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Country report

Gender equality



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Country report

Gender equality

How are EU rules transposed into
national law?

Belgium

Jean Jacqmain

Reporting period 1 January 2017 – 31 December 2017

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1. Introduction

1.1 Basic structure of the national legal system

Given the federal structure of Belgium, vocational orientation and training fall within the exclusive jurisdiction of the federate authorities, i.e. Communities and Regions, which is also true for various other matters such as education (including school staff) or public housing (within the scope of Directive 2004/113/EC). This causes extreme confusion and some significant gaps still remain in the transposition of EU law, although since 2008 every one of the federate authorities has adopted new legislation, usually inspired by federal legislation.

The Act of 10 May 2007 'aimed at combating discrimination between women and men' ('the Gender Act')¹ is the legislative instrument which implements all EU directives concerning gender equality within the jurisdiction of the federal Parliament.

Articles 5 and 6 of the Act of 10 May 2007 apply, *inter alia*, to working conditions including pay, to occupational social security schemes, and to any persons concerned. It deals with certain aspects of access to employment (e.g. in the federal public services, or concerning the standard conditions of access to the professions), but other aspects fall within the jurisdiction of the federate authorities (e.g. in their own public services, or concerning the management of the labour market). Vocational training is almost entirely a Community matter.

1.2 List of main legislation transposing and implementing Directives

At the federal level:

- Act of 10 May 2007 aimed at combating discrimination between women and men, usually known as the 'Gender Act';
- Working Conditions Act of 16 March 1971;
- Well-Being at Work Act of 4 August 1996;
- Act of 22 April 2012 aimed at combating the pay gap between men and women, as amended by the Act of 12 July 2013;
- Collective Agreement No. 25 of 15 October 1975 concerning equal pay for male and female workers.

At the federate level:

- Flemish Community and Region: *decreet* (legislative instrument) of 8 May 2002 'concerning proportional participation in the labour market' and *decreet* of 10 July 2008 'on the framework for the Flemish policy of equal opportunities and equal treatment';
- French-speaking Community: *décret* of 12 December 2008 'aimed at combating certain forms of discrimination;'
- German-speaking Community: *Dekret* of 19 March 2012 'aimed at combating certain forms of discrimination;'
- Walloon Region: *décret* of 6 November 2008 'aimed at combating certain forms of discrimination;'
- Brussels Capital Region: two *ordonnances/ordonnanties* of 4 September 2008, one 'concerning the fight against discrimination and concerning equal treatment in employment' and the other 'aimed at promoting diversity and combating discrimination within the Regional civil service;'

¹ All legal instruments quoted are available in French and Dutch at www.juridat.be, accessed on 13 September 2015.

- French-speaking Community Commission (competent in matters devolved from the French-speaking Community in the Brussels Capital Region): *décret* of 22 March 2007 'concerning equal treatment in vocational training' and *décret* of 9 July 2010 'aimed at combating certain forms of discrimination and implementing the principle of equal treatment.'

2. General legal framework

2.1 Constitution

2.1.1 Does your national Constitution prohibit sex discrimination?

Yes. While Article 10 (2) provides that 'Belgians are equal before the law' (a wording which has never varied since its original adoption in 1831), an Act of 21 February 2002 inserted an additional Paragraph 3: 'Equality between women and men is guaranteed'. The same Act also inserted Article 11*bis*, Paragraph 1 of which reads: 'Laws or [legislative acts of federate authorities] guarantee that women and men may equally exercise their rights and freedoms, and in particular promote their equal access to elective and public mandates.' The remainder of Article 11*bis* then provides that the federal and federate governments must be composed of persons of both sexes, and that the legislative instruments of the respective authorities must impose the same rule upon the composition of all public executive bodies at subordinate levels of administration (e.g. the Board of Mayor and Aldermen of a local council).

2.1.2 Does the Constitution contain other Articles pertaining to equality between men and women?

No.

2.1.3 Can the Article(s) mentioned in the two previous questions be invoked in horizontal relations (between private parties)?

There is no straight answer to this question, as academic opinion has been bitterly divided for quite a long time on the general issue of the direct horizontal effect of constitutional provisions. Oddly enough, this controversy has little practical relevance given that the doctrine of indirect horizontal effect is adhered to uniformly. In other words, when private parties are litigating, it is for the courts to decide whether the legal norms on which they (or one of them) rely are compatible with higher norms. If the disputed norm is of an executive nature (regulations), the court itself must perform the test of compatibility, as stated in Article 159 of the Constitution. If the disputed norm is of a legislative nature, the court is bound to refer to the Constitutional Court for a preliminary ruling. If the dispute involves compatibility with an EU instrument, the court is bound to refer to the CJEU.

Although so far no relevant case law is known, Article 10 (3) of the Constitution is of potentially crucial importance as the various legislative instruments concerning equal treatment (see above) provide that they may not be relied upon in order to challenge discrimination which results from another legislative instrument; in such an eventuality, the court is bound to question the Constitutional Court as to the compatibility of the disputed provision with Article 10 (3) of the Constitution (supposing that the alleged gender discrimination does not fall within the material scope of EU law).

2.2 Equal treatment legislation

2.2.1 Does your country have specific equal treatment legislation?

Yes, at the federal level the Gender Act of 10 May 2007 prohibits sex discrimination, while two sister anti-discrimination Acts adopted on the same date contain provisions to combat discrimination on the ground of other criteria: the Race Act, the scope of which coincides with that of Directive 2000/43/EC; and the Discrimination in General Act. This latter Act deals with twelve criteria, including those mentioned in Directive 2000/78/EC, some others mentioned in Article 21 of the Charter of Fundamental Rights of the European Union such as 'fortune', and some criteria developed at the national level, such as 'health'. At the

federate level, all legislative instruments mentioned above deal with sex among all those various criteria.

It must here be mentioned that, given that all federate pieces of legislation are inspired by their federal counterparts, in order to keep this report manageable they will not be referred to hereafter unless this is unavoidable.

3. Implementation of central concepts

3.1 Sex/gender/transgender

3.1.1 Are the terms gender/sex defined in your national legislation?

No.

3.1.2 Is discrimination due to gender reassignment explicitly prohibited in your national legislation?

Yes. Under Article 4(2) of the Gender Act, a horizontal provision, discrimination on the ground of gender reassignment is to be regarded as gender discrimination.

Moreover, an Act of 22 May 2014 inserted a new paragraph (no. 3) in Article 4 to provide that discrimination on the ground of 'gender identity or gender expression' is also to be regarded as gender discrimination. Although the *Conseil d'État/ Raad van State* (Administrative Court), in its capacity of a legal adviser to the federal government, had recommended that the proposed provision should define those new concepts, such definitions are only to be found in the statement of purpose of the Act,² which refers rather verbosely to non-binding instruments.³

3.2 Direct sex discrimination

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Yes, the concept of sex discrimination is defined in Article 5 of the Gender Act. The distinction between direct and indirect discrimination was introduced in compliance with EU law, including the successive definitions of indirect discrimination (from Directive 97/80/EC to Directive 2006/54/EC), and these notions are commonly accepted. However, the settled case law (be it constitutional, civil or administrative) considers that any discrimination, direct or indirect, is potentially justifiable.

This contradiction with the CJEU's stance induced the following artificial solution, embodied in the new anti-discrimination legislation of 10 May 2007 (three Acts aimed respectively at implementing Directive 2000/43/EC, Directive 2000/78/EC, and all the gender equality directives). A difference is made between 'distinction' and 'discrimination': direct discrimination is a direct distinction which may not be justified; when the object of a direct distinction falls within the scope of EU law, there is direct discrimination for which no justification is permissible, unless the Act provides otherwise (see below), while if the object does not fall within the scope of EU law, i.e. it belongs exclusively to national law, even a 'direct distinction' may be justified.

3.2.2 Are pregnancy and maternity discrimination explicitly prohibited in legislation as forms of direct sex discrimination?

Under Article 4(1) of the Gender Act, a 'direct distinction' on the ground of pregnancy, giving birth and maternity is to be regarded as a 'direct distinction' on the ground of sex, i.e. direct discrimination.

² *Documents parlementaires/Parlementaire stukken*, 2013-2014, no. 3483/001, available in French and Dutch at <http://www.lachambre.be> or www.dekamer.be, accessed on 13 September 2015.

³ Mainly the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, available at <http://www.yogyakartaprinciples.org>, accessed on 13 September 2015.

Moreover, Article 17 states that the provisions aimed at protecting pregnancy and maternity, far from inducing gender discrimination, are a condition for an effective equal treatment of men and women.

3.2.3 Are there specific difficulties in your country in applying the concept of direct sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant

In a general way, the concept of direct discrimination is applied correctly. However, some hesitation can be perceived in cases such as the following one. In a small business, one female employee had complained of discrimination in pay; she was comparing herself with one male colleague. Thus, if there was gender discrimination, it was direct. However, the labour court of appeal immediately examined, and accepted, the cause of the justification (which was the difference in previous professional experience) offered by the employer.⁴ Technically, at least, this was admitting the justification of direct discrimination. The correct approach would have consisted of considering that given the difference in previous professional experience, the comparison was not possible.

Now that the Gender Act uses the different concepts of 'distinction' and 'discrimination' (see 3.2.1 above), there is even more space for such hesitation as it must first be established whether the disputed issue falls within or without the scope of EU law.

3.3 Indirect sex discrimination

3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Yes, under Article 19 of the Gender Act. The definition provided in Article 5 reproduced the definition in Directive 2002/73 (now Article 2(1)(b) of Directive 2006/54).

3.3.2 Is statistical evidence used in your country in order to establish a presumption of indirect sex discrimination? Please provide some examples of cases, if available.

Statistical material is mentioned in Article 33(3)(1) and (3) of the Gender Act as an element which may be used by an alleged victim of discrimination to contend that there is a *prima facie* case. However, there is no known case in which a statistical demonstration of the difference in treatment was required. Usually, the whole litigation is focused on the existence of an objective justification as neither the defendant nor the court dispute the difference. Still, concerning half-time career breaks of which female employees are by far the main users, on one occasion the Constitutional Court has refused, in a very off-handed way, to acknowledge an obvious difference in treatment (by simply noting that the disputed provision applied to men as well as women), but this must be regarded as an exception.⁵

3.3.3 Is in your view the objective justification test applied correctly by national courts? Please provide some examples of cases, if available.

Actually, there are few known cases concerning indirect gender discrimination. However, as mentioned above, in all matters not covered by EU law, an objective justification is admissible even when the discrimination is direct. Thus, in a country where 'discrimination-spotting' has become a national obsession, the courts are usually quite expert at assessing objective justification, along lines very similar to the *Bilka* test. Still, concerning negative gender effects of social policies, the CJEU's decision in Case C-229/89 *Commission v.*

⁴ Labour Court of Appeal in Brussels, judgment of 4 January 2005, (2005) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 451 with J. Jacquemain's case note.

⁵ Judgment no. 51/2008 of 13 March 2008. All judgments of the Constitutional Court are available in French, Dutch and German at www.constitutional-court.be, accessed on 13 September 2015.

*Belgium*⁶ set an example for lenience in such assessments, so that no indirect discrimination against women in the statutory unemployment insurance scheme has been challenged ever since. The gender pay gap should be an ideal battlefield for litigation against indirect discrimination, but after 40 years the case law concerning pay has remained extremely scanty.

3.3.4 Are there specific difficulties in your country in applying the concept of indirect sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

Nothing to report.

3.4 Multiple discrimination and intersectional discrimination

3.4.1 Is multiple discrimination – i.e. discrimination based on two or more grounds simultaneously – and/or intersectional discrimination – i.e. discrimination resulting from the interaction of grounds of discrimination which interact to produce a new and different type of discrimination – explicitly addressed in national legislation?

The concept of multiple discrimination is not used, and consequently not defined, by any statute in Belgium. This means that every element of a situation of multiple discrimination must be challenged separately in the light of one or several statutes; however, this may be done through the same proceedings. For instance, in one case relating to the dismissal of a female employee, the labour court⁷ found that the employer had demonstrated convincingly that he had not breached the rules on the protection of maternity (Act of 16 March 1971) or the prohibition on gender discrimination (Gender Act of 10 May 2007); however, the court found that the dismissal was grounded on “health status” (General Discrimination Act of 10 May 2007).

3.4.2 Is there any case law that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake)?

The only informative case involved the European Commission, which decided in 2004 to dismiss a number of teachers who had been hired to train staff members in various languages. All of them received pay in lieu of a period of notice, except that those who were less than two years short of the legal age of retirement had to work during the period of notice; it so happened that the latter were all women. When one of them complained of discrimination on the ground of age and sex, the labour court of appeal in Brussels found that the European Commission had not succeeded in refuting the *prima facie* case.⁸ However, the anti-discrimination legislation applicable to the facts of the case (age: Act of 25 February 2003; sex: Act of 7 May 1999) did not provide any fixed damage, so that the court allowed a lump sum of EUR 5 000 as reparation of the entire prejudice in tort law.

