18.4 ICCPR; Art. 2 of the First Protocol to the ECHR; ECtHR, *Lautsi*, 3 November 2009);
- The scope of the Decree of 17 December 2003 must be assessed by taking into account the Belgian constitutional system, in which the notion of neutrality is not comparable to the principle of *laïcité* that underpins the French and Turkish policies;
- The Decree of 17 December 2003, which deals with subsidised public schools (*réseau officiel subventionné*; i.e. organised by provinces or municipalities and subsidised by the Community) is different from the Decree of 31 March 1994 concerning Community-owned schools (*réseau de la Communauté française*; i.e. organised and subsidised by the Community), where the latter does provide for an obligation to refrain from showing sympathy to a religion (except during religion lessons);
- Neither the Decree, nor the Constitution, currently prevent teachers of subsidised public schools from demonstrating their religious belief, notably by way of symbols, as long as it is done in a reserved way that does not amount to proselytism;
- The headscarf, depending on its type and the way it is worn, may not automatically be considered as a form of proselytism, so that it could only exceptionally be forbidden by headmasters when justified by a person's problematic behaviour, while a general limitation should be provided for by a Decree;
- The ban on Ms T.'s headscarf is illegal, as it does not appear to be justified by the plaintiff's behaviour. As a consequence, she must be allowed to teach with her headscarf.

Concerning this particular case, see also the rulings nos. 202.852 and 210.000 of the administrative section of the Council of State respectively held on 7 April 2010 and 21 December 2010, commented below (section 0.3).

Judgment no. 202.039 of 18 March 2010 of the administrative section of the Council of State (*Conseil d'Etat, section du contentieux administratif*)

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

**Date of decision:** 18 March 2010

**Name of the parties:** X v. the Flemish Education Council (*het Gemeenschapsonderwijs*)

**Reference number:** Judgment no. 202.039

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

**Brief summary of the key points of law:** The Flemish Education Council (an administrative authority at the head of 700 public primary and secondary schools) decided, on 11 September 2009, to prohibit the wearing of any religious or philosophical symbol at school. The prohibition targeted staff members, professors and students and concerned primary as well as secondary schools. An exception was admissible for the time of religious or philosophical courses. For schools that had not already prohibited religious symbols at school, the prohibition would not enter into force before September 2010. This Flemish Education Council's decision was suspended by the Council of State on 18 March 2010. Indeed, a Muslim student challenged it before the Council of State, which suspended it, referring a preliminary ruling to the Constitutional Court over the constitutionality of the Flemish Special Decree of 14 July 1998 as interpreted to allow the Flemish Education Council to adopt a general ban of religious symbols at school. Its central interrogation was to know if the Flemish Education Council had the competence to take such a decision without a preliminary legislative act regulating the question (Decree). Besides that, the interrogation was also to know if the Flemish Special Decree on Public Education was in conformity with the different principles enshrined at Article 24 of the Constitution; the principle of legality, the principle of freedom of education, and the neutrality requirement for public education.

Judgment no. 202.852 of 7 April 2010 of the administrative section of the Council of State (*Conseil d'Etat, section du contentieux administratif*)

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

**Date of decision:** 7 April 2010

**Name of the parties:** Ms T. Nuran v. the City of Charleroi

**Reference number:** Judgment no. 202.852

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

**Brief summary of the key points of law:** Following the decision of the Court of Appeals of Mons of 10 March 2010 (see above), the Municipality Council of Charleroi adopted, on 30 March 2010, a regulation prohibiting teachers to wear any visible religious, political or philosophical symbol while in the premises of the schools in the city of Charleroi. The Math teacher allowed by the Court of Appeals of Mons to teach wearing the headscarf launched an emergency action in suspension against that regulation before the Council of State. She justified the emergency of the situation by invoking the huge risk to be dismissed. Having used all her legal unjustified sick leave days, and not being covered by a medical certificate, her absence, caused by the 30 March 2010 Charleroi Municipal Council regulation, could not be considered as justified, and she could therefore be dismissed after 10 days of unjustified absence.

The Council of State considered that the requirement of the existence of a risk of serious harm was not met and it rejected the appeal. In its opinion, the applicant cannot be prevented from teaching with the headscarf on the basis of the 30 March 2010 Charleroi Municipal Council regulation because this regulation has a general scope, and not an individual one. Therefore, the sanctions feared by the applicant could not be taken on the basis of that regulation, but on the basis of an individual decision against her. If she does not comply with the regulation, the Municipal Council, or the school, could take an individual decision against her, individual decision that could be criticized before the courts. Therefore, the risk of a serious harm does not exist on the basis of that regulation, and the Council of State rejected this action. The applicant's lawyer announced that he would indeed launch an action against any individual decision targeting the applicant. Following the decision of the Court of Appeals of Mons of 10 March 2010, the Council of State also rejected (decision n° 202.768 held on 2 April 2010) the Math teacher action in suspension launched against the decision of the Charleroi Municipal 'Government' (*Le collège*) of November 2009 prohibiting her to wear the headscarf. Indeed, following the Court of Appeals of Mons decision, there was not anymore, in the opinion of the Council of State, a "serious harm which is likely to be hard to compensate" (*préjudice grave et difficilement réparable*), a legal requirement needed for the emergency proceeding to be launched.

As each party stood its ground, (the city of Charleroi prohibited teachers to wear any visible religious, political or philosophical symbols at school, while the math teacher wanted to wear the headscarf at school), the city of Charleroi dismissed the math teacher on 8 June 2010, on the ground that she did not respect the city of Charleroi's decision (*Règlement d'ordre intérieur*).

Concerning this particular case, see also the ruling no. 210.000 of the administrative section of the Council of State held on 21 December 2010, commented below (section 0.3).

Judgment no. 2010/104 (nr 4869-4870) of 16 September 2010 of the Constitutional Court (*Cour constitutionnelle*)

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

**Date of decision:** 16 September 2010

**Name of the parties:** G. D. and N. M.N. v. the Federal State

**Reference number:** Judgment no. 2010/104 (nr 4869-4870)

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

**Brief summary of the key points of law:** Two women, living together since 1998 and married since 2005, decided to have children. G. had a son in 2005 and N. had a daughter in 2004. In 2008 they both asked the Juvenile Court of Brussels for the simple adoption of the child of their spouse (simple adoption under Belgian Civil Law refers to the legal action seeking for the recognition by a judge of the adoption that does not cause a complete dissolution of the links with the biological family) and to give the children their respective surnames, which the Court accepted.



However, the public prosecutor of Brussels decided to appeal against these two judgments. Indeed, according to Article 353-2, §2, al. 1st of the Civil Code, in case of a simple adoption of the child of the same-sex spouse or partner, both the person wishing to adopt and the same-sex spouse or partner have to declare in court which one of the two surnames the adopted child will bear. Therefore it is not possible for adopted child of same-sex couples to receive the surnames of both parents, whereas it is possible in all other cases of simple adoption. G. and N. alleged sexual orientation discrimination before the Court of Appeals, which decided to refer the matter to the Constitutional Court for a preliminary ruling. The Constitutional Court examined whether Article 353-2, §2, al. 1st of the Civil Code infringed the principles of equality and non-discrimination of Articles 10 and 11 of the Constitution, read separately or combined with Articles 8 and 14 of the European Convention on Human Rights and Fundamental Freedoms. The Court noted that, except the case of simple adoption by a woman of the child of her opposite-sex spouse or partner – which has no influence on the surname of the adopted child – the adopted child has always the possibility to bear a surname composed, by the surname of the person wishing to adopt, and by his/her previous surname. Therefore, it ruled that the provision of the Civil Code contains a unjustified difference of treatment in matter of simple adoption between, on the one hand, children adopted by the same-sex spouse or partner, and on the other hand, children simultaneously adopted by opposite-sex or same-sex spouses or partner and children adopted by their mother's husband or partner.

Judgment of 29 September 2010 of the Commercial Court (*rechtbank van koophandel*) of Ghent

**Name of the court:** Commercial Court (*rechtbank van koophandel*) of Ghent

**Date of decision:** 29 September 2010

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

**Reference number:** Judgment no. 7302

**Brief summary of the key points of law:** The case concerns a deaf man used to self-sufficient travelling who called upon the services of a travel agency to book a package tour in Jordan. Believing that his security would not be correctly ensured because of his difficulties to communicate with the local population, the travel agency refused to offer its services, unless an independent guide accompanied the deaf man at his own expense. After several mediation attempts, the Centre for Equal Opportunities and Opposition to Racism brought an action before the Commercial Court of Ghent, alleging that simple adjustments should have been admitted by the travel agency. The Centre considered that the use of a note pad and SMS to set up appointments and meeting points would have been sufficient to enable this customer to benefit from the travel agency services and that requiring the assistance of an independent guide at his own costs was manifestly disproportionate.

The Commercial Court of Ghent followed the Centre for Equal Opportunities and Opposition to Racism and sentenced the travel agency for failure to provide reasonable accommodation to the victim, and therefore to have refused him to participate in the package tour in Jordan.

The travel agency was condemned to pay a lump sums of EUR 650 and a fine (*astreinte*) of EUR 1000 for every possible new offence noticed and per diem if the offence continues. Furthermore the travel agency had to advertise the judgment in its Ghent's branch and on its website, and to publish it at its own expenses in the media.

Judgment no. 2010/107 (nr 4810) of 30 September 2010 of the Constitutional Court (*Cour constitutionnelle*)

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

**Date of decision:** 30 September 2010

**Name of the parties:** Karel Goots v. the Federal State

**Reference number:** Judgment no. 2010/107 (nr 4810)

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

**Brief summary of the key points of law:** In 1981, K. Goots was hired by a non-profit organisation ("Maatschappij van Kristelijke Liefdadigheid") as a director under a permanent contract. However, in 2005, the non-profit organisation decided to put an end to Goots' employment contract, giving him a six-month advance notice pursuant to Article 83 of the law on employment contracts. Article 82 of the Act of 3 July 1978 on employment contracts stipulates that in case of the termination of a permanent contract by the employer, a three-month advance notice must be granted. A further three-month is added to the initial notice requirement at the beginning of each new five-year period of service under the same employer and if the employee's remuneration exceeds a certain annual amount, the notice period must be fixed by the judge or by an agreement between employer and employee. However, by derogation to Article 82, Article 83 provides that an employer who ends a permanent employment contract from the first day of the month following the one during which the employee has reached 65 years old, must give a six-month advance notice period. K. Goots alleged that Article 83, §1 of the Act of 3 July 1978 on employment contracts, providing for distinct notice period regimes following the employees' age, infringed the principles of equality and non-discrimination of Articles 10 and 11 of the Belgian Constitution. K. Goots therefore decided to sue his employer in order to get a longer advance notice period. At this occasion, the Labour Court of Antwerp asks the Belgian Constitutional Court for a preliminary ruling on the issue.

The Constitutional Court noted that the difference of treatment in Article 83 was based on an objective criterion (the fact that the dismissed employee reaches 65) and was founded on legitimate aims of a social nature. As a matter of fact, the regime of shorter advance notice periods for employees reaching 65 is closely linked to retirement age being reached. Belgian legislation envisaged the nullity of termination clauses ending employment contracts when employees reach 65, so to protect them as they are close to the retirement age. In fact, if the employer had to use the general advance notice periods of Article 82 for employees reaching the retirement age, he/she would have to take such a decision several years in advance, due to the total length the advance notice period would require. Thereby, with shorter notice periods, the dismissal of employees who anyway can aspire to retirement benefits is simpler.

For this reason, Article 83 is reasonably justified. Furthermore, according to the Constitutional Court, Article 6, §1st, al. 1 of Directive 2000/78/EC allows regimes as those established by Article 83 of the Belgian Act on employment contracts. For all these reasons, the Constitutional Court concluded that Article 83 does not infringe the principles of equality and non-discrimination of Articles 10 and 11 of the Constitution.

Judgment no. 210.000 of 21 December 2010 of the administrative section of the Council of State (*Conseil d'Etat, section du contentieux administratif*)

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

**Date of decision:** 21 December 2010

**Name of the parties:** Ms T. Nuran v. the City of Charleroi

**Reference number:** Judgment no. 210.000

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

**Brief summary of the key points of law:** Following the ruling of the Court of Appeal of Mons of 10 March 2010 (commented above, in section 0.3), the City Council of Charleroi adopted, on 30 March 2010, an internal regulation concerning Municipal Secondary Schools which prohibits teachers from wearing any conspicuous sign of a religious, political or philosophical character while in the schools' premises. The math teacher in the center of the controversy launched an emergency action in suspension against this regulation before the Council of State, which was rejected on 7 April 2010 (commented above, in section 0.3). On 9 April 2010, the math teacher launched an application for suspension and annulment against the internal regulation of the City Council of Charleroi before the Council of State, which issued the ruling no. 210.00 on 21 December 2010. In the meantime, the City of Charleroi dismissed the maths teacher on 8 June 2010. The maths teacher raised two main sets of arguments in her appeal to the Council of State.

