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Country report

Non-discrimination

Transposition and implementation at national level of
Council Directives 2000/43 and 2000/78

Belgium

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CONTENTS

EXECUTIVE SUMMARY	6
INTRODUCTION	14
1 GENERAL LEGAL FRAMEWORK	20
2 THE DEFINITION OF DISCRIMINATION	21
2.1 Grounds of unlawful discrimination explicitly covered	21
2.1.1 Definition of the grounds of unlawful discrimination within the directives	21
2.1.2 Multiple discrimination	25
2.1.3 Assumed and associated discrimination	26
2.2 Direct discrimination (Article 2(2)(a))	27
2.2.1 Situation testing	29
2.3 Indirect discrimination (Article 2(2)(b))	32
2.3.1 Statistical evidence	33
2.4 Harassment (Article 2(3))	35
2.5 Instructions to discriminate (Article 2(4))	38
2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)	39
3 PERSONAL AND MATERIAL SCOPE	48
3.1 Personal scope	48
3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2), Directive 2000/43 and Recital 12 and Article 3(2), Directive 2000/78)	48
3.1.2 Natural and legal persons (Recital 16, Directive 2000/43)	48
3.1.3 Private and public sector including public bodies (Article 3(1))	48
3.2 Material scope	49
3.2.1 Employment, self-employment and occupation	49
3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))	50
3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))	52
3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))	53
3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))	54
3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)	54
3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)	55
3.2.8 Education (Article 3(1)(g) Directive 2000/43)	55
3.2.9 Access to and supply of goods and services that are available to the public (Article 3(1)(h) Directive 2000/43)	60
3.2.10 Housing (Article 3(1)(h) Directive 2000/43)	61
4 EXCEPTIONS	65
4.1 Genuine and determining occupational requirements (Article 4)	65
4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)	66
4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)	72
4.4 Nationality discrimination (Article 3(2))	73
4.5 Work-related family benefits (Recital 22 Directive 2000/78)	75
4.6 Health and safety (Article 7(2) Directive 2000/78)	75

4.7	Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)	77
4.7.1	Direct discrimination	77
4.7.2	Special conditions for young people, older workers and persons with caring responsibilities	79
4.7.3	Minimum and maximum age requirements	80
4.7.4	Retirement	81
4.7.5	Redundancy	83
4.8	Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)	84
4.9	Any other exceptions	84
5	POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)	85
6	REMEDIES AND ENFORCEMENT	88
6.1	Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)	88
6.2	Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)	92
6.3	Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78) ..	95
6.4	Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)	96
6.5	Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)	97
7	BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)	101
8	IMPLEMENTATION ISSUES	114
8.1	Dissemination of information, dialogue with NGOs and between social partners	114
8.2	Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)	117
9	COORDINATION AT NATIONAL LEVEL	118
10	CURRENT BEST PRACTICES	122
11	SENSITIVE OR CONTROVERSIAL ISSUES	123
11.1	Potential breaches of the directives (if any)	123
11.2	Other issues of concern	125
12	LATEST DEVELOPMENTS IN 2018	129
12.1	Legislative amendments	129
12.2	Case law	129
	ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION...	132
	ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS	136

LIST OF ABBREVIATIONS

BCSO: Ordinance of 4 September 2008 relating to the promotion of diversity and the fight against discrimination in the civil service of the Region of Brussels- Capital

BEMO: Ordinance of 4 September 2008 relating to the fight against discrimination and equal treatment in the employment field in Brussels-Capital Region

CED: Decree of 9 July 2010 on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment

CEMD: Decree of 22 March 2007 on equal treatment between persons in vocational training, implementing Directives 97/80/EC, 2000/43/EC, 2000/78/EC, 2002/207/EC and 2006/54/EC in the field of vocational training – including vocational guidance, learning, advanced vocational training and retraining – in Brussels-Capital Region

FLED: Framework Decree for the Flemish equal opportunities and equal treatment policy of 10 July 2008

FLEMD: Decree of 8 May 2002 on proportionate participation in the employment market: only applies in very specific situations, in which case FLED is not applicable

FRED: Decree of the French Community adopted on 12 December 2008 on the fight against certain forms of discrimination

GAFA: Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination

GED: Decree of 19 March 2012 aiming at fighting certain forms of discrimination

GEFA: Federal Act of 10 May 2007 pertaining to fight discrimination between women and men

REFA: Federal Act of 10 May 2007 amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia

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

EXECUTIVE SUMMARY

1. Introduction

In Belgium, which has a population of 11 million, the main religion is Roman Catholicism (50 %). Other religious groups are Muslims (5 %), Anglicans, Protestant and Orthodox Christians (2.5 %), persons of Jewish faith (0.4 %) and Buddhists (0.3 %). In addition, nearly 42 % of people identified themselves as non-believers, among which 10 % claim to be atheists.¹ Due to its history and the fact that it houses most of the EU institutions, Belgium is very cosmopolitan. There are no official numbers on the ethnic composition of the country, other than numbers on the different nationalities. According to two different studies, around 25 % of the population are of foreign origin (compared to 10 % who are of foreign nationality). The biggest minorities are Moroccans, Italians, French, Turks, and Dutch.² Belgium is a representative democracy with a bicameral parliament. The official head of state is the King (Philippe, since 21 July 2013) whose main functions are formal (i.e. signing federal laws, largely symbolic role in forming the federal Government). The Prime Minister is the leader of the Government. The Government always consists of a coalition of different political parties since there are a multitude of parties that get elected to Parliament.

The Belgian state system is divided into three levels: the federal state, the regions and communities. This federal structure has been, and still is, a complicating factor in the implementation of anti-discrimination law, because of the uncertainties concerning the division of competences between the different parts. The sociological and political context is also different in each part of the country. While the French-speaking part of the country (the French Community, Walloon Region and, to a large extent, the Brussels Capital Region) has traditionally chosen a more formal and individual model of combating discrimination close to the French model, the Dutch-speaking part (Flemish Region and Community) has been more willing to promote equal treatment through statistical monitoring and to allow for affirmative action schemes. The stakes are also higher in the Flemish Region and Community, because of some significance in that part of the country of the Vlaams Belang (VB), a far-right, populist nationalistic political party, with recurrent xenophobic tendencies, especially regarding the integration of the Muslim community in Belgian society. Its representation allows this party to influence the debates on issues such as the integration of migrants or the wearing of headscarves by Muslim women in schools or in employment. In recent years, the Nieuw-Vlaamse Alliantie (N-VA), a right-wing party with very strict views on policies such as immigration, gained many votes from VB electors and in 2014, became,³ for the first time, part of the federal Government.

2. Main legislation

Belgium is party to most of the important international agreements relevant to counteracting discrimination. However, it has not yet ratified Protocol no. 12 to the European Convention on Human Rights and the Council of Europe Framework Convention for the Protection of National Minorities. Articles 10 and 11 of the Constitution, which prohibit discrimination, are applicable generally, without any restriction either as to the grounds on which the discrimination is based (they require that the principle of equality be

¹ There are no official figures available in Belgium. These come from an academic study: Voyé, L., Dobbelaere, K. and Abts, K. (eds.) (2012) *Autres temps, autres mœurs*, Brussels, Racine-Campus. In 2015, the European Commission published *Eurobarometer 437: Discrimination in the EU in 2015*, which presents the same figures.

² Study carried out by Myria (2015), 'Immigré, étranger, Belge d'origine étrangère: de qui parle-t-on?' (Immigrant, foreigner, Belgian of foreign origin: who are we talking about?), *Myriatics*, December 2015, available in French: www.myria.be/files/Myriatics2_layout.pdf.

³ <https://www.hln.be/nieuws/binnenland/vlaams-belang-haalde-nieuwe-kiezers-vooral-bij-n-va~aa676d40/>. This news article (on the federal elections of 26 May 2019, which took place after the cut-off date of this report) cites a study by iVox which shows that voters move between Vlaams Belang and N-VA, including during the elections of 2014.

respected in relation to all grounds) or as to the situations concerned (they apply to all contexts, going beyond not only employment and occupation, but also the scope of the Racial Equality Directive). These constitutional provisions have been most effective when invoked against either legislative norms or administrative acts.

Today, the major anti-discrimination legislation at federal level is embodied in three acts adopted on 10 May 2007. First, the Federal Act amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia, (the Racial Equality Federal Act).⁴ This act aims at implementing both the Racial Equality Directive and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, in a single law prohibiting discrimination on grounds of presumed race, colour, origin,⁵ national or ethnic origin, and nationality.⁶ Secondly, the Federal Act designed to combat certain forms of discrimination, (the General Anti-Discrimination Federal Act),⁷ which covers age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion, trade union opinion, language, genetic characteristic and social origin. Thirdly, the Federal Act pertaining to fighting discrimination between women and men,⁸ which relates to sex and assimilated grounds, i.e. maternity, pregnancy and transgender. In 2017, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts released a first high-level report making several recommendations to improve the legal framework on anti-discrimination.⁹

In addition to the federal legislature, the regions and communities have also taken action in their respective fields of competence. In July 2008, the Flemish Community/Region adopted a piece of legislation establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy,¹⁰ which tackles the same grounds as those covered at the federal level. Its scope relates to employment policy, health care, education, goods and services available to the public (i.e. housing, energy, cultural services), social advantages, and economic, social, cultural and political activities outside the private sphere. This piece of legislation comprises two main parts: (1) the design of a general framework for the implementation of a proactive and preventive policy on equal opportunities; (2) specific provisions against discrimination based on a closed list of grounds very similar to those prohibited at the federal level.

In December 2008, the French Community (previously called the French-speaking Community) adopted a Decree on the fight against certain forms of discrimination,¹¹ which tackles the same grounds as those covered at the federal level. It applies to the selection, promotion, working conditions, including dismissals and pay in the public service of the French Community, education and vocational training, health policy, social advantages, membership of and involvement in any professional organisation funded by the French Community, and access to goods and services available to the public.

In November 2008, the Walloon Region adopted a Decree on the fight against certain forms of discrimination, including discrimination between women and men in the fields of

⁴ OJ (*Moniteur belge*), 30 May 2007; lastly modified on 17 August 2013, *Moniteur belge*, 5 March 2014.

⁵ Please note that national legislation uses the term 'descent'.

⁶ Please note that nationality is meant here as nationality and not citizenship.

⁷ OJ (*Moniteur belge*), 30 May 2007; lastly modified on 17 August 2013, *Moniteur belge*, 5 March 2014.

⁸ OJ (*Moniteur belge*), 30 May 2007; lastly modified on 22 May 2014, *Moniteur belge*, 24 July 2014.

⁹ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation* www.unia.be/en.

¹⁰ Flemish Community/Region, Framework Decree for the Flemish equal opportunities and equal treatment policy, 10 July 2008, OJ (*Moniteur belge*), 23 September 2008; last modified on 28 March 2014, *Moniteur belge*, 1 April 2014.

¹¹ French Community, Decree on the fight against certain forms of discrimination, 12 December 2008, OJ (*Moniteur belge*), 13 January 2009; last modified on 13 November 2015, OJ (*Moniteur belge*), 8 December 2015.

economy, employment and vocational training.¹² It tackles the same grounds as those covered at the federal level and applies, more precisely, to vocational guidance, socio-professional integration, placing of workers, funding for the promotion of employment, funding for employment and financial incentives to companies in the framework of the economic policy, including social economy and vocational training, in the public and the private sectors. To fill the gaps remaining in its material scope of application, this decree was amended on 19 March 2009 to cover, within the scope of powers of the Walloon Region, social protection (including healthcare and social advantages), supply of goods and services that are available to the public and outside the private and family sphere (including social housing), access, participation or any exercise of an economic, cultural or political activity open to the public, as well as employment relationships (under civil status) in departments of the Walloon Government, public authorities depending on the Walloon Region, decentralised bodies (such as provinces, municipalities, etc.) or public centres for social assistance.

In September 2008, the Brussels Capital Region adopted two ordinances to combat discrimination. The first is the Ordinance on the fight against discrimination and equal treatment in the employment field.¹³ It tackles the same grounds as those covered at the federal level and chiefly applies to placing of workers and advertising of employment. It is worth noting that this ordinance provides for public allowances and labels for business, implementing diversity plans. The second is the Ordinance on the promotion of diversity and the fight against discrimination in the civil service of the Brussels Capital Region.¹⁴ It applies to the employment field in the civil service of the Brussels Capital Region and covers access conditions, selection criteria, promotion and working conditions, including dismissals and pay. By encouraging public institutions to adopt diversity plans, this second ordinance also puts in place a broad policy of equal treatment. As to the fight against discrimination in housing, several ordinances modifying the Brussels Housing Code were adopted recently.¹⁵ Finally, on 5 October 2017, the Brussels Capital Region completed its anti-discrimination legal framework by adopting an ordinance aiming to combat discrimination and promote equality, which covers the missing material fields (goods and services, social protection and advantages, access to economic, cultural and social activities, trade union affiliation, and official documents).¹⁶

On 19 March 2012, the German-speaking Community adopted a new Decree on fighting certain forms of discrimination,¹⁷ which lays down a general framework for combating discrimination within the competence of the German-speaking Community. It is designed to implement anti-discrimination EU law in the fields of: 1) labour relations in the public bodies created or funded by the German-speaking Community, education institutions and the civil service and governmental institutions; 2) education; 3) employment; 4) social advantages; 5) cultural matters; 6) person-related¹⁸ matters; and 7) access to, and supply of, goods and services available to the public. This piece of legislation is very similar to the Federal Anti-Discrimination Acts and covers the same grounds.

The French Community Commission of the Brussels Capital Region (Cocof) adopted the Decree on equal treatment between persons in vocational training on 22 March 2007,¹⁹ which is based on an open list of prohibited criteria. It was amended on 5 July 2012 to

¹² Walloon Region, Decree on the fight against certain forms of discrimination, 6 November 2008, OJ (*Moniteur belge*), 19 December 2008; last modified on 12 January 2012, *Moniteur belge*, 23 January 2012.

¹³ OJ (*Moniteur belge*), 16 September 2008, lastly modified on 16 November 2017, OJ (*Moniteur belge*), 21 November 2017.

¹⁴ OJ (*Moniteur belge*), 16 September 2008 (not modified since then).

¹⁵ Brussels Housing Code, 17 July 2003, lastly modified on 21 December 2018, OJ (*Moniteur belge*), 31 January 2019.

¹⁶ OJ (*Moniteur belge*), 19 octobre 2017.

¹⁷ OJ (*Moniteur belge*), 5 June 2012, lastly modified on 22 February 2016, OJ (*Moniteur belge*), 14 April 2016.

¹⁸ This is a specific Belgian concept, '*matières personnalisables*', which means personal services or policy, such as services for the elderly.

¹⁹ OJ (*Moniteur belge*), 24 January 2008; lastly modified on 5 July 2012, OJ (*Moniteur belge*), 10 September 2012.

include a provision on protection from victimisation. In addition, the Cocof adopted a second Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment on 9 July 2010.²⁰ The purpose of this legal instrument is to lay down a general and harmonised framework for combating certain forms of discrimination and for promoting equal treatment in the fields of competence of the Cocof, more precisely: school transport and school building management; municipal, provincial, inter-municipal and private facilities with regard to physical education, sports and outdoor life; tourism; social advancement; health policy; assistance for people;²¹ access to goods and services; access to, participation in and any other exercise of economic, social, cultural or political activities publicly available; and labour relations within public institutions of the Cocof. This piece of legislation is based on a list of prohibited criteria in line with the Federal Anti-Discrimination Acts. It also aims to promote diversity to the extent that each public institution of the Cocof is required to develop a diversity action plan.

Thereby, at regional level, all the regions/communities (Cocof, German-speaking Community, Flemish Community/Region, Brussels Capital Region, French Community, Walloon Region) have adopted statutory laws fighting against discrimination in order to fully implement the directives. They endeavoured to harmonise their content with the Federal Anti-Discrimination Acts and are, to a large extent, in line with the directives.

3. Main principles and definitions

The Racial Equality Federal Act and the General Anti-Discrimination Federal Act are in line with most of the main concepts enshrined in the EU directives (direct discrimination, indirect discrimination, harassment and instruction to discriminate). There is nevertheless a problem regarding victimisation because Belgian law only protects victims, their representatives and witnesses against victimisation, while the EU directives cover 'all persons' involved. As in the directives, discrimination based on assumed characteristics and discrimination based on association with persons with particular characteristics are not expressly forbidden in the Racial Equality Federal Act and in the General Anti-Discrimination Federal Act. However, the preparatory works (*travaux préparatoires*) clearly specify that these acts apply to such discrimination.

The General Anti-Discrimination Federal Act and the Racial Equality Federal Act provide for the possibility of justifying certain differences in treatment directly based on one of the protected grounds where genuine and determining occupational requirements are concerned, in employment and occupation. The definition of genuine and determining occupational requirements corresponds to that offered in Directive 2000/43/EC and Directive 2000/78/EC. No exhaustive list of such requirements is required and it is left to the judge to decide, on a case-by-case basis, whether the conditions are satisfied in order for the exception to apply. However, the King (i.e. the Government) is authorised to adopt an executive regulation providing a list of examples in order to offer guidance to courts.

There were vigorous debates related to the question of which authority was competent to legislate on reasonable accommodation. The widespread opinion today is that, although disability policy is the responsibility of the communities, this does not prohibit the federal state or the regions from providing that denying reasonable accommodation to a person with a disability amounts to discrimination. The General Anti-Discrimination Federal Act provides that the refusal to put in place reasonable accommodations for a person with a disability is a form of prohibited discrimination. The notion of reasonable accommodation does not extend beyond the situation of persons with disabilities but covers all the fields to which the General Anti-Discrimination Federal Act applies, which go far beyond employment.

²⁰ OJ (*Moniteur belge*), 3 September 2010.

²¹ This covers social assistance, integration of migrants, and policies on disabled or older persons.

No specific rules exist in relation to multiple discrimination. The Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts suggests in its 2017 report that multiple discrimination should be included in the legal framework, which should provide appropriate sanctions.²²

4. Material scope

The Racial Equality Federal Act and the General Anti-Discrimination Federal Act provide for protection in large areas of public life: the provision of goods or services when these are offered to the public, including private housing; social advantages; social protection; access to employment, promotion, conditions of employment, dismissal and remuneration, both in the private and in the public sector; the nomination of a public servant or his/her assignment to a service; the mention in an official document of any discriminatory provision; and access to and participation in, as well as exercise, of an economic, social, cultural or political activity normally accessible to the public. The other legislative instruments adopted in order to implement the equal treatment directives have a material scope of application limited to the competence of either the region or the community. Education is covered at the community level. Unfortunately, some uncertainties remain as to the precise delimitation of the powers of the federal state, the regions and the communities in this field, which is an obstacle in the process of implementation. The most recent pieces of legislation adopted at the regional level, however, address most of the remaining gaps of implementation.

5. Enforcing the law

The General Anti-Discrimination Federal Act and the Racial Equality Federal Act provide for civil and criminal procedural protection of victims of discrimination that is nearly identical with respect to all the prohibited criteria. Alongside one of the guiding principles of the reform that there should be no hierarchy between grounds, only some criminal offences were finally maintained in the Racial Equality Federal Act (discrimination in the provision of goods or a service or in access to employment, vocational training or in the course of a dismissal procedure) and are therefore specific to discrimination based on race and ethnic origin. Victims of discrimination, under the Racial Equality Federal Act and the General Anti-Discrimination Federal Act, may 1) seek a finding that discriminatory provisions in a contract are null and void; 2) seek reparation (damages) according to the usual principles of civil liability (however, the victim may opt for a payment of the lump sums defined in the act rather than for damages calculated on the basis of the 'effective' damage); 3) seek from the judge an injunction imposing immediate cessation of the discriminatory practice, under the threat of financial penalties; 4) seek from the judge publication of the judgment finding a discrimination, by the posting of the judicial decision on the premises where the discrimination occurred, or by the publication of the judicial decision in newspapers. These actions are brought before civil courts, or where an employment relationship is concerned, before specialised labour courts. Those sanctions are generally held to be effective, proportionate and dissuasive in the meaning of EU law. However, in its 2017 report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts, raises several questions as to the dissuasive impact of the sanctions and stresses that this would need further consideration in order to truly assess the effective, proportionate and dissuasive character of the sanctions.²³

The General Anti-Discrimination Federal Act and the Racial Equality Federal Act provide for the legal standing of Unia (known, until 2016, as the Inter-federal Centre for Equal Opportunities), of organisations with a legal interest in the protection of human rights or in combating discrimination, established for at least three years, and of trade unions, to

²² Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation*, para 151 www.unia.be/en.

²³ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation*, para 341 www.unia.be/en.

