

Executive Summary

Country Report Belgium 2011 on measures to combat discrimination

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1. Introduction

In Belgium, which has a population of 11 million, the main religion is Roman Catholicism (50%). Other believers are Muslims (5%), Anglicans, Protestant and Orthodox (2,5%), persons of Jewish faith (0,4%) and Buddhists (0,3%). In addition, nearly 42% of people identified themselves as non-believers, among which 10% claim to be atheists.¹ The country's government type is that of a representative democracy premised upon a bicameral system. The official head of the State is the King (Albert II) who mainly has formal functions. The Prime Minister is the leader of the government. Government always consists of a coalition of different political parties since there are a multitude of parties that get elected into Parliament.

The federal structure of the country has been, and still is, a complicating factor in the implementation, not only because of the uncertainties concerning the division of competences between the Federal State, the Regions and Communities, but also because the sociological and political context is different in each part of the country. While the French-speaking part of the country (Wallonia-Brussels Federation, Walloon Region and, to a large extent, the Brussels-Capital Region) has traditionally opted for an individualistic model of combating discrimination, the Dutch-speaking part (Flemish Region and Community) has been more willing to seek inspiration from the experiences of the United Kingdom or of the Netherlands. These countries have a more communitarian approach implying, for instance, a greater willingness to promote equal treatment through statistical monitoring of the situations of different groups within society and to allow for affirmative action schemes. The stakes are also higher in the Flemish Region/Community, because of the relatively significant representation in that part of the country of the Vlaams Belang, an extreme-right, nationalistic political party. Its representation allows this extremist and xenophobic party to influence the debates on issues such as the integration of migrants or the wearing of headscarves by Muslim women in schools or in employment. The mainstream political parties are accusing the Vlaams Belang of igniting ethnic tensions and of being 'morally responsible' for the multiplication of racist incidents.

Victims of discrimination, either in employment relationships or in the broader spheres to which the prohibition of discrimination under the Racial Equality Directive applies, were afforded a certain level of protection in the Belgian legal order before the European Directives were adopted in 2000. The protection was in particular

¹ There are no official figures available in Belgium. These come from an academic study: L. Voyé and K. Dobbelaere, *Autres temps, autres moeurs*, ed. Racine-Campus, 2012.

afforded by the Federal Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia, which was amended on several occasions to increase the scope of the legislation. 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.

2. Main legislation

Belgium is a party to most of the important international agreements relevant for counteracting discrimination (i.e. the European Convention on Human Rights and its Protocol no. 12, the Revised European Social Charter, the International Covenant on Civil and Political Rights (ICCPR) and the Optional Protocol to the Covenant, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) including the Optional Protocol to this Convention, the Convention of the Rights of the Child, the Council of Europe Framework Convention for the Protection of National Minorities, the Convention on the Rights of Persons with Disabilities). However, it has not yet ratified Protocol no. 12 to the European Convention on Human Rights and the Council of Europe Framework Convention for the Protection of National Minorities. After ratification, these international instruments constitute part of the domestic legal order and can be applied directly by domestic courts if the provision at stake is sufficiently clear and precise for direct application.

Articles 10 and 11 of the Constitution, which prohibits discrimination, 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 situations concerned (they apply to all contexts, going beyond not only employment and occupation, but also the scope of the Racial Equality Directive). However, they are rarely invoked in private relationships, because of their very general formulation and the delicate issues which would be entailed by their application in this context, for instance to protect an individual from private acts of discrimination by an employer. These constitutional provisions have been most effective when invoked against either legislative norms or administrative acts.

Today, the major anti-discrimination legislation at federal level is embodied in three Acts adopted on 10 May 2007. First, 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, colour, descent, national or ethnic origin, and nationality. Secondly, the Federal Act pertaining to fighting certain forms of discrimination, hereafter the *General Anti-discrimination Federal Act* which covers 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. Thirdly, the Federal Act pertaining to fighting against discrimination between women and men, which relates to sex and assimilated grounds, i.e. maternity, pregnancy and transgender.

Apart from the federal legislator, the Regions and Communities have also taken action in their respective fields of competence. The Flemish Community/Region adopted, on 10 July 2008, a piece of legislation establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy which tackles the same grounds as those covered at the federal level. Its scope relates to 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. This piece of legislation comprises two main parts: (1) the design of a general framework for the implementation of a proactive and preventive policy on equal opportunities; (2) specific provisions against discrimination based on a very similar closed list of grounds to those prohibited at the federal level.

The Wallonia-Brussels Federation (previously named the French-speaking Community) adopted a Decree, on 12 December 2008, on the fight against certain forms of discrimination which tackles the same grounds as those covered at the federal level. It applies to the selection, promotion, working conditions, including dismissals and pay in the public service of the Wallonia-Brussels Federation, education and vocational training, health policy, social advantages, membership of and involvement in any professional organisation funded by the Wallonia-Brussels Federation, and access to goods and services available to the public.