For the rest, one can think of several situations in which a better fitting phrase would have been ‘multi-layered discrimination,’ i.e. gender discrimination was hidden under an obvious difference in treatment which was not envisaged by Directives 2000/43/EC or 2000/78/EC, but could be challenged on the grounds of other instruments such as Articles 10 and 11 of the Constitution (the general principle of equality under the law) or Directive 97/81/EC (on the prohibition of discrimination against part-time workers).

In those cases (or rather ‘situations’, as for several of them a positive result was achieved without litigation), eliminating one type of discrimination meant getting rid of the other as

⁶ [1991-I-2205].

⁷ Labour Court of Ghent (division of Kortrijk), 25 October 2016, *Algemene Rol* n° 15/382/1, unreported.

⁸ Judgment of 13 November 2012, (2014) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 286; see Markey, L., ‘Discriminations multiples’, *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 279.

well, so that whether or not to raise the gender discrimination claim was largely a question of strategy or a function of circumstances (e.g. was there a woman willing to complain about gender discrimination?). Here is an example: Until 1 January 2000, part-time contractual employees in the public services were not entitled to seniority increments in their pay scales. Indirect discrimination against women was obvious and could have been challenged on the grounds of Article 119 EEC/141EC, now Article 157 TFEU (see the CJEU's decision in Case C-184/89 *Nimz*),⁹ but the public services' trade unions could not find any prospective claimants, given the risk of victimisation. The issue was resolved as from 1 January 2000 when Belgium had to transpose Directive 97/81/EC, as the authorities and the unions agreed that the principle of non-discrimination against part-time workers must be applied to pay as well as to other working conditions. When, much later on, a female employee claimed pay arrears for the period 1995-1999, the labour court of appeal in Brussels found that there had indeed been indirect discrimination against women.¹⁰

3.5 Positive action

3.5.1 Is positive action explicitly allowed in national legislation?

Positive action is regarded as a lawful justification for a 'direct distinction' (see above question 3.2.1). There is no requirement of positive action; on the contrary, Article 16 of the Gender Act imposes a set of conditions (developed previously by the Constitutional Court in a matter unrelated to EU law) which fits the CJEU's case law, but is expressed in a rather forbidding way. The implementation of the legal provision is conditional on an ancillary Royal Decree, which has not yet been formulated, so that the lawfulness of positive actions which had been undertaken under the previous (and less restrictive) gender equality legislation is uncertain. Moreover, while those previous examples of positive action had been authorized and performed within the scope of Directive 76/207/EEC, Article 16 is a horizontal provision within the Gender Act and should serve to implement Article 6 of Directive 2004/113/EC as well as Article 3 of Directive 2006/54/EC, which even further complicates the drafting of the required Royal Decree.

In order to be exhaustive, one must mention that a Royal Decree of 2 June 2012 was adopted on the grounds of Article 16 of the Gender Act, with a very limited scope: imposing a principle of quotas (not more than ⅓ of staff members of the same sex) for the upper ranks (university grade) of the federal civil service. Five years later on, no report on the effectiveness of that measure has been made public. However, even more recently a Royal Decree of 13 May 2015 applied the same principle to the federal scientific establishments.

3.5.2 Are there specific difficulties in your country in relation to positive action? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

Obviously, the absence of the Royal Decree mentioned above, nine years after the gender Act came into force, is the main difficulty, as for instance advertising vacant positions and a preference for male or female candidates as positive action remains direct discrimination, liable to civil and penal sanctions.

The only relevant case concerned direct discrimination against men in the statutory social security scheme for self-employed workers; when the Belgian government tried to claim that it was positive action in favour of women, the CJEU stated that Directive 79/7/EEC did not allow for such an exception to the principle of equal treatment.¹¹

⁹ [1991-I-297].

¹⁰ Judgment of 17 December 2010, (2012) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 29 with J. Jacquemain's case note.

¹¹ In Case C-373/89 *Integrity* [1990-I-4243].

3.5.3 Has your country adopted measures that aim to improve the gender balance in company boards?

Yes. The Act of 28 July 2011 inserted similar provisions in the Act of 21 March 1991 concerning the (federal) Economic Public Bodies, the Act of 19 April 2002 concerning the National Lottery, and the Company Code (concerning companies which are quoted on the stock exchange): on the board of directors at least $\frac{1}{3}$ of members must be of the other sex from the rest; as long as this quota is not fulfilled, a person belonging to the minority sex must be appointed to any vacant position and any appointment which does not comply with this rule is void. Moreover, the amended Company Code provides a specific sanction: as long as the composition of a board does not comply with the quota, any advantage (financial or otherwise) attached to the position of director is suspended for all the members of the board.

The provisions of the Act of 28 July 2011 are applicable to every concerned enterprise as from the following financial year. However, the new Article 518*bis* of the Company Code provided for considerable delays in its application: as to 'larger' companies, the delay only expired in 2017, and 'smaller' companies have two more years to comply.

3.5.4 Has your country adopted other positive action measures to improve the gender balance in some fields, e.g. in political candidate lists or political bodies? If so, please describe these measures.

Until 2014, Article 34.5 of the Special Act of 6 January 1989 concerning the Constitutional Court only provided that judges must belong to different sexes. Consequently, the bench of the Court is presently composed of ten men and two women. A special Act of 4 April 2014 amended the Special Act of 6 January 1989. Most of the amendments were aimed at improving procedural aspects, but one of them introduced a gender quota in the composition of the bench, along the following lines. There are twelve judges appointed for life at the Constitutional Court; six of them must have been either members of the Court of Cassation or the *Conseil d'État/Raad van State* (the highest administrative court), or professors of law at a university; the other six must have been Members of Parliament (federal or federate). The amendment (to Article 34.5 of the Special Act of 6 January 1989) provides that both sexes must be represented in each category, and that at least $\frac{1}{3}$ of the twelve judges must belong to each sex. That provision will come into force when the quota is achieved; meanwhile, a judge belonging to the less represented sex must be appointed whenever the previous two appointments did not enhance the representation of that sex.

As for political bodies, in order to implement Article 11*bis* of the Constitution (see above question 2.1.1), electoral legislation (at federal, federate and local levels) provides that the parity of sexes must be assured in all lists of candidates. In addition, the first two candidates on every list must be of different sexes. Given that the whole electoral system is proportional, this measure is highly effective. In contrast, a gender balance within political executive bodies strongly depends on the culture of the parties which compose the majority, so that it remains possible that a federal or federate government comprises one single woman in order to comply formally with Article 11*bis* of the Constitution.

3.6 Harassment and sexual harassment

3.6.1 Is harassment explicitly prohibited in national legislation?

It should first be stressed that harassment (*'harcèlement moral/pesterijen'* in Belgian legal terminology) and sexual harassment are hardly ever perceived or analysed as forms of gender discrimination. This is a paradox as Belgium was a pioneer in the EU when its second Act on gender equality in employment (Act of 7 May 1999) envisaged sexual harassment as gender discrimination, and as horizontal provisions (Article 5 (9) and (10) providing the definitions and Article 19 laying down the prohibition) of the present Gender

Act of 10 May 2007 correctly transposed Directives 2006/54/EC and 2004/113/EC in respect of harassment on the ground of sex and sexual harassment. However, since 2002 Belgium has also developed, within the Welfare at Work (i.e. Health and Safety) Act of 4 August 1996, an extensive machinery aimed at preventing and suppressing harassment, sexual harassment and 'violence at work' as such, i.e. regardless of whether it includes any dimension of discrimination. Moreover, in a particularly ill-advised attempt at legal simplification, Article 7 of the Gender Act provided that when an employee who falls within the scope of the Welfare at Work Act complains of harassment or sexual harassment, he/she must rely exclusively on the latter Act.

Consequently, since 2007 there has been no case law in which harassment or sexual harassment at work was challenged as gender discrimination. However, Article 32^{ter} of the Welfare at Work Act was later amended by an Act of 28 February 2014 and now states that harassment, sexual harassment and violence at work may be related (but not necessarily) with one of the criteria mentioned in the three anti-discrimination Acts of 10 May 2007, and that it transposes Directives 2000/43/EC, 2000/78/EC and 2006/54/EC in that respect. The latter statement is questionable in that for the definition of harassment provided in Article 32^{ter} to apply, there must have been a succession of several harmful facts, a requirement which does not appear in any of the allegedly transposed directives.

3.6.2 Please specify the scope of the prohibition on harassment (e.g. does it cover employment and access to goods and services; is it broader?).

As mentioned above, Article 5 (9) and (10) and Article 19 are horizontal provisions within the Gender Act; thus, the definitions of harassment on the ground of sex and sexual harassment, and the prohibition of such behaviour are applicable within the scope of Directive 2004/113/EC as well. They also apply to other matters included in the material scope of the Gender Act, such as statutory social security schemes, 'social advantages' as meant in Article 7 (2) of Regulation 1612/68/EEC (now 492/2011/EU) on the freedom of movement of workers, and 'access to and participation in any economic, social, cultural or political activity open to the public.'

Quite apart from the legislation mentioned above (the Gender Act and the Welfare at Work Act), Article 442^{bis} of the Penal Code made 'harassment' (*harcèlement/belaging*)¹² a penal offence: 'when the perpetrator knew or should have known that another person's quietude would be seriously disturbed.' Penalties are imprisonment for 15 days up to 2 years and/or a fine of EUR 300 up to 1 800. Under Article 442^{ter}, those penalties may be doubled when one of the aggravating factors of the offence is hatred, contempt or hostility towards another person in respect of one of the criteria mentioned in the three anti-discrimination Acts of 10 May 2007. Finally, under the original Article 442^{bis}, public prosecution of the perpetrator was conditional on the victim's complaint; but this condition was removed by an Act of 25 March 2016.

3.6.3 Is sexual harassment explicitly prohibited in national legislation?

Yes; see above (question 3.6.1).

3.6.4 Please specify the scope of the prohibition on sexual harassment (e.g. does it cover employment and access to goods and services; is it broader?).

See above (question 3.6.2.).

3.6.5 Does national legislation specify that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of or submission

¹² There is a difference in terminology (for instance, the Dutch terms *belaging* and *pesterijen*), but this difference is inconsequential.

to such conduct amounts to discrimination (see Article 2(2)(a) of Directive 2006/54)?

Neither Article 19 of the Gender Act nor Article 32ter of the Welfare at Work Act makes any mention of the victim's attitude. However, case law does not reveal any difficulty in that respect.

3.7 Instruction to discriminate

3.7.1 Is an instruction to discriminate explicitly prohibited in national legislation?

Yes. Article 5 (12) of the Gender Act includes such an instruction in the material scope of the act and Article 19 states that it is prohibited as discrimination. There is no significant related case law.

3.7.2 Are there specific difficulties in your country in relation to the concept of instruction to discriminate? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

Nothing to report.

3.8 Other forms of discrimination

Are any other forms of discrimination prohibited in national law, such as discrimination by association or assumed discrimination?

There are no such provisions. However, concerning discrimination by association, the Labour Court in Leuven found that there had been discrimination (against a male employee whose child was disabled) in circumstances very similar to those of Case C-303/06 *Coleman*, under the Discrimination in General Act.¹³ Given that the three anti-discrimination Acts of 10 May 2007 use identical concepts, such case law could surely apply to gender discrimination as well. Concerning assumed discrimination, the case law known to the expert related to the Islamic *hijab* is entirely different from the suggested example: the victims of adverse treatment invariably complain of discrimination on the ground of religious beliefs and/or ethnic origin, but never on the ground of gender.¹⁴

¹³ Judgment of 12 December 2013, (2014) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 344.

¹⁴ See for instance the CJEU's decisions in Case C-157/15 *Achbita* and the rather similar French Case C-188/15 *Bougnaoui*.

4. Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54)

4.1 Equal pay

4.1.1 Is the principle of equal pay for equal work or work of equal value implemented in national legislation?

Yes. Equal pay is guaranteed both by Collective Agreement No. 25 of the National Labour Council, of 15 October 1975, concerning equal pay for male and female workers (only applicable to the private sector) and by the Gender Act of 10 May 2007 (which includes the public sector).¹⁵ Taken together, both instruments cover all aspects of the notion of pay within the scope of EU law, such as remuneration proper, be it *in specie* or *in natura*, tips, various bonuses, etc. and they include job classification schemes (Article 4 of Collective Agreement no. 25; Article 6 (2) (2) of the Gender Act). However, while Article 1 of the Collective Agreement mentions work of equal value, the Gender Act does not (obviously a mere omission in the drafting, as Article 2 states that the Act is aimed at transposing all EU instruments concerning gender equality).