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

Both federal acts provide for a shift of the burden of proof in all the jurisdictional procedures except the criminal ones. The victim seeking damages in reparation of the alleged discrimination will be allowed to produce certain evidence – for example, ‘statistical data’ or ‘recurrence tests’ – which, when presented in court, could lead the judge to presume that discrimination has occurred, thus obliging the defendant to demonstrate that, contrary to that presumption, there has been no discrimination. It should be stressed that ‘recurrence tests’ are closely linked to situation testing but are less controversial, and are therefore explicitly mentioned in the legislation.

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

With the adoption of the various equal treatment decrees and ordinances since 2008, the systems of remedies put in place in the regions and communities copy to a large extent those of the Federal Anti-Discrimination Acts and are in line with the European requirements.

As regards Roma, a ‘National Strategy for Roma Integration’, adopted in 2012, establishes Belgium’s issues and objectives for Roma integration by 2020, and provides for coordination between the federal state, the regions and the communities under the Roma task force, so that every authority can freely take measures according to their areas of responsibility. The Roma task force meets at least twice a year and is the national contact point for the European Commission. However, as highlighted by the Commissioner for Human Rights of the Council of Europe following his visit in Belgium in September 2015,²⁴ the situation of Roma and Travellers in Belgium regarding housing and education is still worrying. In May 2016, a Belgian National Roma Platform was set up in order to trigger dialogue with all stakeholders and Roma communities in Belgium on the topics of employment, housing and education. Recommendations aimed at political decision-makers were drafted in order to better assess the national strategy for Roma integration.

The UN Committee on the Rights of Persons with Disabilities (CRPD), in its first report on Belgium, highlighted the absence of a national plan with clear targets and the fact that accessibility is not a priority.

6. Equality bodies

The Centre for Equal Opportunities and Opposition to Racism (renamed the Inter-federal Centre for Equal Opportunities in 2014 and Unia in 2016) was initially created in 1993. In 2007, it was given a role in the supervision of all the grounds covered by the Racial Equality Federal Act and the General Anti-Discrimination Act: colour, origin, national origin, nationality, age, sexual orientation, civil status, birth, wealth/income (*fortune*, in French), religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion, trade union opinion, genetic characteristic and social origin (not sex and language). In March 2014, Unia became an inter-federal agency, entrusted with the monitoring and implementation of the anti-discrimination law adopted by the regions and the communities. Henceforth, in the event of potential infringement of any of

²⁴ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2015) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*.

the federal or regional anti-discrimination laws, citizens are able to contact either Unia's main office in Brussels, or the contact points in Flanders and Wallonia.

Unia issues reports, surveys and recommendations within its mandate. It also assists victims of discrimination, and it may file judicial actions, but it is not a quasi-judicial body. In 2017, Unia received 6 602 complaints, opened 2 017 files and launched 13 judicial actions.²⁵ The low number of cases relative to the number of opened files is partly due to the capacity of Unia to reach an amicable settlement through mediation. Unia has been established as an autonomous public service. Although placed under the supervision of the federal and regional Parliaments, its independence is guaranteed by legislation and, in practice, it fulfils its mandate in an independent fashion.

7. Key issues

Over the last few years, politicians of the Dutch-speaking nationalist Flemish party (N-VA) have made several statements with racist connotations.²⁶ There is much political concern about this issue, as this party is the biggest in the Flemish part of Belgium, and part of the federal Government (2014-2019). In addition, despite the repeated calls of Unia for an inter-federal action plan against racism, the 2014 Governmental Agreement contains no such commitment. In September 2018, the Flemish television show *Pano* made a documentary on the youth group Schild & Vrienden (Shield and Friends),²⁷ which describe themselves as a Flemish-nationalist group of students. The documentary revealed their racist, sexist, anti-Muslim, anti-Semitic, anti-gay agenda, and also showed that they had infiltrated the public sphere, namely the Youth Parliament and local election lists of the N-VA. Their president, Dries Van Langenhove, was a public supporter of the N-VA and VB. After the documentary, many N-VA members were quick to denounce its content, however there were members of Schild & Vrienden on the 2018 local elections lists of the N-VA who had not been banned. Furthermore, the N-VA left the federal Government at the end of 2018, after disagreements on the Belgian ratification of the Global Compact for Safe, Orderly and Regular Migration (the Marrakesh agreement). This has also led to severe division among the population, and the organisation of a violent 'March against Marrakesh'.²⁸

In 2017 and 2018, there have been key legal and jurisprudential developments regarding inclusive education in the mandatory school system. In 2014, the UN CRPD expressed its concern about the 'poor accessibility for persons with disabilities, the absence of a national plan with clear targets and the fact that accessibility is not a priority' and the fact that little has been done since then is a cause for concern.²⁹ The committee noted 'the low number of persons with disabilities in regular employment' and 'the Government's failure to reach

²⁵ Unia (2018) *Annual report of Unia 2017*, available on its website (www.unia.be/en).

²⁶ Cf., for instance: *Het Nieuwsblad* (2018), 'Weer twee N-VA'ers in opspraak door racisme' (*Again two members of the N-VA denounced for racism*), 12 September 2018; Interview with Liesbeth Homans and Mieke Van Hecke, conducted by *De Standaard*, 6 October 2018, in which Liesbeth Homans (prominent N-VA member and Flemish Minister) affirmed: 'Not every Muslim is a terrorist, but every terrorist is a Muslim'; or when Minister for Home Affairs Jan Jambon said 'a significant part of the Muslim Community danced after the terrorist attacks' (of 22 March 2016 in Brussels): <https://www.demorgen.be/nieuws/jan-jambon-ik-heb-geen-uitspraak-over-dansende-moslims-gedaan~b3f627a4/>.

²⁷ See the documentary here: <https://www.vrt.be/vrtnws/nl/2018/09/05/pano-wie-is-schild-vrienden-echt/>.

²⁸ *Le Vif* (2018) 'Environ 5.500 personnes rassemblées à Bruxelles pour la marche contre Marrakech' (*Around 5.500 people in Brussels for the March against Marrakesh*), 16 December 2018, https://www.levif.be/actualite/belgique/environ-5-500-personnes-rassemblees-a-bruxelles-pour-la-marche-contre-marrakech/article-normal-1068053.html?cookie_check=1561014717; *L'Echo* (2018), '90 arrestations à la "marche contre Marrakech"' (*90 arrests at the March against Marrakech*), 16 December 2018, <https://www.lecho.be/economie-politique/belgique/general/90-arrestations-a-la-marche-contre-marrakech/10079645.html>.

²⁹ UN Committee on the Rights of Persons with Disabilities (UNCRPD) (2014), *Concluding Observations on the initial report of Belgium adopted by the Committee at its 12th session (15 September – 3 October 2014)*, paras. 21–22.

targets for the employment of persons with disabilities within its own agencies, as well as the lack of a quota in the private sector'.³⁰

Concerns about Travellers were also raised in 2014, by the ECRI,³¹ the Committee on the Elimination of Racial Discrimination³² and the Commissioner for Human Rights of the Council of Europe.³³ There is still a shortage of properly equipped transit sites for Travellers, in particular in the Walloon Region and in the Brussels Capital Region. In 2018, Unia published a survey on the participation of Roma children in education.³⁴ The survey recommends promoting inclusive education, improving the housing situation of this community and investing in research related to those issues.

Following the terrorist attacks in Paris and Brussels in 2015 and 2016 respectively, there has been persistent anti-Muslim rhetoric, in both the public and political spheres. This has been realised in calls for completely banning the wearing of the Islamic veil in public spaces (which has led to multiple cases)³⁵ and has led to an increase in reports of discrimination on grounds of religion, of which the Muslim community has been the main target.

Finally, many of the cases decided in court show that there is still a noticeable lack of knowledge of the anti-discrimination law among the professionals in charge of its implementation, especially in respect of the concept of indirect discrimination.

³⁰ UN Committee on the Rights of Persons with Disabilities (UNCRPD) (2014), *Concluding Observations on the initial report of Belgium adopted by the Committee at its 12th session (15 September – 3 October 2014)*, paras. 38 – 39.

³¹ European Commission against Racism and Intolerance (ECRI) (2014) *ECRI Report on Belgium*.

³² CERD/C/BEL/CO/16-19, 14 March 2014, paras. 18–19.

³³ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*.

³⁴ Unia (2017) survey on 'Participation à l'enseignement des enfants des Gens du voyage en 'elgique', December 2017.

³⁵ In 2014, see Council of State (administrative section) (*Conseil d'Etat – section d'administration*), 5 February 2014, *X. v. het Gemeenschaponderwijs*, judgments no. 226.345 and 226.346; 14 October 2014, *Sukhjot Singh, X., Sharanjit Singh v. het Gemeenschaponderwijs*, rulings no. 228.751, 228.752, 228.748; 14 October 2014, *X., de vzw Justice and Democracy, Sharanjit Singh, de vzw United Sikhs (Belgium) v. het Gemeenschaponderwijs*, rulings no. 228.753, 228.754, 224.755; Labour Court of Brussels (*Cour du travail de Bruxelles*), 6 March 2014, *H. Amal v. Ministere de la Région Bruxelles-capitale*, R.G. no. 2012/CB/15.

INTRODUCTION

The national legal system

In the Belgian federal system, the competence to legislate on discrimination in the areas covered by the Racial Equality and Employment Equality Directives is divided between the federal state, the three communities³⁶ and the three regions.³⁷ Unlike in the French-speaking part of Belgium, in the Flemish part of the country, the region and community are merged into one body.

With respect to the implementation of the principle of equal treatment in the fields to which only Directive 2000/43/EC applies (social protection, including social security and healthcare; social advantages; education; access to and supply of goods and services which are available to the public, including housing),³⁸ the Constitution and the Special Act of 8 August 1980, lastly revised on 6 January 2014 (Sixth Belgian State Reform), provide that:

- social security is a federal matter, except for family allowances³⁹ which has been a responsibility of the communities since the Sixth Belgian State Reform of 2014;
- healthcare is essentially a competence of the communities, except for certain matters including the adoption of framework legislation and health insurance, which remain matters of federal competence;
- with a few exceptions, social aid is a competence of the communities;
- education is a competence of the communities, including the status of school teachers and other civil servants or employees working in schools (Article 127(1)(2) of the Constitution);
- social housing, as well as the rules relating to the private housing market, are the responsibility of the regions, since the Sixth Belgian State Reform of 2014;
- prohibition of discrimination in the access to and supply of goods and services available to the public should be dealt with by each competent authority in the sphere of its powers (for instance, public transport falls within the competence of the regions, apart from the national airport and the public railway company, which are the responsibility of the federal state).

With respect to the implementation of the principle of equal treatment in the fields to which both the Racial Equality and the Employment Equality Directives apply, the Special Act of 8 August 1980 specifically reserves to the federal level the competence to legislate in employment law. The regions and communities, however, have important powers in the domain of employment policy:

- the regions have been granted powers relating to the placement of workers (which includes vocational guidance) and the adoption of programmes for the professional integration of the unemployed;
- the communities have been granted powers relating to vocational training (although, in the French-speaking part of the state, vocational training was transferred from the French Community to the Walloon Region and the Brussels Capital Region);
- the status of personnel of the regions or communities is the exclusive competence of the regions and communities.

³⁶ The French Community (*Communauté française*) which is referred to as the Federation Wallonia-Brussels (Fédération Wallonie-Bruxelles) in the political and media discourse, the Flemish Community (*Vlaamse Gemeenschap*), and the German-speaking Community (*deutschsprachigen Gemeinschaft*).

³⁷ The Walloon Region (*Région wallonne*), the Flanders Region (*Vlaams Gewest*) and the Brussels Capital Region (*Région de Bruxelles-capitale*).

³⁸ Directive 2000/43/EC, Article 3(1)(e) to (h).

³⁹ Parental leave allowances are still a federal matter.

List of main legislation transposing and implementing the directives

At the federal level:

- Federal Act of 10 May 2007 amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (*Loi tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*) (the Racial Equality Federal Act).⁴⁰

This act implements the Racial Equality Directive and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination in a single law prohibiting discrimination on grounds of presumed race, colour, origin,⁴¹ national or ethnic origin and nationality. The act contains both civil and criminal law provisions. It covers both the private and public sectors, and includes access to and supply of goods and services available to the public, social protection (notably social security and healthcare), social advantages, working relationships (access to employment, working conditions and salary, termination of employment contract, etc.), affiliation and membership of an organisation representing workers or employers or of any professional organisation, and access to and participation in, or any exercise of, an economic, social, cultural or political activity open to the public.

- Federal Act of 10 May 2007 designed to combat certain forms of discrimination (*Loi tendant à lutter contre certaines formes de discrimination*) (the General Anti-Discrimination Federal Act).⁴²

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

At the regional level:

– **The Flemish Community/Region:**

Framework Decree for the Flemish equal opportunities and equal treatment policy (*Decreet houdende een kader voor het Vlaamse gelijkekansen en gelijkebehandelingsbeleid*) of 10 July 2008 implementing European Directive 76/207/EC as modified by Directive 2002/73/EC, Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC (the Flemish Framework ET Decree).⁴³ Its scope relates to the areas of competence of the Flemish Region and the Flemish Community: employment policy, healthcare, education, goods and services available to the public (i.e. housing, energy, cultural services), social advantages, and economic, social, cultural and political activities outside the private sphere. It provides for the prohibition of discrimination on grounds of:

⁴⁰ OJ (*Moniteur belge*), 30 May 2007; lastly modified on 17 August 2013, *Moniteur belge*, 5 March 2014.

⁴¹ Please note that national legislation uses the term 'descent'.

⁴² OJ (*Moniteur belge*), 30 May 2007; lastly modified on 17 August 2013, *Moniteur belge*, 5 March 2014.

⁴³ OJ (*Moniteur belge*), 10 July 2008; lastly modified on 28 March 2014, *Moniteur belge*, 1 April 2014.

- race,⁴⁴ colour, origin, national or ethnic origin, nationality (cf. Racial Equality Federal Act with some terminological differences);
- age, sexual orientation, civil status, birth, property, religious or philosophical belief, political opinion, trade union opinion, language, state of health,⁴⁵ disability, physical or genetic characteristics, social origin (cf. General Anti-Discrimination Federal Act with some terminological differences);
- gender, gender identity, gender expression (cf. Gender Equality Federal Act with some terminological differences).⁴⁶

Decree of 8 May 2002 on proportionate participation in the employment market (*Decreet houdende evenredige participatie op de arbeidsmarkt*),⁴⁷ which seeks both to prohibit discrimination on the grounds listed in Article 19 of the Treaty on the Functioning of the European Union (TFEU), and to encourage the integration of target groups into the labour market by positive action measures (preparation of diversity plans and annual reports on progress made). This decree has a limited scope of application: vocational training, vocational guidance, integration of persons with disabilities in the labour market, public authorities of the Flemish Region/Community, including those in the field of education. When a discriminatory situation is within the scope of the Decree of 8 May 2002, the Flemish Framework ET Decree is not applicable (Article 20(8)).

– **The French Community:**

Decree of the French Community adopted on 12 December 2008 on the fight against certain forms of discrimination (*Décret de la Communauté française du 12 décembre 2008 relatif à la lutte contre certaines formes de discrimination*)⁴⁸ implementing Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC (the French Community ET Decree).⁴⁹ This decree applies, in the scope of competence of the French Community, to selection, promotion, working conditions, including dismissals and pay, in the public service of the French Community, education and vocational training, health policy, social advantages, membership of and involvement in any professional organisation funded by the French Community, access to goods and services available to the public, and access to and participation in, or any exercise of, an economic, social, cultural or political activity open to the public. The discrimination grounds covered are:

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

⁴⁴ 'Alleged' or 'presumed' is not mentioned contrary to the Racial Equality Federal Act.

⁴⁵ 'Actual and future' are not mentioned contrary to the General Anti-Discrimination Federal Act.

⁴⁶ The Federal Act pertaining to fight against discrimination between women and men (*Loi tendant à lutter contre la discrimination entre les femmes et les hommes*), OJ (*Moniteur belge*) was also adopted on 30 May 2007 (the Gender Equality Federal Act). This act refers to gender and related grounds: pregnancy, childbirth, maternity, gender reassignment, gender identity and gender expression.

⁴⁷ OJ (*Moniteur belge*), 26 July 2002; lastly modified on 10 December 2010, OJ (*Moniteur belge*), 29 December 2010.

⁴⁸ OJ (*Moniteur belge*), 13 January 2009; lastly modified on 5 December 2013, OJ (*Moniteur belge*), 5 March 2014.

⁴⁹ OJ (*Moniteur belge*), 13 January 2009; lastly modified on 13 November 2015, OJ (*Moniteur belge*), 8 December 2015.

– **The Walloon Region:**

Decree of 6 November 2008 on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (*Décret de la Région wallonne du 6 novembre 2008 relatif à la lutte contre certaines formes de discrimination, en ce compris la discrimination entre les femmes et les hommes, en matière d'économie, d'emploi et de formation professionnelle*),⁵⁰ implementing European Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC, as amended on 19 March 2009 in order to extend its material scope (the Walloon ET Decree).⁵¹ This decree covers, in the scope of competence of the Walloon Region, vocational training, vocational guidance, socio-professional integration, placing of workers, funding for the promotion of employment, funding for employment and financial incentives to companies in the framework of the economic policy, including social economy and vocational training, in the public and the private sectors. It also covers: social protection, including healthcare; social advantages; the supply of goods and services that are available to the public and outside the private and family sphere, including social housing; access to, participation in, or any exercise of, an economic, cultural or political activity open to the public and statutory relationships in departments of the Walloon Government, public authorities depending on the Walloon Region, decentralised bodies (such as provinces, municipalities, etc.), and public centres for social assistance.

The discrimination grounds covered are:

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

– **The German-speaking Community:**

Decree of 19 March 2012 on fighting certain forms of discrimination (*Dekret zur Bekämpfung bestimmter Formen von Diskriminierung*), implementing European Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC (the German Community ET Decree).⁵² It covers: labour relations regarding public bodies created or funded by the German-speaking Community, education institutions and the civil service and governmental institutions; education; employment; social advantages; cultural matters; person-related matters; access to, and supply of, goods and services available to the public.

The discrimination grounds covered are the same as those in the Racial Equality Federal Act, the General Anti-Discrimination Federal Act and the Gender Equality Federal Act.

– **The Brussels Capital Region:**

Ordinance of 4 September 2008 relating to the fight against discrimination and equal treatment in the employment field (*Ordonnance relative à la lutte contre la discrimination et à l'égalité de traitement en matière d'emploi*), implementing the EU Equal Treatment Directive 2006/54/EC and Directives 2000/43/EC, 2000/78/EC in the field of employment

⁵⁰ OJ (*Moniteur belge*), 19 December 2008; lastly modified on 12 January 2012, OJ (*Moniteur belge*), 23 January 2012.

⁵¹ OJ (*Moniteur belge*), 10 April 2009.

⁵² OJ (*Moniteur belge*), 5 June 2012; lastly modified on 22 February 2016, OJ (*Moniteur belge*), 14 April 2016.

as regards Brussels Capital (the Brussels ET Employment Ordinance).⁵³ The employment field covers, at the regional level, worker placement policies and policies aimed at unemployed persons (as defined in Article 4(9) of the ordinance).

The discrimination grounds covered are the same as those in the Racial Equality Federal Act, the General Anti-Discrimination Federal Act and the Gender Equality Federal Act.

A second ordinance, also adopted on 4 September 2008, relates to the promotion of diversity and the fight against discrimination in the civil service of the Brussels Capital Region (*Ordonnance visant à promouvoir la diversité et à lutter contre la discrimination dans la fonction publique régionale bruxelloise*). This ordinance implements Directives 2000/43/EC, 2000/78/EC and Directive 2006/54/EC (the Brussels Civil Service ET Ordinance).⁵⁴ It applies to the employment field in the civil service of the Brussels Capital Region and covers access conditions, selection criteria, promotion, and working conditions, including dismissals and pay. Article 4(13) defines the public institutions of the Brussels Capital Region falling within the scope of this ordinance. The discrimination grounds are the same as those enshrined in the Racial Equality Federal Act, the General Anti-Discrimination Federal Act and the Gender Equality Federal Act. In addition to anti-discrimination provisions, the ordinance encourages public institutions to adopt diversity plans.

On 5 October 2017, the Brussels Capital Region completed its anti-discrimination legislative framework: the Ordinance designed to combat certain forms of discrimination and to promote equal treatment (*Ordonnance tendant à lutter contre certaines forms de discriminations et à promouvoir l'égalité de traitement*; the Brussels ET Ordinance). The ordinance covers social protection and advantages; access to goods and services; access to public economic, social and cultural activities; affiliation to workers' organisations and material in official documents. The employment field is already covered by the other ordinances. The protected grounds are the same as those set out in the General Anti-Discrimination Federal Act.

– **The Commission communautaire française (Cocof)**

The Commission communautaire française (Cocof), to which, in 1993, the French Community transferred its competence concerning vocational training, tourism, social advancement, school transport, health policy and assistance for people living in the Brussels Capital Region, adopted two decrees on implementing the EU anti-discrimination directives.

