

European network of legal experts in  
gender equality and non-discrimination

# Country report

## Non-discrimination

Belgium

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English, French and  
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# **Country report**

# **Non-discrimination**

# **Belgium**

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(with the collaboration of Cecilia Rizcallah)

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Cecilia Rizcallah (Research Fellow at the Belgian National Fund for Scientific Research affiliated both to the Université libre de Bruxelles and the Université Saint-Louis Bruxelles) provided a great support in updating the 2017 report. Many thanks to Patrick Charlier, co-Director of UNIA, for his generous help. As the experts of the European network of legal experts in gender equality and non-discrimination, Emmanuelle Bribosia and Isabelle Rorive endorse the full responsibility for the content of the report.

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## **MAIN ABBREVIATIONS**

Al. = Alinea

CJEU/ECJ = Court of Justice of the European Union/ European Court of Justice

ECHR = European Convention on Human Rights

ET = Equal Treatment

UNIA<sup>1</sup>/the Centre = Inter-federal Centre for Equal Opportunities (previously, CECLR = Centre for Equal Opportunities and Opposition to Racism and ICEO = Inter-federal Centre for Equal Opportunities)

Gender Institute = Institute for the Equality of Women and Men

Para. or § = Paragraph

TFEU = Treaty on the Functioning of the European Union

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<sup>1</sup> From 19 February 2016, the official name of the Inter-federal Centre for Equal Opportunities has been UNIA. See: <http://www.UNIA.be/fr/articles/le-centre-interfederal-pour-legalite-des-chances-devient-UNIA>.

## **EXECUTIVE SUMMARY**

### **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.<sup>2</sup> 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 (Philippe, since 21 July 2013) who mainly has formal functions (i.e. signature of the federal legislations; role in the federal government formation). 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, because of the uncertainties concerning the division of competences between the Federal State, the Regions and Communities. The sociological and political context is also different in each part of the country. While the French-speaking part of the country (French Community, Walloon Region and, to a large extent, the Brussels-Capital Region) has traditionally chosen a more formal and individual model of combating discrimination close to the French model, the Dutch-speaking part (Flemish Region and Community) has been more willing to promote equal treatment through statistical monitoring and to allow for affirmative action schemes. The stakes are also higher in the Flemish Region/Community, because of some significance in that part of the country of the Vlaams Belang (VB), 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. In recent years, the Nieuw-Vlaamse Alliantie (N-VA) gained many votes from VB electors and became, for the first time, part of the federal Government in 2014.

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 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 had to be established.

### **2. Main legislation**

Belgium is party to most of the important international agreements relevant for counteracting discrimination. 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

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<sup>2</sup> There are no official figures available in Belgium. These come from an academic study: L. Voyé and K. Dobbelaere, *Autres temps, autres mœurs*, ed. Racine-Campus, 2012.



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*.<sup>3</sup> 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, origin,<sup>4</sup> national or ethnic origin, and nationality. Secondly, the Federal Act pertaining to fighting certain forms of discrimination, hereafter the *General Anti-discrimination Federal Act*<sup>5</sup> 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,<sup>6</sup> 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<sup>7</sup> 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 French Community (previously named the French-speaking Community) adopted a Decree, on 12 December 2008, on the fight against certain forms of discrimination<sup>8</sup> 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 French Community, education and vocational training, health policy, social advantages, membership of and involvement in any professional organisation funded by the French Community, 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.<sup>9</sup> 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

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<sup>3</sup> OJ (*Moniteur belge*), 30 May 2007; lastly modified on 17 August 2013, *Moniteur belge*, 5 March 2014.

<sup>4</sup> Please note that national legislation uses the term 'descent'.

<sup>5</sup> OJ (*Moniteur belge*), 30 May 2007; lastly modified on 17 August 2013, *Moniteur belge*, 5 March 2014.

<sup>6</sup> OJ (*Moniteur belge*), 30 May 2007; lastly modified on 22 May 2014, *Moniteur belge*, 24 July 2014.

<sup>7</sup> OJ (*Moniteur belge*), 23 September 2008; lastly modified on 28 March 2014, *Moniteur belge*, 1 April 2014.

<sup>8</sup> OJ (*Moniteur belge*), 13 January 2009; lastly modified on 5 December 2013, OJ (*Moniteur belge*), 5 March 2014.

<sup>9</sup> OJ (*Moniteur belge*), 19 December 2008; lastly modified on 12 January 2012, *Moniteur belge*, 23 January 2012.

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> Contrary to the other federated entities, the Region of Brussels-Capital does not have an all-embracing anti-discrimination legislation. With the Sixth Belgian State Reform in 2014 which gave additional competences to the Regions, new gaps in the implementation of EU anti-discrimination law have to be taken care of (e.g. private housing).

On 19 March 2012, the German-speaking Community adopted a new Decree aiming at fighting certain forms of discrimination,<sup>13</sup> which aims at laying down a general framework for combatting discrimination within the competences of the German-speaking Community. It is designed to implement anti-discrimination EU law in the fields of labour relations in the public bodies created or funded by the German-speaking Community, education institutions and the civil service and governmental institutions (1°), education (2°), employment (3°), social advantages (4°), cultural matters (5°), person-related matters (6°) and access to, and supply of, goods and services available to the public (7°). This piece of legislation is very similar to the Federal Anti-discrimination Acts and covers the same grounds.

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,<sup>14</sup> which is based on an open list of prohibited criteria. It was amended on 5 July 2012 to include a provision on protection from victimisation. 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.<sup>15</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*, more precisely school transport and school building management, municipal, provincial, inter-municipal and private facilities with regard to physical education, sports

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<sup>10</sup> OJ (*Moniteur belge*), 16 September 2008, lastly modified on 14 July 2011, OJ (*Moniteur belge*), 10 August 2011.

<sup>11</sup> OJ (*Moniteur belge*), 16 September 2008 (not modified since then).

<sup>12</sup> OJ (*Moniteur belge*), 7 April 2009.

<sup>13</sup> OJ (*Moniteur belge*), 5 June 2012 (not modified since then).

<sup>14</sup> OJ (*Moniteur belge*), 24 January 2008; lastly modified on 5 July 2012, OJ (*Moniteur belge*), 10 September 2012.

<sup>15</sup> OJ (*Moniteur belge*), 3 September 2010.

and outdoor life, tourism, social advancement, health policy, assistance for people,<sup>16</sup> 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.

Thereby, at regional level, all the Regions/Communities (*Cocof*, German-speaking Community, Flemish Community/Region, Region of Brussels-Capital French Community, 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 most of the main concepts enshrined in the EU directives (direct discrimination, indirect discrimination, harassment and instruction to discriminate). There is nevertheless a problem regarding victimisation because Belgian law only protects victims, its representatives and witnesses against victimisation while the EU directives cover 'all persons' involved. 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 were 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 discriminations, and there is no official step to introduce such rules in the future.

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<sup>16</sup> This competence covers social assistance, integration of migrants, policy dedicated to disabled persons or older persons.

#### **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, including private housing; social advantages; social protection; 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. Education is covered at the Community level. 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 Inter-federal Centre for Equal Opportunities (renamed UNIA in 2016), 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 turns to UNIA. If the latter considers that an instance of discrimination has occurred, it first seeks 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, UNIA may – with the consent of the victim, where there is an identified victim – file proceedings against the perpetrator of the discrimination.

With the adoption of the various Equal treatment Decrees and Ordinance since 2008, the systems of remedies put in place in the Regions and Communities copy to a large extent those of the Federal Anti-discrimination Acts and are in line with the European requirements.

As regards Roma, a 'National Strategy for Roma Integration', adopted in 2012, establishes Belgium's issues and objectives for Roma integration by 2020, and provides for coordination between the Federal State, the Regions and the Communities within the Task Force on Roma, so that every authority can freely take measures according to their competences. The Task Force on Roma meets at least twice a year and is the national contact point for the European Commission. However, as recently highlighted by the Commissioner for Human rights of the Council of Europe following his visit in Belgium in September 2015,<sup>17</sup> the situation of Roma and Travellers in Belgium is still worrying regarding housing and education.

Concerning the rights of people with disabilities, the UN Committee for the protection of persons with disabilities has stressed, in its first report on Belgium, the absence of a national plan with clear targets and the fact that accessibility is not a priority.

## **6. Equality bodies**

The Centre for Equal Opportunities and Opposition to Racism (renamed Inter-federal Centre for Equal Opportunities in 2014 and UNIA in 2016) was initially created in 1993. In 2007, it was given a role in the supervision of all the grounds covered by the Racial Equality Federal Act and the General Anti-discrimination Act: colour, origin, national origin, nationality, age, sexual orientation, civil status, birth, wealth/income (fortune, in French), religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion, trade union opinion, genetic characteristic and social origin (not sex and language).

In 2012 started a reform to turn the Centre into an inter-federal agency so as to entrust it with the monitoring and implementation of the anti-discrimination law adopted by the Regions and the Communities. Henceforth, in case of potential infringement to any of the federal or regional Anti-discrimination legislations, citizens are able to contact either the main office of UNIA in Brussels, or the contact points in Flanders (*meldpunten*) or in Wallonia, although the latest are not in place yet (only cooperation with the 'Wallonia Spaces'). The inter-federal Centre is operational, since March 2014.

UNIA issues reports, surveys and recommendations within its mandate. It also assists victims of discrimination, and it may file judicial actions but it is not a quasi-judicial body. In 2015, UNIA received 4554 complaints; it opened a file in 1596 cases and it launched a lawsuit in 15 cases. The relative low amount of cases, related to the opened files, is partly due to the capacity of UNIA to reach amicable settlement through mediation. UNIA has been established as an autonomous public service. Although placed under the supervision of the federal and regional Parliaments, its independence is guaranteed by legislation and, in practice, it fulfils its mandate in an independent fashion.

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<sup>17</sup> Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Belgium from 14 to 18 September 2015, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>.

## 7. Key issues

Over the last two years, politicians of the Dutch-Speaking Nationalist Flemish Party (N-VA) held several statements with racist connotations. There is much political concern about this issue as this party is the most influential in the Flemish part of Belgium. After the elections of May 2014, it has been, for the first time, part of the Federal Government. In addition, despite the repeated calls of UNIA for an Inter-federal Action Plan against Racism, the 2014 Governmental Agreement enshrines no commitment in this respect. Belgium is still failing to hold a promise made during the World Conference against Racism held in Durban in 2001.

The Barometers supported by the Inter-federal Centre for Equal Opportunities provide data and statistics, which are crucial to address discrimination issues (Socio-economic Monitoring, Diversity Barometer in Employment and Diversity Barometer in Housing). The next Diversity Barometer on Education is expected in October 2017. These Barometers show that there are still many discriminatory practices in employment and housing. Moreover, in 2014, the UN Committee for the protection of persons with disabilities expresses its concern about the 'poor accessibility for persons with disabilities, the absence of a national plan with clear targets and the fact that accessibility is not a priority'.<sup>18</sup> The Committee notes 'the low number of persons with disabilities in regular employment' and 'the Government's failure to reach targets for the employment of persons with disabilities within its own agencies, as well as the lack of a quota in the private sector'.<sup>19</sup> As to Travellers, concern was also raised, in 2014, by the ECRI,<sup>20</sup> by the Committee on the Elimination of Racial Discrimination<sup>21</sup> and by the Commissioner for Human Rights of the Council of Europe.<sup>22</sup> There is still a shortage of properly equipped transit sites for Travellers, in particular in the Walloon Region and in the Brussels-Capital Region.

The case law and the numerous judicial rulings involving the highest courts in Belgium (such as the Constitutional Court or the Council of State) show that the issue of religious symbols (and actually, the wearing of the Islamic veil) is still a very controversial one in Belgium.<sup>23</sup> On the top of that, a fair amount of cases decided in court show that there is still a noticeable lack of knowledge of the anti-discrimination law by the professionals in charge of its implementation, especially of the notion of indirect discrimination.

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<sup>18</sup> Committee on the Rights of Persons with Disabilities, concluding observations on the initial report of Belgium adopted by the Committee at its 12th session (15 September – 3 October 2014), para. 21 – 22.

<sup>19</sup> Committee on the Rights of Persons with Disabilities, concluding observations on the initial report of Belgium adopted by the Committee at its 12th session (15 September – 3 October 2014), para. 38 – 39.

<sup>20</sup> 2014 ECRI report on Belgium.

<sup>21</sup> CERD/C/BEL/CO/16-19, 14 March 2014, paras. 18–19.

<sup>22</sup> Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Belgium from 14 to 18 September 2015,

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>.

<sup>23</sup> In 2014, see Council of State (administrative section) (*Conseil d'Etat – section d'administration*), 5 February 2014, XXXX v. *het Gemeenschaponderwijs*, judgments no. 226.345 and 226.346; 14 October 2014, XXXX, *Sukhjot Singh, Sharanjit Singh v. het Gemeenschaponderwijs*, rulings no. 228.751, 228.752, 228.748; 14 October 2014, xxxx, *de vzw Justice and Democracy, Sharanjit Singh, de vzw United Sikhs (Belgium) v. het Gemeenschaponderwijs*, rulings no. 228.753, 228.754, 224.755; Labour Court of Brussels (*Cour du travail de Bruxelles*), 6 March 2014, *H. Amal v. Ministere de la Région Bruxelles-capitale*, R.G. no. 2012/CB/15.

## RÉSUMÉ

### 1. Introduction

En Belgique, pays de onze millions d'habitants, la religion prédominante est le catholicisme romain (50 % de la population); les autres communautés religieuses sont les Musulmans (5 %), les Anglicans, Protestants et Orthodoxes (2,5 %), les Juifs (0,4 %) et les Bouddhistes (0,3 %). On recense par ailleurs près de 42 % d'habitants se déclarant non-croyants et, parmi eux, 10 % s'affirmant athées.<sup>24</sup> Le système politique est une démocratie représentative fondée sur un système bicaméral. Le chef officiel de l'État est le Roi (Philippe depuis le 21 juillet 2013), qui exerce des fonctions essentiellement protocolaires (à savoir la signature des actes législatifs fédéraux et un rôle dans la formation du gouvernement fédéral). Le gouvernement, dirigé par le Premier ministre, est toujours formé d'une coalition de partis politiques en raison de la multitude de partis élus au Parlement.

La structure fédérale du pays a été, et reste, une source de complications au niveau de la mise en œuvre en raison des incertitudes quant à la répartition des compétences entre l'État fédéral, les Régions et les Communautés. Le contexte sociologique et politique est également différent dans chacune des parties du pays. Alors que la partie francophone (la Communauté française, la Région wallonne et, dans une large mesure, la Région de Bruxelles-Capitale) a traditionnellement choisi un modèle davantage formel et individuel de lutte contre la discrimination, la partie néerlandophone (la Région flamande et la Communauté flamande) a eu davantage tendance à promouvoir l'égalité de traitement sur la base d'un suivi statistique et à autoriser la mise sur pied de programmes d'action positive. Les enjeux sont également plus importants en Région/Communauté flamande en raison de la présence assez marquée dans cette partie du pays d'un parti politique nationaliste d'extrême droite, le *Vlaams Belang* (VB). Sa représentation permet à ce parti extrémiste et xénophobe d'influencer les débats sur des questions telles que l'intégration des migrants ou le port du foulard par les femmes musulmanes dans les écoles ou sur le lieu de travail. Le parti Nieuw-Vlaamse Alliantie (N-VA) récupère depuis quelques années de nombreuses voix d'électeurs du VB et participe depuis 2014 au gouvernement fédéral pour la première fois.

Les victimes de discrimination, que ce soit dans les relations professionnelles ou dans des sphères plus larges auxquelles s'applique l'interdiction de discrimination en vertu de la directive sur l'égalité raciale, bénéficiaient d'un certain degré de protection dans l'ordre juridique belge avant l'adoption des directives européennes en 2000. Cette protection était plus particulièrement accordée par la loi fédérale du 30 juillet 1981, qui érige en infraction certains actes à motivation raciste ou xénophobe et qui a été modifiée à plusieurs reprises pour élargir le champ d'application de la législation. La loi fédérale du 30 juillet 1981 fait cependant partie de la législation pénale, et les devoirs probatoires auxquels l'accusation doit faire face (ou, bien évidemment, une victime présumée de discrimination) se sont souvent avérés insurmontables, étant donné l'obligation d'établir l'intention de l'auteur de l'acte.

### 2. Législation principale

La Belgique est signataire de la plupart des grands accords internationaux relatifs à la lutte contre la discrimination. Elle n'a toutefois encore ratifié ni le protocole n° 12 à la Convention européenne des droits de l'homme ni la Convention-cadre du Conseil de l'Europe pour la protection des minorités nationales. Après ratification, les instruments internationaux font partie de l'ordre juridique national et peuvent être appliqués directement par les juridictions belges pour autant que la clarté et la précision de la disposition en cause le permettent.

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<sup>24</sup> On ne dispose en Belgique d'aucun chiffre officiel à ce sujet. Les chiffres cités ici sont tirés d'une étude universitaire: L. Voyé et K. Dobbelaere, *Autres temps, autres mœurs*, Éd. Racine-Campus, 2012.

Les articles 10 et 11 de la Constitution, qui interdisent la discrimination, sont généralement applicables, sans aucune restriction tant en ce qui concerne les motifs sur lesquels se fonde la discrimination (ils exigent le respect du principe d'égalité pour tous les motifs) qu'en ce qui concerne les situations en cause (ils s'appliquent à tous les contextes et vont donc au-delà non seulement du domaine de l'emploi et du travail mais également du champ d'application de la directive relative à l'égalité raciale). Ces articles ne sont cependant que rarement invoqués dans les relations privées en raison de leur formulation très générale et des questions délicates qui découleraient de leur application dans ce contexte (le fait de protéger quelqu'un des actes discriminatoires privés commis par un employeur, par exemple). C'est lorsqu'elles ont été invoquées à l'encontre de normes législatives ou d'actes administratifs que ces dispositions constitutionnelles ont été les plus efficaces.

La principale législation anti-discrimination actuellement en vigueur au niveau fédéral comprend trois lois adoptées le 10 mai 2007. Premièrement, la loi fédérale portant amendement à la loi du 30 juillet 1981 pénalisant certains actes inspirés par le racisme ou la xénophobie (ci-après, la «loi fédérale sur l'égalité raciale»)<sup>25</sup> Cette loi vise à mettre en œuvre à la fois la directive relative à l'égalité raciale et la Convention internationale sur l'élimination de toutes les formes de discrimination raciale de 1965 en une seule législation interdisant la discrimination fondée sur une présomption de race, couleur, origine,<sup>26</sup> origine nationale ou ethnique et nationalité. Deuxièmement, la loi fédérale relative à la lutte contre certaines formes de discrimination (ci-après, la «loi fédérale antidiscrimination»)<sup>27</sup> qui couvre l'âge, l'orientation sexuelle, l'état civil, la naissance, la fortune, les convictions religieuses ou philosophiques, l'état de santé actuel ou futur, le handicap, les caractéristiques physiques, les opinions politiques et syndicales, la langue, les caractéristiques génétiques et l'origine sociale. Troisièmement, la loi fédérale relative à la lutte contre la discrimination entre hommes et femmes,<sup>28</sup> qui porte sur le sexe et les motifs assimilés tels la maternité, la grossesse et la transsexualité.

Outre le législateur fédéral, les Régions et Communautés ont pris, elles aussi, des mesures dans leurs domaines de compétence respectifs. La Région/Communauté flamande a adopté, le 10 juillet 2008, un décret-cadre en matière de politique flamande de l'égalité des chances et de traitement,<sup>29</sup> qui porte sur les mêmes motifs que ceux couverts à l'échelon fédéral. Son champ d'application inclut la politique de l'emploi, les soins de santé, l'enseignement, les biens et services mis à la disposition du public (à savoir, le logement, l'énergie et les services culturels), les avantages sociaux et l'activité économique, sociale, culturelle ou politique en dehors de la sphère privée. Ce décret comprend deux grands volets: 1) l'organisation d'un cadre général en vue de la mise en œuvre d'une politique proactive et préventive en matière d'égalité des chances et 2) des dispositions particulières visant à combattre la discrimination fondée sur une liste fermée de motifs très similaire à celle des motifs prohibés au niveau fédéral.

La Communauté française a adopté le 12 décembre 2008 un décret relatif à la lutte contre certaines formes de discrimination,<sup>30</sup> qui reprend les motifs interdits au niveau fédéral. Il s'applique à la sélection dans le processus de recrutement, à la promotion professionnelle et aux conditions de travail, y compris les licenciements et la rémunération des fonctionnaires de la Communauté française, ainsi qu'à l'enseignement et la formation professionnels, à la politique de santé, aux avantages sociaux, à l'affiliation et à la participation à toute organisation professionnelle subventionnée par la Communauté française et à l'accès aux biens et aux services mis à la disposition du public.

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<sup>25</sup> Moniteur belge du 30 mai 2007; modifiée en dernier lieu le 17 août 2013, Moniteur belge du 5 mars 2014.

<sup>26</sup> Il convient de noter que la législation nationale utilise le terme «ascendance».

<sup>27</sup> Moniteur belge du 30 mai 2007; modifiée en dernier lieu le 17 août 2013, Moniteur belge du 5 mars 2014.

<sup>28</sup> Moniteur belge du 30 mai 2007; modifiée en dernier lieu le 22 mai 2014, Moniteur belge du 24 juillet 2014.

<sup>29</sup> Moniteur belge du 23 septembre 2008; modifié en dernier lieu le 28 mars 2014, Moniteur belge du 1<sup>er</sup> avril 2014.

<sup>30</sup> Moniteur belge du 13 janvier 2009; modifié en dernier lieu le 5 décembre 2013, Moniteur belge du 5 mars 2014.



La Région wallonne a adopté, le 6 novembre 2008, un 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.<sup>31</sup> Ce texte retient les mêmes motifs que ceux couverts au niveau fédéral et s'applique plus précisément à l'orientation professionnelle, à l'insertion socioprofessionnelle, au placement des travailleurs, au financement de la promotion de l'emploi, à l'octroi d'aides et de primes à l'emploi, ainsi que d'incitants financiers aux entreprises, dans le cadre de la politique économique, en ce compris l'économie sociale et la formation professionnelle, tant dans le secteur public que dans le secteur privé. Afin de combler les lacunes subsistant dans son champ d'application matériel, ce décret a été modifié le 19 mars 2009 de manière à couvrir, dans les limites des compétences de la Région wallonne, la protection sociale (y compris les soins de santé et les avantages sociaux), la fourniture de biens et de services mis à la disposition du public en dehors de la sphère privée et familiale (logement social entre autres), l'accès et la participation à une activité économique, culturelle ou politique ouverte au public ou l'exercice d'une telle activité, ainsi que les relations d'emploi (sous le statut civil) au sein des ministères du gouvernement wallon, des autorités publiques dépendant de la Région wallonne, des organes décentralisés (tels que les provinces, les municipalités, etc.) ou des centres publics d'action sociale (CPAS).

La Région de Bruxelles-Capitale a adopté le 4 septembre 2008 deux ordonnances relatives à la lutte contre la discrimination. La première porte sur la lutte contre la discrimination et sur l'égalité de traitement en matière d'emploi.<sup>32</sup> Elle vise les mêmes motifs que ceux interdits au niveau fédéral, et s'applique principalement au placement des travailleurs et à la promotion de l'emploi. Il est intéressant de noter que cette ordonnance prévoit des subsides et un label pour les entreprises qui mettent en œuvre des plans en faveur de la diversité. La seconde ordonnance concerne la promotion de la diversité et la lutte contre la discrimination dans la fonction publique régionale bruxelloise.<sup>33</sup> Elle s'applique au domaine de l'emploi dans les organismes publics de la Région de Bruxelles-Capitale et couvre les conditions d'accès, les critères de sélection, l'avancement et les conditions de travail, y compris les licenciements et la rémunération. En incitant les institutions publiques à adopter des plans pour la diversité, cette seconde ordonnance instaure également une vaste politique en matière d'égalité de traitement. En ce qui concerne la lutte contre la discrimination dans le domaine du logement social, une ordonnance modifiant le Code bruxellois du logement a été adoptée le 19 mars 2009.<sup>34</sup> À l'inverse des autres entités fédérées, la Région de Bruxelles-Capitale ne s'est pas dotée d'une législation générale de lutte contre la discrimination. Suite à la sixième réforme de l'État belge, qui confère depuis 2014 des compétences supplémentaires aux Régions, de nouvelles lacunes doivent être comblées dans la mise en œuvre du droit antidiscrimination de l'UE (en matière de logement privé notamment).

La Communauté germanophone a adopté le 19 mars 2012 un nouveau décret visant à lutter contre certaines formes de discrimination<sup>35</sup> par l'instauration d'un cadre général de lutte contre la discrimination dans les limites de la compétence de ladite Communauté. Il est axé sur la mise en œuvre du droit de l'UE en matière de non-discrimination en ce qui concerne 1) les relations de travail au sein des organismes publics institués ou financés par la Communauté germanophone, des établissements d'enseignement et de la fonction publique et des instances gouvernementales; 2) l'enseignement; 3) l'emploi; 4) les avantages sociaux; 5) les matières culturelles; 6) les matières personnalisables; et 7) l'accès aux biens et aux services mis à la disposition du public, ainsi que leur fourniture.

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<sup>31</sup> Moniteur belge du 19 décembre 2008; modifié en dernier lieu le 12 janvier 2012, Moniteur belge du 23 janvier 2012.

<sup>32</sup> Moniteur belge du 16 septembre 2008; modifiée en dernier lieu le 14 juillet 2011, Moniteur belge du 10 août 2011.

<sup>33</sup> Moniteur belge du 16 septembre 2008 (non modifiée depuis lors).

<sup>34</sup> Moniteur belge du 7 avril 2009.

<sup>35</sup> Moniteur belge du 5 juin 2012 (non modifié depuis lors).

Cet acte législatif est très similaire à la loi fédérale antidiscrimination et couvre les mêmes motifs.

La Commission communautaire française de la région Bruxelles-Capitale (*Cocof*) a adopté le 22 mars 2007 un premier décret sur l'égalité de traitement entre les personnes dans la formation professionnelle,<sup>36</sup> lequel repose sur une liste ouverte de critères interdits. Il a été modifié le 5 juillet 2012 afin d'inclure une disposition sur la protection contre les rétorsions. La *Cocof* a adopté en outre le 9 juillet 2010 un deuxième décret qui porte cette fois sur la lutte contre certaines formes de discrimination et sur la mise en œuvre du principe de l'égalité de traitement.<sup>37</sup> Cet instrument juridique a pour objectif de créer un cadre général et harmonisé pour la lutte contre certaines formes de discrimination et pour la promotion de l'égalité de traitement dans les domaines de compétence de la *Cocof*, à savoir le transport scolaire et la gestion des bâtiments scolaires, les infrastructures communales, provinciales, intercommunales et privées en rapport avec l'éducation physique, les sports et la vie en plein air, le tourisme, la promotion sociale, la politique de santé, l'aide aux personnes,<sup>38</sup> l'accès aux biens et services, l'accès, la participation et toute autre exercice d'une activité économique, sociale, culturelle ou politique accessible au public et les relations de travail au sein des institutions publiques de la *Cocof*. Ce texte législatif repose sur une liste de critères interdits alignés sur les lois antidiscrimination adoptées au niveau fédéral. Il vise également à promouvoir la diversité dans la mesure où chaque institution publique de la *Cocof* est tenue d'élaborer un plan d'action à cette fin.

Ainsi donc, au niveau régional, l'ensemble des Régions et des Communautés (*Cocof*, Communauté germanophone, Communauté/Région flamande, Région de Bruxelles-Capitale, Communauté française, Région wallonne) ont adopté des lois contre la discrimination, afin de mettre pleinement les directives en œuvre. Elles se sont efforcées d'harmoniser leur contenu avec les lois fédérales en la matière et sont largement conformes aux directives de l'UE.

### **3. Principes généraux et définitions**

La loi fédérale sur l'égalité raciale et la loi fédérale générale antidiscrimination sont conformes à la plupart des concepts consacrés par les directives de l'Union européenne (discrimination directe, discrimination indirecte, harcèlement et injonction de pratiquer une discrimination). Un problème se pose néanmoins en ce qui concerne les rétorsions dans la mesure où la législation belge protège uniquement les victimes, leurs représentants et les témoins contre la victimisation, alors que les directives de l'UE couvrent «toutes les personnes» concernées. Elles ont en commun avec les directives qu'elles n'interdisent pas expressément les discriminations fondées sur des caractéristiques présumées et sur l'association avec des personnes présentant des caractéristiques particulières. Les travaux préparatoires précisent néanmoins clairement que les deux lois s'appliquent à ces formes de discrimination.

La loi fédérale générale antidiscrimination et la loi fédérale sur l'égalité raciale prévoient la possibilité de justifier, en matière d'emploi et de travail, certaines différences de traitement directement fondées sur l'un des motifs protégés lorsque des exigences professionnelles essentielles et déterminantes sont en cause. La définition des exigences professionnelles essentielles et déterminantes correspond à celle contenue dans la directive 2000/43/CE et dans la directive 2000/78/CE. Aucune liste exhaustive de ces exigences n'est requise et c'est au juge qu'il appartient de décider, au cas par cas, si les conditions d'application de l'exception sont dûment remplies. Le Roi (c'est-à-dire le gouvernement) est toutefois

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<sup>36</sup> Moniteur belge du 24 janvier 2008; modifié en dernier lieu le 5 juillet 2012, Moniteur belge du 10 septembre 2012.

<sup>37</sup> Moniteur belge du 3 septembre 2010.

<sup>38</sup> Cette compétence couvre l'aide sociale, l'intégration des migrants, la politique en faveur des personnes handicapées et des personnes âgées

autorisé d'adopter un règlement d'exécution contenant une liste d'exemples afin de donner certaines orientations aux cours et tribunaux.

En ce qui concerne l'aménagement raisonnable, la question de savoir quelle est l'autorité compétente pour légiférer a suscité de vives controverses. Il est néanmoins communément admis aujourd'hui que, même si la politique en matière de handicap relève des Communautés, rien n'interdit à l'État fédéral ni aux Régions de disposer que le fait de refuser un aménagement raisonnable à une personne handicapée est constitutif d'une discrimination. La loi fédérale générale antidiscrimination prévoit d'ailleurs que le refus de mettre en place des aménagements raisonnables à l'intention d'une personne présentant un handicap est une forme de discrimination interdite. La notion d'aménagement raisonnable ne s'étend pas au-delà de la situation des personnes handicapées et sa définition est conforme à la directive sur l'égalité de traitement dans l'emploi tout en présentant une différence majeure: alors que la directive mentionne uniquement l'aménagement raisonnable dans le domaine de l'emploi, la loi fédérale générale antidiscrimination fait référence à l'ensemble des domaines auxquels elle s'applique – lesquels vont bien au-delà de l'emploi.

Il n'existe pas de règles spécifiques pour ce qui concerne les cas de discrimination multiple et aucune démarche officielle n'en annonce l'introduction.

#### **4. Champ d'application matériel**

La loi fédérale sur l'égalité raciale et la loi fédérale générale antidiscrimination assurent une protection dans de vastes domaines de la vie publique: fourniture de biens et de services mis à la disposition du public, y compris le logement privé; avantages sociaux; protection sociale; accès à l'emploi, promotion, conditions de travail, licenciement et rémunération, tant dans le secteur privé que dans le secteur public; nomination d'un(e) fonctionnaire ou son affectation à un service; mention dans un document officiel de toute disposition discriminatoire; et accès et participation à une activité économique, sociale, culturelle ou politique généralement accessible au public, ou exercice de celle-ci. Le champ d'application matériel des autres instruments législatifs adoptés en vue d'assurer la mise en œuvre des directives relatives à l'égalité de traitement se limite aux compétences de la Région ou de la Communauté concernée. Certaines incertitudes subsistent malheureusement quant à la délimitation précise des compétences respectives de l'État Fédéral et des Régions et Communautés en la matière, ce qui n'a pas manqué d'entraver le processus de mise en œuvre des directives européennes. Les actes législatifs les plus récemment adoptés au niveau régional remédient toutefois à la plupart des lacunes au niveau de cette mise en œuvre.

#### **5. Mise en application de la loi**

La loi fédérale générale antidiscrimination et la loi fédérale sur l'égalité raciale prévoient, en ce qui concerne la protection des victimes de discrimination, des voies de recours civiles et pénales pratiquement identiques pour l'ensemble des motifs interdits. Dans le respect de l'un des principes directeurs de la réforme, à savoir qu'il ne devrait pas y avoir de hiérarchie entre les motifs, seules certaines infractions pénales ont finalement été conservées dans la loi fédérale sur l'égalité raciale (discrimination dans la fourniture d'un bien ou d'un service, dans l'accès à l'emploi ou la formation professionnelle, ou lors d'une procédure de licenciement) et sont donc spécifiques à la discrimination fondée sur la race et l'origine ethnique. En vertu de la loi fédérale sur l'égalité raciale et de la loi fédérale générale antidiscrimination, les victimes de discrimination peuvent: 1) faire constater le caractère nul et non avenu des dispositions discriminatoires contenues dans un contrat; 2) réclamer une réparation (dommages-intérêts) conformément aux principes habituels de la responsabilité civile (la victime pouvant toutefois opter pour le versement d'une somme forfaitaire fixée par la loi plutôt que pour une indemnisation calculée sur la base du préjudice «effectif»); 3) demander au juge qu'il ordonne la cessation immédiate de la

pratique discriminatoire, sous peine de sanctions financières; 4) demander au juge d'ordonner la publication de l'arrêt établissant la discrimination en faisant afficher la décision judiciaire dans les locaux où l'acte discriminatoire s'est produit ou en la publiant dans les journaux. Ces affaires sont portées devant des juridictions civiles ou, lorsqu'une relation professionnelle est en cause, devant des juridictions du travail spécialisées. Ces sanctions doivent être considérées comme effectives, proportionnées et dissuasives au sens du droit de l'UE.

La loi fédérale sur l'égalité raciale et la loi fédérale générale antidiscrimination habilitent le Centre interfédéral pour l'égalité des chances (rebaptisé UNIA en 2016), ainsi que des organisations établies depuis trois ans au moins ayant un intérêt juridique dans la défense des droits de l'homme ou dans la lutte contre la discrimination, de même que les syndicats, à ester en justice: ils peuvent donc engager une action (au civil ou au pénal) en invoquant la législation antidiscrimination. Si toutefois la victime de l'acte discriminatoire présumé est une personne physique ou morale identifiable, elle doit consentir à l'engagement de l'action pour que celle-ci soit recevable.

Les lois fédérales prévoient toutes deux le renversement de la charge de la preuve dans toutes les procédures juridictionnelles, à l'exception des procédures pénales. La victime réclamant réparation des faits allégués de discrimination est autorisée à produire certaines preuves (des «données statistiques» ou des «tests de récurrence», par exemple) qui, présentées au tribunal, pourraient amener le juge à présumer l'existence d'une discrimination, et obliger ainsi la partie défenderesse à démontrer que, contrairement à cette présomption, il n'y a pas eu discrimination. Il convient de faire remarquer que les «tests de récurrence» s'apparentent étroitement aux tests de situation, mais que leur mention en toutes lettres dans le texte de la loi suscite moins de controverse.

La victime d'une discrimination s'adresse le plus souvent à UNIA). Si celui-ci estime qu'il y a eu discrimination, il va d'abord tenter un règlement à l'amiable en s'assurant que des mesures sont prises pour éviter que la pratique discriminatoire persiste ou se répète. Si cette tentative de médiation échoue, UNIA peut, moyennant le consentement de la victime lorsque celle-ci est identifiée, engager des poursuites à l'encontre de l'auteur de l'acte discriminatoire.

Au travers des divers décrets et ordonnances adoptés depuis 2008 en matière d'égalité de traitement, les systèmes de voies de recours en place dans les Régions et les Communautés reproduisent dans une large mesure les dispositions des lois fédérales antidiscrimination et sont conformes aux exigences européennes.

Une Stratégie nationale d'intégration des Roms, adoptée en 2012, définit les problématiques et les objectifs en vue d'une intégration des Roms à l'horizon 2020, et instaure une coordination entre l'État fédéral, les Régions et les Communautés au sein du groupe de travail sur l'inclusion des Roms de sorte que chaque autorité est libre de prendre des mesures en fonction de ses compétences. Ce groupe interministériel sur l'inclusion des Roms, qui constitue le point de contact national pour la Commission européenne, se réunit au moins deux fois par an. Toutefois, comme l'a récemment souligné le Commissaire aux droits de l'homme du Conseil de l'Europe suite à sa visite en Belgique en septembre 2015,<sup>39</sup> la situation des Roms et des Gens du voyage reste préoccupante dans les domaines du logement et de l'enseignement.

En ce qui concerne les droits des personnes handicapées, le comité des Nations unies pour la protection de ces personnes a souligné, dans son premier rapport concernant la

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<sup>39</sup> Rapport de N. Muižnieks, Commissaire aux droits de l'homme du Conseil de l'Europe suite à sa visite en Belgique du 14 au 18 septembre 2015, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>

Belgique, l'absence de plan national assorti d'objectifs précis et le fait que l'accessibilité ne soit pas une priorité.

## **6. Organismes de promotion de l'égalité de traitement**

Le Centre pour l'égalité des chances et la lutte contre le racisme (rebaptisé Centre interfédéral pour l'égalité des chances en 2014 et UNIA en 2016), initialement créé en 1993, s'est vu attribué en 2007 un rôle de supervision couvrant tous les motifs visés par la loi fédérale sur l'égalité raciale et la loi fédérale générale antidiscrimination, hormis le sexe et la langue, à savoir: la couleur de la peau, l'origine, l'origine nationale, la nationalité, l'âge, l'orientation sexuelle, l'état civil, la naissance, la fortune, les convictions religieuses ou philosophiques, l'état de santé actuel ou futur, un handicap, une caractéristique physique, les opinions politiques ou syndicales, une caractéristique génétique et l'origine sociale.

Une réforme a été entamée en 2012 en vue de faire du Centre une agence interfédérale et de le charger ainsi du contrôle et de l'application de la législation antidiscrimination adoptée par les Régions et les Communautés. En cas de non-respect d'une quelconque disposition législative antidiscrimination, qu'elle soit fédérale ou régionale, les citoyens peuvent désormais s'adresser soit au Centre situé à Bruxelles soit aux points de contact situés en Flandre (*meldpunten*) ou en Wallonie, bien que ces derniers n'aient pas encore été mis en place (coopération avec les *Espaces Wallonie* seulement). Le Centre interfédéral est opérationnel depuis mars 2014.

UNIA produit des rapports, des études et des recommandations dans le cadre de son mandat. Il porte également assistance aux victimes de discrimination, et peut intenter des actions en justice – sans être une autorité quasi-judiciaire pour autant. En 2015, UNIA a été saisi de 4 554 plaintes; il a ouvert un dossier dans 1 596 cas et engagé des poursuites dans 15 cas. Le nombre relativement peu élevé d'actions en justice par rapport au nombre de dossiers ouverts s'explique partiellement par la capacité d'UNIA de parvenir à un règlement à l'amiable par la médiation. UNIA a été établi en tant que service public autonome. Bien qu'il soit placé sous le contrôle du parlement fédéral et des parlements régionaux, son indépendance est garantie par la loi et, dans la pratique, il exerce effectivement son mandat de façon indépendante.

## **7. Points essentiels**

Des politiciens du parti nationaliste flamand (N-VA) ont fait au cours des deux dernières années plusieurs déclarations à connotation raciste – ce qui ne manque pas de susciter de vives préoccupations politiques dans la mesure où ce parti est le plus influent dans la partie flamande du pays. Il participe pour la première fois au gouvernement fédéral suite aux élections de mai 2014 et, en dépit des appels réitérés d'UNIA réclamant un plan interfédéral d'action contre le racisme, l'accord gouvernemental de 2014 ne comporte aucun engagement à cet égard. La Belgique n'honore toujours pas la promesse faite lors de la Conférence mondiale contre le racisme tenue à Durban en 2001.

Les baromètres présentés par le Centre interfédéral pour l'égalité des chances fournissent des données et des statistiques indispensables à la lutte contre les discriminations (Monitoring Socio-économique, Baromètre de la diversité: Emploi, et Baromètre de la diversité: Logement). Le prochain Baromètre de la diversité, consacré à l'enseignement, est attendu en octobre 2017. Ces baromètres mettent en évidence la persistance de nombreuses pratiques discriminatoires en matière d'emploi et de logement. De surcroît, le comité des droits des personnes handicapées (Nations unies) s'est inquiété en 2014 «de l'insuffisance d'accessibilité pour les personnes handicapées, qu'il n'existe pas de plan national avec des objectifs chiffrés, et que le manque d'accessibilité ne soit pas

suffisamment considéré comme un problème».<sup>40</sup> Le Comité «note avec préoccupation qu'un faible nombre de personnes handicapées sont employées dans un travail régulier» et que «le gouvernement ne parvient pas à atteindre les objectifs liés à l'emploi des personnes handicapées dans ses propres services, ainsi que l'absence de quota dans le secteur privé».<sup>41</sup> Des préoccupations ont par ailleurs été exprimées en 2014 par l'ECRI,<sup>42</sup> par le Comité pour l'élimination de la discrimination raciale<sup>43</sup> et par le Commissaire aux droits de l'homme du Conseil de l'Europe<sup>44</sup> à propos des Gens du voyage – le premier constatant «qu'il y a encore un manque de sites de transit correctement équipés pour les Gens du voyage, en particulier en Région wallonne et dans la Région de Bruxelles-Capitale où il n'y a presque pas de site de transit».

La jurisprudence et les nombreuses décisions judiciaires émanant des plus hautes juridictions belges (Cour constitutionnelle et Conseil d'État notamment) montrent par ailleurs que la question des symboles religieux (en réalité la question du port du voile islamique) reste très controversée en Belgique.<sup>45</sup> Un nombre non négligeable d'affaires traitées en justice révèlent en outre que les professionnels chargés de faire appliquer le droit antidiscrimination connaissent toujours mal la législation en la matière, et en particulier la notion de discrimination indirecte.

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<sup>40</sup> Comité des droits des personnes handicapées, - Observations finales concernant le rapport initial de la Belgique adoptées par le Comité lors de sa douzième session (15 septembre – 3 octobre 2014), points 21 – 22.

<sup>41</sup> Comité des droits des personnes handicapées, - Observations finales concernant le rapport initial de la Belgique adoptées par le Comité lors de sa douzième session (15 septembre – 3 octobre 2014), points 38 – 39.

<sup>42</sup> Rapport de l'ECRI sur la Belgique, 2014.

<sup>43</sup> CERD/C/BEL/CO/16-19, 14 mars 2014, points 18 et 19.

<sup>44</sup> Rapport de N. Muižnieks, Commissaire aux droits de l'homme du Conseil de l'Europe suite à sa visite en Belgique du 14 au 18 septembre 2015, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>

<sup>45</sup> En 2014, voir Conseil d'État – Section administration, 5 février 2014, XXXX c. *het Gemeenschaponderwijs*, arrêts n° 226.345 et 226.346; 14 octobre 2014, XXXX, *Sukhjot Singh, Sharanjit Singh c. het Gemeenschaponderwijs*, arrêts n° 228.751, 228.752, 228.748; 14 octobre 2014, xxxx, *de vzw Justice & Democracy, Sharanjit Singh, de vzw United Sikhs (Belgium) c. het Gemeenschaponderwijs*, arrêts n° 228.753, 228.754, 224.755; Cour du travail de Bruxelles, 6 mars 2014, *H. Amal c. Ministère de la Région Bruxelles-capitale*, R.G. n° 2012/CB/15.

## **ZUSAMMENFASSUNG**

### **1. Einleitung**

In Belgien mit seinen 11 Millionen Einwohnern ist die römisch-katholische Kirche die größte Glaubensgemeinschaft (50 %). Weitere religiöse Gruppen sind Muslime (5 %), Anglikaner, Protestanten und orthodoxe Christen (2,5 %), Menschen jüdischen Glaubens (0,4 %) und Buddhisten (0,3 %). Fast 42 % der Belgier gehören keiner Glaubensgemeinschaft an, davon sind 10 % nach eigenen Angaben Atheisten.<sup>46</sup> Die Regierungsform des Landes ist eine repräsentative Demokratie, die auf einem Zweikammersystem beruht. Offizielles Staatsoberhaupt ist der König (Philippe, seit dem 21. Juli 2013) der im Wesentlichen formelle Aufgaben wahrnimmt (Unterzeichnung der föderalen Gesetze, Funktionen im Zusammenhang mit der Regierungsbildung usw.). Regierungschef ist der Premierminister. An belgischen Regierungen sind immer mehrere Parteien beteiligt, weil zahlreiche Parteien ins Parlament gewählt werden.

Die föderale Struktur des Landes war und ist ein komplizierender Faktor für die Umsetzung der Richtlinien, da die Zuständigkeiten zwischen Bundesebene, Regionen und Gemeinschaften nicht immer klar abgegrenzt sind. Auch der soziologische und politische Kontext ist in jedem Landesteil anders. Der französischsprachige Teil des Landes, (Französische Gemeinschaft Belgiens, Wallonische Region und zu einem großen Teil die Region Brüssel-Hauptstadt) verfolgen beim Kampf gegen Diskriminierung einen eher formalen und individuellen Ansatz, der an das französische Modell angelehnt ist. Der niederländischsprachige Teil (Flandern und Flämische Gemeinschaft) ist eher bereit, Gleichbehandlung mithilfe statistischer Daten zu überwachen oder gezielte Fördermaßnahmen umzusetzen. In der Flämischen Region bzw. Gemeinschaft steht aber auch mehr auf dem Spiel, weil in diesem Landesteil die rechtspopulistische und nationalistische Partei „Vlaams Belang“ (VB) relativ stark ist. Die extremistische und fremdenfeindliche Partei ist im Parlament vertreten und beeinflusst die politische Debatte zu Themen wie der Integration von Migranten und zum Tragen des Kopftuchs in der Schule oder im Beruf. In den letzten Jahren hat die Nieuw-Vlaamse Alliantie (N-VA) viele Stimmen von VB-Wählern gewonnen und wurde 2014 zum ersten Mal Teil der Föderalregierung.

Das belgische Rechtssystem bot Opfern von Diskriminierung bereits vor der Verabschiedung der Europäischen Richtlinien im Jahr 2000 einen gewissen Schutz, und zwar sowohl im Arbeitsleben, als auch im weiteren Geltungsbereich der Antirassismusrichtlinie. Dieser Schutz gründete sich vor allem auf das Bundesgesetz vom 30. Juli 1981, das Handlungen aus rassistischen oder fremdenfeindlichen Motiven unter Strafe stellt. Der Anwendungsbereich dieses Gesetzes wurde in späteren Neufassungen mehrmals erweitert. Das Bundesgesetz vom 30. Juli 1981 ist jedoch Teil des Strafrechts und die Hürden der Beweisführung sind für die Staatsanwaltschaft – oder auch das mutmaßliche Opfer von Diskriminierung – fast unüberwindlich, weil die Absicht des Täters bewiesen werden muss.

### **2. Wichtigste Gesetze**

Belgien ist den meisten wichtigen internationalen Abkommen beigetreten, die zur Bekämpfung von Diskriminierung dienen. Allerdings hat das Land bisher weder das 12. Protokoll der Europäischen Menschenrechtskonvention, noch das Rahmenübereinkommen zum Schutz nationaler Minderheiten des Europarats ratifiziert. Nach der Ratifizierung werden internationale Rechtsinstrumente Teil des belgischen Rechtssystems und können von den Gerichten des Landes direkt angewendet werden, sofern ihre Bestimmungen klar und präzise genug sind.

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<sup>46</sup> In Belgien gibt es keine offiziellen Statistiken zur Religionszugehörigkeit. Diese Zahlen stammen aus einer wissenschaftlichen Arbeit: L. Voyé und K. Dobbelaere, *Autres temps, autres moeurs*, ed. Racine-Campus, 2012.

Die Artikel 10 und 11 der Verfassung, die Diskriminierung verbieten, sind allgemein und ohne Einschränkung anwendbar, d. h. bei sämtlichen Diskriminierungsgründen (die Artikel schreiben den Grundsatz der Gleichbehandlung in jeder Beziehung vor) und in jeder Situation (sie gelten in jedem Zusammenhang, und gehen damit nicht nur über die Bereiche Beschäftigung und Arbeitsleben, sondern auch über den Geltungsbereich der Antirassismusrichtlinie hinaus). In privatwirtschaftlichen Beziehungen werden sie jedoch nur selten geltend gemacht, weil sie sehr allgemein gehalten sind und ihre Anwendung in derartigen Zusammenhängen, beispielsweise zum Schutz einer Person vor privaten Akten der Diskriminierung durch einen Arbeitgeber, sehr sensible Themen betrifft. Diese verfassungsrechtlichen Bestimmungen wurden bisher vorwiegend angerufen, um entweder gegen andere Rechtsvorschriften oder gegen behördliche Entscheidungen zu klagen.