4.1.2 Is the concept of pay defined in national legislation?

Throughout the whole labour legislation, there is no single and exhaustive definition of 'pay'; however, according to the social partners' comment on Article 4 of Collective Agreement no. 25, the concept must be understood in the broadest sense. Moreover, Article 4 states that 'remuneration' includes pay, tips, advantages provided by the employer, holiday bonuses and benefits provided under occupational social security schemes. Article 6 (2) (2) of the Gender Act is worded along similar lines (although occupational social security schemes are mentioned specifically under Article 6 (1) (4) as such schemes may concern self-employed workers as well). Thus, taken together those provisions comply with Article 157 (2) TFEU.

4.1.3 Does national law explicitly implement Article 4 of Recast Directive 2006/54 (prohibition of direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration)?

Yes. Article 1 of Collective Agreement no. 25 and Article 19 of the Gender Act both contain the prohibition of discrimination. Job classification is mentioned explicitly in Article 3 of the Collective Agreement and Article 6 (2) (2) of the Act.

4.1.4 Is a comparator required in national law as regards equal pay?

There is no legal provision concerning a comparator, hypothetical or otherwise. The case law concerning equal pay is so scanty that it does not reveal any particular difficulty in that respect.

4.1.5 Does national law lay down parameters for establishing the equal value of the work performed, such as the nature of the work, training and working conditions?

There are no legal provisions to lay down any such parameters. However, the Institute for the Equality of Women and Men (the federal 'equality body' as meant in Article 20 (1) of Directive 2006/54/EC) issued a methodological instrument, 'Gender neutral checklist for job assessment and classification,' which was given the following legal recognition.¹⁶ The Act of 22 April 2012 'aimed at combating the gender pay gap' amended the Collective Agreements and Joint Sector Committees Act of 5 December 1968 to insert Article 50/1,

¹⁵ All Collective Agreements of the National Labour Council are available in French and Dutch at www.cnt-nar.be, accessed on 13 September 2015.

¹⁶ Available in French and Dutch at www.igvm-iefh.belgium.be, accessed on 13 September 2015.

under which when a joint sector committee adopts a job classification system, the latter must be submitted to a department of the federal Ministry of Employment for an assessment of its gender neutrality; the checklist mentioned above is one element to be taken into consideration for that purpose.

4.1.6 Does national (case) law address wage transparency in any way?

No.

4.1.7 Is the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency applied in your country? If so, how?

No. However, in the public services the pay structure is governed by objective criteria and by the general principle of equality before the law (Article 10 of the Constitution). Consequently, knowing the rank of a staff member (which, under staff regulations, is general information within a ministry or public body), his/her gross remuneration is transparent. In contrast, there is no transparency as to the remuneration of managers who are hired by public economic enterprises under employment contracts.¹⁷

4.1.8 Which justifications for pay differences are allowed in legislation and/or case law?

If the question is of a general nature, pay scales in the private sector, established by way of collective agreements, are usually based on seniority. Those which still used the criterion of age had to be corrected in compliance with the CJEU's case law (mainly Case C-297/10 and C-298/10, *Hennigs and Mai*).¹⁸ In the public sector, seniority has always been the criterion.

4.1.9 Are there specific difficulties related to the application of the principle of equal pay for equal work and work of equal value in practice? For example in case of outsourcing?

Due to the scarcity of case law, the only 'landmark' case worth mentioning involved the European Trade Union Institute (of the European Trade Union Confederation), where a female researcher complained of pay discrimination in comparison with male colleagues. The Labour Court of Appeal in Brussels¹⁹ found that the employer's pay system was opaque and simply referred to the CJEU's decision in Case 109/88 *Danfoss*²⁰ to conclude that there was gender discrimination.

4.2 Access to work and working conditions

4.2.1 Is the personal scope in relation to access to employment, vocational training, working conditions etc. defined in national law (see Article 14 of Directive 2006/54)?

No. Because of its very broad material scope (broader than all objects covered by EU directives), the Gender Act has no proper personal scope: it applies to anyone involved in any situation which falls within the material scope. The various pieces of federate legislation adopted the same approach.

¹⁷ However, in a judgment of 2 May 2016 (Dumortier, n°234.069 at www.raadvst-consetat.be, accessed on 12 May 2016), the *Raad van State* found that the protection of privacy and of the company's economic interests could not serve as a blanket justification for denying to make the managers' wages transparent at V.R.T., the Flemish public radio and television organisation. This judgment concurs with the CJEU's decision in joint Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk*, [2003 – I – 4989].

¹⁸ [2011-I-7965].

¹⁹ Judgment of 19 October 2014, *Chroniques de droit social/Sociaalrechtelijke Kronieken*, 2005, p. 16 with J. Jacquemain's case note.

²⁰ [1989-3199].

4.2.2 Is the material scope in relation to (access to) employment defined in national law (see Article 14(1) of the Recast Directive 2006/54)?

Yes. Article 19 of the Gender Act lays down the general prohibition of discrimination. As for the content of Article 14 (1) of the Recast Directive:

- (a) was transposed by Article 6 (2) (1) of the Gender Act, which provides a non-exhaustive list of aspects of the notion 'access to employment.' One useful element worth mentioning concerns access to partnership in firms of self-employed professionals (as it had been observed that in certain law firms, for instance, women were admitted as members, but not as partners);
- (b) was transposed by Article 6 (2) (2) and (3) of the Gender Act, concerning working conditions and the termination of employment respectively, again with non-exhaustive lists of aspects;
- (d) was transposed by Article 6 (1) (7) of the Gender Act, in a wording reproduced from the directive;
- (c) concerns matters (vocational training, etc.) which fall under the respective jurisdictions of the federate authorities. Consequently, the transposition is to be found in the various instruments mentioned above; usually, the same method as in the Gender Act (non-exhaustive lists of aspects) was applied.

4.2.3 Has the exception on occupational activities been implemented into national law (see Article 14(2) of Recast Directive 2006/54)?

Yes. Article 13 (1) and (2) of the Gender Act provide that sex may be a genuine and determining occupational requirement, again in a wording reproduced from Article 14 (2) of the Recast Directive. However, under Article 14 (3), an exhaustive list of such situations must be provided in an ancillary Royal Decree; eight years after the Act came into force, such a Royal Decree has not yet been promulgated. Thus, *faute de mieux*, the Royal Decree of 8 February 1979 is regarded as still being in force, although it was adopted as ancillary to the first piece of legislation concerning the equal treatment of male and female workers (Heading V of the Economic Reorientation Act of 4 August 1978), long since repealed. That Royal Decree contains a short exhaustive list of jobs: singers, dancers, actors, fashion and photographic models, plus positions in foreign countries that do not apply the principle of gender equality in employment.²¹ There is also a Royal Decree of 29 August 1985 which provided that prison warders had to be of the same sex as prisoners (given that prisons are sex-segregated); however, it was amended by a Royal Decree of 10 December 2000 and now provides that a maximum of 60 % of warders must be of the same sex as prisoners in any given prison.

4.2.4 Has the exception on protection for women, in particular as regards pregnancy and maternity, been implemented in national law (see Article 28(1) of Recast Directive 2006/54)?

Article 17 of the Gender Act states that provisions aimed at protecting pregnancy and maternity, far from inducing gender discrimination, are a condition for an effective equal treatment of men and women.

4.2.5 Are there particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, working conditions etc.?

Nothing to report.

²¹ For instance, a company wishes to send a representative to a state of the Arabic Peninsula where women are excluded from any such job. Please note that the RD dates back to 1979.

5. Pregnancy, maternity, and leave related to work-life balance (Directive 92/85, relevant provisions of the Directives 2006/54 and 2010/18)

5.1 Pregnancy and maternity protection

5.1.1 Does national law define a pregnant worker?

There is no legal definition of a 'pregnant' worker, but protection of a pregnant worker against pregnancy-related health risks and against dismissal is conditional on the worker informing her employer of her pregnancy (Article 41*bis* and Article 40 of the Working Conditions Act of 16 March 1971, respectively). This is consistent with Article 2 (a) of Directive 92/85/EEC.

5.1.2 Are the protective measures mentioned in the Articles 4-7 of Directive 92/85 implemented in national law?

Yes. Articles 41 to 44 of the Working Conditions Act of 16 March 1971 and Book X, Chapter 5, 'Protection of maternity,' of the Code of Welfare at Work (ancillary to the Welfare at Work Act of 4 August 1996) together provide for full implementation: every employer is bound to assess existing health risks, taking into account the content of Annex I of the directive; individual protection must be provided against all risks, including those listed in Annex II (a) and (b) of the directive, through the adaptation of the workplace, a temporary transfer to another position or, as a last resort, suspension of the occupation; under Article 43 of the Working Conditions Act, an employee has a right not to perform night work during the last eight weeks of pregnancy and the four weeks following the end of the compulsory postnatal leave (moreover, under Collective Agreement no. 46 of the National Labour Council, of 23 March 1990, concerning night work, the same right is applicable to the last three months of pregnancy); all those provisions concern breastfeeding workers as well. Moreover, under Article 44 of the Working Conditions Act, no overtime may be performed by pregnant or breastfeeding workers, an aspect which was not envisaged by the Directive.

5.1.3 Is dismissal prohibited in national law from the beginning of the pregnancy until the end of the maternity leave (see Article 10(1) of Directive 92/85)?

Yes. Under Article 40 of the Working Conditions Act, as from the moment it is informed of pregnancy up to the expiry of the month following the end of maternity leave, an employer may not terminate the working relationship, unless on grounds unrelated with pregnancy or maternity, for which the employer bears the full burden of proof. If the dismissal is found to be unlawful, fixed damages, equal to six months' gross pay, are due; moreover, payment in lieu of a period of notice is due as well.

During maternity leave a worker under an employment contract is not entitled to any remuneration, but to statutory social security benefits which remain due regardless of the end of the working relationship (including the expiry of a fixed duration contract, in which case the protection against dismissal does not apply). In contrast, under the regulations applicable to tenured staff members in the public services, full remuneration is paid during maternity leave; thus, theoretically, dismissal on disciplinary charges might entail the end of such payment (and, under the 'safety net' provisions of an Act of 20 July 1991, the social security benefits would then become available), but such a hypothesis is so improbable that there is absolutely no relevant case law.

5.1.4 In cases of dismissal from the beginning of pregnancy until the end of maternity leave, is the employer obliged to indicate substantiated grounds for the dismissal in writing (see Article 10(2) of Directive 92/85)?

Yes. Under a provision which was inserted into Article 40 of the Working Conditions Act in compliance with the directive, the employer is obliged to indicate the grounds for the dismissal in writing, if the employee so requires. This obviously does not apply in case of a dismissal on serious grounds, as under Article 35 of the Employment Contracts Act of 3 July 1978 such grounds must always be indicated in writing. These grounds are any that the employer regards as serious. The seriousness of the grounds may be challenged in the courts.

5.2 Maternity leave

5.2.1 How long (in days or weeks) is maternity leave? Please specify the relevant legislation and Article(s).

Under Article 39 of the Working Conditions Act, maternity leave normally has a duration of 15 weeks:

- five weeks optional antenatal leave, which the worker is also free to transfer in part or in total to the end of the compulsory postnatal leave, or not to use it at all;
- one week compulsory antenatal leave, immediately before birth;
- nine weeks compulsory postnatal leave.

In the case of a multiple pregnancy, two weeks are added to the optional antenatal leave, and two weeks to the compulsory postnatal leave.

5.2.2 Is there an obligatory period of maternity leave before and/or after birth?

Yes, see above.

5.2.3 Is there a legal provision insuring that the employment rights relating to the employment contract are ensured in the cases referred to in Articles 5, 6 and 7 of Directive 92/85?

Yes. Under Article 42 of the Working Conditions Act, when protection against health risks during pregnancy or breastfeeding entailed that a worker was transferred temporarily to another position, she has a right to be reinstated in her normal position.

5.2.4 Is there a legal provision that ensures the employment rights relating to the employment contract (including pay or an adequate allowance) during the pregnancy and maternity leave?

Yes. For workers under employment contracts (and untenured staff members in the public services), no remuneration is due. Instead, statutory social security benefits are made available under the maternity insurance scheme, organised by Articles 111 to 117 of the Consolidated Act of 14 July 1994 concerning healthcare and sickness insurance and Articles 219 to 223^{quater} of the ancillary Royal Decree of 3 July 1996. These provisions concern the conditions for entitlement and the amount of the benefits available during various periods related with the protection of maternity.

As for tenured staff members in the public services, staff regulations provide that during the various periods of absence related with the protection of maternity, a staff member is considered as being in active service with full pay and all related advantages.