First, there is the Decree of 22 March 2007 on equal treatment between persons in vocational training (*Décret relatif à l'égalité de traitement entre les personnes dans la formation professionnelle*), implementing Directives 97/80/EC, 2000/43/EC, 2000/78/EC, 2002/207/EC and 2006/54/EC in the field of vocational training – including vocational guidance, learning, advanced vocational training and retraining (*orientation, formation, apprentissage, perfectionnement et recyclage professionnel*) – in the Brussels Capital Region (the Cocof Vocational Training ET Decree).⁵⁵ The discrimination grounds covered in the decree are part of an open list of criteria ('or any other ground of discrimination') and those referred to in the Racial Equality Federal Act and the General Anti-Discrimination Federal Act (and the Gender Equality Federal Act) are explicitly named.

Secondly, there is the Decree of 9 July 2010 on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (*Décret relatif*

⁵³ OJ (*Moniteur belge*), 16 September 2008, last modified on 16 November 2017, OJ (*Moniteur belge*), 21 November 2017.

⁵⁴ OJ (*Moniteur belge*), *Moniteur belge*, 16 September 2008 (not modified since then).

⁵⁵ OJ (*Moniteur belge*), 24 January 2008; last modified on 5 July 2012, OJ (*Moniteur belge*), 10 September 2012.

à la lutte contre certaines formes de discrimination et à la mise en oeuvre du principe de l'égalité de traitement), implementing Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC (the Cocof ET Decree).⁵⁶ This decree applies to: school transport and school building management; municipal, provincial, inter-municipal and private facilities with regard to physical education, sports and outdoor life; tourism; social advancement; health policy; assistance for people;⁵⁷ access to goods and services; access to, participation in, and any other exercise of economic, social, cultural or political activities that are publicly available; and labour relations within public institutions of the Cocof. As regards the promotion of diversity within public institutions, each public institution of the Cocof is required to develop a diversity action plan. The discrimination grounds are the same as those enshrined in the Racial Equality Federal Act and the General Anti-Discrimination Federal Act (and the Gender Equality Federal Act).

⁵⁶ OJ (*Moniteur belge*), 3 September 2010 (not modified since then).

⁵⁷ This covers social assistance, integration of migrants, and policy on disabled persons and older persons.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Belgian Constitution includes the following articles regarding non-discrimination:

Articles 10 and 11 guarantee equality before the law and enjoyment without discrimination of the rights and freedoms accorded to all, without specifying a list of prohibited grounds of discrimination. These equality clauses are of general application, without any restriction as to the grounds on which the discrimination is based (they require the principle of equality to be respected in relation to all grounds).

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

The constitutional anti-discrimination provisions are directly applicable. Their main importance lies in the fact that legislative norms adopted either by the Federal state (*Lois/Wetten*) or by the regions or communities (*Décrets/Decreten* or *Ordonnances/Ordonnanties*), and regulations adopted by the different Governments (*Arrêtés royaux/Koninklijke besluiten* when adopted by the federal Government, *Arrêtés du gouvernement de la Région/Besluiten van de regering* when adopted by the Governments of the regions), must respect the constitutional principle of equality. Respect for the constitutional principles of equality and non-discrimination is ensured by the power accorded to every person with a legal interest to seek the annulment of a statutory law or an executive regulation, respectively, before the Constitutional Court or the Council of State (Conseil d'Etat/Raad van State – Supreme Administrative Court). Moreover, if a jurisdiction entertains doubts as to the compatibility of a legislative norm (federal act or decree), it may submit the question to the Constitutional Court by a referral procedure, and the Court may then consider a piece of legislation invalid if it is found to violate the constitutional principles of equality and non-discrimination.

These provisions can be enforced against private actors (in addition to against the state). However, because of their very general formulation and the lack of a general horizontal effect in the field of private relationships, these clauses are not used in practice to protect an individual from private acts of discrimination by an employer or another private person.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation transposing the two EU anti-discrimination directives:

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

At the level of the regions and communities, the same grounds are covered with some terminological differences chiefly relating to the Gender Equality Federal Act. The grounds specified in Directives 2000/43/EC and 2000/78/EC are always expressly mentioned (see details in the Introduction to this report).

2.1.1 Definition of the grounds of unlawful discrimination within the directives

None of the grounds mentioned in the Racial Equality and Employment Equality Directives which were implemented in the Belgian legislation were provided with a definition when the implementation took place. These definitions were considered unnecessary, as these concepts – in the context at least of an act prohibiting discrimination – were seen as self-explanatory. Generally speaking, neither the grounds covered by the Racial Equality and the Employment Equality Directives, nor the additional grounds to which the General Anti-Discrimination Federal Act applies, are defined in other parts of national legislation.

The website of Unia provides some indication of the meaning of the terms, but chiefly relies on broad definitions based on the usual sense of the discrimination grounds.⁵⁸

a) Racial or ethnic origin

The concepts of presumed race and ethnic origin are not defined in Belgian anti-discrimination law. However, it is worth noting that, in its 2013 annual report, Unia focused on racism and on various approaches to it (historical, legal, socio-scientific).⁵⁹

In Unia's 2015 socio-economic monitoring report, which highlights the stratification of the labour market according to the origin and the migratory history of people, both terms are defined as follows:

- the term 'origin' combines the nationality of the person, nationality at birth of the person and nationality at birth of the person's parents;
- the term 'migratory history' combines the nationality of the person, nationality at birth of the person, nationality at birth of the person's parents, country of birth, country of birth of the person's grandparents (only when the persons are of Belgian nationality, are born in Belgium from parents who were Belgian at the moment of the

⁵⁸ www.unia.be/en.

⁵⁹ Unia (2014) *Annual report of Unia 2013 (Discrimination – Diversité)*, pp. 14-31, available on its website www.unia.be/en.

birth), date of registering at the national register and date of acquisition of nationality.⁶⁰

No reference is made to membership of a national minority in the federal anti-discrimination legislation, although it would have been justified by reference to the list of prohibited grounds of discrimination in Article 21 of the EU Charter of Fundamental Rights. In practice, due to the very specific treatment of linguistic minorities in Belgium, the inclusion of 'membership of a national minority' in the anti-discrimination legislation would have been very tricky and the legislature decided to avoid these difficulties by not mentioning it as such.

Belgian case law does not interpret the terms 'presumed race' and 'ethnic origin' separately. Belgian courts do not draw a clear distinction between the two terms; sometimes they use both of them, and sometimes only one of them without any real consistency.⁶¹ Occasionally the courts just refer to the pertinent legal provisions without quoting the grounds themselves.⁶² There are no recognised ethnic minorities in Belgium, which would benefit by having a special legal status. Minority language could be recognised as a part of ethnicity but discrimination on the grounds of language as such is dealt with separately in Belgian anti-discrimination law and is not under the responsibility of Unia because of the tense relationships between the French-speaking and Dutch-speaking communities. In Belgium, the use of French or Dutch in political life, but also in art, culture, education, etc. is of highly symbolic significance and can give rise to serious political tensions.

In its 2016 and 2017 annual reports, Unia focused on the increase of racism and discrimination related to the post-terrorist climate we are living in.⁶³ It also pointed out the significant increase of hate speech on social media.⁶⁴

b) Religion and belief

Religion and belief are not defined in the anti-discrimination legislation.

In 2017, Unia published a report concerning discrimination based on religious belief, linked to the consequences of the terrorist attacks. The report shows a rise in anxiety *vis-a-vis* the Muslim community in Belgium and more broadly people of North African origin.⁶⁵ This situation leads to more discriminatory behaviour being reported to Unia, especially discrimination against Muslim women wearing the hijab.

c) Disability

Social security legislation provides for benefits for persons with a certain degree of disability, which has to be medically certified. In this context, disability is often defined by reference to an official recognition by a competent authority.⁶⁶ For instance, Collective

⁶⁰ Inter-federal Centre for Equal Opportunities (Unia) (2015) *Socio-Economic Monitoring - Labour Market and Origin*, Federal Public Service on Employment, Labour and Social Dialogue, Brussels, November 2015, pp. 19-20 www.unia.be/en.

⁶¹ See: Court of first instance (*Correctionele rechtbank*) of Antwerp, judgment no. 2009/4737 of 22 October 2009; Court of Appeal (*Hof van Beroep*) of Antwerp, judgment no. 2009/1837 of 25 February 2009; Court of Appeal (*Cour d'appel*) of Mons, judgment of 13 January 2010; Criminal Court (*Tribunal correctionnel/Correctionele rechtbank*) Dendermonde, judgment no. F.D. 35.98.16/05 AF of 7 February 2014; and Court of Appeal (*Hof van Beroep*) of Brussels, judgment of 10 February 2015. www.unia.be/en.

⁶² See Court of first instance of Brussels (Criminal section) (*Tribunal correctionnel de Bruxelles*), judgment no. BR 43.IN.101194/06 of 26 February 2014. www.unia.be/en.

⁶³ Unia (2017) *Annual report for 2016*, p. 19 and Unia (2018), *Annual report for 2017*, pp. 58-59, both available on its website www.unia.be/en.

⁶⁴ Unia (2018), *Annual report for 2017*, pp. 53-57, available on its website www.unia.be/en.

⁶⁵ Unia (2017), *Mesures et climat : conséquences post-attentats*, June 2017, www.unia.be/en.

⁶⁶ Similarly, but outside the field of employment, the Ordinance of the Brussels Capital Region of 18 December 2008 relating to the admittance of guide dogs to public places defines a disabled person as 'any person

Agreement No. 99 of 20 February 2009 concerning the level of remuneration for disabled workers and replacing the Collective Agreement No. 26 of 15 October 1975,⁶⁷ applies to disabled workers recognised by a proper authority, namely a regional agency in charge of the social and professional integration of disabled people.⁶⁸

On disability, the explanatory memorandum⁶⁹ accompanying the Cooperation Agreement of 19 July 2007, relating to the concept of reasonable accommodation,⁷⁰ explains that

'by analogy with the General Anti-Discrimination Federal Act, the choice has been made not to include a definition [of disability] in the Protocol. By doing so, it is intended to avoid any restrictive interpretation of the concept of disability and to make it possible for the definition of 'disabled person' to evolve. In any case, it is necessary to understand the notion of disability as any lasting and important limitation of a person's participation, due to the dynamic interaction between 1) intellectual, physical, psychic or sensory deficiencies; 2) limitations during the execution of activities and 3) personal and environmental contextual factors (...). Any person whose participation in the social or professional life is hindered or impeded, and not only the people recognised as being disabled by law, is to be regarded as a disabled person within the meaning of the present protocol.'

By defining disability by reference to the person's environment rather than his/her physical or intellectual characteristics, this commentary seems in line with the definition provided by the Court of Justice of the European Union (CJEU) in *Ring and Skouboe Werge*⁷¹ as well as with Article 1 of the UN Convention on the Rights of Persons with Disabilities, which has been ratified by Belgium.

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

The Liège Labour Tribunal condemned a driving school for discrimination against an obese candidate on grounds of disability and physical characteristics.⁷² The case concerned a man, M.B. who applied to become a driving instructor. The driving school was interested in M.B.'s profile and invited him for an interview. Two days after the interview, M.B. got an email from the driving school rejecting his application. In the email, the driving school explained to M.B. that his 'physical profile' did not match with what was expected from a driving instructor in the school. He was also asked whether he had already thought about losing weight, as being obese was a handicap for this kind of job. Following that reply, M.B. contacted Unia, which unsuccessfully tried to conciliate all the parties. M.B. decided to bring the case to court and Unia joined the case in support of the claimant. In the first instance ruling, the Liège Labour Tribunal extensively explained the Belgian anti-

whose disability is recognised by an authority competent to this end' (last modified on 25 April 2012, OJ (*Moniteur belge*), 5 May 2012).

⁶⁷ Collective Agreement No. 99 of February 2009 (*Convention collective de travail n° 99 du 20 février 2009, conclue au sein du Conseil national du Travail, concernant le niveau de rémunération des travailleurs handicapés et remplaçant la convention collective de travail n° 26 du 15 octobre 1975 concernant le niveau de rémunération des travailleurs handicapés occupés dans un emploi normal*), made compulsory by the Executive Regulation of 28 June 2009, OJ (*Moniteur belge*), 13 July 2009.

⁶⁸ Agence wallonne pour l'intégration des personnes handicapées - AWIPH, Service bruxellois francophone des personnes handicapées, Vlaams Agentschap voor Personen met een Handicap - VAPH and/or Vlaamse Dienst voor Arbeidsbemiddeling en Beroepsopleiding, Dienststelle für Personen mit Behinderung.

⁶⁹ The memorandum is a commentary that is not binding but that the courts are likely to consider as a source of reference when interpreting anti-discrimination concepts.

⁷⁰ Cooperation Agreement of 19 July 2007 (*Protocole du 19 juillet 2007 entre l'État fédéral, la Communauté flamande, la Communauté française, la Communauté germanophone, la Région wallonne, la Région de Bruxelles-Capitale, la Commission communautaire commune, la Commission communautaire française en faveur des personnes en situation de handicap*), OJ (*Moniteur belge*), 20 September 2007.

⁷¹ CJEU, judgment of 11 April 2013, *HK Danmark (Ring and Skouboe Werge)*, joined cases C-335/11 and C-337/11, ECLI:EU:C:2013:222.

⁷² Labour Tribunal of Liège, 20 June 2016, www.unia.be/en.

discrimination law as well as the *Kaltoft* case handed down by the the CJEU.⁷³ In *Kaltoft*, the CJEU dealt with the question of whether obesity can be considered as coming into the scope of the protected ground of disability. On this basis, the tribunal judged that even though obesity is not a protected ground as such, it amounts to disability when it constitutes a barrier to participating in professional life on the same basis as other workers. The tribunal underlined that it is not important in the present case that M.B. effectively suffers from morbid obesity – which is a disability – since the driving school assumed that he did. In any case, according to the tribunal, the reasons underlying to the refusal of M.B.’s application correspond to the ground of disability or at least and undoubtedly to the ground of ‘physical characteristic’ – which is another protected ground enshrined in the General Anti-Discrimination Federal Act. Therefore, M.B. was directly discriminated against (and not indirectly, as stated in the opinion of the public prosecutor). The judgment of the labour tribunal was confirmed by the Liège Labour Court on 12 October 2017,⁷⁴ which ruled in addition that the school failed to prove that the refusal of M.B.’s application could be justified under the genuine occupational requirement exception. The labour court however reduced the amount of damages provided for by the labour tribunal, considering that regardless of his disability, M.B. did not fulfil all the job requirements (in particular holding a specific driving licence).

On 16 October 2017, the Antwerp Labour Court condemned the general and automatic exclusion from employment of people with diabetes dependent on insulin, for security reasons in the Port of Antwerp. An internal rule barred their appointment altogether. The court held that this exclusion constituted discrimination on the ground of disability, which was inadequate and unnecessary to ensure public safety.⁷⁵ In each case, the specific tasks of the job must be considered.

More recently, on 20 February 2018, the Brussels Labour Court rendered a judgment on appeal concerning the dismissal of an employee who needed an adapted schedule after having suffered from cancer.⁷⁶ When she returned to work after long-term sickness leave, she asked for an adapted schedule, as she was not yet able to reprise a full-time schedule. Her request was refused by her employer and led to her dismissal. For the first time in Belgium, the court recognised that the consequences of having cancer could be considered as a disability. It did so by conscientiously applying the case law of the CJEU defining the notion of disability (in particular, in *HK Danmark*).⁷⁷ The dismissal therefore constituted discrimination based on disability in breach of the General Anti-Discrimination Federal Act. Consequently, the employee was entitled to receive reasonable accommodation from her employer.

d) Age

Age is not defined in the anti-discrimination legislation.

Although Unia’s different reports emphasise that it is mostly older people who fall victim to age discrimination (in 2018 almost half of the cases concerned people over 45 years old), all ages can be and are affected.

An example of age discrimination is the *Dovy Keukens* case, in which a 59-year-old man applied for a job in a kitchen manufacturing company, but was refused the job. The

⁷³ CJEU, judgment of 18 December 2014, *Kaltoft*, C-354/13, ECLI:EU:C:2014:2463.

⁷⁴ Judgment of 12 October 2017 of the Labour Court of Liège (in French), www.unia.be/files/Documenten/Rechtspraak/Cour_de_travail_de_Liège_12_octobre_2017.pdf.

⁷⁵ Judgment of 6 October 2017 of the Labour Court of Antwerp (in Dutch), www.unia.be/files/Documenten/Rechtspraak/Arbeidshof_Antwerpen_16_oktober_2017.pdf.

⁷⁶ Judgment of 20 February 2018 of the Labour Court of Brussels (in Dutch), www.unia.be/files/Documenten/Rechtspraak/Arbeidshof_Brussel_20_februari_2018.pdf.

⁷⁷ CJEU, judgment of 11 April 2013, *HK Danmark (Ring and Skouboe Werge)*, joined cases C-335/11 and C-337/11, ECLI:EU:C:2013:222.

employer said he had 'the perfect profile, but for his age'. Dovy Keukens was condemned for discrimination on the ground of age in both the first instance and appeal courts.⁷⁸

e) Sexual orientation

Sexual orientation is not defined in the anti-discrimination legislation.

The previous inter-federal plan on the fight against homophobic and transphobic violence stressed, in 2013, that sexual orientation is not a choice: 'Sexual orientation is defined on the basis of the gender of individuals for whom an individual has both physical and emotional attraction and affection'.⁷⁹

The last inter-federal plan on the matter, adopted in 2018, aims at fighting discrimination and violence towards people based on their sexual orientation, gender identity, gender expression or intersex condition. It provides figures on discrimination against homosexual and bisexual people, as well as transgender or intersex people, but does not provide any definitions.⁸⁰

2.1.2 Multiple discrimination

In Belgium, multiple discrimination is not prohibited in the law.

The current set of three Federal Anti-Discrimination Acts, adopted on 10 May 2007, is based on the very opposite idea, according to which any discrimination must be categorised relative to one identifiable ground, since different legal regimes are set up for each of the three following categories: (1) presumed race, colour, origin, national or ethnic origin and nationality (Racial Equality Federal Act); (2) age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical or genetic characteristic, political opinion, language, social origin, trade union opinion (General Anti-Discrimination Federal Act); and gender and related grounds (Gender Equality Federal Act).

Such a legal impediment does not exist at the regional level where most of the communities/regions have made the choice of adopting a framework equality decree including all the prohibited criteria. According to the French Community and the Flemish Community/Region,⁸¹ such a legislative framework was chosen, to a certain extent, because it is better suited to tackling multiple discrimination. The Ordinance amending the Brussels Housing Code to strengthen the fight against discrimination in access to housing, adopted on 21 December 2018,⁸² explicitly mentions that discrimination may be based on several protected grounds (Article 205 of the Housing Code).

In Belgium, the following case law deals with multiple discrimination:

On 11 August 2017, the Liège Labour Tribunal found that the facts at issue revealed double discrimination based on sex and age.⁸³ The case concerned a 44-year-old man who applied

⁷⁸ www.unia.be/fr/articles/la-societe-cuisines-dovy-condamnee-pour-discrimination-a-lemploi-sur-base-de-lage.

⁷⁹ Institute for Equality between Women and Men (2013) *Inter-federal plan to fight against homophobic and transphobic violence*, 31 January 2013, available on the website of the IEWM: igvm-iefh.belgium.be/fr/avis_et_recommandations/plan_daction_interfederal_de_lutte_contre_les_discriminations_homophobes_et.

⁸⁰ Belgian Government (2018) *Interfederal plan to fight against discrimination and violence towards people based on their sexual orientation, gender identity, gender expression or intersex condition*, May 2018, available on the website of the federal Government: fedweb.belgium.be/sites/default/files/Plan_d_action_LGBTI_2018-2019_FR.pdf.

⁸¹ See the Draft Framework Decree on Equal Opportunities, *Flemish Parliament* 2007-2008, Doc. 1578/1, p. 165.

⁸² OJ (*Moniteur belge*), 31 January 2019.

⁸³ Decision of 11 August 2017, Labour Tribunal of Liège, R.G. 16/294/A.

for an administrative position in a company working in service vouchers. On the same day of his application, he received a refusal justified on the ground that the company essentially works with young girls aged between 20 and 30 years old and that therefore, he could not fit in this tight group. The tribunal rightly found that there was not only a violation of the General Anti-Discrimination Federal Act because of the discrimination based on age, but also a violation of the Gender Equality Federal Act because of the discrimination based on sex. Furthermore, it recognised that the applicant was entitled to receive a double fixed allowance justified by the accumulation of discrimination.

This remains an exceptional case as some obstacles to tackling situations of multiple discrimination are linked to the institutional architecture of the equality bodies. The major one is that, at national level, there are two main distinct equality bodies: the *Federal Institute for the Equality of Women and Men* (the Gender Institute), dealing with gender, and the *Inter-federal Centre for Equal Opportunities* (Unia), dealing with all the other protected grounds (apart from language).