Firstly, the applicant claimed that the contested regulation has been made *ultra vires* by the City Council of Charleroi, because only the legislator would be competent to adopt such a measure, and that this litigious regulation has infringed the principle of proportionality. The Council of State stressed that the Belgian Communities are entitled by the Constitution to organise education – what did the French-speaking Community with the Decree of 31 March 1994 defining the neutrality of education within the Community. Therefore, the Council of State considered that a local authority is entitled to clarify, in a general way, what are the teachers' neutrality duties according to that Decree, notably by prohibiting the wearing of any conspicuous sign of a religious, political or philosophical character. Furthermore, according to the European Court of Human Rights' jurisprudence, the term "law" used by Article 9 § 2 of the European Convention on Human Rights includes measures of infra-legislative level, such as internal regulations by city councils. Finally, the Council of State held that the contested measure pursues the legitimate purpose of establishing neutrality in Municipal Secondary Schools in order to respect students' freedom of conscience.

This measure only provides for limited restrictions to teachers' religious freedom, and was thus held proportionate to the legitimate aim pursued.

Secondly, the applicant considered that the principle of equality and non-discrimination was violated since she was a victim of direct discrimination on the basis of her religion. The Council of State stated that Article 11 of the Decree of the French-speaking Community of 12 December 2008 on the Fight against certain forms of discrimination allows public or private ethos-based organizations to provide for differences in treatment on ground of religion which are not considered as discrimination. Such organizations can also require the persons working for them to act in good faith and with loyalty to the organization's ethic. The Council of State considered that this provision was applicable in the present case precisely because the applicant worked in schools subject to the principle of neutrality. For all these reasons the Council of State found that none of the grounds for annulment were established and, therefore, rejected the claim.

Judgment of 26 January 2011 of the Police Tribunal (*Tribunal de police*) of Brussels

**Name of the court:** Police Tribunal (*Tribunal de police*) of Brussels

**Date of decision:** 26 January 2011

**Name of the parties:** X v. the Municipality of Etterbeek

**Reference number:** Judgment no. 12/2011

**Brief summary of the key points of law:** Administrative sanctions were imposed on Ms X by two decisions of the Municipality of Etterbeek dating from 12 Juny 2009 (50 Euros fine) and 3 September 2009 (200 Euros fine) because she wore a niqab – a full veil that just leaves the area around the eyes clear – on two occasions on the territory of the municipality. Ms X was fined by reason of a violation of Article 12 of the general police regulations of the Municipality of Etterbeek which prohibits concealment of the face on public spaces except on carnival time. Ms X therefore decided to appeal against these decisions invoking mainly a violation, on the one hand, of her religious freedom guaranteed by Article 9 of the ECHR and Article 19 of the Constitution and, on the other hand, the principle of equality and non-discrimination on the basis of religion guaranteed by Article 14 of the ECHR combined with Article 9, Articles 10 and 11 of the Constitution and the General Anti-discrimination Federal Act of 2007. The Police Tribunal of Brussels agreed with the fact that administrative sanctions imposed on Ms X restricts her religious freedom but stressed that, according to Article 9 §2 of the ECHR, this freedom may be limited if the restriction is provided by law, pursues a legitimate aim and is necessary in a democratic society (proportionality control). In this particular case, the restriction is provided by a provision of the general police regulations of the Municipality of Etterbeek and pursues the legitimate aim of guaranteeing public security.

However, with regard to the principle of proportionality, because the restriction was not temporary as in *Phull v. France*<sup>79</sup> (airport security check) or *El Morsli v. France*<sup>80</sup> (consulate entrance control) but merely prohibits any coming and going on public spaces of the territory of the municipality, it was not necessary in a democratic society. Therefore the Police Tribunal of Brussels held that Article 12 of the general police regulations of the Municipality of Etterbeek was contrary to Article 9 of the ECHR, and that administrative sanctions pronounced on this basis were illegal and had to be annulled.

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

*With regard to Travellers*<sup>81</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 authorisation.

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>82</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.

The International Federation for Human Rights (FIDH) lodged a collective complaint with the European Committee of Social Rights (ECSR) to inform on the global situation of Travellers in Belgium by alleging a violation of Article 16 of the Revisited European Social Charter guaranteeing the protection of families<sup>83</sup> (see *infra*, section 3.2.10).

<sup>79</sup> ECtHR (2<sup>nd</sup> section), *Suku Phull v. France*, decision of 11 January 2005 (non admissibility).

<sup>80</sup> ECtHR (3<sup>rd</sup> section), *Fatima El Morsli v. France*, decision of 4 March 2008 (non admissibility).

<sup>81</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>82</sup> Published in *Echos du Logement* 2000, 119, obs. L. THOLOME.

<sup>83</sup> International Federation for Human Rights v. Belgium, application no. 62/2010, declared admissible in December 2010.





*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.

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*”.

To the authors’ knowledge and this of the Centre for Equal Opportunities and Opposition to Racism, there are no figures available at the national level. It is worth stressing that, within the Centre for Equal Opportunities and Opposition to Racism, a working group of 5 persons of the Centre is charged with dealing specifically with issues concerning Roma and Travellers.

## 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>84</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>85</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>86</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.

<sup>84</sup> ECHR, 23 July 1968, *Belgian Linguistic Case* (Series A no. 6), § 10.

<sup>85</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>86</sup> *Cour d'arbitrage*, 2 April 1992, Case no. 28/92, 5.B.4.

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

The constitutional anti-discrimination provisions are directly applicable. 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 (*Arrêtés royaux/Koninklijke besluiten* when adopted by the Federal Government, *Arrêtés 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>87</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>88</sup>. It has been alluded to by the Belgian Constitutional Court, previously the *Cour d'arbitrage-Arbitrage Hof*<sup>89</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>87</sup> For the competence of the Constitutional Court, see Art. 142 of the Constitution.

<sup>88</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>89</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>90</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 suggested a reform of the existing anti-discrimination 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, property, 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>90</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 19 TFEU (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>91</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 (see details *supra*, section 0.3). As a consequence, the General Anti-Discrimination Federal Act was amended on 30 December 2009<sup>92</sup> in order to include the trade union opinion among the protected grounds of discrimination.

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, *Commission communautaire française*), 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 has already been applied to some regional anti-discrimination law, namely the Flemish Framework Decree of 10 July 2008 (decision no. 122/2009), the Ordinance of the Region of Brussels-Capital of 4 September 2008 (decision no. 123/2009) and the Walloon Decree of 12 December 2008 (decision no. 35/2010).

### 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 at the 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”?*

<sup>91</sup> The Gender Equality Federal Act of 10 May 2007 prohibits discrimination based on sex or on assimilated grounds (maternity, pregnancy, transsexualism).

<sup>92</sup> Articles 107 to 119 of the *loi portant des dispositions diverses*, *Moniteur belge*, 31 December 2009, p. 82925.



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.

*Race or ethnic origin.* Because of the risks entailed in processing sensitive personal data as those on an individual's race or ethnic origin<sup>93</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<sup>94</sup>.

<sup>93</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 (available on the website of the Commission: [www.privacycommission.be](http://www.privacycommission.be)). See also the explanatory notes published by the Commission: *La protection des données à caractère personnel en Belgique*, 8 February 2007, esp. pp. 16 & sq. ([http://www.privacycommission.be/fr/static/pdf/cbpl-documents/note\\_vie-priv-e-g-n-ralit-s.pdf](http://www.privacycommission.be/fr/static/pdf/cbpl-documents/note_vie-priv-e-g-n-ralit-s.pdf)); *Loi relative à la protection des données à caractère personnel du 8 décembre 1992. Version coordonnée (août 2007)*, 8 December 2007, esp. pp. 120 & sq. (<http://www.privacycommission.be/fr/static/pdf/wetgeving/codex-fr-31-01-08-website-doc.pdf>).

<sup>94</sup> However, see the Opinion no. 03/2004 adopted on 15 March 2004 by the Commission for the Protection of Privacy (*Commission de protection de la vie privée*): [http://www.rtdh.eu/pdf/20040315\\_comm-vie-privee.pdf](http://www.rtdh.eu/pdf/20040315_comm-vie-privee.pdf).

*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 provide 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 the CJUE Case C-13/05, *Chacón Navas*, should be taken into account by the Belgian courts, since there exists no competing definition in national anti-discrimination legislation.

In relation to the *Chacón Navas* decision, it is worth noticing that the explanatory memorandum<sup>95</sup> accompanying the Cooperation Agreement of 19 July 2007 relating to the concept of reasonable accommodation<sup>96</sup> explains that “by analogy with the General Anti-discrimination Federal Act, the choice has been made not to include a definition [of *disability*] in the Protocol. By doing so, it is intended to avoid any restrictive interpretation of the concept of disability and to make it possible for the definition of ‘disabled person’ to evolve”; “In any case, it is necessary to understand the notion of disability as any lasting and important limitation of a person’s participation, due to the dynamic interaction between 1) intellectual, physical, psychic or sensory deficiencies; 2) limitations during the execution of activities and 3) personal and environmental contextual factors”. The comment further specifies that “Any person whose participation in the social or professional life is hindered or impeded, and not only the people recognised as being disabled by law, is to be regarded as a disabled person within the meaning of the present protocol”. By defining disability by reference to the person’s environment rather than his/her physical or intellectual characteristics<sup>97</sup>, this commentary seems in line with the definition provided by the European Court of Justice in *Chacón Navas* as well as with the International Convention on the Rights of Persons with Disabilities recently ratified by Belgium.

<sup>95</sup> The memorandum is a comment that does not have a binding value but that the courts are likely to consider as a source of inspiration when interpreting anti-discrimination concepts.

<sup>96</sup> *Protocole du 19 juillet 2007 entre l’État fédéral, la Communauté flamande, la Communauté française, la Communauté germanophone, la Région wallonne, la Région de Bruxelles-Capitale, la Commission communautaire commune, la Commission communautaire française en faveur des personnes en situation de handicap*, *Moniteur belge*, 20 September 2007, p. 49653.

<sup>97</sup> See also, for a comparative approach, the study lead by the Research and Information Centre of the Consumers’ Organisations (CRIOC) and entitled “Research relating to reasonable accommodations in the field of goods and services for disabled people and people with reduced mobility” (*Recherche relative aux aménagements raisonnables en biens et services pour personnes handicapées et personnes à mobilité réduite*), published on the Centre for Equal Opportunities and Opposition to Racism’s website: <http://www.diversite.be>.



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

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

In the same line, the legislative instruments adopted at the level of the Regions and Communities to implement the Employment Equality Directive do not provide any definition of the discriminatory grounds. For instance, the Decree on proportionate participation in the labour market adopted on 8 May 2002 by the Flemish Region/Community simply listed among the prohibited grounds of discrimination “present or future state of health, a disability or a physical characteristic”, without offering a definition of disability. However, this latter Decree provides a more detailed notion of equal treatment and goes beyond a simple prohibition of discrimination to impose the adoption of diversity plans and annual reporting on the representation of “target groups” (“*kansengroepen*”) in the workforce of the administrations concerned, and the Executive Regulation adopted on 30 January 2004 by the Flemish Government to implement certain provisions of this Decree does identify persons with disabilities among these “target groups”, and defines them as “persons with a physical, sensory, intellectual 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>98</sup>. These legislations and regulations often define disability by reference to a recognition by a competent authority. For instance, the Collective Agreement no. 99 of 20 February 2009 concerning the level of remuneration of disabled workers<sup>99</sup> and replacing the Collective Agreement no. 26 of 15 October 1975 applies to disabled workers recognised by a proper authority, namely an agency in charge of the social and professional integration of disabled people (AWIPH, *Service bruxellois francophone des personnes handicapées*, VAPH, *Dienststelle für Personen mit Behinderung*)<sup>100</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>101</sup>.

<sup>98</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 intellectual capacity (Art. 6 a).

<sup>99</sup> Made compulsory by the Executive Regulation of 28 June 2009, *Moniteur belge*, 13 July 2009, p. 48068.

<sup>100</sup> Similarly, but outside the field of employment, the Ordinance of the Region of Brussels-Capital of 18 December 2008 relating to the admittance of guide dogs to public places defines the disabled person as “any person whose disability is recognised by an authority competent to this end”.

<sup>101</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>102</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>103</sup>.

*Sexual orientation.* Heavily influenced by Canadian and Dutch precedents<sup>104</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.

<sup>102</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>103</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. In addition, Buddhism has been in the process of becoming a recognised religion in Belgium since 30 March 2007 and is already receiving a grant of 150,000 euros/year. 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>104</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.



The Executive Regulation adopted on 30 January 2004 by the Flemish Government implementing the Decree of 8 May 2002<sup>105</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. 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>106</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>107</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.

<sup>105</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

<sup>106</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.gelijkekansen.be/doelgroepen.html>). This means that Holebi’s should be targeted through positive actions in order to achieve full equality.

<sup>107</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.privacycommission.be](http://www.privacycommission.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.

- 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' for the purposes of freedom of religion, or what is a "disability", sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?*

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

- 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 the 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<sup>108</sup>.