5.2.5 Is pay or an allowance during the pregnancy and maternity leave at the same level as sick leave or is it higher?

Under the provisions mentioned above, the amounts of the social security benefits are the following:

- first 30 days of maternity leave: 82 % of the gross remuneration without a ceiling, which is equal to 100 % of the net remuneration, i.e. what a worker would receive from her employer during the first 30 days of sick leave;
- the remainder of maternity leave: 75 % of the gross remuneration with a ceiling, i.e. the maximum amount of the benefit is EUR 103.97 per day as from 1 June 2016. In comparison, benefits due in case of sick leave amount to 60 % of the gross remuneration with the same ceiling, i.e. a maximum of EUR 81.54 per day;
- suspension of occupation due to health risks: 78 % of gross remuneration with a ceiling, i.e. a maximum of EUR 106 per day.

5.2.6 Are statutory maternity benefits supplemented by some employers up to the normal remuneration?

That is possible under collective agreements concluded at the level of individual employers. For instance, the French-speaking Free University of Brussels will pay full remuneration to an untenured staff member and then recover the social security benefits to which she is entitled.

5.2.7 Are there conditions for eligibility for benefits applicable in national legislation (see Article 11(4) of Directive 92/85)?

Yes. Under Article 128 of the Consolidated Act of 14 July 1994 (since 1 January 2015, Article 116/1) and Article 203 of the Royal Decree of 3 July 1996, a woman must have been subject to the Consolidated Act during at least 120 working days in the last 6 months preceding her application to be entitled to maternity benefits. This requirement gave rise to Case C-65/14 *Rosselle*, in which, because of a change in the nature of the working relationship (from a tenured staff member in one school to a temporary staff member in another one), a teacher was denied maternity benefits while she had been in uninterrupted employment for much longer than one year. Consequently, the Royal Decree of 2 July 1996 was amended²² in the following way: the condition of having been subject to the scheme for at least 120 working days within a period of six months immediately prior to the application for benefits is now waived when the applicant is a tenured staff member of public service who took unpaid leave in order to be engaged as a paid worker by another employer. However, it is still possible (in different situations) that, because a worker does not meet the condition of 120 working days, she receives neither benefits, nor remuneration (as it is not due, see above) during maternity leave, although a part thereof (10 weeks) is compulsory.

5.2.8 In national law, is there a provision that guarantees the right of a woman to return after maternity leave to her job or to an equivalent job, on terms and conditions that are no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence (see Article 15 of Directive 2006/54)?

No. In the private sector, the practical consequences of the absence of such a provision may be observed in certain collective agreements: for instance, if the amount of a Christmas bonus was made proportional to periods of effective work, a notion which excludes periods of absence related with the protection of maternity. In the public sector, there is no such adverse effect because, under staff regulations, those periods of absence are considered as active service (see above), a favourable solution which was extended to workers under employment contracts in order to avoid discrimination between the two categories of personnel.

5.3 Adoption leave

²² Royal Decree of 28 October 2016, *Moniteur belge/Belgisch Staatsblad*, 25 November 2016.

5.3.1 Does national legislation provide for adoption leave?

Yes. Under Article 30^{ter} of the Employment Contracts Act of 3 July 1978, any worker who adopts a child under the age of eight is entitled to adoption leave (thus, each parent is entitled in the case of an adoption by a couple). The maximum length of the leave is six weeks when the child is under three, and four weeks otherwise; the length is double in the case of an adoption of a disabled child. The leave is unpaid, but under Article 223^{ter} of the Royal Decree of 3 July 1996 (see above), during the whole leave the same statutory social security benefit is available as at the beginning of maternity leave, i.e. 82 % of the gross remuneration without a ceiling. This is not subject to any condition, except that the leave must begin within two months after the child has been registered as an inhabitant of the same municipality (*commune/gemeente*) as the adoptive parent(s).

In the public sector, under staff regulations a similar leave is provided, with some more favourable aspects, e.g. the maximum age of the child is 10. During adoption leave, a tenured staff member is considered as being in active service and is entitled to normal remuneration; certain authorities (e.g., for the federal civil service, Royal Decree of 19 November 1998 concerning leave and other forms of leave of absence) have extended this scheme to workers under employment contracts, provided they do not make use of Article 30^{ter} at the same time.

5.3.2 Does national legislation provide for protection against dismissal of workers who take adoption leave and/or specify their rights after the end of adoption leave (see Article 16 of Directive 2006/54)?

Yes. Under Article 30^{ter} (4) of the Employment Contracts Act, a worker who makes use of adoption leave may not be dismissed during a period beginning two months before the leave takes effect and ending one month after it expired, unless on grounds unrelated with the leave, for which the employer bears the full burden of proof. If the dismissal is found to be unlawful, fixed damages, equal to three months of gross pay, are due.

However, there is no provision concerning the preservation of rights after the end of adoption leave; thus, what was reported above concerning maternity leave is applicable in this respect as well. Again, such an issue does not arise in the public services.

5.4 Parental leave

5.4.1 Has Directive 2010/18 been explicitly implemented in your country?

Yes, but it is impossible to explain how Directive 2010/18/EU was implemented without first explaining what was done to implement Directive 96/34/EC.

The Financial Stabilisation Act of 22 January 1985 (Articles 99 to 107) provides the statutory basis for all career break/time credit schemes. Thus, in the private sector (and for all staff members employed by local councils), parental leave was introduced, as a special career-break scheme, by the Royal Decree (RD) of 29 October 1997. Similar provisions then had to be inserted into the numerous sets of regulations applicable to the different authorities: for instance, in the federal administration, when a new RD of 19 November 1998 reorganised the various forms of leave and leave of absences, provisions concerning parental leave were included (Article 35). Curiously, in the private sector, the social partners had pre-empted the RD of 29 October 1997 when on 29 April 1997 they concluded Collective Agreement (CA) no. 64 within the National Labour Council; this CA (later made generally binding by the RD of 29 October 1997) also provided the same parental leave as the RD, but gave no entitlement to a social security benefit. In the public sector, most authorities already provided a primitive parental leave (resulting from the gender-neutral transformation of an ancient 'breastfeeding leave'), which was allowed to

exist alongside the 'new' parental leave mentioned above (e.g., Article 34 of RD of 19 November 1998).

Consequently, the implementation of Directive 2010/18/EU only required amendments to the extant regulations (essentially to lengthen the leave from three to four months and to give effect to Clause 6 of the Framework Agreement: see below). This was done, in the private sector by the RD of 31 May 2012 amending the RD of 29 October 1997, and by CA n° 64*bis* of 24 February 2015 amending CA n° 64. In the public sector, the RD of 20 July 2012 amended various sets of regulations as to the entitlement to social security benefits; each of the various authorities then had to adjust its own regulations as to the right to parental leave. As for the 'old' provisions in the public sector, they were left unamended and thus can no longer be regarded as valid instruments for implementing the Directive.

5.4.2 Is the national legislation applicable to both the public and the private sector (see Clause 1 of Directive 2010/18)?

In the private sector, parental leave is available for all workers irrespective of the nature and duration (full-time/part-time; indeterminate/fixed-term) of the employment relationship. There is no exclusion of an employment relationship with a temporary agency.

In the public sector, every set of regulations mentioned above provides a right to parental leave for any staff member, irrespective of rank (i.e. including high-level managers). However, because of the multiplicity of regulations, it may occur that this or that institution or category of personnel is not included in the scope of any of them: for instance, it was discovered quite recently that the situation of 'Bozar' (the Palace of Fine Arts in Brussels, a federal public body) is unclear concerning parental leave. As to the judiciary (judges or public prosecutors), the Judicial Code contains no provision in that respect.

5.4.3 Does the scope of the national transposing legislation include contracts of employment or employment relationships related to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency?

Yes; see above.

5.4.4 What is the total duration of parental leave? If the provisions regarding duration differ between the public and the private sector, please address the two sectors separately.

The duration of full-time parental leave is four months, both in the private and the public sectors, after the extant regulations were amended in compliance with Directive 2010/18/EU (see above). However, it should be noted that, while the deadline set in Article 3 (2) of the Directive was 8 March 2012, both the RD of 31 May 2012 and the RD of 20 July 2012 came into force on the day of their publication (1st June and 1st August respectively), without any retrospective effect.

The child's maximum age is 12, or 21 if she/he is disabled. There is no difference between natural and adopted children. An employee is entitled to parental leave for every one of her/his children.

5.4.5 Is the right of parental leave individual for each of the parents, a family entitlement or a combination of the two? How many months are reserved for each parent on a take-it or leave it basis?

The right to parental leave is individual for each of the parents, and no part of the leave is transferable from one parent to the other.

- 5.4.6 What form can parental leave take (full-time or part-time, piecemeal, or in the form of a time-credit system)? Do the various available options allow taking into account the needs of both employers and workers and if so, how is that done (see Clause 3 of Directive 2010/18)?

Parental leave may be used under the following forms: full-time (four months), half time (eight months) or one fifth (20 months). Once the leave has begun, the employee may shift from one form to another (thus, for instance: two months full-time and four months half time). The leave may also be broken down into periods of one month (full-time), two months (half time) or five months (one fifth), or a multiple of each of those lengths. The employee is entirely free to choose between those various options.

- 5.4.7 Is there a notice period and if so, how long is it? Does the national legislation take sufficient account of the interests of workers and of employers in specifying the length of such notice periods and how is that done? (see Clause 3 of Directive 2010/18)?

In the private sector (RD of 29 October 1997), a written notice, given at least two and at most three months before the date when the leave must begin, is required; the same applies when the employee wishes to change the form of the leave, or to take a new period after breaking down the leave. There are no similar requirements in the public sector.

- 5.4.8 Did the Government take measures to address the specific needs of adoptive parents (see Clause 4 of Directive 2010/18)?

No.

- 5.4.9 Is there a work and/or length of service requirement in order to benefit from parental leave?

In the private sector, in order to be entitled to leave an employee must have been occupied under an employment contract with the same employer during 12 months in the 15-month period which preceded the notice. There is no such requirement in the public sector.

A succession of fixed-term contracts with the same employer (in so far as it has not resulted in a contract with indeterminate duration) is certainly taken into account for the calculation of the required period of occupation.

- 5.4.10 Are there situations where the granting of parental leave may be postponed for justifiable reasons related to the operation of the organisation?

In the private sector, within one month after receiving notice, the employer may invoke reasons related with business needs to postpone the leave by six months. Such reasons must be 'justifiable', which seems to mean that the employer must be able to demonstrate that they are genuine. This possibility of a postponement is available to all employers, regardless of the size of the business. There is no such provision in the public sector.

- 5.4.11 Are there special arrangements for small firms?

No (see above).

- 5.4.12 Are there any special rules/exceptional conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness?

The only special rule concerning a disabled child has been mentioned above: parental leave is available until she/he reaches the age of 21 instead of 12.

5.4.13 Are there provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave (see Clause 5 of Directive 2010/18)?

Under Article 101 of the Financial Stabilisation Act of 22 January 1985, an employee who has made use of parental leave may only be dismissed on serious grounds or on grounds which (in case of litigation) the Labour Court accepts as sufficient, i.e. unrelated to the leave; the employer bears the burden of proof. Protection against dismissal is applicable as from the date when the employer receives notice until three months after the end of the leave (or of the last fraction of the leave). Fixed damages equal to six months' gross remuneration are due in case of unlawful dismissal. Those provisions are applicable to employees under employment contracts in the private and public sectors. They are not applicable to tenured staff members in the public sector, but given the rules under which such an appointment may be terminated, dismissal related to parental leave is impossible.

5.4.14 Do workers benefitting from parental leave have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship?

No (see under the following question).

5.4.15 Are rights acquired or in the process of being acquired by the worker on the date on which parental leave starts maintained as they stand until the end of the parental leave?

Probably because of the short duration of the leave, there are no statutory provisions concerning either a return to the same job or acquired rights in the private sector. Although the expert is not aware of any case law concerning acquired rights, it is quite possible that certain collective agreements concerning entitlement to a Christmas bonus (to take an example) do not take absences due to parental leave into account for the calculation of the required period of occupation, but the huge number of CAs prevents any attempt to verify that hypothesis. As to the right to return to the same job, the only case worth mentioning concerned an employee who had left the enterprise because the employer was only willing to provide her with an inferior position after four years' time credits under the general scheme; the court decided that the employee had left a position which was not suitable, so that she was entitled to unemployment benefits.²³

The situation is sounder in the public sector, where tenured staff members who make use of parental leave are considered as being in active service and thus retain their positions and acquired rights. The same favourable treatment is usually extended to staff members under employment contracts (e.g. in the federal administration, parental leave as governed by Article 35 of the RD of 19 November 1998 was made applicable to contractual staff members by the Royal Decree of 4 June 1999).