Heute sind die wichtigsten Antidiskriminierungsvorschriften auf Bundesebene in drei Gesetzen verankert, die am 10. Mai 2007 verabschiedet wurden. Erstens das Bundesgesetz zur Änderung des Gesetzes vom 30. Juli 1981, das bestimmte Handlungen aus rassistischen oder fremdenfeindlichen Motiven unter Strafe stellt, im Folgenden das *Bundesgesetz gegen Rassendiskriminierung*.<sup>47</sup> Mit diesem Gesetz sollte sowohl die Antirassismusrichtlinie als auch das Internationale Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung von 1965 in einem gemeinsam Rechtsakt umgesetzt werden, der Diskriminierung aufgrund der mutmaßlichen Rasse, Farbe, Herkunft,<sup>48</sup> nationalen oder ethnischen Herkunft und Nationalität verbietet. Zweitens das Bundesgesetz zur Bekämpfung bestimmter Formen der Diskriminierung, im Folgenden das *Allgemeine Antidiskriminierungsbundesgesetz*,<sup>49</sup> das die Diskriminierungsgründe Alter, sexuelle Ausrichtung, Personenstand, Geburt, Vermögen, Religion oder Weltanschauung, tatsächlicher oder künftiger Gesundheitszustand, Behinderung, körperliche Merkmale, politische Überzeugung, Mitgliedschaft in einer Gewerkschaft, Sprache, genetische Merkmale und soziale Herkunft abdeckt. Drittens das Bundesgesetz zur Bekämpfung der Diskriminierung zwischen Frauen und Männern,<sup>50</sup> das sich auf das Geschlecht und verwandte Diskriminierungsgründe, wie Mutterschaft, Schwangerschaft und Transgender bezieht.

Neben der Gesetzgebung des Bundes haben auch die Regionen und Gemeinschaften Maßnahmen ergriffen, die in ihren Zuständigkeitsbereich fallen. Die Flämische Gemeinschaft bzw. die Region Flandern hat am 10. Juli 2008 eine Rechtsvorschrift verabschiedet, die den Rechtsrahmen für die Flämische Gleichstellungs- und Gleichbehandlungspolitik bildet<sup>51</sup> und dieselben Diskriminierungsgründe abdeckt wie die Bundesgesetze. Sie gilt für Beschäftigungspolitik, Gesundheitswesen, Bildung, öffentliche Güter und Dienstleistungen (z. B. Wohnraum, Energieversorgung, kulturelle Dienstleistungen), soziale Vergünstigungen sowie wirtschaftliche, soziale, kulturelle und politische Aktivitäten außerhalb des privaten Umfelds. Diese Rechtsvorschrift besteht aus zwei Hauptteilen: (1) ein allgemeiner Rechtsrahmen für die Umsetzung einer proaktiven und vorbeugenden Gleichstellungspolitik und (2) spezielle Bestimmungen gegen Diskriminierung aufgrund einer Reihe von Diskriminierungsgründen, die in etwa den Gründen entsprechen, die auch durch Bundesgesetze verboten sind.

Die Französische Gemeinschaft (ehemals französischsprachige Gemeinschaft) verabschiedete am 12. Dezember 2008 eine Verordnung über die Bekämpfung bestimmter Formen der Diskriminierung,<sup>52</sup> welche die gleichen Diskriminierungsgründe abdeckt wie die Bundesgesetze. Sie gilt für Einstellungen, Beförderungen, Arbeitsbedingungen einschließlich Kündigung und Gehalt im öffentlichen Dienst der Französischen

<sup>47</sup> B.S. (*Moniteur belge*), 30. Mai 2007; zuletzt geändert am 17. August 2013, *Moniteur belge*, 5. März 2014.

<sup>48</sup> Es ist zu beachten, dass die nationale Gesetzgebung den Begriff „Abstammung“ verwendet.

<sup>49</sup> B.S. (*Moniteur belge*), 30. Mai 2007; zuletzt geändert am 17. August 2013, *Moniteur belge*, 5. März 2014.

<sup>50</sup> B.S. (*Moniteur belge*), 30. Mai 2007; zuletzt geändert am 22. Mai 2014, *Moniteur belge*, 24. Juli 2014.

<sup>51</sup> B.S. (*Moniteur belge*), 23. September 2008; zuletzt geändert am 28. März 2014, *Moniteur belge*, 1. April 2014.

<sup>52</sup> B.S. (*Moniteur belge*), 13. Januar 2009; zuletzt geändert am 5. Dezember 2013, B.S. (*Moniteur belge*), 5. März 2014.



Gemeinschaft, für die allgemeine und berufliche Bildung, Gesundheitspolitik, soziale Vergünstigungen, Mitgliedschaft und Engagement in Berufsverbänden, die von der Französischen Gemeinschaft finanziert werden, und für den Zugang zu öffentlichen Gütern und Dienstleistungen.

Die Wallonische Region verabschiedete am 6. November 2008 eine Verordnung über den Kampf gegen bestimmte Formen der Diskriminierung, unter anderem der Diskriminierung von Frauen und Männern in der Wirtschaft, im Arbeitsleben und in der beruflichen Bildung.<sup>53</sup> Es bezieht sich auf dieselben Gründe wie das Bundesgesetz und gilt im Einzelnen für die Bereiche Berufsberatung, berufliche und soziale Eingliederung, Arbeitsvermittlung, Fördermittel zur Beschäftigungsförderung und für finanzielle Beschäftigungsanreize für öffentliche und privatwirtschaftliche Unternehmen im Rahmen der allgemeinen Wirtschaftspolitik, einschließlich der Sozialwirtschaft und beruflichen Bildung. Um die Lücken in ihrem sachlichen Anwendungsbereich zu schließen, wurde am 19. März 2009 eine Neufassung der Verordnung verabschiedet, die im Kompetenzbereich der Wallonischen Region für die folgenden Politikfelder gilt: Sozialschutz (z. B. Gesundheitswesen und soziale Vergünstigungen), Zugang zu Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen und außerhalb des privaten und familiären Bereichs liegen (z. B. Sozialwohnungen), Zugang zu und Teilnahme an öffentlichen wirtschaftlichen, kulturellen oder politischen Aktivitäten sowie für die Beschäftigungsverhältnisse (unter zivilrechtlichem Status) in Ministerien der Wallonischen Regierung, Behörden, die der Wallonischen Region unterstehen, dezentralen Stellen (wie Provinzen, Gemeinden usw.) oder öffentlichen Zentren für soziale Unterstützung.

Die Region Brüssel-Hauptstadt verabschiedete am 4. September 2008 zwei Verordnungen gegen Diskriminierung. Die erste Verordnung bezieht sich auf den Kampf gegen Diskriminierung und auf die Gleichbehandlung im Arbeitsleben.<sup>54</sup> Sie bekämpft dieselben Diskriminierungsgründe wie die Bundesgesetze und gilt vor allem für die Bereiche Arbeitsvermittlung und Beschäftigungsförderung. In diesem Zusammenhang ist zu bemerken, dass die Verordnung auch öffentliche Fördermittel und Gütesiegel für Unternehmen vorsieht, die Aktionspläne für mehr Diversität umsetzen. Die zweite Verordnung dient der Förderung von Diversität und dem Kampf gegen Diskriminierung im öffentlichen Dienst der Region Brüssel-Hauptstadt.<sup>55</sup> Sie gilt für Beschäftigungsverhältnisse im öffentlichen Dienst der Region Brüssel-Hauptstadt und regelt Zugangsbedingungen, Einstellungskriterien, Beförderungen und Arbeitsbedingungen, einschließlich Kündigung und Gehalt. Diese zweite Verordnung ermutigt öffentliche Institutionen dazu, Aktionspläne für mehr Diversität zu verabschieden und legt damit auch die Grundlage für eine umfassende Gleichbehandlungspolitik. Um Diskriminierung im Bereich des sozialen Wohnungsbaus zu bekämpfen, wurde am 19. März 2009 eine Verordnung zur Änderung der Brüsseler Bau- und Wohnungsordnung verabschiedet.<sup>56</sup> Im Gegensatz zu den anderen föderierten Gebietskörperschaften existieren in der Region Brüssel-Hauptstadt keine integrierten Antidiskriminierungsvorschriften. Mit der Sechsten Staatsreform von 2014, mit der weitere Zuständigkeiten auf die Regionen übertragen wurden, müssen neue Lücken in der Umsetzung des EU-Antidiskriminierungsrechts angegangen werden (z. B. im privaten Wohnungsbereich).

Am 19. März 2012 verabschiedete die deutschsprachige Gemeinschaft eine neue Verordnung, mit der bestimmte Formen der Diskriminierung bekämpft werden sollen.<sup>57</sup> Diese Verordnung bildet den allgemeinen Rechtsrahmen für die Bekämpfung von Diskriminierung in den Zuständigkeitsbereichen der deutschsprachigen Gemeinschaft. Sie

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<sup>53</sup> B.S. (*Moniteur belge*), 19. Dezember 2008; zuletzt geändert am 12. Januar 2012, B.S. (*Moniteur belge*), 23. Januar 2012.

<sup>54</sup> B.S. (*Moniteur belge*), 16. September 2008, zuletzt geändert am 14. Juli 2011, B.S. (*Moniteur belge*), 10. August 2011.

<sup>55</sup> B.S. (*Moniteur belge*), 16. September 2008 (seitdem unverändert in Kraft).

<sup>56</sup> B.S. (*Moniteur belge*), 7. April 2009.

<sup>57</sup> B.S. (*Moniteur belge*), 5. Juni 2012 (seitdem unverändert in Kraft).

dient der Umsetzung des europäischen Antidiskriminierungsrechts in Bezug auf Beschäftigungsverhältnisse in Körperschaften des öffentlichen Rechts, die durch die deutschsprachige Gemeinschaft gebildet oder finanziert werden, im öffentlichen Dienst und in Regierungsinstitutionen (1°), bei Bildung (2°), Beschäftigung (3°), sozialen Vergünstigungen (4°), Kultur (5°), personenbezogenen Themen (6°) und Zugang zu öffentlichen Gütern und Dienstleistungen (7°). Diese Rechtsvorschrift entspricht im Wesentlichen den Antidiskriminierungsgesetzen des Bundes und deckt die gleichen Diskriminierungsgründe ab.

Die Kommission der Französischen Gemeinschaft der Region Brüssel-Hauptstadt (*Cocof*) verabschiedete am 22. März 2007 eine erste Verordnung über die Gleichbehandlung bei der beruflichen Bildung,<sup>58</sup> die eine offene Liste von verbotenen Auswahlkriterien enthält. Die Verordnung wurde am 5. Juli 2012 um eine Bestimmung zum Schutz vor Viktimisierung erweitert. Am 9. Juli 2010 verabschiedete die *Cocof* außerdem eine zweite Verordnung zur Bekämpfung bestimmter Formen von Diskriminierung und zur Umsetzung des Gleichbehandlungsgrundsatzes.<sup>59</sup> Durch dieses Rechtsinstrument wird im Zuständigkeitsbereich der *Cocof* ein allgemeiner und harmonisierter Rechtsrahmen für den Kampf gegen bestimmte Formen von Diskriminierung und die Umsetzung des Gleichbehandlungsgrundsatzes geschaffen. Im Einzelnen gilt die Verordnung für Schülerverkehr und Schulgebäudeverwaltung, Sport- und Freizeitanlagen der Gemeinden, Provinzen, Gemeindeverbände und privater Anbieter, Tourismus, soziale Aufstiegsförderung, Gesundheitspolitik, Unterstützungsangebote,<sup>60</sup> Zugang zu Gütern und Dienstleistungen, Zugang zu und Teilhabe an öffentlichen wirtschaftlichen, sozialen und kulturellen Angeboten und für Beschäftigungsverhältnisse innerhalb der öffentlichen Einrichtungen der *Cocof*. Diese Rechtsvorschrift nutzt eine Liste verbotener Kriterien, die den Antidiskriminierungsgesetzen des Bundes entsprechen. Außerdem fördert die Verordnung die Diversität, weil sie alle öffentlichen Institutionen der *Cocof* zur Ausarbeitung eines Diversitätsplans verpflichtet.

Damit verfügen alle Regionen bzw. Gemeinschaften (*Cocof*, deutschsprachige Gemeinschaft, Flämische Gemeinschaft bzw. Region, Region Brüssel-Hauptstadt, Französische Gemeinschaft und Wallonische Region) über Antidiskriminierungsvorschriften, die die Richtlinien vollständig umsetzen. Sie harmonisieren inhaltlich mit den Antidiskriminierungsgesetzen des Bundes und entsprechen weitgehend den europäischen Richtlinien.

### 3. Wichtigste Grundsätze und Begriffe

Das Bundesgesetz gegen Rassendiskriminierung und das Allgemeine Antidiskriminierungsbundesgesetz entsprechen in ihren Begriffsbestimmungen im Wesentlichen den wichtigsten Begriffen der EU-Richtlinien (unmittelbare und mittelbare Diskriminierung, unerwünschte Verhaltensweisen und Anweisung zur Diskriminierung). Allerdings gibt es eine Diskrepanz im Bezug auf Viktimisierung, weil das belgische Recht nur die Opfer, deren Vertreter und Zeugen vor Viktimisierung schützt, die EU-Richtlinie jedoch für alle beteiligten Personen gelten. Wie in den Richtlinien ist Diskriminierung aufgrund mutmaßlicher Eigenschaften und Diskriminierung aufgrund der Assoziierung mit Menschen mit bestimmten Eigenschaften auch im Bundesgesetz gegen Rassendiskriminierung und im Allgemeinen Antidiskriminierungsbundesgesetz nicht ausdrücklich verboten. Allerdings geht aus den Vorarbeiten (*travaux préparatoires*) klar hervor, dass auch diese Formen der Diskriminierung unter die Gesetze fallen.

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<sup>58</sup> B.S. (*Moniteur belge*), 24. Januar 2008; zuletzt geändert am 5. Juli 2012, B.S. (*Moniteur belge*), 10. September 2012.

<sup>59</sup> B.S. (*Moniteur belge*), 3. September 2010.

<sup>60</sup> In die Zuständigkeit der *Cocof* fallen die Sozialfürsorge, die Integration von Migranten und politische Maßnahmen für Menschen mit Behinderung und Senioren.

Das Allgemeine Antidiskriminierungsbundesgesetz und das Bundesgesetz gegen Rassendiskriminierung sehen im Bereich Beschäftigung und Beruf Ausnahmen vom Gleichbehandlungsgebot aufgrund der geschützten Diskriminierungsgründe vor, sofern es dabei um wesentliche und entscheidende berufliche Anforderungen geht. Die Begriffsbestimmung von wesentlichen und entscheidenden beruflichen Anforderungen entspricht der Definition in Richtlinie 2000/43/EG und Richtlinie 2000/78/EG. Sie enthält keine umfassende Liste entsprechender Anforderungen und die Entscheidung, ob die Bedingungen für eine Ausnahmeregelung erfüllt sind, trifft im Einzelfall der Richter. Der König (d. h. die Regierung) kann jedoch eine Ausführungsverordnung erlassen, die eine Liste von Beispielsfällen enthält und den Gerichten als Leitfaden dienen kann.

Die Gesetzgebungskompetenz in Bezug auf die angemessenen Vorkehrungen war zwischen den Regierungsebenen äußerst umstritten. Heute sind sich die meisten Experten einig, dass die Behindertenpolitik zwar unter die Zuständigkeit der Gemeinschaften fällt, der Bundesstaat und die Regionen jedoch gesetzlich regeln können, dass es sich um einen Fall von Diskriminierung handelt, wenn für einen Menschen mit Behinderung keine angemessenen Vorkehrungen getroffen werden. Das Allgemeine Antidiskriminierungsbundesgesetz legt fest, dass die Weigerung, einen Menschen mit Behinderung durch angemessene Vorkehrungen zu unterstützen, eine Form verbotener Diskriminierung darstellt. Der Begriff „angemessene Vorkehrungen“ gilt nur für Menschen mit Behinderungen und entspricht im Wesentlichen der Gleichbehandlungsrahmenrichtlinie, jedoch mit einem wichtigen Unterschied. Während die Richtlinie angemessene Vorkehrungen nur im Arbeitsleben vorschreibt, bezieht sich das Allgemeine Antidiskriminierungsbundesgesetz auf alle Lebensbereiche, die unter das Gesetz fallen und geht damit weit über die Richtlinie hinaus.

Es gibt keine speziellen Bestimmungen in Bezug auf Mehrfachdiskriminierung und auch keine offizielle Verpflichtung zur künftigen Einführung entsprechender Regelungen.

#### **4. Sachlicher Anwendungsbereich**

Das Bundesgesetz gegen Rassendiskriminierung und das Allgemeine Antidiskriminierungsbundesgesetz schützen in weiten Bereichen des öffentlichen Lebens vor Diskriminierung: bei der Bereitstellung von Gütern und Dienstleistungen für die Öffentlichkeit einschließlich des privaten Wohnungsmarkts, bei sozialen Vergünstigungen, Sozialschutz, Zugang zum Arbeitsmarkt, Beförderung und Arbeitsbedingungen, Kündigung und Entlohnung, sowohl in der Privatwirtschaft, als auch im öffentlichen Dienst, bei der Einstellung und Versetzung von Beamten, bei diskriminierenden Bestimmungen in öffentlichen Dokumenten und beim Zugang zu und der Teilhabe an wirtschaftlichen, sozialen, kulturellen oder politischen Tätigkeiten, die für die Öffentlichkeit zugänglich sind. Der sachliche Anwendungsbereich der anderen Rechtsinstrumente, mit denen die Gleichbehandlungsrichtlinien umgesetzt wurden, ist auf die Zuständigkeitsbereiche der jeweiligen Region bzw. Gemeinschaft beschränkt. Bildung fällt unter die Zuständigkeit der Gemeinschaften. Leider gibt es in diesem Bereich weiterhin Unklarheiten bei der genauen Kompetenzabgrenzung zwischen dem Bund und den Regionen bzw. Gemeinschaften, dies hat den Umsetzungsprozess behindert. Die jüngsten Rechtsvorschriften, die auf regionaler Ebene verabschiedet wurden, haben die meisten Lücken bei der Umsetzung inzwischen geschlossen.

#### **5. Rechtsdurchsetzung**

Das Allgemeine Antidiskriminierungsbundesgesetz und das Bundesgesetz gegen Rassendiskriminierung eröffnen den Opfern von Diskriminierung straf- und zivilrechtliche Klagemöglichkeiten bei weitestgehend identischen verbotenen Diskriminierungskriterien. Einer der Grundsätze der Gesetzesreform war das Prinzip, eine Hierarchie der Diskriminierungsgründe zu vermeiden. Entsprechend behandelt das Bundesgesetz gegen Rassendiskriminierung nur wenige Formen von Diskriminierung aufgrund der Rasse oder

ethnischen Herkunft weiterhin als Straftaten (Diskriminierung bei der Bereitstellung von Gütern und Dienstleistungen, beim Zugang zu Beschäftigung und beruflicher Bildung und in Kündigungsverfahren). Opfern von Diskriminierung stehen gemäß dem Bundesgesetz gegen Rassendiskriminierung und dem Allgemeinen Antidiskriminierungsbundesgesetz die folgenden Rechtsmittel zur Verfügung: 1) Klage gegen diskriminierende Bestimmungen in Verträgen, um diese für unwirksam erklären zu lassen, 2) Schadensersatzklagen nach den üblichen Grundsätzen der zivilrechtlichen Haftung (das Opfer kann sich jedoch statt der nach dem „tatsächlichen“ Schaden berechneten Summe für eine im Gesetz vorgesehene Pauschalsumme entscheiden), 3) Antrag auf eine gerichtliche Verfügung zur sofortigen Beendigung der diskriminierenden Praxis unter der Androhung einer Geldstrafe, 4) Antrag auf die Veröffentlichung des Urteils, in dem die Diskriminierung festgestellt wird, an dem Ort, an dem die Diskriminierung stattgefunden hat oder in Zeitungen. Geklagt wird vor Zivilgerichten bzw. wenn es um Streitigkeiten zwischen Arbeitnehmer und Arbeitgeber geht, vor spezialisierten Arbeitsgerichten. Diese Sanktionen sind ohne Zweifel im Sinne des EU-Rechts wirksam, verhältnismäßig und abschreckend.

Nach dem Allgemeinen Antidiskriminierungsbundesgesetz und dem Bundesgesetz gegen Rassendiskriminierung sind das Interföderale Zentrum für Chancengleichheit (2016 umbenannt in UNIA), Organisationen mit einem rechtmäßigen Interesse am Schutz der Menschenrechte oder am Kampf gegen Diskriminierung, die seit mindestens drei Jahren bestehen, sowie Gewerkschaften berechtigt, aufgrund der Antidiskriminierungsgesetze (vor einem Zivil- oder Strafgericht) zu klagen. Sofern das Opfer der mutmaßlichen Diskriminierung eine feststellbare (natürliche oder juristische) Person ist, wird ihre Klage nur zugelassen, wenn sie nachweisen kann, dass das Opfer der Klage zugestimmt hat.

Beide Bundesgesetze kehren die Beweislast in allen Gerichtsverfahren, mit Ausnahme von Strafverfahren, um. Opfer, die aufgrund einer mutmaßlichen Diskriminierung auf Schadensersatz klagen, können vor Gericht Beweise vorlegen – z. B. „statistische Daten“ oder „Wiederholungstests“ – die das Gericht eine Diskriminierung vermuten lassen. Dann muss der Beklagte nachweisen, dass es sich entgegen dieser Vermutung nicht um Diskriminierung gehandelt hat. Hierbei ist zu betonen, dass „Wiederholungstests“ eng mit Situationstests verwandt sind, ihre wörtliche Erwähnung in Gesetzestexten jedoch weniger umstritten ist.

In der Regel wenden sich Opfer von Diskriminierung an UNIA. Wenn UNIA zu der Auffassung kommt, dass eine Diskriminierung stattgefunden hat, versucht es zunächst, die Parteien zu einer gütlichen Einigung zu bewegen, indem sie Maßnahmen veranlasst, die gewährleisten, dass sich die diskriminierende Praxis nicht wiederholt oder fortsetzt. Hat der Schlichtungsversuch keinen Erfolg, kann UNIA – gegebenenfalls mit Zustimmung des Opfers – gegen die Person klagen, von der die Diskriminierung verübt wurde.

Seit der Verabschiedung der einzelnen Gleichstellungsverordnungen im Jahr 2008 gibt es in den Regionen und Gemeinschaften eine Reihe von Rechtsmitteln, die im Wesentlichen denen der Antidiskriminierungsgesetze des Bundes und den europäischen Vorgaben entsprechen.

In Bezug auf die Roma wurde 2012 eine „Nationale Strategie für die Integration der Roma“ verabschiedet, die die Probleme bei der und die Ziele für die Eingliederung der Roma bis 2020 in Belgien benennt und die Koordination zwischen Bund, Regionen und Gemeinschaften durch eine Roma-„Task Force“ gewährleistet, sodass jede Regierungsebene in ihrem Zuständigkeitsbereich nach Ermessen entsprechende Maßnahmen ergreifen kann. Die Roma-„Task Force“ tagt mindestens zweimal jährlich und fungiert als nationale Kontaktstelle für die Europäische Kommission. Wie der Menschenrechtskommissar des Europarats nach seinem Belgienbesuch im September

2015 jedoch kürzlich unterstrich,<sup>61</sup> ist die Situation der Roma und Fahrenden in Bezug auf Wohnraum und Bildung in Belgien nach wie vor besorgniserregend.

Zur Frage der Behindertenrechte hat der Ausschuss der Vereinten Nationen für die Rechte von Menschen mit Behinderungen in seinem ersten Länderbericht zu Belgien betont, dass das Land keinen Plan mit klaren Zielen verabschiedet hat und Barrierefreiheit in Belgien keine politische Priorität hat.

## **6. Gleichbehandlungsstellen**

Das Zentrum für Gleichstellung und gegen Rassismus (2014 umbenannt in Interföderales Zentrum für Chancengleichheit und 2016 in UNIA) wurde 1993 gegründet. Seit 2007 ist es für die Überwachung aller Diskriminierungsgründe zuständig, die durch das Bundesgesetz gegen Rassendiskriminierung und das Allgemeinen Antidiskriminierungsbundesgesetz verboten sind: Farbe, Herkunft, nationale Herkunft, Nationalität, Alter, sexuelle Ausrichtung, Personenstand, Geburt, Vermögen bzw. Einkommen (französisch: *fortune*), Religion oder Weltanschauung, tatsächlicher oder künftiger Gesundheitszustand, Behinderung, körperliche Merkmale, politische Überzeugung, Mitgliedschaft in einer Gewerkschaft, genetische Merkmale und soziale Herkunft (nicht Geschlecht und Sprache).

2012 wurde das Zentrum im Rahmen einer Reform zu einer interföderalen Agentur umgebaut, die für die Überwachung und Umsetzung des Antidiskriminierungsrechts der Regionen und Gemeinschaften zuständig ist. Seitdem können sich Bürger, die einen mutmaßlichen Verstoß gegen die Antidiskriminierungsvorschriften des Bundes oder der Regionen feststellen, entweder an den Hauptsitz von UNIA in Brüssel oder an die Kontaktstellen in Flandern (*meldpunten*) oder in der Wallonie wenden, wobei letztere derzeit noch nicht eingerichtet sind (lediglich Zusammenarbeit mit den „*Espaces Wallonie*“). Das Interföderale Zentrum hat im März 2014 seine Arbeit aufgenommen.

Zu seinen Aufgaben gehört auch die Erstellung von Berichten, Umfragen und Empfehlungen. Außerdem unterstützt UNIA Opfer von Diskriminierung und kann Klage vor Gericht einreichen, es ist jedoch keine quasi-gerichtliche Stelle. 2015 gingen 4554 Beschwerden bei UNIA ein, 1596 Fälle wurden aktenkundig und in 15 Fällen wurde eine Klage angestrengt. Die relativ geringe Zahl der Klagen im Vergleich zu den anerkannten Diskriminierungsfällen ist teilweise darauf zurückzuführen, dass UNIA befugt ist, Streitigkeiten durch Mediation gütlich beizulegen. UNIA hat den Status einer eigenständigen staatlichen Einrichtung. Es unterliegt zwar formal der Aufsicht der Parlamente des Bundes und der Regionen, seine Unabhängigkeit ist jedoch gesetzlich garantiert und in der Praxis arbeitet es völlig unabhängig.

## **7. Wichtige Punkte**

In den vergangenen zwei Jahren kam es seitens von Politikern der niederländischsprachigen nationalistischen Partei Neue Flämische Allianz (N-VA) wiederholt zu Äußerungen mit rassistischen Konnotationen. Dies weckt große politische Befürchtungen, weil diese Partei im flämischen Teil Belgiens besonders einflussreich ist. Seit den Wahlen vom Mai 2014 ist die Partei erstmals Teil der belgischen Föderalregierung. Obwohl UNIA wiederholt einen Interföderalen Aktionsplan gegen Rassismus gefordert hat, enthält der Koalitionsvertrag von 2014 außerdem keinerlei Verpflichtung in diesem Sinne. Damit ist Belgien immer noch nicht der Verpflichtung nachgekommen, die das Land im Jahr 2001 bei der Weltkonferenz gegen Rassismus in Durban akzeptiert hatte.

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<sup>61</sup> Bericht des Menschenrechtskommissars des Europarats, N. Muižnieks, im Anschluss an seinen Belgienbesuch vom 14. bis 18. September 2015.

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>.

Vom Interföderalen Zentrum für Chancengleichheit geförderte Umfragen liefern wichtige Daten und Zahlen zur Diskriminierungsproblematik in Belgien (Sozioökonomisches Monitoring, Diversitätsbarometer für den Arbeitsmarkt und Diversitätsbarometer für den Wohnungsmarkt). Das nächste Diversitätsbarometer für das Bildungswesen wird für Oktober 2017 erwartet. Diese Barometer zeigen, dass auf dem Wohn- und Arbeitsmarkt immer noch viele diskriminierende Verfahren praktiziert werden. Außerdem hat sich der Ausschuss der Vereinten Nationen für die Rechte von Menschen mit Behinderungen im Jahr 2014 darüber besorgt gezeigt, dass Menschen mit Behinderungen in Belgien ungenügenden Zugang zu Gütern und Dienstleistungen haben, das Land keinen Plan mit klaren Zielen verabschiedet hat und Barrierefreiheit in Belgien keine politische Priorität hat.<sup>62</sup> Der Ausschuss kritisiert die „geringe Beschäftigungsquote bei Menschen mit Behinderungen“ und „das Unvermögen der Regierung, in ihren eigenen Institutionen die gesetzten Quoten für Menschen mit Behinderungen zu erfüllen und verbindliche Quoten für die Privatwirtschaft einzuführen“.<sup>63</sup> Auch in Bezug auf die Roma meldeten die Europäische Kommission gegen Rassismus und Intoleranz,<sup>64</sup> der Ausschuss für die Beseitigung der Rassendiskriminierung<sup>65</sup> und der Menschenrechtskommissar des Europarats<sup>66</sup> 2014 Bedenken an. Es gibt noch immer nicht genug Transitplätze für Fahrende, insbesondere in der Wallonischen Region und in der Region Brüssel-Hauptstadt.

Die Rechtsprechung und zahlreiche Urteile der obersten belgischen Gerichte (wie des Verfassungsgerichts und des Staatsrats) zeigen, dass die Frage religiöser Symbole (und in der Tat das Tragen des islamischen Kopftuchs) in Belgien weiterhin sehr kontrovers diskutiert wird.<sup>67</sup> Außerdem zeigen nicht wenige Gerichtsurteile, dass viele Personen, die beruflich für die Umsetzung des Antidiskriminierungsrechts zuständig sind, immer noch zu wenig über diese Gesetze und insbesondere über den Begriff der mittelbaren Diskriminierung wissen.

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<sup>62</sup> Ausschuss für die Rechte von Menschen mit Behinderungen, abschließende Beobachtungen zum ursprünglichen Länderbericht zu Belgien, verabschiedet auf der 12. Sitzung des Ausschusses (15. September - 3. Oktober 2014), Abs. 21-22.

<sup>63</sup> Ausschuss für die Rechte von Menschen mit Behinderungen, abschließende Beobachtungen zum ursprünglichen Länderbericht zu Belgien, verabschiedet auf der 12. Sitzung des Ausschusses (15. September - 3. Oktober 2014), Abs. 38-39.

<sup>64</sup> ECRI-Bericht 2014 zu Belgien.

<sup>65</sup> CERD/C/BEL/CO/16-19, 14. März 2014, Abs. 18-19.

<sup>66</sup> Bericht des Menschenrechtskommissars des Europarats, N. Muižnieks, im Anschluss an seinen Belgienbesuch vom 14. bis 18. September 2015.  
<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>

<sup>67</sup> Für das Jahr 2014, siehe Staatsrat (Administrative Sektion) (*Conseil d'Etat – section d'administration*), 5. Februar 2014, *XXXX v. het Gemeenschaponderwijs*, Urteil Nr. 226.345 und 226.346; 14. Oktober 2014, *XXXX, Sukhjot Singh, Sharanjit Singh v. het Gemeenschaponderwijs*, Urteile Nr. 228.751, 228.752, 228.748; 14. Oktober 2014, *xxxx, de vzw Justice and Democracy, Sharanjit Singh, de vzw United Sikhs (Belgium) v. het Gemeenschaponderwijs*, Urteile Nr. 228.753, 228.754, 224.755; Brüsseler Arbeitsgericht (*Cour du travail de Bruxelles*), 6. März 2014, *H. Amal v. Ministère de la Région Bruxelles-capitale*, R.G. Nr. 2012/CB/15.

## INTRODUCTION

### The national legal system

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>68</sup> and the three Regions.<sup>69</sup> In contrast to the French-speaking part of Belgium, the Region and Community are merged in the Flemish part.

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>70</sup> the Constitution and the Special Act of 8 August 1980, lastly revised on 6 January 2014 (Sixth Belgian State Reform), provide that:

- social security is a federal matter, except for family allowances<sup>71</sup> which is a competence of the Communities since the Sixth Belgian State Reform of 2014;
- 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;
- with a few exceptions, social aid is a competence of the Communities;
- education is a competence of the Communities, including the status of school teachers and other civil servants or employees working in schools (Article 127, § 1, 2° of the Constitution);
- social housing is a competence of the Regions as well as the rules relating to the private housing market since the Sixth Belgian State Reform of 2014;
- prohibition of discrimination in the access to and supply of goods and services available to the public should be dealt with by each competent authority in the sphere of its powers (for instance, public transports fall within the competence of the Regions, apart from the national airport and the public railway company which fall within the competence of the Federal State).

With respect to the implementation of the principle of equal treatment in the fields to which both the Racial and the Employment Equality Directives apply, the Special Act of 8 August 1980 specifically reserves to the federal level the competence to legislate in employment law. The Regions and Communities, however, have important 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;
- the Communities have been granted competences relating to vocational training (although, in the French-speaking part of the State, vocational training was transferred from the French Community to the Walloon Region and the Region of Brussels-Capital);
- the status of personnel of the Regions or Communities is the exclusive competence of the Regions and Communities.

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<sup>68</sup> The French-speaking Community (*Communauté française*) which is referred to as the Federation Wallonia-Brussels (*Fédération Wallonie-Bruxelles*) in the political and media discourse, the Flemish Community (*Vlaamse Gemeenschap*), the German-speaking Community (*deutschsprachigen Gemeinschaft*).

<sup>69</sup> The Walloon Region (*Région wallonne*), the Flanders (*Vlaams Gewest*) and the Brussels-Capital Region (*Région de Bruxelles-capitale*).

<sup>70</sup> Article 3(1), (e) to (h) of Directive 2000/43/EC.

<sup>71</sup> Parental leave allowances are still a federal matter.

## List of main legislation transposing and implementing the directives

At the federal level:

- Federal Act of 10 May 2007 amending the 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*)<sup>72</sup> (hereafter the Racial Equality Federal Act).

It aims at implementing 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, origin,<sup>73</sup> national or ethnic origin and nationality. This Act contains civil law provisions, and does not only address criminal law. It covers both the private and public sectors including access to goods and services, supply of goods and services which are available to the public, social protection (notably social security and health care), social advantages, working relationships (access to employment, working conditions and salary, termination of employment contract, etc.), affiliation and membership of an organisation representing workers or employers or of any professional organization, and access and participation to or any exercise of an economic, social, cultural or political activity open to the public.

- Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination (*Loi tendant à lutter contre certaines formes de discrimination*)<sup>74</sup> (hereafter the General Anti-discrimination Federal Act).

It seeks to implement Directive 2000/78/EC of 27 November 2000. It provides for the prohibition of discrimination on grounds of age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical or genetic characteristic, political opinion, language, social origin, trade union opinion. Similarly to the previous Federal Act, it covers both the private and public sectors including access to goods and services, supply of goods and services which are available to the public, social protection (notably social security and health care), social advantages, working relationships (access to employment, working conditions and salary, termination of employment contract, etc.), affiliation and membership of an organisation representing workers or employers or of any professional organisation, and access and participation to or any exercise of an economic, social, cultural or political activity open to the public.

At the regional level:

- The Flemish Community/Region:

Framework Decree for the Flemish equal opportunities and equal treatment policy (*Decreet houdende een kader voor het Vlaamse gelijkekansen en gelijkebehandelingsbeleid*) of 10 July 2008 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 (hereafter the Flemish Framework ET Decree).<sup>75</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. It provides for the prohibition of discrimination on grounds of:

- race,<sup>76</sup> colour, origin, national or ethnic origin, nationality (cf. Racial Equality Federal Act with some terminological differences);

<sup>72</sup> OJ (*Moniteur belge*), 30 May 2007; lastly modified on 17 August 2013, *Moniteur belge*, 5 March 2014.

<sup>73</sup> Please note that national legislation uses the term 'descent'.

<sup>74</sup> OJ (*Moniteur belge*), 30 May 2007; lastly modified on 17 August 2013, *Moniteur belge*, 5 March 2014.

<sup>75</sup> OJ (*Moniteur belge*), 23 September 2008; lastly modified on 28 March 2014, *Moniteur belge*, 1 April 2014.

<sup>76</sup> 'Alleged' is not mentioned contrary to the Racial Equality Federal Act.



- age, sexual orientation, civil status, birth, property, religious or philosophical belief, political opinion, trade union opinion, language, state of health,<sup>77</sup> disability, physical or genetic characteristics, social origin (cf. General Anti-discrimination Federal Act with some terminological differences);
- gender, gender identity, gender expression (cf. Gender Equality Federal Act with some terminological differences).<sup>78</sup>

Decree of 8 May 2002 on proportionate participation in the employment market (*Decreet houdende evenredige participatie op de arbeidsmarkt*),<sup>79</sup> which seeks both to prohibit discrimination on the grounds listed in Article 19 of the Treaty on the Functioning of the European Union (hereafter TFEU), 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: 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. When a discriminatory situation is under the scope of the Decree of 8 May 2002, the Flemish Framework ET Decree is not applicable (Article 20, 8°).

- The French Community:

Decree of the French Community adopted 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>80</sup> implementing Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC (hereafter the French Community ET Decree).<sup>81</sup> This Decree applies, in the scope of the competences of the French Community, to the selection, promotion, working conditions, including dismissals and pay regarding the public service of the French Community, education and vocational training, health policy, social advantages, membership of and involvement in any professional organisation funded by the French Community, access to goods and services available to the public, and access and participation to or any exercise of an economic, social, cultural or political activity open to the public.<sup>82</sup> The discrimination grounds covered are:

- alleged race, colour, origin, national or ethnic origin, nationality (cf. Racial Equality Federal Act);
- age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical or genetic characteristic, political opinion, language, social origin, trade union opinion (cf. General Anti-discrimination Federal Act);
- gender and related grounds: pregnancy, childbirth, maternity and gender reassignment (cf. Gender Equality Federal Act).

- The Walloon Region:

Decree of 6 November 2008 on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and

<sup>77</sup> 'Actual and future' are not mentioned contrary to the General Anti-discrimination Federal Act.

<sup>78</sup> 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*), OJ (*Moniteur belge*) was also adopted on 30 May 2007 (hereafter the Gender Equality Federal Act). This Act refers to gender and related grounds: pregnancy, childbirth, maternity, gender reassignment, gender identity and gender expression.

<sup>79</sup> OJ (*Moniteur belge*), 26 July 2002; lastly modified on 10 December 2012, OJ (*Moniteur belge*), 29 December 2010.

<sup>80</sup> OJ (*Moniteur belge*), 13 January 2009; lastly modified on 5 December 2013, OJ (*Moniteur belge*), 5 March 2014.

<sup>81</sup> OJ (*Moniteur belge*), 13 January 2009; lastly modified on 5 December 2013, OJ (*Moniteur belge*), 5 March 2014.

<sup>82</sup> Lastly modified by the Decree of 5 December 2013, OJ (*Moniteur belge*), 5 March 2014.

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>83</sup> implementing European Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC, as amended on 19 March 2009 in order to extend its material scope (hereafter the Walloon ET Decree).<sup>84</sup> This Decree applies, in the scope of the competences of the Walloon Region, to economy, employment and vocational training 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. It also covers social protection, including health care, 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 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.

The discrimination grounds covered are:

- alleged race, colour, origin, national or ethnic origin, nationality (cf. Racial Equality Federal Act);
- age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical or genetic characteristic, political opinion, language, social origin, trade union opinion (cf. General Anti-discrimination Federal Act);
- gender and related grounds: pregnancy, childbirth, maternity, transgender and gender reassignment (cf. Gender Equality Federal Act with some terminological differences).
- The German-speaking Community:

Decree of 19 March 2012 aiming at fighting certain forms of discrimination (*Dekret zur bekämpfung bestimmter formen von diskriminierung*), implementing European Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC (hereafter the German Community ET Decree).<sup>85</sup> It covers labour relations regarding public bodies created or funded by the German-speaking Community, education institutions and the civil service and governmental institutions; education; employment; social advantages; cultural matters; person-related matters; access to, and supply of, goods and services available to the public.

The discrimination grounds covered are the same than the ones enshrined in the Racial Equality Federal Act, General Anti-discrimination Federal Act (and Gender Equality Federal Act).

- The Region of Brussels-Capital:

Ordinance of 4 September 2008 relating 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*), implementing European Directive 76/207/EC as modified by Directive 2002/73/EC and Directives 2000/43/EC, 2000/78/EC in the field of employment as regards Brussels-Capital (hereafter the Brussels ET

<sup>83</sup> OJ (*Moniteur belge*), 19 December 2008; lastly modified on 12 January 2012, *Moniteur belge*, 23 January 2012.

<sup>84</sup> OJ (*Moniteur belge*), 10 April 2009.

<sup>85</sup> OJ (*Moniteur belge*), 5 June 2012 (not modified since then).

Ordinance).<sup>86</sup> 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 discrimination grounds covered are the same than the ones enshrined in the Racial Equality Federal Act, General Anti-discrimination Federal Act (and Gender Equality Federal Act).

A 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*). This Ordinance implements Directives 2000/43/EC, 2000/78/EC and Directive 76/207/EEC (as modified by Directive 2002/73/EC) (hereafter the Brussels Civil Service ET Ordinance).<sup>87</sup> 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. Article 4, 13° defines the public institutions of the Region of Brussels-Capital falling within the scope of this Ordinance. The discrimination grounds are the same than those enshrined in the Racial Equality Federal Act, the General Anti-discrimination Federal Act (and the Gender Equality Federal Act). Beside anti-discrimination provisions, the Ordinance encourages public institutions to adopt diversity plans.

Contrary to the other federated entities, the Region of Brussels-Capital does not have a single all-embracing anti-discrimination legislation. This situation is likely to rise some issues – i.e. legislative gap – especially following the Sixth Reform of the Belgian State in the area of private housing (see below, in section 3.2.10).

– The *Commission communautaire française (Cocof)*

The *Commission communautaire française* (hereafter *Cocof*), to which the French Community 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 of 22 March 2007 on equal treatment between persons in vocational training (*Décret relatif à l'égalité de traitement entre les personnes dans la formation professionnelle*), implementing Directives 97/80/EC, 2000/43/EC, 2000/78/EC, 2002/207/EC and 2006/54/EC 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>88</sup> The discrimination grounds covered are part of an open list of suspect criteria ('or any other ground of discrimination') and those referred to in the Racial Equality Federal Act, the General Anti-discrimination Federal Act (and the Gender Equality Federal Act) are explicitly named.

Second, the Decree of 9 July 2010 on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (*Décret relatif à la lutte contre certaines formes de discrimination et à la mise en oeuvre du principe de l'égalité de traitement*), implementing Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC (hereafter the *Cocof ET Decree*).<sup>89</sup> It applies to school transport and school building management; municipal, provincial, inter-municipal and private facilities with

<sup>86</sup> OJ (*Moniteur belge*), 16 September 2008, lastly modified on 14 July 2011, OJ (*Moniteur belge*), 10 August 2011.

<sup>87</sup> OJ (*Moniteur belge*), *Moniteur belge*, 16 September 2008.

<sup>88</sup> OJ (*Moniteur belge*), 24 January 2008; lastly modified on 5 July 2012, OJ (*Moniteur belge*), 10 September 2012.

<sup>89</sup> OJ (*Moniteur belge*), 3 September 2010.

regard to physical education, sports and outdoor life; tourism; social advancement; health policy; assistance for people;<sup>90</sup> 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*. As regards the promotion of diversity within public institutions, each public institution of the *Cocof* is required to develop a diversity action plan. The discrimination grounds are the same than those enshrined in the Racial Equality Federal Act, the General Anti-discrimination Federal Act (and the Gender Equality Federal Act).

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<sup>90</sup> This competence covers social assistance, integration of migrants, policy dedicated to disabled persons or older persons.

## **1 GENERAL LEGAL FRAMEWORK**

### **Constitutional provisions on protection against discrimination and the promotion of equality**

The Belgian Constitution includes the following articles dealing with non-discrimination:

Articles 10 and 11 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 as to the grounds on which the discrimination is based (they require that the principle of equality be respected in relation to all grounds).

These provisions apply to all areas covered by the directives. Their material scope is broader than those of the directives. They are applicable to all contexts, going beyond not only employment and occupation, but also the scope of Directive 2000/43/EC.

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 different governments (*Arrêtés royaux/Koninklijke besluiten* when adopted by the Federal Government, *Arrêtés du gouvernement de la Région/Besluiten van de regering* when adopted by the governments of the Regions), 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). 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.

These provisions can be enforced against private actors (in addition to against the state). 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 clauses are not used in practice to protect an individual from private acts of discrimination by an employer or another private person.

## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law:

- alleged race, colour, origin, national or ethnic origin, nationality (Racial Equality Federal Act);
- age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical or genetic characteristic, political opinion, language, social origin, trade union opinion (General Anti-discrimination Federal Act);
- gender and related grounds: pregnancy, childbirth, maternity, gender reassignment, gender identity and gender expression (Gender Equality Federal Act).

At the level of the Regions and Communities, the same grounds are covered with some terminological differences chiefly relating to the Gender Equality Federal Act. The grounds embodied in Directives 2000/43/EC and 2000/78/EC are always expressly mentioned (see details above in section 0.2).

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

None of the grounds mentioned in the Racial and Employment Equality Directives which were implemented 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.

The website of the Inter-federal Centre for Equal Opportunities (hereafter UNIA or 'the Centre') provides some indication but chiefly rely on broad definitions based on the usual sense of the discrimination grounds.<sup>91</sup>

##### *Race and ethnic origin*

The concepts of alleged race and ethnic origin are not defined in anti-discrimination Belgian law. It is though worth stressing that, in its 2013 annual report, UNIA made a focus on racism and on its various approaches (historical, legal, socio-scientific).<sup>92</sup>

In the framework of the socio-economic Monitoring (2015), which aims at highlighting the stratification of the labor market according to the origin and the migratory history of people, both terms have been defined as follows:

- The 'origin' combines nationality of the person, nationality at birth of the person and nationality at birth of the person's parents;
- The 'migratory history' combines nationality of the person, nationality at birth of the person, nationality at birth of the person's parents, country of birth, country of birth of the person's grand-parents (only when the persons are of Belgian nationality, are born in Belgium from parents who were Belgian at the moment of the birth), date of registering at the national register and date of acquisition of nationality.<sup>93</sup>

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<sup>91</sup> <http://www.UNIA.be/en> (all hyperlinks of this report were last accessed on 3 July 2017).

<sup>92</sup> Annual report of UNIA 2013 (*Discrimination – Diversité*), p. 14-31, available on its website ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>93</sup> 2015 Socio-Economic Monitoring - *Labour Market and Origin*, Inter-federal Centre for Equal Opportunities and Federal Public Service on Employment, Labour and Social Dialogue, Brussels, November 2015, p. 19-20 ([www.UNIA.be/en](http://www.UNIA.be/en)).

No reference is moreover made to membership of a national minority in the Federal antidiscrimination legislation, 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. Actually due to the very specific treatment of linguistic minorities in Belgium, the inclusion of 'membership of a national minority' in the antidiscrimination legislation would have been very tricky and the legislator decide to avoid these difficulties by not mentioning it as such.

#### *Age, religion or belief and sexual orientation*

Age, religion or belief and sexual orientation are not defined either in the anti-discrimination pieces of legislation.

Generally speaking, 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.

As to sexual orientation, one may highlight the definition provided in the interfederal plan adopted in order to fight against homophobic and transphobic violences, in 2013. Sexual orientation is defined as covering 'heterosexuality, homosexuality and bisexuality. Sexual orientation is not a choice. Sexual orientation is defined on the basis of the gender of individuals for whom an individual has both physical and emotional attraction and affection'.<sup>94</sup>

#### *Disability*

As to disability, however, legislation in the field of social security does provide that certain benefits will be attributed to persons with a certain degree of disability, which has to be medically certified. In such a context, disability is often defined by reference to a recognition by a competent authority.<sup>95</sup> For instance, the Collective Agreement no. 99 of 20 February 2009 concerning the level of remuneration of disabled worker and replacing the Collective Agreement no. 26 of 15 October 1975<sup>96</sup> applies to disabled workers recognised by a proper authority, namely a regional agency in charge of the social and professional integration of disabled people.<sup>97</sup>

Still with respect to disability, the explanatory memorandum<sup>98</sup> accompanying the Cooperation Agreement of 19 July 2007 relating to the concept of reasonable accommodation<sup>99</sup> explains that

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<sup>94</sup> Interfederal plan to fight against homophobic and transphobic violences, 31 January 2013, available at the following address: [http://igvm-iefh.belgium.be/fr/avis\\_et\\_recommandations/plan\\_daction\\_interfederal\\_de\\_lutte\\_contre\\_les\\_discriminations\\_homophobes\\_et](http://igvm-iefh.belgium.be/fr/avis_et_recommandations/plan_daction_interfederal_de_lutte_contre_les_discriminations_homophobes_et).