<sup>108</sup> There are very few examples of cooperation between the Institute for Equality between Women and Men and the Centre for Equal Opportunities and Opposition to Racism on cases of multiple discrimination. It is worth citing, in this regard, a case in which a group of male and female friends went to a nightclub (see S. Lauwers and S. Martens, "Accommodating multiple discrimination – Equality bodies in Belgium and the Netherlands analyzed from an intersectional gender perspective", Working paper for the QUING Conference, 2-3 October 2009, <http://www.quing.eu>). The women from the age of 18 were immediately allowed to enter, whereas the men had to be 21 and were asked to wait. Not only did gender and age played a role here, but also sexual orientation as it was acted upon a clear heterosexual norm (male clients preferring younger women). The case was split between the Centre and the Institute, although only the latter seems to have worked on it. The case was not brought before justice. See also Annual report of the Centre for Equal Opportunities and Opposition to Racism 2009 (*Discrimination – Diversité*), p. 95, available on the website of Centre ([www.diversite.be](http://www.diversite.be)), which mentions a seminar held, on 13 October 2009, in partnership with the Institute on the situation of immigrant women on the job market.

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, property, religious or philosophical belief, actual or future state of health, disability, physical characteristic, genetic characteristic, political opinion, language and social origin<sup>109</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 for long had a department competent for racial discriminations and a department competent for the "other grounds". Each individual case had to be encoded under one single ground of discrimination and was then directed to the competent department. Difficulties arose from this system, for instance, when the Centre had 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. Under the present revised system of complaints, there is only one department concerned with discrimination cases (another one deals with immigration issues) and the encoding system allows to sort out these cases according to several discrimination grounds. As a consequence, except cases involving sex discrimination that have to be dealt with by the Institute for Equality between Women and Men, cases involving multiple discrimination can now be processed within one single department, which could lead to a better adjudication of these cases. In its last annual report, the Centre stresses that 21% of the complaints it received in 2009 involved several grounds of discrimination<sup>110</sup>.

<sup>109</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.

<sup>110</sup> Annual report of the Centre for Equal Opportunities and Opposition to Racism 2009 (*Discrimination – Diversité*), p. 71, available on the website of Centre ([www.diversite.be](http://www.diversite.be)).

In consequence, multiple discrimination “is a priority issue for the methodology of complaints recording of the Centre”<sup>111</sup>.

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>112</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. 19 TFEU 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 19 TFEU 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>113</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>114</sup>

<sup>111</sup> *Ibidem*, p. 72.

<sup>112</sup> See the Draft Framework Decree on equal opportunities, *Flemish Parliament* 2007-2008, Doc. 1578/1, p. 165.

<sup>113</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>114</sup> Report Libert, *Doc. Parl. Chambre* 2006-2007, no. 2720/009, pp. 41-42.

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?*

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>115</sup> As a result of the decision of the CJUE in *Coleman*<sup>116</sup>, discriminations based on being associated with persons presenting a specifically protected characteristic are impliedly forbidden under federal law<sup>117</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>118</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.

<sup>115</sup> Report Libert, *Doc. Parl. Chambre* 2006-2007, no. 2720/009, p. 42.

<sup>116</sup> Case C-303/06.

<sup>117</sup> See also the *Van Themsche* case decided on 10 October 2007 by the Court of Assizes of Antwerp (*supra*, section 0.3).

<sup>118</sup> Article 4, 6° and 7° of the General Anti-discrimination Federal Act; Article 4, 6° of the Racial Equality Federal Act.



All the Regional Anti-discrimination pieces of legislation now define direct discrimination in line with EU requirements<sup>119</sup>.

- b) *Are discriminatory statements or discriminatory job vacancy 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 CJUE held that such a discriminatory statement in a recruitment campaign amounts to direct discrimination. Thereby the Brussels Labour Appeal Court followed the opinion of the CJUE and ordered the cessation of the discriminatory practice and the publication of this judicial injunction in several newspapers<sup>120</sup>.

- 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).*

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);

<sup>119</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”.

<sup>120</sup> Brussels Labour Appeal Court, 28 August 2009, *Centre for Equal Opportunities and Opposition to Racism v. NV Firma Feryn*, not published (See *supra*, section 0.3).

- Where the difference in treatment is imposed by, or by virtue of, another legislation (Art. 11, “safeguard provision”).

Since the first two exceptions are directly inspired by the Racial Equality Directive, they require no further explanation here.

The third exception 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<sup>121</sup>.

The General Anti-discrimination Federal Act seeks to implement Directive 2000/78/EC and prohibits discrimination based on age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion, trade union 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?*

<sup>121</sup> As regards the question of conformity of such a safeguard provision with the requirements of the EU Directives, see *supra*, section 0.2.

None of the legislation implementing Directive 2000/78/EC clearly state how a distinction based on age should be assessed. The issue is left to the courts<sup>122</sup>. It is nevertheless worth noting that a detailed provision of the General Anti-discrimination Federal (Art. 12) specifies, with respect to each material scope, the cases in which direct distinctions based on age do 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).

### 2.2.1 Situation Testing

- a) *Does national law clearly permit or prohibit the use of 'situation 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? If the law is silent please indicate.*

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>123</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>124</sup>. These consultations also highlighted the difficulty in simultaneously pursuing two partially incompatible objectives. 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.

<sup>122</sup> See, for instance, the cases reported *supra*, in section 0.3, chiefly the judgment of the Constitutional Court of 5 October 2005 (no. 152/2005), the judgment of the Constitutional Court of 7 November 2007 (no. 137/2007), the judgment of 29 February 2008 of the Labour Appeal Court.

<sup>123</sup> *Le Soir*, 26, 27 and 28 March 2005.

<sup>124</sup> *De Standaard*, 25 March 2005.

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>125</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>126</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 shift 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) *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>127</sup>. In the same line, the Comity ALARM (*Action pour le logement accessible aux réfugiés à Molenbeek*) published in September 2009 the results of a testing showing that out of a hundred of phone calls made to landlords, 28 resulted in the landlord's refusal to lend a place to foreigners.

In 2009, the Centre for Equal Opportunities and Opposition to Racism relied once on a small form of situation testing to build a case in court. The owner of a restaurant in Sint-Niklaas (a town located in the Flemish part of Belgium) had refused entry to his restaurant to a customer's guide dog. The Centre attempted to initiate some mediation without any success. Consequently, the Centre asked the same customer to try to access the same restaurant with her guide dog at a time where a bailiff (*huissier de justice*) could record the denial of entry. The Court condemned the restaurant owner for discrimination on the basis of disability, holding that guide dogs are not comparable to domestic animals.

<sup>125</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>126</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>127</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)).

The victim was awarded the maximum fixed-rate compensation of 1300 Euros for moral damage. In addition, the Court ordered an end to be put to the discriminatory treatment under penalty of 250 Euros per new offence<sup>128</sup>. The fact that the Centre for Equal Opportunities and Opposition to Racism does not rely more frequently on situation testing seems mostly due to two reasons. First, according to the Centre, 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 did not make any progress in 2010.

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.

- c) *Is there any reluctance to use situation 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 generalise 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), the courts are sometimes sharing such reluctance.

- d) *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>129</sup>. 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>130</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.

<sup>128</sup> Judgment of 4 November 2009 of the President of the First Instance Court of Termonde (emergency proceedings), Centre for Equal Opportunities and Opposition to Racism and Ludwina De Lathauwer v. Komebar and Simun Ramic (unpublished). For more details, see the website of the Centre for Equal Opportunities and Opposition to Racism: <http://www.diversite.be>.

<sup>129</sup> Court of Cassation, 5 February 1985, *Gaddum, Pasicrisie*, 1985, I, 690; Court of Cassation, 7 February 1979, *Salerno, Pasicrisie*, 1979, I, 665.

<sup>130</sup> See for example ECHR, *Texeira de Castro v. Portugal*, 9 June 1998, Rep. 1998-IV, p. 1463, § 63.



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 Anti-discrimination 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 be rented to another person, an acquaintance of the owner. 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>131</sup>

The judgment adopted on 30 November 2005 by the Court of Appeals of Ghent provides another example<sup>132</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 criminal case decided on 25 February 2009<sup>133</sup> concerning a Fitness Centre (*Better Bodies*, see *supra*, section 0.3) which was refusing candidate members on the basis of the colour of their skin or their foreign origin. The Centre for Equal Opportunities has strongly criticised this decision, which clearly misinterpreted the legislation.

<sup>131</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>132</sup> For the details of this case, see the *Belgian Report 2007*, section 0.3.

<sup>133</sup> Ref. no. 2008/AR/2681, unpublished.

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.

## 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>134</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 decriminalises certain offences linked to discrimination on grounds of alleged race, color, descent, national or ethnic origin, and nationality, *inter alia* because the criminalisation of indirect discrimination was considered to be problematic as regards the requirement of legal certainty.

Article 4, 9° of the General Anti-discrimination Federal Act defines indirect discrimination in the same way as the Racial Equality Federal Act: an 'indirect distinction' on the basis of one of the protected grounds (age, sexual orientation, civil status, birth, property, religious or philosophical belief, political opinion, trade union 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>135</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?*

<sup>134</sup> Art. 9 of the Racial Equality Federal Act. See *infra* in the report, section 2.3.b.

<sup>135</sup> Art. 9 of the General Anti-discrimination Federal Act. See *infra* in the report, section 2.3.b.

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).

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

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<sup>136</sup>.

<sup>136</sup> *Supra*, sections 0.2 and 2.1.

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 highlighted by the Committee on the Elimination of Racial Discrimination. In the observations adopted at its meeting held on 5 March 2008<sup>137</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>138</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. 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>139</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?*

<sup>137</sup> Available at <http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-BEL-CO-15.pdf>.

<sup>138</sup> See Flash report 5, 19 March 2008.

<sup>139</sup> See *supra*, section 0.3.

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>140</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>141</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 most recent 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. 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, the two Decrees of the *Cocof* of 22 March 2007 and of 9 July 2010, 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?*

<sup>140</sup> For instance, Case *Lewark*, 6 February 1996, Case C-457/93, §§ 29-30.

<sup>141</sup> Report Libert, *Doc. Parl. Chambre* 2006-2007, no. 51-2720/0009, pp. 80-81.



To the knowledge of the authors (as confirmed by the Centre for Equal Opportunities and Opposition to Racism), 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 by the Commission for the protection of private life – *Commission de protection de la vie privée* – the independent federal supervisory authority). The Centre for Equal Opportunities and Opposition to Racism is keeping this question under review and is preparing a “diversity barometer” (*baromètre de la diversité*). The interministerial conference, however, has still not authorised 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 five grounds. The aim of this question is to find out 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>142</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 three major exceptions to this general prohibition.

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>142</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/her 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>143</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>144</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, l) 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.

<sup>143</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>144</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 for the protection of private life, the independent authority monitoring compliance with this legislation, delivered an opinion where it considered that the processing of sensitive personal data in order to implement the affirmative duty to promote the equal treatment of certain target groups (under the system set up by the Flemish Decree of 8 May 2002) was authorised under these provisions. The Commission also confirmed an opinion no. 7/93 it had delivered on 6 August 1993, according to which the processing of personal data relating to membership of a cultural or ethnic minority was acceptable insofar as the objective is to grant certain specific advantages to those persons (under a positive action scheme) and if the data collected relate to the person's country of birth, or to that of the parents or grand-parents. In this way, this opinion implicitly opposes the processing of personal data relating directly to racial or ethnic origin, whether for affirmative action purposes or otherwise<sup>145</sup>. The Flemish Decree does not include racial or ethnic minorities as such among target groups, but only persons of foreign origin (*allochtonen*).<sup>146</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 the 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.

<sup>145</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>146</sup> Commission for the Protection of Private Life [*Commission de protection de la vie privée*], Draft Decree allowing members of the Employment administration of the Flemish Community to process personal sensitive data related to members of "target groups" to fulfil the objectives of the Flemish Decree on proportionate participation in the labour market [*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).

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>147</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/her in a situation of dependency in the sense of Article 27 of the Executive Regulation of 13 February 2001 and whether this person’s consent may suffice to legitimate the processing of data in situations where this would be otherwise allowable has not been decided yet. It will be noted however that, in the only situation other than employment where positive actions are being adopted in Belgium – where special measures are being taken by the French-speaking and Flemish Communities to promote the integration of the children of newly arrived immigrants – such measures have been targeted not on the basis of race or ethnic origin, or on the basis of any other sensitive data, but on the basis of the nationality of the parents<sup>148</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>149</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”.

<sup>147</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”).

<sup>148</sup> These measures are described in further detail below.

<sup>149</sup> *Moniteur belge*, 6 June 2007.

These conducts could notably be linked to religion or beliefs, disability, age, sexual orientation, sex, race or ethnic origin. Article 442*bis* of the Penal Code introduced by the Federal Act of 30 October 1998 already criminalised 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. In this area, it is 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>150</sup>. 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)<sup>151</sup>. It is considered as direct discrimination in the Decree adopted by the German-speaking Community on 17 May 2004 and in the Decrees adopted by the *Cocof* on 22 March 2007 and 9 July 2010. 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)?*

No, apart from the legislative Acts mentioned in a), there are no specific instruments, except for the Codes of Practice made by private actors or companies.

<sup>150</sup> See also the Gender Equality Federal Act, Art. 7.

<sup>151</sup> See also the Gender Equality Federal Act, Art.19.



In November 2010, following a particular dismissal of a trade union's representative accused of harassment, the Belgian Federation of Employers (*Fédération des employeurs de Belgique* – FEB) called for a discussion with the trade unions in order to adopt a general Code of Practice relating to harassment.