5.4.16 What is the status of the employment contract or employment relationship for the period of the parental leave?

Under Articles 100 and 102 of the Financial Stabilisation Act of 22 January 1985, execution of the employment contract is fully or partially suspended during parental leave. As mentioned above, a staff member in the public sector is considered as being in active service during the leave.

²³ Labour Court of Appeal in Brussels, judgment of 3 September 2013, (2014) *Journal des tribunaux du travail*, p. 94.

5.4.17 Is there continuity of the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave?

The entitlements to all social security benefits, including healthcare and retirement pensions, are unaffected by parental leave, although no contributions are paid. The same applies to the pension scheme for tenured staff members in the public sector.

5.4.18 Is parental leave remunerated by the employer? If so, how much and in which sectors?

No remuneration is paid by the employer during parental leave, either in the private or public sectors.

5.4.19 Does the social security system in your country provide for an allowance during parental leave? If so, how much and in which sectors?

Social security benefits are granted during parental leave; for historical reasons, they are provided by the Unemployment Insurance Scheme.²⁴ For both sectors, the gross monthly amounts are (since 1 June 2017) EUR 818.56 for full-time leave (EUR 1 129.61 for a single parent); for half-time leave, under 50, EUR 409.27 (EUR 564.80 for a single parent), over 50, EUR 551.76; for one-fifth leave, under 50, EUR 138.84 (EUR 186.71 for a single parent) over 50, EUR 208.27.

5.4.20 In your view, regarding which issues does the national legislation apply or introduce more favourable provisions (see Clause 8 of Directive 2010/18)?

Obviously, fixing the maximum age at 21 if the child is disabled was a generous step. As to entitlement to parental leave in the case of the birth (or adoption) of twins, and the CJEU's decision in Case C-149/10 *Khatzi*, the regulations applicable to both private and public sectors are interpreted as giving a right to parental leave in respect of each of the children.²⁵ Finally, under Article 149 of the Social Penal Code, denying an employee the right to career breaks / time credits, and thus to parental leave as well, is an offence liable to a fine of EUR 350 up to EUR 3 500; however, there is no known case in which such a sanction was imposed.

5.5 Paternity leave

5.5.1 Does national legislation provide for paternity leave?

Yes. Under Article 30 (2) of the Employment Contracts Act of 3 July 1978, there is a right to paternity leave, although since 2011 the term 'paternity' is hardly appropriate as the leave is accessible to the male or female spouse, the registered partner or the common law partner (provided that a stable relationship of at least three years can be proved) of the woman who has given birth. The length of the leave is ten days, which may be used as the worker pleases within four months after the birth. This is not subject to any condition, except that the worker must notify the employer in writing of his/her making use of the leave. Normal remuneration is paid during the first three days; under Article 223*bis* of the Royal Decree of 3 July 1996, the same social security benefits as at the beginning of the maternity leave (see above) are available during the following seven days.

Identical provisions apply in the public sector, except that normal remuneration is paid during the whole leave (as during adoption leave, see above).

²⁴ Regulated by the Royal Decree of 25 November 1991.

²⁵ See J. Jacmain's case note on *Khatzi*, (2012) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 274.

- 5.5.2 Does national legislation provide for protection against dismissal of workers who take paternity leave and/or specify their rights after the end of paternity leave (see Article 16 of Directive 2006/54)?

Yes. Under Article 30 (4) of the Employment Contracts Act, a worker who makes use of the leave may not be dismissed as from the moment when he/she has notified the employer up to the end of three months following the notification (a slight incoherence as the leave may be used over a period of four months), except on grounds unrelated with the leave, for which the employer bears the full burden of proof. If the dismissal is found to be unlawful, fixed damages, equal to three months' gross remuneration, are due.

Again, there is no provision concerning the preservation of rights after the end of paternity leave. What has been reported above concerning adoption leave is also applicable here.

5.6 Time off/care leave

- 5.6.1 Does national legislation entitle workers to time off from work on grounds of *force majeure* for urgent family reasons in case of sickness or accident (see Clause 7 of Directive 2010/18)?

Time off on grounds of *force majeure* may be provided in isolation from the parental leave scheme. In the private sector, Collective Agreement no. 45, concluded within the National Labour Council on 18 December 1989, entitles any employee to up to 10 days' leave per year, under serious circumstances which are not necessarily related to childcare. The leave is unpaid and gives no right to social security benefits, but entitlement to social security cover is maintained. Given that there are employees who do not fall within the scope of CA no. 45 (essentially, contractual staff members in the public sector), Article 30*bis* of the Employment Contracts Act of 3 July 1978 and its ancillary RD of 11 October 1991 also provided the same leave under the same conditions.

In the public sector, regulations applicable to tenured staff members usually provide the right to *force majeure* leave, in case of an illness or an accident affecting a close relative (e.g. the spouse as well as a child). The leave is usually a maximum of four days per year, during which the staff member is considered to be in active service and entitled to remuneration (e.g., in the RD of 19 November 1998, Article 20).

The only recent provisions which may be regarded as implementing Clause 7 of the revised Framework Agreement on parental leave concern the case of a sick or injured child who must be rushed to hospital. The special career break/time credits scheme aimed at caring for a seriously ill relative (RD of 10 August 1998 and, in the public sector, various sets of regulations) includes several restrictions: the employee must give seven days' notice, the employer may object to the leave (in small businesses) or postpone it on organisational grounds (in any business), and the minimum duration of the leave must be one month. In order to make that leave usable under the emergency circumstances mentioned above, a Royal Decree of 10 October 2012 amended the RD of 10 August 1998 so that the leave may take effect immediately and the employer may neither object to it nor postpone it and the minimum duration of the leave is one week with an optional second week. The RD of 10 October 2012 contained no reference to Directive 2010/18, but when a Royal Decree of 12 July 2013 amended the various regulations applicable in the public sector to the same effect, a reference to the Directive was included in its recital.

5.7 Leave in relation to surrogacy

- 5.7.1 Is parental leave available in case of surrogacy?

No. So far, surrogacy has no legal existence.

5.8 Leave sharing arrangements

5.8.1 Does national law provide a legal right to share (part of) maternity leave?

No.

5.8.2 Is there a possibility for one parent to transfer part of the parental leave to the other parent?

The only possibility of a transfer is provided in Article 39 of the Working Conditions Act of 16 March 1971, Article 114 of the Consolidated Act of 14 July 1994 and Article 221 of the Royal Decree of 3 July 1996. It concerns cases when, after giving birth, a worker (a) dies or (b) must remain hospitalized when the child can be taken home. In such cases, the part of the maternity leave which has not been used before the birth is transferred in total (in case (a)) or inasmuch as the mother cannot use it (in case (b)) to her male or female spouse, registered partner or stable common law partner. In case (a), maternity benefits are paid to this person. In case (b), maternity benefits continue to be paid to the mother while benefits equal to 60 % of the gross remuneration with a ceiling (i.e. the same rate as during sick leave) are paid to the transferee.

5.9 Flexible working time arrangements

5.9.1 Does national law provide workers with a legal right (temporarily or otherwise) to reduce working time on request?

There is no legal right to permanent part-time work.²⁶

In the public sector where full-time appointments are the general rule (except in education), staff regulations provide a wide and rather incoherent range of possibilities of a voluntary reduction of the working time. In all cases, the reduction has a limited duration; in most cases, no motive must be given in the application. The main reason for such a plethora is that, usually, the time during which no work is performed does not give right to any pay, thus allowing budgetary savings. The most widely used scheme is the 'voluntary 4-day week'. Under the Act of 19 July 2012, staff members have a right to such a reduced work schedule without any need to provide a motive. The weekly day of leave does not give a right to pay, but to a monthly fixed bonus currently amounting to EUR 112. The scheme is available during a maximum of 60 months over the whole career to a staff member under the age of 50 (over that age, the limit does not apply), but it is possible to use the scheme beyond the maximum without receiving the bonus. Applications must be for a minimum of three months and a maximum of 24; the work schedule is fixed by the manager of the institution according to the requirements of the service. Staff members in higher positions may only access the scheme if they give up the bonus.

In the private sector, historically the most resolute attempt to facilitate the reconciliation of work and private life was the career-breaks scheme, introduced by the Financial Stabilisation Act of 22 January 1985; this scheme was promptly extended to the public sector. As from 2001, in the private sector the wording 'career breaks' was replaced by 'time credits'.

As from 1 January 2015, the recently reformed 'time-credits scheme' is structured under three headings: a) unmotivated leave; b) motivated leave; c) end-of-career leave. The following details apply to heading b), which is the only relevant one for the purposes of this report.

²⁶ In that respect, some attention should be paid to Case C-221/13 *Mascellani*, in which the Court of Justice stated that Directive 97/81/EC does not guarantee a right to part-time work.

The right to 'time credits' is governed by Collective Agreement (hereafter CA) no. 103, concluded on 27 June 2012 within the National Labour Council. As the CA does not provide for the payment of remuneration during the periods of absence, statutory social security benefits are granted by the Royal Decree of 12 December 2001, considerably amended by the Royal Decree of 30 December 2014.

CA no.103 is applicable to all employers in the private sector, regardless of their size, and to all employees. However, CAs concluded within a joint sector committee or within an individual enterprise may deprive certain categories of employees, completely or partly, from the right to time credits; employees in executive management positions are quoted as a possible example.

Basically, access to the right to time credits is conditional on 24 months' seniority with the employer at the time of application.

The admissible 'care' motives are: caring for a child under the age of eight; caring for a disabled child under the age of 21; caring for a seriously ill family member up to the second degree of kinship; caring for a terminally ill family member.

Time credit leave is available up to a maximum of 48 months during the whole career. The leave may be full-time, half-time or one-fifth, but the chosen fraction has no relevance to the calculation of the time credits (i.e. one month with one-fifth leave is equal to one month with full-time leave).

For historical reasons, social security benefits are granted by the Unemployment Insurance Scheme.²⁷ By 1 June 2017, the gross monthly benefit in case of full-time leave amounts to EUR 818.56, and EUR 1 129.61 for a single parent. If the leave is half-time, those amounts are divided by two. If the leave is one-fifth, the amount is EUR 138.84, or EUR 186.71 for a single parent.

As mentioned above, the 'time-credits' scheme is not applicable to the public sector (with some exceptions which concern certain public bodies where the private sector legislation is applicable), which remains subject to the former 'career-breaks' scheme. Under the Royal Decree of 7 May 1999 and the regulations adopted by the various authorities for their own staff members, that scheme provides a right to up to five years' full-time leave during the whole career, plus a right to up to five years' part-time leave (half-time or one-fifth). The leave is unpaid and a social security benefit is provided by the Statutory Unemployment Insurance scheme, at very modest rates as the basic monthly gross benefit by 1 June 2017 is EUR 418.86 in case of full-time leave. Access to career break leave does not require any motive, unless a staff member wishes to make use of one of the 'special variants' which are attached to the general scheme. One of those special variants provides a right to a maximum of 24 months' leave to care for a seriously ill child under the age of 16. The current rate of corresponding monthly benefits is EUR 818.56 gross for full-time leave, i.e. the same as in the private sector. Moreover, the federal government has decided to reform the 'career-breaks' scheme of the public sector radically so that it becomes identical to the reformed 'time-credits' scheme of the private sector described above; the required negotiations with public servants' unions have recently taken place.

5.9.2 Does national law provide workers with a legal right to adjust working time patterns (temporarily or otherwise) on request?

No, except for the provisions which were adopted to implement Clause 6 (1) of the revised Framework Agreement on parental leave. Clause 6 (1) of the revised Framework Agreement was simply reproduced from Article 7/1 of the RD of 29 October 1997, inserted by the RD of 31 May 2012. The maximum period of time during which working hours and

²⁷ Regulated by the Royal Decree of 25 November 1991.

patterns may be 'adapted' (not 'reduced') is six months. The application for an adaptation, stating the employee's need for reconciliation, must be submitted in writing at least three months before the end of the leave; the employer must give a written answer at least one week before the end of the leave, explaining how the enterprise's and the employee's respective needs were taken into account.

In the public sector, the RD of 20 July 2012 inserted a similar provision (as Article 35*bis*) in the RD of 19 November 1998, which only applies to staff members of the federal administration. As for personnel employed by other authorities, the implementation of Clause 6 (1) does not seem to have been achieved yet.

5.9.3 Does national law provide workers with a legal right to work from home or remotely (temporarily or otherwise) on request?

No. As regulated by Heading VI of the Employment Contracts Act of 3 July 1978, the traditional forms of working from home imply the consent of the employer. So do the provisions which were adopted to implement the Framework Agreement of 16 July 2002 concerning telework: in the private sector, Collective Agreement n° 85, concluded on 9 November 2005 within the National Labour Council; in the public sector, diverse regulations, e.g. the Royal Decree of 22 November 2006 in the federal public services.