<sup>95</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' (lastly modified on 25 April 2012, OJ (*Moniteur belge*), 5 May 2012).

<sup>96</sup> *Convention collective de travail n° 99 du 20 février 2009, conclue au sein du Conseil national du Travail, concernant le niveau de rémunération des travailleurs handicapés et remplaçant la convention collective de travail n° 26 du 15 octobre 1975 concernant le niveau de rémunération des travailleurs handicapés occupés dans un emploi normal*, made compulsory by the Executive Regulation of 28 June 2009, OJ (*Moniteur belge*), 13 July 2009.

<sup>97</sup> *Agence wallonne pour l'intégration des personnes handicapées - AWIPH, Service bruxellois francophone des personnes handicapées, Vlaams Agentschap voor Personen met een Handicap - VAPH and/or Vlaamse Dienst voor Arbeidsbemiddeling en Beroepsopleiding, Dienststelle für Personen mit Behinderung*.

<sup>98</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>99</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*, OJ (*Moniteur belge*), 20 September 2007.

'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 (...). 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>100</sup> this commentary seems in line with the definition provided by the Court of Justice of the European Union (hereafter ECJ) in *Skouboe Werge and Ring*<sup>101</sup> as well as with Article 1 of the UN Convention on the Rights of Persons with Disabilities ratified by Belgium. As a case in point, the Labour Appeal Court of Brussels, in a judgment of 9 January 2013, explicitly referred to the *Chacón Navas* case, to hold that the dismissal of a woman working as a replenisher in a famous hypermarket, because she was unable to carry out her function due to a physical impairment having affected her hands after 17 years of work, amounted to unlawful discrimination. The Court underlined that the definition of disability given by the ECJ in *Chacón Navas* insists on the limitation individually experienced, insofar as it hinders the participation to the labour market. Therefore, the Labour Appeal Court of Brussels judged that the failing of the employer to provide for an adaptation of the employee's function as a form of reasonable accommodation was contrary to Article 14 of the General Anti-discrimination Federal Act of 2007 (judgment no. 2013/118).

Concerning the definition of disability in general, it should be borne in mind that the anti-discrimination legislation also covers the state of health, a physical characteristic or a genetic characteristic.

The Labour Tribunal of Liège condemned a driving school for discrimination against an obese candidate on grounds of disability and physical characteristic.<sup>102</sup> The case concerns a man, M. B. who applied to a driving school as driving instructor. The driving school manifested its interest in M. B.'s profile and invited him for an interview. Two days after the interview, M. B got an email from the driving school rejecting its application. In the email, the driving school explained to M. B that his 'physical profile' did not match with the company. He was also asked whether he had already thought about losing weight, which is a handicap for this kind of job. Following that reply, M. B contacted UNIA which tried to conciliate all the parties. However, the attempt of conciliation failed. M. B decided to bring the case before Court. UNIA intervened in support of the applicant. In its judgment, the Tribunal extensively explained the Belgian anti-discrimination law as well as the *Kaltoft* case handed down by the European Court of justice.<sup>103</sup> As a reminder, in the *Kaltoft* case, the Court dealt with the question of whether obesity can be considered as falling into the scope of the protected ground of disability. On this basis, the Tribunal judged that even though obesity is not a protected ground as such, it is seen as a disability – which is a protected ground – when it constitutes a barrier to participate in professional life on the same basis as other workers. The Tribunal underlined that it is not important in the present

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<sup>100</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 website of the Centre: <http://www.UNIA.be/en/>.

<sup>101</sup> CJEU, Joined cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, Judgment of 11 April 2013.

<sup>102</sup> Labour Tribunal of Liège, 20 June 2016, <http://www.UNIA.be/en/>.

<sup>103</sup> CJEU, Judgment in *Kaltoft*, C-354/13, ECLI:EU:C:2014:2463.



case that M D. effectively suffers from morbid obesity – which is a disability – since the driving school implied it. In any case, according to the Tribunal, the reasons which based the refusal of M B.'s application correspond to the ground of disability or at least and undoubtedly to the ground of 'physical characteristic' – which is another protected ground enshrined in the General Anti-discrimination Federal Act. As a consequence, M B. was victim of a direct discrimination – and not of an indirect discrimination, in opposition to the advice of the public prosecutor –.

Regarding the heading 'race and ethnic origin', Belgian case law does not interpret the terms 'alleged race' and 'ethnic origin' separately. Belgian courts do not draw a clear difference between the two terms: They use sometimes both of them, sometimes only one of them without real consistency.<sup>104</sup> They also occasionally just refer to the pertinent legal provisions without quoting the grounds themselves.<sup>105</sup> There are no recognized ethnic minorities in Belgium, which would benefit of a special legal status. Minority language could be recognized as a part of ethnicity but discrimination on the grounds of language as such is dealt with separately in Belgian anti-discrimination law and is not under the responsibility of the inter-federal equality body (UNIA) because of the tensed relationships between French-speaking and Dutch-speaking communities.

There is no relevant case-law as to the definition of other protected grounds such as age, religion and belief or sexual orientation.

### **2.1.2 Multiple discrimination**

In Belgium prohibition of multiple discrimination is not included in the law:

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, colour, origin, national or ethnic origin and nationality (Racial Equality Federal Act); (2) age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical or genetic characteristic, political opinion, language, social origin, trade union opinion (General Anti-discrimination Federal Act); gender and related grounds (Gender Equality Federal Act).

Such a legal impediment does not exist at the regional level where most of the Communities/Regions have made the choice of adopting a framework equality Decree including all the prohibited criteria. According to the French Community or the Flemish Community/Region,<sup>106</sup> such a legislative framework was chosen, to a certain extent, because it is better suited to tackle multiple discrimination.

In Belgium there is no case law dealing with multiple discrimination.

The authors of this report are not aware of any case law, which explicitly addresses or takes into account situations of multiple discrimination.<sup>107</sup>

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<sup>104</sup> See Judgment no. 2009/4737 of 22 October 2009 of the Court of First instance (*Correctionele rechtbank*) of Antwerp; Judgment no. 2009/1837 of 25 February 2009 of the Court of Appeals (*Hof van Beroep*) of Antwerp; Judgment of 13 January 2010 of the Court of Appeals (*Cour d'appel*) of Mons; Judgment no. F.D. 35.98.16/05 AF of 7 February 2014 of the Criminal Court (*Tribunal correctionnel/Correctionele rechtbank*) Dendermonde; Judgement of 10 February 2015 of the Court of Appeals (*Hof van Beroep*) of Brussels [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>105</sup> See Judgment no. BR 43.IN.101194/06 of 26 February 2014 of the Court of First Instance of Brussels (Criminal section) (*Tribunal correctionnel de Bruxelles*), [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>106</sup> See the Draft Framework Decree on Equal Opportunities, *Flemish Parliament* 2007-2008, Doc. 1578/1, p. 165.

<sup>107</sup> The last annual report of UNIA only concerns cases involving single grounds of discrimination (UNIA 2015 (*Discrimination – Diversité*), p. 42-54, available on the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en))).

It is worth highlighting that some obstacles to tackling situations of multiple discrimination are linked to the institutional architecture of equality bodies. At national level, there are two main distinct equality bodies: the *Federal* Institute for the Equality of Women and Men (hereafter Gender Institute), dealing with gender, and the *Inter-federal* Centre for Equal Opportunities (UNIA), dealing with all the other protected grounds (apart from language).

Additionally, UNIA, 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. In 2011, the system of the registration of complains was changed. There is only one department concerned with discrimination cases, and the encoding system allows sorting out these cases according to several discrimination grounds. As a consequence, apart from cases involving sex discrimination that have to be dealt with by the Gender Institute, cases involving multiple discrimination can now be processed within one single department, which could lead to a better adjudication of these cases. In its annual report for 2013, the Centre stresses that 15% of the complaints it registered in 2013 involved several grounds of discrimination, such as race plus religion, race plus sexual orientation, race plus property or disability and state of health<sup>108</sup> (12,5% in 2012).<sup>109</sup>

In its early evaluation report conducted in 2015 and published beginning of 2016, UNIA recommends to expressly mention 'multiple discrimination' in the Anti-discrimination Acts.<sup>110</sup>

### 2.1.3 Assumed and associated discrimination

#### a) Discrimination by assumption

In Belgium the following national law (including case law) prohibits discrimination based on perception or assumption of what a person is:

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>111</sup> The reference to 'presumed race' in the Racial Equality Federal Act may be seen as implying *per se* that discrimination based on an assumed characteristic is prohibited.<sup>112</sup>

The same applies at the regional level where discriminations based on assumed characteristics are not expressly forbidden in the text of the regional decrees but the prohibition results clearly from the preparatory works. Though, in the Flemish Framework ET Decree,<sup>113</sup> the definition of direct discrimination expressly states that it is applicable in case of discrimination based on an assumed characteristic (Article 16).

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<sup>108</sup> Annual report of UNIA 2013 (*Discrimination – Diversité*), p. 80-81, available on the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>109</sup> Annual report of UNIA 2009 (*Discrimination – Diversité*), p. 60, available on the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>110</sup> UNIA report, *Evaluation of the Anti-discrimination Federal Acts* (Federal Act of 10 May 2007 amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia and Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination), February 2016, p. 8 and 62 [www.UNIA.be/en](http://www.UNIA.be/en). This statement was repeated in the evaluation report published in February 2017, p. 68.

<sup>111</sup> Report Libert, *Doc. Parl. Chambre* 2006-2007, no. 2720/009, p. 41-42.

<sup>112</sup> Article 3 and article 4, 4° of the Racial Equality Federal Act.

<sup>113</sup> Framework Decree for the Flemish equal opportunities and equal treatment policy (*Decreet houdende een kader voor het Vlaamse gelijkheidskansen en gelijkebehandelingsbeleid*) of 10 July 2008.

## b) Discrimination by association

In Belgium the following national law (including case law) prohibits discrimination based on association with persons with particular characteristics:

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, during the preparatory works (*travaux préparatoires*), it was stressed that the Court of Justice of the European Union was considering a reference for preliminary ruling in the *Coleman* case<sup>114</sup> and that the federal legislation would be construed in accordance with the ECJ ruling.

In this line, on 10 December 2013, the Labour Court (*Arbeidsrechtbank*) of Leuven (Flanders) convicted the manager of a Fitness Centre for discrimination by association, by reason of an employee's dismissal based on the disability of this employee's younger child. The Court sentenced the employer to pay six-month salary compensation and additional damages to the dismissed employee. This is the first conviction handed down by a Belgian court for discrimination by association. It is worth noting that the Labour Court of Leuven directly referred to the decision of the ECJ in *Coleman*, to hold that discriminations based on being associated with persons with disability are impliedly forbidden under federal law and constitute direct discriminations.<sup>115</sup>

What is true at the federal level applies at the regional level. In addition, in the Flemish Framework ET Decree,<sup>116</sup> the definition of direct discrimination expressly states that it is applicable in case of discrimination by association (Article 16).

In its evaluation report of the Anti-discrimination Federal Acts, published beginning of 2017, UNIA recommends to explicitly mention 'assumed and associated discrimination' in the Anti-discrimination Acts.<sup>117</sup>

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

### a) Prohibition and definition of direct discrimination

In Belgium, direct discrimination is prohibited in national law. It is defined.

The Racial Equality Federal Act and the General Anti-discrimination Federal Act define direct discrimination as any 'direct distinction' (described 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')<sup>118</sup> which cannot be justified under one of the exceptions provided for under the Act.<sup>119</sup> As explained just below (in point b), these exceptions in turn are restrictively defined in order to ensure that those legislative texts are in compliance with the requirements of the directives.

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<sup>114</sup> CJEU, Case *Coleman*, C-303/06, ECLI:EU:C:2008:415.

<sup>115</sup> Judgment no. 12/1064/A of 10 December 2013 (*Jan V.H. v. BVBA V.*) of the Labour Court of Leuven, available on the website of the Centre, ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>116</sup> Framework Decree for the Flemish equal opportunities and equal treatment policy (*Decreet houdende een kader voor het Vlaamse gelijkekansen en gelijkebehandelingsbeleid*) of 10 July 2008.

<sup>117</sup> UNIA report, *Evaluation of the Anti-discrimination Federal Acts (...)*, February 2017, p. 67-69, [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>118</sup> To the knowledge of the authors of the report, the use of the term 'a person' has not been interpreted as excluding groups of persons from protection.

<sup>119</sup> Article 4, 6° & 7° and Article 14 of the General Anti-discrimination Federal Act; Article 4, 6° and Article 12 of the Racial Equality Federal Act.

All the Regional Anti-discrimination pieces of legislation now define direct discrimination in line with EU requirements.<sup>120</sup> However, it is worth noting that the definition of direct discrimination by the Flemish Decree of 10 July 2008 (Article 16, § 1) and by the Decree of the German Community of 19 March 2012 (Article 5, al. 4), as it is currently worded, could be formally read as allowing for derogations to direct discrimination, while this is not possible under the directives' provisions.

#### b) Justification of direct discrimination

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, colour, origin, national or ethnic origin, and nationality. A distinction is made between 1° differences in treatment based on alleged race, colour, origin, 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 (Article 7, § 2, al. 1), unless this would be in violation of the prohibition of discrimination on grounds of nationality under EU law (Article 7, § 2, al. 2);
- By contrast, differences in treatment based on alleged race, colour, origin, national or ethnic origin, are in principle absolutely prohibited (i.e., such differences may not be justified) (Article 7, § 1), with three exceptions:
  - In the field of employment and occupation, where such characteristics constitute a genuine occupational requirement (Article 8);
  - Where the difference in treatment is part of a positive action measure (Article 10);
  - Where the difference in treatment is imposed by, or by virtue of, another legislation (Article 11, known as the safeguard provision).

Since the first two exceptions are directly inspired by the Racial Equality Directive, they require no further explanation. 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. It provides that the Racial Federal Act does not, *per se*, apply to differences in treatment enshrined in any other piece of legislation. Needless to say that any legal provision allowing a difference of treatment based on alleged race, colour, origin, national or ethnic origin, may be challenged on the basis of Articles 10 and 11 of the Constitution, or under European and international law.

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 (Article 7).

However, Article 8 of the General Anti-discrimination Federal Act 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 and 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 (Article

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<sup>120</sup> Even if direct discrimination is correctly defined by the Flemish Framework ET Decree as taking place 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 OJ (*Moniteur belge*) where it is stated that direct discrimination occurs when 'someone is treated less favourably than another person in a comparable situation'.

10), or – like under the 'safeguard provision' enshrined in the Racial Equality Federal Act – unless it is imposed or authorized by another legislation (Article 11). 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, in their spirit, takes into account EU requirements. However, as it is currently worded, the Flemish Framework ET Decree (Article 16, § 1) and the German Community ET Decree (Article 5, al. 4), could be formally read as allowing for derogations to direct discrimination, while this is not possible under the directives' provisions.

### 2.2.1 Situation testing

#### a) Legal framework

In Belgium situation testing is clearly permitted in national law.

However, situation testing is not explicitly mentioned in the legislation. For political reasons, the words 'situation testing' were highly controversial when the Federal Anti-discrimination Acts of 2007 were adopted. Another wording was used: 'recurrence test' (*test de récurrence*) and 'comparability test' (*test de comparabilité*). In this line, as examples of facts leading to a presumption of direct discrimination, the Federal Anti-discrimination Acts of 2007 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>121</sup> These so-called 'recurrence tests' and 'comparability test' are not easy to grasp. They seem to be the two sides of the coin of the situation testing.<sup>122</sup> Beyond the use of this unclear terminology, 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. It follows the general admissibility conditions of such evidence in court.

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) Practice

In Belgium situation testing is used in practice.

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*

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<sup>121</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>122</sup> Van der Plancke, V., 'Les tribulations du testing en Belgique: quels enseignements?', *Horizons stratégiques*, 2007, issue 5, p. 12 ; Rorive, I. and Van der Plancke, V., '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.

*droit d'entrée*).<sup>123</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.<sup>124</sup> In recent years, the *Minderhedenforum* (a platform gathering associations concerned with ethnic and cultural minorities) has aimed at developing situation testing as a tool to raise awareness. In 2012, it published the results of situation tests on racial discrimination in housing in the Flemish cities of Antwerp and Ghent.<sup>125</sup> In 2015, it released the results of situation tests on racial discrimination showing that around 62,3% of companies of 'service voucher' (*'titre-service'*) in Flanders are ready to abide by the discriminatory requests of their clients.<sup>126</sup> Note that companies of 'service voucher' are a public project aiming at fostering less qualified jobs outside the black market (chiefly domestic work). These companies receive public funding.<sup>127</sup>

UNIA continues to sustain a policy to develop scientific situation testing with no purpose to go to court. In this respect a situation testing implying the sending of 1708 CVs to companies was carried on with the collaboration of the University KUL. The results were published in September 2012 as part of the Diversity Barometer in Employment. In this respect, the conclusions of the Diversity Barometer reveal, on the whole, the existence of discrimination practices in the Belgian labour market during the first stage of the selection process. Moreover, this discrimination would mainly affect older people and people who are not of Belgian origin (and especially as stressed in the Barometer: Moroccan, Congolese and Italian).<sup>128</sup> In 2013, UNIA developed *ad hoc* testing to see whether some fitness centers were developing a discriminatory pricing policy based on ethnic origin. The experiment was non conclusive. In 2013, a similar situation testing was carried out, in private housing, by the Centre in collaboration with the Federal Minister for Equal Opportunities, the three Regional Housing Ministers and the Gender Institute. It consisted of one research programme set up by Belgian universities. This study for private housing implied 688 'test calls' and 1769 'test emails'. The results (presented in 2014) reveal that people with foreign origin and those who receive social allowances or do not have very high income are discriminated against. More specifically, the report shows that property owners and real estate agencies, although aware that discrimination is forbidden, adopt some subtle strategies for not renting buildings to the above-mentioned categories including people with disabilities (blind and hard-hearing).<sup>129</sup>

<sup>123</sup> This campaign took place in 2000 and 2001. For a follow-up, see Delanghe, C., 'Encore et toujours', paper published on 26 April 2005 (<http://mrx.be/wp/la-direction-se-reserve-le-droit-dentree/>). See also. Van der Plancke, V., 'Les tribulations du testing en Belgique: quels enseignements?', *Horizons stratégiques* 3/2007 (no. 5), p. 40-59.

<sup>124</sup> See the website of the Centre: <http://www.UNIA.be/en>.

<sup>125</sup> See the website of the Centre: <http://www.UNIA.be/en/discrimination-sur-le-march%C3%A9-du-logement-r%C3%A9action-du-centre-aux-tests-de-situation-du>. See also, <http://www.migpolgroup.com/anti-discrimination-equality/situation-testing/>.

<sup>126</sup> N. Spaas, *Dienstencheques: subsidiëren om te discrimineren*, Minderhedenforum, 22 February 2015.

<sup>127</sup> Note that since then, trade unions and employers in the service voucher sector reached a memorandum of understanding on the fight against discrimination on 27 September 2016. A clause to be included in the employment contracts is in preparation; It would make it impossible to require an "autochthonous" worker to sign a contract. The unions would like the government to make this provision mandatory. The protocol provides for specific training for both employers and supervisors. The parties are also in favor of a broad awareness campaign aimed at customers. As regards the anti-discrimination clause, it was agreed that the social partners would establish a model and disseminate it. Trade unions want to go further, and see the clause included in contracts between companies and customers. The social partners have still to make their agreement affective and expect the support of the different governments. According to Unia, the agreement reached between the social partners to combat discrimination in the service voucher sector is a step in the right direction. However, this agreement can not be regarded as sufficient in its present form, as it does not regulate the organization of effective monitoring of compliance with anti-discrimination legislation. Unia asked the Federal Minister Kris Peeters, in charge of Employment, to invite the social partners to go one step further in the fight against discrimination (UNIA, press release, "Fight against discrimination in the service sector: further progress", 30 September 2016, available on the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en))).

<sup>128</sup> See the Diversity Barometer in Employment, available on the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>129</sup> See the Diversity Barometer in housing, available on the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en)).



In recent years, UNIA has shown more willingness to support the use of situation testing in court. First, in 2009, UNIA relied 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. On 4 November 2009, the First Instance Court of Termonde condemned the restaurant owner for discrimination on the basis of disability, holding that guide dogs are not comparable to domestic animals. The victim was awarded the maximum fixed-rate compensation of EUR 1300 for moral damage. In addition, the Court ordered an end to be put to the discriminatory treatment under penalty of EUR 250 per new offence.<sup>130</sup> On 6 December 2012, the Court of Appeal of Ghent confirmed this decision.<sup>131</sup> As a way to establish the occurrence of discrimination, situation 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 is often used on an *ad hoc* basis by victims acting spontaneously to strengthen their case.

Second, in November 2016, UNIA launched a situation testing device targeting ethnic discrimination in housing. This online device is designed as a roadmap for NGOs and candidate tenants, which want to gather evidences of a discriminatory treatment, either by phone or by email. Basic points of methodology are described and a list of partners associations is provided to give further support.<sup>132</sup> This device aims at improving the chances of successful judicial complaints.

Finally, in its evaluation report carried on in 2015 and published beginning of 2016, UNIA called the Belgian authorities to authorize Labour inspectorate to carry out situation testing such as 'mystery shopping' or 'mystery calling' without any warning to the employer in order to identify discrimination at work.<sup>133</sup> In December 2016, the Minister of Labour of the Region of Brussels adopted a plan against discrimination on the labour market proposing ten measures fighting against discrimination.<sup>134</sup> One of these measures concerns the organization of situation tests by the Labour Inspection Office. Some lively parliamentary debates already took place during the second semester of 2016. At the time of writing the report, it was uncertain whether a statute could be adopted in 2017.

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

### a) Prohibition and definition of indirect discrimination

In Belgium, indirect discrimination is prohibited in national law.<sup>135</sup> It is defined.

The Racial Equality Federal Act (Article 4, 9°) defines indirect discrimination as an 'indirect distinction' on the basis of one of the protected grounds (alleged race, colour, origin, national or ethnic origin, and nationality), which cannot be justified under title II of the Act.<sup>136</sup> Article 4, 8° in turn defines 'indirect distinction' as the situation which occurs

<sup>130</sup> Judgment of 4 November 2009 of the President of the Court of First Instance of Termonde (emergency proceedings), *CECLR and Ludwina De Lathauwer v. Komebar and Simun Ramic* (unpublished). For more details, see the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>131</sup> Judgment no. 2010/AR/264 of 6 December 2012 of the Court of Appeal of Ghent, available on the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>132</sup> See "Comment prouver une discrimination raciale au logement", available on the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>133</sup> UNIA report, Evaluation of the Anti-discrimination Federal Acts (...), February 2016, p. 7.

<sup>134</sup> See press release of the Minister of Labour of the Region of Brussels, "Fight against discrimination - The Brussels Region will be equipped with completely new devices", available at: [http://www.didiergossuin.brussels/sites/default/files/communiqués-de-presse/cab\\_gossuin\\_dp\\_discrimination\\_emploi\\_161208.pdf](http://www.didiergossuin.brussels/sites/default/files/communiqués-de-presse/cab_gossuin_dp_discrimination_emploi_161208.pdf)

<sup>135</sup> Article 12 REFA and Article 14 GAFA.

<sup>136</sup> Article 9 of the Racial Equality Federal Act. See just below in section 2.3.b. of the report.

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'. This Act also decriminalises certain offences linked to discrimination on grounds of alleged race, colour, origin, 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 in criminal law.

The General Anti-discrimination Federal Act (Article 4, 9°) 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>137</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.

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

#### b) Justification test for indirect discrimination

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.

The General Anti-discrimination Federal Act (Article 9, al. 2) 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 (Articles 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 Articles 11 of the Racial Equality Federal Act and of the General Anti-discrimination Federal Act).

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

#### c) Comparison in relation to age discrimination

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<sup>137</sup> Article 9 of the General Anti-discrimination Federal Act. See just below in section 2.3.b. of the report.



Belgian anti-discrimination law does not specify how a comparison is to be made in relation to age discrimination.

### 2.3.1 Statistical evidence

#### a) Legal framework

In Belgium, there are national rules permitting data collection.

Data relating to race or ethnic origin, religion, disability (health) or sexual orientation are regarded as sensitive data (Article 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>138</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 (Article 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. This exception (as well as that provided under Article 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. 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 (Article 7 of the Flemish Decree of 8 May 2002 on proportionate participation on the labour market).<sup>139</sup> 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>140</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 (Article 2(2), al. 2).

Second, under ‘Article 6, § 2, l) and Article 7, § 2, e) of the Act of 8 December 1992’ (the latter provision concerning data relating to health) the processing of sensitive personal data may be justified by statutory law for any legitimate public interest. The Commission for the protection of private life, the independent authority monitoring compliance with this legislation, delivered an opinion where it considered that the processing of sensitive

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<sup>138</sup> *Loi du 8 décembre 1992 relative à la protection de la vie privée à l’égard des traitements de données à caractère personnel*, OJ (*Moniteur belge*), 18 March 1992, lastly modified on 18 March 2014, OJ (*Moniteur belge*), 28 March 2014). 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).

<sup>139</sup> *Decreet houdende evenredige participatie op de arbeidsmarkt*, OJ (*Moniteur belge*), 26 July 2002, lastly modified on 10 December 2012 (*Moniteur belge*, 29 December 2012).

<sup>140</sup> Article 2(2), al. 1, of the 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 (*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*), OJ (*Moniteur belge*), 4 March 2004, lastly modified on 20 June 2014 (*Moniteur belge*, 20 October 2014).

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>141</sup> The Flemish Decree does not include racial or ethnic minorities as such among target groups, but only persons of foreign origin (*allochtonen*).<sup>142</sup>

Third, under Belgian law, the written consent of the person concerned (the data subject) may also justify the processing of sensitive data (Article 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,<sup>143</sup> 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. 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>144</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 Community and the Flemish Community to promote the integration of the children of newly arrived immigrants – such

<sup>141</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>142</sup> Commission for the Protection of Private Life (*Commission de protection de la vie privée*), Opinion no. 3/2004 of 15 March 2004, concerning the 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*).

<sup>143</sup> See, for instance, 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.

<sup>144</sup> Executive Regulation of 13 February 2001 implementing the Act of 8 December 1992 on the protection of the right to private life with respect to the processing of personal data (*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*), OJ (*Moniteur belge*), 13 March 2001 ('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').

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.

On 13 December 2011, the International Federation of Human Rights Leagues (FIDH) lodged a collective complaint with the European Committee of Social Rights (ECSR) to challenge the situation of highly dependent disabled adults in need of reception facilities and accommodation, and their relatives, in Belgium. It is worth noting that one of the conclusions of the Committee, in its 18 March 2013 decision on the merits, is that there is a violation of Article 30 (right to protection from poverty and social exclusion) of the Revised European Social Charter because the Belgian State's failure to collect reliable data and statistics throughout the territory of Belgium in respect of highly dependent persons with disabilities prevents an 'overall and coordinated approach' to the social protection of these persons and constitutes an obstacle to the development of targeted policies concerning them.<sup>145</sup>

In another context, referring to ECRI's General Policy Recommendation No. 11,<sup>146</sup> the Commissioner for Human rights of the Council of Europe invited Belgium to acknowledge and address practices of ethnic profiling of Roma and Travellers by the police at the federal and local levels.<sup>147</sup>

In Belgium, the collection of statistical evidence is permitted by national law in order to establish indirect discrimination.

The Racial Equality Federal Act (Article 30, § 3) and the General Anti-discrimination Federal Act (Article 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'. Legislative preparatory works are not of great help. 'General statistics' are said to be those gathered at the macro-economic level (national or regional) and the Court of Justice of the European Union in gender discrimination makes reference to their use.<sup>148</sup> According to the preparatory works, the shift of the burden of proof could also come from 'specific 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>149</sup>

In its 2009 rulings concerning several actions in annulments against the Federal Anti-discrimination Acts, 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;

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<sup>145</sup> *International Federation of Human Rights Leagues (FIDH) v. Belgium*, complaint no. 75/2011, decision on the merits, 18 March 2013.

<sup>146</sup> ECRI General Policy Recommendation No.11: Combating racism and racial discrimination in policing adopted on 29 June 2007. This Recommendation clarifies that the use by the police of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities 'can hardly be justified outside the case where the police act on the basis of a specific suspect description within the relevant time-limits, i.e. when it pursues a specific lead concerning the identifying characteristics of a person involved in a specific criminal activity' (§ 29).

<sup>147</sup> Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Belgium from 14 to 18 September 2015, Strasbourg, 28 January 2016, para. 179, p. 31 and seq. <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>.

<sup>148</sup> For instance, Case *Lewark*, 6 February 1996, Case C-457/93, §§ 29-30.

<sup>149</sup> Report Libert, *Doc. Parl. Chambre* 2006-2007, no. 51-2720/0009, p. 80-81.

decision no. 39/2009, para. B.52; decision no. 40/2009, para. B.97).<sup>150</sup> In the opinion of the authors of this report, that statement of the Court is in complete breach of EU 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 Community, the German-speaking Community and the Walloon Region were 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 (the Decree of the *Cocof* on equal treatment between persons in vocational training of 22 March 2007, the *Cocof* ET Decree, the Brussels ET Ordinance and the Brussels Civil Service ET Ordinance), it seems that this mode of proving discrimination is allowed under the provisions providing for shifting the burden of proof in civil cases. In any case, statistical evidence follows the general admissibility conditions of such evidence in court.

#### b) Practice

In Belgium, statistical evidence in order to establish indirect discrimination is not used in practice.

To the knowledge of the authors of this report (as confirmed by UNIA),<sup>151</sup> 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 neither have they been used to design positive action measures. 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). However, it is worth noting that the Diversity Barometer in Employment published by the Centre at the end of 2012 relied upon statistical data so as to assess the evolution of employment rate regarding certain target groups (age, national origin, disability).<sup>152</sup> Similarly, the Socio-economic Monitoring (2015) aims at highlighting the stratification of the labor market according to the origin and the migratory history of people.<sup>153</sup>

The Centre stresses that the concept of indirect discrimination is still not well known in Belgium and that the question of intent remains an issue in many cases on the ground (confusion between disguised direct discrimination and indirect discrimination).<sup>154</sup> At present, one cannot assert that evolution in other countries have a tremendous influence on Belgian law as far as European strategic litigation is at stake.

## 2.4 Harassment (Article 2(3))

#### a) Prohibition and definition of harassment

In Belgium, harassment is prohibited in national law. It is defined.

In the Federal Act of 4 August 1996 on the welfare of workers while carrying out their work,<sup>155</sup> 'moral harassment at work' is defined as

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<sup>150</sup> Constitutional Court (*Cour constitutionnelle*), Decision of 12 February 2009, no. 17/2009, para. B.93.3; Decision of 11 March 2009, no. 39/2009, para. B.52; Decision of 2 April 2009, no. 40/2009, para. B.97.

<sup>151</sup> Interview with Patrick Charlier, co-Director of UNIA, 28 March 2017.

<sup>152</sup> Diversity Barometer in Employment, available on the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>153</sup> 2015 Socio-Economic Monitoring - *Labour Market and Origin*, Inter-federal Centre for Equal Opportunities and Federal Public Service on Employment, Labour and Social Dialogue, Brussels, November 2015 ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>154</sup> Interview with Patrick Charlier, co-Director of UNIA, 28 March 2017.

<sup>155</sup> *Loi relative au bien-être des travailleurs lors de l'exécution de leur travail*, as lastly modified on 15 May 2014, OJ (*Moniteur Belge*), 18 June 2014, Article 32 ter, 2°.

'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.'

This provision applies to the relationships, during working time, between employers and workers<sup>156</sup> including trainees and students carrying out an internship, but not to domestic workers (housemaids) and volunteers.<sup>157</sup>

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'.

This provision has a general scope of application.

Both the Racial Equality Federal Act (Article 12) and the General Anti-discrimination Federal Act (Article 14) prohibit harassment as a form of discrimination and define it with the same wording as Directives 2000/43/EC and Directive 2000/78/EC. It is worth keeping in mind the conform interpretation of the Constitutional Court's 2009 ruling, in line with the principle of legality in criminal matters.<sup>158</sup> Indeed, in this ruling, 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*. On this basis, it seems that the Court requires an intention to be proven more generally, i.e. in civil matters as well. This interpretation may raise an issue of lack of compliance with EU and national law since both define harassment as an unwanted conduct related to a protected criterion. If a behaviour which has the effect of creating a bad environment amounts to a prohibited harassment, no specific intention is required under EU and national law. Consequently, the conformed interpretation of the Court should be strictly applied to criminal matters – and not to civil matters – to be in compliance with EU law and national law.

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 (Article 6) and the General Anti-discrimination Federal Act (Article 6) provide that in employment relationships, the sole Act of 4 August 1996 is applicable.<sup>159</sup> This exclusion was justified during legislative preparatory works 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.

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<sup>156</sup> To be applicable, this provision requires a relationship of authority between the parties concerned.

<sup>157</sup> Except if the victim can prove a relationship of authority (Article 2, § 1 to 4 of the *Loi relative au bien-être des travailleurs lors de l'exécution de leur travail*, as lastly modified on 15 May 2014, OJ (*Moniteur Belge*), 18 June 2014).

<sup>158</sup> Constitutional Court (*Cour constitutionnelle*), Decision of 12 February 2009, no. 17/2009, para. B.53.4; Decision of 11 March 2009, no. 39/2009, para. B.25.4; Decision of 2 April 2009, no. 40/2009, para. B.33.4.

<sup>159</sup> See also the Gender Equality Federal Act (Article 7).

Harassment is defined in line with the directives in all the Regional Anti-discrimination legislations.

In Belgium, harassment does explicitly constitute a form of discrimination.

Harassment is prohibited as a form of discrimination in the Racial Equality Federal Act (Article 12) and in the General Anti-discrimination Federal Act (Article 14).<sup>160</sup> All Regional Anti-discrimination legislations have been harmonised with the Federal ones, prohibiting harassment as a form of discrimination.

#### b) Scope of liability for harassment

Where harassment is perpetrated by an employee in Belgium, the employer and the employee are liable.

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 Article 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 would 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 insured against the risk of any such liability. According to Article 18 of the Act of 3 July 1978 on employment contracts,<sup>161</sup> the employer will have to cover the cost of the damages granted to the victim of the discrimination caused by his/her employee. However, if the employer proves that the employee has acted intentionally or recklessly, the employee might be held personally liable.

As to criminal liability, 'Article 67, al. 2, of the Criminal Code' 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 (Article 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.

## **2.5 Instructions to discriminate (Article 2(4))**

#### a) Prohibition of instructions to discriminate

In Belgium, instructions to discriminate are prohibited in national law (Article 12 REFA and Article 14 GAFA). Instructions are defined: 'any behaviour to instruct anyone to discriminate on the basis of one of the protected criteria, against an individual, a group, a community or one its members' (Article 4, 12° of the Racial Equality Federal Act and Article 4, 13° the General Anti-discrimination Federal Act).

Under Article 20 of the Racial Equality Federal Act and Article 22 of the General Antidiscrimination Federal Act, the incitement to commit a discrimination, or the incitement to hatred, violence or segregation against a person or against a group, a community or its

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<sup>160</sup> See also the Gender Equality Federal Act (Article 19).

<sup>161</sup> Federal Act of 3 July 1978 on employment contracts (*Loi du 3 juillet 1978 relative aux contrats de travail*), OJ (*Moniteur belge*), 22 August 1978, lastly modified on 26 December 2013 (*Moniteur belge*, 31 December 2013).

members, on the basis of a protected ground of discrimination, is a criminal offence, if it is done under the conditions of publicity defined by Article 444 of the Penal Code. In this respect, the Constitutional Court held that the offence contained in Article 20 of the Racial Equality Federal Act requires a special *mens rea (dol special)*, i.e. the intent of inciting or encouraging to discriminatory, hatred or violent behaviours.<sup>162</sup> The French Community ET Decree (Article 52), the Walloon ET Decree (Article 23), the German Community ET Decree (Article 25) and the Cocof ET Decree (Article 20) contain similar provisions as the federal ones.

In Belgium, instructions do explicitly constitute a form of discrimination.

Both the Racial Equality Federal Act (Article 12) and the General Anti-discrimination Federal Act (Article 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.

b) Scope of liability for instructions to discriminate

In Belgium the instructor and the discriminator are liable.

As explained above (in section 2.4 – point b), according to 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 Article 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 insured against the risk of any such liability. According to Article 18 of the Act of 3 July 1978 on employment contracts,<sup>163</sup> the employer will have to cover the cost of the damages granted to the victim of the discrimination caused by his/her employee. However, if the employer proves that the employee has acted intentionally or recklessly, the employee might be held personally liable.

As to civil liability of service-providers for the acts of third parties, although 'Article 1384 (al. 1) 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 (Article 1384 al. 4 of the Civil Code). This would not extend to a landlord for the discriminatory acts of tenants, or to a restaurant owner for the discriminatory acts of his/her patrons, with whom no relationship of subordination exists.

As to criminal liability, 'Article 67, al. 2, of the Criminal Code' 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 (Article 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

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<sup>162</sup> Constitutional Court (*Cour constitutionnelle*), decision no. 40/2009 of 11 March 2009.

<sup>163</sup> Federal Act of 3 July 1978 on employment contracts (*Loi du 3 juillet 1978 relative aux contrats de travail*), OJ (*Moniteur belge*), 22 August 1978, lastly modified on 26 December 2013 (*Moniteur belge*, 31 December 2013).

superiors will be fined or imprisoned in the terms provided by the law. The regional anti-discrimination pieces of legislation contain similar provisions.

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

- a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Belgium, the duty to provide reasonable accommodation is included in the law. It is defined.

The definition adopted at federal level and at regional level is very close to this of Article 5 of the Employment Equality Directive (unless specified otherwise). The major difference is that the duty to provide reasonable accommodation to persons with disabilities extent far beyond the field of employment and relies on the scope of competences of each legislator.<sup>164</sup>

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 (Article 14).<sup>165</sup> Definition is provided in 'Article 4, 12° of the General Anti-discrimination Federal Act'.

The Flemish Framework ET Decree defines the denial of reasonable accommodation as a form of prohibited discrimination. Definition is provided in Article 19. 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>166</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, except for its extension beyond persons with disabilities.

In the French Community, Article 3, 9° of the French Community ET Decree reproduces almost word for word the definition enshrined in Article 5 of the Employment Equality Directive.

The Walloon ET Decree defines the denial of reasonable accommodation for persons with disabilities in line with Directive 2000/78/EC and provides that it is a form of prohibited discrimination (Article 15, 6°).

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<sup>164</sup> The material scope of each ET legislation is developed above, in section 0.2 of this report.

<sup>165</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>166</sup> Compare with Article 2, § 2, b), ii) of the Employment Equality Directive.



In the Region of Brussels-Capital, the Brussels ET Ordinance and the Brussels Civil Service Ordinance define reasonable accommodation for person with disabilities in line with EU requirements (Articles 4, 12° & 4, 8°).

The Decree of the *Cocof* on equal treatment between persons in vocational training of 22 March 2007 defines correctly the duty of reasonable accommodation for persons with disabilities (Article 7). The *Cocof* ET Decree also provides that denying reasonable accommodation to a person with a disability amounts to discrimination (Article 9, § 2). Moreover, Article 26, 4° of the Decree on the social and professional integration of persons with disabilities<sup>167</sup> provides that the Executive of that institution shall 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 (Article 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 other Decree. 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.

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'.<sup>168</sup>

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 2010. Senator Francis Delpérée resubmitted it to the Senate on 22 September 2010.<sup>169</sup> On 31 January 2013, it was approved without amendment by the Senate (plenary session) and, on 28 February 2013, it was approved in commission before being transferred to the House of Representatives, on 1<sup>st</sup> March 2013.<sup>170</sup> However, the House of Representatives did not pursue the adoption process before the dissolution of both the Senate and the House of representatives on 28 April 2014. As a consequence, this amendment became null and void.<sup>171</sup> The Governmental Agreement for the legislative period 2014 – 2019 does not provide the adoption of such a provision in the Constitution.<sup>172</sup>

## b) Practice

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 its uniform implementation throughout the country, whatever the legal basis on which the person with a disability may seek to rely. A Cooperation Agreement (which is legally binding) was

<sup>167</sup> *Décret relatif à l'intégration sociale et professionnelle des personnes handicapées*, adopted on 4 March 1999, OJ (*Moniteur belge*), 3 April 1999.

<sup>168</sup> Document no. 4-1531/3.

<sup>169</sup> Document no. 5-139/1.

<sup>170</sup> Document no. 53-2680/001.

<sup>171</sup> For more details on the adoption process, see

<http://www.senate.be/www/?MIval=dossier&LEG=5&NR=139&LANG=fr>.

<sup>172</sup> The Government agreement for the legislative period 2014 – 2019 is available on

[http://www.belgium.be/fr/la\\_belgique/pouvoirs\\_publics/autorites\\_federales/gouvernement\\_federal/politique\\_accord\\_de\\_gouvernement/](http://www.belgium.be/fr/la_belgique/pouvoirs_publics/autorites_federales/gouvernement_federal/politique_accord_de_gouvernement/).

concluded between the relevant public authorities.<sup>173</sup> It 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 agreement gives examples and further explanations 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.

UNIA 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>174</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, 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.

On 9 March 2015, the Labour Court of Mons and Charleroi ruled that a funeral company had discriminated against an employee with multiple sclerosis.<sup>175</sup> The company had refused modifications of the employee's schedules and the nature of his tasks and, a few weeks later, it had laid him off. The Court considered that the applicant had brought some evidence that discrimination had occurred (the burden of proof shifted to the company – Article 28 GAFA) and concluded that multiple sclerosis could be considered as a disability. Concerning direct discrimination, it ruled that it could not be excluded that the employee's dismissal was linked to his multiple sclerosis, held as a disability. Furthermore, it considered that the company did not justify in which extent the modifications of the applicant's schedule and working tasks were not reasonable and constituted a disproportionate burden.

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.<sup>176</sup> 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>177</sup> and the Executive Regulation to that Decree was finally adopted on 2 October 2008,<sup>178</sup> (2) the

<sup>173</sup> OJ (*Moniteur belge*), 20 September 2007.

<sup>174</sup> The booklet and the notebooks are available on the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>175</sup> Labour Court of Mons and Charleroi (*Tribunal du travail*), 9 March 2015, R.G. 14/436/A, <http://www.UNIA.be/en>.

<sup>176</sup> For a brief presentation in English of the regulatory framework applicable in Belgium as to guide dogs, see the website of the Belgian Assistance Dog Federation: <http://www.badf.be/EN/toegangsrechtEN.html>.

<sup>177</sup> OJ (*Moniteur belge*), 8 December 2006.

<sup>178</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*, OJ (*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*. This regulation is included in the executive regulation of the Walloon Government codifying the legislation in the field of health and social action, 29 September 2011.

Region of Brussels-Capital adopted an Ordinance to the same effect on 18 December 2008,<sup>179</sup> followed by an Executive Regulation on 22 October 2009,<sup>180</sup> (3) the Flemish Authority also passed a Decree on 20 March 2009<sup>181</sup> and the Executive Regulation to that Decree was finally adopted on 29 March 2013.<sup>182</sup>

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>183</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 disability, holding that guide dogs are not comparable to domestic animals. The victim was awarded the maximum fixed-rate compensation of EUR 1300 for moral damage.<sup>184</sup> On 6 December 2012, the Court of Appeal of Ghent confirmed this decision.<sup>185</sup>

c) Definition of disability and non-discrimination protection

In the Equal Treatment legislation adopted at both federal and regional levels, 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.

d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Belgium, there is a duty to provide reasonable accommodation for people with disabilities outside the employment field.

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 (Article 4, 12°), which go far beyond employment.<sup>186</sup> The definition is the same whether reasonable accommodation is implemented within or outside the employment field. The Flemish Framework ET Decree, the French Community ET Decree, the German Community ET Decree and the Cocof ET Decree similarly define the scope of the duty of reasonable accommodation as applying to all the material areas they cover. The Walloon ET Decree seems also to extend the duty of reasonable accommodation beyond

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<sup>179</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*), OJ (*Moniteur belge*), 14 January 2009, p. 1527 (lastly modified on 19 April 2012).

<sup>180</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*), OJ (*Moniteur belge*), 9 December 2009.

<sup>181</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*), OJ (*Moniteur belge*), 8 May 2009.

<sup>182</sup> Executive Regulation of the Flemish Government defining the modalities of the certification procedure of guide dogs, provided by Article 4 of the Decree of 20 March 2009 concerning the accessibility of persons with disabilities accompanied by a guide dog to public places (*Besluit van de Vlaamse Regering betreffende de regels inzake de attestatie van assistentiehonden, vermeld in artikel 4 van het decreet van 20 maart 2009 houdende de toegankelijkheid van publieke plaatsen voor personen met een assistentiehond*), OJ (*Moniteur belge*), 13 May 2013.

<sup>183</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*), OJ (*Moniteur belge*), 30 December 2005.

<sup>184</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 and Discrimination: <http://www.UNIA.be/en>.

<sup>185</sup> Judgment no. 2010/AR/264 of 6 December 2012 of the Court of Appeal of Gent (available on the website of the Centre: [www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>186</sup> See above, section 0.2 of this report.

employment (Article 4, 13°). The Walloon Government is in charge of defining more precisely the notion of reasonable accommodation and its modality of application (Article 13). However, it has not done it yet.

The 15 July 2009 judgment of the President of the First Instance Court of Ghent is a good illustration of the duty to provide reasonable accommodation in an area not related to the field of employment.<sup>187</sup> In this case, the applicants, parents of three deaf children attending regular school, claimed that 5 to 9 hours a week of interpreting at school was insufficient as it would make it difficult, if not impossible, for their children to follow the courses. They claimed that the refusal to grant their children more interpreting hours amounted to a denial of reasonable accommodation. The judge referring to an opinion of the then Dutch Commission for Equal Treatment (*Commissie Gelijke Behandeling*) of 9 February 2005,<sup>188</sup> held that the way of handling a request for reasonable accommodation may in itself amount to a denial of such accommodation. In his opinion, this was the case here, notably because the procedure established by the Flemish Government did not take into account the individual needs of each child for the distribution of interpreting hours among the children. As a consequence, the judge held that the Flemish Community had denied reasonable accommodation to the deaf claimants by allowing them no more than 9 hours of deaf interpreting a week at school. The Flemish Community launched an appeal against this decision but the Court of Appeal of Ghent confirmed it, on 7 September 2011.<sup>189</sup>

On 16 July 2014, another case relating to reasonable accommodation was decided in the field of services.<sup>190</sup> The Court of First Instance of Brussels condemned one of the most influential press agents in Belgium and its company for having discriminated against an independent journalist who was in a wheelchair. The agent had refused to organise the interview between the journalist and the artist and expressed discriminatory words about the journalist's situation. The Court judged that the journalist had been directly discriminated against on the ground of disability. According to the Court, he had also been discriminated against because of the refusal to find reasonable accommodation to give him the opportunity to interview an artist by providing an accessible location for the interview. The Court pronounced an injunction imposing the cessation of the discriminatory practice under the threat of a daily fine of EUR 1000. In addition, it convicted the press agent to the payment of a lump sum of EUR 1300 in damages.

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In Belgium, failure to meet the duty of reasonable accommodation does count as discrimination.

As regards fields that are a federal competence, the failure to meet the duty to provide reasonable accommodation constitutes a form of discrimination.<sup>191</sup> In the federal as well as in the regional anti-discrimination legislations, the duty to provide reasonable accommodations for disabled people is required unless such measures would impose a disproportionate burden on the addressee of such a duty, but this burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability public policy. The potential sanctions and remedies in case of failure to meet the duty of reasonable accommodation are the same as those imposed for unlawful discrimination, i.e. payment of damages either on the basis of the 'effective' damage, or on the basis of the lump sums defined in the law, judicial injunction (*action en*

<sup>187</sup> 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).

<sup>188</sup> Opinion no. 2005-18, available on the website of the Commission:  
<https://www.mensenrechten.nl/publicaties/oordelen/2005-18>.