## 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'. For example, 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>152</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, 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 does not appear under the definitions either of direct discrimination, or of indirect discrimination<sup>153</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 Flemish Framework Decree on the Flemish equal opportunities and equal treatment policy of 10 July 2008 defines the denial of reasonable accommodation as a form of prohibited discrimination but limits the duty to provide reasonable accommodation to persons with disabilities.

*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.

<sup>152</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>153</sup> Compare with Art. 2 § 2, b), ii) 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 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. The Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment of 9 July 2010 also provides that denying reasonable accommodation to a person with a disability amounts to discrimination (Art. 9 § 2). 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>154</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). This legislation makes it possible for employers to draw upon public grants for providing reasonable accommodation, and they could indirectly impact on the employer's level of obligation to provide this kind of accommodation resulting from the two other Decrees. Indeed, generally speaking, 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. 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>155</sup>.

<sup>154</sup> *Moniteur belge*, 3 April 1999.

<sup>155</sup> *Moniteur belge*, 20 September 2007, p. 49653.

This Cooperation Agreement defines the concept of reasonable accommodation as a “concrete measure aimed to neutralise 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 organisational impact, the frequency of use of the accommodation, the impact on the quality of life of other 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.

As to rules applying to the Federal State and all federate entities, it should also be mentioned that the Commission for Institutional Affairs of the Senate adopted on 7 January 2010 a revision of the Constitution to the effect of inserting an Article 22<sup>ter</sup> drafted as follows: *“Each disabled person has the right to benefit, according to the nature and the gravity of her handicap, from accommodations that ensure her autonomy and her cultural, social and professional integration. [Legislative Acts and Decrees] guarantee the protection of this right.”* The Senate approved this provision on 14 January 2010, but the process of adoption ended with the early dissolution of both Houses of Parliament during the Spring 2009. Senator Francis Delpérée resubmitted it to the Senate on 22 September 2010<sup>156</sup>. It may, however, still be substantially amended by the House of Representatives and the consequences of its possible adoption are uncertain.

It should also be noted that the Centre for Equal Opportunities and Opposition to Racism published in June 2009 a booklet devoted to disability discrimination. In addition, the Centre released a series of 10 practical notebooks on reasonable accommodation that may usefully be provided to disabled people or to people with reduced mobility in 10 sectors of the everyday life: culture, public services, hotels, restaurants, trade, etc.<sup>157</sup> These notebooks aim to increase the suppliers of goods and services’ awareness of the concept of reasonable accommodation. 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.

<sup>156</sup> See <http://193.190.217.10/www/?Mlval=/publications/viewPubDoc&TID=83886275&LANG=fr> et <http://www.senate.be/www/?Mlval=/dossier&LEG=5&NR=139&LANG=fr>.

<sup>157</sup> The booklet and the notebooks are available on the Center’s website: <http://www.diversite.be>.

It should further be mentioned, as to guide dogs in particular, 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 accompanied by a guide dog to public places<sup>158</sup> and the Executive Regulation to that Decree was finally adopted on 2 October 2008<sup>159</sup>; (2) the Region of Brussels-Capital adopted an Ordinance to the same effect on 18 December 2008<sup>160</sup>, followed by an Executive Regulation on 22 October 2009<sup>161</sup>; (3) the Flemish Authority also passed a Decree on 20 March 2009<sup>162</sup>. In January 2011, the Flemish Government must still implement this Decree, notably with a view to adopting the certification procedure of guide dogs.

Even before this specific legislation was applicable, the Court of First Instance of Termonde condemned, on 4 November 2009, the owner of a restaurant in Sint-Niklaas (a town located in the Flemish part of Belgium) who had refused entry to his restaurant to a customer's guide dog. The owner had called upon the regulation relating to food hygiene. However, the Federal Executive Regulation of 7 February 1997 relating to the general hygiene of foodstuffs<sup>163</sup> provided for an exception in favour of guide dogs, including in period of training. The Court condemned the restaurant owner for discrimination on the basis of handicap, holding that guide dogs are not comparable to domestic animals. The victim was awarded the maximum fixed-rate compensation of 1300 Euros for moral damage<sup>164</sup>.

<sup>158</sup> *Moniteur belge*, 8 December 2006.

<sup>159</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. See also the *Arrêté du Gouvernement wallon du 27 avril 2010 fixant les modèles de la demande d'agrément et du carnet prévus par les articles 4, § 2, et 9, § 1er, de l'arrêté du Gouvernement wallon du 2 octobre 2008*.

<sup>160</sup> Ordinance concerning the accessibility of persons with disabilities accompanied by a guide dog to public places [*Ordonnance relative à l'accès des chiens d'assistance aux lieux ouverts au public*], *Moniteur belge*, 14 January 2009, p. 1527.

<sup>161</sup> Executive Regulation of Ordinance concerning the accessibility of persons with disabilities accompanied by a guide dog to public places [*Arrêté portant exécution de l'ordonnance du 18 décembre 2008 relative à l'accès des chiens d'assistance aux lieux ouverts au public*], *Moniteur belge*, 9 December 2009, p. 76469.

<sup>162</sup> Decree concerning the accessibility of persons with disabilities accompanied by a guide dog to public places [*Decreet houdende de toegankelijkheid van publieke plaatsen voor personen met een assistentiehond*], *Moniteur belge*, 8 May 2009, p. 35850.

<sup>163</sup> Now repealed and replaced by the Executive Regulation of 22 December 2005 relating to the hygiene of foodstuffs (*Arrêté royal relatif à l'hygiène des denrées alimentaires*), *Moniteur belge*, 30 December 2005, p. 57470.

<sup>164</sup> Judgment of 4 November 2009 of the President of the First Instance Court of Termonde (emergency proceedings), *Centre for Equal Opportunities and Opposition to Racism and Ludwina De Lathauwer v. Komebar and Simun Ramic* (unpublished). For more details, see the website of the Centre for Equal Opportunities and Opposition to Racism: <http://www.diversite.be>.



- 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?*

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).

For a noteworthy illustration of the duty to provide reasonable accommodation in an area not related to the field of employment, see the 15 July 2009 judgment of the President of the First Instance Court of Ghent cited above (under 0.3). In this case, the judge held that the Flemish Community had denied reasonable accommodation to the deaf plaintiffs by allowing them no more than 9 hours of deaf interpreting a week at school.

- 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 that 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 national law clearly provide 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 Decrees 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).

In his already mentioned (section 0.3) 27 July 2009 judgment, the President of the First Instance Court of Ghent shifted the burden of proof to the Flemish Government as a result of a presumption that reasonable accommodation had been denied to the deaf plaintiffs. The judge inferred this presumption from the observation that 1) deaf students had been granted a greater amount of interpreting hours in the past; 2) Dutch hearing-impaired students have in principle a right to an interpreter during 100% of school hours and 3) the Flemish government did not contest that more support for deaf children was to be wished.

- 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?*

The Framework Act of 17 July 1975<sup>165</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>166</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>167</sup>.

In the *Walloon Region*, a Code on the Land and Urban Planning was adopted in 1984.

<sup>165</sup> Framework Act of 17 July 1975 on the access of persons with disabilities to buildings accessible to the public, *Moniteur belge*, 19 August 1975.

<sup>166</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>167</sup> However, the Federal Government is still 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.

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>168</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 Decree of 27 March 2009 adapting and supplementing the policy of regional planning, authorisations and maintenance<sup>169</sup> repealed the Framework Act of 17 July 1975. In order for this repeal to take effect, the Flemish Government, relying on Article 54 of the Decree of 18 May 1999 organising the regional planning, adopted on 5 June 2009 an Executive Regulation creating a Flemish planning regulation in relation to accessibility<sup>170</sup>, which came into effect on 1 March 2010. Article 54 of the Decree of 18 May 1999 provides indeed that the Flemish Government must enact regulations in order to ensure, notably, the accessibility of buildings, installations and roadways open to the public. It is worth mentioning that Article 54 has been amended by the Decree of 27 March 2009 to the effect of replacing the words “people with reduced mobility” with the ones “functionally limited people” (*personen met een functiebeperking* in Dutch). The preliminary works do not explain this change of terminology, but the new expression seems to stress the limitations created by the environment, rather the person’s deficiencies (pursuant to what has been mentioned above concerning the definition of disability, section 2.1.1.).

<sup>168</sup> The list comprises buildings for the care of aged or disabled persons, hospitals and clinics, cemeteries and building 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.

<sup>169</sup> *Decreet tot aanpassing en aanvulling van het ruimtelijke planings-, vergunningen- en handhavingsbeleid*, *Moniteur belge*, 15 May 2009, p. 37297.

<sup>170</sup> *Besluit van de Vlaamse Regering tot vaststelling van een gewestelijke stedenbouwkundige verordening inzake toegankelijkheid*, *Moniteur belge*, 2 September 2009, p. 59717. This Regulation repeals the Federal Executive Regulation of 9 May 1977 as well as all provincial and communal planning regulations adopted in the field of accessibility.

In this regard, it is further interesting to note that the Executive Regulation of 5 June 2009 includes technical standards without ever making mention of the words “disability” or “person with reduced mobility”<sup>171</sup>. The Flemish government’s report preceding the Regulation specifies in this respect that “For people with a limitation – one thinks of the disabled, but also the elderly, parents with a buggy, someone whose arm is in plaster – it is essential that our built environment be (...) accessible. Only such an accessible environment guarantees the right to autonomously and equally participate in social life (...)”.

The three regional Codes on the Land and Urban Planning<sup>172</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>173</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<sup>174</sup>. Consequently, a lot of public buildings such as borough councils, courts, police stations, schools or hospitals, remain inaccessible to persons with disabilities.

<sup>171</sup> On the contrary, title IV of Brussels regional planning regulation is addressed to people with reduced mobility, understood as those whose faculty to walk is temporary or definitively reduced (Art. 2, 4°). Articles 414 and 415 of the Walloon Code on land and urban planning also aim only at people with reduced mobility, without defining this concept.

<sup>172</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>173</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>174</sup> Though it should be noted, as far as the German-speaking Community is concerned, that Articles 5 and 7, 5° of the Decree of 18 March 2002 relating to the Infrastructure (*Moniteur belge*, 10 July 2002, p. 30968) empowers the German-speaking Government to enact regulations on the accessibility of subsidised infrastructures to disabled persons. The government did so by adopting an Executive Regulation of 12 July 2007 (*Moniteur belge*, 22 November 2007, p. 58366) that sets the standards to be met in order for any project of infrastructure to be subsidised. It is worth noticing in this regard that by project of infrastructure, the Decree (Art. 2) understands not only the construction or the transformation of buildings, but also repair works, furnishings, aspects of durable construction, etc. The Decree is thus not limited to constructions, rebuildings or important restorations of constructions accessible to the public and for which an urban authorisation is required. However, the Decree only applies to the infrastructures that made a request for subsidising.

Moreover, except in the Region of Brussels-Capital (with the new RRU) and in the Flemish Region, the current legislation does not apply to intellectual and sensory disabilities (blindness, deafness...), but only to physical disability. Finally, legislation regarding accessibility is abundant but little known and little respected.

Through the complaints which it receives, the Centre for Equal Opportunities and Opposition to racism is often confronted with the difficulty, even with the impossibility, for disabled people to access certain buildings such as administration buildings, arts centres, banks and post-offices, schools cinemas, sport centres, supermarket cash points, health care services, transport, etc. 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”. 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>175</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. As a consequence, there is currently a project to screen federal public buildings and in its next Action Plan for Equality – still confidential in January 2011 – the French Community also foresees a screening of its buildings<sup>176</sup>.

In 2010, the Centre has mostly worked with public transports in order to increase the accessibility of the train stations, the trains, the trams and the buses as well as to increase general awareness on the general issue of accessibility.

- 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?*

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, etc.). 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.

<sup>175</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)).

<sup>176</sup> See also, the Flemish Executive Regulation of 5 June 2009 commented a few paragraphs above.



- 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 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>177</sup> These are entreprises which offer persons with disabilities the opportunity to work in adapted conditions.

In the Walloon Region for instance<sup>178</sup>, all disabled workers whose ability is considered to be at least 20% (intellectual

disability) or 30% (physical disability) of that of a non-disabled worker may work in these structures<sup>179</sup>. Moreover non-disabled workers may also be employed, provided that the proportion of such workers in the company does not exceed 30%<sup>180</sup>. 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.

<sup>177</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>178</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>179</sup> The *Commission Technique d'Orientation et de Reclassement Professionnel* (COTOREP) evaluates whether an individual worker fulfils this condition.

<sup>180</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.



- b) *Would such activities be considered to constitute employment under national law-including for the purposes of application of the anti-discrimination law?*

Such activities would clearly be considered to constitute employment under national law (including for the purposes of application of anti-discrimination law) if the question was asked in these terms. For instance, these employees receive unemployment benefits if they lose their job<sup>181</sup>.

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<sup>181</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>182</sup>. These arguments are not decisive, however, as regards the possibility for groups as such (in particular groups which are recognised 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.

<sup>182</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).

*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). 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>183</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/her 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>184</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 anyone may be held civilly liable not only for the damage caused by his/her own behaviour, but also for the damage caused by persons for whom he/she is 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).