5.9.4 Are there any other legal rights to flexible working arrangements, such as arrangements by which workers can 'bank' hours to take time off in the future?

No. The possibility to 'bank' hours is severely constricted by the provisions which had to be adopted in order to implement the Working Time Directive 93/104/EEC, now 2003/88/EC. In the private sector, under the Working Conditions Act of 16 March 1971, overtime must be compensated by rest periods within a maximum of 12 months; in the public sector, under the Working Time (Administrative Services) Act of 14 December 2000, within a maximum of four months.

6. Occupational social security schemes (Chapter 2 of Directive 2006/54)

6.1 Is direct and indirect discrimination on grounds of sex in occupational social security schemes prohibited in national law?

Yes. The horizontal prohibition of discrimination is laid down in Article 19 of the Gender Act; Articles 6 (3) and 12 together deal with occupational social security schemes in a wording which is extremely close to Article 9 of the directive.

6.2 Is the personal scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 6 of Directive 2006/54? Please explain and refer to relevant case law, if any.

Neither broader nor more restricted; as mentioned above, the Gender Act has no proper personal scope, but applies to any person concerned by any object included in the material scope. However, in respect of occupational social security schemes, certain provisions necessarily specify whether they apply to paid or to self-employed workers.

6.3 Is the material scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 7 of Directive 2006/54? Please explain and refer to relevant case law, if any.

Neither broader nor more restricted, as Article 12 of the Gender Act refers to Article 6 (1) (4), which simply mentions 'occupational social security schemes.' Now, in Belgium the whole statutory social security system is obligatory, so that an occupational scheme may only complement the corresponding statutory scheme (as stated in Article 45 of the Social Security (Paid Workers) Act of 27 June 1969). Therefore, an occupational scheme may be aimed at meeting any of the items mentioned in Article 7 of the directive.

6.4 Has national law applied the exclusions from the material scope as specified in Article 8 of Directive 2006/54?

No, simply because none of the items mentioned in Article 8 (1) of the directive can possibly fall within the notion of an 'occupational scheme' as it is understood in Belgium (such as private insurance, falling under the scope of Directive 2004/113),²⁸ so that there is no necessity for such exclusions.

6.5 Are there laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54?

There was some case law concerning discrimination against women as well as against men, which was related to the maximum or minimum age of entitlement to occupational benefits, at a time when the age of retirement was different in the statutory social security scheme (as allowed by Article 7 (1) (a) of Directive 79/7/EEC), although the CJEU's decision in Case C-262/88 *Barber* had made it clear that such a reference to the statutory scheme was not a justification in an occupational one and, indeed, the CJEU had ruled against Belgium in Case C-173/91 *Commission v. Belgium*, concerning an occupational complement to unemployment benefits.²⁹ The relevance of that case law progressively died down as the faulty provisions in occupational schemes were belatedly corrected; however, situations which arose in the distant past may still be disputed now. For instance, quite recently the Court of Cassation found that as the Gender Act of 10 May 2007 is *d'ordre public*, a retired female worker could rely on Article 12 of the Act to reclaim occupational disablement benefits which had been denied to her when she had reached

²⁸ A Paragraph 3 was inserted into Article 12 of the Gender Act to implement the exclusions from the material scope, as a consequence of the CJEU's decision in Case C-236/09 *Test-Achats*.

²⁹ [1991-I-2205].

the age of 60 (before the Act came into force), while they would have been allowed to a man up to the age of 65.³⁰

6.6 Is sex used as an actuarial factor in occupational social security schemes?

Yes, as Article 12 of the Gender Act reproduced Article 9 of the Recast Directive, including the possible uses of sex as an actuarial factor which are permitted in Article 9 (1) (h) and (j) (i) and (ii). Indeed, sex (i.e. gender-segregated mortality tables) is the most readily quoted example of an actuarial factor in occupational pension schemes. Probably for that reason, no related case law is known.

6.7 Are there specific difficulties in your country in relation to occupational social security schemes, for example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.

Nothing to report.

³⁰ Judgment of 16 September 2013, (2014) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 282.

7. Statutory schemes of social security (Directive 79/7)

7.1 Is the principle of equal treatment for men and women in matters of social security implemented in national legislation?

Yes. Again, the horizontal prohibition of discrimination is laid down in Article 19 of the Gender Act. Article 5 (14) provides the definition of 'statutory social security schemes.' Article 18 (3) empowers the sovereign (i.e. the federal government) to amend any social security statutes in order to comply with the principle of gender equality. So far, this power has not been used for the following reason. Since Directive 79/7/EEC came into force, i.e. 23 years before the Gender Act, a number of statutes and regulations had to be amended in compliance with its provisions (e.g. to implement the CJEU's decision in Case C-373/89 *Integrity*, quoted above); this was done simply by tabling a bill of law in Parliament or by promulgating a Royal Decree to correct another one. Thus, Article 18 (3) is probably more symbolic than useful.

7.2 Is the personal scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 2 of Directive 79/7? Please explain and refer to relevant case law, if any.

Neither broader nor more restricted as, again, the Gender Act has no proper personal scope, but applies to any person concerned by any object included in the material scope.

7.3 Is the material scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 3 par. 1 and 2 of Directive 79/7? Please explain and refer to relevant case law, if any.

Certainly broader as the definition provided in Article 5 (14) of the Gender Act includes not only the content of Article 3 (1) of the directive, but also survivors' and family benefits. Moreover, in the past various statutory social security provisions which entailed direct gender discrimination were found to be breaching the principle of equality before the law (Article 10 of the Constitution) and had to be amended as a consequence. For instance, the Constitutional Court decided that within the optional statutory social security scheme for Belgian expatriates (Act of 17 July 1963), the provisions under which, although the rate of contributions was uniform, only widows were entitled to survivors' benefits, were incompatible with Article 10 of the Constitution.³¹

Worth mentioning is a judgment of the Labour Court of Veurne³² concerning a man's entitlement to reimbursement of medication in treatment of breast cancer. The Labour Court relied not only on Article 10 of the Constitution, but also on Article 4 of Directive 79/7/EEC to set aside the provisions of the social security regulations which reserved reimbursement to women. This is an important development as in previous litigation concerning the treatment of osteoporosis, in which the male claimant had only relied on Article 10 of the Constitution, the Court of Cassation³³ had refused to recognize the discrimination against men.

7.4 Has national law applied the exclusions from the material scope as specified in Article 7 of Directive 79/7? Please explain (specifying to what extent the exclusions apply) and refer to relevant case law, if any.

³¹ Judgment no. 121/2000 of 29 November 2000, (2001) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 380 with J. Jacquemain's case note.

³² Judgment of 14 March 2013, (2016), *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 176.

³³ Judgment of 14 June 2004, (2004) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 15 with J. Jacquemain's case note.

Historically, Belgium availed itself of Article 7 (1) (a) of the directive to maintain different legal ages of retirement for men and women in the statutory pension schemes for paid and self-employed workers; consequently, entitlement to benefits of the unemployment and sickness insurance schemes would cease at the same difference in ages for men and women. Under an Act of 26 July 1996, the difference was progressively reduced and, as from 1 January 2009, the legal age of retirement became uniform (65 years) for men and women. Under the Act of 10 August 2015, the latter age shall be brought up to 66 from 1 February 2025 and 67 from 1 February 2030, again uniformly for men and women.

7.5 Is sex used as an actuarial factor in statutory social security schemes?

Yes. Indeed, Belgian legislation concerning accidents at work is similar to the Finnish one, except that only one third of the total value of the lifelong compensation benefit may be paid as a lump-sum amount; gender-segregated mortality tables are used in order to calculate this value. The relevant provisions are Article 45 of the Accidents at Work Act of 10 April 1971 and Article 6 of the ancillary Royal Decree of 24 December 1987. These instruments are applicable in the private sector, but are referred to by the provisions which are applicable in the public services (Article 12 (1) of the Act of 3 July 1967 and Article 21 of the Royal Decree of 24 January 1969). After the European Commission requested all Member States to screen their statutory security schemes in the light of Case C-318/13, a Royal Decree of 30 November 2015 amended Article 6 of the R.D. of 24 December 1987 in order to impose the use of gender-neutral actuarial factors as to lump sums to be paid as of 1 January 2016. In the same way, a Royal Decree of 15 March 2017 amended the R.D. of 15 September 1965 (ancillary to the Act of 17 July 1963 concerning the Overseas Social Security Scheme) so that gender-neutral actuarial factors must now be used in order to calculate the pension annuity provided by the scheme.

7.6 Are there specific difficulties in your country in relation to implementing Directive 79/7? For example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.

Nothing to report.

8. Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)

8.1 Has Directive 2010/41/EU been explicitly implemented in national law?

Essentially, the substantial provisions that serve to transpose Directive 2010/41/EU (as they did for Directive 86/613/EEC) are to be found in Royal Decree no. 38 (equivalent to an Act of Parliament) of 27 July 1967 'organising the social protection scheme for self-employed persons' and in a number of ancillary Royal Decrees.

As to effectiveness and remedies, the necessary provisions are those of the Gender Act (see below), which was devised to implement all EU instruments on gender equality and the material scope of which is broad enough to cover all the aspects of equal treatment mentioned in the directive.

8.2 What is the personal scope related to self-employment in national legislation? Has your national law defined self-employed or self-employment? Please discuss relevant legislation and national case law (see Article 2 Directive 2010/41/EU)

Under Articles 3 to 7*bis* of Royal Decree no. 38, the social protection system is applicable to two categories of persons:

- 'self-employed workers': any person performing a gainful activity other than under an employment contract or regulations applicable to civil servants;
- 'assistants': any person who assists or substitutes for a self-employed worker in performing his/her activity without having been hired by the latter under an employment contract.

When the spouse of a self-employed worker does not perform any gainful activity which entitles her /him to social protection, or is not a recipient of social security benefits, that spouse is regarded as an assisting spouse and therefore an assistant.

The same provisions apply in the case of a registered partnership (*cohabitation légale/wettelijke samenwoning*), which under Article 1475 ff. of the Civil Code simply requires a common statement of the partners at the registrar's office.

As to *de facto* (or 'common law') life partnerships, the assisting partner simply falls into the category of assistants, as will, for instance, an assisting sibling of a self-employed worker.

It should be recalled that both marriage and a registered partnership are available to heterosexual and to homosexual couples.

The provisions mentioned above are applicable regardless of the dimension of the business or of the nature of the activity, including in the agricultural sector.

The only restriction worth reporting concerns the spouse or registered partner of a person who is a member of the board of directors or a chief executive officer in a company which does not employ him/her under an employment contract, as defined in Article 32 of the Income Tax Code (1992). The latter person is a self-employed worker, but his/her spouse or registered partner is not regarded as an assistant.

In conclusion, Article 2 of the Directive seems to have been transposed exhaustively.

8.3 Related to the personal scope, please specify whether all self-employed workers are considered part of the same category and whether national legislation recognises life partners.

See the answer to the previous question.

8.4 How has national law implemented Article 4 Directive 2010/41/EU? Is the material scope of national law relating to equal treatment in self-employment the same, more restricted, or broader than specified in Article 4 Directive 2010/41/EU?

No steps had been taken to transpose Article 4 of Directive 86/613/EEC, most probably because at the time there were no legal provisions which might have been used to hinder women in the establishment, equipment or extension of a business. There have never been any cases to reveal practices to such an effect. Thus, no new steps were taken when Article 4 of the old directive became Article 4 (1) of Directive 2010/41/EU and national law is in conformity.

As for Article 4 (2) and (3) of the new directive, harassment/sexual harassment and an instruction to discriminate are prohibited as discrimination by Article 19 of the Gender Act, a horizontal provision.

8.5 Has your State taken advantage of the power to take positive action (see Article 5 Directive 2010/41/EU)? If so, what positive action has your country taken? In your view, how effective has this been?

Over the years, some indirect positive actions have certainly been taken by way of modest subsidies granted to universities or private associations in order to stimulate research on and campaigning in favour of female entrepreneurship; there is no way to assess what impact such efforts may have produced. Presently, any more resolute initiative is impossible because, while Article 16(2) of the Gender Act allows positive action, Article 16(3) requires that a Royal Decree defines in what situations and on what conditions such actions may be taken. Now, ten years later, such a Royal Decree still does not exist, so that no positive action is possible.

8.6 Does your country have a system for social protection of self-employed workers (see Article 7 (Directive 2010/41/EU)?

The social protection scheme for self-employed workers is entirely statutory. Its legal foundation is Royal Decree no. 38 of 27 July 1967, which provides that the scheme is financed by obligatory pay-as-you-go contributions by self-employed workers and assistants (see above) and by a state subsidy.