In its evaluation report, Unia recommends that there should be explicit mention of 'multiple discrimination' in the Anti-Discrimination Federal Acts.⁸⁴ In its report, the Expert Commission for the Assessment of the Anti-Discrimination Federal Acts suggests explicitly mentioning multiple discrimination in the legal framework, providing for appropriate sanctions and further reflection on the legal standing of the different equality bodies.⁸⁵ Note that the president of this commission was Françoise Tulkens (former vice-president of the ECtHR) and the vice-president was Marc Bossuyt (former president of the Belgian Constitutional Court).

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Belgium, discrimination based on a perception or assumption of a person's characteristics is prohibited in national law.

As in the directives, discrimination based on assumed characteristics is not expressly forbidden in the Racial Equality Federal Act and in the General Anti-Discrimination Federal Act. However, the preparatory works (*travaux préparatoires*) clearly specify that these acts apply to such discrimination.⁸⁶ The reference to 'presumed race' in the Racial Equality Federal Act may be seen as implying *per se* that discrimination based on an assumed characteristic is prohibited.⁸⁷

The same applies at the regional level where discrimination based on assumed characteristics are not expressly forbidden in the text of the regional decrees but the prohibition results clearly from the preparatory works. However, in the Flemish Framework ET Decree,⁸⁸ the definition of direct discrimination specifically states that it is applicable in cases of discrimination based on an assumed characteristic (Article 16).

⁸⁴ Unia (2016), *Evaluation of the Anti-Discrimination Federal Acts* (Federal Act of 10 May 2007 amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia and Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination), February 2016, pp. 8 and 62, www.unia.be/en. This statement was repeated in the evaluation report published in February 2017, p. 68.

⁸⁵ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, p. 9 and para. 73, www.unia.be/en. For more details about this expert commission, see below, sections 9 and 10.

⁸⁶ Report Libert, *Doc. Parl. Chambre* 2006-2007, no. 2720/009, p. 41-42.

⁸⁷ Belgium, Racial Equality Federal Act, Articles 3 and 4(4).

⁸⁸ Framework Decree for the Flemish equal opportunities and equal treatment policy (*Decreet houdende een kader voor het Vlaamse gelijkheden en gelijkebehandelingsbeleid*) of 10 July 2008.

The Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts has suggested explicitly mentioning assumed discrimination in the legal framework to ensure legal certainty.⁸⁹

b) Discrimination by association

In Belgium, discrimination based on association with persons with particular characteristics is prohibited in national law.

As in the directives, discrimination based on association with persons with particular characteristics is not expressly forbidden in the Racial Equality Federal Act and in the General Anti-Discrimination Federal Act. However, during the preparatory works (*travaux préparatoires*), it was stressed that the Court of Justice of the European Union was considering a reference for preliminary ruling in the *Coleman* case⁹⁰ and that the federal legislation would be construed in accordance with the CJEU ruling.

On 10 December 2013, the labour tribunal (*Arbeidsrechtbank*) of Leuven (Flanders) convicted the manager of a fitness centre for discrimination by association, by reason of an employee's dismissal based on the disability of the employee's younger child. The court sentenced the employer to pay six months' salary compensation and additional damages to the dismissed employee. This is the first conviction handed down by a Belgian court for discrimination by association. It is worth noting that the Leuven Labour Court directly referred to the decision of the CJEU in *Coleman*, to hold that discrimination based on being associated with persons with disability is implicitly forbidden under federal law and constitutes direct discrimination.⁹¹

What is true at the federal level applies at the regional level. In addition, in the Flemish Framework ET Decree,⁹² the definition of direct discrimination expressly states that it is applicable in cases of discrimination by association (Article 16). It is the same in the Brussels Capital Region with respect to housing. The Ordinance amending the Brussels Housing Code to strengthen the fight against discrimination in access to housing, adopted on 21 December 2018,⁹³ explicitly mentions discrimination by association (Article 205 of the Housing Code).

In its 2017 evaluation report of the Anti-Discrimination Federal Acts, Unia recommends explicitly mentioning 'assumed and associated discrimination' in the anti-discrimination acts.⁹⁴ The Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts also suggests explicitly mentioning discrimination by association in the legal framework to ensure legal certainty.⁹⁵

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

a) Prohibition and definition of direct discrimination

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

⁸⁹ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, p. 9 and para. 77 www.unia.be/en.

⁹⁰ CJEU, judgment of 17 July 2008, *Coleman*, C-303/06, ECLI:EU:C:2008:415.

⁹¹ Judgment no. 12/1064/A of 10 December 2013 (*Jan V.H. v. BVBA V.*) of the Labour Court of Leuven, available on the website of the Centre, www.unia.be/en.

⁹² Framework Decree for the Flemish equal opportunities and equal treatment policy (*Decreet houdende een kader voor het Vlaamse gelijkekansen en gelijkebehandelingsbeleid*) of 10 July 2008.

⁹³ OJ (*Moniteur belge*), 31 January 2019.

⁹⁴ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, p. 67-69, www.unia.be/en.

⁹⁵ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, p. 9 and para. 81, www.unia.be/en.

The Racial Equality Federal Act and the General Anti-Discrimination Federal Act define direct discrimination as any 'direct distinction' (described as 'the situation which occurs whenever, on the basis of a protected ground, a person is treated less favourably than another is treated, has been treated, or would be treated in a comparable situation')⁹⁶ which cannot be justified under one of the exceptions provided for under the act.⁹⁷ As explained just below (in point b), these exceptions in turn are restrictively defined in order to ensure that those legislative texts are in compliance with the requirements of the directives.

All the pieces of regional anti-discrimination legislation now define direct discrimination in line with EU requirements.⁹⁸ However, it is worth noting that the definition of direct discrimination in the Flemish Decree of 10 July 2008 (Article 16(1)) and the Decree of the German Community of 19 March 2012 (Article 5(4)), as currently worded, could be formally read as allowing for derogations to direct discrimination, which is not possible under the directives.

b) Justification for direct discrimination

The Racial Equality Federal Act prohibits discrimination on grounds of presumed race, colour, origin, national or ethnic origin, and nationality. A distinction is made between 1) differences in treatment based on presumed race, colour, origin, national or ethnic origin, and 2) differences in treatment based on nationality:

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

The first two exceptions are directly inspired by the Racial Equality Directive. The third exception is justified, according to the Government, by the need to avoid the challenge of legal provisions on the basis of the Racial Equality Federal Act. It provides that the Racial Equality Federal Act does not, *per se*, apply to differences in treatment enshrined in any other piece of legislation. Needless to say that any legal provision allowing a difference of treatment based on alleged race, colour, origin, national or ethnic origin, may be challenged on the basis of Articles 10 and 11 of the Constitution, or under European and international law.

In the General Anti-Discrimination Federal Act, differences in treatment based on one of the listed grounds (age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical characteristic,

⁹⁶ To the knowledge of the authors of the report, the use of the term 'a person' has not been interpreted as excluding groups of persons from protection.

⁹⁷ Belgium, General Anti-Discrimination Federal Act, Article 4(6) and (7) and Article 14; Racial Equality Federal Act, Article 4(6) and Article 12.

⁹⁸ Even if direct discrimination is correctly defined by the Flemish Framework ET Decree as taking place when 'someone is treated less favourably than another person is, has been or would be treated in a comparable situation', it is worth mentioning that there is an error in the French translation of the decree published in the OJ (*Moniteur belge*) where it is stated that direct discrimination occurs when 'someone is treated less favourably than another person in a comparable situation'.

political opinion, trade union opinion, language, genetic characteristic and social origin) are prohibited unless they are justified as means both appropriate and necessary to realise a legitimate objective (Article 7).

However, Article 8 of the General Anti-Discrimination Federal Act adds that, in the field of employment and occupation, and concerning the grounds listed in Directive 2000/78/EC (age, sexual orientation, religious or philosophical conviction and disability), only genuine occupational requirements may justify differences in treatment directly based on these grounds, unless the difference in treatment is justified as a form of positive action (Article 10), or – as in the ‘safeguard provision’ in the Racial Equality Federal Act – unless it is imposed or authorised by another law (Article 11). Finally, Article 13 provides that in the case of occupational activities within public or private organisations the ethos of which is based on religion or belief (churches are not explicitly mentioned, but must be considered included), a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos (in line with Article 4(2) of Directive 2000/78/EC).

All the regional anti-discrimination legislation have a justification system regarding direct discrimination that, in their spirit, takes into account EU requirements. However, as it is currently worded, the Flemish Framework ET Decree (Article 16(1)) and the German Community ET Decree (Article 5(4)), could be formally read as allowing for derogations to direct discrimination, which is not possible under the provisions of the directives.

2.2.1 Situation testing

a) Legal framework

In Belgium, situation testing is clearly permitted in national law.

Since 2017, situation testing has begun to be explicitly mentioned in some pieces of legislation, but this is a very new development.

For political reasons, the phrase ‘situation testing’ was highly controversial when the Federal Anti-Discrimination Acts of 2007 were adopted, and another wording was used instead: ‘recurrence test’ (*test de récurrence*) and ‘comparability test’ (*test de comparabilité*). Linked to this, the Federal Anti-Discrimination Acts of 2007 list, as examples of facts leading to a presumption of direct discrimination, (1) factors revealing a certain recurrence of unequal treatment, including repeated isolated complaints to the equality body and (2) factors revealing that the situation of the alleged victim is comparable to that of the individual of reference.⁹⁹ These so-called ‘recurrence tests’ and ‘comparability tests’ are not easy to grasp. They seem to be the two sides of the coin of situation testing.¹⁰⁰ Beyond the use of this unclear terminology, what is certain is that, under current law, situation testing remains a legitimate way to reverse the burden of proof, whatever the ground of discrimination concerned, and as long as it is carried out with proper methodology and does not amount to provocation. It follows the general admissibility conditions of such evidence in court.

The regional anti-discrimination legislation all provide for the shift of the burden of proof, but only some of them list the recurrence tests and the comparability tests as facts leading

⁹⁹ Belgium, General Anti-Discrimination Federal Act, Article 28; Racial Equality Federal Act, Article 29. See also Article 33 of the Gender Equality Federal Act.

¹⁰⁰ Van der Plancke, V. (2007), ‘Les tribulations du testing en Belgique: quels enseignements?’, *Horizons stratégiques*, 2007, issue 5, p. 12 ; Rorive, I. and Van der Plancke, V. (2008), ‘Quels dispositifs pour prouver les discriminations?’, in Ch. Bayart, S. Sottiaux & S. Van Drooghenbroeck (eds), *Les lois fédérales du 10 mai 2007 luttant contre les discriminations*, Brussels, La Charte, 2008, p. 447.

to a presumption of direct discrimination. In the Brussels Capital Region, an Ordinance aiming to fight against discrimination on the job market, was adopted on 16 November 2017.¹⁰¹ It provides labour inspectorates with new tools to fight discrimination in employment, including situation testing. The situation test is based on sending out pairs of equivalent CVs with a variable criterion measuring discrimination (ethnic origin, age, disability, gender, etc). The ordinance also provides for 'mystery calls' according to which a labour inspector is allowed to call, with a false identity, a job intermediary to see whether s/he obeys the discriminatory demands of a potential client. The latter chiefly concerns companies of 'service vouchers' (*titres-service*), which put individuals looking for domestic help in contact with housekeepers. To be valid, these situation tests should meet several conditions: (1) they cannot amount to provocation and should be in line with fairness of proof standards; (2) they cannot be purely proactive or used randomly, i.e. they should follow several complaints or reporting (*signalements*), for instance, before Unia or the Institute for Equality of Women and Men, and be based on serious indications of practices likely to be considered as direct or indirect discrimination within a particular place or a sector of activity.

The Federal Act of 15 January 2018 containing various provisions in matters of employment, also inserted new provisions into the Federal Social Criminal Code in order to enable labour inspectors to use mystery calls with the purpose of collecting evidence of criminal offences as defined by the three Federal Anti-Discrimination Acts of 10 May 2007.¹⁰² According to the statement of purposes of the bill, which was tabled in the House of Representatives (federal Parliament), the use of mystery calls (i.e. a labour inspector passes himself/herself off as a client or a jobseeker) is only permissible if the principles of fairness and respect of the rights of defence are maintained. Hence, provocation and 'fishing expeditions' are prohibited; there must be a strong presumption that discrimination is perpetrated, based on professionally conducted data mining and data matching. Moreover, in every case, the use of mystery calls must be sanctioned previously by the *procureur du Roi* (public prosecutor) or the *auditeur du travail* (specialised public prosecutor in matters of social law).

In the Brussels Capital Region, another Ordinance amending the Brussels Housing Code to strengthen the fight against discrimination in access to housing, was adopted on 21 December 2018.¹⁰³ The officers of the Regional Inspection Service are now entitled to carry out situation tests and mystery calls (Article 214*bis*). The same safeguards are provided for to ensure fairness of proof (no provocation, no fishing expedition but no need for there to have been a formal complaint).

b) Practice

In Belgium, situation testing is used in practice.

It is mostly NGOs that have used situation testing to reveal discriminatory practices. For instance, the Movement Against Racism Anti-Semitism and Xenophobia (*Mouvement contre le racisme, l'antisémitisme et la xénophobie*) ran a campaign targeting certain Brussels' night clubs called 'Management reserves the right to refuse entry' (*La direction se réserve le droit d'entrée*).¹⁰⁴ In recent years, the *Minderhedenforum* (a forum gathering associations concerned with ethnic and cultural minorities) has aimed at developing situation testing as a tool to raise awareness. In 2015, they released the results of situation tests on racial discrimination showing that around 62.3 % of service voucher companies

¹⁰¹ OJ (*Moniteur belge*), 21 November 2017.

¹⁰² OJ (*Moniteur belge*), 5 February 2018.

¹⁰³ OJ (*Moniteur belge*), 31 January 2019.

¹⁰⁴ This campaign took place in 2000 and 2001. For a follow-up, see Delanghe, C., (2005) 'Encore et toujours', paper published on 26 April 2005, mrax.be/wp/la-direction-se-reserve-le-droit-dentree/. See also. Van der Plancke, V. (2007), 'Les tribulations du testing en Belgique: quels enseignements?', *Horizons stratégiques* 3/2007 (no. 5), pp. 40-59.

(*titre-service*) in Flanders are ready to abide by the discriminatory requests of their clients.¹⁰⁵ Note that service voucher companies are a public project aimed at creating less qualified jobs outside the black market (chiefly domestic work). These companies receive public funding.

In recent years, Unia has been involved in research projects relying on data based on situation testing. In this context, a situation test involving the sending of 1 708 CVs to companies was carried out with the collaboration of the University KUL. The results were published in September 2012 as part of the report, *Diversity Barometer: Employment*. The conclusions of the diversity barometer reveal the existence of discrimination practices in the Belgian labour market during the first stage of the selection process. Moreover, this discrimination will mainly affect older people and people who are not of Belgian origin (and especially, as stressed in the report, those of Moroccan, Congolese and Italian origin).¹⁰⁶ In 2013, Unia developed *ad hoc* testing to see whether some fitness centres were developing a discriminatory pricing policy based on ethnic origin. The experiment was not conclusive. In 2013, a similar situation test was carried out in private housing, by Unia in collaboration with the Federal Minister for Equal Opportunities, the three regional Housing Ministers and the Gender Institute. It consisted of a research programme set up by Belgian universities. This study for private housing involved 688 test calls and 1 769 test emails. The results (presented in 2014) reveal that people with a foreign origin, those who receive social allowances or do not have very high income, and people with disabilities (blind and hard of hearing) are discriminated against. More specifically, the report shows that property owners and real estate agencies, although aware that discrimination is forbidden, adopt some subtle strategies in order not to rent buildings to people in the above-mentioned categories.¹⁰⁷

In the meantime, Unia has shown more willingness to support the use of situation testing in court. First, in 2009, Unia relied on a small form of situation test to build a case in court. The owner of a restaurant in Sint-Niklaas (a town located in the Flemish part of Belgium) had refused entry to a customer's guide dog. The Centre (Unia) attempted to initiate some mediation without any success. Consequently, the Centre asked the same customer to try to access the same restaurant with her guide dog at a time where a bailiff (*huissier de justice*) could record the denial of entry. On 4 November 2009, the first instance court of Termonde convicted the restaurant owner for discrimination on the basis of disability, holding that guide dogs are not comparable to domestic animals. The victim was awarded the maximum fixed-rate compensation of EUR 1 300 for moral damage. In addition, the court ordered an end to be put to the discriminatory treatment under penalty of EUR 250 per new offence.¹⁰⁸ On 6 December 2012, the Ghent Court of Appeal confirmed this decision.¹⁰⁹ As a way to establish the occurrence of discrimination, situation testing has mostly been used in criminal cases. In such cases, any means of proof consistent with the principle of fairness of evidence should be allowed. In this respect, situation testing is often used on an *ad hoc* basis by victims acting spontaneously to strengthen their case.

Secondly, in November 2016, Unia launched a situation testing tool targeting ethnic discrimination in housing. This online tool is designed as a roadmap for NGOs and candidate tenants, who want to gather evidence of a discriminatory treatment, either by phone or by email. Basic points of methodology are described and a list of partner associations is

¹⁰⁵ Spaas, N. (2015) *Dienstencheques: subsidiëren om te discrimineren*, Minderhedenforum, 22 February 2015.

¹⁰⁶ Unia (2012) *Diversity Barometer: Employment*, available on the website of the Centre, www.unia.be/en.

¹⁰⁷ Unia (2014) *Diversity Barometer: Housing*, available on the website of the Centre www.unia.be/en.

¹⁰⁸ Judgment of 4 November 2009 of the President of the Court of First Instance of Termonde (emergency proceedings), *CECLR and Ludwina De Lathauwer v. Komebar and Simun Ramic* (unpublished). For more details, see the website of the Centre, www.unia.be/en.

¹⁰⁹ Judgment no. 2010/AR/264 of 6 December 2012 of the Court of Appeal of Ghent, available on the website of the Centre www.unia.be/en.

provided to give further support.¹¹⁰ This tool aims to improve the chances of success of judicial complaints.

Since the entry into force of the Ordinance on the fight against discrimination in the job market, on 16 November 2017, several situation tests have been carried out in the Brussels Capital Region. Furthermore, Unia, the Institute for the Equality of Women and Men and the Regional Employment Inspector have signed a protocol of cooperation on discrimination in the job market, in order to ensure smooth communication about situations of discrimination, and to clarify in which cases situation tests are desired. In addition, Unia is collaborating with some universities to design situation tests in access to goods and services so as to launch court cases when several reports of discrimination have taken place.

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

a) Prohibition and definition of indirect discrimination

In Belgium, indirect discrimination is prohibited in national law.¹¹¹ It is defined.

The Racial Equality Federal Act (Article 4(9)) and the General Anti-Discrimination Federal Act (Article 4(9)) define indirect discrimination as an 'indirect distinction' on the basis of one of the protected grounds, which cannot be justified under Article 9 of the Racial Equality Federal Act or the General Anti-Discrimination Federal Act (see section 2.3.b below). Article 4(8) in turn defines 'indirect distinction' as the situation that occurs whenever an apparently neutral provision, criterion or practice, may result in (*'est susceptible d'entraîner'*) a particular disadvantage for persons characterised by one of those protected grounds. The definition of indirect discrimination has thus been aligned with that of the Racial Equality Directive, which it seeks to implement, although by the detour of the strange (and perhaps antonymous) notion of 'indirect distinction'. The Racial Equality Federal Act also decriminalises certain offences linked to indirect discrimination on grounds of presumed race, colour, origin, national or ethnic origin, and nationality, *inter alia* because the criminalisation of indirect discrimination was considered to be problematic as regards the requirement of legal certainty in criminal law.

All the regional anti-discrimination legislation define indirect discrimination in line with the EU requirements.

b) Justification test for indirect discrimination

Article 9 of the Racial Equality Federal Act and of the General Anti-Discrimination Federal Act provide that such apparently neutral measures may only be justified if they are objectively justified by a legitimate objective that they seek to fulfil by means which are both appropriate and necessary.

The General Anti-Discrimination Federal Act (Article 9(2)) adds that, as regards apparently neutral measures resulting in a particular disadvantage for persons with disabilities, they may be justified by the fact that no reasonable accommodation can be adopted. Incidentally, this demonstrates that discrimination resulting from the failure to provide 'reasonable accommodation' is considered as indirect discrimination, rather than as direct discrimination, although Article 14 of the General Anti-Discrimination Federal Act lists the denial of reasonable accommodation, along with direct discrimination, indirect discrimination, the instruction to discriminate and harassment as a form of discrimination.

¹¹⁰ See Unia, 'Comment prouver une discrimination raciale au logement', available on the website of the Centre, www.unia.be/en.