<sup>183</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>184</sup> *Loi du 3 juillet 1978 relative aux contrats de travail*, *Moniteur belge*, 22 August 1978 (Act of 3 July 1978 on employment contracts).

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. 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?*

*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.*

Under the Belgian legislative framework, all these situations are covered by anti-discrimination legislation. The Council of State (general assembly of the legislative section) stated, in its opinion on 11 July 2006<sup>185</sup>, that although the Federal State is responsible for regulating employment contracts<sup>186</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 current situation is the following:

<sup>185</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>186</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).



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

*Civil provisions.* The legislative instruments adopted in order to implement Directives 2000/43/EC and 2000/78/EC have a scope of applicability limited to the respective competences of each entity (Federal State, Region or Community), which makes it very difficult to briefly describe 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>187</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

<sup>187</sup> Both Acts refer to "working relationships" which is described in their Articles 5 § 2.

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). More precisely, it applies to the statutory employment relationships present in the public bodies that the French-speaking Community 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 Decree adopted on 19 March 2009 is filling 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>188</sup> further specifies this material scope.

In the *Region of Brussels-Capital*, the two *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, workers 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.

<sup>188</sup> *Supra*, section 0.2.

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.

The *two Decrees* adopted by the *Commission communautaire française, (Cocof)* respectively in March 2007 and July 2010 (*supra*, section 0.2), fill the gap regarding anti-discrimination in the employment competences of the *Cocof* and its own staff. The first Decree relates to equal treatment between persons in the field of vocational training – including vocational guidance, learning, advanced vocational training and retraining – in the Region of Brussels-Capital (Art. 11). The second Decree relates to the fight against certain forms of discrimination and to the implementation of the principle of equal treatment in the fields of competences of the *Cocof*, including labour relations within public institutions of the *Cocof* (Art. 4 §2). It covers access, nomination and promotion conditions, access to vocational guidance, learning and retraining, employment and work conditions, and affiliation and commitment to workers and employers organizations (Art. 5, 9°). Article 5, 19° defines the specific public institutions of the *Cocof* falling within the scope of this Decree.

**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.*

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>189</sup>

<sup>189</sup> A recent amendment was achieved through the Executive Regulation of 20 January 2010: see *Arrêté royal du 20 janvier 2010 portant exécution de certaines dispositions de la loi du 11 avril 1995 visant à instituer "la charte" de l'assuré social*, *Moniteur belge*, 5 February 2010, p. 6094.

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. It remains to be seen 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.

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

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

In the Belgian federal system, *vocational guidance* (as part of employment policy) is a competence of the Regions<sup>190</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) 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>191</sup>.

<sup>190</sup> Article 6 § 1, IX of the Special Federal Act of 8 August 1980 on institutional reforms.

<sup>191</sup> Article 4, 15° and 16° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.

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. The Anti-discrimination Decree of the Walloon Region of 19 March 2009 covers vocational training and validation of competences in its material scope (Art. 5, 8°). 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 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 in which the federal level is competent to a large extent. The Racial Equality Federal Act and the General Anti-discrimination Federal Act explicitly include the membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided by such organisations (Art. 3(1), (d), of the Directive), in their scope of application (see Art. 5 § 1, 7°).

In order to fully implement the Directives, it is 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 19 TFEU. 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 disputed 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 with 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 to people because of their employment or residence status, for example 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 existing regulations), and not to statutory law or regulations which stipulate the level of advantages each individual or family shall be allowed to.

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 was done, in 2008, by the Flemish Community/Region, the French-speaking Community and the Walloon Region, which all explicitly include social advantages in the material scope of their Anti-discrimination Decree. 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 are favoured and supported.*

Education is a competence of the Communities in the Belgian federal system<sup>192</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 (section of legislation) 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.

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>193</sup>) states that schools have to take into account the social origin and the cultural origin of the children in order to promote a real policy of equal opportunities and social insertion (Arts 6 & 11).

<sup>192</sup> Article 127, § 1, al. 1, 2° of the Constitution.

<sup>193</sup> *Moniteur belge*, 23 September 1997.

In addition, both the French-speaking and the Flemish Community adopted innovative Decrees<sup>194</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>195</sup>. Comparable measures were also adopted by the Flemish Community<sup>196</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 schools (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>197</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 schools (in either the mainstream or the special educational system), which welcome children with disability<sup>198</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>199</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>194</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>195</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>196</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>197</sup> Executive Regulation of the Flemish Government on the integration of children with a moderate or severe intellectual 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>198</sup> *Moniteur belge*, 3 June 2004.

<sup>199</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 Communities' public servants from a statutory point of view, are protected under the Flemish Decree of 8 May 2002<sup>200</sup> and the Decree adopted on 17 May 2004 by the German-speaking Community<sup>201</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>202</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>203</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.

<sup>200</sup> See Art. 3, 2° and Art. 2, 6° of the Flemish Decree of 8 May 2002.

<sup>201</sup> See Art. 2 § 1, 4° and Art. 3 of the Decree of the German-speaking Community of 17 May 2004.

<sup>202</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>203</sup> *Les Roma de Bruxelles*, publication of the Regional Integration Centre, Foyer Bruxelles asbl, September 2004, pp. 36 et seq.

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>204</sup>.

The Delegate General for the Rights of the Child recently worried about the extreme poverty of Travellers' children, which is one of the reasons why these children are not being brought to school regularly: "The exclusion of the families is reflected in the children at various levels: they cannot wash in the morning, they miss heating during winter, they are victims of the stress caused by expulsions and their environment is unhealthy (...)"<sup>205</sup>.

### 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°) and the Decree of the Cocof of 9 July 2010 (Art. 4, § 1er, 7°).

<sup>204</sup> For a recent study on the schooling of Roma children in Belgium, see "Schooling of Roma children in Belgium. The parent's voice", Publications of the King Baudouin Foundation, 2009, available at: <http://boudewijnstichting.org/publication.aspx?id=245782&LangType=1033>.

<sup>205</sup> Délégué Général aux Droits de l'Enfant, "Rapport relatif aux incidences et aux conséquences de la pauvreté sur les enfants, les jeunes et leurs familles" (Report on the incidences and effects of poverty on children, young people and their families), available at: <http://www.dgde.cfwb.be>, pp. 30-32.



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) and the German-speaking Community.

*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 against 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>206</sup>. Social housing exclusively falls within the competences of the Regions<sup>207</sup>.

<sup>206</sup> See their annual report 2008 available on their website : <http://www.anlh.be>.

<sup>207</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.

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).

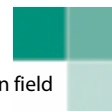
*With regard to Travellers*, case law is scarce but there exists a certain amount of cases related to difficulties encountered by Travellers in finding a place to stop with their caravan, either temporarily, during the travelling period, or permanently. Given the shortage of sites where Travellers are allowed to stop (especially in the Brussels' and Walloon Regions), they are regularly evicted from lands where they have parked their caravan without authorisation. 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.
- 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>208</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.

<sup>208</sup> Juge de paix Verviers 30 juin 2000, *Echos du Logement* 2000, 119, note L. THOLOME.



The International Federation for Human Rights (FIDH) lodged a collective complaint with the European Committee of Social Rights (ECSR) to challenge the global situation of Travellers in Belgium by alleging a violation of Article 16 of the Revised European Social Charter guaranteeing the protection of families<sup>209</sup>. Indeed, even though Belgium refused to be bound by Article 31 of the ECSR guaranteeing the right to housing, the Committee already considered that an inefficient integration policy with regard to Roma living in caravans leads to a violation of Article 16 which for its part binds Belgium<sup>210</sup>. If the Committee ascertain the violation of the ECSR, the Committee of Ministers of the Council of Europe will adopt a resolution to recommend that Belgium takes specific measures to bring the situation into line with the Charter.

Not 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>209</sup> International Federation for Human Rights v. Belgium, application no. 62/2010, declared admissible in December 2010.

<sup>210</sup> Decision *ERRC v. Greece*, 8 December 2004 (Complaint No. 15/2003).

## 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 authorised 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>211</sup>.

*Regions and Communities.* The instruments adopted by the Regions and Communities contain similar provisions that are in line with the EU requirements<sup>212</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 19 TFEU, 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.

<sup>211</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>212</sup> See, for instance, Article 7, § 2 of the Walloon Anti-discrimination Decree of 6 November 2008.

## 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?*

*Federal State.* The General Anti-discrimination Federal Act contains a provision (Art. 13) which follows almost word-for-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, both Decrees of the *Cocof* of 22 March 2007 and of 9 July 2010, 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>213</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.

- c) *Are there cases where religious institutions are permitted to 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)?*

<sup>213</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.



*What are the conditions for such selection? 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>214</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.

#### **4.3 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).

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

<sup>214</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/>).

No.

#### 4.4 Nationality discrimination (Art. 3(2))

*Both the Racial Equality Directive and the Employment Equality 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?*  
*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 (i.e. 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* of 2007<sup>215</sup> 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 employees and their partners. 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) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?*

<sup>215</sup> Note that the Decree of the *Cocof* of 2010 provides that differences of treatment based on nationality may be justified in case of a genuine and determining occupational requirement (Art. 10).

Articles 10 and 11 of the Constitution prohibits discrimination on grounds of civil status, including marriage<sup>216</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>217</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 recognised 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>218</sup>, on the other. 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.

<sup>216</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, personen 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>217</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>218</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.

- b) *Would it constitute unlawful discrimination in national law if an employer provides 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)**

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

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>219</sup>. It is not possible in the context of this report to enter into the details of this regulatory framework.

- b) *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)?*

Exceptions relating to health and safety are also contained in the already mentioned regional decrees on the admittance of guide dogs to public places (section 2.6). The Ordinance of the Region of Brussels-Capital of 18 December 2008 as well as the Walloon Decree of 23 November 2006 provide in their article 4 that the admittance to guide dogs may be refused:

- By way of a place-specific regulation justified by the requirements of hygiene, public health, safety or by the impossibility of providing reasonable accommodation;
- By way of a derogating law or regulation.

These restrictions are allowed only in buildings specifically devoted to the administration of care, the execution of medical acts or the preparation of food, or if these buildings are usually attended by barefoot people.

<sup>219</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.



Similarly, the Flemish government is tasked by the recently adopted decree with determining the public places the access to which may be refused to guide dogs for reasons of public health or safety<sup>220</sup>.

#### 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 ?*
  - *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 Decrees both of the Cocof of 2007 (Art. 8) and of 2010 (Art. 11) have all made use of this option to allow proportionate different treatment which is provided by Article 6(1), al. 1, of Directive 2000/78/EC, 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.

<sup>220</sup> Article 3, al. 2, of the above-mentioned Decree of 20 March 2009.

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). At the beginning of 2011, these items of legislation and regulations were 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.

When it comes to discriminations relating to age in Belgium, salary schedules are of particular concern in view of their compatibility with Directive 2000/78/EC. Political awakening in this regard has been late. It is only in November 2006 that the Minister of Labour informed the social partners of the need for removing the references to age for the determination of salaries. Nevertheless, the elimination of those references can only happen progressively and the social partners agreed that the beginning of 2009 should be the ultimate deadline. The Minister accepted this compromise by extending the obligatory force of collective agreements (*conventions collectives de travail*) relying on age until the beginning of the year 2009. In March 2009, the Minister of Employment confirmed that since 1 January 2009, sectorial collective agreements containing age-based schedules would no longer be made compulsory, because they would be in breach of the Anti-discrimination Act of 10 May 2007. The Minister also announced the imminent publication of an Executive Regulation aiming at putting in place a commission of four experts who will analyse the proposals made by social partners in view of relying on other criteria than age<sup>221</sup>. Down to January 2011, nothing has been done in this respect.

However, the Minister's and social partners' engagements do not remove the potential illegality which rises from the provisional preservation of collective agreements relying on age. In this respect, the date of 1 January 2009 does not find support on any legal provision since the prohibition of discrimination on the basis of age is effective since the entry into force of the 25 February 2003 Act<sup>222</sup>.

According to the Centre for Equal Opportunities and Opposition to Racism, very few cases involving alleged discrimination on the basis of age are brought in court, the majority of the disagreements being regulated by way of negotiation and payment of compensation by the employer to the victim. In such cases, the Centre is not entitled to file a suit.

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

<sup>221</sup> See the press release: <http://www.milquet.belgium.be/fr/news/trois-nouvelles-mesures-pour-renforcer-la-lutte-contre-les-discriminations-liées-à-l'âge> (in French).

<sup>222</sup> P. Joassart, « La prohibition de la discrimination et les barèmes liés à l'âge: *summum ius, summa injuria?* » ("The prohibition of discrimination and salary schedules: *summum ius, summa injuria?*"), *Journal des Tribunaux du Travail*, 2008, p. 233.

- c) *Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, 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, and women at 64 (if the pension begins between 1 January 2006 and 31 December 2008) or 65 (after 1 January 2009). Other age limits 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, 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>223</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>224</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.

<sup>223</sup> See the Belgian National Action Plan for Employment 2004, paragraph 5.1.1.

<sup>224</sup> This was the subject of a Cooperation Agreement between the Regions and Communities concluded on 24 July 2003.