<sup>189</sup> This decision is available in Dutch on the UNIA website at the following address:  
<http://unia.be/fr/jurisprudence-alternatives/jurisprudence/cour-dappel-de-gand-7-septembre-2011>.

<sup>190</sup> Court of First Instance of Brussels (civil section), 16 July 2014, RG 13/13580/A, [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>191</sup> For more details and for a description of the law in the Regions and Communities, the reader is referred to point a) in this section of this report.

cessation), the decision may be posted publicly, and the addressee (defendant) may be subject to fines (*astreintes*) in the case of non-compliance with a judicial order.<sup>192</sup>

As an example, in the case involving an employee with multiple sclerosis (reported above in this section under b)), the Court convicted the funeral company to pay EUR 17.319,48 compensation for damages equivalent to six months' salary.<sup>193</sup>

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. In the above-mentioned decisions of 2009 and 2011 (in point d)), the President of the First Instance Court of Ghent, and the Court of Appeal of Ghent respectively, shifted the burden of proof to the Flemish Government as a result of a presumption that reasonable accommodation had been denied to the deaf claimants. 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.<sup>194</sup>

In the case of 16 July 2014 in which the Court of First Instance of Brussels convicted a press agent and its company for having discriminated a disabled journalist who was in a wheelchair (reported above in this section under d)),<sup>195</sup> the Court relied on Article 28 of the General Anti-discrimination Federal Act providing the shifting of the burden of proof. On this basis, it held that the written transcriptions of the phone call between the journalist and the press agent could amount to a presumption of discrimination.

#### f) Duties to provide reasonable accommodation in respect of other grounds

In Belgium, there is no duty to provide reasonable accommodation in respect of other grounds in the public and the private sector.

Although, the Flemish Decree of 8 May 2002 on proportionate representation<sup>196</sup> does not restrict the notion of reasonable accommodations to persons with disabilities and could therefore also apply in principle to persons in respect of other grounds than disability, it has not been applied with respect to other grounds for the time being.

It might also be worth mentioning that, on 16 September 2016, the Labour Tribunal of Brussels,<sup>197</sup> relying on the Antidiscrimination Federal Act of 10 May 2007, condemned a company for having directly discriminated, on the ground of the current or future state of health, a worker suffering from tendonitis who asked for a part-time for medical reasons. The employer refused this request and dismissed the worker a few weeks later. According to the Labour Tribunal, the worker had no right to reasonable accommodation since there was no sufficient evidence of the sustainable character of her disease and she was not held as disabled. The firing was nevertheless discriminatory and the employer was condemned to pay a compensation of EUR 20 000 to his former employee. An 'a contrario' reasoning could lead to the possibility of reasonable accommodation duty on the ground of current state of health where the long-term character of the disease is proved.

<sup>192</sup> See below, in section 6.5 of this report.

<sup>193</sup> Labour Court of Mons and Charleroi (*Tribunal du travail*), 9 March 2015, R.G. 14/436/A, <http://www.UNIA.be/en>.

<sup>194</sup> 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).

<sup>195</sup> Court of First Instance of Brussels (civil section), 16 July 2014, no. RG 13/13580/A, <http://www.UNIA.be/en>.

<sup>196</sup> *Decreet houdende evenredige participatie op de arbeidsmarkt*, OJ (*Moniteur belge*), 26 July 2002, lastly modified on 10 December 2012 (OJ (*Moniteur belge*), 29 December 2010).

<sup>197</sup> [http://unia.be/files/Documenten/Rechtspraak/Tribunal\\_du\\_travail\\_francophone\\_16\\_septembre\\_2016.pdf](http://unia.be/files/Documenten/Rechtspraak/Tribunal_du_travail_francophone_16_septembre_2016.pdf).

g) Accessibility of services, buildings and infrastructure

In Belgium, national law requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way.

The Framework Act of 17 July 1975<sup>198</sup> first introduced the requirement for buildings open to the public to be accessible to the persons with disabilities. The implementing Executive Regulations were adopted on 9 May 1977,<sup>199</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>200</sup>

In the Walloon Region, a Code on the Land, Urban Planning, Heritage and Energy (CWATUPE) was adopted in 1984.<sup>201</sup> This legislation has been modified on a number of occasions, and most recently by an Executive Regulation of the Walloon Government of 25 January 2001 stipulating that a building permit will only be issued if the buildings concerned<sup>202</sup> (in fact, all buildings which are not private habitations) are made accessible to persons with disabilities (Article 414 – 415/16 CWATUPE). The Executive Regulation 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 open 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.<sup>203</sup> 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>204</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>205</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

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<sup>198</sup> Framework Act of 17 July 1975 on the access of persons with disabilities to buildings accessible to the public, OJ (*Moniteur belge*), 19 August 1975.

<sup>199</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, OJ (*Moniteur belge*), 8 June 1977.

<sup>200</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, OJ (*Moniteur belge*), 5 May 2001, as amended on 25 April 2003.

<sup>201</sup> Code on the Land, Urban Planning, Heritage and Energy (CWATUPE) of 14 May 1984, OJ (*Moniteur belge*), 25 May 1984, lastly modified on 12 December 2014 (*Moniteur belge*, 29 December 2014).

<sup>202</sup> The list comprises buildings for the care of aged or disabled persons, hospitals and clinics, cemeteries and buildings for religious worship, centres offering social, medical or familial aid, buildings meant for sport or tourism activities, cultural buildings, playing grounds, schools and higher education institutions, all public services including courts and tribunals, post offices, train stations, airports, subway stations, banks, office buildings, commercial buildings, restaurants and cafés, communal areas of apartment buildings, car parks of at least 10 places, public toilets and so on.

<sup>203</sup> OJ (*Moniteur belge*), 19 December 2006.

<sup>204</sup> *Decreet tot aanpassing en aanvulling van het ruimtelijke plannings-, vergunningen- en handhavingsbeleid*, OJ (*Moniteur belge*), 15 May 2009.

<sup>205</sup> *Besluit van de Vlaamse Regering tot vaststelling van een gewestelijke stedenbouwkundige verordening inzake toegankelijkheid*, OJ (*Moniteur belge*), 2 September 2009. 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.



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 legislative 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.<sup>206</sup> 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>207</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>208</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. 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>209</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>210</sup> Consequently, a lot of public buildings such as borough councils, courts, police stations, schools or hospitals, remain inaccessible to persons with disabilities.

<sup>206</sup> However, it is interesting to note that, while the official Flemish text of the Decree of 27 March 2009 refers to 'functionally limited people' (*personen met een functiebeperking*), the French translation wrongly refers to 'disabled people' (*personnes handicapées*).

<sup>207</sup> Besluit van de Vlaamse regering tot vaststelling van een gewestelijke stedenbouwkundige verordening betreffende toegankelijkheid van 5 juni 2009 (BS 02/09/09, available in Dutch and the following address: <http://www.toegankelijkgebouw.be/Regelgeving/Downloads/tabid/328/Default.aspx>). Note that, 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 (Article 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>208</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>209</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>210</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) 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) 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 (Article 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, re-buildings 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.

On 24 June 2014, the Criminal Court of Ghent condemned the manager of a grocery shop because he prohibited a blind person to enter his shop with his assistance dog. The manager explained he was afraid of dogs and of having allergies. The Court held that the manager had the obligation to give access to his shop – a public place – to people with disabilities accompanied by assistance dogs.<sup>211</sup>

On 28 October 2014, the UN Committee on the Rights of Persons with Disabilities handed down its concluding observations on the initial report of Belgium.<sup>212</sup> The Committee expresses its concern about 'poor accessibility for persons with disabilities, the absence of a national plan with clear targets and the fact that accessibility is not a priority'. It also noted 'that government action has focused primarily on accessibility for persons with physical disabilities and that few measures have been taken to promote accessibility for persons with hearing, visual, intellectual or psychosocial disabilities' (para. 21). It recommended that Belgium provides a legal framework with specific, binding benchmarks for accessibility, including in respect of buildings, roads and transport, services, and e-accessibility (para. 22). In this context, it is worth noting that UNIA requested five Belgian universities to carry out a survey about the rights of people with disabilities in order to determine whether the needs of people with disabilities are being met in Belgium. The results of the survey were published in October 2014.<sup>213</sup>

According to the report of the Commissioner for Human rights of the Council of Europe, Nils Muižnieks, there is a persisting high rate of institutionalisation of persons with disabilities in Belgium, especially in the Walloon Region. As stated by the Commissioner, '[t]he placement in institutions has long been considered in Belgium as the only lasting option for persons with disabilities [...]. The problem is reportedly compounded by the lack of accessible and affordable housing for persons with disabilities and a serious lack of community-based services'.<sup>214</sup>

In Belgium, national law does not contain a general duty to provide accessibility by anticipation for people with disabilities.

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.

#### h) Accessibility of public documents

In order to comply with Article 56a of Directive 2001/83/EC (as amended by Directive 2004/27/EC), the Act of 1 May 2006 revising the pharmaceutical legislation was adopted and henceforth requires that the name of medicinal products be expressed in Braille format

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<sup>211</sup> Judgment of the Criminal Court of Ghent of 24 June 2014.

<sup>212</sup> Committee on the Rights of Persons with Disabilities, concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session (15 September – 3 October 2014) : <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>.

<sup>213</sup> See below in this report. The results of the survey are available in French on the website of the Centre: <http://www.UNIA.be/en/la-consultation-des-personnes-en-situation-de-handicap-sur-leurs-droits-fondamentaux-les>.

<sup>214</sup> Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Belgium from 14 to 18 September 2015, Strasbourg, 28 January 2016, p. 19 and seq. <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>.



on the packaging.<sup>215</sup> Except for this specific legislation, national law does not require public services to translate their documents in Braille or to provide a translation in sign languages. However, the failing to provide such a translation may constitute a refusal to provide a reasonable accommodation to disabled people (insofar as it does not create a disproportionate burden). Indeed, in the federal and regional anti-discrimination legislations, the duty to provide a reasonable accommodation to disabled people is imposed on private as well as public persons in fields that exceed the employment field, such as the field of access to and supply of goods and services which are available to the public. In this respect, the Federal Public Service on Public Health launched, on 3 September 2013, a new system of sign language interpretation (in Dutch and French), which provides sign language interpreters in hospitals by means of videoconferences, so as to facilitate communication between deaf patients and medical staff.

It is worth noting that the Walloon Government adopted on 14 May 2009<sup>216</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, etc.).

Finally, the UN Committee on the Rights of Persons with Disabilities declared in its concluding observations on the 2014 initial report of Belgium that 'Sign language should be made available across the country in order to ensure access to public services for persons with disabilities on an equal basis with other citizens, in the various official languages and in different formats, regardless of place of residence, and particularly for procedures relating to law and order' (para. 22).<sup>217</sup>

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<sup>215</sup> *Loi du 1<sup>er</sup> mai 2006 portant révision de la législation pharmaceutique*, OJ (*Moniteur belge*), 16 May 2006.

<sup>216</sup> *Arrêté fixant les conditions et les modalités d'intervention d'aide individuelle à l'intégration des personnes handicapées*, OJ (*Moniteur belge*), 7 July 2009.

<sup>217</sup> Committee on the Rights of Persons with Disabilities, concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session (15 September – 3 October 2014) : <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>.

### **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)**

In Belgium, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

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

###### **a) Protection against discrimination**

In Belgium, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of protection against discrimination.

The extension of the personal scope regarding protection to legal persons was not discussed during the preparatory works but the term 'persons' used by the legislator is broad enough to encompass legal persons as well as natural persons, where relevant.

In Belgium the personal scope of anti-discrimination covers natural and legal persons for the purpose of liability for discrimination.

###### **b) Liability for discrimination**

Both natural and legal persons are prohibited from committing the types of discrimination defined in the instruments implementing the directives (Article 5, § 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>218</sup> All Regional pieces of legislation also impose their obligations on both natural and legal persons.

##### **3.1.3 Private and public sector including public bodies (Article 3(1))**

###### **a) Protection against discrimination**

In Belgium the personal scope of national law covers private and public sector including public bodies for the purpose of protection against discrimination and for the purpose of liability for discrimination, except the Brussels ET Ordinance, the Cocof Decree for the public sector and the Brussels Civil Service ET Ordinance for the private sector.

The Anti-discrimination Federal Acts of 10 May 2007 apply, in their fields of competences, to both private and public sector including public bodies (Article 5, § 1 of both Federal Acts). All regional pieces of legislation also apply, in their fields of competences, to both private and public sector including public bodies.

###### **b) Liability for discrimination**

In Belgium the personal scope of national law covers private and public sector including public bodies for the purpose of liability for discrimination, except the Brussels ET

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<sup>218</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.

Ordinance, the Cocof Decree for the public sector and the Brussels Civil service ET Ordinance for the private sector.

## **3.2 Material scope**

### **3.2.1 Employment, self-employment and occupation**

In Belgium, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, military service, holding statutory office, for the five grounds, except the decree ET vocational training cocof for access to employment and occupation and except the German speaking Community decree for self employment.

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>219</sup> that although the Federal State is responsible for regulating employment contracts<sup>220</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:

- 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, colour, origin, 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 application 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 (Article 5, § 1, 5°).<sup>221</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.<sup>222</sup>

The French Community ET Decree applies to the selection, promotion, working conditions, including dismissals and pay regarding its own public service (Article 8). More precisely, it applies to (1) the statutory employment relationships present in the public bodies that the French Community created or is funding, (2) the education institutions, (3) the civil service and governmental institutions.

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<sup>219</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 re-examine the question of the division of competences.

<sup>220</sup> With regard to employment law, see Article 6, § 1, VI, al. 4, 12° of the Special Act on institutional reforms of 8 August 1980 (*Loi spéciale de réformes institutionnelles*, OJ (*Moniteur belge*), 15 August 1980).

<sup>221</sup> Both acts refer to 'working relationships', as described in their Articles 5, § 2.

<sup>222</sup> For more details, see above in section 0.2.

The Walloon ET Decree has a scope of application limited to the Region's competences in the area of employment policy and retraining. The prohibition of discrimination 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 (Articles 4, 1° and 5). It also applies to 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 (Article 5, § 2).

The German Community ET Decree applies to labour relations regarding its own public service and to employment (Article 4, 1° and 3°). More precisely, it covers access to employment, promotion, work conditions, remuneration and termination of employment relationships, with regard to public bodies created or funded by the German-speaking Community, education institutions and the civil service and governmental institutions of the German-speaking Community (Article 3, 11°). It also covers the employment policy carried out by the German-speaking Community (Article 3, 13°).

In the Region of Brussels-Capital, the Brussels ET Ordinance covers workers placement policies and the policies aimed at unemployed persons (as defined in Article 4, 9°). The Brussels Civil Service ET Ordinance relates to the promotion of diversity and the fight against discrimination in the civil service of the Region of Brussels-Capital. It applies to the employment field in the civil service of the Region of Brussels-Capital and covers (as defined in Article 4, 1°) access conditions, criteria selection, promotion, work conditions, including dismissals and pay. Article 4, 13° defines the specific public institutions of the Region of Brussels-Capital falling within the scope of this Ordinance. The Cocof Decree of 22 March 2007 on equal treatment between persons in vocational training also covers vocational guidance, learning, advanced vocational training and retraining in the Region of Brussels-Capital (Article 11). The Cocof ET 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* (Article 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 (Article 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))**

In Belgium, national legislation prohibits discrimination in the following areas: 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 for the five grounds in both private and public sectors as described in the directives (Articles 4, 1° and 5, § 2 of the REFA and the GAFA), except the decree ET vocational training Cocof for access to employment and occupation and except the German speaking Community decree for self employment. As to the detailed presentation of the relevant provisions, the reader is referred to the remarks made under section 3.2.1.

On 10 February 2015, the Appeal Court of Brussels handed down a decision in an important case relating to discrimination on the grounds of race and ethnic origin concerning the access to temporary work.<sup>223</sup> The applicants (the French NGO 'SOS Racisme', and the

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<sup>223</sup> Appeal Court of Brussels, 10 February 2015, <http://www.UNIA.be/en>.

Belgian leftist Trade Union organisation the 'FGTB') claimed that the well-known temporary work agency 'Adecco' was listing job seekers depending on their race and ethnic origin. Native Belgian people without foreign roots were registered in the computer system under the code 'BBB', by reference to the Belgian breed of Cattle 'Blanc Bleu Belge' ('White Blue Belgian'). The system was put in place to please some clients who did not want to hire people with a foreign origin. In first instance, the Court sentenced Adecco to pay EUR 25.000 of damages to the first applicant and 1 euro to the second applicant.<sup>224</sup> On appeal, the Court upheld the decision and also held the Adecco firm liable of discrimination. The liability was assessed under a provision of the Civil Code (Article 1384, al. 3) according to which an employer is liable for his/her employees' civil offences committed during the employment relationship (irrefutable presumption of liability). As to damages, the Appeal Court of Brussels condemned Adecco to pay a much higher compensation (EUR 25.000 to all applicants), stressing that a mere symbolic sentence of EUR 1 does not meet the requirement of effective and dissuasive sanction as imposed by European Law. Such a condemnation is important as the practice was denounced since more than a decade by Unia and the first attempt to denounce the discriminatory practice before the Courts had failed for procedural reasons.<sup>225</sup>

On 2 May 2016, the Labour Tribunal of Ghent<sup>226</sup> condemned a company for having directly discriminated against a 59-year-old-applicant in a recruitment procedure. M. S. (the victim) applied to a company (the defendant) for a job as an independent kitchen seller, on the basis of a vacancy published online. He received the following reply: 'Dear M, you seem like having the perfect profile for the job except to your age – I am sorry for being so straightforward about this but it is probably better that you know the reason why I do not invite you for interview'. The applicant reported the case to UNIA, which launched a conciliation procedure which failed. As a consequence, UNIA decided to bring the case before the Labour Tribunal of Ghent which ruled that M.S. had 'undoubtedly' ('onmiskienbaar') been directly discriminated against on grounds of age. According to the Tribunal, the fact that the company had negative experiences with older workers because they supposedly had encountered troubles with software programs could not be considered as an objective justification. The stereotyped view according to which older candidate are less likely to deal with software programs was rejected altogether. In an in-depth reasoning, the jurisdiction sentenced the company. Firstly, it ordered the company the immediate cessation of the discriminatory practice, under the threat of financial penalties (*astreintes*) (EUR 1.000 for each new offence) (Article 20 of the General Antidiscrimination Federal Act). Secondly, it imposed the publicity of the judgment by the posting of the decision – during one month – at the company headquarters – where it could be visible for the workers and the next candidates for a job – and in the shops of the company – where it could be visible for clients and members of the Board. Interestingly, the Tribunal judged that the publication of the decision in newspapers would be disproportionate. Finally, it sentenced the defendant to pay moral and material damages of EUR 25. 000 to the victim which correspond to 6 months of remuneration determined *ex aequo et bono*.

On 20 June 2016, the Labour Tribunal of Liège condemned a driving school for discrimination against an obese candidate on grounds of disability and physical characteristic.<sup>227</sup> The case concerns a man, M. B., who applied to a job of driving instructor. The driving school invited him for an interview. Two days after the interview, M. B got an email from the driving school rejecting its application. In the email, the driving school explained to M. B that his 'physical profile' did not match with the company. He was also asked whether he had already thought about losing weight, which is a handicap for this kind of job. Following that reply, M. B contacted UNIA which unsuccessfully tried to

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<sup>224</sup> Note that this difference between the two applicants could be explained by their respective claims. The Belgian leftist Trade Union organisation the 'FGTB' had only required one euro as symbolic damages.

<sup>225</sup> See press release of the Centre for Equal Opportunities available at the following address: <http://unia.be/fr/articles/adecco-pas-de-renvoi-en-correctionnelle>.

<sup>226</sup> Judgment of the Labour Tribunal of Ghent, 2 May 2016, <http://www.UNIA.be/en>.

<sup>227</sup> Labour Tribunal of Liège, 20 June 2016, <http://www.UNIA.be/en>.

conciliate the parties. M. B decided to bring the case in court with the support of UNIA. In its ruling, the Tribunal extensively explained the Belgian anti-discrimination law as well as the *Kaltoft* case handed down by the European Court of justice.<sup>228</sup> On this basis, the Tribunal judged that even though obesity is not a protected ground as such, it is seen as a disability – which is a protected ground – when it constitutes a barrier to participate in professional life on the same basis as other workers. The Tribunal underlined that it is not important in the present case that M D. effectively suffers from morbid obesity – which is a disability – since the driving school implied it. According to the Tribunal, the reasons which based the refusal of M B.’s application correspond to the ground of disability or at least and undoubtedly to the ground of a ‘physical characteristic’ – which is another protected ground enshrined in the General Anti-discrimination Federal Act. As a consequence, M B. was victim of a direct discrimination – and not of an indirect discrimination, which was the thesis of the public prosecutor in this case –. The judge also decided that the weight of the applicant did not constitute a genuine and determining occupational requirement in the light of the function at hand and despite the security reasons brought by the defendant. Moreover, according to the judge, even though not being obese would constitute a genuine and determining occupational requirement, reasonable accommodations could have been found, what the defendant failed to do. The Tribunal condemned the driving school to pay moral and material damages to M. B corresponding to 6 months of remuneration (9.866,82€).

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

In Belgium, national legislation prohibits discrimination in the following areas: working conditions including pay and dismissals, for all five grounds and for both private and public employment (Article 5, § 2 REFA and Article 4, 1° GAFA).

As detailed above (section 3.2.1), except for the Decree of the *Cocof* of 22 March 2007 on equal treatment between persons in vocational training, the federal and regional anti-discrimination legislations prohibit direct and indirect discrimination, *inter alia*, with regard to employment and working conditions, including pay and dismissals. In this respect, it is worth mentioning that the Labour Appeal Court of Brussels, in a judgment of 12 March 2013, held that the notion of dismissal, enshrined in the General Anti-discrimination Federal Act of 2007, should receive an extensive interpretation, so as to consider the incidence of *force majeure* (it allows a contractual party to suspend or terminate the performance of its obligations when certain circumstances beyond the control of the parties arise, making performance impossible) as a form of dismissal.<sup>229</sup>

On 16 September 2016, the Labour Tribunal of Brussels,<sup>230</sup> relying on the Antidiscrimination Federal Act of 10 May 2007, condemned a company for having directly discriminated, on the ground of the current or future state of health, a worker suffering from tendonitis who asked to work part-time for medical reasons.

The employer refused this request and dismissed the worker a few weeks later. According to the Labour Tribunal, the worker had no right to reasonable accommodation since there was no sufficient evidence of the sustainable character of her disease. The firing was nevertheless discriminatory and the employer was condemned to pay a compensation of EUR 20 000 to his former employee.

In a case decided on 25 October 2016,<sup>231</sup> the Labour Tribunal of Ghent condemned a company for having dismissed an employee who had been on a long-term sick leave (due

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<sup>228</sup> CJEU, Judgment in *Kaltoft*, C-354/13, ECLI:EU:C:2014:2463, where the Court dealt with the question of whether obesity could be considered as disability.

<sup>229</sup> Judgment no. 2011/AB/631 of 12 March 2013 of the Labour Appeal Court (*Arbeidshof*) of Brussels.

<sup>230</sup> [http://unia.be/files/Documenten/Rechtspraak/Tribunal\\_du\\_travail\\_francophone\\_16\\_septembre\\_2016.pdf](http://unia.be/files/Documenten/Rechtspraak/Tribunal_du_travail_francophone_16_septembre_2016.pdf).

<sup>231</sup> [http://unia.be/files/Documenten/Rechtspraak/Arbeidsrechtbank\\_Gent\\_25\\_oktober\\_2016.pdf](http://unia.be/files/Documenten/Rechtspraak/Arbeidsrechtbank_Gent_25_oktober_2016.pdf).

to a cancer) and who got pregnant during this leave. The dismissal relied on the fact that the 'continuity of her work was compromised'. The Tribunal first considered that the employee had not sufficiently demonstrated unequal treatment based on gender. Enough evidence was produced to presume a discriminatory treatment based on her state of health and the employer was unable to show that the dismissal was not based on the state of health of the worker. At this stage, the Tribunal had to assess whether the difference in treatment could be reasonably justified (note that contrary to direct discrimination based on disability, direct discrimination based on the state of health can be justified under the Antidiscrimination Federal Act). According to the Tribunal, this could be the case in three situations: (1°) The difference in treatment pursues a legitimate aim and respects the principle of proportionality, (2°) The difference in treatment is prescribed by law, (3°) It constitutes a lawful positive action. As the dismissal did not fall in the scope of any of these exceptions, the Tribunal ruled that the dismissal amounted to an unjustified direct discrimination on the ground of the state of health of the worker. The company was condemned to pay a compensation of 6 months' salary and a fine of one euro for symbolic compensation to UNIA (which took part in the proceedings).<sup>232</sup>

#### 3.2.3.1 Occupational pensions constituting part of pay

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>233</sup>

The compatibility with the requirements of non-discrimination and equality of treatment of these regulations is to be insured 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), which provides that these legislations will not, *per se*, apply to differences in treatment imposed by another legislation, or by virtue of another legislation. In other words, they will only apply to administrative practices in the fields they cover and not to statutory law or regulations. 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))**

In Belgium, national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

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<sup>232</sup> One may highlight that The Institute for equality between women and men also took part to the procedure but its request was declared inadmissible as unequal treatment based on gender was not held sufficiently proven. Note that, in this cas, the claim for gender discrimination and the claim for discrimination on the grounds of state of health were made distinctly and not articulated as multiple or intersectional discrimination.

<sup>233</sup> A recent amendment was achieved through the Executive Regulation of 24 June 2013: see *Arrêté royal portant adaptation au bien-être de certaines pensions dans le régime des travailleurs salariés*, OJ (*Moniteur belge*), 3 July 2013, p. 41844.

In the Belgian federal system, vocational guidance (as part of employment policy) is a competence of the Regions,<sup>234</sup> although the Walloon Region transferred that competence to the German-speaking Community for the territory of the German-speaking Region on the 1<sup>st</sup> January 2000. The Flemish Region/Community (Decree of 8 May 2002 on proportionate participation in the employment market), the Walloon Region (Walloon ET Decree), the German-speaking Community (German Community ET Decree) and the Region of Brussels-Capital (Brussels ET Ordinance) prohibit discrimination in vocational guidance. Nevertheless, the German Community ET Decree does not explicitly prohibit discrimination in vocational guidance, but it applies to employment policy, which should include 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>235</sup> The French 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 *Commission communautaire française (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 Walloon ET Decree covers vocational training and validation of competences in its material scope (Article 5, 8°). The French Community ET Decree also includes, in its material scope, vocational training but in the European understanding of the term (Article 3, 14°).

Finally, education is a competence of the Communities. In 2008, the Flemish Community/Region and the French 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, the German Community ET Decree expressly prohibits discrimination in the field of education.

### **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))**

In Belgium, national legislation prohibits discrimination in the following areas: membership of, and involvement in workers or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.

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 (Article 3(1), (d), of the Directive), in their scope of application (Article 5, § 1, 7° of both federal Acts).

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 Community in its Decree of 12 December 2008 (Article 4, 5°) and by the *Cocof* in

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<sup>234</sup> Article 6 § 1, IX of the Special Federal Act of 8 August 1980 on institutional reforms.

<sup>235</sup> Article 4, 15° and 16° of the Special Federal Act of 8 August 1980 on institutional reforms.



its Decree of 9 July 2010 (Article 5, 9°). 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. Though it has not yet been confirmed or interpreted as such through case law.

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

In Belgium, national legislation prohibits discrimination in the following areas: social protection, including social security and healthcare as formulated in the Racial Equality Directive, except the following legislations: Brussels ET Ordinance, Brussels Civil Service ET Ordinance and Decree on equal treatment between persons in vocational training (*Commission communautaire française [Cocof]*). But beyond alleged race, colour, origin, ethnic and national origin and nationality, the grounds covered are 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 and language, genetic characteristic and social origin, trade union opinion

Social security is in principle regulated by legislation adopted at federal level (Article 6 § 1, VI, al. 4, 12° of the Special Federal Act of 8 August 1980 for institutional reforms). Healthcare and social aid, on the other hand, are essentially a competence of the Communities (Article 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, overrules the discriminatory provision. 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 (Article 5, § 3 of each Act). As regards healthcare and social aid, the Flemish ET Decree, the French Community ET Decree, the German Community ET Decree and the Cocof ET Decree cover them. 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.

#### **3.2.6.1 Article 3.3 exception (Directive 2000/78)**

In Belgium, national law does not rely on the exception in Article 3.3.

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

In Belgium, national legislation prohibits discrimination in the following areas: social advantages as formulated in the Racial Equality Directive.

Social advantages are explicitly mentioned in the Racial Equality Federal Act and the General Anti-discrimination Federal Act (Article 5, § 1, 3°). Therefore they are clearly covered by the legislation. As a result of the safeguard provision which both Federal

equality Acts include (Article 11, see above in 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 Community and the Walloon Region, and in 2012, by the German-speaking Community, which all explicitly refer to social advantages in the material scope of their ET Decree. The *Cocof* also included social advantages in the material scope of its 2010 Decree, but only regarding labour relations within public institutions of the *Cocof*. For the sake of full implementation of EU law, 'social advantages' should be added to the material scope of the ET Ordinances of the Region of Brussels-Capital and to the Decree on equal treatment between persons in vocational training (*Commission communautaire française [Cocof]*).

In Belgium, the lack of definition of social advantages does not raise problems.

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

In Belgium, national legislation prohibits discrimination in the following areas: education as formulated in the Racial Equality Directive.

Education is a competence of the Communities in the Belgian federal system.<sup>236</sup> The Communities are therefore exclusively competent to adopt legislation prohibiting discrimination in the field of education.

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 (Article 20, § 1, 5°) and by the French Community Decree of 12 December 2008 (Article 3, 13° and 16 ss.). In the German-speaking Community, the field of education is expressly covered only since the adoption of the German Community ET Decree, in 2012.

#### **a) Religion**

There are many sensitive issues regarding the wearing of conspicuous philosophical symbols for pupils in Belgian schools. There is no general provision at Community level regulating this question. Such a competence belongs to the school boards (or an administrative body in the Flemish Community). As a consequence, there are different practices on the Belgian territory. On 14 October 2014, the Belgian Council of State handed down three important rulings. In the three cases, the applicants (students wearing the Islamic headscarf and their parents as well as two Sikh students) filed an action for annulment against the internal regulations of their respective school boards prohibiting the wearing of any conspicuous philosophical signs. In the three procedures, they argued that the circular as well as the internal regulations breached their freedom of religion.

On 14 October 2014, the Council of State decided to cancel the disputed internal school regulations.<sup>237</sup> The Council of State stated that such a prohibition of any conspicuous philosophical signs at school constitutes an interference with the right to freedom of religion and has to comply with the conditions of Article 9 of the European Convention of Human Right: namely the prohibition should be enshrined in the Law, it has to aim at reaching specific purposes and should be necessary in a democratic society. While the two first

<sup>236</sup> Article 127, § 1, al. 1, 2° of the Constitution.

<sup>237</sup> Council of State (administrative section), 14 October 2014, rulings no. 228.751, 228.752, 228.748, <http://www.raadvst-consetat.be/?page=news&lang=fr&newsitem=237>.

conditions were met, the Council of State ruled that all three schools failed to prove that this prohibition was necessary in a democratic society. According to the Council of State, if such a regulation could be adopted because of serious problems in some schools – as in the Antwerp Region –, the schools of the applicants were not in such a situation that could justify a prohibition of the wearing of any conspicuous philosophical signs in their internal regulations. The Council of State did not rule the case under the Anti-discrimination provisions but rather under Article 9 of the ECHR (freedom of religion). It is worth noting that, after a long saga of cases on the prohibition of any conspicuous philosophical signs at school, the Council of State, for the first time, ruled on the question of freedom of religion.<sup>238</sup>

On 4 October 2016, the President of the Court of First Instance of Liege condemned a graduate school for religious discrimination because religious symbols were forbidden within the school premises (the Islamic headscarf was, once again, at stake here). According to the Court, this measure was not necessary and proportionate. An interdiction of proselytism or the prohibition to miss any class for religious reasons would be more appropriate. The Court stressed that the principle of individual freedom and of peaceful manifestation of one's convictions must remain the rule and that the any limitation should be strictly framed. It emphasised that the fact that the internal regulation applied to adult students must be taken into consideration. Finally, the Court stressed that the wearing of the Islamic headscarf did not constitute an obstacle to learning in this case. In conclusion, the contested regulation was considered discriminatory.<sup>239</sup>

#### b) Pupils with disabilities

In Belgium the general approach to education for pupils with disabilities does raise problems.

In 2004, the Flemish Government 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>240</sup> Moreover, on 21 March 2014, a Decree aiming at promoting the inclusion of children with disabilities in mainstream schools was adopted.<sup>241</sup> However, according to the Commissioner for Human Rights of the Council of Europe 'it falls short of promoting the full inclusion of children with disabilities in mainstream education, in line with the UN Convention for the Rights of Persons with Disabilities'.<sup>242</sup> Similarly, a Cooperation Agreement (approved by a Decree of 1 March 2004 of the French Community) between the French Community and the *Commission communautaire française (Cocof)* seeks to support schools (in either the mainstream or the special educational system), which

<sup>238</sup> The previous relevant cases are chiefly: Constitutional Court, ruling no. 40/2011, 15 March 2011; Council of State, ruling no. 202.039, 18 March 2010; Council of State, ruling no. 220.245, 220.246, 220.247, 10 July 2012; Council of state, ruling no. 221.617, 4 December 2012; Council of State, ruling no. 228.753, 228.754, 224.755, 14 October 2014 (see flash reports nos BE-105; 1180-BE-66 'The Flemish Education Council deemed competent by the Constitutional Court to regulate the wearing of religious and philosophical symbols at school'; 851-BE-40 'The Flemish Community prohibits any religious signs at school' and BE-90 'Council of State Conspicuous Signs Flemish Community December 2013').

<sup>239</sup> The decision is not available but is summarized on the following website: <http://www.unia.be/fr/articles/la-justice-interdit-un-reglement-dune-haute-ecole-qui-empeche-le-port-du-voile-islamique-unia-accueil-positivement-lordonnance>.

<sup>240</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*), OJ (*Moniteur belge*), 2 March 2004.

<sup>241</sup> Flemish Decree of 21 March 2014 on measures for pupils with specific education needs, OJ (*Moniteur belge*), 28 August 2014 (*Decreet betreffende maatregelen voor leerlingen met specifieke onderwijsbehoeften*).

<sup>242</sup> Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Belgium from 14 to 18 September 2015, Strasbourg, 28 January 2016, p. 2 and 21 and seq. <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>.

welcome children with disability.<sup>243</sup> In addition, a Decree of 3 March 2004 of the French Community seeks to reorganise the special educational system for children and adolescents with specific needs.<sup>244</sup> As explained by the Commissioner for Human rights, in the German-speaking Community 'a transition from segregated education towards inclusion was undertaken as of 2009. Geographically isolated specialised schools were banned and rebuilt close to ordinary schools in order to develop interactions between the two types of schools'.<sup>245</sup>

Staffs of the education sector, as they are Communities' public servants from a statutory point of view, are protected by the Flemish Decree of 8 May 2002<sup>246</sup> and the Decree adopted on 19 March 2012 by the German-speaking Community.<sup>247</sup>

However, these initiatives are far from being satisfactory. In its concluding observations on the initial report of Belgium, the Committee on the Rights of Persons with Disabilities made very severe comments (Article 24):

'36. The Committee is concerned at reports that many students with disabilities are referred to and obliged to attend special schools because of the lack of reasonable accommodation in the mainstream education system. As inclusive education is not guaranteed, the special education system remains an all too frequent option for children with disabilities. The Committee is also concerned about poor accessibility in schools.

37. The Committee requests that the State party implement a coherent inclusive education strategy for children with disabilities in the mainstream system and ensure the provision of adequate financial, material and human resources. It recommends that the State party ensure that children with disabilities receive the educational support they need, in particular through the provision of accessible school environments, reasonable accommodation, individual learning plans, assistive technology in classrooms, and accessible and adapted materials and curricula, and guarantee that all teachers, including teachers with disabilities, receive comprehensive training on the use of Braille and sign language with a view to improving the education of all children with disabilities, including boys and girls who are blind, deaf-blind, deaf or hard of hearing. The Committee also recommends that inclusive education should form an integral part of teacher training at university and during continuing professional development.'<sup>248</sup>

Following his visit in Belgium in Septembre 2015, the Commissioner for Human Rights of the Council of Europe Nils Muižnieks expressed strong concern about the high number of children with disabilities who are educated separately from other children in specialised schools in Belgium. According to the report, '[w]hile the authorities stress the high quality of education provided in the Belgian specialised education system, children enrolled in specialised schools do not obtain diplomas and are only rarely reintegrated into mainstream education'. The Commissioner feared that 'separation in education has long-lasting detrimental effects on their inclusion in society' and, in this context, called for 'a firm nation-wide commitment in Belgium towards the inclusion of children with disabilities in

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<sup>243</sup> OJ (*Moniteur belge*), 3 June 2004.

<sup>244</sup> *Décret du 3 mars 2004 de la Communauté française organisant l'enseignement spécialisé*, OJ (*Moniteur belge*), 3 June 2004 (Decree of 3 March 2004 of the French-speaking Community on special education, as lastly modified on 17 October 2013). This decree was modified by a Decree of 13 January 2011 which included a new provision (Article 147, para. 2) obliging mainstream schools to demonstrate willingness to integrate children with specific needs in some conditions.

<sup>245</sup> Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe, *op. cit.*, para. 110 p. 22.

<sup>246</sup> See Article 3, 2° and Article 2, 6° of the Flemish Decree of 8 May 2002.

<sup>247</sup> See Article 3, 11° of the German Community ET Decree of 19 March 2012.

<sup>248</sup> Committee on the Rights of Persons with Disabilities, concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session (15 September – 3 October 2014): <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>.

mainstream education'.<sup>249</sup>

As underlined by the Commissioner, the figures reported by the 2014 annual report of Unia illustrate this problem: disability is the second most commonly alleged ground with 726 complaints and 372 files opened by UNIA. 20% of these claimed were submitted in the area of education, including refusals by schools to provide reasonable accommodation and enrolment denials.<sup>250</sup> The 2015 annual report of Unia confirms this trend: disability is still the second most commonly alleged ground with 750 complaints and 384 files opened by UNIA; 23% of these claimed were submitted in the area of education.<sup>251</sup>

The inter-federal body in charge of promoting equality and fighting against discrimination (UNIA) released, in August 2016, a booklet related to reasonable accommodations at school for pupils with disabilities, in order to inform all actors involved of schools' obligation in this field.<sup>252</sup>

### c) Trends and patterns regarding Roma pupils

In Belgium, there are specific patterns existing in education regarding Roma pupils such as segregation.

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 Roma 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>253</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>254</sup> Moreover, according to figures for 2001 from the Flemish Centre for Minorities (VMC), the majority of children from these communities were directed towards technical and vocational education, in the way children from disadvantaged social backgrounds generally are. These figures remain patchy and make it difficult to identify the precise causes of the dropout and absenteeism of the Roma communities, although they do suggest that the lack of measures to assist Roma children in mainstream educational institutions may be the main reason why the dropout figures are so high.<sup>255</sup> The Delegate General for the Rights of the Child 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 forced evictions and their environment is unhealthy (...)'.<sup>256</sup>

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<sup>249</sup> Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe, *op. cit.*, p. 2 and 21 and seq.

<sup>250</sup> *Ibidem*, para. 104 p. 21. See UNIA 2014 annual report, p. 22 [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>251</sup> UNIA 2015 annual report, p. 43 [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>252</sup> <http://unia.be/fr/publications-et-statistiques/publications/lecole-de-ton-choix-avec-un-handicap-les-amenagements-raisonnables-dans-lenseignement>.

<sup>253</sup> Machiels, T. *Keeping the Distance or Taking the Chances, Roma and Travellers in Western Europe*, Brussels, ENAR, March 2002, p. 17.

<sup>254</sup> *Les Roma de Bruxelles*, publication of the Regional Integration Centre, Foyer Bruxelles asbl, September 2004, p. 36 & sq.

<sup>255</sup> For a 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, at: <https://www.kbs-frb.be/~media/Files/Bib/Publications/Older/PUB2009-1857-SchoolingRomaChildren.pdf>.

<sup>256</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), 2009, at: <http://www.dgde.cfwb.be>, p. 30-32.

According to Patrick Charlier, Deputy Director of UNIA, most of the Roma children are oriented to the special educational system for children and teenagers with specific needs.<sup>257</sup>

These issues have been confirmed by the Commissioner for Human rights of the Council of Europe in its 2016 report following his visit in Belgium in September 2015. The Commissioner expressed his deep concerns about the low participation of Roma and Traveller children in education. He notably highlighted the following issues:<sup>258</sup>

- The very high dropout and absenteeism rates as well as a growing number of children not attending school at all;
- The constant risk of housing eviction which seriously affects the access of an increasing number of children to education;
- Enrolment denials;
- The disproportionately high rate of Roma and Traveller children enrolled in special education, due among others factors to a lack of proficiency in the language of education.<sup>259</sup>

In May 2016, based on an initiative of the Belgian national contact point for Roma, the Federal Public Service 'Social Integration' launched the Belgian National Roma Platform. The platform is supervised by a pilot committee made of staff of the Federal and regional administrations, NGOs active at the local level and UNIA (the inter-federal body in charge of promoting equality and fighting against discrimination). The aim of this Platform is to trigger dialogue with all stakeholders and Roma communities in Belgium. A meeting of the Belgian National Roma Platform took place on 28 October 2016 in Brussels specifically on education. It emphasizes, once again, two major issues: school absenteeism and the high rate of Roma and Traveller children enrolled in special education.<sup>260</sup> Some concrete policy recommendations should be adopted at the end of this process in 2017.

#### d) Pupils with an immigration background

Since the beginning of the new millennium, measures have been adopted in order to foster the insertion of newly arrived migrants in the education system. In the French Community, these measures are now enshrined in the Decree of 18 May 2012 on the setting up of a welcome and schooling plan for first-generation immigrant pupils in the education system organised or subsidised by the French Community.<sup>261</sup> In 2016, a Governmental order was adopted to create a new welcome and schooling plan for first-generation immigrant pupils in secondary school.<sup>262</sup>

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<sup>257</sup> Interview with Patrick Charlier, co-Director of UNIA, 28 March 2017.

<sup>258</sup> Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Belgium from 14 to 18 September 2015, Strasbourg, 28 January 2016, p. 28-29 and 31-32  
<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>.

<sup>259</sup> According to a 2010 study carried out in the city of Leuven, 27% of the Roma and Traveller children surveyed were enrolled in specialised schools.

<sup>260</sup> The minutes of the meeting are available in French at  
[https://www.miiis.be/sites/default/files/documents/plate-forme\\_des\\_roms\\_education\\_pv\\_fr\\_final.pdf](https://www.miiis.be/sites/default/files/documents/plate-forme_des_roms_education_pv_fr_final.pdf).

<sup>261</sup> Decree of the French Community of 18 May 2012 on the setting up of a welcome and schooling plan for first-generation immigrant pupils in education organised or subsidised by the French-speaking Community (*Décret de la Communauté française du 18 mai 2012 visant à la mise en place d'un dispositif d'accueil et de scolarisation des élèves primo-arrivants dans l'enseignement organisé ou subventionné par la Communauté française*), *Moniteur belge*, 22 June 2012, p. 35113.

<sup>262</sup> Arrêté du Gouvernement de la Communauté française portant création d'un nouveau dispositif d'accueil et de scolarisation des élèves primo-arrivants dans l'enseignement secondaire en application de l'article 4 du décret du 18 mai 2012 visant à la mise en place d'un dispositif d'accueil et de scolarisation des élèves primo-arrivants dans l'enseignement organisé ou subventionné par la Communauté française, pour l'année scolaire 2016-2017, *Moniteur belge*, 17 January 2017, p.2788.



In Flanders, a different system has been set up.<sup>263</sup> 'In primary education, newly arrived children are assigned a place in the regular school system. They are then either integrated into this class through extra support and flexible programmes or provided with an additional reception programme in separate classes'. The situation is different for secondary education. As schools generally don't accept the students because of their lack of Dutch, pupils with a migrant background (newcomers) must first take part in reception classes, known in Dutch as Okan (onthaalklas voor anderstalige nieuwkomers – reception class for non-Dutch speaking newcomers). They follow a personalized study programme in order to be mainstreamed as soon as possible. This programme is only available to youngsters who have been in Flanders for less than a year and generally lasts one academic year, though extensions are possible. 'According to the Flemish Agency for Education Services, the number of Okan students doubled from 1,592 to 3,120 in the years between 2007 and 2012. Antwerp province received the most students: 1,250 in the 2011-12 school year, or 40% of the total number that year'. 'Pupils cannot just be put in classes according to their age; they are mostly assembled in groups with similar academic abilities. While some are unable to read or write in their own languages, others have received high-quality education in their home countries.'. 'The teachers don't work towards concrete requirements for pupils to move on to the next level, as they do in the regular education system. Their aim is to achieve *ontwikkelingsdoelen*, or development goals, which are primarily related to the Dutch language but also concern ICT, mathematics and social skills. These goals are meant to not only help pupils communicate in Dutch but also to adapt to Flemish society'. Several reports and research studies were published on this system of 'Okan schools'.<sup>264</sup> 'One of the major findings is that too many Okan students are referred to professional secondary education only on the basis of their language skills.'. According to the report of the Centre for Language and Education (CTO), 'there is not enough attention paid to students' other competences, which may make them more suited to other study tracks. The researchers suggest introducing a portfolio that lists students' skills, sort of like a CV'. To further answer the needs of newcomers, the report suggests adjusting teacher training in higher education. 'Teaching studies could be extended, with courses in how to teach Okan students specifically or in how to deal with diversity in the classroom in general'. 'The current system relies too much on the willingness of teachers to take extra training voluntarily.' In 2017, 'the CTO has started a large-scale, three-year research project at the request of the government of Flanders. Researchers are working with experts from the universities of Antwerp, Ghent and Leuven to map the entire reception education system – analysing the structural organisation, teaching methods and financial means of Okans in both primary and secondary education.

The researchers will also follow up the situation of certain Okan students over three years to examine how successfully they are able to integrate into the regular school system and into society in general'.<sup>265</sup>

According to the report of the Commissioner for Human Rights of the Council of Europe, children of immigrant background are over-represented in specialised education 'due to a number of factors, including disadvantage connected to a lack of proficiency in the language of education'. For example, in Flanders, during the school year 2014-2015, 11,12% of the children of foreign nationality were enrolled in specialised primary education and 11,23% in specialised secondary education.<sup>266</sup> It is worth highlighting that the

<sup>263</sup> The presentation of this system that follows is taken from the following source: Andy Furniere, "Okan schools help youngsters feel at home in Flanders", 24 May 2017, <http://www.flanderstoday.eu/education/okan-schools-help-youngsters-feel-home-flanders>.

<sup>264</sup> See, among others: De Clerck, H., E. Piqueray, L. De Bruyne, I. Philips & I. Truys (2014), "Actie-onderzoek 16- tot 18-jarige nieuwkomers uit derdelanden. Geïntegreerd eindrapport", available at the following address: [http://www.cteno.be/downloads/publicaties/eindversie\\_rapport\\_eif\\_an\\_nov2014.pdf](http://www.cteno.be/downloads/publicaties/eindversie_rapport_eif_an_nov2014.pdf).

<sup>265</sup> Andy Furniere, "Okan schools help youngsters feel at home in Flanders", 24 May 2017, <http://www.flanderstoday.eu/education/okan-schools-help-youngsters-feel-home-flanders>.

<sup>266</sup> *Ibidem*, para. 77, p. 16. Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Belgium from 14 to 18 September 2015, Strasbourg, 28 January 2016, para. 77, p. 16.

Commissioner did not denounce this practice as a racial discrimination but rather as an issue of refugees integration.

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

In Belgium, national legislation prohibits discrimination in the following area: access to and supply of goods and services as formulated in the Racial Equality Directive.

- 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 (Article 5, § 1, 1°).
- 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.
- At the regional level. Access to and supply of goods and services available to the public are also partly covered at the regional level by the Flemish Framework ET Decree (Article 20, § 1, 6°), the French Community ET Decree (Article 4, 6°), the Walloon ET Decree (Article 5, § 1, 9°), the Cocof ET Decree (Article 4, § 1er, 7°) and the German Community ET Decree (Article 4, 7°). 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 ET Ordinance of the Region of Brussels-Capital (except regarding social housing, which is covered by an Ordinance adopted on 19 March 2009).