The following categories of benefits are available:

- healthcare: the social insurance scheme is now the same as for paid workers, organised by the Consolidated Act of 14 July 1994;
- sickness and maternity benefits: organised by the Royal Decree of 20 July 1971;
- family benefits: organised by the Act of 29 March 1976;³⁴
- retirement and survivors' pensions: organised by Royal Decree no. 72 of 10 November 1967; and
- a premature end of activity benefit: organised by the Royal Decree of 18 November 1996, this is a stop-gap relief measure, available during a maximum of one year to meet situations such as bankruptcy or permanent disablement.

³⁴ As a consequence of the 6th Institutional Reform of the State, family benefits were transferred to the respective jurisdictions of the various federate authorities as from 1 January 2015.

In order to implement Article 6 of Directive 86/613/EEC (now Article 7 (1) of Directive 2010/41/EU), affiliation to the sickness and maternity benefits scheme was first made available to assisting spouses on a voluntary basis. It was then found that such a measure was insufficient and, after a two-year transition period, affiliation to the whole protection scheme was made compulsory for all assisting spouses and registered partners as from 1 January 2006. However, a spouse or registered partner may remain exempt from affiliation if she/he states in an affidavit that she/he does not provide any assistance to the self-employed worker, in which case she/he will be considered as the latter's dependant.

As explained above, a *de facto* ('common law') life partner who assists a self-employed worker is simply regarded as an assistant, subject to compulsory affiliation to the whole scheme.

8.7 Has Article 8 Directive 2010/41/EU regarding maternity benefits for self-employed been implemented in national law?

The scheme aimed at protecting maternity for self-employed workers, assistants and assisting spouses was built up gradually, first in order to implement Directive 86/613/EEC, then under its own steam and, finally, but in a very marginal way, in order to implement Directive 2010/41/EU.

Protection of maternity is optional, i.e. a woman must apply to her sickness insurance fund to be granted benefits. This scheme can be described in the following way:

- there is maternity leave of eight weeks (or nine in the case of a multiple pregnancy), of which three weeks (one immediately before and two immediately after the birth) are compulsory, i.e. using those three weeks is a condition of entitlement to any of the allowances. The remainder (i.e. five or six weeks) is optional and usable under the following possibilities: two extra weeks immediately after the compulsory postnatal leave; and/or in fractions, each of at least one week, during a maximum period of 21 weeks following the compulsory postnatal leave;
- for every week of leave, a gross maternity allowance of EUR 467.47 (as of 1 September 2017) is available;
- as from 1 January 2017 and for any maternity leave beginning by that date, the provisions mentioned above will be improved in the following way: the maximum duration of the leave will be twelve weeks (thirteen in case of multiple pregnancy), including the 'obligatory' three weeks; the optional part of the leave may be used over a period of 36 weeks; during the optional part of the leave, a worker will be allowed to resume her activities half-time. In that case, the optional part of the leave will amount to a maximum of 18 (or 20) weeks, and the weekly benefit will be halved;
- in order to promote the reconciliation of work and family life, there is an additional scheme of 'maternity support', under which the beneficiary receives 105 'service vouchers', each worth EUR 9.00. Private persons normally buy and use service vouchers to remunerate menial household tasks, performed by workers in precarious situations (unemployed, beneficiaries of public assistance, etc.) who in this way are given access to regular employment. The workers are employed by specially created 'service voucher firms' which remunerate them (the minimum gross hourly salary is EUR 9.50 as from 1 July 2017). One voucher corresponds to one hour's work, and the difference is compensated for by a state subsidy paid to the firm.

The amount of the maternity allowance seems to meet the requirements of Article 8(3) of Directive 2014/41/EU. The criteria which were used to fix this amount appear to fall under subsection (a), but it is definitely higher than the sickness benefit (a maximum of EUR 350 per week), most probably as an incentive to use maternity leave.

As for Article 8(4) of the Directive, the 'maternity support' scheme can hardly be regarded as an implementation measure, as it is aimed at relieving the self-employed worker of part

of her domestic tasks and not at providing her with temporary replacement in her gainful activities.

8.8 Has national law implemented the provisions regarding occupational social security for self-employed persons (see Article 10 of Recast Directive 2006/54)?

Originally, Article 12 of the Gender Act, which deals with occupational social security schemes, only applied to schemes for paid workers. However, when the Gender Act had to be amended as a consequence of Case C-236/09 *Test-Achats*, it was realized that self-employed workers used to subscribe to various individual or collective insurance schemes in order to complement statutory social security benefits (most of them within legal frameworks provided by diverse statutes); gender-based actuarial factors were routinely used to calculate premiums and benefits. Thus, the same Act of 19 December 2012 which amended Article 10 of the Gender Act as to goods and services also amended Article 12 to provide a non-exhaustive list of such schemes and to state that the use of gender-based actuarial factors was no longer permitted in schemes set up or contracts concluded after 20 December 2012.

8.9 Has national law made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54? Please describe relevant law and case law.

No.

8.10 Is Article 14(1)(a) of Recast Directive 2006/54 implemented in national law as regards self-employment?

Yes. Describing the material scope of the Gender Act, Article 6 (1) (7) includes membership of a workers' or employers' organization, or any other organization of persons performing a professional activity.

9. Goods and services (Directive 2004/113)

9.1 Does national law prohibit direct and indirect discrimination on grounds of sex in access to goods and services?

Yes. The horizontal prohibition of discrimination is laid down in Article 19 of the Gender Act. Under Article 8, the prohibition is applicable to access to goods and services, a notion defined in Article 6 (1) (1).

9.2 Is the material scope of national law relating to access to goods and services more restricted or broader than specified in Article 3 of Directive 2004/113? Please explain and refer to relevant case law, if any.

Broader, as Article 6 (1) (1) does not exclude the content of media, advertising and education from the material scope of the Gender Act.

9.3 Has national law applied the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education?

No (see above).

9.4 Have differences in treatment in the provision of the goods and services been justified in national law (see Article 4(5) of Directive 2004/113)? Please provide references to relevant law and case law.

Article 9 (1) of the Gender Act was reproduced from Article 4(5) of the directive to allow that certain goods and services might be reserved exclusively or mainly to persons belonging to one sex if justified and proportionate. However, under Article 9 (2) these goods and services must be listed exhaustively in an ancillary Royal Decree, which has not yet been promulgated eight years after the Gender Act came into force. Under Article 9 (3), in the absence of such a Royal Decree it was for the courts to assess whether a difference in treatment could be justified in individual cases, but only until 21 December 2007; consequently, no exception is presently admissible under the Gender Act. Now, certain aspects of the notion 'goods and services' fall within the respective jurisdictions of the federate authorities; their various legislative anti-discrimination instruments (see above) contain identical provisions to Article 9 of the Gender Act, including the need for ancillary decrees to list possible exclusions, none of which has been promulgated until now. Again, in the absence of such decrees, the courts have the power to assess justifications for differences in treatment, but there is no time limit to this power. The discrepancy between federal and federate provisions led to the following bizarre case.

When a man complained of gender discrimination because access to a fitness facility was reserved for women, the Court of Appeal in Liège found that the material object of the dispute fell within the notion of 'sport', i.e. within the jurisdiction of the French-speaking Community. Under the *decree* of 12 December 2008, the court was competent to assess the proposed justifications for the difference in treatment, being the morphological differences between men and women and the protection of privacy. The court found that these justifications were valid.³⁵ In contrast, under the Gender Act the court would have been bound to conclude that the difference in treatment was direct discrimination, as it would have had no power of assessment.

9.5 Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial

³⁵ Judgment of 4 November 2014, (2015) *Journal des tribunaux*, p. 42 with S. van Drooghenbroeck's case note.

services shall not result in differences in individuals' premiums and benefits (see Article 5(1) of Directive 2004/113)?

Yes. Under Article 10 (1) of the Gender Act, the use of gender-segregated actuarial factors for the calculation of premiums and benefits in life insurance was permitted without any time limit. However, in compliance with the CJEU's decision in Case C-236/09, that provision was annulled by the Constitutional Court,³⁶ then reformulated by an Act of 19 December 2012; under this new version, the previous permission is only applicable to contracts concluded before 21 December 2012.

9.6 How has the exception of Article 5(2) of Directive 2004/113 been interpreted in your country? Please report on the implementation of the C-236/09 *Test-Achats* ruling in national legislation.

See above.

9.7 Has your country adopted positive action measures in relation to access to and the supply of goods and services (see Article 6 of Directive 2004/113)?

No.

9.8 Are there specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in your country in relation to access to and the supply of goods and services? Please briefly describe relevant case law.

Nothing to report.

³⁶ Judgment no. 116/2011 of 30 June 2011.

10. Violence against women and domestic violence in relation to the Istanbul Convention

10.1 Has your country ratified the Istanbul Convention?

Yes. The Belgian ratification of the IC required that all federate authorities, every one of which has jurisdiction over a number of issues covered by the IC, had granted their assent to the federal Parliament's ratification. This process started in 2013 and was completed in 2015.³⁷ The Act of ratification was then promulgated on 1 March 2016.³⁸

³⁷ *Decreet* Flemish Community, 29 November 2013; *Décret* French-speaking Community, 27 February 2014; *Décret* Walloon Region, 13 March 2014; *Décret* French Community Commission, 7 April 2014; *Dekret* German-speaking Community, 6 May 2014; *Ordonnance/Ordonnantie* Brussels Capital Region, 19 March 2015.

³⁸ *Moniteur belge/Belgisch Staatsblad*, 9 June 2016.

11. Enforcement and compliance aspects (horizontal provisions of all directives)

11.1 Victimisation

11.1.1 Are the provisions on victimisation implemented in national legislation and interpreted in case law?

Yes. Given that the Gender Act is aimed at implementing all EU directives concerning gender equality, two provisions were necessary: Article 22 on victimization in employment relations including occupational social security schemes, and Article 21 on victimization in other matters. The pattern of both provisions is the same: after the alleged victim has either filed a reasoned complaint about gender discrimination or taken legal action, the alleged perpetrator may not impose any adverse measure on the alleged victim, unless on grounds entirely unrelated to the complaint or lawsuit, for which the alleged perpetrator bears the full burden of proof. This protection against victimization is applicable during 12 months after the complaint was filed, or until the end of a period of three months following the delivery of a final judgment in the lawsuit. As to reparation if the alleged perpetrator has subjected the victim to victimization in breach of those rules: under Article 22, fixed damages equal to six months' gross remuneration are due, unless the victim is reinstated in her/his job or in unmodified employment conditions; under Article 21, fixed damages equal to EUR 1 300 are due.

As to the content of Article 24 of Directive 2006/54/EC and Article 10 of Directive 2004/113/EC, the provisions of the Gender Act offer sufficient implementation. For instance, the protection in Article 22 of the Act is applicable within the employment relationship as well as after it has been terminated: this is in compliance with the CJEU's decision in Case C-185/97 *Coote*. Article 22 applies both to victims and to any worker who is called as a witness, either during the examination of the complaint or during the lawsuit: this was regarded as an indispensable extension of the protection against victimization, while there was no need for such an extension in favour of workers' representatives (mentioned in Article 24 of the Recast Directive), who as such already enjoyed better protection under other statutes or collective agreements.

However, the effectiveness of the protection against victimization is disputable in the light of the purpose of the directives. Indeed, six months' gross remuneration is the standard amount in Belgian labour law for fixed damages aimed at compensating workers after an unlawful dismissal in various specific situations (e.g. maternity leave, parental leave but also vocational training leave, etc.); in fact, the amount was already the same in the first gender equality Act (of 4 August 1978). Over nearly 40 years, the case law concerning victimization has not been very abundant, but this is mainly because, in many cases, gender discrimination consisted of the victim's dismissal (which would not have occurred if she had been a man), so that there was neither the time nor the space for victimization. Still, the amount of fixed damages is too modest to deter an unlawful dismissal in any specific situation, unless the employer is a very small business with very limited financial resources.

11.2 Burden of proof

11.2.1 Does national legislation and/or case law provide for a shift of the burden of proof in sex discrimination cases?

Yes. Article 33 (1) of the Gender Act was closely copied from Article 19 (1) of the Recast Directive. Article 33 (2) provides some examples of the notion 'facts from which direct or indirect discrimination may be presumed,' but in too general a wording to be really helpful (e.g. 'elements which reveal some recurrence of the adverse treatment').