The Walloon Region adopted a Decree, on 6 November 2008, on the fight against certain forms of discrimination, including discrimination between women and men in the fields of economy, employment and vocational training. It tackles the same grounds as those covered at the federal level and applies, more precisely, 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. To fill the gaps remaining in its material scope of application, this Decree was amended on 19 March 2009 to cover, within the field of competences of the Walloon Region, social protection (including health care and social advantages), supply of goods and services which are available to the public and outside private and family sphere (including social housing), access, participation or any exercise of an economic, cultural or political activity open to the public, as well as employment relationships (under civil status) in departments of the Walloon Government, public authorities depending on the Walloon Region, decentralised bodies (such as provinces, municipalities, etc.) or public Centres for social assistance.

The Region of Brussels-Capital adopted two Ordinances fighting against discrimination on 4 September 2008. The first Ordinance, relates to the fight against discrimination and equal treatment in the employment field. It tackles the same grounds as those covered at the federal level and chiefly applies to placing of workers and promotion of employment. It is worth noting that this Ordinance provides for public allowances and labels for business implementing diversity plans. The second Ordinance relates to the promotion of diversity and the fight against discrimination in the civil service of the Region of Brussels-Capital. It applies to the employment field in the civil service of the Region of Brussels-Capital and covers access conditions, criteria selection, promotion, work conditions, including dismissals and pay. By encouraging public institutions to adopt diversity plans, this second Ordinance also puts in place a broad policy of equal treatment. As to the fight against discrimination in social housing, an Ordinance modifying the Brussels Housing Code was adopted on 19 March 2009 and filled the last gap regarding the material scope of protection in the Region of Brussels-Capital.

The German-speaking Community adopted a Decree on the guarantee of equal treatment on the labour market on 17 May 2004, which prohibits direct and indirect discrimination with respect only to the bodies or persons who fall under the powers of the German-speaking Community. The grounds concerned are sex, race, colour, descent, national or ethnic origin, sexual orientation, civil status, birth, property, age, religious or philosophical convictions, current or future state of health, disability or physical characteristic. In June 2007, this Decree was amended in order to comply with EU law in different respects (modification of the definitions of discrimination, victimisation, legal standing of organisations, etc.).

The French Community Commission of the Region of Brussels-Capital (*Cocof*) adopted a first Decree on equal treatment between persons in vocational training on 22 March 2007, which is based on an open list of prohibited criteria. In addition, the *Cocof* adopted a second Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment on 9 July 2010. 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*, more precisely school transport and school building management, municipal, provincial, inter-municipal and private facilities with regard to physical education, sports and outdoor life, tourism, social advancement, health policy, assistance for people,² access to goods and services, access, participation and any other exercise of economic, social, cultural or political activities publicly available and labour relations within public institutions of the *Cocof*. This piece of legislation is based on a list of prohibited criteria in line with the Federal Anti-discrimination Acts. It also aims at promoting diversity to the extent that each public institution of the *Cocof* is required to develop a diversity action plan.

² This competence covers social assistance, integration of migrants, policy dedicated to disabled persons or older persons.

Thereby, at regional level, all the Regions/Communities (*Cocof*, German-speaking Community, Flemish Community/Region, Region of Brussels-Capital Wallonia-Brussels Federation, Walloon Region) adopted statutory law fighting against discrimination in order to fully implement the Directives. They endeavoured to harmonize their content to the Federal Anti-discrimination Acts and are, to a large extent, in line with the Directives.

3. Main principles and definitions

The Racial Equality Federal Act and the General Anti-discrimination Federal Act are in line with all the main concepts enshrined in the EU Directives (direct discrimination, indirect discrimination, harassment, instruction to discriminate and victimisation). As in the Directives, discriminations based on assumed characteristics and 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 preparatory works (*travaux préparatoires*) clearly specify that these Acts apply to such discriminations.

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 definition of genuine and determining occupational requirements corresponds to that offered in Directive 2000/43/EC and Directive 2000/78/EC. No exhaustive list of such requirements is required and 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. The King (i.e., the Government) is, however, authorized to adopt an Executive Regulation providing a list of examples in order to offer guidance to courts.

Concerning reasonable accommodation, there are vivid controversies related to which authority is competent to legislate. The widespread opinion today is that, although disability policy is allocated to the Communities, this does not prohibit the Federal State or the Regions providing that denying reasonable accommodation to a person with a disability amounts to discrimination. 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. The notion of reasonable accommodation does not extend beyond the situation of persons with disabilities and is defined in conformity with the Employment Equality Directive, although with one major difference. Whereas the Directive only refers to reasonable accommodation in employment, the General Anti-discrimination Federal Act refers to all the fields to which it applies which go far beyond employment.

No specific rules exist as regards situations of multiple discrimination, and there is no official step to introduce such rules in the future.