¹¹¹ Belgium, Racial Equality Federal Act, Article 12 and General Anti-Discrimination Federal Act, Article 14.

In addition, 'indirect distinctions' (i.e., apparently neutral measures which may result in a particular disadvantage for persons characterised by one of those protected grounds) may be justified:

- by the need to adopt positive action measures (Article 10 of the Racial Equality Federal Act and the General Anti-Discrimination Federal Act);
- or by the fact that the adoption of such measures is imposed by, or by virtue of, other legislation (these are the 'safeguard provisions' referred to earlier, found in Article 11 of the Racial Equality Federal Act and the General Anti-Discrimination Federal Act).

Similar justification systems are inserted in the regional anti-discrimination legislation.

2.3.1 Statistical evidence

a) Legal framework

In Belgium, there is legislation regulating the collection of personal data.

Data relating to race or ethnic origin, religion, disability (health) or sexual orientation were regarded as sensitive data under Article 6(1) of the Federal Act of 8 December 1992 on the protection of the right to private life with respect to the processing of personal data,¹¹² and their processing was prohibited under Belgian law.

Since the entry into force of the GDPR, this 1992 law has been repealed and replaced by the Federal Act of 30 July 2018 concerning the protection of physical persons regarding the processing of personal data.¹¹³

This act mainly refers to the definitions of the GDPR (Article 9(1)), and still provides a general prohibition on the processing of personal data. It should be noted that the definition of sensitive data is broader than the one that was used in the 1992 act. Now, the GDPR and the 2018 federal act regard as sensitive data: data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation (Article 34 of the 2018 act).

The 2018 act (Article 34) singles out three exceptions in the GDPR, where:

- the treatment of the data is authorised by national, European or international law;
- processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent;
- processing relates to personal data which are manifestly made public by the data subject.

In line with Article 9(3) of the GDPR, the federal act listed those bodies authorised to process sensitive personal data, which includes the relevant public authorities, the secret services (including the OCAM, the counterterrorism unit) and the armed forces.

¹¹² Belgium, *Loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel*, OJ (Moniteur belge), 18 March 1992. This legislation was amended by a Federal Act of 11 December 1998 (Moniteur belge, 3 February 1999) in order to implement Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23 November 1995, p. 31).

¹¹³ OJ (MB), 5 September 2018.
www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2018073046.

On 13 December 2011, the International Federation of Human Rights Leagues (FIDH) lodged a collective complaint with the European Committee of Social Rights (ECSR) against Belgium, to challenge the situation of highly dependent disabled adults in need of reception facilities and accommodation, and their relatives. It is worth noting that one of the findings of the ECSR, in its 18 March 2013 decision on the merits, is that there is a violation of Article 30 (right to protection from poverty and social exclusion) of the Revised European Social Charter because the Belgian state's failure to collect reliable data and statistics throughout the territory of Belgium in respect of highly dependent persons with disabilities prevents an 'overall and coordinated approach' to the social protection of these persons and constitutes an obstacle to the development of targeted policies concerning them.¹¹⁴

When receiving reportings of discrimination, Unia processes personal data: name, e-mail address and gender. The latter is necessary to establish records on the number of reports that might have a gender dimension. Unia also works with subcontractors: IT companies for the digitisation of the reports, and research institutions for the production of statistics. The latter is a legal obligation towards the various authorities that finance Unia (Article 7 of the 2013 Intergovernmental Agreement), and also allows Unia to evaluate satisfaction vis-à-vis its work. This evaluation is done in the context of the three-year strategic plans Unia has to establish. Hence, the subcontractors can be required to process non-anonymised personal data (name, ground and area of the reported discrimination), although the contract guarantees the confidentiality of such processing. In any case, a data protection officer has recently been designated within the Centre in order to guarantee on the one hand the rights of the person whose data is being processed, and on the other hand the correct treatment of said data.

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

The Racial Equality Federal Act (Article 30(3)) and the General Anti-Discrimination Federal Act (Article 28(3)) provide that, in civil cases,

'among the facts from which it may be presumed that there has been indirect discrimination are included, although not exclusively, 1° general statistics concerning the situation of the group to which the victim of discrimination belongs or facts of general knowledge; or 2° the use of an intrinsically suspect criterion of distinction; or 3° elementary statistics which reveal adverse treatment'.

Legislative preparatory works are of no great help. 'General statistics' are said to be those gathered at the macro-economic level (national or regional) and the Court of Justice of the European Union has made reference to their use in gender discrimination.¹¹⁵ According to the preparatory works, the shift of the burden of proof could also come from 'specific statistics' related to the group to which the victim belongs (for instance, at the level of the company). 'Elementary statistics' are statistics that do not provide conclusive evidence of the disproportionate impact of a neutral provision, criterion or practice but which lead to a presumption of disproportionate impact.¹¹⁶

In its 2009 rulings concerning several actions in annulments against the Federal Anti-Discrimination Acts, the Constitutional Court stressed that the facts leading to the reversal of the burden of proof cannot be of general character but must be attributed specifically to the author of the distinction. Consequently, the Court stated that it is not enough to establish through statistics that a neutral criterion disadvantages persons characterised by a protected ground of discrimination. According to the Court, it must also be shown that

¹¹⁴ *International Federation of Human Rights Leagues (FIDH) v. Belgium*, complaint no. 75/2011, decision on the merits, 18 March 2013.

¹¹⁵ For instance, CJEU, judgment of 6 February 1996, *Lewark*, Case C-457/93, paragraphs 29-30.

¹¹⁶ Report Libert, *Doc. Parl. Chambre* 2006-2007, no. 51-2720/0009, p. 80-81.

the defending party was *aware* of that situation.¹¹⁷ In the opinion of the authors of this report, that statement of the Court is in complete breach of EU law and in complete contradiction to the intention of the Belgian legislature.

The most recent anti-discrimination legislation adopted by the Flemish Community/Region, the French Community, the German-speaking Community, the Walloon Region and the Brussels Capital Region have all been harmonised with the federal acts regarding the express reference to statistical evidence to establish indirect discrimination. Although statistics as such are not mentioned explicitly in the Decree of the Cocof on equal treatment between persons in vocational training of 22 March 2007, the Cocof ET Decree, the Brussels ET Employment Ordinance and the Brussels Civil Service ET Ordinance, it seems that this mode of proving discrimination is allowed under the provisions providing for shifting the burden of proof in civil cases. In any case, statistical evidence follows the general admissibility conditions of such evidence in court.

b) Practice

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

To the knowledge of the authors of this report (as confirmed in the first report of the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts),¹¹⁸ with respect to the grounds of discrimination listed in the Racial Equality and Employment Equality Directives, statistical data have not so far been invoked in the context of judicial proceedings and have not been used to design positive action measures. This is to be explained by the fact that the data which should be relied upon are not available, due to the restrictions imposed by the legislation relating to the protection of personal data (and the interpretation thereof by the Belgian Privacy Commission – the Data Protection Agency). However, it is worth noting that the *Diversity Barometer: Employment*, published by the Centre at the end of 2012, relied upon statistical data to assess the employment rates of certain target groups (age, national origin, disability) over time.¹¹⁹ Similarly, the socio-economic monitoring reports of 2013, 2015 and 2017) highlight the stratification of the labour market according to the origin and the migratory history of people.¹²⁰

The Centre stresses that the concept of indirect discrimination is still not well known in Belgium and that the question of intent remains an issue in many cases in practice (there is a confusion between disguised direct discrimination and indirect discrimination).¹²¹ This is also underlined in the first report of the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts.¹²²

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

¹¹⁷ Constitutional Court (*Cour constitutionnelle*), Decision of 12 February 2009, no. 17/2009, para. B.93.3; Decision of 11 March 2009, no. 39/2009, para. B.52; Decision of 2 April 2009, no. 40/2009, para. B.97.

¹¹⁸ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, para. 111 www.unia.be/en.

¹¹⁹ Unia (2012) *Diversity Barometer: Employment*, available on the website of the Centre, www.unia.be/en.

¹²⁰ Inter-federal Centre for Equal Opportunities (2015) *Socio-Economic Monitoring - Labour Market and Origin*, Federal Public Service on Employment, Labour and Social Dialogue, Brussels, November 2015, www.unia.be/en.

¹²¹ Interview with Patrick Charlier, co-director of Unia, 3 April 2019.

¹²² Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, para. 66, www.unia.be/en.

In the Federal Act of 4 August 1996 on the welfare of workers while carrying out their work,¹²³ 'moral harassment at work' is defined as

'several unwanted conducts, of the same kind or not, external or internal to the company or the institution, which last over a certain period of time, with the purpose or the effect of violating the personality, the dignity or the physical or psychological integrity of a worker (...), during the time of work, of putting in jeopardy his/her work or of creating an intimidating, hostile, degrading, humiliating or offensive environment and which manifest themselves notably through words, intimidations, acts, gestures or unilateral writings.'

This provision applies to the relationships, during working time, between employers and workers,¹²⁴ including trainees and students carrying out an internship, but not to domestic workers (housekeepers) and volunteers.¹²⁵

Such behaviour could be linked to religion or beliefs, disability, age, sexual orientation, sex, race or ethnic origin. Article 442*bis* of the Criminal Code introduced by the Federal Act of 30 October 1998, already criminalised harassment in general:

'Anyone who has harassed another when he/she knew, or should have known, that he/she would seriously affect the peace of mind of the person concerned by this behaviour'.

This provision has a general scope of application.

Since the entry into force of the Act of 22 May 2014 aiming to combat sexism in public spaces,¹²⁶ forms of sexual harassment and street sexual harassment committed in public places are punishable. The law states that any person who behaves, in public or in the presence of witnesses, in a way that tends to consider a person inferior or to despise this person because of his or her sex or even to reduce him or her to a sexual dimension may be punished.¹²⁷

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

Both the Racial Equality Federal Act (Article 12) and the General Anti-Discrimination Federal Act (Article 14) prohibit harassment as a form of discrimination and define it with the same wording as Directives 2000/43/EC and Directive 2000/78/EC.¹²⁸ All regional anti-discrimination legislation have been harmonised with the federal acts (and consequently with the directives), and prohibit harassment as a form of discrimination.

It is worth keeping in mind the consistent interpretation of the Constitutional Court's 2009 ruling, in line with the principle of legality in criminal matters.¹²⁹ Indeed, in this ruling, the Court states that Article 4(10) of the General Anti-Discrimination Federal Act and the Racial Equality Federal Act, which defines the notion of harassment, does not specify that this behaviour could be punished if it has the consequence of creating an intimidating, hostile,

¹²³ Belgium, *Loi relative au bien-être des travailleurs lors de l'exécution de leur travail*, last modified on 15 May 2014, OJ (Moniteur Belge), 18 June 2014, Article 32ter(2).

¹²⁴ To be applicable, this provision requires a relationship of authority between the parties concerned.

¹²⁵ Except if the victim can prove a relationship of authority (Article 2(1) to (4) of the *Loi relative au bien-être des travailleurs lors de l'exécution de leur travail*, last modified on 15 May 2014, OJ (Moniteur Belge), 18 June 2014).

¹²⁶ Belgium, Act of 22 May 2014 aiming to combat sexism in public space (*Loi du 22 mai 2014 tendant à lutter contre le sexisme dans l'espace public et modifiant la loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes afin de pénaliser l'acte de discrimination*), OJ (Moniteur belge) 24 July 2014.

¹²⁷ Please note that nothing in the definition of the offence excludes individuals of the same sex.

¹²⁸ See also the Gender Equality Federal Act (Article 19).

¹²⁹ Constitutional Court (*Cour constitutionnelle*), Decision of 12 February 2009, no. 17/2009, para. B.53.4; Decision of 11 March 2009, no. 39/2009, para. B.25.4; Decision of 2 April 2009, no. 40/2009, para. B.33.4.

degrading, humiliating or offensive environment, *without any intention on the part of the offender to create such an environment*. On this basis, it seems that the Court requires an intention to be proven more generally, i.e. in civil matters as well. This interpretation may raise an issue of lack of compliance with EU and national law since both define harassment as unwanted conduct related to a protected criterion. If behaviour has the effect of creating a bad environment amounts to a prohibited harassment, no specific intention is required under EU and national law. Consequently, the interpretation of the Court should be strictly applied only to criminal matters – and not to civil matters – to be in compliance with EU law and national law.

The coexistence of the notion of harassment in the former Federal Anti-Discrimination Act of 25 February 2003 and in the Act of 4 August 1996 on the welfare of workers while carrying out their work as subsequently amended, created legal uncertainty, as harassment in the workplace could fall under either of the two acts. In order to solve the problem, the Racial Equality Federal Act (Article 6) and the General Anti-Discrimination Federal Act (Article 6) provide that in employment relationships, only the Act of 4 August 1996 is applicable.¹³⁰ This exclusion was justified during legislative preparatory works on the basis that the 1996 act puts in place detailed procedures in favour of victims and is especially tailored to tackle harassment at the workplace.

In its first report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts stresses that the definition of harassment in the Act of 4 August 1996 on the welfare of workers is not in line with EU law, as it requires 'several acts' (i.e. a pattern of repetitive behavior), whereas the equality directives do not require such a condition. The Expert Commission recommends amendment of the Act of 4 August 1996 so as to bring it in line with EU law.¹³¹

b) Scope of liability for harassment

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

Following the general principles of civil liability, the employer may be held liable when an employee commits a fault, which causes the damage for which the victim seeks reparation (the rule is codified in Article 1384(3) of the Civil Code). Thus, the employer would be liable for any discrimination practised by his/her employee following this general rule because of the existence of a hierarchical link between the employee and the employer, whether or not any fault had been committed by the employer. The purpose of this presumption of responsibility by the employer is to ensure that victims of the faults committed by employees carrying out their jobs will be compensated, as the employer will have to be insured against the risk of any such liability. According to Article 18 of the Act of 3 July 1978 on employment contracts,¹³² the employer must cover the cost of damages granted to the victim of discrimination caused by his/her employee. However, if the employer proves that the employee acted intentionally or recklessly, the employee might be held personally liable.

As to criminal liability, Article 67(2) of the Criminal Code provides that those who gave instructions to commit a criminal offence will be considered accomplices. This provision is in principle applicable to the criminal offences currently described in both federal acts of 10 May 2007, but the scope of applicability remains very limited. Moreover, under both federal acts of 10 May 2007 (Article 23), where discrimination is carried out by a public

¹³⁰ See also the Gender Equality Federal Act (Article 7).

¹³¹ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, p. 9 and para. 86, www.unia.be/en.

¹³² Belgium, Federal Act of 3 July 1978 on employment contracts (*Loi du 3 juillet 1978 relative aux contrats de travail*), OJ (*Moniteur belge*), 22 August 1978, last modified on 26 December 2013 (*Moniteur belge*, 31 December 2013).

servant in the exercise of his/her functions, in obedience to an order received from a hierarchical superior, criminal liability of the individual public servant who committed the discriminatory act is excluded. If discrimination is indeed established, only the superiors will be fined or imprisoned in the terms provided by the law. The regional anti-discrimination pieces of legislation contain similar provisions.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Belgium, instructions to discriminate are prohibited in national law. Instructions are defined.

Article 12 of the Racial Equality Federal Act and Article 14 of the General Anti-Discrimination Federal Act prohibit instructions to discriminate. Instructions are defined as 'any behaviour to instruct anyone to discriminate on the basis of one of the protected criteria, against an individual, a group, a community or one its members' (Article 4(12) of the Racial Equality Federal Act and Article 4(13) the General Anti-Discrimination Federal Act).

Under Article 20 of the Racial Equality Federal Act and Article 22 of the General Anti-Discrimination Federal Act, incitement to commit discrimination and incitement to hatred, violence or segregation against a person or against a group, a community or its members, on the basis of a protected ground of discrimination, is a criminal offence, if it is done under public conditions, as defined by Article 444 of the Criminal Code. In this respect, the Constitutional Court held that the offence contained in Article 20 of the Racial Equality Federal Act requires a special *mens rea (dol special)*, i.e. the intent of inciting or encouraging hatred or discriminatory or violent behaviours.¹³³ The French Community ET Decree (Article 52), the Walloon ET Decree (Article 23), the German Community ET Decree (Article 25) and the Cocof ET Decree (Article 20) contain similar provisions to the federal acts.

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

Both the Racial Equality Federal Act (Article 12) and the General Anti-Discrimination Federal Act (Article 14) list instructions to discriminate as a form of prohibited discrimination. At the level of the regions and communities, all the anti-discrimination legislation provides that an instruction to discriminate should be considered as a form of discrimination.

b) Scope of liability for instructions to discriminate

In Belgium, the instructor and the discriminator are liable.

As explained above (in section 2.4.b), according to the general principles of civil liability, the employer may be held liable when an employee commits a fault that causes the damage for which the victim seeks reparation (the rule is codified in Article 1384(3) of the Civil Code). Thus, the employer would be liable for any discrimination practised by his/her employee following this general rule because of the existence of a hierarchical link between the employee and the employer, whether or not any fault may be found to have been committed by the employer. The purpose of this presumption of responsibility by the employer is to ensure that victims of the faults committed by employees carrying out their jobs will be compensated, as the employer will have to be insured against the risk of any such liability. According to Article 18 of the Act of 3 July 1978 on employment contracts, the employer will have to cover the cost of damages granted to the victim of discrimination

¹³³ Constitutional Court (*Cour constitutionnelle*), decision no. 40/2009 of 11 March 2009.

caused by his/her employee. However, if the employer proves that the employee has acted intentionally or recklessly, the employee might be held personally liable.

As to civil liability of service providers for the acts of third parties, although Article 1384(1) of the Civil Code provides in principle that anyone may be held civilly liable not only for the damage caused by his/her own behaviour, but also for the damage caused by persons for whom he/she is responsible, service providers will only be liable for the acts of third parties in the specific instance of education. Schoolteachers may be held responsible for the damage caused by their pupils when under their watch (Article 1384(4) of the Civil Code). This does not, for instance, extend to a landlord for discriminatory acts of tenants, or to a restaurant owner for discriminatory acts of his/her patrons, with whom no relationship of subordination exists.

As to criminal liability, Article 67(2) of the Criminal Code provides that those who give instructions to commit a criminal offence will be considered accomplices. This provision is in principle applicable to the criminal offences currently described in both federal acts of 10 May 2007, but the scope of applicability remains very limited. Moreover, under both federal acts of 10 May 2007 (Article 23), with respect to discrimination committed by a public servant in the exercise of his/her functions, obedience to an order received from a hierarchical superior excludes the criminal liability of the individual public servant who has committed the discriminatory act. If discrimination is indeed established, only the superiors will be fined or imprisoned in the terms provided by the law. The regional anti-discrimination pieces of legislation contain similar provisions.

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

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

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

The definition adopted at the federal and regional levels is very close to that of Article 5 of the Employment Equality Directive (unless specified otherwise). The major difference is that the duty to provide reasonable accommodation to persons with disabilities extends far beyond the field of employment and relies on the scope of competence of each legislature.¹³⁴

- The General Anti-Discrimination Federal Act provides that the refusal to put in place reasonable accommodation for a person with a disability is a form of prohibited discrimination (Article 14).¹³⁵ A definition is provided in Article 4(12) of the General Anti-Discrimination Federal Act.
- The Flemish Framework ET Decree defines the denial of reasonable accommodation as a form of prohibited discrimination. The definition is provided in Article 19. In the Decree adopted on 8 May 2002 by the Flemish Region/Community, reasonable accommodation is described as a requirement entailed by the principle of equal treatment, however the reasonable accommodation mentioned in Article 5(4) does not appear under the definitions of either direct discrimination or indirect discrimination,¹³⁶ which may be attributed both to the vague character of the 'reasonable accommodation' (*'redelijke aanpassingen'*) called for by this decree, and

¹³⁴ The material scope of each piece of ET legislation is described above, in the introduction to this report.

¹³⁵ Note also that Article 9 of the General Anti-Discrimination Federal Act demonstrates incidentally that discrimination resulting from the failure to provide 'reasonable accommodation' is considered as indirect discrimination.

¹³⁶ Compare with Article 2(2)(b)(ii) of the Employment Equality Directive.

to the broad definition of the concept of reasonable accommodation, which is mentioned without specific reference to disability, but as a *general* requirement of equal treatment. According to Article 5(4) of the decree, the concept means that the employer to whom the decree applies (or persons or organisations acting as labour market intermediaries) should take appropriate measures where needed in a particular case to enable a person to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden, according to the same provision, must not be disproportionate when it is sufficiently remedied by existing measures. The wording of this provision is of course borrowed from Article 5 of Directive 2000/78, except for its extension beyond persons with disabilities.