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>225</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. 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>226</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>227</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>228</sup>. It was repealed by an Executive Regulation adopted in 2006, also providing subsidies for certain investments made by employers to improve the working conditions of older workers, the latter being this time defined as workers aged 45 years or more<sup>229</sup>.

<sup>225</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.

<sup>226</sup> *Convention collective du travail* (no. 82) of 10 July 2002 modified by *Convention collective du travail* (no. 82bis) of 17 July 2007.

<sup>227</sup> This represented a gain of 1,600 euros per year per worker, which since 2004 has been increased to 4,000 euros.

<sup>228</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>229</sup> *Arrêté royal du 1er juillet 2006 portant sur la promotion des possibilités d'emploi, la qualité des conditions de travail ou l'organisation du travail des travailleurs âgés dans le cadre du Fonds de l'expérience professionnelle* (Executive Regulation of 1 July 2006 on the promotion of employment opportunities, the good quality of working conditions or the organisation of work for older workers within the framework of the Fund for Professional Experience), *Moniteur belge*, 1 August 2006, p. 37425.

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>230</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. 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 34bis of the Act of 16 March 1971 on work authorises work until 11pm in cases of *force majeure*.

<sup>230</sup> See also on this the OECD publications on Belgium, especially the report *Ageing and Employment Policies* (2005) and the *Economic Survey – Belgium 2005*.



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>231</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>232</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:

- 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;

<sup>231</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>232</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.

- 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>233</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>234</sup>. To the knowledge of the authors, this process is still in progress.

#### 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. A full recital of the list of exceptions is beyond the scope of this survey.

#### 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 actually 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>233</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>234</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 longer, or can a person collect a pension and still work?*

Since 2009, the legal retirement age for both women and men is 65 years.

- b) *Is there a normal age when people 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 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, and 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 legislation 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<sup>235</sup>. 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).

<sup>235</sup> An employer may dismiss a worker without giving a reason for termination, provided that he or she gives notice or pays the compensation prescribed by law. However, in the event of a contested termination of employment, it is for the employer to prove that the dismissal is not unfair.

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 continues 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 Employment Equality 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>236</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 authorise the adoption of positive action measures through an Executive Regulation (*Arrêté royal*) (Art. 10 § 3 of both Acts)<sup>237</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, are 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), 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) and the Decree of the *Cocof* of 9 July 2010 (Art. 13). 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).

<sup>236</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>237</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 Flemish Decree of 8 May 2002 on the proportionate representation of target groups in employment stands out in this respect, since its objective is achieved through action plans for diversity and annual reporting: one of its guiding principles, therefore, may be said to constitute a form of positive action, in the broad sense of this expression as used in the Racial and Employment Equality Directives. The German-speaking Community's Decree does not adopt the same affirmative conception of equality as that of the Flemish Decree of 8 May 2002, but nevertheless provides 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 for 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 five grounds, and 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 organising 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>238</sup> (*supra*, section 2.1.1). In this line, a Flemish Action Plan fighting against discrimination in employment was adopted in December 2007.

<sup>238</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.

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>239</sup> which involve public funding available to employers (between 2500 to 10.000 Euros for the implementation of a plan of diversity). 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>240</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>241</sup>, included the so-called “travelling populations” (*trekkende bevolking*) among the minorities concerned by this legislation. “Travelling populations”, as defined in this Decree, included both Travellers and Roma. The general goal of the policy delineated in this text was 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 did 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. Nevertheless the Decree of 28 April 1998 has been revised in 2009 and henceforth relates generally to the Flemish policy of integration<sup>242</sup>. It does not refer anymore explicitly to “travelling population” defined as Roma and Travellers, but to “people (...) who are or were living in a caravan”. More specifically, the Decree is targeted at permanent residents without Belgian nationality (or whose parents does not have Belgian nationality), including “people who are or were living in a caravan”, but also to illegal immigrants. This new text defines the Flemish policy of integration as an emancipation policy based on the proportional participation of people protected by the Decree, a policy based on access to all structures for everyone and a policy based on coexistence within diversity.

<sup>239</sup> For more details, see [www.werk.be/diversiteit](http://www.werk.be/diversiteit).

<sup>240</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.diversiteit.be](http://www.diversiteit.be)).

<sup>241</sup> *Moniteur belge*, 19 June 1998.

<sup>242</sup> Flemish Decree of 30 April 2009, *Moniteur belge*, 2 July 2009, p. 45282 (partly into force since 1 January 2011).

The Decree also provides for a network of integration centres and services coordinated by the *Flemish Expertise Center in Migration and Integration (Vlaams Expertisecentrum Migratie and Integratie)*.

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. In addition, the Decree provides for the possibility to register children of Travellers prior to other pupils in schools (Art. 3.4). 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>243</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. The Walloon declaration of regional policy 2009-2014 mentions the development, in cooperation with the Centre for mediation of Travellers, of a regional regulation aimed at organising the temporary stay of Travellers on the territory of the communes. The Government also made a commitment to further support communal projects of adjustments of places for the stay of Travellers, to adopt measures for the integration and harmonious cohabitation of Travellers with the local population and to fight against the stigmatisation of Travellers<sup>244</sup>.

<sup>243</sup> *Moniteur belge*, 19 August 1997.

<sup>244</sup> Declaration available at <http://gouvernement.wallonie.be/declaration-de-politique-regionale-wallonne>.

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 in favour of the underprivileged populations in general (Travellers, Roma and newly arrived migrants in particular).* The Decree of the French-speaking Community of 30 April 2009<sup>245</sup> aims to organise a differentiated supervision scheme within schools in order to ensure each pupil will have equal opportunities of social emancipation. The Decree pursues a policy of differentiated attribution of resources (mainly understood in terms of personnel) for the benefit of schools accommodating socially underprivileged children. The level of supervisory staff in a given school is thus linked to the socio-economic origin of its pupils. This legislation supplements the Decree of 14 June 2001 on the insertion of newly arrived pupils in the education system organised or subsidised by the French-speaking Community<sup>246</sup>.

*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>247</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<sup>248</sup>, 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>249</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>250</sup>.

<sup>245</sup> Decree of 30 April 2009 organizing a differentiated supervision scheme within schools in order to ensure equal opportunities of social emancipation to each pupil (*Décret organisant un encadrement différencié au sein des établissements scolaires de la Communauté française afin d'assurer à chaque élève des chances égales d'émancipation sociale dans un environnement pédagogique de qualité*), *Moniteur belge*, 9 July 2009,

<sup>246</sup> Decree of 14 June 2001 on the insertion of newly arrived pupils in the education system organised or subsidised by the French-speaking Community (*Décret visant à l'insertion des élèves primo-arrivants dans l'enseignement organisé ou subventionné par la Communauté française*), *Moniteur belge*, 17 July 2001, p. 24355.

<sup>247</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>248</sup> Beneficiaries are defined under article 1 of the Act. It is aimed at persons whose employability is reduced by 30 % of the physical capacity or 20 % of the intellectual capacity.

<sup>249</sup> *Moniteur belge*, 30 April 1999.

<sup>250</sup> See Article 25 of the Act of 22 March 1999.



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>251</sup> The Executive Regulation of 5 March 2007 organising the recruitment of people with disabilities in the Federal Administration<sup>252</sup> provides that federal public services will have to employ disabled people at the rate of 3% of their manpower from 2010 and creates a commission tasked with enforcing this new regulation<sup>253</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>254</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.

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>255</sup>. Efforts in this direction nevertheless continue.

<sup>251</sup> See also the Executive Regulation of 5 March 2007 organising 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>252</sup> *Arrêté royal organisant le recrutement des personnes handicapées dans la fonction publique administrative fédérale*, *Moniteur belge*, 16 March 2007, p. 14751.

<sup>253</sup> See the brochure published by the Centre for Equal Opportunities and Opposition to Racism in June 2009, « Discrimination des personnes avec un handicap », available at: <http://www.diversite.be>.

<sup>254</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.

<sup>255</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.cpdr.ucl.ac.be/cridho](http://www.cpdr.ucl.ac.be/cridho).

On 6 October 2005, an Executive Regulation (*Arrêté royal*)<sup>256</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.

In the field of education, the French-speaking Community and the Walloon Region concluded on 10 October 2008 a Cooperation Agreement as regards the support for schooling of young disabled people<sup>257</sup>. The Agreement aims in particular to complement the school's action by providing a specialised support to the students whose schooling in the ordinary or special education system is made more difficult because of his/her disability.

It may also be noted that the Walloon Government adopted on 14 May 2009<sup>258</sup> an Executive Regulation in order to take care of whole or part of the expenditure related to the individual assistance granted to people with disabilities for their integration. This financial intervention is offered to the disabled person for the expenses that are necessary to her activities and to her participation in social life (cane, car adjustment, stand assist lift, magnifying glass, book reader, Braille printer,...).

<sup>256</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>257</sup> *Accord de coopération entre la Communauté française et la Région wallonne en matière de soutien à la scolarité pour les jeunes présentant un handicap*, *Moniteur belge*, 10 April 2009, p. 28543 to which it was given approval on 19 March 2009 by the Walloon Region (*Moniteur belge*, 10 April 2009, p. 28542) and on 30 April 2009 by the French-speaking Community (*Moniteur belge*, 9 July 2009, p. 47468).

<sup>258</sup> *Arrêté fixant les conditions et les modalités d'intervention d'aide individuelle à l'intégration des personnes handicapées*, *Moniteur belge*, 7 July 2009, p. 46240.

## 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 Anti-discrimination 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 Anti-discrimination 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>259</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).

<sup>259</sup> It is a criminal offence to refuse to comply with a judgment delivered under this provision (Art. 24).

These actions are brought before civil tribunals (*tribunal de première instance*, *rechtbank van eerste aanleg*), or where an employment relationship is concerned, before specialised tribunals (*tribunal du travail*, *arbeidsrechtbank*). In addition, the Acts provide in limited circumstances for a criminal liability in cases of discrimination. First – but this goes beyond the scope of behaviours which the Racial or the Employment Equality Directives cover –, the incitement to commit a discrimination, or the incitement to hatred or violence against a group defined by 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 Anti-discrimination Federal Act)<sup>260</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 maximum two years<sup>261</sup>.

*Regions and Communities.* Before, 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>262</sup>.

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

All 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).

<sup>260</sup> These offences which may thus lead to stronger convictions if driven by such an “abject motive” 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>261</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>262</sup> The system of remedies put in place at regional level is described in detail in the Flash Reports reporting and commenting on these different pieces of legislation.

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) *What is the time limit within which a procedure must be initiated?*

*Time limit in order to ask for the nullity of a contractual clause:* one must refer to the rules governing prescription in civil matters (art. 2262bis of the Civil Code). If nullity is sought by filing a suit, a 10 years deadline will apply for the introduction of the action, starting from the forming of the discriminatory act. If nullity is asserted by way of an exception (for example, nullity is called upon by the debtor against the request formed by the creditor of a discriminatory act), there is no limit of time<sup>263</sup>.

*Reparation according to the usual principles of civil liability:* a 10 years limitation should apply, apart from the actions for damages based on a non-contractual liability, which are extinguished after 5 years as from the moment when the victim was informed of the damage and of the responsible person's identity. In the latter case, the actions are in any case extinguished 20 years after the fact that is the origin of the damage (art. 2262bis of the Civil Code).

*Time limit to seek a judicial injunction imposing the cessation of a discriminatory practice:* there is no specific time limit prescribed by law. There is nevertheless a controversy as for the possibility of bringing an action in cases where the litigious act has already been accomplished and has exhausted its effects (e.g. the author of the discrimination has already rented the good after refusing to rent it to the victim of this discrimination). The first decisions in this matter seem to adopt a broad conception of the interest that must be demonstrated by the victim in order to take action, particularly when there exists a danger that the violation will be repeated<sup>264</sup>.

*With regard to criminal procedures:* one must refer to the usual rules governing criminal prescription (Art. 21 and sqq. of the Preliminary Title of the Code of Penal Procedure).

The offences comprised in the Acts of 10 May 2007 and the regional decrees are *délits* (i.e. offences punished by maximum 5 years imprisonment) and public prosecution is thus in principle extinguished after 5 years.

<sup>263</sup> P. Wautelet, "Les garanties de la non-discrimination : sanctions civiles et aspects de procédure dans les lois fédérales luttant contre la discrimination" [The non-discrimination safeguards : civil sanction and procedural aspects in the Federal Acts fighting against discrimination], in P. Wautelet (dir.), *Le droit de la lutte contre la discrimination dans tous ses états*, C.U.P., Anthemis, Liège, 2009, p. 224.

<sup>264</sup> P. Wautelet, "Les garanties de la non-discrimination : sanctions civiles et aspects de procédure dans les lois fédérales luttant contre la discrimination", [The non-discrimination safeguards : civil sanction and procedural aspects in the Federal Acts fighting against discrimination], in P. Wautelet (dir.), *Le droit de la lutte contre la discrimination dans tous ses états*, C.U.P., Anthemis, Liège, 2009, p. 236.



As regards offences committed with an “abject motive”, these can consist of *délits* or crimes, for which public prosecution becomes in principle impossible after respectively 5 and 10 years. However, it is worth mentioning that the admission of extenuating circumstances may transform a crime into a *délit* (with a limitation of 5 years) or a *délit* into a minor offence (for which the limitation is one year). Finally, there exist various causes of suspension and interruption of prescription. In this respect, the Anti-discrimination Federal Acts provide in particular that the suspension occurs in the event of an action seeking the cessation of a discriminatory practice brought before civil tribunals.