#### **3.2.9.1 Distinction between goods and services available publicly or privately**

In Belgium, national law distinguishes 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).

When they cover access to and supply of goods and services, all different ET federal and regional legislations in Belgium refer to access to and supply of goods and services available to the public.<sup>267</sup> There is no specification as to what this expression refers to, but it is clear from the 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.<sup>268</sup>

However, regarding the criminalisation of discrimination when committed in the provision of goods and services (Article 24 of the Racial Equality Federal Act), it does not seem that the goods and services concerned are only those available to the public. For instance, private leases are most probably included.

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

In Belgium, national legislation prohibits discrimination in the following area: housing as formulated in the Racial Equality Directive.

Social housing has been part of the competences of the Regions for years.<sup>269</sup> Since the 2014 Sixth Belgian State Reform, private housing has become a competence of the Regions as well. Discriminations in housing fall under the Flemish Framework ET Decree (Article 20, § 1er, 6°), the Walloon ET Decree (Article 5, § 1er, 9°) and a specific Ordinance of the Region of Brussels-Capital adopted on 19 March 2009 (above, section 0.2).

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<sup>267</sup> Access to and supply of *goods* is not covered by the following legislations: Brussels ET Ordinance, Brussels Civil Service ET Ordinance, Decree on equal treatment between persons in vocational training (*Commission communautaire française [Cocof]*).

<sup>268</sup> To the knowledge of the authors of the report, there is no case law clarifying the notion yet.

<sup>269</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.



It should be kept in mind that following the transfer of competence in private housing to the regions, there is a lack of protection against discrimination in the Region of Brussels-Capital. Indeed, there is no provision that protects (potential) tenants against discrimination in this field. In opposition to the other regions, the Region of Brussels-Capital has no general anti-discrimination legislation that applies to its entire field of competence. The Specific Ordinance in housing is only applicable to entities in charge of social housing and is not binding for private actors.<sup>270</sup> Therefore, the legislation in the Region of Brussels-Capital currently does not comply with the Race Directive.

Apart from the AD legislative framework adopted at regional level, 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 the National Association for housing of persons with disabilities (*Association nationale pour le logement des personnes handicapées*), which is very active on the ground.

In Belgium, there are patterns of housing discrimination against people with a migrant background. But it is difficult to affirm that it is because of their migrant background or rather discrimination on the grounds of wealth/income (*fortune*, in French), social condition or ethnic origin. The Diversity Barometer in housing adopted in 2014 by Unia<sup>271</sup> gives a better picture of the situation in practice. The AD legal framework described above apply to migrants, irrespective of their nationality and discrimination on the grounds of nationality is prohibited according to this legal framework.

#### 3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Belgium there are patterns of housing segregation and discrimination against the Roma.

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, local authorities almost systematically refuse to deliver the required planning permit. 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.

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<sup>270</sup> On this question, see S. Ganty and M. Vanderstraeten, 'Droit de la non-discrimination : avancées et enjeux', *Actualités de la lutte contre la discrimination dans les biens et services, en ce compris l'enseignement*, in E. Bribosia, I. Rorive, S. Van Drooghenbroeck (eds), *Droit de la non-discrimination : avancées et enjeux*, Bruxelles, Bruylant, 2016.

<sup>271</sup> Available on the website of UNIA (<http://www.unia.be/fr/publications-et-statistiques/publications/barometre-de-la-diversite-logement>).

When Travellers lodge complaints, courts generally hold that their stationing was illegal and the eviction therefore justified.

On 30 September 2010, the International Federation of Human Rights (FIDH) lodged a collective complaint before the European Committee of Social Rights (ECSR) to challenge the global situation of Travellers in Belgium by alleging a violation of Article 16 (the right of the family to social, legal and economic protection), Article 30 (the right to protection against poverty and social exclusion) and Article E (non-discrimination clause) of the Revised European Social Charter.<sup>272</sup> In particular, the complaint pointed out the inadequate number of public sites accessible to Travellers families, the failure of urban planning legislation to take account of Travellers' specific needs or circumstances, the unreasonable use by the authorities of eviction procedures against Travellers, the obstacles to domiciliation, the failure to recognise caravans as dwellings, the failure to adapt the rules governing health, safety and living conditions to the particular features of mobile homes, and the failure to guarantee Travellers' families adequate social, legal and economic protection. In conclusion, the complaint of the International Federation of Human Rights Leagues alleged a violation of rights related to housing for Travellers under the Revised European Social Charter. In this respect, it is worth noting that even though Belgium refused to be bound by Article 31 of the Revised European Social Charter guaranteeing the right to housing, the European Committee of Social Rights 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>273</sup>

On 21 March 2012, the European Committee of Social Rights handed down a decision on the merits, and transmitted it to the Parties and to the Committee of Ministers of the Council of Europe. The decision was officially published on 31 July 2012.<sup>274</sup>

In its decision, the European Committee of Social Rights concluded that there is a violation of Article E read in conjunction with Article 16 because of:

- the failure in the Walloon Region to recognise caravans as dwellings and the existence, in the Flemish and Brussels Regions, of housing quality standards relating to health, safety and living conditions that are not adapted to caravans and the sites on which they are installed;
- the lack of sites for Travellers and the state's inadequate efforts to solve the problem;
- the failure to take sufficient account of the specific circumstances of Travellers families when drawing up and implementing planning legislation;
- the illegal use of evictions against Travellers who are unlawfully settled on land because they have been unable to find a place on an authorised site.

Moreover, the Committee held that there is a violation of Article E read in conjunction with Article 30 because of the characteristics of the violation of Article E read in conjunction with Article 16 and of the lack of a coordinated overall policy with regards to Travellers in order to prevent and combat the poverty. On 30 April 2013, the Committee of Ministers of the Council of Europe, on the basis of the information communicated by the delegation of Belgium, adopted a resolution related to the above-mentioned decision of the European Committee of Social Rights. The Committee of Ministers took note of the statement made by the Belgian government on the follow-up to the decision of the European Committee of

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<sup>272</sup> *International Federation of Human Rights Leagues (FIDH) v. Belgium*, complaint no. 62/2010, decision on admissibility, 1 December 2010.

<sup>273</sup> *Decision ERRC v. Greece*, 8 December 2004 (Complaint No. 15/2003).

<sup>274</sup> *International Federation of Human Rights Leagues (FIDH) v. Belgium*, complaint no. 62/2010, decision on the merits, 21 March 2012.

Social Rights and welcomed the announced measures with a view to bringing the situation into conformity with the Charter.<sup>275</sup>

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. After a visit in September 2015, the Commissioner for Human rights of the Council of Europe expressed deep concerns for immigrants of Roma origin and Travellers regarding housing (availability of encampment sites, legal recognition of caravans, domiciliation, etc.).<sup>276</sup> He noted that '[I]ittle progress appears to have been achieved since the 2012 Decision of the European Committee of Social Rights'.<sup>277</sup> Moreover, the constant risk of housing eviction is a huge issue and has a profound impact on 'the access of an increasing number of children to education'.<sup>278</sup>

As to legislative developments, with regard to the Brussels Region, an Ordinance amending the Brussels Housing Code with a view to recognizing Traveller dwellings as decent housing was enacted on 1 March 2012. The Government of the Brussels-Capital Region had to define the specific rules for this kind of dwelling by executive regulation. It also had to define the minimum requirements that the sites made available to Travellers should meet and to identify, in particular, what safety standards would apply to itinerant homes. In 2016, this executive regulation has not yet been adopted.

As to policy developments, thanks to the efforts of Flemish authorities, caravan sites have been developed in the Flanders and can accommodate at present around half of the Traveller population. By contrast, only one site exists in the Walloon Region. The Walloon Declaration of regional policy 2014-2019 mentioned, as the previous one, the adoption, in cooperation with the Centre for Mediation of Travellers, of a regional regulation aimed at organizing the temporary stay of Travellers on the territory of the municipalities. The Government also expressed its willingness to finalize the inventory of the available places for large groups of Travellers. Finally, the Government committed itself to further support local authorities' projects to develop places where Travellers could stay.<sup>279</sup>

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<sup>275</sup> Committee of Ministers of the Council of Europe, Resolution CM/ResChS(2013)8, at [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResChS\(2013\)8&Language=lanFrench&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResChS(2013)8&Language=lanFrench&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383).

<sup>276</sup> Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Belgium from 14 to 18 September 2015, Strasbourg, 28 January 2016, p. 27 <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>.

<sup>277</sup> *Ibidem*, p. 30 and seq.

<sup>278</sup> *Ibidem*, p. 3.

<sup>279</sup> Declaration available in French at [http://www.wallonie.be/sites/wallonie/files/publications/dpr\\_2014-2019.pdf](http://www.wallonie.be/sites/wallonie/files/publications/dpr_2014-2019.pdf).

## 4 EXCEPTIONS

### 4.1 Genuine and determining occupational requirements (Article 4)

In Belgium (Federal level), the General Anti-discrimination Federal Act and the Racial Equality Federal Act provide for an exception for genuine and determining occupational requirements (Article 8). 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 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>280</sup>

The instruments adopted by the Regions and Communities contain similar provisions that are in line with the EU requirements.<sup>281</sup>

Little case law exists on that question. As an example, the Labour Court of Brussels ruled in favour of a football referee who was refused by the Royal Belgian Football Union for a training course because he was older than 36. The court considered that an unjustified discrimination on the ground of age occurred since the decision was clearly based on the age of the referee. The Union could not rely on the genuine and determining occupational requirement's justification as long as it did not bring any argument in this respect.<sup>282</sup>

In a case ruled in 2013, the President of the Labour Court of Bruges<sup>283</sup> stated that an employer could not disadvantage an employee based on a physical or genetic characteristic and/or an alleged disability in order to respond to the needs and preferences of colleagues and/or customers. According to the Court, this kind of direct distinction could neither be considered as a genuine and determining occupational requirement, nor as a positive action, nor as a difference in treatment imposed by, or by virtue of, legislation. In the present case, the applicant who had syndactyly (a congenital hand malformation) was not hired under a permanent contract because, according to his employer, his congenital hand deformities would not have been presentable for customers and would have prevented him from fully assuming his job.

On 20 June 2016, the Labour Tribunal of Liège condemned a driving school for discrimination against an obese applicant on grounds of disability and physical characteristic.<sup>284</sup> The tribunal examined the question whether the weight of the applicant amounted to a genuine and determining occupational requirement that justified the difference of treatment. The Tribunal judged that it could not be seen as such, given the

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<sup>280</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 Framework ET Decree shows that the requirement to identify with precision, *ex ante*, the occupational requirements, which fall within the exceptions of Article 4 of the Racial Equality Directive and of Article 4(1) of the Framework Directive, is achievable.

<sup>281</sup> See, for instance, Article 7, § 2 of the Walloon ET Decree.

<sup>282</sup> Judgment no. 087518 of 29 February 2008 of the Labour Appeal Court (*Arbeidshof*) of Brussels. See also Labour Court (*Arbeidsrechtbank*) of Tongres (Flanders), 2 January 2013, *Joyce V. O. D. B. v. R. B. NV and H. B. BVBA*, judgment no. A.R. 11/2142/A, <http://www.UNIA.be/en/> and judgment of 15 January 2008 of the Labour Court of Appeal of Brussels and judgment no. 2011/2128 of 23 December 2011 of the Labour Court of Appeal of Antwerp.

<sup>283</sup> Judgment no. 12/2552/A and no. 12/2596/A of 10 December 2013 of the President of the Labour Court (*Arbeidsrechtbank*) of Bruges (Flanders).

<sup>284</sup> Labour Tribunal of Liège, 20 June 2016, <http://www.UNIA.be/en/>.

function at hand and despite the safety reasons brought by the defendant. Moreover, according to the Tribunal, even though not being obese could constitute a genuine and determining occupational requirement, a reasonable accommodation could have been put in place, what the defendant failed to do.

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

- Exception for employers with an ethos based on religion or belief

In Belgium (Federal level), the General Anti-discrimination Federal Act contains a provision (Article 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.

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 (German-speaking Community, Walloon Region, French Community, Flemish Community/Region but with a less precise formulation, nevertheless in line with the EU requirements). Neither both Decrees of the Cocof of 22 March 2007 and of 9 July 2010, nor the Brussels Civil Service ET Ordinance and the Brussels ET Ordinance contain any clause using the exception embodied in Article 4(2) of Directive 2000/78/EC.

Even though the concept of employer with an ethos based on religion or belief is not expressly referred to in the decision, it is worth mentioning the Hema case decided by the Labour Court of Tongres in January 2013.<sup>285</sup> The Hema store (belonging to the Dutch discount retail chain) in Genk (Flanders) had forbidden a Muslim employee who wore a headscarf from working with customers after some had complained. At the beginning of her employment, the Muslim employee was told that the wearing of a headscarf was acceptable, and she was even provided with a Hema headscarf as worn by staff in the Netherlands. However, after receiving many negative reactions from customers, the company asked the Muslim employee to stop wearing her headscarf in order to comply with 'the neutral and discreet image of Hema'. As she refused to do so, Hema did not renew her contract. After having consulted the trade unions and with the consent of the employee, UNIA decided to bring the matter to the Labour Court of Tongres. The main purpose of such a strategic legal action was to get a CJEU preliminary ruling to clarify how far a company can go in seeking to present a 'neutral image' to its customers. Indeed, some companies are currently trying to get neutrality recognized as a belief or conviction, as if a neutral company could be recognized as an 'organization with an ethos based on religion or belief'. According to UNIA, this could not only result in opening the door to discrimination on the basis of religious belief or moral convictions, but also in removing the essential purpose of the very concept of 'organization with an ethos based on religion or belief'. Furthermore, in the opinion of the Centre, neutrality can hardly be invoked as a genuine and determining occupational requirement.

In its ruling of 2 January 2013, the Court held that terminating labour relations by reason of the wearing of a headscarf constituted direct discrimination on the grounds of belief and sentenced the Hema store in Genk to pay a six-months salary compensation to the fired employee. In its decision, the Labour Court recalled that the concept of 'genuine and determining occupational requirements' should be used parsimoniously. Evidences in the case showed that the neutrality argument was a fake one invoked to cover the prejudice toward Islam of some clients. However, the Court stressed that the Hema store in Genk had, at the moment of the case, no clear neutrality policy in the workplace, and consequently, no valid reason to dismiss the Muslim employee on the grounds of her

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<sup>285</sup> Labour Court (*Arbeidsrechtbank*) of Tongres (Flanders), 2 January 2013, *Joyce V. O. D. B. v. R. B. NV and H. B. BVBA*, judgment no. A.R. 11/2142/A, available on the website of the Centre ([www.UNIA.be/en/](http://www.UNIA.be/en/)).

religious beliefs. This might imply that if the Hema store in Genk had clearly stated in its labour regulations that the wearing of religious signs was prohibited to comply with a neutrality policy, it would not have been sentenced.<sup>286</sup>

In opposition to the previous judgment, the Labour Court of Antwerp held in 2011 that the layoff of an employee wearing the headscarf, in order to preserve the neutral image of the company, was not unreasonable and therefore did not amount to an indirect discrimination, even though the company did not have any clear regulation on the neutrality in the workplace at the time of hiring.<sup>287</sup> This case concerned a Muslim woman who worked as a permanent contract receptionist at G4S Security Services and decided, in April 2006, three years after her hiring, to wear the Islamic headscarf during the working hours. She had not held any duty to wear a specific uniform so far. However, a few days after she decided to wear the headscarf at work, she was informed that it would not be tolerated,<sup>288</sup> because it was contrary to the neutrality policy of the company. The work regulations of the company were also amended in order to forbid the workers to wear any visible symbol expressing their political, philosophical or religious beliefs. Refusing to remove her headscarf within the premises of the company, the Muslim employee was laid off. According to the Court, the employer could prohibit the wearing of any religious signs by all employees in order to preserve the neutral image of the company.

The applicant brought the case before the Belgian Court of Cassation which decided to submit a preliminary ruling to the Court of Justice. In the ruling of 9 March 2015,<sup>289</sup> the Belgian Court firstly recalled the purpose of the 2000/78/EC directive (article 1) as well as the prohibition of direct and indirect discrimination (article 2). On this basis, considering that the appeal Court ruled that there was not direct discrimination and that the applicants claimed that such an interpretation was not compatible with the text of the directive, the Court of cassation decided to suspend the proceedings and to submit the following preliminary ruling to the Court of Justice of the European Union (henceforth: CJEU):

'Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?'

It is worth noting that a similar preliminary ruling had been submitted by a French jurisdiction before the CJEU the same year.<sup>290</sup> The CJEU has heard pleadings regarding the two preliminary references on 15 March 2016.

On 31 May 2016, the Advocate General J. Kokott delivered her conclusions. In her view, if the ban is based on a general company rule which prohibits political, philosophical and religious symbols from being worn visibly in the workplace, such a ban may be justified if it enables the employer to pursue the legitimate policy of ensuring religious and ideological neutrality. Advocate General Juliane Kokott takes the view that there is no direct discrimination on the ground of religion where an employee of Muslim faith is banned from wearing an Islamic headscarf in the workplace, provided that the ban relies on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudices against one religion or against religious

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<sup>286</sup> Such a ruling is in line with the decision of the Labour Court of Appeal of Brussels in the decision *E.F. v. Club corp.* of 15 January 2008.

<sup>287</sup> Judgment no. A.R. 2010/AA/453 and no. A.R. 2010/AA/467 of 23 December 2011 of the Labour Court of Appeal (*Arbeidshof*) of Antwerp.

<sup>288</sup> CJEU, *Achbita case*, C-157/15.

<sup>289</sup> Court of cassation, 9 March 2015, S.12.0062.N, [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>290</sup> CJEU, *Bougnaoui case*, C-188/15.



beliefs in general. If that is the case, there is no less favourable treatment based on religion.

That ban may constitute indirect discrimination based on religion, but may, however, be justified in order to enforce a legitimate policy of religious and ideological neutrality pursued by the employer in the company concerned, in so far as the principle of proportionality is observed. According to Advocate General J. Kokott, in such a case, the proportionality test is a delicate matter. The Court of Justice should therefore grant the national authorities, in particular the national courts, a margin of appreciation to be exercised in strict accordance with EU rules. Accordingly, it is ultimately for the Belgian Kassationshof to strike a fair balance in the present case between the conflicting interests, taking into account all the relevant circumstances of the case, in particular the size and conspicuousness of the religious symbol, the nature of Ms Achbita's activity and the context in which she must perform her activity, as well as the national identity of Belgium. Indeed, in the view of Advocate General Kokott, there can be no doubt, in principle, that the ban at issue in this case is appropriate for achieving the legitimate objective pursued by G4S of ensuring religious and ideological neutrality. The ban is necessary for the purposes of implementing that company policy. Less intrusive but equally suitable alternatives for achieving the objective pursued have not been identified during the proceedings before the Court. Finally, so far as concerns proportionality in the narrow sense, in Advocate General Kokott's view, the ban at issue in the present case does not unduly prejudice the legitimate interests of the female employees concerned and must therefore be regarded as proportionate.

On 13 July 2016, the Advocate General Sharpston gave opposite conclusions on the similar French case C-188/15, considering that a policy requiring an employee to remove her Islamic headscarf when in contact with clients was a direct an unlawful direct discrimination.<sup>291</sup>

In a similar case ruled on 18 May 2015, the Labour Court of Brussels dismissed an applicant claiming that she had been discriminated against on the ground of religion/belief because her employer refused her to wear the Islamic headscarf.<sup>292</sup> Referring to the above-mentioned decisions of 23 December 2011 of the Labour Court of Appeal of Antwerp, the Court ruled that there was no direct or indirect discrimination. Regarding direct discrimination, it considered that the applicant did not bring any evidence that she had been treated differently from the other employees on the ground of her religion/belief. Regarding indirect discrimination, it noted that the work regulations enshrined a 'neutrality policy' and requested from the employees to wear clothes with the name of the company. Therefore, the Court concluded that even though this neutrality policy could have disadvantaged the applicant, this was considered as proportionate and reasonably justified. Therefore, the Court ruled the case without waiting for the decision of the CJEU in the Achbita case.

In a ruling handed down on 16 November 2015, the President of the Court of First instance of Brussels reached another conclusion.<sup>293</sup> He ruled that the working regulation of Actiris – the government body responsible for employment in the Region of Brussels-Capital – prohibiting the wearing of conspicuous philosophical symbols amounted to an indirect discrimination against the applicant who was wearing the Islamic veil. According to the Court, the prohibition at stake was not legitimate since the regional legislator itself did not impose an 'exclusive neutrality'. Moreover, Actiris did not show that the measure was appropriate and necessary to achieve the aim of neutrality pursued. Finally, the President considered that it was not necessary to wait for the CJEU ruling in the *Achbita* case since

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<sup>291</sup> Note that, on 14 March 2017, beyond the cut off date of the report, the CJEU (Grand Chamber) has delivered its judgments in the two cases.

<sup>292</sup> Labour Court of Brussels (Tribunal du travail), 18 May 2015, A.R. 14/218/A, [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>293</sup> Court of First instance of Brussels, 16 November 2015, n° 13 / 7828 / A.

there was an indirect discrimination anyway in the *Actiris* case while the *Achbita* case was not about indirect discrimination but was only related to direct discrimination.<sup>294</sup>

Finally, the numerous judicial rulings of the Belgian Council of State in cases concerning the wearing of conspicuous religious symbols by teachers show that the issue of religious symbols (and actually, the wearing of the Islamic veil) is controversial at every level.

The question has been debated before the Council of State in a case involving two Flemish public Schools which refused to appoint teachers of Islamic religion because of their refusal to remove their headscarf outside the classroom, after teaching their religion courses.<sup>295</sup> The two religion teachers filed an action for suspension and annulment of the decision of refusal of their appointments before the Council of State. In two decisions on the actions in suspension handed down on 5 February 2014, the Council of State held that the religious beliefs – and thus related religious symbols – of a religion teacher are inherent to his/her function. It concluded that, *prima facie*, by refusing to appoint an Islamic religion teacher only because she wears a headscarf as a religious symbol and refuses to remove it outside the classroom, after class, the schools have breached Article 24 of the Constitution concerning the neutrality of public education. The Court did not rule this question under the anti-discrimination provisions.<sup>296</sup> The Council of State based its rulings on the decision adopted in 17 April 2013<sup>297</sup> in which it annulled the sentence ‘when they are in the premises where they give their courses’, which was part of the public schools’ internal regulation adopted by the City Council of Grâce-Hollogne (French-speaking part of Belgium). Following these rulings, the wearing of political, ideological or religious symbols, granted to teachers of religion or moral education, is not limited to the premises where they teach their philosophical courses. The Council of State confirms this case law in a ruling of 25 September 2015 in a similar case.<sup>298</sup>

It is worth noting that the above-mentioned case-law of the Council of State is applicable only for religion teachers. As a reminder,<sup>299</sup> on 27 March 2013,<sup>300</sup> the administrative jurisdiction sitting in banc (*assemblée générale*) dismissed a Maths teacher on her action for annulment (merits of the case) against a regulation adopted by the city Council of Charleroi prohibiting the wearing of religious signs by teachers of public schools.

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In Belgium there are specific provisions concerning religious educational institutions. To a certain extent, these institutions are free to choose the curriculum and values at the core of their teaching. 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>301</sup>

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<sup>294</sup> On this question see footnote 134 Chr. Horevoets, S. Vincent, Concepts et acteurs de la lutte contre les discriminations, in E. Bribosia, I. Rorive, S. Van Drooghenbroeck (coord.), *Droit de la non-discrimination : avancées et enjeux, Morceaux choisis et développements récents à la lumière du droit belge, européen et international*, Bruxelles, Bruylant, 2016.

<sup>295</sup> Council of State, 5 February 2014, n°226.345 and 226.346, <http://www.raadvst-consetat.be/>.

<sup>296</sup> However, the Council of State refused to suspend the execution of the challenged decisions and thus rejected both actions in suspension because the applicants didn’t manage to prove the risk of serious irrevocable prejudice.

<sup>297</sup> Council of State, 17 April 2013, n° 223.201, <http://www.raadvst-consetat.be/>.

<sup>298</sup> Council of State, 25 September 2015, n° 232.344, <http://www.raadvst-consetat.be/>.

<sup>299</sup> E. Bribosia & I. Rorive, *Belgium country report on measures to combat discrimination – 2013*, available at <http://www.non-discrimination.net/countries/belgium>.

<sup>300</sup> Council of State, 27 mars 2013, n° 223.042.

<sup>301</sup> For instance, Article 21 of the Decree adopted on 27 July 1992 by the French Community (*Décret de la Communauté française du 27 juillet 1992 fixant le statut des membres du personnel subventionnés 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



In its rulings on several actions in annulment launched against the Federal Anti-discrimination Acts of 10 May 2007, the Constitutional Court<sup>302</sup> stated that 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 equates to '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, a distinction on the ground of religion or belief implemented by such an organisation, can be considered as objectively and reasonably justified having in mind the basis (*fondement*) of the organisation.

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.

In a case involving the Christian Congregation of Jehovah's Witnesses, the applicant who was expelled from the Congregation 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 found themselves without social fabric, as they were required not to develop any relation with the external world while being part of the Congregation. Confirming the decision of the Court of Appeal of Liège<sup>303</sup> which was quashed by the Court of cassation<sup>304</sup> for the reason that it was in breach of the principle of the reversal of the burden of proof, the Court of Appeal of Mons held that the applicant did not invoke any pertinent element to presume the existence of discrimination as he was in a similar situation to the one of any person properly banned from a group or association. The Court also reminded that the State's obligations to neutrality and impartiality did not allow it to assess the legitimacy of religious beliefs or the way religious beliefs manifest themselves as part of the principle of personal autonomy of believers.

Moreover, on 5 October 2005, the Constitutional Court<sup>305</sup> 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,

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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.

<sup>302</sup> Judgments of the Constitutional Court, nos. 17/2009, 39/2009, 40/2009, 64/2009, delivered on 12 February 2009, 11 March 2009 and 2 April 2009.

<sup>303</sup> Appeal Court (*Cour d'appel*) of Liège, 6 February 2006, *Jurisprudence Liège, Mons et Bruxelles*, 2006/15, p. 661664.

<sup>304</sup> Judgment of 18 December 2008 of the Court of Cassation.

<sup>305</sup> Judgment no. 152/2005 of the Constitutional Court, delivered on 5 October 2005.

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.

– Religious institutions affecting employment in state funded entities

In Belgium 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.

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’ (Article 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*).<sup>306</sup> Religion teachers are selected and appointed on the basis of a proposal of their own hierarchy.<sup>307</sup>

There is one interesting case decided on 12 June 2007 by the President of the Appeal Court of Liège in emergency proceedings (*X v. Église protestante unie de Belgique*).<sup>308</sup> The Protestant Unified Church of Belgium (*Église protestante unie de Belgique*) dismissed a pastor. Before the First instance Court, he asked to be reinstated but 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 that 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 (Article 3(4) and Recital 18 Directive 2000/78)**

In Belgium, national legislation provides for an implicit exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78).

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<sup>306</sup> Although Belgian law recognizes a formal equality between all religions, differences of treatment remains as several religions benefit from an official recognition by, or by virtue of law. Six denominations enjoy this status: Catholicism, Protestantism, Judaism, Anglicanism (1870), Islam (1974), and the Orthodox Church (1870, amended in 1985). In addition, since 1993, the Constitution was modified in order to recognize and finance non believers (*laïques*). In 2006, the Belgian Union of Buddhist introduced a request before the Ministry of Justice in order to be recognized as a non confessional philosophical community. Discussions are still ongoing at the political level.

<sup>307</sup> Article 21, Decree of 10 March 2006 on the status of religion masters and religion teachers (*Décret relatif aux statuts des maîtres de religion et professeurs de religion*) (French Community), OJ (*Moniteur belge*), 19 May 2006; Article 37, Decree of 27 March 1991 on the status of some staff members in public schools (Flemish Community) (Decreet betreffende de rechtspositie van bepaalde personeelsleden van het Gemeenschapsonderwijs), OJ (*Moniteur belge*), 25 May 1991, lastly modified on 19 December 2014, OJ (*Moniteur belge*), 3 February 2015.

<sup>308</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/>).

Whereas the General Anti-discrimination Federal Act is silent on this, it appears from the explanatory memorandum (*exposé des motifs*) that the Government accepts that the preservation of the fighting force in the army might be a legitimate objective when defining genuine and determining occupational requirements within the army. Therefore the general understanding is that this exception is covered under Article 8 of the General Anti-discrimination Federal Act, mentioned under section 4.1.

#### **4.4 Nationality discrimination (Article 3(2))**

##### **a) Discrimination on the ground of nationality**

In Belgium, national law does not include exceptions relating to difference of treatment based on nationality.

In Belgium, nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law.

The Racial Equality Federal Act enshrines 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, origin, 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 (Article 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 22 March 2007<sup>309</sup> does not provide for a justification system of direct discrimination based on nationality.

The Constitutional Court has already ruled cases where the applicant claimed being discriminated against on the ground of nationality because of legislative provisions. A lot of these cases are linked to the Freedom of movement within the EU and the conditions required to having access to social, cultural and economic rights.<sup>310</sup>

There is also a fair amount of cases related to the discrimination on the ground of nationality in the field of social security. In these cases, the Constitutional Court<sup>311</sup> and national courts in general usually apply the criterion of 'strong consideration', on the basis of the case law of the European Court of Human Rights.<sup>312</sup>

##### **b) Relationship between nationality and 'race or ethnic origin'**

To the knowledge of the authors of the report, 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.

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<sup>309</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 (Article 10).

<sup>310</sup> See a recent case ruled by the Constitutional Court concerning the language conditions that employees of nurseries financed by the Flemish community have to comply with, Decision no. 97/2014 of 30 June 2014.

<sup>311</sup> See more recently the following cases: Constitutional Court, decision no. 155/2014 of 23 October 2014 and decision no. 12/2013 of 21 February 2013 available on the website of the Court: <http://www.const-court.be/>.

<sup>312</sup> See Bouckaert, S., 'Influence de la jurisprudence de la CEDH sur le droit et la jurisprudence belges', in CIECLR, *Différences de traitement en fonction de la nationalité ou du statut de séjour: justifiées ou non?*, 2012, p. 17.

However, in March 2012, six NGOs – among which the French-speaking and the Flemish Human Rights Leagues – decided to apply to the Constitutional Court for annulment of the Belgian Act of 8 July 2011 on family reunification (Article 9). They argue that, by imposing on Belgian citizens the same conditions as non-EU citizens in terms of income and housing, and thus by imposing stricter conditions on Belgian citizens than other EU citizens, the new legislation introduces discrimination between EU citizens (reverse discrimination). According to the six organisations, it is particularly Belgians of Turkish and Moroccan origin who will be most badly hit by the legislation, which is therefore considered to be discriminatory on the basis of ethnic origin. Individuals or couples asking for family reunification have brought thirty-six similar actions in annulment before the Constitutional Court. On 26 September 2013, the Constitutional Court handed down a decision on the merits in which it held that Article 40<sup>ter</sup> of the Act of 15 December 1980, as modified by the new Belgian Act of 8 July 2011 on family reunification, does not infringe the right to equality and non-discrimination enshrined in Articles 10 and 11 of the Constitution. According to the Court, the principle of equality and non-discrimination between Belgian citizens and EU citizens may authorize, by reason of the specific situation of both categories of persons, certain differences of treatment. The Court reminded that the fact that the Belgian legislator transposes EU legislation with regard to EU citizens, by virtue of EU obligations, without simultaneously extending this legislation to a category of persons not subject to it (Belgian citizens who have not made use of their free movement rights), does not in itself infringe the principle of equality and non-discrimination. Furthermore, the Court considered that the differences in treatment between Belgian citizens who have not made use of their free movement rights and EU citizens, regarding the conditions imposed on family reunification in terms of age, income and housing, are based on an objective criterion, are justified by the legitimate aim of controlling migratory flows and do not constitute a disproportionate infringement upon the right to equality and non-discrimination. As a consequence, the Constitutional Court held that these grounds for annulment were not established and rejected the claim regarding these specific grounds (judgment no. 121/2013 of 26 September 2013).

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

##### **a) Benefits for married employees**

In Belgium it could constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married.

Articles 10 and 11 of the Constitution prohibits discrimination on grounds of civil status, including marriage.<sup>313</sup> Moreover, it is one of the prohibited grounds of discrimination under the General Anti-discrimination Federal Act. Discrimination based on marital status may also be challenged directly under all the Anti-discrimination statutes adopted at Regional level. 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. Strangely enough, 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>314</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

<sup>313</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 amount of inheritance rights between people in civil partnerships (*samenwonende, personnes vivant ensemble*)). However, the Constitutional Court considered that the legislature could legitimately favour marriage above other forms of (stable) relationships, thereby demonstrating its attachment to the institution of marriage: see Constitutional Court, Case no. 128/98 of 9 December 1998, *Arr. C.A.* 1998, p. 1565, point B.15.3.

<sup>314</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*), OJ (*Moniteur belge*), 28 February 2003.

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).

b) Benefits for employees with opposite-sex partners

In Belgium, it would constitute unlawful discrimination in national law if an employer only provides benefits 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 that seeks to implement the Employment Equality Directive in Belgium.

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

a) Exceptions in relation to disability and health/safety

In Belgium, there are no exceptions in relation to disability and health and safety as allowed under Article 7(2) of the Employment Equality Directive.

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>315</sup> It is not possible in the context of this report to enter into the details of this regulatory framework.

It is nevertheless worth mentioning the exceptions relating to health and safety 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 (whose provisions are now enshrined in the Walloon Code of Social Action and Health of 29 September 2011)<sup>316</sup> provides 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.

The Flemish Decree of 20 March 2009 provides, in its Article 3/1 (introduced by the Flemish Decree of 28 June 2013) that the admittance to guide dogs may be refused:

- by way of a derogating law or regulation;
- where it concerns access to premises, or parts of premises, devoted to intensive care and invasive medical interventions;
- where it concerns access to operating areas, recovery rooms, delivery rooms, onco-hematology services, hemodialysis units and services for badly burned people.

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<sup>315</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), OJ (*Moniteur belge*), 16 June 2003.

<sup>316</sup> OJ (*Moniteur belge*), 21 December 2011 (*Arrêté du Gouvernement wallon portant codification de la législation en matière de santé et d'action sociale, confirmé par le Décret de la Région wallonne du 1er décembre 2011*).

In 2011, Unia adopted recommendations towards the Federal Ministers for public health and equal opportunities on access of guide dogs to hospitals. Unia recommended that '(t)he Superior Health Council develop a uniform procedure regulating the access to hospitals and healthcare establishments. The general rule should be that persons accompanied by a guide dog should have free access to consultation places, hospital rooms, cafeteria ... It is essential to establish a list of places where guide dogs are not admitted. The procedure must also mention the hygiene precautions to be respected and the way in which the hospital staff can be sensitized to these questions'.<sup>317</sup> As a follow-up, The Superior Health Council adopted a new Opinion, in May 2014, on access to guide dogs to hospitals, where it reiterates that access to premises, or parts of premises, devoted to intensive care and invasive medical interventions should be prohibited, unless otherwise stated by the Hospital Hygiene Committee.<sup>318</sup>

The judgment of 21 November 2011 of the Labour Court of Appeal constitutes a good illustration of exceptions in relation to disability and health/safety. The case concerns a woman with type-1 diabetes (insulin-dependent) who was working since 2004 as a storekeeper at the port of Antwerp. In 2008, she decided to apply for a position of containers scorekeeper, but the occupational doctor considered that she was medically unfit for any function at the port of Antwerp. The doctor's position relied on internal guidelines, which automatically exclude employees or prospective employees with type-1 diabetes, irrespective of any individual examination and regardless of the position concerned. On this basis, the woman brought an action before the Labour Court of Antwerp, which dismissed her action. The Centre decided to appeal this judgment with the claimant. The Labour Court of Appeal of Antwerp<sup>319</sup> overruled both the individual decision of the occupational doctor regarding the claimant and the internal guidelines of the port of Antwerp, which automatically exclude employees or prospective employees with type-1 diabetes from all functions performed at the port of Antwerp. It held that the fitness to work of an employee, or a prospective employee, with type-1 diabetes, should be considered on a case-by-case basis in relation to the position concerned, so as to be in accordance with the Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination. It examined the discrimination under the ground of 'disability'.<sup>320</sup> The port of Antwerp brought the case before the Belgian Court of Cassation. In a ruling of 14 December 2015, the Court dismissed the port of Antwerp and confirmed the decision of the Labour Court of Appeal of Antwerp.<sup>321</sup>

The Appeal Court of Mons ruled a case related to discrimination on the ground of health in access to services. The applicant who was wearing a headscarf to hide her baldness caused by a chemotherapy had been refused to enter in a bowling alley. The refusal was based on the bowling alley's regulation that prohibits the wearing of any headgear for 'decency and hygiene' reasons. The court judged that the refusal is the consequence of misinterpretation of the regulation and a communication problem between the employee of the bowling alley and the applicant and does not constitute a discrimination since it is not a usual practice. This judgment means that since there was miscommunication/unusual practice, the applicant will be able to enter the bowling in the future but no damages were allowed in the absence of recognised discrimination.<sup>322</sup>

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<sup>317</sup> Recommendation available on the website of Unia at the following address: <http://unia.be/fr/legislation-et-recommandations/recommandations-dunia/recommandation-relative-a-lacces-des-chiens-dassistance-dans-les-hopitaux>.

<sup>318</sup> This opinion is available in French and Dutch at the following address: <https://www.health.belgium.be/en/node/20840>.

<sup>319</sup> Judgment of 21 November 2011 of the Labour Court of Appeal (*Arbeidshof*) of Antwerp.

<sup>320</sup> [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>321</sup> Court of Cassation, 14 December 2015, [www.UNIA.be/en](http://www.UNIA.be/en). See also a similar decision handed down by the Labour Court of Liège (Tribunal du travail) on 19 August 2015 (summary available on the UNIA website: [www.UNIA.be/en](http://www.UNIA.be/en)). The Court judged that the health problems of the applicants had played a role in the lay-off of the latter.

<sup>322</sup> Court of Appeal of Mons, 29 September 2015, [www.UNIA.be/en](http://www.UNIA.be/en). See *contra* Court of First Instance of Brussels (civil section), 25 January 2011, [www.UNIA.be/en](http://www.UNIA.be/en).

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

### 4.7.1 Direct discrimination

In Belgium, national law provides an exception for direct discrimination on age in the field of the Directive 2000/78/EC. At the Federal level, the General Anti-discrimination Federal Act provides for such an exception (Article 12, § 1) that is in line with Article 6(1), al. 1, of Directive 2000/78/EC.

At the Regions and Communities level, the Flemish Framework ET Decree (Article 23), the Walloon ET Decree (Article 11), the French Community ET Decree (Article 12), the Brussels Civil Service ET Ordinance (Article 10), the Brussels ET Ordinance (Article 13), the German Community ET Decree (Article 8), the Decree of the Cocof of 22 March 2007 (Article 8) and the Cocof ET Decree (Article 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.

#### a) Justification of direct discrimination on the ground of age

In Belgium, it is possible, under certain conditions, to justify direct discrimination on the ground of age.

The wording of all the provisions referred to at the beginning of this section (4.7.1) follows Article 6(1), al. 1, of Directive 2000/78/EC and appears to be in conformity with the approach adopted by the ECJ in *Mangold*<sup>323</sup> and *Kucukdeveci*.<sup>324</sup> For instance, Article 12, § 1 of the General Anti-discrimination Federal Act does not provide for age limits, but instead requires a case-by-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. Despite the lack of case law interpreting this provision, Belgian law seems compatible with the *Mangold* and *Kucukdeveci* approach.

#### b) Permitted differences of treatment based on age

In Belgium, the number of items of legislation and regulations that refers to age within the material scope of Directive 2000/78 is still important.

Before the entry into force of the requirements relating to age of the Directive 2000/78/EC, Belgium started a compilation of the items of legislation and regulations imposing differences of treatment on the grounds of age (coordinated by the Federal Public Service of Employment, Labour and Social Dialogue, with the collaboration of UNIA). However, at the beginning of 2017 and after several renewals of the Government, these items of legislation and regulations have not been systematically screened yet.

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 and is still not sufficient.<sup>325</sup> It is only in November 2006 that the Minister of Labour informed the social partners of the need to remove 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

<sup>323</sup> CJEU, 22 November 2005, *Mangold*, C-144/04.

<sup>324</sup> CJEU, 19 January 2010, *Kucukdeveci*, C-555/07.

<sup>325</sup> Joassart, P., '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.



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 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. At the end of 2016, nothing was done in this respect.

The Diversity Barometer in Employment, published in September 2012 by Unia, reveals the existence of age discrimination practices in the Belgian labour market during the first stage of the selection process, mainly affecting older people.<sup>326</sup> The first data published by UNIA on its activities in 2016 reveal that, between 2015 and 2016, the highest increase in cases opened occurred in age discrimination cases in the field of employment: 106 cases were opened, which means an increase of 126%. According to Unia, 'this type of discrimination remains underestimated, not taken seriously and, worse, almost socially accepted. Yet, considering the aging of the population and the lengthening of careers, this phenomenon should be tackled structurally'.<sup>327</sup> According to UNIA, even if the amount of complaint increased in 2016, few cases involving alleged discrimination on the basis of age are brought in court, the majority of the disputes 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. The high profile case before the Labour Tribunal in Ghent, involving a condemnation of a famous kitchen seller company in Flanders for having directly discriminated against a 59-year-old-applicant in a recruitment procedure could be a starting point in this respect.<sup>328</sup>

c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In Belgium, national law allows 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). While the legislation is extremely complex and has been modified on a large number of occasions, the basic rule is that, since 1 January 2009, men and women may take pension at 65.<sup>329</sup> Other age limits apply in specific sectors, such as underground mining (55 years) or surface mining (60 years). In addition, from 1 January 2013 to 1 January 2016, the early retirement age is progressively raised from 60 to 62, if the employee may prove a minimum years of employment (from 35 to 40 by 1 January 2015), with at least 1/3 occupation for each year.<sup>330</sup> The 2014 Federal Governmental Agreement stresses that a new pension reform needs to be set up since, according to the recommendations of the European Council, complementary measures should be taken to delay the exit from the Belgian labour market. Concerning early retirement, the Federal Governmental Agreement states that the age is expected to be increased to 62,5 years in 2017 and to 63 years in 2019 if the employee may prove a minimum years of employment (from 41 to 42 by 1 January 2017). Furthermore, according to this Agreement, the retirement age will be

<sup>326</sup> See the Diversity Barometer in Employment (available on the website of the Centre: [www.UNIA.be/en/](http://www.UNIA.be/en/)).

<sup>327</sup> First data of UNIA on discrimination in the field of employment and education – 2016, available on its website ([www.UNIA.be/en/](http://www.UNIA.be/en/)).

<sup>328</sup> See section 12 "Case-law" below.

<sup>329</sup> Article 2 of the Executive Regulation of 23 December 1996 executing Articles 15, 16 and 17 of the Act of 26 July 1996 on the modernisation of social security and assuring the viability of the legal pension schemes (*Arrêté royal portant exécution des articles 15, 16 et 17 de la loi du 26 juillet 1996 portant modernisation de la sécurité sociale et assurant la viabilité des régimes légaux des pensions*), as modified most recently by the Acts of 28 December 2011 and of 20 July 2012.

<sup>330</sup> Article 4 of the Executive Regulation of 23 December 1996 executing Articles 15, 16 and 17 of the Act of 26 July 1996 on the modernisation of social security and assuring the viability of the legal pension schemes (*Arrêté royal portant exécution des articles 15, 16 et 17 de la loi du 26 juillet 1996 portant modernisation de la sécurité sociale et assurant la viabilité des régimes légaux des pensions*), as modified most recently by the Act of 19 December 2014, OJ (*Moniteur belge*), 29 December 2014.



increased to 66 years by 2025 and to 67 years by 2030.<sup>331</sup> The reform has been adopted in 2015.<sup>332</sup>

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

In Belgium, there are 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.

- **Older workers.** The economic activity rate of people aged between 55 and 64 is particularly low in Belgium (in 2012, 39,5%, compared to an EU-28 average of 48,8%).<sup>333</sup> The current situation is the legacy of a time 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>334</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 this respect, it is worth noting that the Diversity Barometer in Employment, published in September 2012 by UNIA, shows discrimination practices in the Belgian labour market during the first stage of the selection process, mainly affecting older people.<sup>335</sup> To address this problem, all Regions (employment policy being a competence of the Regions) are putting in place schemes ensuring a smooth transition from full-time active employment to retirement. These schemes include financial incentives to remain active part-time; '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. Other financial measures aim at encouraging the return to work of older workers.

- **Young workers.** In the conclusions on Articles 7, 8, 16, 17 and 19 of the Revised Charter handed down in January 2012, the Committee held that these provisions were not satisfactorily implemented. The situation depicted by the Committee concerning the remuneration of apprentices in Belgium seemed to be even worse than in 2005<sup>336</sup> since the Region of Brussels Capital but also the French Community, the German-speaking Community and the Flemish Community did not comply with the minimum monthly apprenticeship allowances required by the Committee.

About the Flemish community all minimum monthly apprenticeship allowances fell below the Committee's minimum requirements except for that paid to apprentices aged 18 or over in their first year.<sup>337</sup>

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<sup>331</sup> Belgian Federal Governmental Agreement 2014 – 2019, p. 30. The Agreement is available in French on the following website: <http://www.premier.be/fr/accord-de-gouvernement>.

<sup>332</sup> Belgian Federal Act of 10 August 2015 aiming at increasing the minimum retirement age, setting up the access conditions to early retirement schemes (Loi du 10 Août 2015. - visant à relever l'âge légal de la pension de retraite, les conditions d'accès à la pension de retraite anticipée et l'âge minimum de la pension de survie), *O.J. (Moniteur belge)*, 21 August 2015.

<sup>333</sup> See, Eurostat statistics as regards employment rate by sex, age and nationality for 2012 (available at: [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa\\_ergan&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_ergan&lang=en)).

<sup>334</sup> See the Belgian National Action Plan for Employment 2004, paragraph 5.1.1.

<sup>335</sup> See the Diversity Barometer in Employment (available on the website of the Centre: <http://www.UNIA.be/en/>).

<sup>336</sup> European Committee of Social Rights, Conclusions XVII-2 (2005) (BELGIUM) on Article 7 of the Revised Charter.

<sup>337</sup> European Committee of Social Rights, Conclusions 2011 (BELGIUM) on Articles 7, 8, 16, 17 and 19 of the Revised Charter, January 2012.

Regarding the general prohibition of night work of young workers, the Committee reached similar conclusions. Indeed, it concluded that the Belgian Government was incapable of demonstrating that the legal prohibition on night work applied to the great majority of persons under the age of 18. It is noteworthy that, according to the new report handed down by the Belgian Government on 14 November 2013 to the Social Committee of Social Rights, no change was made regarding the situation of night work of young workers in Belgium.<sup>338</sup>

In 2005, the Federal Act on the solidarity pact between the generations (*Pacte de solidarité entre les générations en Belgique*) was adopted in Belgium.<sup>339</sup> Its main objective was to raise the level of activity among older workers, as the measures described above had not achieved the desired results. The main measures in the Solidarity Pact may be sum up 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;
- 2) encouraging a longer career a) by raising the level of income that 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) (according to the Federal Government, this measure will be abolished in 2015); 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) the 2014 Governmental Agreement provides that the 'unity of Career' (*Unité de carrière*) will be abolished, meaning that people who continue to work after the age of 65 (legal retirement age) will get supplementary pension rights;
- 4) discouraging the lay-off of older workers: laid-off workers who receive unemployment benefits can also benefit from a supplementary allowance paid by the employer when they have been laid off after the age of 60 years (with some exceptions), and when they prove a minimum years of employment; 35 years for men (it had to be progressively increased to 40 years by 2015), and 28 years for women (it will be progressively increased to 40 years by 2024);
- 5) reform of the mechanisms on collective redundancies decisions in the context of restructurations of undertakings.

- **People with caring responsibilities.** A vast array of measures seek to improve the balance between family and working life. Most of these measures seek to improve the chance for both mothers and fathers to take care of their children. Certain measures seek to support the professional integration of people caring for children with disabilities. For example, 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>340</sup> Moreover, the same

<sup>338</sup> 8e rapport national sur l'application de la Charte sociale européenne soumis par le Gouvernement de la Belgique (Articles 2, 4, 5, 6, 21, 22, 26, et 29 pour la période 01/01/2009 – 31/12/2012), RAP/RCha/BEL/12(2014), [http://www.coe.int/t/dghl/monitoring/socialcharter/Reporting/StateReports/Belgium8RESC\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Reporting/StateReports/Belgium8RESC_en.pdf).