- In the French Community, Article 3(9) of the French Community ET Decree reproduces almost word for word the definition enshrined in Article 5 of Directive 2000/78/EC.
- The Walloon ET Decree defines the denial of reasonable accommodation for persons with disabilities in line with Directive 2000/78/EC and provides that it is a form of prohibited discrimination (Article 15(6)).
- In the Brussels Capital Region, the Brussels ET Ordinance, the Brussels ET Employment Ordinance and the Brussels Civil Service Ordinance define reasonable accommodation for person with disabilities in line with EU requirements (Articles 5(11); 4(12) and 4(8)).
- The Cocof Vocational Training ET Decree correctly defines the duty of reasonable accommodation for persons with disabilities (Article 7). The Cocof ET Decree also provides that denying reasonable accommodation to a person with a disability amounts to discrimination (Article 9(2)). Moreover, Article 26(4) of the Decree on the social and professional integration of persons with disabilities¹³⁷ provides that the executive of the Cocof will stipulate the conditions under which its administration will be authorised to compensate the employer for the costs of any accommodation of the employee that is considered necessary. The compensation should cover the full cost of the accommodation provided, if it is deemed necessary (Article 31). This legislation makes it possible for employers to draw upon public grants for providing reasonable accommodation, and they could indirectly impact on the employer's level of obligation to provide this kind of accommodation resulting from the other decree. Indeed, generally speaking, the burden imposed on the employer as a result of the obligation to provide reasonable accommodation will not be considered disproportionate if the employer may apply for public funds.

As to rules applying to the federal state and all federal entities, it should also be mentioned that the Commission for Institutional Affairs of the Senate adopted on 7 January 2010 a revision of the Constitution to insert Article 22*ter*, which was drafted:

'Each disabled person has the right to benefit, according to the nature and the gravity of their handicap, from accommodations that ensure their autonomy and their cultural, social and professional integration. [Legislative Acts and Decrees] guarantee the protection of this right'.¹³⁸

The Senate approved this provision on 14 January 2010, but the process of adoption ended with the early dissolution of both Houses of Parliament during spring 2010. Senator Francis Delpérée resubmitted it to the Senate on 22 September 2010.¹³⁹ On 31 January 2013, it

¹³⁷ Belgium, *Décret relatif à l'intégration sociale et professionnelle des personnes handicapées*, adopted on 4 March 1999, OJ (Moniteur belge), 3 April 1999.

¹³⁸ Document no. 4-1531/3.

¹³⁹ Document no. 5-139/1.

was approved without amendment by the Senate (plenary session) and, on 28 February 2013, it was approved in commission before being transferred to the House of Representatives, on 1 March 2013.¹⁴⁰ However, the House of Representatives did not pursue the adoption process before the dissolution of both the Senate and the House of Representatives on 28 April 2014. As a consequence, this amendment became null and void.¹⁴¹ The Governmental Agreement for the legislative period 2014 – 2019 does not include the adoption of such a provision in the Constitution.¹⁴²

On 31 March 2006, the Council of Ministers (at federal level) adopted a legislative bill seeking to ensure, as a matter of principle, the admittance of guide dogs in public places.¹⁴³ In June 2006, the Council of State considered that the federal state was not competent to deal with the matter. Since then, some pieces of legislation have been adopted at the regional level. For instance:

- the Walloon Region adopted the Decree of 23 November 2006 concerning the accessibility of persons with disabilities accompanied by a guide dog to public places,¹⁴⁴ and the executive regulation to that decree was finally adopted on 2 October 2008;¹⁴⁵
- the Brussels Capital Region adopted an ordinance to the same effect on 18 December 2008,¹⁴⁶ followed by an executive regulation on 22 October 2009;¹⁴⁷
- the Flemish Community/Region also passed a Decree on 20 March 2009¹⁴⁸ and the executive regulation to that decree was finally adopted on 29 March 2013.¹⁴⁹

Even before this specific legislation was applicable, on 4 November 2009, the court of first instance of Termonde found the owner of a restaurant in Sint-Niklaas (a town located in the Flemish part of Belgium) who had refused entry to his restaurant to a customer's guide dog, guilty of discrimination (see above, 2.2.1). The owner had called upon the regulation relating to food hygiene. However, the Federal Executive Regulation of 7 February 1997 relating to the general hygiene of foodstuffs¹⁵⁰ provided for an exception in favour of guide

¹⁴⁰ Document no. 53-2680/001.

¹⁴¹ For more details on the adoption process, see www.senate.be/www/?MIval=dossier&LEG=5&NR=139&LANG=fr.

¹⁴² The Government agreement for the legislative period 2014 – 2019 is available on www.belgium.be/fr/la_belgique/pouvoirs_publics/autorites_federales/gouvernement_federal/politique/accord_de_gouvernement/.

¹⁴³ For a brief presentation in English of the regulatory framework applicable in Belgium as to guide dogs, see the website of the Belgian Assistance Dog Federation: www.badf.be/EN/toegangsrechtEN.html.

¹⁴⁴ OJ (*Moniteur belge*), 8 December 2006.

¹⁴⁵ Wallonia, *Arrêté du Gouvernement wallon portant exécution du décret du 23 novembre 2006 relatif à l'accessibilité aux personnes handicapées accompagnées de chiens d'assistance des établissements et installations destinés au public*, OJ (*Moniteur belge*), 29 October 2008, p. 57345. See also the *Arrêté du Gouvernement wallon du 27 avril 2010 fixant les modèles de la demande d'agrément et du carnet prévus par les articles 4, § 2, et 9, § 1er, de l'arrêté du Gouvernement wallon du 2 octobre 2008*. This regulation is included in the executive regulation of the Walloon Government codifying the legislation in the field of health and social action, 29 September 2011.

¹⁴⁶ Ordinance concerning the accessibility of persons with disabilities accompanied by a guide dog to public places (*Ordonnance relative à l'accès des chiens d'assistance aux lieux ouverts au public*), OJ (*Moniteur belge*), 14 January 2009, p. 1527 (last modified on 19 April 2012).

¹⁴⁷ Executive Regulation of Ordinance concerning the accessibility of persons with disabilities accompanied by a guide dog to public places (*Arrêté portant exécution de l'ordonnance du 18 décembre 2008 relative à l'accès des chiens d'assistance aux lieux ouverts au public*), OJ (*Moniteur belge*), 9 December 2009.

¹⁴⁸ Decree concerning the accessibility of persons with disabilities accompanied by a guide dog to public places (*Decreet houdende de toegankelijkheid van publieke plaatsen voor personen met een assistentiehond*), OJ (*Moniteur belge*), 8 May 2009.

¹⁴⁹ Executive Regulation of the Flemish Government defining the modalities of the certification procedure of guide dogs, provided by Article 4 of the Decree of 20 March 2009 concerning the accessibility of persons with disabilities accompanied by a guide dog to public places (*Besluit van de Vlaamse Regering betreffende de regels inzake de attestatie van assistentiehonden, vermeld in artikel 4 van het decreet van 20 maart 2009 houdende de toegankelijkheid van publieke plaatsen voor personen met een assistentiehond*), OJ (*Moniteur belge*), 13 May 2013.

¹⁵⁰ Now repealed and replaced by the Executive Regulation of 22 December 2005 relating to the hygiene of foodstuffs (*Arrêté royal relatif à l'hygiène des denrées alimentaires*), OJ (*Moniteur belge*), 30 December 2005.

dogs, including in a period of training. The Court condemned the restaurant owner for discrimination on the basis of disability, holding that guide dogs are not comparable to domestic animals. The victim was awarded the maximum fixed-rate compensation of EUR 1 300 for moral damage.¹⁵¹ On 6 December 2012, the Court of Appeal of Ghent confirmed this decision.¹⁵²

Due to the fact that the concept of reasonable accommodation appears in different laws, the federal Government, the regions and the communities have sought to reach a common understanding of this notion, in order to ensure its uniform implementation throughout the country, whatever the legal basis on which the person with a disability may seek to rely. A cooperation agreement (which is legally binding) was concluded between the relevant public authorities.¹⁵³ It defines the concept of reasonable accommodation as a 'concrete measure aimed to neutralise the limitative impact of a non-appropriate environment on the participation of a person with disabilities'. The agreement gives examples and further explanations of such measures, which could be material or otherwise, as well as collective or individual. It also provides that the reasonable accommodation must be efficient, must ensure equal participation of the person with disabilities as well as autonomous participation, and must ensure the security of the person. The agreement then defines a non-exhaustive list of criteria to determine whether the measure is reasonable. This takes into account the financial impact of the measure, as well as its organisational impact, the frequency of use of the accommodation, the impact on the quality of life of other persons with disabilities, the impact on the general environment or other people, the lack of appropriate alternatives, and the non-application of current compulsory rules. Finally, the agreement puts in place a monitoring mechanism, requiring each authority to collect information on reasonable accommodation and examples of best practice.

b) Practice and case law

In June 2009, Unia published a booklet devoted to disability discrimination. In addition, the Centre released a series of 10 practical guides on reasonable accommodation that may usefully be provided to disabled people or to people with reduced mobility in 10 sectors of the everyday life: culture, public services, hotels, restaurants, trade, etc.¹⁵⁴ These guides aim to increase awareness among suppliers of goods and services of the concept of reasonable accommodation. This is clearly an example of a good practice, as it constitutes a most useful tool, especially for businesses, for clarifying their legal obligations and providing illustrations of what steps should be taken in order to ensure compliance.

On 9 March 2015, the Mons and Charleroi Labour Tribunal ruled that a funeral company had discriminated against an employee with multiple sclerosis.¹⁵⁵ The company had refused modifications to the employee's schedules and the nature of his tasks and, a few weeks later, he was laid off. The court considered that the applicant had brought some evidence that discrimination had occurred (the burden of proof shifted to the company – Article 28 GAFA) and concluded that multiple sclerosis could be considered as a disability. Concerning direct discrimination, the court ruled that it could not be excluded that the employee's dismissal was linked to his multiple sclerosis, which it held to be a disability. Furthermore, it considered that the company did not justify the extent to which the modifications of the applicant's schedule and working tasks were not reasonable and constituted a disproportionate burden.

¹⁵¹ Judgment of 4 November 2009 of the President of the first instance court of Termonde (emergency proceedings), *Centre for Equal Opportunities and Opposition to Racism and Ludwina De Lathauwer v. Komebar and Simun Ramic* (unpublished). For more details, see the website of Unia, www.unia.be/en.

¹⁵² Judgment no. 2010/AR/264 of 6 December 2012 of the Court of Appeal of Ghent (available on www.unia.be/en).

¹⁵³ OJ (*Moniteur belge*), 20 September 2007.

¹⁵⁴ The booklet and the notebooks are available on the website of the Centre at the following address: www.unia.be/fr/publications-et-statistiques/publications/les-amenagements-raisonnables-en-10-brochures. www.unia.be/fr/publications-et-statistiques/publications/discrimination-des-personnes-avec-un-handicap.

¹⁵⁵ Labour Court of Mons and Charleroi (*Tribunal du travail*), 9 March 2015, R.G. 14/436/A, www.unia.be/en.

In a case discussed above (in section 2.1.1), the Liège Labour Court¹⁵⁶ condemned a driving school for direct discrimination against an obese candidate on grounds of disability and physical characteristic. The fact that the driving school had even not considered the issue of reasonable accommodation was also taken into account to decide the case against the school.

On 20 February 2018, the Brussels Labour Court rendered a judgment on appeal concerning the dismissal of an employee who could not maintain her working hours, after having suffered from cancer (reported above in section 2.1.1.c).¹⁵⁷ Although Belgian law recognises state of health as a protected criterion, the refusal of reasonable accommodation on this ground does not amount to discrimination. Therefore, by considering that the consequences of the cancer of an employee amounted to a disability due to the extended duration of the sickness, the court enhanced her protection by giving her a right to reasonable accommodation.

c) Definition of disability and non-discrimination protection

In the equal treatment legislation adopted at both federal and regional levels, there is no specific definition of disability for the purpose of claiming reasonable accommodation or for the purpose of claiming protection from other forms of discrimination.

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

In Belgium, failure to meet the duty of reasonable accommodation in employment for people with disabilities does count as discrimination.

As regards fields that are a federal competence, the failure to meet the duty to provide reasonable accommodation constitutes a form of discrimination.¹⁵⁸ In the federal as well as in the regional anti-discrimination laws, the duty to provide reasonable accommodation for disabled people is required unless such measures would impose a disproportionate burden on the bearer of such a duty, but this burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability public policy. The potential sanctions and remedies in the event of a failure to meet the duty of reasonable accommodation are the same as those imposed for unlawful discrimination: payment of damages either on the basis of the 'effective' damage, or on the basis of the lump sums defined in the law; judicial injunction (*action en cessation*); the decision may be posted publicly; and the defendant may be subject to financial penalties (*astreintes*) in the case of non-compliance with a judicial order.¹⁵⁹

As an example, in the case involving an employee with multiple sclerosis (reported above at 2.6.b), the court sentenced the funeral company to pay EUR 17 319.48 compensation for damages, which was equivalent to six months' salary.¹⁶⁰

At the federal level, Articles 27 and 28 of the General Anti-Discrimination Federal Act provide expressly for the shift of the burden of proof when claiming the right to reasonable accommodation. This is also the case for the regional anti-discrimination decrees that were drafted in line with the federal act in this respect.

¹⁵⁶ Judgment of 12 October 2017 of the Labour Court of Liège (in French), www.unia.be/files/Documenten/Rechtspraak/Cour_de_travail_de_Liège_12_octobre_2017.pdf.

¹⁵⁷ Judgment of 20 February 2018 of the Labour Court of Brussels (in Dutch), www.unia.be/files/Documenten/Rechtspraak/Arbeidshof_Brussel_20_februari_2018.pdf.

¹⁵⁸ For more details and for a description of the law in the regions and communities, the reader is referred to section 2.6.a of this report.

¹⁵⁹ See below, in section 6.5 of this report.

¹⁶⁰ Labour Court of Mons and Charleroi (*Tribunal du travail*), 9 March 2015, R.G. 14/436/A, www.unia.be/en.

On 16 July 2014,¹⁶¹ the court of first instance of Brussels condemned one of the most influential press agents in Belgium and its company for having discriminated against an independent journalist who was in a wheelchair. The agent had refused to organise an interview between the journalist and an artist and had used discriminatory words about the journalist's situation. The court judged that the journalist had been directly discriminated against on the ground of disability. According to the court, he had also been discriminated against because of the refusal to make reasonable accommodation to give him the opportunity to interview an artist by providing an accessible location for the interview. The court pronounced an injunction imposing the cessation of the discriminatory practice under the threat of a daily fine of EUR 1 000. In addition, it sentenced the press agent to the payment of a lump sum of EUR 1 300 in damages. The court relied on Article 28 of the General Anti-Discrimination Federal Act providing the shifting of the burden of proof. On this basis, it held that the written transcriptions of the phone call between the journalist and the press agent could amount to a presumption of discrimination.

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

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

At the federal level, the duty to provide reasonable accommodation for persons with disabilities extends to all the fields to which the General Anti-Discrimination Federal Act applies (Article 4(12)), which go far beyond employment.¹⁶² The definition is the same whether reasonable accommodation is implemented within or outside the employment field. The Flemish Framework ET Decree, the French Community ET Decree, the German Community ET Decree and the Cocof ET Decree similarly define the scope of the duty of reasonable accommodation as applying to all the material areas they cover. The Walloon ET Decree also seems to extend the duty of reasonable accommodation beyond employment (Article 4(13)). The Walloon Government is in charge of defining more precisely the notion of reasonable accommodation and its modality of application (Article 13). However, it has not yet done so.

On 18 July 2017, the court of first instance of Brussels dealt with a case concerning reasonable accommodation for a man in a wheelchair at a railway station in Flanders (Thielen).¹⁶³ The national railway company refused to put in place the reasonable accommodation requested in order for this man to get on the train at this station. The railway station was in itself accessible for people with reduced mobility, but this man would have needed personal assistance in order to get on the train, which was refused by the railway company. Unia raised an injunction (*action en cessation*) against the railway company on behalf of the man in a wheelchair. This action aimed to put an end to the refusal of reasonable accommodation at this specific Flemish station. The court of first instance considered that, in this specific case, the introduction of reasonable accommodation would be too costly in comparison to the advantages for this user. Considering that this judgment was not in line with the UN CRPD, Unia lodged an appeal against the decision, which is still pending.

Another field where reasonable accommodation is required is education, in which there have been several recent developments.

¹⁶¹ Court of First Instance of Brussels (civil section), 16 July 2014, RG 13/13580/A, www.unia.be/en.

¹⁶² See above, introduction to this report.

¹⁶³ Judgment of 18 July 2017, Court of First Instance of Brussels, www.unia.be/files/Documenten/Rechtspraak/Nederlandstalige_rechtbank_van_eerste_aanleg_Brussel_18_juli_2017.pdf.

In 2009, the President of the first instance court of Ghent¹⁶⁴ made a judgment in a case in which the applicants were parents of three deaf children attending regular school. The parents claimed that five to nine hours a week of interpreting at school was insufficient as it would make it difficult, if not impossible, for their children to follow the courses. They claimed that the refusal to grant their children more interpreting hours amounted to a denial of reasonable accommodation. The judge, referring to an opinion of the then Dutch Commission for Equal Treatment (Commissie Gelijke Behandeling) of 9 February 2005,¹⁶⁵ held that the way of handling a request for reasonable accommodation may in itself amount to a denial of such accommodation. In his opinion, this was the case here, notably because the procedure established by the Flemish Government did not take into account the individual needs of each child for the distribution of interpreting hours among the children. As a consequence, the judge held that the Flemish Community had denied reasonable accommodation to the deaf claimants by allowing them no more than nine hours of deaf interpreting a week at school. The Flemish Community launched an appeal against this decision but the Ghent Court of Appeal confirmed it on 7 September 2011.¹⁶⁶ In these decisions, the President of the first instance court of Ghent, and the Ghent Court of Appeal respectively shifted the burden of proof to the Flemish Government as a result of a presumption that reasonable accommodation had been denied to the deaf claimants. The judge inferred this presumption from the observations that: 1) deaf students had been granted a greater amount of interpreting hours in the past; 2) Dutch hearing-impaired students have in principle a right to an interpreter during 100 % of school hours; and 3) the Flemish Government did not contest that more support for deaf children was to be desired.¹⁶⁷

On 7 November 2018, the first instance court of Antwerp rendered a judgment on inclusive education.¹⁶⁸ A pupil with Down's syndrome who had completed his first year in a nursery school was prevented from re-enrolling in the same school for his second year. The school officials carried out a kind of enquiry among the teachers to find out who was ready to welcome him into their classroom and to provide suitable support. Apart from the pedagogical assistants, no teacher responded positively. As a result, the school asked the parents to look for another school. Given the evident discriminatory treatment, the equality body Unia decided to go to court. The judge found that refusing to enrol the child in these circumstances was a denial of reasonable accommodation, which is discriminatory within the meaning of the Flemish Decree of 10 June 2008 on equal opportunities and equal treatment.

The reasonable accommodation was mainly organisational. The pupil had the right to 5.5 hours of complementary support with an IOK teacher (a teacher who is trained in inclusive education), and with trainee teachers. The IOK teacher had been hired not only for the pupil in question – which was confirmed as she continued working in the school even after the pupil left. The trainee teachers were hired in cooperation between the school and higher education institutions, and they also stayed after the pupil left. Therefore the judge refuted that such accommodation would have been excessive from both an organisational and a financial point of view.

The judge confirmed that specialised education for disabled students must remain the exception. It therefore considered that all the necessary adjustments are in principle

¹⁶⁴ Judgment of 15 July 2009 of the President of the first instance court (*Tribunal de première instance – Rechtbank van eerste aanleg*) of Ghent (emergency proceedings).

¹⁶⁵ Opinion no. 2005-18, available on the website of the Commission: www.mensenrechten.nl/publicaties/oordelen/2005-18.

¹⁶⁶ This decision is available in Dutch on the Unia website: www.unia.be/fr/jurisprudence-alternatives/jurisprudence/cour-dappel-de-gand-7-septembre-2011.

¹⁶⁷ Judgment of 15 July 2009 of the President of the first instance court (*Tribunal de première instance – Rechtbank van eerste aanleg*) of Ghent (emergency proceedings).

¹⁶⁸ Judgment of 7 November 2018, Court of First Instance of Antwerp (in Dutch), www.unia.be/files/Documenten/Rechtspraak/Rechtbank_Eerste_aanleg_Antwerpen_7_november_2018.pdf.

reasonable until their disproportionate nature is established. Furthermore, the school chiefly focused on what the pupil was unable to do and, on the problems faced by the teachers. It is precisely this kind of prejudice that the public authorities wanted to avoid by adopting the Decree implementing various measures for the inclusion of children with disabilities in mainstream education in the Flemish Community.