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

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) *What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association).*

*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>265</sup>, that certain associations and representative unions 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).

<sup>265</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, *Pasicrisie*, 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).

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).

*The legal standing of associations in civil procedures.* The General Anti-discrimination Federal Act and the Racial Equality Federal Act provide for the legal standing of the Centre for Equal Opportunities and Opposition to Racism, of certain organisations and of representative unions (Art. 29 and 30 respectively).

*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 Decrees adopted by the *Cocof* in 2007 and 2010 (respectively Art. 14 and Art. 28) have solutions similar to that of the Anti-discrimination Federal Acts of 10 May 2007. 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>266</sup> and both Ordinances adopted by the Region of Brussels-Capital on 4 September 2008.

- b) *What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove "legitimate interest", what types of proof are needed? Are there legal presumptions of "legitimate interest"?*

*At the Federal level:*

Besides the Centre for Equal Opportunities and Opposition to Racism and representative unions, associations willing to claim damages in support of complainants, in case of violation of the anti-discrimination legislations, must have a legal personality for at least three years<sup>267</sup> and a legal interest in the protection of human rights or in combating discrimination (Art. 32, 1° of the Racial Equality Federal Act and Art. 30 the General Anti-discrimination Federal Act).

*At the Regional level:*

As it is provided at the federal level, to engage in proceedings in support of complainants, organisations must be established since at least three years and must pursue the objective of protecting human rights and combating discrimination.

<sup>266</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.

<sup>267</sup> In the procedure it had launched against Belgium, the European Commission took the view that the requirement of being established for a minimum of five years was too heavy. The choice to lower the requirement to three years' existence is an answer to this concern.

This uniform system is provided by Art. 16 of the Flemish Decree of 2002, Art. 20 of the Decree of the German-speaking Community of 2004, Art. 14 (2007) and Art. 28 (2010) of the Decrees of the *Cocof*, Art. 41 of the Decree of the Flemish Community/Region of 2008, Art. 31 of the Decree of the Walloon Region of 2008, Art. 39 of the Decree of the French-speaking Community of 2008 and respectively Art. 27 (employment) and Art. 25 (civil service) of the Ordinances of the Region of Brussels-Capital of 2008.

- c) *Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?*

Both at the Federal level and the Regional ones, where the victim of the alleged discrimination is an identifiable (natural or legal) person, actions of the entities entitled to act in support of them will only be admissible if they prove that the victim has agreed to their action being filed. This principle is provided for by the General Anti-discrimination Federal Act (Art. 31), the Racial Equality Federal Act, (Art. 33), the Decree of the Flemish Community/Region of 2008 (Art. 40), the Decree of the Walloon Region of 2008 (Art. 32), the Decree of the French-speaking Community of 2008 (Art. 40), the Decree of the German-speaking Community of 2004 (Art. 20), the Decree of the *Cocof* of 2007 (Art. 14), the Decree of the *Cocof* of 2010 (Art. 28) and the Ordinances of the Region of Brussels-Capital of 2008 (Art. 27 (employment) and Art. 24 (civil service)).

- d) *Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.*

The extension of legal interest in case of a person being victim of discrimination to the Centre for Equal Opportunities and Opposition to Racism, representative unions and associations has an important consequence: such entities acting as private prosecutors may overcome both the inertia of the public prosecutor (in case of criminal proceedings) 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. However, these entities may only launch proceedings on the basis of the Federal or regional anti-discrimination acts with the agreement of the individual victim, and they have absolutely no legal duty to act in support of the victim in case of violation of these legislations.

- e) *What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.*

The Centre for Equal Opportunities and Opposition to Racism, representative unions and associations may engage in criminal proceedings (under the Act of 30 July 1981 criminalising certain acts inspired by racism and xenophobia as modified by the Racial Equality Federal Act) and civil proceedings under the other Federal and regional anti-discrimination acts.

- f) *What type of remedies may associations seek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify*

Just as the victim of discrimination, the Centre for Equal Opportunities and Opposition to Racism, representative unions and associations may ask the court for an injunction to court in order to stop a discriminatory behavior. They may engage in criminal proceedings to obtain the conviction of the person responsible for discrimination when he/she has committed an offence under an Anti-discrimination Act. They also may engage in civil proceedings to obtain damages for the victim (in this case they have the possibility to choose between full compensation for the damage or lump-sum compensation fixed by law). Therefore, these entities may seek and obtain the same remedies compared to the victim of discrimination, and benefit from the same protection.

- g) *Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?*

No, the rules on the shifting burden of proof are exactly the same for victims of discrimination and for entities acting in support of them.

- h) *Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

The Federal and regional anti-discrimination legislations provide for *legal standing of associations* to a certain extent. But, the concept of *actio popularis* understood as a mechanism implying that a "representative plaintiff" will sue in the name of the collective interest, is unknown in Belgian law. The Centre for Equal Opportunities and Opposition to Racism, representative unions and associations may engage in civil or criminal proceedings in case of violation of anti-discrimination legislation, but only in support of an identified victim of discrimination.

- i) *Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

Just as the concept of *actio popularis*, the concept of *class action*, understood as a mechanism implying that a “representative plaintiff” will sue in the name of a class and obtain a judgment binding on all the members of that class, is unknown in Belgian law. The Centre for Equal Opportunities and Opposition to Racism, representative unions and associations may engage in civil or criminal proceedings in case of violation of anti-discrimination legislation, but only in support of one identified victim of discrimination.

### 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. 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>268</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).

<sup>268</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.



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 Anti-discrimination 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 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>269</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>270</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.

The same observation 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. Both Decrees of the Cocof provide for a very similar system (Art. 13 §§ 2-3 of the Decree of 2007 and Art. 25 of the Decree of 2010).

<sup>269</sup> To the knowledge of the authors, nothing has been done yet in order to correct this erroneous translation.

<sup>270</sup> See Art. 10(3) of Directive 2000/78/EC.

## 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 people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint)*

*At the Federal level:*

The General Anti-discrimination 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 Anti-discrimination 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 Anti-discrimination 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>271</sup>. 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).

<sup>271</sup> See Article 12(1) of the Flemish Decree.

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 Anti-discrimination 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 Anti-discrimination 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>272</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 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 2009 of the Centre for Equal Opportunities and Opposition to Racism: Only 1,85 % of discrimination cases brought to the attention of the public prosecutor lead to criminal proceedings<sup>273</sup>. The 2007 Federal Anti-discrimination 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 Anti-discrimination 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)

<sup>272</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>273</sup> Annual report of the Centre for Equal Opportunities and Opposition to Racism 2009 (*Discrimination – Diversité*), p. 157, available on the website of Centre ([www.diversite.be](http://www.diversite.be)).

<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>274</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> <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 anti-discrimination instruments adopted by the Regions and Communities in 2008, 2009 and 2010 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* in 2007 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).

<sup>274</sup> See *infra*, section 8.2.





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 correspond 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>275</sup>. This Act was importantly modified in 2003 in order to extend its remit not only to all prohibited grounds defined in Article 19 TFEU, but also to the supplementary grounds stipulated in the original version of the Act of 25 February 2003 (Art. 23, 24<sup>276</sup> and 31 Act of 25 February 2003). The General Anti-discrimination 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 Anti-discrimination Federal Act, with the exception of language<sup>277</sup> (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. Two Protocols of Collaboration were signed in 2009, with the Walloon Region and the French-speaking Community.

<sup>275</sup> *Moniteur belge*, 19 February 1993. The Act of 15 February 1993 is available, in English translation, from the Centre's website.

<sup>276</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>277</sup> A Bill introduced on 30 September 2008 is currently pending in the House of Representatives and aims at creating a Centre of Promotion of Linguistic Diversity (*Centre de promotion de la diversité linguistique*) which would be competent as regards linguistic discriminations in a way similar to the Centre for Equal Opportunities and Opposition to Racism and the Institute for Equality between Women and Men. It is doubtful though whether this Bill will ever be adopted.

These Protocols allow the Centre<sup>278</sup> to fulfil all its traditional missions<sup>279</sup>, apart from filing legal suits, in the fields covered by the Decrees of the Walloon Region and of the French-speaking Community. They also provide for the creation of a decentralised network dealing with complaints and promoting equality locally, and for the exchange of information between the Walloon Region, the French-speaking Community and the Centre. There is currently a team of 5 people working under these Protocols in the Centre. In January 2011, a Protocol of Cooperation has not yet been signed with the Region of Brussels-Capital. The Flemish Community/Region gave public funding to the Centre for Equal Opportunities for its participation in the setting of 13 contact points presently operational in the larger cities of Flanders (training, exchanges of good practices, etc.)<sup>280</sup>. 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.

Although the German-speaking Community does not have a “specialised body” for the promotion of equal treatment, it has instituted the function of Ombudsman for the German-speaking Community on 26 May 2009<sup>281</sup>. The Ombudsman is notably tasked with supervising independently the compliance by administrative bodies with the Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC. In addition, the Economic and Social Council (*Conseil économique et social*) of the German-speaking Community was vested, on 27 April 2009<sup>282</sup>, with the mission of producing reports, studies and recommendations on all aspects related to labour market discrimination, “with a view to ensuring the full implementation” of the European Directives adopted in this field. One can wonder whether such initiatives dismiss the prospect that these missions might one day be entrusted by the German-speaking Community to the Centre for Equal Opportunities and Opposition to Racism.

- 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.

<sup>278</sup> Two similar protocols were signed with the Institute for Equality between Women and Men as well.

<sup>279</sup> These traditional missions are providing assistance to victims, conducting surveys, publishing reports and issuing recommendations.

<sup>280</sup> See the list (in Dutch) here: <http://www.gelijkekansen.be/Meldpunten%20discriminatie/>.

<sup>281</sup> *Décret instituant la fonction de médiateur pour la Communauté germanophone*, *Moniteur belge*, 7 October 2009, p. 66202.

<sup>282</sup> *Décret Programme 2009*, *Moniteur belge*, 15 June 2009, p. 41866.

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 2010, its budget increased compared to 2009 (figures not available at the time of writing the report) and 12 persons have been added to its staff.

- 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 Anti-discrimination 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, property, religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion, genetic characteristic and social origin). Following the amendment of the General Anti-discrimination Act on 30 December 2009 in order to include the trade union opinion among the discriminatory grounds, it remains uncertain whether the Centre should consider itself competent regarding this ground as well, as the legislator forgot to modify the Act of 15 February 1993 accordingly (*supra*, section 0.3)<sup>283</sup>.

- 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?*

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.

<sup>283</sup> Note that in its Annual Report of 2009, the Centre stated that it is generally considering itself not competent to deal with this ground of discrimination.

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>284</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 Anti-discrimination 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>285</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>284</sup> For a more detailed presentation of those activities of the Centre, see their website : <http://www.diversiteit.be/>

<sup>285</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 which 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>286</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) Is the independence of the body / bodies stipulated in the law? If not, can the body/bodies be considered to be independant ? Please explain why.*

No, the Centre for Equal Opportunities and Opposition to Racism is not a quasi-judicial institution.

*g) Are the tasks undertaken by the body / bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports)*

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, a working group of 5 persons of the Centre is charged with dealing specifically with issues concerning Roma and Travellers.

<sup>286</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 anti-discrimination legislation adopted at the Federal level has been widely publicised 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 organisation 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 Anti-discrimination Acts in “sign language”<sup>287</sup>. The Centre has also organised several informative afternoons in the major cities of the country 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.

Furthermore, on 18 March 2008, the Federal Government decided to initiate a national debate on multiculturalism and diversity named the “Assizes on Interculturality”. Its aim was to discuss with the main field actors on how to promote a society of diversity and integration, without discrimination, where all cultural specificities are respected, as well as where a set of common values can be shared. Its official partners were the Centre for Equal Opportunities and Opposition to Racism, the Institute for Equality between Women and Men, the non-profit organisation “Promotion of Ethnic and Cultural Diversity on the Labour Market”, the Federal Ministry for Employment, Labour and Social Dialogue, numerous NGO’s and field actors as well as more than 50 legal persons or public bodies selected on the basis of projects they submitted to the pilot Committee.

<sup>287</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)).

Works conducted by a Steering Committee from September 2009 to September 2010 have finally led to a Final Report handed in to the Federal Vice-Prime Minister, Minister of Employment and Equal Opportunities in charge of Immigration and Asylum, Mrs. Joëlle Milquet, on 8 November 2010. This Final Report contains 67 recommendations grouped by themes: education; employment; governance; goods and services (health and housing); community work, culture and media.

In the education field, the Steering Committee notably recommends to integrate the learning of intercultural skills by teachers during trainings, to introduce cultural diversity into course syllabus and to have the teaching staff mirroring the diversity of origins present in the society. Another important issue dealt with by the Committee concerns the wearing of religious signs by students. The later recommends, as a compromise between opposing tendencies, a legislative ban on wearing religious symbols until the third year of secondary school, followed by a legislative general authorization to wear them from the fourth year of secondary school, that is to say from the age of 15-16.