<sup>339</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 (most recently amended by the Act of 19 December 2014, OJ (*Moniteur belge*), 29 December 2014).

<sup>340</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), OJ (*Moniteur belge*), 28 July 2005.

regulation 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.

#### **4.7.3 Minimum and maximum age requirements**

In Belgium, there are 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 report. As a matter of example, Labour Court judges must be at least 25 years old, Labour Courts of Appeal judges and non-professional judges sitting in Commercial Courts must be at least 30 years old, *juges de paix* (lowest-level judges) and Police Tribunal judges must be at least 35 years old and Constitutional Court judges must be at least 40 years old when they take office.

One should also highlight in this respect the decision of the Labour Appeal Court (*Arbeidshof*) of Brussels of 29 February 2008 in a case of age limit fixed to be admitted to a training course to become a football referee in the first division.<sup>341</sup> In this case, a football referee was following a training course to become a referee in the first division and when he was 38 years old, the Royal Belgian Football 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 Court (*Tribunal du travail*) 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.<sup>342</sup> 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.

More recently, the Labour Court of Brussels (*Tribunal du travail*) ruled that an airline company discriminated against a pilot on the ground of his age by not admitting him to a traineeship because of his age (55 years old).<sup>343</sup>

#### **4.7.4 Retirement**

##### **a) State pension age**

In Belgium, there is no state pension age, at which individuals must begin to collect their state pensions.

If an individual wishes to work longer, the pension can be deferred.

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<sup>341</sup> Labour Appeal Court (*Arbeidshof*) of Brussels, 29 February 2008, *Barbry Geert v. VZW Koninklijke Belgische Voetbalbond*, no. 087518. This decision is available in Dutch at the following address: <http://unia.be/fr/jurisprudence-alternatives/jurisprudence/cour-du-travail-de-bruxelles-29-fevrier-2008>.

<sup>342</sup> *Ibid.*

<sup>343</sup> Judgment of the Labour Court of Brussels (*Tribunal du travail*) of 5 September 2014 (available on the website of the Centre: <http://www.UNIA.be/en/>).

An individual can collect a pension and still work (under certain conditions which go beyond the scope of this report).<sup>344</sup>

Since 2009, the legal pensionable age - at which individuals become entitled to a state pension - is 65 years for both women and men.<sup>345</sup> The legal retirement age is raised to 66 in 2025 and to 67 in 2030.

According to Article 36 of the Act of 3 July 1978 on employment contracts,<sup>346</sup> clauses providing that the fact of having reached the age of state or occupational pension terminate the contract are void. However, the employee who is dismissed while being older than 65 is not entitled to a period of notice longer than 26 weeks. In other words the period of notice might be shortened due to the retirement age of the employee (see below in point d).

Note that the payment of social benefits (sickness, unemployment, early retirement, ...) stops when the legal retirement age is reached. The beneficiary of social benefits is therefore forced to take his/her pension at the state pension age.

#### b) Occupational pension schemes

In Belgium, there is normal age (65 years old, the state pension age) when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

If an individual wishes to work longer, payments from such occupational pension schemes cannot be deferred.

An individual can collect a pension and still work.

Occupational pension schemes are based on a contract between the employer and an insurance company. When the employee reaches the state pension age, the employer stops to contribute to the pension insurance.

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. The 2014 Governmental Agreement provides that the limits of income of a professional activity concurrent with pension rights will be completely abolished.<sup>347</sup> Moreover, the length of career required to get pension rights will be harmonized between the public and the private sectors. Indeed, from 2016 onwards, years of studies won't be considered as part of the career to have access to pension rights in the public sector.

#### c) State imposed mandatory retirement ages

In Belgium, there is no state-imposed mandatory retirement age(s) in the private sector. Public servants, however, retire automatically at 65 years. On the top of that, there are

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<sup>344</sup> See the website of the federal ministry for Pensions (*Service public fédéral des pensions*) - in French: <http://www.onprvp.fgov.be/FR/profes/working/Pages/default.aspx>.

<sup>345</sup> Article 2 of the Executive Regulation of 23 December 1996 executing Articles 15, 16 and 17 of the Act of 26 July 1996 on the modernisation of social security and assuring the viability of the legal pension schemes (*Arrêté royal portant exécution des articles 15, 16 et 17 de la loi du 26 juillet 1996 portant modernisation de la sécurité sociale et assurant la viabilité des régimes légaux des pensions*), as modified most recently by the Acts of 28 December 2011 and of 20 July 2012.

<sup>346</sup> Federal Act of 3 July 1978 on employment contracts (*Loi du 3 juillet 1978 relative aux contrats de travail*), OJ (*Moniteur belge*), 22 August 1978.

<sup>347</sup> See Federal Governmental Agreement, 11 October 2014, available at the following address in French and Dutch: [http://www.premier.be/sites/default/files/articles/Accord\\_de\\_Gouvernement\\_-\\_Regeerakkoord.pdf](http://www.premier.be/sites/default/files/articles/Accord_de_Gouvernement_-_Regeerakkoord.pdf).

some exceptions to the mandatory retirement age of 65 laid down in the public sector. For instance, as regards judges, the mandatory retirement age is 70 for Court of Cassation and Council of State judges and 67 for other judges of the Judiciary. In addition, at the federal level, a civil servant might carry on working beyond 65 years providing that s/he addresses a formal request to her/his chief officer who agrees for one year, which is renewable.<sup>348</sup>

d) Retirement ages imposed by employers

In Belgium, national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally. The 'normal' retirement age referred to sub a) 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>349</sup> According to the Act of 3 July 1978 on employment contracts, contractual clauses providing that the mere fact of reaching normal retirement ages ends the contract are void (Article 36). However, 'Article 83, § 1 of this Act' provides that the employer may terminate the employment contract when the employee reaches the 'normal' retirement age with a reduced notice period of 6 months (3 months if the employee has been in continuous employment for less than 5 years).<sup>350</sup> This Article also provides for a reduced notice period in case of resignation by the employee from the age of 60 years. Therefore, when an employee reaches the normal retirement age, the employer still has to put an end to the contractual relationship and to give formal notice and the notice period will be reduced in this case. 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.

Bear in mind that in the public sector, apart from some exception (above, point c), retirement is automatic and compulsory, and fixed at 65 years for both men and women.

e) Employment rights applicable to all workers irrespective of age

In Belgium, the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age as long as they remain in employment.

f) Compliance of national law with CJEU case law

In Belgium, national legislation is partially in line with the CJEU case law on age regarding compulsory retirement. Apart from the public sector, where retirement is automatic and compulsory at the age of 65 years (with a few exceptions), there is no compulsory retirement age in the private sector. In the private sector, workers may work beyond the retirement age of 65 years, and their employer may not force them to retire; to do so the employer still has to terminate the contractual relationship by giving formal notice, even if the notice period will be reduced in this case. Therefore, except for the public sector, which is likely to constitute one of the items for discussion in the process of screening Belgian

<sup>348</sup> See the Ministerial Decree of 11 September 2012 to implement Article 3 of the Royal Decree of 12 May 1927 on the age of retirement of officers, employees and service people of state administrations - *Arrêté ministériel du 11 septembre 2012 portant exécution de l'article 3 de l'arrêté royal du 12 mai 1927 relatif à l'âge de la mise à la retraite des fonctionnaires, employés et gens de service des administrations de l'Etat*. Details in French on the official website of the Federal Government: [http://www.fedweb.belgium.be/fr/fin\\_de\\_carriere/travailler\\_apres\\_65\\_ans/#.UgNUmuCyUJl](http://www.fedweb.belgium.be/fr/fin_de_carriere/travailler_apres_65_ans/#.UgNUmuCyUJl).

<sup>349</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.

<sup>350</sup> The Constitutional Court confirmed the compliance of Article 83, § 1 of the Act of 3 July 1978 on employment contracts with the principle of equality and non-discrimination contained in Articles 10 and 11 of the Constitution and with Article 6, § 1 of Directive 2000/78/EC (see judgment no. 107/2010 of 30 September 2010 of the Constitutional Court, available on the website of the Court: <http://www.const-court.be/>).

legislation and regulations for potential age-based discrimination, Belgian law is in line with the CJEU case law on age regarding compulsory retirement as regards the private sector. However, the reduced notice period provisions to terminating the contractual relationship in the private sector (mentioned in section 4.7.4.d) might possibly be out of line with the CJEU case law.

#### **4.7.5 Redundancy**

##### **a) Age and seniority taken into account for redundancy selection**

In Belgium, national law (indirectly) permits age or seniority to be taken into account in selecting workers for redundancy.<sup>351</sup> 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) Age taken into account for redundancy compensation**

In Belgium, national law provides compensation for redundancy. This compensation allocated to the workers laid off, covering a period normally of four months following the layoff (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 therefore probably be more expensive for the employer to lay off older workers because their level of remuneration will on average be higher, but strictly speaking the level of compensation is not linked to the age of the worker.

#### **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)**

In Belgium, national law does not include express exceptions that seek to rely on Article 2(5) of the Employment Equality Directive. In any case, 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 or the Charter of Fundamental Rights of the EU.

#### **4.9 Any other exceptions**

In Belgium, 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 these Federal Acts as a 'general motive of justification' (see below in section 5). The so-called 'safeguard provision', as referred to in section 11.2, is also mentioned under the Chapter 'general motives of justification'.

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<sup>351</sup> 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.

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

### a) Scope for positive action measures

In Belgium positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is allowed under certain conditions in national law.

- **At the Federal State level.** 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 (Article 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>352</sup> (Article 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 Federal Government must authorise the adoption of positive action measures through an Executive Regulation (*Arrêté royal*) (Article 10, § 3 of both Acts).<sup>353</sup> The Federal Secretary of State (Elke Sleurs, NVA)<sup>354</sup> in charge of the Equal Opportunities policy announced that the adoption of such a regulation was one of her 'priority tasks'. However, in 2016, nothing was done yet as she said that she was going to wait for the evaluation process of the AD legislation to be discussed before the Parliament (2017) before proposing a draft. 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 reached. 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, the Regions and Communities must also comply with them. Similarly to the Federal Acts, these conditions, under which positive actions are admitted, are expressly included in the Flemish Framework ET Decree (Article 26), the Walloon ET Decree (Articles 12 and 14), the French Community ET Decree (Article 6), the Brussels Civil Service ET Ordinance (Article 12) and the Brussels ET Ordinance (Article 11), the Cocof ET Decree (Article 13) and the German Community ET Decree (Article 11). It is worth highlighting that the Brussels Civil Service ET Ordinance 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 (Articles 5 and 6).

As the General Anti-discrimination Federal Act, Article 6 of the Anti-discrimination Decree of the French Community provides that a direct or indirect difference of treatment is not discriminatory when it takes the form of a positive action measure. Article 6, para. 2, defines the conditions under which such positive action can be adopted. The former para. 3 provided that it belongs to the Government (of the French Community) to define the hypothesis and conditions to implement positive action measures. Until recently, private and public actors could not legally or validly adopt such measures because no executive regulation was implemented. This is why, on 13 November 2015, the legislator of the French Community brought an amendment to the Anti-discrimination Decree by adding a fourth paragraph to Article 6. This new paragraph provides that, in the absence of an

<sup>352</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>353</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 (Article 10, § 4).

<sup>354</sup> Replaced by Zuhal Demir since February 2017.



executive regulation of the Government, the judge is competent to scrutinize the validity of positive action, except in the field of employment. Henceforth, even in the absence of executive regulation, private and public actors can adopt positive action measures, which will be assessed case by case in court.

The Flemish Decree of 8 May 2002 on the proportionate representation of target groups in employment stands out in this respect. 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 Decree of the *Cocof* of 22 March 2007 (Article 9) and the Ordinance of 26 June 2003 of the Region of Brussels-Capital (Article 4, § 2) do not adopt the same affirmative conception of equality as that of the Flemish Decree of 8 May 2002, but nevertheless provide for positive action measures, which are defined in conformity with the definition offered by the Employment Equality Directive.

b) Main positive action measures in place on national level

Presently, there is a fair amount of schemes of positive actions (mainly broad social policy measures, but also preferential treatment narrowly tailored and sometimes quotas), which either comes from the federal level or the regional ones. In the framework of this report, we are discussing 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, migrants or people with an immigration background and instances concerning persons with disabilities, which deserve a separate comment.

*Preliminary remark – Monitoring pointing at the need for more positive action in the labour market*

Initiated in 2006 by UNIA and the Federal Public Service on Employment, Labour and Social Dialogue, the first report on 'Socio-Economic Monitoring' was presented on 5 September 2013.<sup>355</sup> This is a long-term measuring instrument whose objective is to identify the position of workers on the labour market according to their Belgian, European or Non-European origin. The study is based on exhaustive data from the population registers and the Crossroads Bank for Social Security (the motor and coordinator of e-government in the social sector which manages the 'Datawarehouse Labour Market and Social Protection'). For the first time in Belgium, this study did not only take into account the nationality, but also the origin (i.e. the country of birth and the migratory history) of the workers and their parents. The results of the study show employment discrimination in Belgium. The report confirms the hypothesis that non-European people find numerous difficulties in accessing the Belgian labour market, in comparison with Belgian or European people. Foreigners from non-European countries would be confronted with structural obstacles, which are related both to the structure of the Belgian labour market and to direct or indirect discrimination. In fact, there is a systemic over- or under-representation of certain categories of workers of foreign origin in different sectors of employment.

According to UNIA and the Federal Public Service on Employment, Labour and Social Dialogue, the 'Socio-Economic Monitoring' does not only contain figures, it aims at measuring the effectiveness of diversity policies and at orienting federal and regional policies in the long term. Further to this study, UNIA recommends the setting-up or the strengthening of diversity policies at the Federal, the Community and the Region levels. In this respect, the Centre recently reiterated that it regretted that no positive action measures could legally or validly be adopted by private and public actors on a Federal level because no Executive Regulation (*Arrêté royal*) to authorize positive action measures on

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<sup>355</sup> The report is available on the website of the Centre for Equal Opportunities and Opposition to Racism and Discrimination ([www.UNIA.be/en](http://www.UNIA.be/en)).



the basis of Article 10 of the General Antidiscrimination Federal Act has been adopted yet.<sup>356</sup>

In November 2015, the second 'Socio-Economic Monitoring' was presented by UNIA and the Federal Public Service on Employment, Labour and Social Dialogue.

The 2015 Socio-Economic Monitoring is more accurate than the first one since it uses a new algorithm that aims to identify people depending on their ethnic origin and their migration background. It also takes into account a longer period of reference which includes the period of economic crisis (2008 – 2012).

It confirms and brings responses to the numerous interpellations of many international institutions and organizations (OECD,<sup>357</sup> European Commission,<sup>358</sup> European Council) concerning the alarming employment situation in Belgium for people with foreign origin. It notably focuses on the inequalities between foreign and native populations and the issues related to the professional insertion.

The second Socio-Economic Monitoring confirms most of the conclusions of the first one. It shows the structural character of the inequalities on the labour market in Belgium.<sup>359</sup> The main observations are the following ones:

- There is an important gap in the employment rate between people of Belgian origin and people of foreign origin. As an example, 73, 3% of the people of Belgian origin had a job in 2012 while only 42, 7% of the people from the Maghreb were employed.<sup>360</sup>
- There is a clear link between low paid salary and foreign origin.<sup>361</sup>
- Regarding the unemployment rate, the gap is very important as well: in 2012, 25, 5% of the people from the Maghreb and 21% of the people from other African countries were unemployed while only 5, 9% of the people of Belgian origin could not find a job.<sup>362</sup>
- The situation of people from other African countries (outside the Maghreb) is the most problematic one regarding the discrimination in employment.<sup>363</sup> There is no positive evolution for this group. According to the report, it is an alarming situation.<sup>364</sup>

The monitoring gives some important recommendations to the politics,<sup>365</sup> notably:

- The adoption of a integrated policy which requires a collaboration between the federated entities in education, employment etc.;
- Fighting discrimination on the Belgian labour market including positive actions;
- Education policies should be more inclusive;
- Rectifying the immigration policy in order to link it to the labour market;
- Reforming the labour market.

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<sup>356</sup> Inter-Federal Centre for Equal Opportunities' parallel report on the sixteenth, seventeenth, eighteenth and nineteenth reports presented by Belgium on the application of the International Convention on the Elimination of All Forms of Racial Discrimination, January 2014, p. 5, available on the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>357</sup> *OECD Economic Surveys – Belgium*, OCDE, 2015.

<sup>358</sup> *Rapport 2015 pour la Belgique contenant un bilan approfondi sur la prévention et la correction des déséquilibres macroéconomiques*, Commission européenne, 2015

<sup>359</sup> 2015 Socio-Economic Monitoring, Labour Market and Origin, Inter-federal Centre for Equal Opportunities and Federal Public Service on Employment, Labour and Social Dialogue, p. 3 and 210 ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>360</sup> *Ibidem*, pp. 211 and 221.

<sup>361</sup> *Ibidem*, p. 214.

<sup>362</sup> *Ibidem*, p. 215.

<sup>363</sup> *Ibidem*, p. 221.

<sup>364</sup> *Ibidem*, p. 222.

<sup>365</sup> *Ibidem.*, pp. 243 – 246.

- *Positive action in employment*

The Flemish Decree of 8 May 2002 was the primary 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 cibles*). 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>366</sup> The Executive Regulation adopted on 30 January 2004 by the Flemish Government implementing the Decree of 8 May 2002<sup>367</sup> identifies certain groups which, 'in particular', fall under that definition: these groups are persons of non-EU origin and persons with a foreign 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 (Article 2(2), al. 2). Neither Gay, lesbians and bisexuals (Holebi's) nor minority religious groups are mentioned, due to the difficulty of quantifying such a representation without infringing on the right to privacy of the workers. However, the Executive Regulation of the Flemish Government of 7 June 2013, laying down the criteria, conditions and modalities for the granting of subsidies in support and in execution of the career and diversity policy, identifies, *inter alia*, among the target groups with regard to which career and diversity plans within organisations can be subsidised by the Flemish Community/Region, gay, lesbians, bisexuals and transexuals (LGBT's), people affected by HIV, people in a poverty situation, ex-prisoners, illiterate people, people with foreign roots, little-schooled people, non-qualified young people, etc.<sup>368</sup> It is worth noting that, unlike the Executive Regulation of 30 January 2004, the Executive Regulation of 7 June 2013 does not use the word 'allochtone' (foreign-born people) anymore, but refers to 'people who have foreign roots' ('personnes ayant des racines étrangères').<sup>369</sup>

There are several other schemes developed either at the federal level or at regional ones, which are based upon soft law initiatives.<sup>370</sup>

- *Positive action regarding Roma*

In the Flemish Region and Community, on 7 June 2013, the Flemish Government adopted a Decree on Flemish integration and civic integration policy, which repealed and replaced the Decree of 28 April 1998 as modified in 2009.<sup>371</sup> The Decree provides that the Flemish

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<sup>366</sup> Article 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*), OJ (*Moniteur belge*), 4 March 2004, p. 12050.

<sup>367</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), OJ (*Moniteur belge*), 4 March 2004, p. 12050.

<sup>368</sup> *Moniteur belge*, 23 July 2013, p. 45964 (*Besluit van de Vlaamse Regering van 7 juni 2013 tot vaststelling van de criteria, de voorwaarden en de nadere regels voor het verlenen van subsidies ter ondersteuning en uitvoering van het loopbaan- en diversiteitsbeleid*).

<sup>369</sup> See Article 1, 8° of the Executive Regulation of 7 June 2013.

<sup>370</sup> Regarding the Region of Brussels-Capital, see the study of Ringelheim, J. & Vander Plancke, V ('Diversity Plans in Private Companies. Affirmative action or positive communication ? The case of the Region of Brussels-Capital', 'Plans de diversité dans l'entreprise. action positive ou communication positive ? Le cas de la Région de Bruxelles-Capitale', in Van Drooghenbroeck, S., Sottiaux, S. & Bayard, Ch. *Actualités du droit de la non-discrimination*, La Charte – Die Keure, 2010, p. 311-352.

<sup>371</sup> OJ (*Moniteur belge*), 26 July 2013, p. 47325 (*Decreet van 7 Juni 2013 betreffende het Vlaamse integratie- en inburgeringsbeleid*). This Decree was partially modified in 2015 (decreet van 29 mei 2015, OJ (*Moniteur*

integration policy is inclusive and, like the Decree of 1998, it is targeted at permanent residents without Belgian nationality (or whose parents do not have Belgian nationality), including 'people who are or were living in a caravan', and at illegal immigrants. Moreover, the Decree of 7 June 2013 merges the eight 'integration centres' with the Flemish Expertise Centre in Migration and Integration into an External Autonomous Agency of Private Law (*Agence Autonomisée Externe de Droit Privé*).<sup>372</sup>

- *Broad social policy measures and preferential treatment narrowly tailored*

As to 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 (Article 3.4).

- *Broad social policy measures*

With respect to housing, Flemish authorities have been provided, since 1990, local communities, which decided to open a caravan site for Travellers with funding amounting to 90 % of the costs of the construction of the site. Flemish authorities 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 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>373</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. The Walloon Declaration of regional policy 2014-2019 mentioned, as the previous one, 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 municipalities. The Government also expressed its willingness to finalize the inventory of the available places for large groups of travellers. Finally, the Government made a commitment to further support local authorities' projects of adjustments of places for the stay of Travellers.<sup>374</sup>

In the Region of Brussels-Capital, the Ordinance of 1 March 2012 introduced an Article 175*bis* – which became Article 191 – in the Brussels Housing Code of 17 July 2003, so as to provide that the right to decent housing does not exclude 'itinerant housing' (*habitat itinérant*) and that the Government of the Region of Brussels-Capital should determine in an executive regulation the minimal requirements of security, hygiene and equipment that

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*belge*), 23 June 2015, p. 36388 en decreet van 3 juli 2015, OJ (*Moniteur belge*), 24 July 2015, p. 47448).

For a more detailed presentation, see the information available at

<https://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1023121&param=informatie>.

<sup>372</sup> See Article 16 of the Decree.

<sup>373</sup> OJ (*Moniteur belge*), 19 August 1997.

<sup>374</sup> Declaration available at [http://www.wallonie.be/sites/wallonie/files/publications/dpr\\_2014-2019.pdf](http://www.wallonie.be/sites/wallonie/files/publications/dpr_2014-2019.pdf).

'itinerant housing', and lands it is provided with by public authorities, should comply with.<sup>375</sup>

Despite those different positive actions dedicated to Roma and Travellers, a collective complaint of the International Federation of Human Rights Leagues alleging a violation of rights related to housing for Travellers under the Revised European Social Charter was brought before the European Committee of Social Rights in 2010.<sup>376</sup> In a decision published on 31 July 2012, the European Committee of Social Rights concluded that Belgium was liable for discrimination against Travellers under the Revised European Social Charter (see above in section 3.2.10).<sup>377</sup>

- *Broad social policy measures*

Task force on Roma. On 21 March 2011, the Belgian Inter-ministerial Conference on Social Integration – a structure of permanent cooperation between the Federal State, the Regions and the Communities – created a Task Force on Roma. Its mandate was to concretely develop an integrated action plan so as to draw up proposals to improve Roma integration in Belgium. Work conducted by the Task Force led to a 'National Strategy for Roma Integration', issued on March 2012.<sup>378</sup> It establishes Belgium's issues and objectives for Roma integration by 2020. The strategy aims at a comprehensive and coordinated approach of Roma integration. The Action Plan lists the following objectives with different tasks for each level of government: fostering participation and autonomy of the Roma community in the Belgian society, enhancing access to education, employment, health care, housing and social inclusion, managing migration flows coming from Central and Eastern Europe and improving the collection of data and the fight against discrimination. Within this framework, the Strategy provides for coordination between the Federal State, the Regions and the Communities within the Task Force on Roma, so that every authority can freely take measures according to their competences. The Task Force on Roma meets at least twice a year and is the national contact point for the European Commission. As part of this strategy, Roma 'help desks' have been set up and Roma mediators have been recruited in Brussels and in Flanders. In the 2014 Federal Governmental Agreement, an assessment of the 'National Strategy for Roma Integration' is planned.

The Commissioner for Human rights of the Council of Europe noted in the 2016 report following his visit in Belgium that 'no specific funding is allocated for the implementation of the strategy and that the latter does not include precise objectives, timeframes and monitoring tools' (§ 137). In this context, he invited 'the Belgian authorities to strengthen the implementation of the national Roma integration strategy and, as appropriate, to update it, in close co-operation with all the relevant stakeholders, and in particular with Roma representatives' (§ 139). He also underlined the need to focus more 'on combating stereotypes and prejudices against Roma and travellers' (§ 137).<sup>379</sup>

In May 2016, based on an initiative of the Belgian national contact point for Roma, the Federal Public Service 'Social Integration' launched the Belgian National Roma Platform. This platform is supervised by a pilot committee staffed with people from Federal and

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<sup>375</sup> OJ (*Moniteur belge*), 14 March 2012 (*Ordonnance du 1<sup>er</sup> mars 2012 modifiant le Code bruxellois du Logement afin de reconnaître l'habitat des gens du voyage*).

<sup>376</sup> *International Federation of Human Rights Leagues (FIDH) v. Belgium*, application no. 62/2010, registered at the Secretariat on 30 September 2010 and declared admissible on 1 December 2010 (see [http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/CC62CaseDoc1\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/CC62CaseDoc1_en.pdf)).

<sup>377</sup> *International Federation of Human Rights Leagues (FIDH) v. Belgium*, complaint no. 62/2010, decision on the merits, 21 March 2012.

<sup>378</sup> The National Strategy for Roma Integration is available online: [http://ec.europa.eu/justice/discrimination/files/roma\\_belgium\\_strategy\\_fr.pdf](http://ec.europa.eu/justice/discrimination/files/roma_belgium_strategy_fr.pdf).

<sup>379</sup> Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Belgium from 14 to 18 September 2015, p. 27 <https://wcd.coe.int/com.instranet.InstrServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>.

regional administrations, NGOs active at the local level and UNIA. The aim of this Platform is to trigger dialogue with all stakeholders and Roma communities in Belgium. This is a requirement that urgently needed to be improved and respected as until recently the participation of Roma in the full process related to the national strategies and policies relevant for Roma was currently non-existent in the Belgian context. Such an initiative is made possible thanks to the support of DG Justice of the European Commission that provides some funding for a year. Four thematic meetings focusing on healthcare (29 September 2016), education (28 October 2016), housing and employment are planned in order to discuss interactively what is currently working and missing in Belgium in terms of the protection of the rights of Roma. The aim of the project is to draft recommendations aimed at political decision-makers in order to better assess the national strategy for Roma integration.<sup>380</sup>

- *Broad social policy measures in favour of migrants and/or persons with a foreign background)*

Progressively, each Community and Region of Belgium has set up policies of integration directed towards migrants but often also towards citizens with foreign origin. These policies entail language classes and reception/civic integration programme that are compulsory in some of the Regions.<sup>381</sup>

In the education field, social measures were also adopted in order to facilitate the schooling of the first-generation immigrants (new-comers) in the education system. It is beyond the framework of this report to enter into the details of each of the regulation. As an example, the following system has been set up in the French-speaking Community. The Decree of the French Community of 30 April 2009<sup>382</sup> aims to organise a differentiated supervision scheme within schools in order to ensure each pupil with 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 Community, henceforth repealed and replaced by the Decree of 18 May 2012 on the setting up of a welcome and schooling plan for first-generation immigrant pupils in the education system organised or subsidised by the French Community.<sup>383</sup> In 2016, the French Community adopted a Governmental order creating a

<sup>380</sup> More information available in French online: <http://www.mi-is.be/fr/themes/pauvrete/integration-des-roms/la-plateforme-nationale-belge-pour-les-roms>.

<sup>381</sup> See Flemish Decree of 7 June 2013 on the Flemish policy of integration and civic integration; COCOF Decree of 18 July 2013 on the reception programme for new-comers in the Brussels-Capital Region. For the Walloon Region, see Title II of the Walloon Code on Social Action and Health, which concerns the integration of migrants or citizens with foreign origins (it was recently amended by two important Decrees of 27 March 2014 and 28 April 2016)

Please note that there is an obligation to attend a reception/civic integration programme in the Flemish and the Walloon Regions. A project of Ordinance concerning the obligation to attend such a programme in the Brussels-Capital Region is currently being discussed by the assembly of the COCOM (Ref. B- 71, session 2016-2017). Regarding the German-speaking community, a project of Decree on the creation of a reception programme for newcomers is currently under preparation by the Government of the German-speaking community. For more information about the reception/civic integration programmes in Belgium, see Ganty S., Delgrange P., "Heurs et malheurs des parcours d'accueil et d'intégration des étrangers en Belgique ", *Revue du droit des étrangers*, 2015, n° 185, 511 – 528.

<sup>382</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*), OJ (*Moniteur belge*), 9 July 2009.

<sup>383</sup> Decree of the French Community of 18 May 2012 on the setting up of a welcome and schooling plan for first-generation immigrant pupils in education organised or subsidised by the French-speaking Community (*Décret de la Communauté française du 18 mai 2012 visant à la mise en place d'un dispositif d'accueil et de scolarisation des élèves primo-arrivants dans l'enseignement organisé ou subventionné par la Communauté française*), *Moniteur belge*, 22 June 2012, p. 35113.

new welcome and schooling plan for first-generation immigrant pupils in secondary school.<sup>384</sup>

- *Positive action (quotas) benefiting persons with disabilities*

Systems of quotas for recruiting disabled workers exist only as such in the public sector. The rate of manpower to be reached differ from one public body to the other: 3% within the federal public administration, 2,5% in the Walloon Region, 2% in the Region of Brussels-Capital, 5 % in the Cocof (Brussels) and 3 % in the Flemish Region.<sup>385</sup> A common problem in this area is that of effective enforcement: in fact, reports show that quantitative objectives for the integration of persons with disabilities are usually not met (Example: in 2012, only 1,54% in the federal public service). This was highlighted, in 2014, in the first Report on Belgium delivered by the Committee on the Rights of persons with disabilities, which

'notes with concern the low number of persons with disabilities in regular employment. The Committee also notes the Government's failure to reach targets for the employment of persons with disabilities within its own agencies, as well as the lack of a quota in the private sector' (§ 38).<sup>386</sup>

Efforts in this direction continue. UNIA requested five Belgian universities to carry out a survey about the rights of people with disabilities in order to determine whether the needs of people with disabilities are being met in Belgium. The results of the survey were published in October 2014.<sup>387</sup> In the conclusions of the survey, Jozef De Witte, former Director of UNIA, stated that there is still a lot to do in Belgium to comply with the UN Convention. Firstly, he claimed that public authorities are primarily responsible to implement the Convention. He strongly called for the adoption of the Federal Executive Regulation on positive actions. He also highlighted the crucial role of the civil society and noted that the Centre, as an independent mechanism, is an important actor to put in place a 'forum' related to these questions of disabilities. Finally, he said that too little was done in Belgium between 2009 and 2014 and the different actors should make a lot of effort in the following years to catch up.

Finally, it is worth noting that some regional funds (AWIPH, PHARE, DPB), which finance such employment assistance measures, don't accept to give subsidies to the public administrations when the requirement of quotas is not reached. This is an important issue since such a refusal to give subsidies may jeopardise the access to regular employment of people with disabilities, creating a vicious circle. In this context, the Centre called the regional funds to grant subsidies to support the hiring of people with disabilities even though the required quotas are not reached.

- *Broad social policy measures*

In the field of education, the French Community and the Walloon Region concluded on 10 October 2008 a Cooperation Agreement as regards the support for schooling of young

<sup>384</sup> Arrêté du Gouvernement de la Communauté française portant création d'un nouveau dispositif d'accueil et de scolarisation des élèves primo-arrivants dans l'enseignement secondaire en application de l'article 4 du décret du 18 mai 2012 visant à la mise en place d'un dispositif d'accueil et de scolarisation des élèves primo-arrivants dans l'enseignement organisé ou subventionné par la Communauté française, pour l'année scolaire 2016-2017, *Moniteur belge*, 17 January 2017, p.2788.

<sup>385</sup> For a detailed presentation of this body of legislations, see the first report of Belgium before the UN Committee for the rights of persons with disabilities, available online at the following address: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/BEL/1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/BEL/1&Lang=en).

<sup>386</sup> Final observations of the Committee for the rights of persons with disabilities, at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBEL%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBEL%2fCO%2f1&Lang=en).

<sup>387</sup> See the report available in French on the website of the Centre: <http://www.UNIA.be/en/la-consultation-des-personnes-en-situation-de-handicap-sur-leurs-droits-fondamentaux-les>.

disabled people.<sup>388</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>389</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, etc.).

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<sup>388</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 (OJ (*Moniteur belge*), 10 April 2009) and on 30 April 2009 by the French-speaking Community (OJ (*Moniteur belge*), 9 July 2009).

<sup>389</sup> *Arrêté fixant les conditions et les modalités d'intervention d'aide individuelle à l'intégration des personnes handicapées*, OJ (*Moniteur belge*), 7 July 2009.



## 6 REMEDIES AND ENFORCEMENT

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

#### a) Available procedures for enforcing the principle of equal treatment

In Belgium the following procedures exist for enforcing the principle of equal treatment (judicial – civil and criminal – and, in most of the case, 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 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 – Article 24 – or in access to employment, vocational training or in the course of a dismissal procedure – Article 25) and are therefore specific to discrimination based on race and ethnic origin. Victims of discrimination, under both acts, may

- seek a finding that discriminatory provisions in a contract are null and void (Article 15 and Article 13 respectively).
- seek a reparation (damages) according to the usual principles of civil liability (Articles 18 and 16 respectively), although the victim may choose a payment of the lump sums defined in the Act rather than for a damage calculated on the basis of the 'effective' damage (the lump sum consists of EUR 1300, reduced to EUR 650 if the defendant provides evidence that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element; in the field of employment, this predefined sum amounts to 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; see below in section 6.5). In its evaluation report conducted in 2015 and published beginning of 2016, UNIA showed that the very low lump sum discourages victims to lodge a complaint before Court, especially in the field of good and services, including housing.<sup>390</sup>
- seek from the judge that he/she delivers an injunction imposing immediate cessation of the discriminatory practice, under the threat of financial penalties (Articles 19 and 20 and Articles 17 and 18 respectively).<sup>391</sup> However, UNIA recently pointed out that it actually does not accelerate the procedure even though it is the primary aim of this procedure.<sup>392</sup>
- seek from the judge that he/she imposes the publicity of the judgment finding 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 (Articles 20, § 3 and 18, § 3 respectively).

These actions are brought before Courts of First Instance (civil section) (*tribunal de première instance, rechtbank van eerste aanleg*), or where an employment relationship is concerned, before specialised courts (*tribunal du travail, arbeidsrechtbank*). In addition, the Acts provide in limited circumstances for criminal liability. First – but this goes beyond the scope of the Racial or the Employment Equality Directives –, 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

<sup>390</sup> UNIA report, Evaluation of the Anti-discrimination Federal Acts (...), February 2016, pp. 10 and 53 [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>391</sup> It is a criminal offence to refuse to comply with a judgment delivered under this provision (Article 24).

<sup>392</sup> UNIA report, Evaluation of the Anti-discrimination Federal Acts (...), February 2016, pp. 10 and 53 [www.UNIA.be/en](http://www.UNIA.be/en).



by Article 444 of the Penal Code (Articles 22 and 20 respectively). Second, civil servants who, in the exercise of their functions, commit discrimination may be criminally convicted (Article 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 (Articles 33-42 of the General Anti-discrimination Federal Act).<sup>393</sup> In this respect, on May 2012, the murder of a young homosexual man was the first murder treated as a homophobic hate crime by the Belgian judicial authorities under new Anti-discrimination law.<sup>394</sup> Reacting to an increase of homophobic violence reported by UNIA, the former Federal Government elaborated a legislative draft in order to punish the crimes committed with an 'abject motive' with more severe sanctions. The federal act amending Article 405*quater* of the Penal Code was adopted on the 14 January 2013 and published on the 31 January 2013.<sup>395</sup> In another case, the Criminal Court of Liège convicted the perpetrator for murder with premeditation, considering the homophobic intent as an aggravating circumstance.<sup>396</sup> The murderer was sentenced to 25 years in prison. Several NGOs acted as a civil party at the trial, including UNIA.<sup>397</sup>

In a case where about 15 people – mainly undocumented migrants and homeless people – were victim of violent and degrading treatment by railway police officers, the perpetrators were brought by the public prosecutor before the Court of First Instance of Brussels (Criminal section). They were notably charged with use of violence as a police officer without any legitimate reason with the 'abject motive', i.e. with discriminatory intent (hate crimes). On 26 February 2014, the Court of First Instance of Brussels (Criminal section) convicted, eleven out of fourteen defendants. The nature and the degree of the sentences vary depending on the role of the perpetrators in the violent acts at stake and their might be former criminal convictions: sentence of community service of 60 hours, prison sentence of 1 year to 40 months with probation that was combined, in some cases, with a fine between EUR 500 and 600. It is worth noting that the abject motive (discriminatory intent) was recognized against the four police officers in the cases in which UNIA intervened.<sup>398</sup>

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<sup>393</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*: Articles 372 to 375 of the Penal Code); homicide (Articles 393 to 405*bis* of the Penal Code); refusal to assist a person in danger (Articles 422*bis* and 422*ter* of the Penal Code); deprivation of liberty (Articles 434 to 438 of the Penal Code); harassment (Article 442*bis* of the Penal Code); attacks against the honor or the reputation of an individual (Articles 443-453 of the Penal Code); putting a property on fire (Articles 510-514 of the Penal Code); destruction or deterioration of goods or property (Articles 528-532 of the Penal Code). Except for the offence of harassment, these situations are not normally met in the field of employment and occupation.

<sup>394</sup> In this particular case, Ihsane Jarfi, a Muslim gay man of 32 years old, disappeared, on 22 April 2012, after a night out in a gay bar in Liège (one of the main cities of Wallonia). His body was discovered in a field by two hikers, one week after his disappearance. According to witnesses, after having left the gay bar, on the night of the 22 of April, Ihsane Jarfi was approached by four men in a car and entered it voluntarily. He would have made sexual advances towards the other men, who would have then decided to 'teach him a lesson' by beating him up and letting him naked in a field in the middle of the night. Thanks to the fact that one of the men present in the car used the victim's phone to send a text message, the four suspects were identified. Two suspects told the Police that the victim was still alive when they left him in the field. However, the judicial authorities decided to charge the four suspects with robbery with violence, forcible confinement and murder, with homophobic intent as an aggravating circumstance (Article 34 of the General Anti-discrimination Federal Act and Article 405*quater* of the Penal Code).

<sup>395</sup> *Loi du 14 janvier 2013 modifiant l'article 405quater du Code pénal et l'article 2 de la loi du 4 octobre 1867 sur les circonstances atténuantes*, OJ (*Moniteur belge*), 31 January 2013.

<sup>396</sup> During the night of 24-25 July 2012, in the Avroy park of Liège, a 61 year-old homosexual man was killed with a hammer. The perpetrator immediately confessed his crime. He explained to the police that he had come to this park frequented by many homosexuals with the intention of killing one of them. He wanted to take revenge on a homosexual who allegedly raped him when he was young.

<sup>397</sup> The decision of the criminal court of Liège is not available. However, additional information is available on the following website: [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>398</sup> Judgment of the Court of First Instance of Brussels (Criminal section) of 26 February 2014, available on the following website: [www.UNIA.be/en](http://www.UNIA.be/en).

- **Regions and Communities.** With the adoption of the various ET Decrees and Ordinance since 2008, the systems of remedies put in place in the Regions and Communities copy to a large extent those of the Federal Anti-discrimination Acts and are in line with the European requirements.<sup>399</sup>

All the procedures described above are binding. In most of the situations involving discriminatory acts, a conciliation procedure is also available, under the Act of 10 February 1994, which makes mediation possible for all offences punishable by an imprisonment of maximum two years.<sup>400</sup> Some Regional Anti-discrimination statutes provide also expressly for a conciliation procedure. Moreover, equality bodies have developed non-binding procedures in their assistance to victims to reach an amicable settlement. In addition, labour inspectorate is entitled to report cases of discrimination at work.

Finally, it is also worth highlighting that some Belgian municipalities took initiatives in order to protect victims of discrimination. As an example, the Municipalities of Ghent approved on 25 June 2013 a new regulation relating to the activities of doorman. All the clubs, bars and restaurants of the city have to indicate the phone number '8989' on their front window. On this basis, victims or witnesses of any discrimination can directly send a 'text message' notifying the alleged discrimination. The contact points (*meldpunten*) will study the complaint and contact the victims/witnesses within the week. The follow-up of the complaint will also be ensured by the police services.<sup>401</sup>

#### b) Barriers and other deterrents faced by litigants seeking redress

If the victim wants to file a complaint him/herself, along with or without the Centre or another organisation aimed at fighting discrimination, he/she will need to instruct a lawyer, at his/her own expenses. However, according to Article 508/1 and following of the Judicial Code, persons with low incomes can benefit from legal aid, which is entirely or partially free. However, with the financial crisis, getting legal aid is becoming increasingly difficult. Moreover, as UNIA pointed out in its evaluation report conducted in 2015 and published in 2016, it is very difficult for the applicants who don't fall within the conditions of legal aids to bring a claim before courts because of the numerous obstacles of such procedures (very high costs and the payment of procedural indemnity in case of dismissal).<sup>402</sup>

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.

The time limits do not seem to act as deterrents to seeking redress. The following points are nevertheless worth being taken into account. There is no specific time limit prescribed by law to seek a judicial injunction imposing the cessation of a discriminatory practice. There is nevertheless a controversy as to the possibility of bringing an action in cases where the breach 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 is a danger that the violation will be repeated.<sup>403</sup> In 2014, the Labour Court of Brussels ruled on this issue. In this case, the claimant was asked by the

<sup>399</sup> The system of remedies put in place at regional level is described in detail in the Flash Reports.

<sup>400</sup> This legislation has inserted Article 216ter in the Code of Criminal Procedure (*Code d'instruction criminelle*) to create a form of criminal mediation.

<sup>401</sup> UNIA 2013 Report, available on the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>402</sup> UNIA report, Evaluation of the Anti-discrimination Federal Acts (...), February 2016, pp. 10 and 53 [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>403</sup> Wautelet, P., '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 Wautelet, P. (dir.), *Le droit de la lutte contre la discrimination dans tous ses états*, C.U.P., Anthemis, Liège, 2009, p. 236.

administration of the Region of Brussels–Capital to choose between removing her headscarf and not doing the one-month job for which she had been hired as a student. The Centre wrote to the administration condemning such a discriminatory practice. Subsequently, the administration informed the claimant that she could work for the rest of the month and could wear her headscarf, as ‘exceptional derogation’. The applicant refused the gentlemen's agreement and brought the case before the President of the Labour Court of Brussels (*Tribunal du travail*) in emergency proceedings asking the judge to order the administration to cease the discriminatory practice. In an admissibility decision adopted on 24 October 2012, the President held that the claimant had an actual and existing legal interest since there was no guarantee that she could enjoy the above-mentioned ‘exceptional derogation’ in the future, in case of a new application. However, the President of the Labour Court of Brussels (*Tribunal du travail*) dismissed the applicant on the merits. The applicant lodged an appeal before the Labour Court of Brussels, which ruled that the action of the applicant was inadmissible. The Court held that the injunction procedure aimed to stop an illegal act: the act at stake should have still existed. Indeed, the injunction procedure could not be used merely to hear from the judge that an act was illegal when the act in issue had already ceased. However, the Court said that the judge could recognize the illegal character of a practice – though it had already ceased – if a risk of repetition existed which was not the case *in casu* because the claimant had refused the gentlemen's agreement of the administration and had not worked for the administration of the Region of Brussels-Capital anymore. Moreover, according to the Court, since the claimant was not a student at the time of the hearing, she was not likely to apply for such a job anymore.

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, 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 are 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 courts (*tribunaux*).

c) Number of discrimination cases brought to justice

In Belgium there are no available statistics on the number of cases related to discrimination brought to justice.

d) Registration of discrimination cases by national courts

In Belgium discrimination cases are not registered as such by national courts. There is no data on the number of discrimination cases brought to justice or dealt with by national courts.

It is noteworthy that, in application of the Common Circular (*circulaire commune*) for an efficient policy of monitoring and prosecution with respect to every ground of discrimination, adopted on 16 December 2013 (see below, section 9), the police services and the prosecution departments have to identify and register the cases related to discrimination and ‘hate crime’. The contact prosecutor in the field of non-discrimination has the obligation to control the process of identification and registration. According to the circular, the registration of such cases and the follow-up are crucial to gather data and statistics on the number of cases related to discrimination brought to justice and to get a better knowledge of that issue. However, as far as the authors of this report are aware of, such statistics and data are not available. In its 2016 evaluation report, UNIA called the prosecution departments to implement better the Common Circular regarding different issues.<sup>404</sup>

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<sup>404</sup> UNIA report, Evaluation of the Anti-discrimination Federal Acts (...), February 2016, p. 7 [www.UNIA.be/en](http://www.UNIA.be/en).

In its 2014 report on Belgium, the European Commission against Racism and Intolerance (ECRI) asked Belgian authorities to 'ensure that the new regulations for collecting data on racist and homo/transphobic incidents are applied in practice so that specific and reliable information on hate speech offences and the reaction of the criminal justice system is made available'.<sup>405</sup>

Finally, in 2015 UNIA initiated a lawsuit in 14 cases related to discrimination.<sup>406</sup>

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

### **a) Engaging on behalf of victims of discrimination (representing them)**

In Belgium, certain associations or organisations and representative unions are entitled, under both federal and regional anti-discrimination legislations, to act on behalf of victims of discrimination under certain conditions.

- **At the Federal level.** 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>407</sup> that certain associations and representative unions could claim damages as a result of a violation of the provisions of this legislation (Article 32 of the current Racial Equality Federal Act). UNIA later set up by the Act of 15 February 1993 as an independent body, received similar powers under criminal statutory law.

In civil procedures, the General Anti-discrimination Federal Act (Articles 29 and 30) and the Racial Equality Federal Act (Articles 31 and 32) provide for the legal standing of UNIA, of certain organisations and of representative unions.

In the above-mentioned case « Adecco » (see 3.2.2), the Appeal Court of Brussels confirmed the decision of the Court of First instance (civil section) on the grounds of admissibility and rejected the argument brought forward by Adecco that the French NGO 'SOS Racism' – one of the applicant – would lack legal standing because its interest would be restricted to discrimination happening in France. Interpreting Article 32, 1° of the Racial Equality Federal Act (providing that associations willing to claim damages on behalf or in support of complainants, in case of violation of the anti-discrimination legislations, must have a legal personality for at least three years and a legal interest in the protection of human rights or in combating discrimination) in the light of European Law, the Court held that there was no territorial requirement and that an association could bring a non-discrimination claim irrespective of the location of its head office.<sup>408</sup> Although there were thousands of job seekers discriminated against on the grounds of their race and ethnic origin in this case, Adecco and SOS Racism were not acting on behalf or in support

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<sup>405</sup> Report available on the website of the CoE (<http://www.coe.int/>).

<sup>406</sup> Annual report of UNIA 2015 (*Discrimination – Diversité*), available on its website ([www.UNIA.be/en](http://www.UNIA.be/en)), pp. 23-27.

<sup>407</sup> 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). The Court of Cassation confirmed its position on a number of later cases (e.g., Cour de Cassation, 19 September 1996, *Revue critique de jurisprudence belge*, 1997, p. 105).

<sup>408</sup> Appeal Court of Brussels, 10 February 2015, <http://www.UNIA.be/en>.

of named plaintiffs in this case.

- **At the Regional level.** The Flemish Decree of 8 May 2002 (Article 16), the Decree adopted by the German Community ET Decree (Article 13), the Decree adopted by the *Cocof* on 22 March 2007 (Article 14) and the *Cocof* ET Decree (Article 28) have solutions similar to that of the Anti-discrimination Federal Acts of 10 May 2007. It is also the case for the Flemish Framework Decree (Article 41), the Walloon ET Decree (Article 31), the French Community ET Decree (Article 39),<sup>409</sup> the Brussels Civil Service ET Ordinance and the Brussels ET Ordinance.