In the context of the collective complaint lodged by the International Federation of Human Rights (FIDH) and Inclusion Europe before the European Committee of Social Rights (ECSR), Unia also filed an amicus brief. The complaint was registered on 18 January 2017. It alleges that the lack of sufficient efforts to promote the inclusion of children with intellectual disabilities in 'ordinary' primary and secondary schools within the Wallonia-Brussels Federation (French Community) amounts to a breach of several provisions of the Revised European Social Charter (specifically, Article 15: right of persons with disabilities to independence, social integration and participation in the life of the community), Article 17: right of children and young persons to social, legal and economic protection and Article E: non-discrimination). The case is still pending.

In September 2016, Unia published a new edition of a booklet aimed at education professionals in order to guide them in the inclusion of pupils with disabilities at school. The booklet aims at clarifying the duty of reasonable accommodation provided in the anti-discrimination legislation.¹⁶⁹ Moreover, in 2018, it published *Diversity Barometer: Education*.¹⁷⁰ This most recent diversity barometer measuring discrimination and inequalities in the education system, was the result of long-term scientific research carried out by KU Leuven-HIVA, the learning and diversity research Centre of Ghent University and ULB-GERME. It emphasised a real concern about the inclusion of pupils with disabilities in Belgium's education system, and particularly the difficulties of parents in obtaining reasonable accommodation measures for their children.

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

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

However, the Flemish Decree of 8 May 2002 on proportionate representation¹⁷¹ does not restrict the notion of reasonable accommodation to persons with disabilities and could therefore also apply in principle to persons in respect of grounds other than disability. However, it has not yet been applied with respect to other grounds.

It might also be worth mentioning that on 16 September 2016, the Brussels Labour Tribunal,¹⁷² found a company had directly discriminated, on the ground of the current or future state of health, against a worker suffering from tendonitis who had asked for a part-time position for medical reasons. The employer refused this request and dismissed the worker a few weeks later. According to the labour tribunal, the worker had no right to reasonable accommodation since there was not sufficient evidence of the sustainable nature of her disease and she was not held as disabled. The firing was nevertheless discriminatory, and the employer was sentenced to pay compensation of EUR 20 000 to the former employee. An *a contrario* reasoning could lead to the possibility of a reasonable accommodation duty on the ground of current state of health where the long-term nature of the disease is proved. That was the reasoning behind the judgment of 20 February 2018

¹⁶⁹ Unia (2016) 'A l'école de ton choix avec un handicap: les aménagements raisonnables dans l'enseignement', available on the website of Unia, www.unia.be.

¹⁷⁰ See Unia (2018) *Diversity Barometer: Education* (available on the website of the Centre: www.unia.be/en/).

¹⁷¹ *Decreet houdende evenredige participatie op de arbeidsmarkt*, OJ (*Moniteur belge*), 26 July 2002, last modified on 10 December 2010 (OJ (*Moniteur belge*), 29 December 2010).

¹⁷² www.unia.be/files/Documenten/Rechtspraak/Tribunal_du_travail_francophone_16_septembre_2016.pdf.

(mentioned above) where the consequences of a cancer were recognised as constituting a disability requiring reasonable accommodation.¹⁷³

¹⁷³ Judgment of 20 February 2018 of the Labour Court of Brussels (in Dutch), www.unia.be/files/Documenten/Rechtspraak/Arbeidshof_Brusseel_20_februari_2018.pdf.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2), Directive 2000/43 and Recital 12 and Article 3(2), Directive 2000/78)

In Belgium, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.¹⁷⁴

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

a) Protection against discrimination

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

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

b) Liability for discrimination

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

Both natural and legal persons are prohibited from committing the types of discrimination defined in the instruments implementing the directives (Article 5(1) of both federal acts of 10 May 2007). This requires no specific explanation where civil liability is concerned. Although the applicable acts are silent on this issue, this seems to be the only plausible interpretation in line with the courts' existing practice. Under the criminal clauses contained in the relevant instruments, Belgian criminal law has extended to legal persons all offences, which could be committed by natural persons through the Federal Act of 4 May 1999.¹⁷⁵ All regional pieces of legislation also impose their obligations on both natural and legal persons.

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

a) Protection against discrimination

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

The Federal Anti-Discrimination Acts of 10 May 2007 apply, in their fields of competence, to both the private and public sectors, including public bodies (Article 5(1) of both federal acts). All regional pieces of legislation also apply, in their fields of competence, to both the private and public sectors, including public bodies.

¹⁷⁴ Please note that there is no obstacle to the anti-discrimination legislation applying to irregular migrants.

¹⁷⁵ On the sanctions, which can be imposed on legal persons where they are criminally liable, see Article 7bis of the Criminal Code, inserted by the Act of 4 May 1999.

b) Liability for discrimination

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

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

Under the Belgian legislative framework, all these situations are covered by anti-discrimination legislation. The Council of State (general assembly of the legislative section) stated, in its opinion on 11 July 2006,¹⁷⁶ that although the federal state is responsible for regulating employment contracts¹⁷⁷ and for adopting general rules of civil and criminal law, the regions and communities are exclusively competent to define the status of their staff (this follows from Articles 9 (public bodies) and 87 (staff of the Governments) of the Special Act on institutional reforms of 8 August 1980).

The current situation is the following:

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

Regarding civil provisions, the legislative instruments adopted in order to implement Directives 2000/43/EC and 2000/78/EC have a scope of application limited to the respective competences of each entity (federal state, region or community):

- The Racial Equality Federal Act and the General Anti-Discrimination Federal Act prohibit direct and indirect discrimination, *inter alia*, with regard to access to employment or self-employment, and working conditions, in both the private and the public sector (Article 5(1)(5)).¹⁷⁸
- The prohibition of discrimination enshrined in the Flemish Decree of 8 May 2002 on proportionate participation in the employment market extends *ratione materiae* to access to employment (including self-employment) and vocational guidance and training. However, this decree applies only to situations that fall under the competence of the Flemish Region or Community.¹⁷⁹
- The French Community ET Decree applies to selection, promotion, working conditions, including dismissals and pay regarding its own public service (Article 8).

¹⁷⁶ Council of State, opinions no. 40.689/AG, 40.690/AG, and 40/691/AG, of 11 July 2006. These opinions are appended to the Government bill presented to the House of Representatives on 26 October 2006 (doc. 51 2720/001). Following a number of changes to the original bill, a second text was presented to the Council of State, on 2 October 2006. However, the second opinion of the Council of State did not re-examine the question of the division of competence.

¹⁷⁷ With regard to employment law, see Article 6(1)(VI)(4)(12) of the Special Act on institutional reforms of 8 August 1980 (*Loi spéciale de réformes institutionnelles*, OJ (*Moniteur belge*), 15 August 1980).

¹⁷⁸ Both acts refer to 'working relationships', as described in their Articles 5(2).

¹⁷⁹ For more details, see above, in the introduction.

More precisely, it applies to: (1) the statutory employment relationships in the public bodies created or funded by the French Community; (2) the education institutions; and (3) the civil service and governmental institutions.

- The Walloon ET Decree has a scope of application limited to the Walloon Region's competence in the area of employment policy and retraining. The prohibition of discrimination applies to vocational guidance, socio-professional integration, placing of workers, funding for the promotion of employment, funding for employment and financial incentives to companies in the framework of the economic policy, including social economy and vocational training, in the public and the private sectors (Articles 4(1) and 5). It also applies to statutory employment relationships in departments of the Walloon Government, public authorities depending on the Walloon Region, decentralised bodies (such as provinces, municipalities, etc.), and public centres for social assistance (Article 5(2)).
- The German Community ET Decree applies to labour relations regarding its own public service and to employment (Article 4(1) and (3)). More precisely, it covers access to employment, promotion, working conditions, remuneration and termination of employment relationships, with regard to public bodies created or funded by the German-speaking Community, education institutions and the civil service and governmental institutions of the German-speaking Community (Article 3(11)). It also covers the employment policy of the German-speaking Community (Article 3(13)).
- In the Brussels Capital Region, the Brussels ET Employment Ordinance covers worker placement policies and the policies aimed at unemployed persons (as defined in Article 4(9)). The Brussels Civil Service ET Ordinance relates to the promotion of diversity and the fight against discrimination in the civil service of the Brussels Capital Region. It applies to the employment field in the civil service of the Brussels Capital Region and covers (as defined in Article 4(1)) access conditions, selection criteria, promotion, and working conditions, including dismissals and pay. Article 4(13) defines the specific public institutions of the Brussels Capital Region falling within the scope of the ordinance. The Cocof Vocational Training ET Decree covers vocational guidance, learning, advanced vocational training and retraining in the Brussels Capital Region (Article 11). The Cocof ET Decree relates to the fight against certain forms of discrimination and to the implementation of the principle of equal treatment in the fields of competences of the Cocof, including labour relations within public institutions of the Cocof (Article 4(2)). It covers access, nomination and promotion conditions, access to vocational guidance, learning and retraining, employment and working conditions, and affiliation and commitment to workers and employers organisations (Article 5(9)). Article 5(19) defines the specific public institutions of the Cocof falling within the scope of the decree.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

In Belgium, national legislation prohibits discrimination in the following areas: conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both private and public sectors as described in the directives (Articles 4(1) of the REFA and 5(2) of the GAFA), except the Cocof Vocational Training ET Decree for access to employment and occupation and except the German-speaking Community Decree for self employment. For a detailed discussion of the relevant provisions, see section 3.2.1 above.

On 10 February 2015, the Brussels Appeal Court handed down a decision in an important case relating to discrimination on the grounds of race and ethnic origin concerning the

access to temporary work.¹⁸⁰ The applicants (the French NGO, SOS Racisme, and the Belgian leftist trade union organisation, the FGTB) claimed that the well-known temporary work agency, Adecco, was listing jobseekers depending on their race and ethnic origin. Native Belgian people without foreign roots were registered in the computer system under the code 'BBB', by reference to the Belgian breed of Cattle '*Blanc Bleu Belge*' ('White Blue Belgian'). The system was put in place to please some clients who did not want to hire people with a foreign origin. In first instance, the Court sentenced Adecco to pay EUR 25 000 of damages to the first applicant and EUR 1 to the second applicant.¹⁸¹ On appeal, the Court upheld the decision and also held Adecco liable for discrimination. The liability was assessed under a provision of the Civil Code (Article 1384(3)), according to which an employer is liable for his/her employees' civil offences committed during the employment relationship (irrefutable presumption of liability). As to damages, the Brussels Appeal Court sentenced Adecco to pay a much higher compensation (EUR 25 000 to all applicants), stressing that a mere symbolic sentence of EUR 1 does not meet the requirement of an effective and dissuasive sanction as imposed by European law. The conviction is important, as the practice was first denounced by Unia more than a decade ago and the first attempt to denounce the discriminatory practice before the Courts had failed for procedural reasons.

On 2 May 2016, the Ghent Labour Tribunal¹⁸² convicted a company for having directly discriminated against a 59-year-old-applicant in a recruitment procedure. M.S. (the victim) applied to a company (the defendant) for a job as an independent kitchen seller, on the basis of a vacancy published online. He received the following reply: 'Dear M, you seem like having the perfect profile for the job except for your age – I am sorry for being so straightforward about this, but it is probably better that you know the reason why I do not invite you for interview'. The applicant reported the case to Unia, which launched a conciliation procedure that failed. As a consequence, Unia decided to bring the case before the Ghent Labour Tribunal, which ruled that M.S. had 'undoubtedly' ('*onmiskienbaar*') been directly discriminated against on the ground of age. According to the tribunal, the fact that the company had negative experiences with older workers because they supposedly had encountered difficulty with software programmes could not be considered to be an objective justification. The stereotypical view according to which older candidates are less likely to deal with software programmes was rejected altogether. In an in-depth reasoning, the jurisdiction sentenced the company. First, it ordered the immediate cessation of the company's discriminatory practice, under the threat of financial penalties (*astreintes*) (EUR 1 000 for each new offence) (Article 20 of the General Anti-Discrimination Federal Act). Secondly, it imposed the sanction of publicising the judgment, by the posting of the decision for one month at the company headquarters, where it could be visible for the workers and the next candidates for a job and in the shops of the company, where it could be visible for clients and members of the board. Interestingly, the tribunal judged that the publication of the decision in newspapers would be disproportionate. Finally, it sentenced the defendant to pay moral and material damages of EUR 25 000 to the victim which correspond to six months of remuneration determined *ex aequo et bono*.

In 2017, in a case reported above (in section 2.1.1), the Liège Labour Court¹⁸³ convicted a driving school of direct discrimination against an obese candidate on grounds of disability and physical characteristic.

As described above in section 2.1.1, on 16 October 2017, the Antwerp Labour Court criticised the general and automatic exclusion from employment of people with diabetes dependent on insulin for security reasons in the Port of Antwerp.

¹⁸⁰ Appeal Court of Brussels, 10 February 2015, www.unia.be/en.

¹⁸¹ Note that this difference between the two applicants could be explained by their respective claims. The Belgian leftist Trade Union organisation the 'FGTB' had only required one euro as symbolic damages.

¹⁸² Judgment of 2 May 2016 of the Labour Tribunal of Gent (in Dutch), www.unia.be/en.

¹⁸³ Judgment of 12 October 2017 of the Labour Court of Liège (in French), www.unia.be/files/Documenten/Rechtspraak/Cour_de_travail_de_Liège_12_octobre_2017.pdf.

On October 2017, the Senate approved a motion for a resolution concerning the proportionate employment of disabled people in the labour market.¹⁸⁴ This proposal, which points out numerous obstacles preventing disabled people accessing the job market, aims to implement the UN Convention on the Rights of Persons with Disabilities.

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

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

As detailed above (section 3.2.1), the federal and regional anti-discrimination laws (except for the Cocof Vocational Training ET Decree) prohibit direct and indirect discrimination, *inter alia*, with regard to employment and working conditions, including pay and dismissals. In this respect, it is worth mentioning that the Brussels Labour Appeal Court, in a judgment of 12 March 2013, held that the notion of dismissal, enshrined in the General Anti-Discrimination Federal Act of 2007, should be broadly interpreted, so as to consider the incidence of *force majeure* (allowing a contractual party to suspend or terminate the performance of its obligations when certain circumstances beyond the control of the parties arise, making performance impossible) as a form of dismissal.¹⁸⁵

On 16 September 2016, in a case reported above (in 2.6.f), the Brussels Labour Tribunal¹⁸⁶ convicted a company of having directly discriminated, on the ground of the current or future state of health, a worker suffering from tendonitis who asked to work part-time for medical reasons. The employer refused this request and dismissed the worker a few weeks later.

In a case decided on 25 October 2016,¹⁸⁷ the Ghent Labour Tribunal convicted a company for having dismissed an employee who had been on a long-term sick leave (due to cancer) and who got pregnant during this leave. The dismissal relied on the fact that the 'continuity of her work was compromised'. The tribunal first considered that the employee had not sufficiently demonstrated unequal treatment based on gender. Enough evidence was produced to presume discriminatory treatment based on her state of health and the employer was unable to show that the dismissal was not based on the state of health of the worker. At this stage, the tribunal had to assess whether the difference in treatment could be reasonably justified (note that contrary to direct discrimination based on disability, direct discrimination based on the state of health can be justified under the Anti-Discrimination Federal Act). According to the tribunal, this could be the case in three situations: (1) the difference in treatment pursues a legitimate aim and respects the principle of proportionality; (2) the difference in treatment is prescribed by law; and (3) It constitutes a lawful positive action. As the dismissal did not come under any of these exceptions, the tribunal ruled that the dismissal amounted to unjustified direct discrimination on the ground of the state of health of the worker. The company was sentenced to pay a compensation of six months' salary and a fine of one euro for symbolic compensation to Unia (which took part in the proceedings).¹⁸⁸

¹⁸⁴ 'Proposition de résolution relative à une mise à l'emploi proportionnelle des personnes en situation de handicap sur le marché du travail régulier', adopted by the Senate on 10 October 2017, www.senate.be/www/?MIval=/dossier&LEG=6&NR=319&LANG=fr.

¹⁸⁵ Judgment no. 2011/AB/631 of 12 March 2013 of the Labour Appeal Court (*Arbeidshof*) of Brussels.

¹⁸⁶ www.unia.be/files/Documenten/Rechtspraak/Tribunal_du_travail_francophone_16_septembre_2016.pdf.

¹⁸⁷ www.unia.be/files/Documenten/Rechtspraak/Arbeidsrechtbank_Gent_25_oktober_2016.pdf.

¹⁸⁸ One may highlight that The Institute for equality between women and men also took part to the procedure, but its request was declared inadmissible as unequal treatment based on gender was not held sufficiently proven. Note that, in this case, the claim for gender discrimination and the claim for discrimination on the grounds of state of health were made distinctly and not articulated as multiple or intersectional discrimination.

More recently, on 20 February 2018, the Brussels Labour Court considered that the dismissal of an employee who was unable to work her contractually agreed working hours, due to facing the consequences of cancer, was in breach of the Anti-Discrimination Federal Act.¹⁸⁹ The Court, by considering that the consequences due to her cancer were constitutive of a disability due to their durability, enhanced her protection by giving her a right to reasonable accommodation.

In both cases the contract termination was due to the fact that the employee had cancer. In the former case, the employee was still on sick leave when the decision was taken, in the latter the employee was able to return to work but not the same amount as before. In the 2016 judgment, Unia said that the employer had wrongly qualified the state of health of the employee as a 'disability', as if she would no longer be able to execute her work. The difference is therefore linked to the fact that on the one hand, the cancer treatment was still ongoing (state of health), with no certainties regarding the outcome, whereas in the other, the employee would no longer be able to work full time, for an indefinite period of time, or maybe forever (disability).

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

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

In the Belgian federal system, vocational guidance (as part of employment policy) is a competence of the regions,¹⁹⁰ although the Walloon Region transferred that competence to the German-speaking Community for the territory of the German-speaking Region on 1 January 2000. The Flemish Region/Community (Decree of 8 May 2002 on proportionate participation in the employment market), the Walloon Region (Walloon ET Decree), the German-speaking Community (German Community ET Decree) and the Region of Brussels-Capital (Brussels ET Employment Ordinance) prohibit discrimination in vocational guidance. The German Community ET Decree does not explicitly prohibit discrimination in vocational guidance, but it applies to employment policy, which should include vocational guidance.

Vocational training extends presumably, to advanced vocational training and retraining, but probably not to practical work experience, which is a competence of the regions under employment policy. Vocational training is a competence of the communities.¹⁹¹ The French Community has nevertheless delegated that competence (in the Belgian interpretation of the term, which differs from the European concept of vocational training that has been extended to university courses or technical courses) to, respectively, the Walloon Region (for the population of that region) and the Commission communautaire française (Cocof) of the Brussels Capital Region (for the French-speaking population of the Brussels Capital Region). This latter body adopted the Cocof Vocational Training ET Decree on 22 March 2007 in order to implement the relevant European directives in the field of vocational training – including vocational guidance, learning, advanced vocational training and retraining. The Walloon ET Decree covers vocational training and validation of skills in its material scope (Article 5(8)). The French Community ET Decree also includes, in its material scope, vocational training but in the European understanding of the term (Article 3(14)).

¹⁸⁹ Judgment of 20 February 2018 of the Labour Court of Brussels (in Dutch), www.unia.be/files/Documenten/Rechtspraak/Arbeidshof_Brussel_20_februari_2018.pdf.

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

¹⁹¹ Article 4, 15° and 16° of the Special Federal Act of 8 August 1980 on institutional reforms.

Finally, education is a competence of the communities. In 2008, the Flemish Community/Region and the French Community adopted legislation in order to prohibit discrimination in this field, at all levels of education, including the university level. In the German-speaking Community, the German Community ET Decree expressly prohibits discrimination in the field of education.

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

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

This is an area in which the federal level is competent to a large extent. The Racial Equality Federal Act and the General Anti-Discrimination Federal Act explicitly include the membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided by such organisations (Article 3(1)(d) of the Directive), in their scope of application (Article 5(1)(7) of both federal acts).

In order to fully implement the directives, it is necessary to include, in the material scope of the regional decrees, 'membership of, and involvement in, an organisation of workers or employers or any organisation whose members carry on a particular profession' that is financed by the relevant community or region. This has only been done expressly by the French Community in its Decree of 12 December 2008 (Article 4(5)) and by the Cocof in its Decree of 9 July 2010 (Article 5(9)). In respect of the Walloon Region and the Flemish-speaking Community, one could consider that it is implicitly included in 'the access, participation or whatever exercise of an economical, social, cultural or political activity open to the public' which are referred to in both decrees. However, that has not yet been confirmed or interpreted as such through case law.

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

In Belgium, national legislation prohibits discrimination in social protection, including social security and healthcare as formulated in the Racial Equality Directive, except the following legislations: the Brussels ET Employment Ordinance, Brussels Civil Service ET Ordinance and the Cocof Vocational Training ET Decree. Discrimination in social protection is not only prohibited on grounds of presumed race, colour, origin, ethnic and national origin and nationality, but also on the other protected grounds in the different pieces of anti-discrimination legislation (age, sexual orientation, civil status, birth, wealth/income (*fortune*, in French), religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion and language, genetic characteristic, social origin, and trade union opinion).