In the employment field, the Steering Committee has noticed that persons of Moroccan or Turkish origin are six times more likely to lose their job and are still often discriminated against during the hiring process. For this reason, the Committee suggests different solutions, such as the use of socio-economic monitoring techniques to measure diversity in employment (especially to observe discrimination on the grounds of nationality and origin), the establishment of quotas to allow the hiring of persons belonging to minorities (mostly on the basis of objective grounds such as nationality and origin), and the introduction of anonymous CVs to avoid discrimination based on the applicants' names or nationality. The Committee has also tackled the issue of reasonable accommodations in the workplace. The General Anti-discrimination Federal Act of 2007 already provides for reasonable accommodation in the employment field, but only on the grounds of disability. This time the Committee suggests that a reflection regarding the enlargement of this concept to other grounds of discrimination, notably in religious and philosophical matters should be initiated. The Steering Committee also recommends an adaptation of the calendar of legal public holidays, which generally correspond to Christian religious festivals. The proposal is to retain five public holidays (National Day, New Year's Day, Christmas Day, Labour Day and Armistice Day), then to create three new public holidays without any religious connotation (for example, International Women's Day or International Day Against Racism and Xenophobia) and finally to allow everyone to choose freely two floating days according to their culture or religion.

In the field of governance, the Steering Committee essentially promotes the principle of freedom regarding the wearing of religious symbols in public services, that the officer be in contact with the public or not, unless he acts as an authority (for example, a judge). The Committee also recalls that Belgium should transform the Centre for Equal Opportunities and Opposition to Racism into an inter-federal body – and not only federal – or create independent entities at the regional/community level, in order to comply with EU Anti-discrimination Directives.

Furthermore, the Committee stresses out the “duty of memory”. For that purpose, it suggests reforming the Act of 23 March 1995, aiming at suppressing negation, minimization, justification and approbation of the genocide committed by German National Socialist regime during the Second World War. This would consist in clarifying the scope of the law and enlarging it to others genocides. Also, the Committee recommends that the political authorities recognize the Belgian colonial past and apologize for the dramatic events related. In this respect, it would be symbolically important to remove all traces of this past, for example in the names of streets or public spaces.

In the field of health and housing, the Steering Committee notably recommends that the authorities provide more social housing of large size in order to be adapted to large family needs, that they make available more lands for Roma people, and that they still fight against discrimination regarding private housing (for example, by sensitizing all actors involved, such as landlords or estate agents, to the importance of informing authorities of all cases they might know).

In the fields of community work, culture and media, the Steering Committee mainly suggests a better representation of cultural diversity, by facilitating their access to persons belonging to minorities, and stresses the importance of intercultural skills in these fields.

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*

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 organisations, 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<sup>288</sup>. 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 specialised 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 the situation of 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).*

<sup>288</sup> Note that there is nothing in this respect in the interprofessional agreement 2009-2010.



The formulations of the General Anti-discrimination 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 Anti-discrimination 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>289</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 anti-discrimination 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 anti-discrimination 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, 2009 and 2010 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 does 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 that are 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>289</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?*

At the *federal level*, anti-discrimination 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, Mrs Eliane Tillieux (French-speaking Socialist Party) ; for the *Flemish Region/Community*, the Minister of Youth, Education and Equal Opportunities : Mr Pascal Smet (Dutch-Speaking Socialist Party) ; for the *French-speaking Community*, the Minister of Culture, Broadcasting, Health and Equal Opportunities : Mrs Fadila Laanan (French-speaking Socialist Party) ; for the *Region of Brussels-Capital*, the Secretary of State of Mobility, Civil Service, Equal Opportunities and Administrative Simplification : Bruno De Lille (Dutch-speaking Green Party). There is no equivalent member of the Government specifically in charge of equal opportunities in the *German-speaking Community*. 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.

*Is there an anti-racism or anti-discrimination National Action Plan ? If yes, please describe it briefly.*

At the end of 2002, the Belgian Prime Minister gave the Centre for Equal Opportunities and Opposition to Racism the responsibility of elaborating a project of "National Action Plan against racism, racial discrimination, xenophobia and intolerance often associated with it". To that purpose, the Centre delivered a first project on September 2003. Besides this project prepared by the Centre, the "Federal Action Plan against racial, anti-Semitic and xenophobic violence" and the "Final report of the Assizes on Inter-culturality" should be used for elaborating the National Action Plan. Nevertheless, election deadlines and the political crisis of the country is slowing down this process, so that the National Action Plan has neither been finalized, nor adopted.



## **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 January 2010

<b>Title of Legislation (including amending legislation)</b>	<b>Date of adopti on:</b>	<b>Date of entry 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	30 July 1981	June 2007 (entry into force of the most recent	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	Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment; civil remedies, and

<b>Title of Legislation (including amending legislation)</b>	<b>Date of adopti on:</b>	<b>Date of entry in force from:</b>	<b>Grounds covered</b>	<b>Civil/Administrative/ Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
20 January 2003 and of 10 May 2007 [Racial Equality Federal Act] (available on the following website <a href="http://wwwdiversiteit.be">http://wwwdiversiteit.be</a> )		amend ments)			private and in the public sector; the nomination of a public servant or his/her assignment to a service; reference in an official document; access to goods or services including private housing, economic, social, cultural or political activities normally accessible to the public	criminal provisions



Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
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> )	15 Febr. 1993	June 2007 (entry into force of the most recent amendments)	All grounds covered by the Racial Equality Federal Act and by the General Anti-discrimination 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> ), as amended by the Act of 30 December 2009 [General Anti-discrimination Federal Act] (available on	10 May 2007	Dec. 2009 (entry into force of the most recent amendments)	Age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion,	Administrative, civil, criminal	Provision of goods and services; access to employment, promotion, conditions of employment, dismissal and remuneration, both in the private and in	Prohibition of direct and indirect discrimination, Including instruction to discriminate and harassment ; civil remedies, and criminal provisions

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
the following website <a href="http://www.diversiteit.be">http://www.diversiteit.be</a> )			trade union opinion and language, genetic characteristic and social origin		the public sector; the nomination of a public servant or his/her assignment to a service; economic, social, cultural or political activities normally accessible to the public	
Flemish Region/Community: Decree of 8 May 2002 on proportionate participation in the employment market ( <i>Decreet houdende evenredige participatie op de arbeidsmarkt</i> ) as amended by the Decrees of 30 April 2004, of 9 March 2007 and of	8 May 2002	June 2009 (entry into force of the most recent amend	Gender, alleged race, ethnic origin, religion or belief, disability, age and sexual orientation	Civil and criminal	Access to employment, vocational training, promotion, working conditions, but only applicable to a) labour	Prohibition of direct and indirect discrimination, instruction to discriminate and harassment

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
30 April 2009 (available on the following website <a href="http://www.diversiteit.be">http://www.diversiteit.be</a> )		ments)			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	
Flemish Region/Community: Decree of 10 July 2008, establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy ( <i>Decreet</i>	10 July 2008	Oct. 2008	All grounds of article 13 EC plus colour, ancestry or national origin, civil status (married/non	Administrative, civil, criminal	In the field of competences of the Flemish Community/Region : employment policy, health	Prohibition of direct and indirect discrimination, including instruction to discriminate and

Title of Legislation (including amending legislation)	Date of adopti on:	Date of entry in force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
<i>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> )			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) (+ trade union opinion < conform interpretation of the Constitutional Court, July 2009)		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.	harassment ; civil remedies, and criminal provisions

Title of Legislation (including amending legislation)	Date of adopti on:	Date of entry in force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
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> )	12 Dec. 2008	Jan. 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, language, present or future state of health, physical or genetic characteristics	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 involvment in a professional organisation funded by the French-speaking Community, access to goods and services at	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)	Date of adopti on:	Date of entry in force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
					disposal of the public as long as they fall into the field of competence of the French Community.	
Walloon Region: Decree of the Walloon Region of 6 November 2008 on the fight against certain forms of discrimination ( <i>Décret relatif à la lutte contre certaines formes de discrimination</i> ), as amended and renamed by the Decree of 19 March 2009 (formerly known as the Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment	6 Nov. 2008	April 2009 (entry into force of the most recent amendments)	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,	Administrative, civil, criminal	Economy, employment and vocational training in the public and the private sectors, social protection, including health care, social advantages, supply of goods and services available to the public and outside private and family	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)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
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/cgi/welcome.pl">http://www.ejustice.just.fgov.be/cgi/welcome.pl</a> )			pregnancy, childbirth, maternity leave and transgender		sphere, including social housing, access, participation or any exercise of an economic, cultural or political activity open to the public and statutory relationships in departments of the Walloon Government, public authorities depending on the Walloon Region, decentralised bodies (such as provinces,	

Title of Legislation (including amending legislation)	Date of adopti on:	Date of entry in force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
					municipalities, etc.), public Centres for social assistance.	
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> )	17 May 2004	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	Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment

Title of Legislation (including amending legislation)	Date of adopti on:	Date of entry in force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
					with respect to the provision of reasonable accommodation to people with disabilities.	
Region of Brussels-Capital: Ordinance of the Region of Brussels-Capital adopted on 4 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> ) as amended by the Ordinance of 30 April 2009 (available on the following website: <a href="http://www.ejustice.just.fgo">http://www.ejustice.just.fgo</a> )	4 Sept. 2008	May 2009 (entry into force of the most recent amend ments)	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,	Administrative, civil, criminal	Employment field which covers, at that regional level, the placement of workers policies and the policies dedicated to unemployed persons.	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)	Date of adopti on:	Date of entry in force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
v.be/cgi/welcome.pl)			ancestry, national or, social origin. (+ trade union belief < conform interpretation of the Constitutional Court, July 2009)			
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.fgo">http://www.ejustice.just.fgo</a>	4 Sept. 2008	Sept. 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,	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)	Date of adopti on:	Date of entry in force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
v.be/cgi/welcome.pl)			nationality, colour, ancestry, national or, social origin.			
<i>Commission communautaire française (Cocof):</i> Decree on equal treatment between persons in vocational training of 22 March 2007 ( <i>Décret relatif à l'égalité de traitement entre les personnes dans la formation professionnelle</i> ) (available on the following website <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> )	22 March 2007	Jan. 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
<i>Commission communautaire française (Cocof):</i> Decree on the fight against certain forms of discrimination and on the	9 July 2010	Sept. 2010	age, sexual orientation, civil status, birth, property, religious or philosophical	Administrative, civil, criminal	School transport and school building management; municipal,	Prohibition of direct and indirect discrimination, instruction to discriminate,

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
implementation of the principle of equal treatment of 9 July 2010 ( <i>Décret relatif à la lutte contre certaines formes de discrimination et à la mise en oeuvre du principe de l'égalité de traitement</i> ) (available on the following website <a href="http://www.ejustice.just.fgov.be/loi/loi.htm">http://www.ejustice.just.fgov.be/loi/loi.htm</a> )			belief, political or trade union opinion, language, actual or future state of health, disability, physical or genetic characteristic, sex, pregnancy, motherhood, childbirth, gender reassignment, nationality, alleged race, skin colour, descent and national, ethnic or social origin		provincial, intermunicipal and private facilities with regard to physical education, sports and outdoor life; tourism; social advancement; health policy; assistance for people; access to goods and services; access, participation and any other exercise of economic, social, cultural or political activities	harassment and sexual harassment and the failure to provide reasonable accommodation for persons with disabilities; civil remedies, and criminal provisions.

<b>Title of Legislation (including amending legislation)</b>	<b>Date of adopti on:</b>	<b>Date of entry in force from:</b>	<b>Grounds covered</b>	<b>Civil/Administrative/ Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
					publicly available; labour relations within public institutions of the <i>Cocof</i> .	

**ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS**

Name of country: Belgium

Date: 01 January 2010

<b>Instrument</b>	<b>Date of signature (if not signed please indicate)</b>	<b>Date of ratification (if not ratified please indicate)</b>	<b>Derogations/ reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	4 November 1950	14 June 1955	No	N/A	Yes
Protocol 12, ECHR	4 November 2000	Not ratified		N/A	
Revised European Social Charter	3 May 1996	2 March 2004		Ratified Protocol on collective complaints on 23.6.2003	
International Covenant on Civil and Political Rights	10 December 1968	21 April 1983	No	Ratified Optional Protocol on 17.5.1994	Yes
Framework Convention for the Protection of National Minorities	3 July 2001	Not ratified			
International Convention on Economic, Social and	12 December 1968	21 April 1983	No	N/A	Yes

<b>Instrument</b>	<b>Date of signature (if not signed please indicate)</b>	<b>Date of ratification (if not ratified please indicate)</b>	<b>Derogations/ reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Cultural Rights					
Convention on the Elimination of All Forms of Racial Discrimination	17 August 1967	7 August 1975	No		Yes
Convention on the Elimination of Discrimination Against Women	17 July 1980	10 July 1985	No	Ratified Optional Protocol 17.6.2004	Yes
ILO Convention No. 111 on Discrimination	25 June 1958	22 March 1977	No		Yes
Convention on the Rights of the Child	16 January 1990	16 December 1991	No	N/A	Yes
Convention on the Rights of Persons with Disabilities	30 March 2007	2 July 2009	No	Ratified Optional Protocol on 2.7.2009	Yes