Case law concerning discrimination in recruitment is very scant. Indeed, when the European Commission's proposal for the future Directive 97/80/EC was still under discussion, the usefulness of such an instrument as to the burden of proof had been questioned in Belgium, given that under Articles 870 and 871 of the Judicial Code, each of the litigating parties is bound to contribute to proof, and the courts may order them to produce whatever elements of proof are in their possession. However, there is no known case similar to C-415/10 *Meister*, so that the effectiveness of Articles 870 and 871 has never been tested in relation to gender equality. There is no case similar to C-104/10 *Kelly* either, but concerning a statute applicable to the Flemish civil service, the Constitutional Court ruled³⁹ that the protection of privacy had to be set aside when the principle of equality before the law (Article 10 of the Constitution) demanded that one civil servant be informed of the elements of another's personal record which justified why the latter had been selected for promotion in preference to the former (this case was not related to gender).

11.3 Remedies and Sanctions

11.3.1 What types of remedies and sanctions (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.) exist in your country for breaches of EU gender equality law? Please specify the applicable legislation.

Obviously, the most radical remedy consists of the general power to annul an unlawful provision, which is vested in the Constitutional Court under the Special Act of 6 January 1989 (with regard to legislative provisions) and in the *Conseil d'État / Raad van State* under the Consolidated Act of 12 January 1973 (with regard to regulations).

As for specific remedies and sanctions, they are all provided by the Gender Act. Under Article 23, a victim of discrimination may claim compensation for the prejudice that she/he has suffered, the amount of which she/he must demonstrate according to tort law; alternatively, the victim may claim fixed damages equal to six months' gross pay (in employment matters) or EUR 1 300 (in other matters), but these amounts may be halved if the perpetrator succeeds in demonstrating that the adverse treatment would still have occurred in the absence of discrimination (this is an application of the CJEU's decision in Case C-180/95 *Draehmpaehl*). Under Article 25, the victim, the equality body (see below) or an interest group (see below) may apply for a court order to put an end to the act which caused discrimination, and under Article 24, a failure to comply may entail a penalty payment. Under Articles 26 to 31, various breaches of the Act are also penal offences, the perpetrator of which is liable to imprisonment for one month up to one year and/or a fine of EUR 300 up to 6 000; in particular, under Articles 28/1 and 28/2, both inserted by an Act of 22 May 2014, discrimination in access to goods and services and discrimination in employment relations are such penal offences.

11.3.2 In your opinion, do the remedies and sanctions meet the standards of being effective, proportionate and dissuasive? Please explain, if possible referring to relevant legislation or case law.

Curiously, while the CJEU had to state (in Case C-271/91 *Marshall II*) that no *ceiling* could validly be imposed on compensation for the actual prejudice, until 2007 victims of discrimination in Belgium were hampered by the absence of a legal *floor* when the prejudice was not material; thus, the introduction of the possibility of claiming fixed damages under Article 23 of the Gender Act (see above) was a definite improvement. Still, the doubts which were expressed above (concerning protection against victimization) as to the effectiveness of such modest fixed damages as a deterrent also apply to compensation.

³⁹ Judgment no. 17/97 of 25 March 1997, (1997) *Journal des tribunaux*, p. 476.

Another moot point concerns the scope of the courts' power to order perpetrators to put an end to discrimination consisting of the dismissal of the victim. So far, the Court of Cassation's inflexible case law has decreed that no court may order an employer to reinstate a worker under an employment contract; this doctrine was applied more than 25 years ago to a case of direct gender discrimination⁴⁰ and has produced a freezing effect ever since. In contrast, when the *Conseil d'État / Raad van State* annuls an administrative decision as being unlawful, it is deemed never to have existed so that, for instance, a dismissed civil servant must be reinstated;⁴¹ however, no such case related to gender discrimination can be quoted.

11.4 Access to courts

11.4.1 In your opinion, is the access to courts safeguarded for alleged victims of sex discrimination? Please explain and discuss particular difficulties and barriers victims of sex discrimination have encountered. Refer to relevant legislation and case law.

Under Articles 23 to 25 of the Gender Act, any person who claims to be a victim of gender discrimination has access to the courts. Under Article 578 (10) of the Judicial Code, claims based on the Gender Act and concerning matters of employment fall within the jurisdiction of the labour courts; however, if the source of the alleged discrimination lies in a decision by an authority, its annulment may be sought from the *Conseil d'État / Raad van State*, and if it lies in a legislative instrument, from the Constitutional Court. Claims concerning goods and services fall within the general jurisdiction of the civil courts.

There are no legal barriers to access; the cost of legal proceedings and the conditions of entitlement to legal aid (see below) certainly result in a deterrent effect for workers who cannot rely on a trade union's assistance, but this is certainly not specific to gender equality matters.

Two distinct elements might be pointed out as particular causes of the reluctance in taking individual legal action. One concerns gender discrimination in remuneration: given that in the private sector, the whole structure of pay scales is governed by collective agreements, it is always bold to claim that such an agreement induces gender discrimination. The other results from the current concept of 'diversity', under which gender is only one criterion among many others, some of which may focus the attention of political decision makers and of the media for circumstantial reasons, such as religion or ethnic origin.

11.4.2 In your opinion, is the access to courts safeguarded for anti-discrimination/gender equality interest groups or other legal entities? Please explain and refer to relevant legislation and case law.

Yes. Under Article 4 (6) of the Act of 16 December 2002 (see below), the Institute for Equality of Women and Men is entitled to take legal action in respect of all federal legislation concerned with gender equality. Under Article 35 of the Gender Act, entitlement to take legal action in order to uphold the principle of gender equality was conferred on trade unions, on organizations of employers and of self-employed workers and on any association or charity possessing legal personality and a charter under which it is aimed at upholding human rights or fighting discrimination.

There is hardly any significant case law as usually, when a trade union is involved in a discrimination case, it is in its traditional function of providing legal assistance to its members; however, the *Fédération générale du travail de Belgique/Algemeen Belgisch*

⁴⁰ Court of Cassation, judgment of 20 June 1988, (1988) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 345.

⁴¹ In that respect, see the pending Case C-96/17 *Vernaza Ayovi*, in which the CJEU has been invited to compare an employee with a fixed duration contract (Directive 1999/70/EC) and a tenured civil servant.

Vakverbond broke new ground when it supported the considerable costs of an appeal to the Court of Cassation, which resulted in the favourable solution of a case of gender discrimination in pay related to maternity.⁴² As for associations and charities, so far none of them has ever taken legal action within the scope of the Gender Act; when *Test-Achats/Test-Aankoop* applied to the Constitutional Court concerning the issue which led to the CJEU's decision in Case C-236/09 *Test-Achats*, it did so as a defender of consumers' rights. In contrast, the Institute for Equality of Women and Men frequently goes to court alongside the claimant, e.g. on the issue which led to the CJEU's decision in Case C-65/14 *Rosselle*.

11.4.3 What kind of legal aid is available for alleged victims of gender discrimination?

There is no specific legal aid, apart from free advice which the Institute for Equality of Women and Men is bound to provide under Article 4 (5) of the Act of 16 December 2002 (see below). Under the Judicial Code, legal aid (i.e. *pro bono* assistance by counsel and an exemption from legal costs) is available to any person whose net monthly income does not exceed a fixed ceiling (i.e. for a single person, ca. EUR 1 000; for a person with dependants, between EUR 1 200 and 2 800 according to their number).

11.5 Equality body

11.5.1 Does your country have an equality body that seeks to implement the requirements of EU gender equality law?

Yes. The gender equality body is the Institute for Equality of Women and Men, which was created by the Act of 16 December 2002. Its competence covers discrimination on the ground of gender (including gender reassignment), while other grounds fall within the respective competences of two other institutions, the 'Interfederal' Centre for Equal Opportunities (now 'Unia') and the Federal Centre for Migration (now 'Myria'). The Institute has a hybrid purpose. On the one hand, it serves as an administrative body to implement federal policy on gender equality. On the other, it is in charge of promoting gender equality through all useful means, including research; in this capacity, the Institute is bound to provide advice to victims of gender discrimination, and is also entitled to take legal action to uphold gender equality.

11.6 Social partners

11.6.1 What kind of role do the social partners in your country play in ensuring compliance with and enforcement of gender equality law? Are there any legislative provisions in this respect?

The Gender Act assigns two different roles to the social partners. On the one hand, before adopting the various Royal Decrees ancillary to the Act, the federal government is bound to request the opinions of diverse advisory organs in which the social partners are represented, such as the National Labour Council. On the other hand, under Article 35 trade unions, employers' organizations and self-employed workers' organizations are entitled to take legal action in order to uphold gender equality, although trade unions usually prefer to assist members in individual cases (see above).

11.7 Collective agreements

11.7.1 To what extent does your country have collective agreements that are used as means to implement EU gender equality law? Please indicate the legal status of

⁴² Final judgment in the case: Labour Court of Appeal in Brussels, 2 September 2009, (2010) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 23.

collective agreements in your country (binding/non-binding, usually declared to be generally applicable or not).

Collective agreements are only used in the private sector (and, by way of exception, in some rare public institutions) as collective relations in the public sector follow a different logic, based on the obligatory negotiation of any proposed changes in statutes or regulations. Under the Collective Agreements and Joint Sector Committees Act of 5 December 1968, collective agreements may be concluded at various levels: individual enterprise, activity sector (within a Joint Sector Committee) or the whole country (within the National Labour Council). By itself, a collective agreement has the same value as a contract; however, it is binding for all employers who are members of an employers' organization which is a signatory, and all clauses concerning workers' rights automatically extend to all workers employed by those employers. Moreover, a collective agreement may be made generally binding by way of a Royal Decree, in which case it applies to all employers and workers concerned, and a failure to comply is a penal offence.

The only – but very significant – example of a collective agreement specifically aimed at promoting gender equality is Collective Agreement no. 25 concerning equal pay for male and female workers, concluded within the National Labour Council on 15 October 1975 and made generally binding by a Royal Decree of 9 December 1975. Collective Agreement no. 95 concerning equal treatment at all stages of an employment relationship, concluded within the National Labour Council on 10 October 2008 and made generally binding by a Royal Decree of 11 January 2009, refers to Recast Directive 2006/54/EC, but also to Directives 2000/43/EC and 2000/78/EC, and only quotes 'sex' among a list of diverse criteria in respect of which equal treatment must be guaranteed; moreover, the usefulness of this collective agreement is probably more symbolic than effective, given that it duplicates the statutory provisions of the three anti-discrimination Acts of 10 May 2007. Clauses have been inserted in various collective agreements as positive action in favour of women (e.g. to promote vocational training within enterprises), but the present legal validity of such clauses is parlous due to a lack of an ancillary Royal Decree to the Gender Act (see above). Finally, when job classification systems are introduced by way of collective agreements, they must be made gender-neutral in compliance with the Act of 22 April 2012 aimed at combating the gender pay gap (see above).

12. Overall assessment

Apart from the obvious gaps described above, in the view of the expert the main weaknesses of the transposition are the following:

- the unnecessary complication of the concepts used in the trio of anti-discrimination legislation adopted on 10 May 2007;
- eight years after the Gender Act came into force, the absence of several ancillary Royal Decrees hinders the effective application of the Act;
- the questionable effectiveness of the remedies available to victims;
- the uneasy coexistence of federal and federate legislation concerning matters covered by EU law.

In the view of the expert, the following can be considered examples of positive implementation that exceed the requirements of EU law:

- the provisions aimed at protecting pregnancy and maternity are regarded as a condition for gender equality in employment;
- gender equality in statutory social security schemes also applies to family benefits and survivor's benefits;
- the whole statutory social security scheme for self-employed workers is also applicable to assisting spouses or registered partners;
- education and media are not excluded from the material scope of legislation in the context of gender equality in access to goods and services; and
- the Belgian federal legislation exceeds the EU requirements in relation to the equality body: under its Institution Act of 16 December 2002, the Institute for Equality of Women and Men is authorised to initiate litigation in order to enforce the principle of gender equality.

Annexes

Bibliography

- Bayart C., Sottiaux S., van Drooghenbroeck S. (eds.), (2008), *Les nouvelles lois luttant contre la discrimination/De nieuwe federale antidiscriminatiewetten*, Bruges, die Keure/la Charte.
- Cuypers D. (ed.), (2003) *Gelijkheid in het arbeidsrecht (Equality in labour law)*, Mortsel, Intersentia.
- Demagos A., (2015) *L'écart salarial entre hommes et femmes*, Brussels, Larcier.
- Jacqmain J., (2015) « Égalité dans le travail entre femmes et hommes » and « Travail des femmes » in Van den Avyle G., *Guide social permanent – Droit du travail : Commentaires*, Waterloo, Kluwer.
- Jacqmain J., Markey L., « Actualités de la lutte contre les discriminations en droit social » in Bribosia E., Rorive I, van Drooghenboeck S. (eds), (2016) *Droit de la non-discrimination – Avancées et enjeux*, Brussels, Bruylant.

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