At both Federal and regional level, associations willing to claim damages on behalf or in support of claimants, in case of violation of the anti-discrimination legislations, must have a legal personality for at least three years<sup>410</sup> and a legal interest in the protection of human rights or in combating discrimination. This uniform system is provided by 'Article 32, 1<sup>o</sup>' of the Racial Equality Federal Act, Article 30 of the General Anti-discrimination Federal Act, Article 16 of the Flemish Decree of 2002, Article 13 of the German Community ET Decree, Article 14 (2007) and Article 28 (2010) of the Decrees of the *Cocof*, Article 41 of the Flemish Framework Decree, Article 31 of the Walloon ET Decree, Article 39 of the French Community ET Decree, Article 27 of the Brussels ET Ordinance and Article 25 of the Brussels Civil Service ET Ordinance. However, it is worth noting that under the German Community ET Decree and the *Cocof* ET Decree, associations, which have a legal personality at the moment of the discriminatory act (but not necessarily for three years), may engage in proceedings in support of complainants. Furthermore, under the *Cocof* Decree of 22 March 2007, associations willing to engage in proceedings in support of complainants must have a legal personality for at least five years (and not just three years).

Both at the Federal and the Regional levels, where the victim of the alleged discrimination is an identifiable (natural or legal) person, actions of the entities entitled to act on behalf or 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 (Article 31), the Racial Equality Federal Act, (Article 33), the Decree of the Flemish Framework ET Decree (Article 40), the Walloon ET Decree (Article 32), The French Community ET Decree (Article 40), the German Community ET Decree (Article 14), the Decree of the *Cocof* of 2007 (Article 14), the *Cocof* ET Decree (Article 28), the Brussels Civil Service ET Ordinance (Article 34) and the Brussels Civil Service ET Ordinance (Article 27).

The extension of legal interest in case of a person being victim of discrimination to UNIA, 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 on behalf or in support of the victim in case of violation of these legislations.

Just as the victim of discrimination, UNIA, representative unions and associations may ask the court for an injunction to court in order to stop a discriminatory behaviour. 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.

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<sup>409</sup> Article 38 provides that the IECO and the Institute for the Equality of Women and Men are competent to file a suit on the basis of the Decree.

<sup>410</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 burdensome. The choice to lower the requirement to three years' existence is an answer to this concern.

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.

b) Engaging in support of victims of discrimination

In Belgium, certain associations or organisations and representative unions are entitled, under both federal and regional anti-discrimination legislations, to act in support of victims of discrimination, under exactly the same conditions as described under section 6.2, a), above.

c) Actio popularis

In Belgium national law does not allow associations, organisations or trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*). As described under a) and b), the Federal and Regional anti-discrimination legislations provide for legal standing of associations to a certain extent. But, the concept of '*actio popularis*' involving a 'representative claimant' acting in court in the name of a collective interest, is unknown in Belgian law. Where there is an identified victim, UNIA, representative unions and associations may engage in civil or criminal proceedings in case of violation of anti-discrimination legislation, but only on behalf or in support of this victim of discrimination. However, it is worth stressing that, if there is no identified victim, they may act on their own behalf to denounce a breach of the anti-discrimination legislations. This would, for instance, be the case when an employer publicly boasts that thanks to the 'selective' recruitment procedures he has introduced no homosexual will ever be hired.

The *Feryn* case is a topical instance. The director of a firm (Mr. Feryn) had stated that he did not wish to recruit 'Moroccans', arguing that his clients refused foreigners or workers with a foreign origin in their home. On appeal, the Labour Court considered that an interpretation of the Racial Equality Directive was necessary to decide the case. On 10 July 2008, the Court of Justice of the European Union (CJEU) delivered a judgment in line with the opinion of Advocate General Maduro.<sup>411</sup> The Court notably held that the fact that an employer declares publicly that he will not recruit employees of a certain ethnic or racial origin is likely to deter applicants from this ethnic minority. This practice hinders their access to the labour market and constitutes a direct discrimination in respect of recruitment within the meaning of Directive 2000/43. According to the Court, the existence of such a direct discrimination was not dependent on the identification of a particular victim (para. 25).<sup>412</sup>

d) Class action

In Belgium national law does not allow associations, organisations or trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.<sup>413</sup> Just as the concept of *actio popularis*, the concept of *class action*, understood as a mechanism implying that a 'representative claimant' 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. UNIA, representative unions and associations may engage in civil or criminal proceedings in case of violation of anti-discrimination legislation, but only on behalf or in support of one identified victim of discrimination.

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<sup>411</sup> Opinion of Advocate General Maduro delivered on 12 March 2008, Case C-54/07, para. 19.

<sup>412</sup> CJEU, *Feryn*, 10 July 2008, Case C-54/07.

<sup>413</sup> The only exception relates to consumer law. Since September 1, 2014, a collective redress action may be brought against a company that causes harm to consumers (Federal Act of 28 March 2014 which provides for the insertion of a Title 2 in the Book XVII ('Special Court proceedings') of the Code of Commercial law. This new part of the Code is entitled 'collective redress action').

The Labour Appeal Court of Antwerp, in a 25 June 2008 ruling, made an interesting statement on the range of the injunction procedure (*action en cessation*) aimed at putting an end to a discriminatory behaviour. It considered that UNIA 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.<sup>414</sup>

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

In Belgium national law, at both Federal and Regional levels, requires a shift of the burden of proof from the complainant to the respondent in civil procedures

- **At the Federal level.** Both Anti-discrimination Federal Acts provide for shifting the burden of proof in all the jurisdictional procedures, except the criminal ones (Article 27 of the Racial Equality Federal Act and Article 29 of the General Anti-discrimination Federal Act). The victim seeking damages in reparation of the alleged discrimination, on the basis of Article 1382 of the Civil Code, can produce some evidences – such as ‘statistical data’ or recurrence tests, for instance – which 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 testing 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>415</sup> to a strong opposition from employers’ organisations (above, 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.<sup>416</sup> 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.

It is worth noting that in its evaluation report conducted in 2015 and published beginning of 2016, UNIA observed that in many cases it is almost impossible for the applicant to bring the proof of the discrimination despite the principle of the shift of the burden of proof. Moreover, judges do not always accurately apply this principle. The burden of proof is therefore often too heavy for the applicant.<sup>417</sup>

- **At the Regional level.** The Regional Anti-discrimination statutes, adopted since 2008, 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.

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<sup>414</sup> Labour Appeal Court (*Arbeidshof*) of Antwerp, 25 June 2008, no. 54470, *Centre for Equal Opportunities and Opposition to Racism v. B&G*.

<sup>415</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, such situation tests must not be too burdensome to perform, and they should remain a relatively accessible means by which a presumption of discrimination may be established.

<sup>416</sup> Constitutional Court (*Cour constitutionnelle*), 12 February 2009, 11 March 2009 and 2 April 2009, decision no. 17/2009, para. B.93.4; decision no. 39/2009, para. B.53; decision no. 40/2009, para. B.98, available on the website of the Court: [www.const-court.be](http://www.const-court.be).

<sup>417</sup> UNIA report, Evaluation of the Anti-discrimination Federal Acts (...), February 2016, pp. 10 and 53 [www.UNIA.be/en](http://www.UNIA.be/en).



The previous instruments were 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>418</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. Both Decrees of the *Cocof* provide for a very similar system (Article 13 § 2-3 of the Decree of 2007 and Article 25 of the *Cocof* ET Decree).

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

In Belgium there are legal measures of protection against victimisation.

- **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 and 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 or on whose behalf a complaint has been filed, in the field of employment. This protection is extended to witnesses (Article 17, § 9). Article 16 of the General Anti-discrimination Federal Act provides a similar protection from victimisation in fields other than employment; in this context too, this protection extends to witnesses (Article 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. However, they are only applicable to victims and witnesses of act of discrimination, which is more restrictive than the directives.

In a 28 December 2010 ruling, the Labour Court of Appeal of Ghent confirmed a formalistic interpretation of the protection of witness against reprisal. The Appeal Court decided that the protection of a witness against reprisal (as enshrined in Article 15, § 9 of the Racial Equality Federal Act) only applies to a person who acknowledges the facts of the case in a signed and dated document in the framework of the investigation of the trade union on the presumed discrimination or to a person who appears as a witness in the proceeding before the labour inspector.<sup>419</sup> One must highlight that this interpretation could be applicable to the three Federal Anti-discrimination Acts of 2007.

- **At the Regional level.** The Flemish Framework Decree 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 (Articles 37 and 38).

All the other regional ET statutes provide for protection against victimisation, in their respective material scope, following the model of the Federal Anti-discrimination Acts. Except from the *Cocof* which is in line with the directives,<sup>420</sup> they lay down rules on

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<sup>418</sup> See Article 10(3) of Directive 2000/78/EC.

<sup>419</sup> *Rechtskundig Weekblad*, 2011-12, no. 29, 17 March 2012, p. 1304-1305.

<sup>420</sup> Article 26, § 8 of the Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment of July 2010 and article 15/1 of the Decree on equal treatment between



protection from victimisation that are only applicable to victims and witnesses of act of discrimination, which is more restrictive than the directives.

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

a) Applicable sanctions in cases of discrimination – in law and in practice

- **At the Federal level.** Under the General Anti-discrimination Federal Act and under the Racial Equality Federal Act, the victim of discrimination may seek damages according to the usual principles of civil liability (Articles 18 and 16 respectively), although the victim now may opt for a payment of the lump sums defined in the law. Damages are payable each time a discriminatory practice is proven to have occurred (in line with the general rule in non-contractual civil liability enshrined in Article 1382 of the Civil Code). The choice of 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, aims at ensuring the effectiveness of the sanctions provided for instances of discrimination. These different sanctions may apply whether the discrimination occurs in private or public employment, or in a field outside employment covered ET legislation. The victim can also request that:

- the Court rules that the discriminatory provisions enshrined in a contract are null and void (Article 15 of the General Antidiscrimination Federal Act and Article 13 of the Racial Equality Federal Act);
- the Court delivers an injunction ordering the immediate cessation of the discriminatory practice, under the threat of financial penalties (*astreintes*) (Articles 19 and 20 of the General Antidiscrimination Federal Act and Articles 17 and 18 of the Racial Equality Federal Act);
- the Court 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 (Article 20, § 3 of the General Antidiscrimination Federal Act and Articles 18, § 3 of the Racial Equality Federal Act).

The decisions handed down by the Commercial Court and the Court of appeal of Ghent in the case *Centre for Equal Opportunities and Opposition to Racism v. B.V.B.A. Kuoni Travel Belgium*<sup>421</sup> provide a good example of the applicable sanctions in Belgian 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 insured 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, UNIA brought an action before the Commercial Court of Ghent (*Tribunal de commerce*), alleging that simple adjustments should have been admitted by the travel agency. The Commercial Court of Ghent ruled in favour of UNIA 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 sum of EUR 650 and a civil 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. In a decision of 20 January 2011, the Court of Appeal of Ghent confirmed the judgment of the Commercial Court of Ghent, but decided to condemn the travel agency to pay a lump sum of EUR 1300 (and not only EUR 650 as it was decided in first instance).

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persons in vocational training of 2007 (*the protection applies also to any person intervening as a witness, counsel, defender or support of the alleged victim of discrimination*).

<sup>421</sup> Judgment no. 7302 of 29 September 2010 of the Commercial Court (*rechtbank van koophandel*) of Ghent and Decision of 20 January 2011 of the Court of Appeal of Ghent.

The already mentioned *Feryn* case is another good example (see above, section 6.2 c)). After the decision of the Court of Justice of the European Union of 10 July 2008 (Case C-54/07), the Labour Appeal Court (*Cour du travail*) of Brussels delivered its Judgment on 28 August 2009.<sup>422</sup> The 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.

In addition, due to the insistence of certain non-governmental organisations, a limited range of discriminatory acts (racial discrimination in the provision of goods or services and in employment) is also criminally punishable. These offences, which fall under the scope of Directive 2000/43/EC, may lead to imprisonment (one month to a year), fines (EUR 250 to 5,000), or to both sanctions combined, and even to the loss of their civil and political rights for a certain time (meaning that during this time the offender cannot be a civil servant, nor be elected, nor sit in representative bodies) (Article 25 of the General Anti-discrimination Act and Article 27 of the Racial Equality Federal Act). Moreover the victim has the option of claiming compensation for the damage caused by the offence. Actually, these criminal offences have been very rarely prosecuted and have led to very few convictions because of the difficulties in finding a person criminally liable (burden of proof issue).

- **At the Regional level.** The ET statutory law adopted by the Regions and Communities since 2008 are directly inspired by the system of sanctions provided for in the Federal Anti-discrimination Acts.

b) Ceiling and amount of compensation

In Belgium, there is no ceiling as such but the victim is entitled to choose the lump sums defined in the law rather than asking for damages calculated on the basis of the 'effective' loss. (EUR 1300, reduced to EUR 650 when 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 shows that the disputed measure would have been adopted anyway, even in the absence of the discriminatory element). There is no information available as to the average amount of compensation allocated to victims of discrimination.

c) Assessment of the sanctions

The 2007 Federal Anti-discrimination Acts significantly improved 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 choose for a fixed rate damages was presented by the federal legislator as a way to improve remedies' effectiveness.

The ET statutory law adopted by the Regions and Communities since 2008 are directly inspired by the system of sanctions 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. The Flemish Decree of 8 May 2002 on proportionate participation in the labour market also contains a penal clause (Article 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 Court might order the cessation of the discriminatory practice (Article 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

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<sup>422</sup> Judgment of 28 August 2009 of the Labour Appeal Court (*Cour du travail*) of Brussels after the preliminary ruling of the Court of Justice of the European Union of 10 July 2008 (Case C-54/07).

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 was held discriminatory by a Court (Article 16). One might doubt that this Decree fulfil the European requirements 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 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)**

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

In Belgium, the Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination (in this report, the Centre<sup>423</sup> or UNIA) is the equality body designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive.

From its creation in 1993<sup>424</sup> until 2014, the formerly called 'Centre for Equal Opportunities and Opposition to Racism and Discrimination' (CECLR) was a federal Centre, only competent regarding both Federal Anti-discrimination Acts. It was not institutionally linked to the Regions and Communities, and was therefore not competent regarding Regional ET statutory law. In order to empower the Centre for Equal Opportunities to play a role at Regional level, the Federal State, the Regions and the Communities signed a Cooperation Agreement on 12 June 2013. The Centre for Equal Opportunities and Opposition to Racism and Discrimination was turned into an *inter-federal* Centre competent to promoting equal opportunities and fighting any kind of distinction, exclusion or restriction based on the prohibited grounds contained in various Anti-discrimination instruments adopted at both Regional and Federal levels.

The new Inter-federal Centre for Equal Opportunities is fully operational since March 2014.<sup>425</sup> Henceforth, in case of potential infringement to any of the Federal or Regional Anti-discrimination legislations, citizens are able to contact either the main office of the Centre in Brussels or a decentralized contact point in Flanders or in Wallonia.<sup>426</sup> Since the entry into force of the Cooperation Agreement of 2013, these contact points fall directly under the responsibility of UNIA. As a consequence, whether a potential discrimination case is submitted to the main office or to a local contact point, the Inter-federal Centre is the centralized equality body competent to assist victims and file legal actions with respect to Federal as well as Regional ET law (Cooperation Agreement of 12 June 2013, Article 6). In 2015, two years after the entry into force of the Cooperation Agreement of 12 June 2013, 4.554 people had contacted the Centre to report discrimination cases and, among them, 904 had come from the contact points. As pointed out by the Centre itself, the goal of the Cooperation Agreement is achieved in this respect.<sup>427</sup>

Another Cooperation Agreement was also planned in order to turn the Institute for the Equality of Women and Men into an inter-federal Institute but the process could not be achieved under the former legislature for political reasons. This project seems to be abandoned, as there is no reference to this Cooperation Agreement or to a future Inter-federal Centre for the Equality of Women and Men in the 2014 Federal Governmental Agreement.<sup>428</sup>

In addition, the project of a National Human Rights Institution, initiated under the former legislature, was not adopted, before the elections of 2014. The creation of such a new

<sup>423</sup> It is the short-cut chosen by the Centre itself (see, on its website: <http://www.UNIA.be/en/>).

<sup>424</sup> The Centre for Equal Opportunities and Opposition to Racism was created by a Federal Act of 15 February 1993 (OJ (*Moniteur belge*), 19 February 1993).

<sup>425</sup> Since 15 March 2014 (date of the entry into force of the Cooperation Agreement of 12 June 2013), all the details regarding the missions, organisation and functioning of the Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination are enshrined in the Cooperation Agreement (and not anymore in the Federal Act of 15 February 1993).

<sup>426</sup> There are presently 13 contact points in Flanders. In Wallonia, a collaboration exists presently with 10 'Wallonia Spaces' ('Espaces Wallonie'). There are 4 UNIA contact points covering 4 sub-regions. A list of the contact points is available at the following address: <http://unia.be/en/contacting-unia/our-local-contact-points>.

<sup>427</sup> Annual report of UNIA 2015 (*Discrimination – Diversité*), available on its website ([www.UNIA.be/en](http://www.UNIA.be/en)), p. 27.

<sup>428</sup> Interview with Patrick Charlier, Deputy Director of UNIA, 28 March 2017.

mechanism or institution is designed to fully implement the United Nations 'Paris Principles' on the status and functioning of national institutions for the protection and promotion of human rights. In the 2014 Federal Governmental Agreement, there is a reference to the creation of a 'national mechanism of Human rights', in conformity with the international commitments. The Federal Minister of Justice and the Federal Secretary of State for Equal Opportunities are currently elaborating a draft that should be discussed in Parliament in 2017. Belgium is under political pressure to accelerate this process as it had committed to set up such a mechanism at the former Universal Periodical Review before the Council of Human Rights of the United Nations and it was not yet set up when Belgium had to undergo the following Universal Periodical Review in 2016. Meanwhile, the Centre launched a collaborative network in the field of Human Rights, in March 2014. The 13 January 2015, a Protocol of collaboration was signed between all Federal and Regional independent public bodies, accessible to the citizens, that are active in the field of human rights in order to foster the cooperation in this field and exchange good practices (i.e., Federal Ombudsmen, Walloon Ombudsman, Ombudsman of the German-speaking Community, General Delegate to the Rights of the Child, Commission for the Protection of Privacy, High Council of Justice, Institute for the Equality of Women and Men, Standing Police Monitoring Committee or Committee P, etc.). This platform for Human Rights is gathering on a monthly basis with a rotating chair. According to Patrick Charlier, Deputy Director of UNIA, the collaboration within this platform, chaired by UNIA since 2016, is very efficient. This could be a starting point for the future national mechanism of Human rights.<sup>429</sup>

According to the Cooperation Agreement of 12 June 2013 (Article 3, § 1, point b.), UNIA is the independent mechanism in charge of promoting, protecting and monitoring the implementation of the Convention of the Rights of Persons with Disabilities (Article 33, § 2). For this purpose, a department of a multidisciplinary team of seven equivalent full-time employees was especially set up to carry out these new missions of the Centre. The department designs a three-year strategic plan and a one-year action plan. A Support Committee of 23 people (11 Dutch-speaking persons, 11 French-speaking persons and 1 German-speaking person) belonging to associations of people with disabilities, the Academic World and social partners, is in charge of the representation and participation of civil society within the framework of the missions carried out by the department. It is responsible for approving the three-year strategic plan and the one-year action plan elaborated by the 'Service'.

#### b) Status of the designated body/bodies – general independence

UNIA has the status of an 'independent public service' (*service public autonome*). The independence of the new Inter-federal Centre is explicitly referred to in the Cooperation Agreement approved on 12 June 2013 (Article 2, § 1 and Article 3, § 3: 'the Centre accomplishes its mission independently, in conformity with the Paris Principles').<sup>430</sup>

The new Inter-federal Centre is managed by a Board of Directors composed of 20 members, plus a member of the German-speaking Community for matters concerning the German-speaking Community, including 10 members appointed by the House of Representatives and 10 members (plus one member), appointed by the Parliaments of the Regions and Communities. Members of the Inter-federal Board are appointed by the federal and regional Parliaments, on the basis of their competence, experience, independence and moral authority. They belong to academia, the judiciary, civil society and social partners. The Inter-federal Board has to be a pluralist body (Article 8, § 2 of the Cooperation Agreement of 12 June 2013). The Board members are appointed for six years, but their mandate is renewable twice. The lack of independence, criticised by several international

<sup>429</sup> Interview with Patrick Charlier, co-Director of UNIA, 28 March 2017.

<sup>430</sup> As previously mentioned in this report, since 15 March 2014 (date of the entry into force of the Cooperation Agreement of 12 June 2013), all the details regarding the missions, organisation and functioning of the Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination are enshrined in the Cooperation Agreement (and not anymore in the Federal Act of 15 February 1993).

bodies,<sup>431</sup> which resulted from the appointment of the Board of the Centre by the Government, is therefore solved through the adoption of the Cooperation Agreement. In February 2015, the first Inter-federal Board was appointed by the Parliaments.<sup>432</sup> The Presidents are Michael Cerulus, Senior Policy Officer at ILGA-Europe, and Bernadette Renault, University lecturer (UCL and Mons University) and law clerk at the Constitutional Court. The board elected them on 10 September 2015.

The appointment of the two deputy directors (joint management on a double parity: gender – male/female -, linguistic – Dutch/French speaking) took more time than initially planned. Early December 2015, Patrick Charlier and Els Keytsman were appointed as the two deputy directors of the new Inter-federal Centre.

On the 2 July 2015, the Board of Directors approved the Rules of Procedures in order to implement Article 10, § 3 of the Cooperation Agreement of 12 June 2013.<sup>433</sup>

The staff of the Centre is about 100 employees.

The Centre is required to hand in an annual report to the Federal and Regional Parliaments on the fulfillment of its missions, the use of its resources and the way it is functioning. The Centre is also compelled to send a copy of this annual report to each Federal or Regional Government (Article 7 of the Cooperation Agreement of 12 June 2013).

Even if one could say that, in practice, the Centre is able to function independently, some political pressures are not excluded on touchy issues.<sup>434</sup> In 2014, the appointment of Prof. Matthias Storme at the Board of Directors was very controversial because Matthias Storme, a lawyer and law professor, is well known as a fierce opponent of the ET legislations and the equality body in charge of their implementation. He was the one who launched the actions in annulment against almost all the provisions of 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), which were rejected by the Constitutional Court on 12 February 2009. In addition, in 2004, he publicly stated that the conviction for racism of the Vlaams Blok almost morally obliged him to vote for the extreme-right and that the anti-discrimination law was a 'blunder and an attack against democracy'.<sup>435</sup> Still on a libertarian tone, he also stated that 'to discriminate is a fundamental freedom'.<sup>436</sup>

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<sup>431</sup> Committee on the Rights of Persons with Disabilities, concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session (15 September – 3 October 2014), § 48: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>. Moreover, in the 2014 Concluding observations, the Committee on the Elimination of Racial Discrimination is concerned 'that the board of the new Centre is appointed by the Executive, which may compromise its independence' (CERD/C/BEL/CO/16-19, 14 March 2014, para. 7).

<sup>432</sup> The list of the Members is available at the following address (in French): <http://unia.be/fr/propos-dunia/membres-du-conseil-dadministration-dunia>.

<sup>433</sup> OJ (*Moniteur Belge*), 22 July 2015, p. 46958 Entry into force 1 August 2015.

<sup>434</sup> In this respect, even if it happened after the cut off date of the report, it is worth mentioning that the freshly-appointed Belgian federal Secretary of State to equal opportunities, Zuhair Demir (N-VA, appointed on 24 February 2017) has harshly criticized the Inter-federal Centre for Equal Opportunities and Opposition to Racism (UNIA) in the Flemish Media. She wondered whether the Centre still really pursued its initial goal of fighting against racism. She considered that the Centre obviously lack a good perception by citizens because of its too moralizing tone. She furthermore stressed that Unia looked ridiculous by opening positions only for women. According to her, Unia also works principally on issues raised by French-speaking people. The Flemish minister for equal opportunities, Liesbeth Homans (N-VA) has also been in this direction by pointing out that, in her view, Unia is not neutral nor objective and that it protects "allochtonous" people more than Belgian citizens. This has been contested by the Inter-federal Centre which invited the Secretary of State to equal opportunities to a dialogue (<http://www.lalibre.be/actu/politique-belge/zuhair-demir-charge-unia-obsede-par-les-discussions-sur-le-pere-fouettard-58b1275dcd70e898180d11c1>) .

<sup>435</sup> 'Le N-VA Matthias Storme nommé administrateur du Centre interfédéral pour l'Egalité des Chances', *Le Soir*, 25 October 2014, available on the website of this newspaper: <http://www.lesoir.be>.

<sup>436</sup> 'La N-VA a nommé Matthias Storme au poste d'administrateur de l'institution. Ses partenaires n'y voient rien à redire', *Le Soir*, 27 October 2014, available on the website of this newspaper: <http://www.lesoir.be>.

However, according to Patrick Charlier, the co-director of Unia, in 2016, the Board of Directors has been able to fulfil its mandate and to work in a satisfactory manner.<sup>437</sup>

The budget awarded to the Centre has evolved along the following line over the last years:

- 2009: EUR 4.480.000;
- 2010: EUR 7.140.000 (This increase of the budget is a late adaptation of the extension of the missions of the Centre, which took place in 2003. 12 persons were added to the staff which went from 74 to 86 people);
- 2011: EUR 7.260.000;
- 2012: EUR 7.189.000;
- 2013: EUR 7.596.000;
- 2014: EUR 7.705.200;
- 2015: EUR 7.840.000 (of which EUR 6.200.000 millions are paid by the Federal State).

c) Grounds covered by the designated body/bodies

The Centre is competent to deal with all the protected grounds listed in the Federal and Regional Anti-discrimination legislations, apart from language and gender<sup>438</sup> (i.e. alleged race, colour, origin, 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, trade union opinion, genetic characteristic and social origin) (Article 3, § 1, point a. of the Cooperation Agreement of 12 June 2013).

*Competence of the Equality body towards migrant issues*

Unia is competent to deal with all the so-called 'racial' criteria, such as ancestry, skin color, nationality, national or ethnic origin and the so-called 'race'. It is therefore competent to deal with discriminations suffered by migrants on the ground of one of these criteria. In 2015, there were 661 files opened on the grounds of one of the so-called "racial" criteria, a decrease of 13% compared to 2014. This set of criteria, accounted for 37% of all cases handled by Unia in 2015. After a downward trend between 2010 and 2012, the number of such files had increased sharply to a record of 764 files in 2014.

But there is no specific actions or data in the files opened by Unia that permit to identify which files are more specifically related to migrants and which are related to Belgian citizens with a foreign background.

Moreover, since March 2014, following the inter-federalisation of the Centre for equal opportunities and fight against racism, Myria, the Belgian Federal Migration Centre, is the body specifically in charge of migrations and the fundamental rights of migrants. It is a Federal independent public body, which analyses migration, defends the rights of foreigners and combats human smuggling and trafficking. Myria promotes public policies based on evidence and human rights.<sup>439</sup>

One of Myria's missions is 'to ensure that the basic rights of foreigners are respected, through field observations (particularly within closed centres) and by carefully following the complex legislation that regulates this issue. It also provides first line support to persons who wish to receive information on their fundamental rights or residency status. Through an ongoing dialogue with the authorities (local, regional and federal) and other relevant public services, Myria works to ensure that these rights are respected within all areas affecting the status of foreigners: international protection, territorial access,

<sup>437</sup> Interview with Patrick Charlier, co-Director of UNIA, 28 March 2017.

<sup>438</sup> Pregnancy, birth, maternity leave and transgender are assimilated to gender.

<sup>439</sup> More information available on its website: <http://www.myria.be/en/about-myria>.

residency, the right to live within a family, access to work and to a career, opportunity for citizenship, issues relating to detention and deportation, etc. Myria makes observations on these issues and gives recommendations to public authorities and civil society in the clearest, most dynamic way possible'.<sup>440</sup>

In December 2016, Myria published an important study called 'Being a foreigner in Belgium in 2016. Observations of the fundamental rights of foreigners'. Several topical issues in 2016 are examined in this report:

- access to urgent medical assistance, which could be further improved;
- prevention of Ethnic profiling in police operations;
- access to banking services, which remains problematic for people with precarious residence status;
- the procedures for the execution of sentences which have become inaccessible to irregular migrants;
- the use of administrative fines, which should include exceptions and accessible remedies;
- the right of victims of crime, when they are illegally residing, to go to the police without running the risk of being arrested and sent to a detention center.<sup>441</sup>

d) Competences of the designated body/bodies – and their independent exercise

Articles 4, 5 and 6 of the Cooperation Agreement creating the Inter-federal Centre, define the tasks of the Centre and the means it may use in order to fulfill 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 Federal and Regional Anti-discrimination legislations, 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.

As explained on its website, UNIA receives discrimination reporting on a daily basis, either directly or through the local contact points. The attention, which the Centre devotes to these reports from the first contact, is essential for proper monitoring. A large number of requests for intervention are rapidly answered by providing information or referral to other authorities or organisations. Other questions require more work: racist or homophobic attacks, conflicts between employer and employee, discrimination in domestic leases, racist remarks and incitement to hatred on the Internet, etc. In such situations, the personnel at the Centre actively intervene and provide practical support to the victims. In the new structure put in place in 2014, there are 25 persons working in the Department in charge of processing individual reports.

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 trainings, 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 seeking a better understanding by the political leaders of specific new phenomena. In addition, the Federal, Regional and Community authorities increasingly rely on the expertise of the Centre.<sup>442</sup> Since 2014 and the entry into force of the Cooperation Agreement, a new

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<sup>440</sup> *Ibid.*

<sup>441</sup> More information available at the following address: [http://www.myria.be/files/Etre\\_etranger\\_en\\_2016-final.pdf](http://www.myria.be/files/Etre_etranger_en_2016-final.pdf).

<sup>442</sup> For a more detailed presentation of those activities of the Centre, see its website ([www.UNIA.be/en/](http://www.UNIA.be/en/)).



department for public policies is in place in the Centre. A representative of each Region and Community is part of it to ensure the link between national and regional policies.<sup>443</sup>

Although placed under the supervision of the Federal and Regional Parliaments (formerly, before the Prime Minister), the Centre fulfills its mandate in an independent fashion.

e) Legal standing of the designated body/bodies

In Belgium the Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination (UNIA) has legal standing to bring discrimination complaints (on behalf or not of identified victim(s)).

As already mentioned (above, section 6.2), the General Anti-discrimination Federal Act and most of the Regional ET statutory law give UNIA 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), the power of UNIA to file a suit is conditional upon the consent of the victim. However, it is worth stressing that, if there is no identified victim, UNIA may act on its own behalf to denounce a breach of the anti-discrimination legislations. However, UNIA has no power to launch ex officio investigation. This mechanism appears to be in conformity with Article 9(2) of the Racial Equality Directive.

In a typical case of an individual person asking UNIA to intervene in an instance of discrimination, UNIA first appraises the facts. When the allegation is not ill founded, UNIA then seeks to obtain an amicable settlement with the alleged discriminator. Because the discriminator may fear the bad publicity of a lawsuit for alleged discrimination, s/he may be tempted to accept this process, even in situations where it may be difficult to prove that discrimination occurred. Where such an amicable settlement seems unsatisfactory, because of blatant discrimination or non-cooperation with the defendant, UNIA may suggest to the victim to file a suit. If the victim agrees, UNIA is competent to bring the case to court. Other organisations, which aim to fight discrimination and protect human rights, as well as trade unions, have the same competence (above, section 6.2).

UNIA 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. UNIA has developed significant expertise in this discreet way to proceed. In addition, anti-discrimination local 'contact points' have been established in several towns and cities in Flanders (14) and in Wallonia (4) in addition to the collaboration with the ten 'Wallonia Spaces' ('Espaces Wallonie'), ensuring that day-to-day discriminatory practices can be fought against in close consultation with local and provincial authorities and with local integration centers, associations, neighborhood committees, etc. Since the conclusion of the Cooperation Agreement of 12 June 2013, these anti-discrimination 'contact points' fall directly under the responsibility of UNIA:

The Centre provides access to its services, including to persons with disabilities, and organises, in addition to the central contact point, in collaboration with the Regions, provinces and municipalities, contact points at the local level, where a report may be filed. These contact points must be sufficiently distributed geographically in order to ensure easy access to citizens' (Article 6 of the Cooperation Agreement).

The legal standing of the Centre is expressly defined in several parts to the Cooperation Agreement, namely the Federal State,<sup>444</sup> the Walloon Region,<sup>445</sup> the French<sup>446</sup> and the

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<sup>443</sup> Interview with Patrick Charlier, Deputy Director of UNIA, 28 March 2017.

<sup>444</sup> General Antidiscrimination Federal Act, Articles 16, 17, 18.

<sup>445</sup> The Walloon ET Decree, Articles 30 & 31.

<sup>446</sup> French Community ET Decree, Articles 37, § 2 & 38.

Flemish<sup>447</sup> Communities in the framework of the missions of the IEOC (Article 3 of the Cooperation Agreement) and of the different anti-discriminations norms (Article 6, § 3 of the Cooperation Agreement). The other entities broadly authorize Human Rights organizations to file lawsuits within the scope of the legislative provisions but do not expressly give legal standing to the Centre.<sup>448</sup> However, according to UNIA, there is no doubt in practice that the Centre can directly take legal action on the basis of the Decrees and Ordinances listed on the basis of the Cooperation Agreement.<sup>449</sup>

In 2015, UNIA initiated a lawsuit in fourteen cases related to discrimination or hate crimes. Seven out of these fourteen cases relate to racism, antisemitism or negationism (Holocaust denial), 5 relate to discrimination on the grounds of disability, one relates to a discrimination on the ground of nationality and another one to a discrimination on the ground of social condition and political belief. They are all cases where no amicable settlement could be found and which 'needed more legal certainty or which were particularly serious'.<sup>450</sup>

f) Quasi-judicial competences

In Belgium UNIA is not a quasi-judicial institution.

g) Registration by the body/bodies of complaints and decisions

In Belgium UNIA registers the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are available to the public.

Such data are part of the annual report published on its website.<sup>451</sup> This report lists the number of complaints received by ground and field, the number of complaints regarding to which a file was opened and the number of cases in which the Centre launched a lawsuit. In 2015, the Centre received 4554 complaints (compared to 4627 in 2014), it opened a file in 1596 cases (compared to 1670 in 2014, which means a slight decrease) and, as in 2014, the Centre launched a lawsuit in 14 cases. The low amount of court cases compared to the figures of files opened reflects the policy of the Centre to reach constructive, out of court, settlement and to seek alternative measures, designed to help victim and perpetrator alike, even once legal action has been initiated. In addition, the Centre tends to only go to court when strategic litigation is at stake: 'if the case is highly relevant from a social point of view (to establish a legal precedent (...) or clarify a point of law) or if the facts of the case are particularly serious (such as flagrant hate crimes)'.<sup>452</sup>

h) Roma and Travellers

Since the new structure has been put in place in 2014, one full-time employee, in the public policies department of the Centre, is especially in charge of the Roma discrimination issues (Mr 'Roma and Travellers').<sup>453</sup> In 2015, the Centre for Equal Opportunities organised several round tables between journalists and members of the Roma community, in order to raise awareness on the negative stereotypes that are conveyed in the media.<sup>454</sup> It also

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<sup>447</sup> Flemish Framework ET Decree, Article 40 and Executive Regulation (Flemish Community) of 16 May 2014, OJ (*Moniteur Belge*), 27 June 2014.

<sup>448</sup> The Brussels Civil Service ET Ordinance, Article 27; Brussels ET Ordinance, Article 25; German Community ET Decree, Article 13; Decree on equal treatment between persons in vocational training (*Commission communautaire française [Cocof]*), Article 14, § 1; The Cocof ET Decree, Article 28, 1<sup>o</sup>.

<sup>449</sup> Interview with Patrick Charlier, Deputy Director of UNIA, 14 April 2015.

<sup>450</sup> Annual report of UNIA 2015 (*Discrimination – Diversité*), available on its website ([www.UNIA.be/en](http://www.UNIA.be/en)), p. 24.

<sup>451</sup> Annual report of UNIA 2015 (*Discrimination – Diversité*), available on its website ([www.UNIA.be/en](http://www.UNIA.be/en)), pp. 22-30. See also Annual Report of UNIA 2015 – Data, June 2016, available on its website: [http://www.unia.be/files/Documenten/Jaarrapport/chiffres\\_2015.pdf](http://www.unia.be/files/Documenten/Jaarrapport/chiffres_2015.pdf).

<sup>452</sup> *Ibidem*.

<sup>453</sup> Interview with Patrick Charlier, Deputy Director of UNIA, 28 March 2017.

<sup>454</sup> For more information, look at <http://www.UNIA.be/en/se-rencontrer-pour-se-comprendre>.

opened 22 new files related to potential discrimination against Roma. Moreover, the Centre was associated to the work conducted by the Task Force on Roma which adopted a 'National Strategy for Roma Integration', issued on March 2012. It defines issues and objectives for Roma integration by 2020, and provides for coordination between the Federal State, the Regions and the Communities within the Task Force on Roma, so that every authority can freely take measures according to their competences. The Task Force on Roma meets at least twice a year and is the national contact point for the European Commission.

Since May 2016, Unia is also participating in the pilot committee of the Belgian National Roma Platform, set up on an initiative of the Belgian national contact point for Roma.<sup>455</sup>

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<sup>455</sup> For more information, see section 5 "positive action" of the report.

## 8 IMPLEMENTATION ISSUES

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

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The Anti-discrimination Federal Acts were widely publicised in 2007, in particular through brochures presenting the main provisions of the law and identifying a list of organisations and administrations involved in their implementation. Seminars on the content of the law in the context of employment took place in 2007 in the framework of a European project dedicated to the dissemination of information about legal protection against discrimination. The Federal Anti-discrimination Acts were also translated in 'sign language'.<sup>456</sup> Furthermore, the Centre organised several training afternoons in the major cities of the country dedicated to the information of local actors (centers of integration, municipalities, lawyers, associations, etc.). In addition, the Federal Minister in charge of Equal Opportunities funded the creation, in 2007-2008 and 2008-2009, of an inter-universities Chair on 'Law and discrimination', involving academics from three universities for the French-speaking part of the project. Each year, there have been 30 hours of training given by scholars coming from those universities on anti-discrimination law. Attendance was free and it was part of the continuing training of lawyers and judges. In early 2016, UNIA launched its new website which is much more user-friendly and published a leaflet called 'For equality, against discrimination. How can we help?' in order to clarify its role and missions to the public.<sup>457</sup> The 'EDiv' initiative is also worth mentioning. It is an online free training on anti-discrimination law aimed at fostering diversity in companies by providing employers with practical situations and solutions.<sup>458</sup> In its last annual report published in 2016, Unia stresses the success of this tool: since its creation, 3426 users have registered and the free data bank counts 14109 hits.<sup>459</sup>

- b) Measures 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)

On 22 March of each year, an 'Anti-discrimination Day' is organised, 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.

Furthermore, on 18 March 2008, the Federal Government decided to initiate a national debate on multiculturalism and diversity named the 'Assizes on Inter-culturality'. Its aim was to discuss with the main field actors 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 could be shared. Its official partners were the Centre for Equal Opportunities, the Institute for the Equality of 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 NGOs 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. Works conducted by a Steering Committee from September 2009 to September 2010 eventually led to a Final Report handed in to the Federal Vice-Prime Minister, Minister of Employment and Equal Opportunities in charge of

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<sup>456</sup> For more details on those initiatives, see the Annual Report, 2007 of UNIA (*Discrimination - Diversity*), p. 122 and sq., available on the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>457</sup> The folder is available at the following address:  
[http://www.unia.be/files/Documenten/UNIA\\_folder\\_EN\\_220116.pdf](http://www.unia.be/files/Documenten/UNIA_folder_EN_220116.pdf).

<sup>458</sup> For more details on this initiative, see the UNIA website: [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>459</sup> Annual Report, 2015 of UNIA (*Discrimination - Diversity*), p. 35, available on the website ([www.UNIA.be/en](http://www.UNIA.be/en)).

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. The report was heavily criticised and most of these recommendations were not given any follow-up.<sup>460</sup>

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 companies. 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.

- c) Measures 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, UNIA 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 Council for Labour (*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>461</sup> In line with this commitment, a new Collective Agreement was signed on 10 December 2008 and was made compulsory by the Executive Regulation of 11 January 2009 (Collective Agreement no. 95 relating to equality of treatment at all stages of the employment relationship). Moreover, as mentioned above, in the project of inter-professional agreement 2011-2012, adopted on 18 January 2011, the gradual harmonization of the social status of labourers (*ouvriers*) and employees (*employés*) was one of the four policy issues especially under focus.<sup>462</sup> Thereby, an Act was adopted, on 12 April 2011, as a first step to gradually equalise the social status of labourers and employees regarding the notice period.<sup>463</sup> A second Act was adopted on 23 December 2013 (in force on 1 January 2014), so as to provide for a single notice period system for both labourers

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<sup>460</sup> Ringelheim, J., 'Du Dialogue aux Assises: heurts et malheurs de l'interculturalité en Belgique', in Bribosia, E. & Rorive, I. (eds), *L'accommodement de la diversité religieuse. Regards croisés: Canada, Europe, Belgique*, P.I.E. Peter Lang, 2015, pp. 101-122.

<sup>461</sup> Note that there is nothing in this respect in the interprofessional agreement 2009-2010.

<sup>462</sup> The project of inter-professional agreement is available online: [http://www.csc-en-ligne.be/Images/aip\\_1112\\_projet\\_tcm22-238497.pdf](http://www.csc-en-ligne.be/Images/aip_1112_projet_tcm22-238497.pdf).

<sup>463</sup> *Loi modifiant la loi du 1er février 2011 portant la prolongation de mesures de crise et l'exécution de l'accord interprofessionnel, et exécutant le compromis du Gouvernement relatif au projet d'accord interprofessionnel* (Act of 12 April 2011 amending the Act of 1<sup>st</sup> February 2011 on the extension of anti-crisis measures and the execution of the inter-professional agreement, and executing the compromise of the Government related to the project of inter-professional agreement), *Moniteur belge*, 28 April 2011.

and employees and removes the 'carens day' system so that labourers as well as employees are entitled to a guaranteed remuneration as from the first day of illness.<sup>464</sup>

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 UNIA, 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) Addressing the situation of Roma and Travellers

As mentioned above (in section 5), the Belgian Inter-ministerial Conference on Social Integration created a Task Force on Roma, on 21 March 2011, in order to develop an integrated action plan to draw up propositions to improve Roma integration in Belgium. Work conducted by the Task Force led to a 'National Strategy for Roma Integration', issued on March 2012. It defines issues and objectives for Roma integration by 2020, and provides for more coordination between the Federal State, the Regions and the Communities within the Task Force on Roma, so that every authority can freely take measures according to its competences. The Task Force on Roma meets at least twice a year and is the national contact point for the European Commission.

In 2014 and 2015, UNIA organised several round tables between journalists and members of the Roma community, in order to raise awareness on the negative stereotypes that are conveyed in the media.<sup>465</sup> Nevertheless, the Commissioner for Human Rights stressed, in its last report on Belgium, that 'the authorities should also take measures to combat stereotypes and prejudices against Roma in society more actively, notably by raising awareness of the history of Roma in Europe'.<sup>466</sup>

In May 2016, a Belgian National Roma Platform was set up following an initiative of the Belgian national contact point for Roma.<sup>467</sup> The aim of this Platform is to trigger dialogue with all stakeholders and Roma communities in Belgium in the field of employment, housing and education and to draft recommendations aimed at political decision-makers in order to better assess the national strategy for Roma integration.<sup>468</sup>

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

#### a) Mechanisms

The formulations of the General Anti-discrimination Federal Act and of the Racial Equality Federal Act comply with Article 16, b) of Directive 2000/78/EC and Article 14, b) of

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<sup>464</sup> OJ (*Moniteur belge*), 31 December 2013, (*Loi du 26 décembre 2013 concernant l'introduction d'un statut unique entre ouvriers et employés en ce qui concerne les délais de préavis et le jour de carence ainsi que de mesures d'accompagnement*).

<sup>465</sup> For more information, look at <http://www.UNIA.be/en/se-rencontrer-pour-se-comprendre>.

<sup>466</sup> Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Belgium from 14 to 18 September 2015, § 140, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>.

<sup>467</sup> For more information, see section 5 "positive action" of this report.

<sup>468</sup> More information available in French at the following link : <http://www.mis.be/fr/themes/pauvrete/integration-des-roms/la-plateforme-nationale-belge-pour-les-roms>).

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>469</sup> However, this should be read in combination with the 'safeguard provisions' (contained in Article 11 of both Acts) 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 ET Acts adopted since 2008 have a similar provision than the federal one 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', which follows the same model as the federal one.

b) Rules contrary to the principle of equality

It is not possible to identify, on a systematic basis, which Acts, regulations or rules may conflict with the principle of equal treatment. First, due to the complexity of the Belgian system (Federal state, with regional/communities competencies), there are too many texts, which would have to be screened to that effect, especially if we include internal rules of companies (that are anyway not accessible as such). 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. Taking into account this disclaimer, as a result of the present report, there is no act, regulation or rule that are apparently contrary to the principle of equality.

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<sup>469</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).

## 9 COORDINATION AT NATIONAL LEVEL

At the federal level, anti-discrimination policy is, since 2014, in the hands of the Secretary of State, Elke Sleurs (Nationalist Flemish Party).<sup>470</sup> She is in charge of the fight against poverty, equal opportunities, disabled persons, fight against tax evasion or fraud and scientific policy.

Her counterparts are:

- in the Walloon Region, the Minister of Civil Engineering, Health, Social Action and Heritage, Mr Maxim Prevot (French-speaking Humanist Party);
- in the Flemish Region/Community, the Minister of Home Affairs, Inburgering (integration of migrants), Housing, Equal Opportunities and Fight against Poverty: Mrs Liesbeth Homans (Dutch-Speaking Nationalist Flemish Party);
- in the French Community, the Minister of Education in the field of social advancement (*promotion sociale*), Youth, Women's rights and Equal Opportunities: Mrs Isabelle Simonis (French-speaking Socialist Party);
- in the Region of Brussels-Capital, the Secretary of State of Development, Cooperation, Road safety, Technology (*Informatique régionale et communale et de la Transition numérique*) and Equal Opportunities: Mrs Bianca Debaets (Dutch-speaking Centre Party);
- In the German-speaking Community, the Minister of Family, Health and Social Affairs: Mr Antonios Antoniadis (socialist Party).

At an early stage of implementation of the EU anti-discrimination directives, the absence of a strong coordination between the different levels of the State was certainly the most serious obstacle to full compliance of Belgium with its obligations under EU 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. Moreover, the Federal State, the Regions and the Communities approved a Cooperation Agreement, on 12 June 2013, to turn the Centre for Equal Opportunities and Opposition to Racism into an Inter-federal Centre. The independent Inter-federal Centre for Equal Opportunities (UNIA), which is operational since March 2014, is competent with regard to the various ET legislations adopted at both Regional and Federal levels. However, as developed above (section 7), the 2014 Federal Governmental Agreement of October 2014 is silent on the other project of turning the Institute for the Equality of Women and Men into an inter-federal Institute. There is only a commitment to design a National Human Rights Mechanism, according to the international obligations of Belgium. Such a mechanism should allow a full implementation of the United Nations 'Paris Principles' on the status and functioning of national institutions for the protection and promotion of human rights. In 2016, the details of the project were discussed by the Federal Minister of Justice and the Secretary of State for Equal Opportunities but it is still confidential.

Two other elements of the 2014 Federal Governmental Agreement aim at fostering more coherence in equal opportunities policies:

- the creation of an 'Equal Opportunities Unit' in the Federal administration. This 'Pilot Group Diversity' has been set up in December 2014 within the Federal administration. It is made of internal and external experts in the field of diversity and gathers 4 times a year. Among its tasks, it has
  - o to develop a vision of a federal management of diversity;
  - o to coordinate the 'plan-program' and prioritize the projects;
  - o to manage and attribute the central budgets;

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<sup>470</sup> Please note that, in February 2017, beyond the cut off date of the report, she was replaced by Zuhail Demir, following an internal reorganisation within the national Flemish Party (NVA).



- to give advices and report at the political level.<sup>471</sup>
- the assessment of the anti-discrimination legislations in order to have a better coordination of these legislations and to enhance effectiveness. It is worth noting that a Decree establishing the composition of an Expert Commission for the assessment of the anti-discrimination legislations was eventually adopted on 18 November 2015. The Expert Commission is made of two representatives of the judiciary, two lawyers, four members proposed by the National Labour Council and four members proposed by the Ministry for equal opportunities. It was working during the second part of 2016 and has heard several experts in the field of non-discrimination, among which E. Bribosia and I. Rorive. The final report should be submitted to the Federal Parliament in 2017.