4. Material scope

The Racial Equality Federal Act and the General Anti-discrimination Federal Act provide for protection in large areas of public life: the provision of goods or services when these are offered to the public; access to employment, promotion, conditions of employment, dismissal and remuneration, both in the private and in the public sector; the nomination of a public servant or his/her assignment to a service; the mention in an official document of any discriminatory provision; and access to and participation in, as well as exercise, of an economic, social, cultural or political activity normally accessible to the public. The other legislative instruments adopted in order to implement the equal treatment directives have a material scope of application limited to the competences of either the Region or the Community. Some uncertainties remain, regrettably, as to the precise delimitation of the powers respectively of the Federal State and the Regions and Communities in this field, which has constituted an obstacle in the process of implementation. The most recent pieces of legislation adopted at the regional level, however, address most of the remaining gaps of implementation.

5. Enforcing the law

The General Anti-discrimination Federal Act and the Racial Equality Federal Act provide for civil and criminal procedural protection of victims of discrimination nearly identical with respect to all the prohibited criteria. Alongside one of the guiding principles of the reform that there should be no hierarchy between grounds, only some criminal offences were finally maintained in the Racial Equality Federal Act (discrimination in the provision of a good or a service or in access to employment, vocational training or in the course of a dismissal procedure) and are therefore specific to discrimination based on race and ethnic origin. Victims of discrimination, under the Racial Equality Federal Act and the General Anti-discrimination Federal Act, may 1) seek a finding that discriminatory provisions in a contract are null and void; 2) seek reparation (damages) according to the usual principles of civil liability (however, the victim may opt for a payment of the lump sums defined in the Act rather than for damages calculated on the basis of the 'effective' damage); 3) seek from the judge an injunction imposing immediate cessation of the discriminatory practice, under the threat of financial penalties; 4) seek from the judge publication 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. These actions are brought before civil courts, or where an employment relationship is concerned, before specialised labour courts. Those sanctions must be held as effective, proportionate and dissuasive in the meaning of EU law.

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 organisations with a legal interest in the protection of human rights or in combating discrimination, established for at least three years, and of trade unions,

which may file a suit (civil or criminal) on the basis of the anti-discrimination legislation. However, where the victim of the alleged discrimination is an identifiable (natural or legal) person, their action will only be admissible if they prove that the victim has agreed to their action being filed.

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 will be allowed to produce certain evidence – such as “statistical data” or “recurrence tests” as two examples – which, when presented in court, 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. It should be stressed that “recurrence tests” are closely linked to situation testing but are less controversial to be mentioned in full words in the text of the legislation.

Typically, the victim of discrimination will turn to the Centre for Equal Opportunities and Opposition to Racism. If the Centre considers that an instance of discrimination has occurred, it will first seek to encourage an amicable settlement of the case, by ensuring that measures will be taken in order to avoid a repetition or a continuation of the discriminatory practice. If the attempt at mediation fails, the Centre may – with the consent of the victim, where there is an identified victim – file proceedings against the perpetrator of the discrimination.

6. Equality bodies

The Centre for Equal Opportunities and Opposition to Racism was created by an Act of Parliament of 15 February 1993, most recently amended on 10 May 2007 in order to give the Centre a role in the supervision of all the grounds covered by the Racial Equality Federal Act and the General Anti-discrimination Act, apart from language. For the time being, it should be kept in mind that the Centre is still not competent to deal with cases involving discrimination based on trade union opinion.

The Centre issues reports and recommendations within its mandate. It also assists victims of discrimination, and it may file judicial actions. The Centre has been established as an autonomous public service; although organically attached directly to the Prime Minister of the Belgian Federal Government, its independence is guaranteed by legislation and, in practice, it fulfils its mandate in an independent fashion.

The Centre is now entrusted with the monitoring and implementation of some of the legislative instruments adopted by the Regions and the Communities. This body is still currently a federal agency and in order to empower it 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. In 2009, two Protocols of Collaboration were signed with the Walloon Region and the Wallonia-Brussels Federation and 4 full time employees are

working in the Centre under the scope of these Protocols of Collaboration. These Protocols allow the Centre to fulfil all its traditional missions, apart from filing legal suits, in the fields covered by the Decrees of the Walloon Region and of the Wallonia-Brussels Federation. Such a Protocol is still under discussion with the Region of Brussels-Capital and the *Cocof*. There is presently no Protocol with the Flemish Community/Region, which has nevertheless given public funding to the Centre for Equal Opportunities to participate in the setting of 13 contact points in the larger cities of Flanders (training, exchanges of good practices, etc.). The German-speaking Community has not yet designated any equality body in relation to its anti-discrimination law. It has, however, instituted the function of Ombudsman for the German-speaking Community on 26 May 2009. The Ombudsman is notably tasked with supervising the compliance by administrative bodies with the Anti-discrimination Directives. In addition, the Economic and Social Council of the German-speaking Community was vested, on 27 April 2009, with the mission of producing reports, studies and recommendations on all aspects related to labour market discrimination, “with an eye to ensuring the full implementation” of the European Directives adopted in this field. In the political agreement of December 2011, the Federal Government committed itself to transform the Centre for Equal Opportunities and Opposition to Racism into an inter-federal body qualified to act regardless of the division of competences between the Federal State and the regional entities.