In addition, in its Annual Report of 2014, UNIA highlighted as best practices the transversal approaches of equal opportunities and anti-discrimination policies developed in Flanders, since 2005 and in the Federation Wallonia-Brussels more recently.<sup>472</sup>

Furthermore, a Common Circular (*circulaire commune*) 13/2013 for an efficient policy of monitoring and prosecution with respect to every ground of discrimination, approved by the Association of General Prosecutors, the former Minister of Justice, and the former Vice-Prime Minister, Minister of the Interior and in charge of Equal Opportunities was presented to police officers and judicial authorities, on 16 December 2013. The Circular aims at strengthening the cooperation between the Justice departments and the Police departments, so as to ensure a better registration and prosecution of all forms of discrimination and hate crimes, including homophobic discrimination and cyberhate. In criminal matters, this Circular compels the prosecution departments and the police services to register all criminal cases implying a discriminatory intent on the basis of the following grounds: gender, disability, racism/xenophobia, homophobia. This should provide for better statistics. Moreover, this Circular provides for the appointment of a 'coordinator prosecutor' (*magistrat coordinateur*) who is in charge of its implementation. This prosecutor is the contact person for UNIA. Other prosecutors and labour auditors are in charge of discrimination issues in their respective departments (prosecution department and labour department) as well as public servants in police services. The Circular defines their missions. According to the last annual report of the Centre, the potential of this Circular has not been fully exploited yet, notwithstanding the training organized by Unia in order to fostering a better implementation.<sup>473</sup>

In its Annual Report 2014, UNIA, acknowledging the difficulties of such a process, still stressed the need for an inter-federal Action Plan against racism, racial discrimination, xenophobia and intolerance. Such a commitment was already adopted at the Federal level after the Durban World Conference against racism. However, more than 12 years later, such a Plan has not been adopted yet and is not even mentioned in the 2014 Federal Governmental Agreement. The Committee for the Elimination of Racial Discrimination urged Belgium to speed up the adoption of such a Plan.<sup>474</sup> Moreover, in its 2014 report on Belgium, ECRI considered that:

'after the incidents surrounding the case of Sharia4Belgium, the authorities announced a plan to boost the fight against 'racism and radicalism'. These phenomena would be tackled in a transversal way; prevention, coordination and law enforcement would be the key elements of the plan. ECRI is of the opinion that this plan should be combined with an assessment of the application and effectiveness of

<sup>471</sup> For further information, see [http://www.fedweb.belgium.be/fr/a\\_propos\\_de\\_l\\_organisation/administration\\_federale/mission\\_vision\\_valeurs/Egalite\\_des\\_chances\\_et\\_diversite/Les\\_acteurs/groupe-de-pilotage](http://www.fedweb.belgium.be/fr/a_propos_de_l_organisation/administration_federale/mission_vision_valeurs/Egalite_des_chances_et_diversite/Les_acteurs/groupe-de-pilotage).

<sup>472</sup> Annual report of UNIA 2014 (*Discrimination – Diversité*), p. 13, available on its website ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>473</sup> Annual report of UNIA 2015 (*Discrimination – Diversité*), pp. 15-16, available on its website ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>474</sup> Periodic Report on Belgium, CERD/C/BEL/CO/16-19.

the 2007 acts as recommended earlier in this report, in particular the provisions prohibiting hate speech'.<sup>475</sup>

In 2016, though, a preliminary study as to the feasibility of such an inter-federal Action Plan against racism, racial discrimination, xenophobia and intolerance has been delivered to the Secretary of State in charge of Equal Opportunities. But no follow-up has been put in place at the time of delivering the report.<sup>476</sup>

The former Federal Government and the Regions and Communities approved, on 31 January 2013, an Inter-federal Action Plan with a view to prevent and better fight homophobic and transphobic violence. Firstly, the common Action Plan aims at improving the development of knowledge in that matter through scientific research, notably on stress problems that young people face in compulsory education related to sexual orientation, identity and gender expression. Secondly, the Action Plan promotes the inclusion, in the Federal and Regional Anti-discrimination legislations, of gender expression and gender identity, in addition to sexual orientation. Thirdly, it encourages the involvement, the training and the support of police and judicial personnel and of professionals from the psychological, medical and social fields, as essential actors in the development of specific and general preventive measures. Fourthly, the Action Plan hopes to raise the awareness of homophobic and transphobic crimes and hate speeches, by increasing the visibility of sexual and gender diversity, more specifically through institutions and organisations which have educational, scientific or social functions. Fifthly, it stresses the necessity of improving assistance to victims of homophobic and transphobic hate crimes. Sixthly, the Action Plan recommends the use of appropriate statistics and the setting up of efficient monitoring and prosecution policies. The administrations of the Federal and Regional Governments, on the one hand, and UNIA and the Institute for the Equality of Women and Men, on the other hand, are in charge of the implementation of the measures promoted in the Inter-federal Action Plan. In its Annual report of 2014, UNIA underlines the need for an assessment of the Inter-federal Action Plan with a view to prevent and better fight homophobic and transphobic violence.<sup>477</sup>

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<sup>475</sup> Para. 57 of the 2014 ECRI report on Belgium: <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Belgium/BEL-CbC-V-2014-001-ENG.pdf>.

<sup>476</sup> Dr. Saïla Ouald Chaïb, under the scientific supervision of Prof. Eva Brems (UGent), «Racisme in België. 15 jaar na de Durban verklaring: tijd voor an interfederaal aktie plan tegen racisme» (Racism in Belgium 15 years after the Durban Declaration: time for an inter-federal action plan against racism), 2 September 2016. (Interview with Patrick Charlier, co-Director of UNIA, 28 March 2017).

<sup>477</sup> Annual report of UNIA 2014 (*Discrimination – Diversité*), p. 10, available on its website ([www.UNIA.be/en](http://www.UNIA.be/en)).

## 10 CURRENT BEST PRACTICES

- The Inter-federal Centre for Equal Opportunities, fully operational since March 2014, combined with the development of local contact points, simplifies the access of the victims to the different remedies. Today, whether a potential discrimination case is deferred to the main office or to a local contact point, the Inter-federal Centre is the centralized equality body competent to assist victims and file legal actions with respect to Federal as well as Regional Anti-discrimination law (Cooperation Agreement of 12 June 2013, Article 6) (above, section 7).
- The setting up of the Expert Commission for the assessment of the 2007 Anti-discrimination Acts has been finalized in 2016. This requirement was laid down by the Federal General AD Act (article 52). It is composed by two representatives of the judiciary, two lawyers, four members proposed by the National Labour Council and four members proposed by the Ministry for equal opportunities. It has been working in the second part of 2016 and has heard several experts in the field of non-discrimination, among which E. Bribosia and I. Rorive. The final report should be submitted to the Federal Parliament in 2017. Previously, UNIA had published several reports related to an in-depth assessment of Belgian non-discrimination law available on its website.<sup>478</sup>
- Common Circular (*circulaire commune*) for an efficient policy of monitoring and prosecution with respect to every ground of discrimination, approved by the Association of General Prosecutors, the former Minister of Justice and the former Vice-Prime Minister, Minister of the Interior and in charge of Equal Opportunities, on 16 December 2013. The Circular aims at strengthening the cooperation between the Justice and the Police departments to ensure better registration and prosecution of all forms of discrimination and hate crimes, including homophobic discrimination and cyberhate (above, section 9).
- Adoption of several Diversity Barometers at the initiative of UNIA. These Diversity Barometers provide data and statistics, which are crucial to address discrimination issues in the fields of employment, housing and education in Belgium (two Socio-economic Monitorings – 2013 and 2015,<sup>479</sup> Diversity Barometer in Employment,<sup>480</sup> Diversity Barometer in housing).<sup>481</sup> The next Diversity Barometer on Education should be made public in 2017.
- Inter-federal Action Plan with a view to prevent and better fight homophobic and transphobic violence (above, section 9).
- In November 2016, Unia launched a situation-testing instrument to help candidate-tenants to gather evidence of discrimination on the housing market. It should improve successful judicial complaints in this field (above, section 2.2.1., b)).
- In May 2016, on an initiative of the Belgian national contact point for Roma, the Federal Public Service 'Social Integration' launched the Belgian National Roma Platform. This platform is supervised by a pilot committee staffed with people from Federal and regional administrations, NGOs active at the local level and UNIA. The aim of this Platform is to trigger dialogue with all stakeholders and Roma communities in Belgium. This is a requirement that urgently needed to be improved and respected as until recently the participation of Roma in the full process related to the national strategies and policies relevant for Roma was currently non-existent in the Belgian context. Such an initiative is made possible thanks to the support of DG Justice of the European Commission that provides some funding for a year. Four thematic meetings focusing on healthcare (29 September 2016), education (28 October 2016),

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<sup>478</sup> Available on the website of UNIA (<http://unia.be/fr/publications-et-statistiques/publications/evaluation-de-la-legislation-federale-antidiscrimination>).

<sup>479</sup> Available on the website of UNIA (<http://www.unia.be/fr/publications-et-statistiques/publications/monitoring-socio-economique-deuxieme-rapport>).

<sup>480</sup> Available on the website of UNIA (<http://www.unia.be/fr/publications-et-statistiques/publications/barometre-de-la-diversite-emploi>).

<sup>481</sup> Available on the website of UNIA (<http://www.unia.be/fr/publications-et-statistiques/publications/barometre-de-la-diversite-logement>).

housing and employment are planned in order to discuss interactively what is currently working and missing in Belgium in terms of the protection of the rights of Roma. The aim of the project is to draft recommendations aimed at political decision-makers in order to better assess the national strategy for Roma integration.<sup>482</sup>

- UNIA released, in August 2016, a booklet related to reasonable accommodations at school for pupils with disabilities, in order to inform all relevant actors about the schools' obligation in this field.<sup>483</sup>
- UNIA released a strategic plan (2016 – 2018) for an inclusive society 'with a place for each one', which results from a participative process of all UNIA teams. 'Promoting and fostering an inclusive society for everyone is the core (objective) of Unia's 2016-2018 strategic plan. It essentially imposes the opening up of (UNIA) to the actors of society and anchors inclusive participation in a structural, preventive and proactive approach involving all sectors of society. This requires targeted attention to the promotion and enforcement of anti-discrimination and fundamental rights, including the rights of persons with disabilities'.<sup>484</sup>
- The UNIA 'EDiv' initiative is also worth mentioning. It is an online free training on anti-discrimination law aimed at fostering diversity in companies by providing employers with practical situations and solutions.<sup>485</sup> In its last annual report published in 2016, Unia stresses the success of this tool: since its creation, 3426 users have registered and the free data bank counts 14109 hits.<sup>486</sup>
- The Labour Minister of the Region of Brussels adopted a plan against discrimination on the labour market proposing ten measures fighting against discrimination (above, section 2.2.1., b)).
- The Flemish government adopted a horizontal plan on equal opportunities for the period 2015–2019. This plan requires all ministers to foster equal opportunities in their policies in particular with respect to gender, disability, LGBT and accessibility. UNIA will be required to give its opinion on the envisaged actions. However, UNIA points out that the participation of disabled persons, which is required by the UN Convention, is not sufficiently guaranteed by the plan.<sup>487</sup>

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<sup>482</sup> More information available in French online: <http://www.mi-is.be/fr/themes/pauvrete/integration-des-roms/la-plateforme-nationale-belge-pour-les-roms>

<sup>483</sup> Available on the website of UNIA (<http://unia.be/fr/publications-et-statistiques/publications/lecole-de-ton-choix-avec-un-handicap-les-amenagements-raisonnables-dans-lenseignement>).

<sup>484</sup> Available on the website of UNIA ([http://unia.be/files/Documenten/Publicaties\\_docs/Plan\\_strategique\\_Unia\\_2016-2018\\_def.pdf](http://unia.be/files/Documenten/Publicaties_docs/Plan_strategique_Unia_2016-2018_def.pdf)).

<sup>485</sup> For more details on this initiative, see the UNIA website: [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>486</sup> Annual Report, 2015 of UNIA (*Discrimination - Diversity*), p. 35, available on the website ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>487</sup> This plan is available in Flemish online: <http://www.gelijkekansen.be/Portals/GelijkeKansen/beleid/BN%20GK%202014-2019.pdf>.

## 11 SENSITIVE OR CONTROVERSIAL ISSUES

### 11.1 Potential breaches of the directives (if any)

- The definition of direct discrimination by the Flemish Decree of 10 July 2008 (Article 16, § 1) and by the Decree of the German Community of 19 March 2012 (Article 5, al. 4), as it is currently worded, could be formally read as allowing for derogations to direct discrimination, while this is prohibited under the directives' provisions (above, section 2.2.a).
- The Constitutional Court stated in 2009<sup>488</sup> that 'Article 4, 10°' of both 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. On this basis, it seems that the Court requires an intention to be proven more generally, i.e. in civil matters as well. This interpretation may raise an issue of lack of compliance with EU and national law since both define harassment as an unwanted conduct related to a protected criterion. If a behaviour which has the effect of creating a bad environment amounts to a prohibited harassment, no specific intention is required under EU and national law. Consequently, the interpretation of the Constitutional Court should be strictly applied to criminal matters – and not to civil matters – to be in compliance with EU law and national law (above, section 2.4).
- 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. Only the French Community (French Community ET Decree of 12 December 2008, Article 4, 5°) and the *Cocof* (Cocof ET Decree of 9 July 2010, Article 5, 9°) have done it. 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 ET Decrees. The ET statutory law of the Region of Brussels-Capital and of the German-speaking Community should be completed in this respect (above, section 3.2.5).
- For the sake of full implementation of EU law, 'social advantages' should be added to the material scope of the ET Ordinances of the Region of Brussels-Capital (above, section 3.2.7.). In addition, the full implementation of the Racial Equality Directive requires the inclusion of supply of goods and services available to the public in the material scope of the ET Ordinance of the Region of Brussels-Capital (except regarding social housing, which is covered since 2009) (above, section 3.2.9). The example of private housing is striking. Following the transfer of competence in private housing to the Regions (Sixth Reform of the Belgian State), there is no provision that protects (potential) tenants against discrimination in the field of private housing in the Region of Brussels-Capital (the Specific Ordinance in housing is only applicable to entities in charge of social housing).<sup>489</sup> As a consequence, the Region of Brussels-Capital should adopt as soon as possible a legislation that deals with this lack of protection against discrimination in private housing since the situation is not in compliance with the Race Directive. According to Patrick Charlier, co-Director of UNIA, contacts were made with the authorities of the Region of Brussels-Capital in

<sup>488</sup> Constitutional Court (*Cour constitutionnelle*), Decision of 12 February 2009, no. 17/2009, para. B.53.4; Decision of 11 March 2009, no. 39/2009, para. B.25.4; Decision of 2 April 2009, no. 40/2009, para. B.33.4.

<sup>489</sup> On this question, see S. Ganty, M. Vanderstraeten, « Droit de la non-discrimination : avancées et enjeux », *Actualités de la lutte contre la discrimination dans les biens et services, en ce compris l'enseignement* in E. Bribosia, I. Rorive, S. Van Drooghenbroeck (coord.), *Droit de la non-discrimination : avancées et enjeux, Morceaux choisis et développements récents à la lumière du droit belge, européen et international*, Bruxelles, Bruylant, 2016.

order to convince them to adopt a single Equal Treatment Ordinance that would be all-embracing and cover the entire material field of competences of the Region.<sup>490</sup>

- 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 and is still not sufficient. It is only in November 2006 that the Minister of Labour informed the social partners of the need to remove 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 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 Federal Act of 10 May 2007. The Minister also announced the 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. At the end of 2016, nothing was done in this respect and one may wonder whether the project is still alive (above, section 4.7.1).
- In Belgium, national legislation is partially in line with the CJEU case law on age regarding compulsory retirement. Apart from the public sector, where retirement is automatic and compulsory at the age of 65 years (with a few exceptions), there is no compulsory retirement age in the private sector. In the private sector, workers may work beyond the retirement age of 65 years and their employer could not force them to retire. To do so the employer still has to terminate the contractual relationship by giving formal notice, even if the notice period will be reduced in this case. Therefore, except for the public sector, which is likely to constitute one of the items for discussion in the process of screening Belgian legislation and regulations for potential age-based discrimination, Belgian law is in line with the CJEU case law on age regarding compulsory retirement. However, the reduced notice period provisions to end the contractual relationship in the private sector might possibly be out of line with the CJEU case law (above, section 4.7.4.d and 4.7.4.f).
- In its 2009 rulings concerning several actions in annulments against the Federal Anti-discrimination Acts, 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.<sup>491</sup> In the opinion of the authors of this report, that statement of the Court is in complete breach of EU law and in complete contradiction to the intention of the Belgian legislator (above, section 6.3).
- There is a problem regarding victimisation because Belgian law only protects victims, its representatives and witnesses against victimisation while the EU directives cover 'all persons' involved. Only the Cocof ET Decree and the Flemish Framework ET Decree are in line with the directives regarding protection against reprisals (above, section 6.5).
- The 'safeguard provision' (Article 11 of both the General Antidiscrimination Federal Act and the Racial Equality Federal Act) implies that any statutory law (or regulation implementing a legislative provision), which might be considered discriminatory under the EU directives, shall not be voided by the adoption of the antidiscrimination legislative framework. It may be necessary, therefore, to launch a full-scale screening of the existing legislation and regulations in order to ensure that any discriminatory

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<sup>490</sup> Interview with Patrick Charlier, co-Director of UNIA, 28 March 2017.

<sup>491</sup> Constitutional Court (*Cour constitutionnelle*), Decision of 12 February 2009, no. 17/2009, para. B.93.3; Decision of 11 March 2009, no. 39/2009, para. B.52; Decision of 2 April 2009, no. 40/2009, para. B.97.

provisions are identified and removed, since a purely case-to-case approach left in the hands of courts might be insufficient.

## 11.2 Other issues of concern

### 1) Political context

In its 2014 report on Belgium, ECRI pointed that

'since its fourth report on Belgium a number of leaders of and militants from extremist parties have continued making statements in public against the other linguistic Community in the name of extreme nationalism combined with intolerant and xenophobic arguments against foreigners and minority groups. ECRI considers that this exploitation of the climate of political tension that exists between the linguistic Communities is particularly deplorable as it not only encourages inter-Community prejudice and stereotyping but can fuel hatred also against ethnic minorities and migrants'.<sup>492</sup>

This statement has echoed in the recent years where politicians of the Dutch-Speaking Nationalist Flemish Party (NVA) made several statements with racist connotations. Firstly, it was made public that the current Secretary of State for Asylum, Migration and Administrative Simplification, Theo Francken, wrote on facebook: 'I acknowledge the added value of the Jewish, Chinese and Indian Diasporas but I don't recognize the added value of the Moroccan, Congolese and Algerian Diasporas'. Secondly, in March 2015, Bart de Wever, the President of the NVA and Mayor of the major Flemish city (Antwerp) stated that 'racism is a relative concept and is used too frequently as an excuse of personal failure by some communities such as Maroccans, especially Berbers'.<sup>493</sup> Such controversial statements opened the awkward debate as to whether this is racism or not according to the Racial Equality Federal Act. Some organizations and citizens lodged a complaint for racism against Bart De Wever. According to the authors of this report, even if the applicability of the Racial Equality Federal Act is questionable, it is highly problematic that politicians, who have very high responsibilities, stigmatize ethnic minorities, whose members have been facing discrimination in Belgium for many years.

In addition, even if it happened after the cut off date of the report, it is worth mentioning that the freshly-appointed Belgian federal Secretary of State to equal opportunities, Zuhail Demir (N-VA, appointed on 24 February 2017) has harshly criticized the Inter-federal Centre for Equal Opportunities and Opposition to Racism (UNIA) in the Flemish Media. She wondered whether the Centre still really pursued its initial goal of fighting against racism. She considered that the Centre obviously lacks the support of citizens because of its too moralizing tone. She furthermore stressed that UNIA looked ridiculous by opening positions only for women. In her view, UNIA works chiefly on issues raised by French-speaking people. The Flemish minister for equal opportunities, Liesbeth Homans (N-VA), also pointed out that UNIA is neither neutral nor objective and that it protects 'allochtonous' people (i.e. people with a foreign origin) more than Belgian citizens (missing the fact that many 'allochtonous' people are Belgian citizens...). UNIA disagreed with such an analysis and invited the Secretary of State to equal opportunities to a dialogue.<sup>494</sup>

### 2) Inertia and/or lack of political will

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<sup>492</sup> Para. 51 of the 2014 ECRI report on Belgium.

<sup>493</sup> See the press article available through the following link: <http://www.lesoir.be/830581/article/actualite/belgique/politique/2015-03-23/communaute-berbere-epinglee-par-bart-wever-je-ne-suis-pas-raciste>.

<sup>494</sup> See the press article available through the following link: <http://www.lalibre.be/actu/politique-belge/zuhail-demir-charge-unia-obsede-par-les-discussions-sur-le-pere-fouettard-58b1275dcd70e898180d11c1>.



Beyond this tense political climate, there is also a worrying inertia at the political level regarding several issues central to the fight against discriminations:

- Belgium has not yet ratified Protocol No. 12 to the European Convention on Human Rights. There is no commitment to a forthcoming ratification in the 2014 Federal Governmental Agreement.
- Contrary to the reiterated proposals made by UNIA,<sup>495</sup> no executive Regulation has been adopted yet providing guidance in fields such as positive action and occupational requirements, except for the French communities. This is not as such a breach of the directives but the adoption of these regulations would certainly enhance the effectiveness of the fight against discrimination. More recently, in its evaluation report conducted in 2015 and published beginning of 2016 on the Anti-discrimination Federal Acts, UNIA strongly called for the adoption of such an executive Regulation.<sup>496</sup>
- As stressed by ECRI in its 2014 report on Belgium<sup>497</sup> and by UNIA,<sup>498</sup> the assessment of the 2007 Federal Anti-discrimination Acts, which should have taken place in 2012 (five years after its coming into force), was not finalized yet in 2016. Though, the setting up of the Expert Commission eventually happened and, after having worked for six months in 2016, the report should be sent to the Federal Parliament in 2017
- Despite the repeated calls of UNIA for an Inter-federal Action Plan against Racism (i.e. in the 2014 Memorandum drafted by UNIA in view of the Federal, Regional and European elections of 25 May 2014), the 2014 Governmental Agreement enshrines no commitment in this respect. However, the Secretary of State in charge of Equal Opportunities had outsourced a study on the feasibility of such a plan to the University of Ghent (Prof. Eva Brems & Dr Saila Ouald Chaib) and the study was released in September 2016. This could be a starting point to relaunch this project.
- As recently highlighted by the Commissioner for Human rights of the Council of Europe following his visit in Belgium in September 2015,<sup>499</sup> the situation of Roma and travellers in Belgium is still worrying regarding housing and education. Despite the adoption of some measures by the federated entities, it seems there is a lack of political will to improve the precarious situation of these vulnerable groups. It remains to be seen how the Belgian National Roma Platform set up in 2016 is going to improve the situation.
- In its evaluation report conducted in 2015 and published beginning of 2016, UNIA pointed out that the fight against discrimination is not a priority for the competent judiciary, administrative and disciplinary authorities and that the Anti-discrimination legislation is not well applied.<sup>500</sup>

### 3) Issue of effectiveness

- A fair amount of cases decided in court show that there is still a noticeable lack of knowledge of the anti-discrimination law by the professionals in charge of its implementation, especially of the notion of indirect discrimination.
- As pointed out in the 2014 ECRI report on Belgium, there is still a shortage of properly equipped transit sites for Travellers, in particular in the Walloon Region and in the Brussels-Capital Region. This was also stressed by the Committee on the Elimination

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<sup>495</sup> See the 2014 Memorandum drafted by the Inter-federal Centre for Equal Opportunities in view of the Federal, Regional and European elections of 25 May 2014, available through the following link: <http://www.UNIA.be/en/elections-2014-memorandum>.

<sup>496</sup> UNIA report, Evaluation of the Anti-discrimination Federal Acts (...), February 2016, p. 67 [www.UNIA.be/en](http://www.UNIA.be/en).

<sup>497</sup> Paras. 24–25.

<sup>498</sup> See the 2014 Memorandum drafted by the Inter-federal Centre for Equal Opportunities in view of the Federal, Regional and European elections of 25 May 2014, available through the following link: <http://www.UNIA.be/en/elections-2014-memorandum>.

<sup>499</sup> Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Belgium from 14 to 18 September 2015, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>.

<sup>500</sup> UNIA report, Evaluation of the Anti-discrimination Federal Acts (...), February 2016, pp. 10 and 53 [www.UNIA.be/en](http://www.UNIA.be/en).



of Racial Discrimination in its Concluding observations on the sixteenth to nineteenth periodic reports of Belgium<sup>501</sup> and by the Commissioner for Human Rights of the Council of Europe, after its last visit in Belgium, in September 2015.<sup>502</sup>

- As underlined by the two Barometers of UNIA in employment and housing, there are still many discriminatory practices in these fields. As OECD and the European Commission, the 2015 second Socio-Economic monitoring stresses and underlines the alarming situation of inequalities on the Belgian Labour market. This was also stressed by the Committee on the Elimination of Racial Discrimination:

'despite numerous measures taken by the State party at the Federal, Regional and Community levels, migrants and persons of foreign origin continue to face obstacles to the full enjoyment of economic, social and cultural rights. In particular, the Committee is concerned at reports that persons of foreign origin, especially those from non-European Union countries, face structural discrimination in the field of employment, where 'ethnic stratification' seems to exist. The Committee is further concerned at difficulties faced by such persons in accessing housing (Article 5)'.<sup>503</sup>

The Federal State, the Communities and the Regions should take appropriate measures to tackle such issues. In this regard, it is worth mentioning some figures available on the website of UNIA. In 2015, 301 new cases related to discrimination or hatred against Muslims were reported to UNIA. Most of the messages of hatred came from Internet and media in general (55%). But there were also a lot of complaints related to discrimination in employment (14%) and education (11%). Moreover, in 2014, UNIA registered 130 cases of anti-Semitism and/or Holocaust denial out of 4.627 complaints. This showed a very important increase comparing to 2013 (85 cases).<sup>504</sup> It is nevertheless worth noting that, in 2015, there has been a marked decrease in anti-Semitic reports (53 reports, which resulted in the opening of 20 files), which could mean that antisemitism is rather a cyclical phenomenon in Belgium.<sup>505</sup>

- Concerning the rights of people with disabilities, at least two points stressed by the UN Committee for the protection of persons with disabilities, which echo the above-mentioned observations, are noteworthy. First, the Committee expresses its concern about the

'poor accessibility for persons with disabilities, the absence of a national plan with clear targets and the fact that accessibility is not a priority. It notes that government action has focused primarily on accessibility for persons with physical disabilities and that few measures have been taken to promote accessibility for persons with hearing, visual, intellectual or psychosocial disabilities'.<sup>506</sup> Moreover, the Committee notes 'the low number of persons with disabilities in regular employment' and 'the Government's failure to reach targets for the employment of persons with disabilities within its own agencies, as well as the lack of a quota in the private sector'.<sup>507</sup>

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<sup>501</sup> CERD/C/BEL/CO/16-19, 14 March 2014, paras. 18-19.

<sup>502</sup> Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Belgium from 14 to 18 September 2015, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2879548&SecMode=1&DocId=2349344&Usage=2>.

<sup>503</sup> Committee on the Elimination of Racial Discrimination, Concluding observations on the sixteenth to nineteenth periodic reports of Belgium, CERD/C/BEL/CO/16-19, 14 March 2014, para. 15.

<sup>504</sup> Available on the website of the Centre ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>505</sup> Annual report of UNIA 2015 (*Discrimination – Diversité*), p. 42, available on its website ([www.UNIA.be/en](http://www.UNIA.be/en)).

<sup>506</sup> Committee on the Rights of Persons with Disabilities, concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session (15 September – 3 October 2014), para. 21 – 22.

<sup>507</sup> Committee on the Rights of Persons with Disabilities, concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session (15 September – 3 October 2014), para. 38 – 39.

#### 4) Religious symbols

The numerous judicial rulings involving the highest courts in Belgium (such as the Constitutional Court or the Council of State) show that the issue of religious symbols (and actually, the wearing of the Islamic veil) is still a very controversial one in Belgium (sections 3.2.8 and 4.2 above).

In the 2014 Memorandum drafted by UNIA in view of the Federal, Regional and European elections of 25 May 2014), this equality body 'recommends that each political entity in our country begins a process of reflection on the issue of convictional signs related to the neutrality requirement in order to achieve the clearest possible normative situation'.

## 12 LATEST DEVELOPMENTS IN 2016

### 12.1 Legislative amendments

A Decree establishing the composition of an expert Commission for the assessment of the 2007 Anti-discrimination Acts was adopted on 18 December 2015.<sup>508</sup> The Decree provides that the expert Commission is composed of 12 effective members appointed by the King (i.e. the Federal Government). The Commission includes two representatives of the judiciary, two representatives of the Bar, four representatives of the National Labour Council (*Conseil national du travail*) and four actors with knowledge and specific experiences in the field of non-discrimination. The experts were suggested by the Federal Secretary of State in charge of Equal opportunities to the King (Article 2). The double parity (gender – male/female –, linguistic – Dutch/French speaking) had to be respected. The Interfederal Centre for equal opportunities (UNIA) is in charge of the secretariat of the Commission (Article 4). The Expert Commission was set up in 2016 and started working in the Autumn. The final report should be presented before the Federal Parliament in 2017 and made public at the same time.

### 12.2 Case law

#### Religion/Belief

**Name of the Court:** The Court of First Instance ('Tribunal des référés') of Liège

**Date of decision:** 4 October 2016

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

**Brief summary:** The Graduate School 'Haute Ecole Province de Liège' prohibited, in its internal regulation, the wearing of jewellery, signs or clothing that express political, philosophical or religious beliefs inside the school. Sixteen students claimed that this regulation violated their fundamental freedoms and that it was discriminatory.

In its judgment, the Court considered this measure was not necessary and proportionate regarding the pursued aimed that could be attained by an interdiction of proselytism or by the prohibition to miss classes on the ground of religious beliefs. The principle of individual freedom and of pacific manifestation of its convictions must remain the rule and the limitations must be strictly framed. The fact that the public subject to this limitation is adult must, moreover, be taken into consideration.

#### Disability

**Name of the Court:** Labour Tribunal of Liège

**Date of the decision:** 20 June 2016

**Address of webpage:** <http://www.unia.be/en>

**Brief summary:** The Labour Tribunal of Liège condemned a driving school for discrimination against an obese candidate on grounds of disability and physical characteristic.<sup>509</sup> The case concerns a man, M. B. who applied to a driving school as driving instructor. The driving school manifested its interest in M. B.'s profile and invited him for an interview. Two days after the interview, M. B got an email from the driving school rejecting its application. In the email, the driving school explained to M. B that his 'physical profile' did not match with the company. He was also asked whether he had already thought about losing weight, which is a handicap for this kind of job. Following that reply, M. B

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<sup>508</sup> Decree of 18 November 2015 establishing the composition of the Expert Commission, the appointment of the experts as well as the form and the content of the report which has to be presented according to article 52, para. 3 of Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination (Arrêté royal du 18 novembre 2015 fixant la composition de la Commission d'experts, leur désignation, et la forme et le contenu concret du rapport qui doit être présenté en exécution de l'article 52, § 3, de la loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination), *M.B.*, 2 December 2015.

<sup>509</sup> Labour Tribunal of Liège, 20 June 2016, <http://www.UNIA.be/en>.

contacted UNIA which tried to conciliate all the parties. However, the attempt of conciliation failed. M. B decided to bring the case before Court. UNIA intervened in support of the applicant. In its judgment, the Tribunal extensively explained the Belgian anti-discrimination law as well as the Kaltoft case decided by the European Court of justice.<sup>510</sup> As a reminder, in the Kaltoft case, the Court dealt with the question of whether obesity can be considered as falling into the scope of the protected ground of disability. On this basis, the Tribunal judged that even though obesity is not a protected ground as such, it is seen as a disability – which is a protected ground – when it constitutes a barrier to participating in professional life on the same basis as other workers. The Tribunal underlined that it is not important in the present case that M D. effectively suffers from morbid obesity – which is a disability as such – since the driving school implied it. In any case, according to the Tribunal, the reasons which grounded the refusal of M B.'s application correspond to the ground of disability or at least and undoubtedly to the ground of 'physical characteristic' – which is another protected ground enshrined in the General Anti-discrimination Federal Act. As a consequence, M B. was victim of a direct discrimination – and not of an indirect discrimination-, in opposition to the advice of the public prosecutor.

**Name of the Court:** Labour Tribunal of Brussels

**Date of the decision:** 16 September 2016

**Address of webpage:**

[http://unia.be/files/Documenten/Rechtspraak/Tribunal du travail francophone\\_16\\_septembre\\_2016.pdf](http://unia.be/files/Documenten/Rechtspraak/Tribunal du travail francophone_16_septembre_2016.pdf)

**Brief Summary:** The 16 September 2016, the Labour Tribunal of Brussels, relying on the General Anti-discrimination Federal Act, condemned a company for having directly discriminated on the ground of the current or future state of health a worker suffering a tendonitis and asking for a part-time for medical reason. The employer refused this request and dismissed the worker a few weeks later. The Labour Tribunal nevertheless did not consider that the worker had the right to benefit of reasonable accommodations since there was no sufficient evidence of the sustainable character of her disease. It is not cristal clear out of the reasoning of the Court whether a long-term disease would have qualified as a disability and therefore open a right to reasonable accommodation. The employer was condemned to pay a compensation of EUR 20 000 to the victim of the discriminatory dismissal.

**Name of the Court:** Labour Tribunal of Ghent

**Date of the decision:** 25 October 2016

**Address of webpage:**

[http://unia.be/files/Documenten/Rechtspraak/Arbeidsrechtbank Gent\\_25\\_oktober\\_2016.pdf](http://unia.be/files/Documenten/Rechtspraak/Arbeidsrechtbank Gent_25_oktober_2016.pdf)

**Brief summary:** The Labour Tribunal of Ghent condemned, the 25 October 2016, a company for having dismissed an employee which has been on long-term sick leave and which got pregnant during this leave. The dismissal was motivated on the fact that the 'continuity of her work was compromised'. The employee was suffering a cancer. The Tribunal first considered that the employee had not sufficiently demonstrated the possible existence of a discrimination based on gender grounds. Conversely, the worker had, in the opinion of the Tribunal, produced enough evidence of the possible existence of a discrimination on the ground of her state of health. The employer had, thus, to produce evidence of the fact that the dismissal was not based on the state of health of the worker. Since this proof was not given by the employer, the Tribunal had to assess whether the difference in treatment based on the state of health could be reasonably justified. According to the tribunal, this may be the case in three situations: (i.) if the difference in treatment pursues a legitimate aim and respects the principle of proportionality, (ii.) if the difference in treatment is imposed by law, (iii.) if it constitutes a lawful positive action. The Tribunal considered that the dismissal did not fall in the scope of any of these exceptions.

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<sup>510</sup> CJEU, Judgment in Kaltoft, C-354/13, ECLI:EU:C:2014:2463.

The Tribunal therefore considered that the dismissal was contrary to the General Anti-discrimination Federal Act of 2007 since it constituted an unjustified direct discrimination on the ground of the state of health of the worker. The company was condemned to pay a compensation of 6 months' salary and a fine of one euro for symbolic compensation requested by Unia (which was party to the proceedings).

## **Age**

**Name of the Court:** Labour Court of Brussels

**Date of the decision:** 18 November 2016

**Address of webpage:**

<http://unia.be/fr/jurisprudence-alternatives/jurisprudence/cour-du-travail-bruxelles-18-novembre-2016>

**Brief summary:** The Labour Court of Brussels considered justified that a self-employed person aged of more than 65 years who decided, on a voluntary basis, to continue working, could not benefit from the status of working incapacity and the indemnities attached to it. The Court found that the social security system did not entail an exact proportionality between contributions and benefits. It stressed that the aim of this distinctive treatment was to maintain the equilibrium of the social security system. Moreover, it underlined that a person aged of more than 65 years incapable to work could benefit from a retirement pension.

**Name of the Court:** Labour Tribunal of Ghent

**Date of the decision:** 2 May 2016

**Address of webpage:** <http://www.UNIA.be/en>.

**Brief summary:** On 2 May 2016, the Labour Tribunal of Ghent condemned a company for having directly discriminated against a 59-year-old-applicant in a recruitment procedure. M. S. (the victim), a 59-year-old-man, applied to a company (the defendant) for a job as an independent kitchen seller in a famous kitchen seller company in Flanders, on the basis of a vacancy published online. He received the following reply: Dear M, you seem like having the perfect profile for the job except to your age – I am sorry for being so straightforward about this but it is probably better that you know the reason why I do not invite you for interview. The applicant reported the case to Unia, which launched a conciliation procedure which failed. As a consequence, Unia decided to bring the case before the Labour Tribunal of Ghent. On 2 May 2016, the Labour Tribunal of Ghent judged that M.S. had 'undoubtedly' ('onmiskienbaar') been directly discriminated against on grounds of age. The Tribunal dismissed the argumentation of the company. It stated that the fact that the company had negative experiences with older workers because they supposedly had encountered troubles with software programs couldn't be considered as an objective justification. Therefore, the judge rejected the stereotyped view according to which older candidate are less likely to deal with software programs. On this ground, in an in-depth reasoning, the jurisdiction sentenced the company. Firstly, it ordered the immediate cessation of the discriminatory practice, under the threat of financial penalties (*astreintes*) (EUR 1.000 for each new offence) (Article 20 of the General Antidiscrimination Federal Act). Secondly, it imposed the publicity of the judgment by the posting of the decision – during one month – at the company headquarters – where it could be visible for the workers and the next candidates for a job – and in the shops of the company – where it could be visible for clients and members of the Board. Interestingly, the Tribunal judged that the publication of the decision in newspapers would be disproportionate. Finally, it sentenced the defendant to pay moral and material damages of EUR 25. 000 to the victim which correspond to 6 months of remuneration determined *ex aequo et bono*. This highly publicised case helped Unia highlighting the importance of structurally fighting against age discrimination in employment.

## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country:** Belgium  
**Date:** 1 January 2017

<b>Title of legislation (including amending legislation)</b>	<p>Title of the Law: Act criminalising certain acts inspired by racism or xenophobia.</p> <p>Abbreviation: Racial Equality Federal Act.</p> <p>Date of adoption: 30 July 1981.</p> <p>Latest amendments: amended by the Acts of 12 April 1994, of 7 May 1999, of 20 January 2003 and of 10 May 2007.</p> <p>Entry into force: 9 June 2007 (entry into force of the Federal Act of 10 May 2007 amending the Act of 30 July 1981).</p> <p>Latest amendments: 17 August 2013.</p> <p>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></p> <p>Grounds covered: Alleged race, colour, origin, ethnic and national origin and nationality.</p>
	Civil, administrative and criminal law.
	<p>Material scope: Access to and provision of goods and services including private housing; labour relations; social advantages; social protection; 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; economic, social, cultural or political activities normally accessible to the public.</p>
	<p>Principal content: Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment; civil remedies, and criminal provisions</p>
<b>Title of legislation (including amending legislation)</b>	<p>Title of the law: Act pertaining to fight against certain forms of discrimination.</p> <p>Abbreviation: General Antidiscrimination Federal Act.</p> <p>Date of adoption: 10 May 2007.</p> <p>Latest amendments: 17 August 2013.</p> <p>Entry into force: 9 June 2007.</p> <p>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></p> <p>Grounds covered: 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 and language, genetic characteristic and social origin</p>
	Civil, administrative and criminal law.
	<p>Material scope: Access to and provision of goods and services including private housing; labour relations; social advantages; social protection; 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; economic, social, cultural or political activities normally accessible to the public.</p>
	<p>Principal content: Prohibition of direct and indirect discrimination, Including instruction to discriminate and harassment; civil remedies, and criminal provisions</p>
<b>Title of legislation</b>	<p>Title of the law: Decree on proportionate participation in the employment market (Flemish Community/Region).</p>

<b>(including amending legislation)</b>	<p>Abbreviation: /</p> <p>Date of adoption: 8 May 2002.</p> <p>Entry into force: 1 October 2002.</p> <p>Latest amendments: 10 December 2010.</p> <p>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></p> <p>Grounds covered: Gender, alleged race, ethnic origin, religion or belief, disability, age and sexual orientation.</p> <p>Civil, administrative and criminal law.</p> <p>Material scope: Access to employment, vocational training, promotion, working conditions, but only applicable to a) labour market intermediaries; b) the public authorities of the Flemish Region/Community, including the field of education; c) the other employers with respect only to vocational training and integration of persons with disabilities in the labour market.</p> <p>Principal content: Prohibition of direct and indirect discrimination, instruction to discriminate and harassment.</p>
<b>Title of legislation (including amending legislation)</b>	<p>Title of the Law: Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region).</p> <p>Abbreviation: The Flemish Framework ET Decree.</p> <p>Date of adoption: 10 July 2008.</p> <p>Entry into force: 3 October 2008.</p> <p>Latest amendments: 28 March 2014.</p> <p>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></p> <p>Grounds covered: All grounds of Article 19 TFEU<sup>511</sup> plus colour, ancestry or national origin, civil status (married/non married), birth, wealth/income, state of health, physical or genetic characteristics, political opinions, language, social position, nationality, trade union opinion.</p> <p>Civil, administrative and criminal law.</p> <p>Material scope: In the field of competences of the Flemish Community/Region: employment policy, health care, education, goods and services available to the public (i.e. housing, energy, cultural services), social advantages, economical, social, cultural and political activities outside the private sphere.</p> <p>Principal content: Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment; civil remedies, and criminal provisions.</p>
<b>Title of legislation (including amending legislation)</b>	<p>Title of the Law: Decree on the fight against certain forms of discrimination (French Community).</p> <p>Abbreviation: The French Community ET Decree.</p> <p>Date of adoption: 12 December 2008.</p> <p>Entry into force: 23 January 2009.</p> <p>Latest amendments: 5 December 2013.</p> <p>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></p> <p>Grounds covered: All grounds listed in Article 19 TFEU 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, trade union opinion.</p> <p>Civil, administrative and criminal law.</p>

<sup>511</sup> Pregnancy, birth, maternity leave and transgender are assimilated to the ground of gender.



	<p>Material scope: Selection, promotion, working conditions, including dismissals and pay regarding its own public service, education and vocational training, health policy, social advantages, membership of, and involvement in a professional organisation funded by the French Community, access to goods and services at disposal of the public as long as they fall into the field of competence of the French Community.</p> <p>Principal content: 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.</p>
<b>Title of legislation (including amending legislation)</b>	<p>Title of the Law: Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (Walloon Region).  Abbreviation: The Walloon ET Decree.  Date of adoption: 6 November 2008.  Latest amendments: 12 January 2012.  Entry into force: 30 December 2008.  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>  Grounds covered: All grounds listed in Article 19 TFEU plus nationality, colour, ancestry and national or social origin, civil status (married/non married), birth, wealth/income, political opinion, trade union opinion, language, present or future state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave, gender reassignment and transgender.</p> <p>Civil, administrative and criminal law.</p> <p>Economy; employment and vocational training in the public and the private sectors; social protection, including health care; social advantages; access to and supply of goods and services 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 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.</p> <p>Principal content: 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.</p>
<b>Title of legislation (including amending legislation)</b>	<p>Title of the law: Decree aimed at fighting certain forms of discrimination (German-speaking Community).  Abbreviation: The German Community ET Decree.  Date of adoption: 19 March 2012.  Latest amendments: /  Entry into force: 15 June 2012.  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>  Grounds covered: nationality, alleged race, skin colour, origin, national or ethnic origin, age, sexual orientation, religious or philosophical belief, disability, sex, pregnancy, motherhood, childbirth, gender reassignment, civil status, birth, property, political or trade union opinion, language, actual or future state of health, physical or genetic characteristic, social origin.</p> <p>Civil, administrative and criminal law.</p> <p>Material scope: labour relations, education, employment, social advantages, cultural matters, person-related matters and access to, and supply of, goods and services available to the public.</p>



	Principal content: 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.
<b>Title of legislation (including amending legislation)</b>	<p>Title of the Law: Ordinance related to the fight against discrimination and equal treatment in the employment field (Region of Brussels-Capital).  Abbreviation: Brussels ET Ordinance.  Date of adoption: 4 September 2008.  Entry into force: 26 September 2008.  Latest amendments: 14 July 2011.  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>  Grounds covered: All grounds listed in Article 19 TFEU plus political opinion, civil status (married/non married), birth, wealth/income, language, state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave, transgender, nationality, colour, ancestry, national or social origin, trade union belief.</p> <p>Civil, administrative and criminal law.</p> <p>Material scope: Employment field which covers, at that regional level, the placement of workers policies and the policies dedicated to unemployed persons.</p> <p>Principal content: Prohibition of direct and indirect discrimination, harassment and sexual harassment and instruction to discriminate; civil remedies, and criminal provisions.</p>
<b>Title of legislation (including amending legislation)</b>	<p>Title of the Law: Ordinance related to the promotion of diversity and the fight against discrimination in the civil service of the Region of Brussels-Capital.  Abbreviation: The Brussels Civil Service ET Ordinance.  Date of adoption: 4 September 2008.  Latest amendments: /  Entry into force: 26 September 2008.  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>  Grounds covered: All grounds listed in Article 19 TFEU plus political opinion, civil status (married/non married), birth, wealth/income, language, state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave, transgender, nationality, colour, ancestry, national or social origin.</p> <p>Civil, administrative and criminal law.</p> <p>Material scope: Employment field in the civil service of the Region of Brussels-Capital: access conditions, criteria selection, promotion, work conditions, including dismissals and pay.</p> <p>Principal content: Prohibition of direct and indirect discrimination, harassment and sexual harassment and instruction to discriminate; civil remedies, and criminal provisions.</p>
<b>Title of legislation (including amending legislation)</b>	<p>Title of the Law: Decree on equal treatment between persons in vocational training (Commission communautaire française [Cocof]).  Abbreviation: /  Date of adoption: 22 March 2007.  Latest amendments: 5 July 2012.  Entry into force: 24 January 2008.  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>  Grounds covered: All grounds (open list of suspect criteria).</p> <p>Administrative and disciplinary.</p> <p>Material scope: Vocational training, including vocational guidance, learning, advanced vocational training and retraining.</p>

	Principal content: Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment.
<b>Title of legislation (including amending legislation)</b>	<p>Title of the Law: Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (Commission communautaire française [Cocof]).</p> <p>Abbreviation: The Cocof ET Decree.</p> <p>Date of adoption: 9 July 2010.</p> <p>Latest amendments: /</p> <p>Entry into force: 3 September 2010.</p> <p>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></p> <p>Grounds covered: 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, origin and national, ethnic or social origin.</p>
	Civil, administrative and criminal law.
	Material scope: 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; access to and supply of goods and services; access, participation and any other exercise of economic, social, cultural or political activities publicly available; labour relations within public institutions of the Cocof.
	Principal content: 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.

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country:** Belgium  
**Date:** 1 January 2017

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd.mm. YYYY</b>	<b>Date of ratification (if not ratified please indicate) Dd.mm. YYYY</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)	04.11.1950	14.06.1955	No	N/A	Yes
Protocol 12, ECHR	04.11.2000	Not ratified	N/A	N/A	N/A
Revised European Social Charter	03.05.1996	2.03.2004	No	Ratified Protocol on collective complaints on 23.6.2003	Yes
International Covenant on Civil and Political Rights	10.12.1968	21.04.1983	No	Ratified Optional Protocol on 17.5.1994	Yes
Framework Convention for the Protection of National Minorities	3.07.2001	Not ratified	N/A	N/A	N/A
International Covenant on Economic, Social and Cultural Rights	12.12.1968	21.04.1983	No	N/A	Yes
Convention on the Elimination of All Forms of Racial Discrimination	17.08.1967	7.08.1975	No		Yes
Convention on the Elimination of	17.07.1980	10.07.1985	No	Ratified Optional Protocol 17.6.2004	Yes

<b>Instrumen t</b>	<b>Date of signature (if not signed please indicate) Dd.mm. yyyy</b>	<b>Date of ratificatio n (if not ratified please indicate) Dd.mm. yyyy</b>	<b>Derogations / reservations relevant to equality and non- discriminatio n</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Discrimina- tion Against Women					
ILO Convention No. 111 on Discriminati on	25.06.1958	22.03.1977	No		Yes
Convention on the Rights of the Child	16.01.1990	16.12.1991	No	N/A	Yes
Convention on the Rights of Persons with Disabilities	30.03.2007	2.07.2009	No	Ratified Optional Protocol on 2.7.2009	Yes

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