Social security is in principle regulated by legislation adopted at federal level (Article 6(1)(VI)(4)(12) of the Special Federal Act of 8 August 1980 for institutional reforms). Healthcare and social aid, on the other hand, are essentially a competence of the communities (Article 5(1)(I)(1) and II(2) of the Special Federal Act of 8 August 1980). However, if discrimination results from a statutory scheme adopted by an act (federal) or a decree (community), the Constitutional Court may find that it violates Articles 10 and 11 of the Constitution and, if necessary, can overrule the discriminatory provision. The Council of State (section of administration) has the same competence with respect to executive regulations (*arrêts*) implementing the relevant legislation.

The Racial Equality Federal Act and the General Anti-Discrimination Federal Act state explicitly that they apply to social security (Article 5(3) of both acts). The Flemish ET Decree, the French Community ET Decree, the German Community ET Decree and the Cocof ET Decree cover healthcare and social aid. However, the practical impact of this may be limited by the 'safeguard provision' referred to in the introduction to this report, which states that any measures contained in a law or adopted by virtue of a law should not be subordinated to the anti-discrimination legislation, but only to the Constitution and international law. Therefore, only administrative practices are covered by the prohibitions contained in both federal acts of 2007. To the extent that any disputed measure in the field of social security is contained in a legislative instrument or implements a legislative provision, it need only be checked that it complies with Articles 10 and 11 of the Constitution, as well as with equality clauses of international instruments. Although the Constitutional Court can punish both direct and indirect forms of discrimination, it is uncertain whether the broad clauses of the Constitution present the required clarity and precision that an adequate implementation of the directives would require.

a) Article 3(3) exception (Directive 2000/78)

In Belgium, national law does not rely on the exception in Article 3(3).

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

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

Social advantages are explicitly mentioned in the Racial Equality Federal Act and the General Anti-Discrimination Federal Act (Article 5(1)(3)). As a result of the safeguard provision included in both federal equality acts (Article 11, see the introduction above), the prohibition of discrimination applies only to administrative practices (i.e. the implementation, by the public authorities, of existing regulations), and not to statutory law or regulations that stipulate the level of advantages that each individual or family will be allowed.

The Flemish Community/Region, the French Community and the Walloon Region, and the German-speaking Community all explicitly refer to social advantages in the material scope of their ET decrees. The Cocof also included social advantages in the material scope of its 2010 decree, but only regarding labour relations within public institutions of the Cocof. For the sake of full implementation of EU law, 'social advantages' should be added to the material scope of the the Cocof Vocational Training ET Decree.

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

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

Education is a competence of the communities in the Belgian federal system.¹⁹² The communities are therefore exclusively competent to adopt legislation prohibiting discrimination in education.

Since 2008, the field of education (which comprises primary, secondary and higher education) is covered by the Anti-Discrimination Framework Decree of 10 July 2008 adopted by the Flemish Community/Region (Article 20(1)(5) and by the French Community Decree of 12 December 2008 (Article 3(13) and (16)). In the German-speaking Community, the field of education has only been explicitly covered since the adoption of the German-speaking Community ET Decree in 2012.

¹⁹² Article 127, § 1, al. 1, 2° of the Constitution.

In 2018, Unia published its *Diversity Barometer: Education*,¹⁹³ which is based on a study made by three Belgian universities identifying the risks of discrimination of pupils on the ground of their social or ethnic origin, disability or sexual orientation at school. The study focuses on compulsory education (6-18 years) and is based on interviews with teachers and school directors, surveys and behaviour tests. It points out important systemic deficiencies in Belgian educational systems resulting in discrimination against some groups of pupils. These deficiencies are notably caused by the organisation of the education system (public funding, freedom for parents to choose the school, and budget allowed according the number of students), which often result in a distribution of the pupils among the different schools according to their socio-economic background. Another factor explaining inequalities at school in Belgium is the existence of different educational programmes, some of which are more valued than others. Early orientation to one of them often further enhances inequality.

UNIA recommends measures in favour of an inclusive education system, such as:

- the adoption of measures to increase the objectivity of methods of examining the existence of discrimination at school;¹⁹⁴
- a registration procedure which better contributes to social diversity, including the adoption of quotas for 'priority' students (target groups victim of discrimination) in each school;
- providing additional clarity regarding the powers, role and capacity of the 'class councils', which are composed by teachers, with regards to decisions related to orientation;
- taking seriously the question of harassment at school;
- a longer common core programme at schools for pupils to avoid orientation based on the social or ethnic origin;
- the introduction of measures combating harassment of LGBT students;
- adopting general measures for more accessibility at school and a better adoption of reasonable accommodation measures for students with a disability by schools.

a) Pupils with disabilities

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

In 2004, the Flemish Government adopted a decree supporting supplementary hours in schools (in order to ensure the provision of pedagogical support to children with intellectual disability) and subsidies for institutions organising 'type 2' (specially adapted) classes.¹⁹⁵ Moreover, on 21 March 2014, a decree to promote the inclusion of children with disabilities in mainstream schools was adopted.¹⁹⁶ Similarly, a cooperation agreement (approved by the Decree of 1 March 2004 of the French Community) between the French Community and the Cocof seeks to support schools (in either the mainstream or the special educational system), which welcome children with disability.¹⁹⁷ In addition, the Decree of 3 March 2004 of the French Community seeks to reorganise the special educational system for children

¹⁹³ Unia (2018) *Diversity Barometer: Education*, available at: <https://www.unia.be/en/publications-statistics/publications/diversity-barometer-education-2018>.

¹⁹⁴ Please note that the school inspection is organised at the level of the Communities as the federal level is not competent as to education. Recommendations are "soft law" but they could guide the school inspection while checking the implementation on the Decree on inclusive education.

¹⁹⁵ Executive Regulation of the Flemish Government on the integration of children with a moderate or severe intellectual disability in primary and secondary education (*Arrêté du Gouvernement flamand relatif à l'intégration d'élèves présentant un handicap intellectuel modéré ou sévère dans l'enseignement primaire et secondaire ordinaire*), OJ (*Moniteur belge*), 2 March 2004.

¹⁹⁶ Flemish Decree of 21 March 2014 on measures for pupils with specific education needs, OJ (*Moniteur belge*), 28 August 2014 (*Decreet betreffende maatregelen voor leerlingen met specifieke onderwijsbehoeften*).

¹⁹⁷ OJ (*Moniteur belge*), 3 June 2004.

and adolescents with specific needs.¹⁹⁸ As explained by the Commissioner for Human Rights, in the German-speaking Community, 'a transition from segregated education towards inclusion was undertaken as of 2009. Geographically isolated specialised schools were banned and rebuilt close to ordinary schools in order to develop interactions between the two types of schools'.¹⁹⁹ As education sector staff are public servants of the communities (from a statutory point of view), they are protected by the Flemish Decree of 8 May 2002²⁰⁰ and the German-speaking Community ET Decree, adopted on 19 March 2012.²⁰¹

However, these initiatives are far from being satisfactory. The Committee on the Rights of Persons with Disabilities and the Commissioner for Human Rights of the Council of Europe have severely criticised the Belgian education system, as it fails to promote the full inclusion of children with disabilities in mainstream education.^{202 203 204}

Unia filed an amicus brief in the collective complaint lodged by the International Federation of Human Rights (FIDH) and Inclusion Europe before the European Committee of Social Rights (ECSR). The complaint was registered on 18 January 2017. It alleges that the lack of sufficient efforts to promote the inclusion of children with intellectual disabilities in 'ordinary' primary and secondary schools within the Wallonia-Brussels Federation (French Community) amounts to a breach of several provisions of the Revised European Social Charter (specifically, Article 15: right of persons with disabilities to independence, social integration and participation in the life of the community, Article 17: right of children and young persons to social, legal and economic protection and Article E: non-discrimination).

The Brussels court of first instance ruled that the Flemish Community had to take measures in order to better meet the needs of visually impaired pupils. The case was brought by parents who considered that not enough support was given to their children at school. The court sentenced the Flemish Community to a financial penalty (*astreinte*) of EUR 250 each day of delay in complying with the judgment.²⁰⁵

As reported above (in 2.6), in September 2016, Unia published a new edition of a booklet aimed at professionals in the education system in order to guide them in the inclusion of pupils with disabilities at school. The booklet aims to clarify the duty of reasonable accommodation provided in the anti-discrimination legislation.²⁰⁶

Recently, new legislation was adopted in the French Community. The first piece of legislation was the Decree of 29 June 2016 concerning inclusive social advancement education. This decree establishes the right for any student with disabilities to seek

¹⁹⁸ *Décret du 3 mars 2004 de la Communauté française organisant l'enseignement spécialisé*, OJ (*Moniteur belge*), 3 June 2004 (Decree of 3 March 2004 of the French-speaking Community on special education, as lastly modified on 17 October 2013). This decree was modified by a Decree of 13 January 2011 which included a new provision (Article 147, para. 2) obliging mainstream schools to demonstrate willingness to integrate children with specific needs in some conditions.

¹⁹⁹ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, para. 110 p. 22.

²⁰⁰ See Article 3, 2° and Article 2, 6° of the Flemish Decree of 8 May 2002.

²⁰¹ See Article 3, 11° of the German Community ET Decree of 19 March 2012.

²⁰² Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, Strasbourg, 28 January 2016, pp. 2 and 21 and seq.

²⁰³ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session* (15 September – 3 October 2014): www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx.

²⁰⁴ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, Strasbourg, 28 January 2016, pp. 2 and 21 and seq.

²⁰⁵ Judgment of 26 June 2017 of the Court of First Instance of Brussels www.unia.be/files/Documenten/Rechtspraak/Nederlandstalige_rechtbank_van_eerste_aanleg_Brussel_26_juni_2017.pdf

²⁰⁶ Unia (2016) 'A l'école de ton choix avec un handicap : les aménagements raisonnables dans l'enseignement', available on the website of Unia, see www.unia.be.

reasonable accommodation from the Council of Studies and through a reference person. An appeal can be made to the Commission for Inclusive Social Advancement Education.

Secondly, on 7 December 2017,²⁰⁷ the French speaking Community Government adopted a decree concerning the reception, the assisting and the maintenance of children with specific needs in basic and secondary education. This decree provides arrangements for consultation on and the implementation of reasonable accommodation for students with disability. It also creates a conciliation procedure and an appeal to an ad hoc committee, in which Unia will sit 'on a voluntary and advisory basis'. However, it also raises some concerns on the understanding of the right to reasonable accommodation, which is much too limited in view of legal texts and case law. In particular, the decree makes the right to reasonable accommodation conditional on the fact that the pupil's situation 'does not make it necessary to send him or her to specialised education according to the provisions of the Decree of 3 March 2004 organising special education' (Article 4(1)). Under anti-discrimination legislation and the UN CRPD, the refusal of reasonable accommodation constitutes discrimination. In other words, the accommodation is a right as soon as that is reasonable, rather than a mere 'possibility'. This right must be open to all students with disabilities within the meaning of the UN convention and international jurisprudence. Therefore, this additional condition does not comply with the law. Furthermore, the new decree excludes from ordinary schools, students with specific needs that 'call into question the learning objectives defined by the inter-jurisdictional reference frameworks' (Article 4(4)). This provision goes against the concept of an inclusive education system that should allow for flexible study programmes, learning methods and forms of assessment adapted to all students.²⁰⁸

Another case of significance here is that of the Antwerp first instance court,²⁰⁹ in which the judge found that refusing to enrol a pupil with Down's syndrome because no teacher wanted to accommodate him in their class amounted to a refusal of reasonable accommodation. The judge confirmed that specialised education for disabled students must remain the exception. It therefore considered that all the necessary adjustments are in principle reasonable until their disproportionate nature is established. Furthermore, the school chiefly focused on what the pupil was unable to do and, on the problems faced by the teachers. It is precisely this kind of prejudice that the public authorities wanted to avoid by adopting the Decree implementing various measures for the inclusion of children with disabilities in mainstream education in the Flemish Community.

Issues with inclusive education occur not only within primary and secondary schools, but also in the university environment. For example, on 25 October 2018, the Council of State suspended a university-college examination board's decision, because it was discriminatory and against the Constitution.²¹⁰ The case concerned a student who was about to graduate as a natural science teacher but eventually failed because of his low score in French, even though the university had been aware for years of his dyslexia and dysorthographia.

b) Trends and patterns regarding Roma pupils

In Belgium, there are specific patterns existing in education regarding Roma pupils. Although these patterns do not formally amount to segregation, but rather to indirect discrimination, the boundaries between the two are significantly blurred in this case.

²⁰⁷ Decree of 7 December 2017 on the reception, accompaniment and maintenance of basic and secondary education for pupils with special needs (*Décret du 7 décembre 2017 relatif à l'accueil, à l'accompagnement et au maintien dans l'enseignement ordinaire fondamental et secondaire des élèves présentant des besoins spécifiques*), OJ (Moniteur belge), 1 February 2018, www.gallilex.cfwb.be/document/pdf/44807_000.pdf.

²⁰⁸ See: UN CRPD, General Comment No. 4 (2016) on the right to inclusive education, Articles 14 and 26.

²⁰⁹ Judgment of 7 November 2018 of the Court of First Instance of Antwerp (in Dutch), www.unia.be/files/Documenten/Rechtspraak/Rechtbank_Eerste_aanleg_Antwerpen_7_november_2018.pdf

²¹⁰ Council of State (section of administration), *Baijot v. la Haute Ecole Galilée*, 25 October 2018, judgment no. 242.794, www.unia.be/files/Documenten/Rechtspraak/Conseil_detat_25_octobre_2018.pdf.

According to surveys carried out in 1994,²¹¹ 2001 and 2004,²¹² school absenteeism and dropout rates constitute a serious problem among the Roma, Sinti and Traveller communities, in Belgium, particularly in secondary education. A large number of Roma children do not complete secondary school. Moreover, the majority of children from these communities are directed towards technical and vocational education, in the way in which children from disadvantaged social backgrounds are generally directed. The figures remain patchy and make it difficult to identify the precise causes of the dropout and absenteeism of pupils from Roma communities, although they do suggest that the lack of measures to assist Roma children in mainstream educational institutions may be the main reason why the dropout figures are so high.²¹³ The Delegate General for the Rights of the Child, an independent public body appointed by the Wallonia-Brussels Federation, is concerned about the extreme poverty of Traveller children, which is one of the reasons why these children are not being brought to school regularly:

'the exclusion of the families is reflected in the children at various levels: they cannot wash in the morning, they miss heating during winter, they are victims of the stress caused by forced evictions and their environment is unhealthy (...).'²¹⁴

These issues have been confirmed by the Commissioner for Human Rights of the Council of Europe in his 2016 report following his visit in Belgium in September 2015. The Commissioner expressed his deep concerns about the low participation of Roma and Traveller children in education. He highlighted the following issues:²¹⁵

- the very high dropout and absenteeism rates as well as a growing number of children not attending school at all;
- the constant risk of housing eviction which seriously affects the access of an increasing number of children to education;
- enrolment denials;
- the disproportionately high rate of Roma and Traveller children enrolled in special education, due among other factors, to a lack of proficiency in the language of education.²¹⁶

In May 2016, based on an initiative of the Belgian national contact point for Roma, the Social Integration Federal Public Service launched the Belgian National Roma Platform. The platform (or forum) is supervised by a pilot committee made of staff of the federal and regional administrations, NGOs active at the local level and Unia. The aim of this forum is to trigger dialogue between stakeholders and Roma communities in Belgium. On 18 April 2017, an open day was organised by the Belgian National Roma Platform in order to make public its recommendations to the Belgian public authorities in the different fields covered by its work: healthcare, education, housing and employment (see section 5 below). In July 2017, the Belgian National Roma Platform, which benefits from EU funding, extended its activity for another 12 months.²¹⁷

²¹¹ Machiels, T. (2002) *Keeping the Distance or Taking the Chances, Roma and Travellers in Western Europe*, Brussels, ENAR, March 2002, p. 17.

²¹² Regional Integration Centre (2004) *Les Roma de Bruxelles*, Foyer Bruxelles asbl, September 2004, p. 36 & sq.

²¹³ For a study on the schooling of Roma children in Belgium, see King Baudouin Foundation (2009) 'Schooling of Roma children in Belgium. The parent's voice', www.kbs-frb.be/~media/Files/Bib/Publications/Older/PUB2009-1857-SchoolingRomaChildren.pdf.

²¹⁴ Délégué Général aux Droits de l'Enfant (2009), 'Rapport relatif aux incidences et aux conséquences de la pauvreté sur les enfants, les jeunes et leurs familles' (Report on the incidences and effects of poverty on children, young people and their families), 2009, p. 30-32.

²¹⁵ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, Strasbourg, 28 January 2016, pp. 28-29 and 31-32.

²¹⁶ According to a 2010 study carried out in the city of Leuven, 27 % of the Roma and Traveller children surveyed were enrolled in specialised schools.

²¹⁷ www.mi-is.be/fr/themes/pauvrete/integration-des-roms/plateforme-nationale-belge-pour-les-roms.

There is still little information available on school attendance or the level of education of the Traveller community. The few studies and reports carried out on this subject showed specific patterns factually (not formally) amounting to segregation, including an overrepresentation in the special educational system.²¹⁸ According to Patrick Charlier, deputy director of Unia, most Roma children are oriented to the special educational system for children and teenagers with specific needs.²¹⁹ This is why Unia conducted a survey to determine the participation of Traveller children in education.²²⁰ This survey, published in the beginning of 2018, especially recommends promoting inclusive education, improving the housing situation of this community and investing in research related to those issues.

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

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

- At the federal level - civil provisions: the Racial Equality Federal Act and the General Anti-Discrimination Federal Act apply, *inter alia*, to the access to and supply of goods and services available to the public (Article 5(1)(1)).
- At the federal level - criminal provisions: Article 24 of the Racial Equality Federal Act criminalises discrimination when committed in the provision of goods and services.
- At the regional level: access to and supply of goods and services available to the public are also partly covered at the regional level by the Flemish Framework ET Decree (Article 20(1)(6)), the French Community ET Decree (Article 4(6)), the Walloon ET Decree (Article 5(1)(9)), the Cocof ET Decree (Article 4(1er)(7)), the German Community ET Decree (Article 4(7)) and the Brussels ET Ordinance (Article 4(3)).

In Belgium, as in other countries of Europe, there has been some debate on the legality of the burkini ban (body-covering swimwear) in swimming pools. This debate is directly related to the access of Muslim women to goods and services, in this case to public swimming pools. On 5 July 2018, the Ghent Tribunal ruled in two first instance judgments that the ban of burkinis in two municipal swimming pools was unlawful.²²¹ Relying on the ECtHR case law, the judge stressed that it is not the role of the court to discuss whether the Muslim religion imposes or not the wearing of such clothing. The legitimacy of such a practice is not an issue that the court should consider. As to the discrimination issue, the Ghent Tribunal ruled that the burkini ban does not amount to direct discrimination since it stems from the general internal rules of the swimming pool, which require the wearing of a swimming suit to access the pool. However, there is indirect discrimination against Muslim women willing to wear a burkini for religious reasons. According to the Ghent Tribunal, justifications on grounds of security or hygiene do not stand up to scrutiny, especially when considering the opinion of a regional health agency. It rightly points out that although a requirement of neutrality may be imposed upon the providers of public services, the same cannot be required from the users of these services.

These are the first rulings on the burkini ban in Belgium. They arose from the work of the human rights legal clinic of Ghent University, led by professor Eva Brems. The former

²¹⁸ Unia (2018) *Annual Report for 2017*, www.unia.be/files/Documenten/Jaarrapport/UNIA-rapport2017_FR-AS.pdf.

²¹⁹ Interview with Patrick Charlier, co-director of Unia, 28 March 2017.

²²⁰ Unia (2017) 'Participation à l'enseignement des enfants des Gens du voyage en Belgique, December 2017', www.unia.be/files/Documenten/Aanbevelingen-advies/Participation_%C3%A0_l'enseignement_des_Gens_du_voyage.pdf.

²²¹ Judgment of 5 July 2018 of the Tribunal of Ghent (in Dutch): for the swimming pool of Van Eyck: [www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_\(zwembad_Van_Eyck\).pdf](http://www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_(zwembad_Van_Eyck).pdf); for the swimming pool of Merelbeke: [www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_\(zwembad_Merelbeke\).pdf](http://www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_(zwembad_Merelbeke).pdf).

National Secretary of State for Equal Opportunities, Zuhair Demir, reacted negatively to the judgments. She stated that a legal avenue to banning burkinis in swimming pools should be explored. As she put it, the burkini is 'a symbol of oppression rather than a symbol of emancipation'. However, to the contrary, Unia sees no justification for such bans, which discriminate against people based on their religious beliefs or a disability.

a) Distinction between goods and services available publicly or privately

In Belgium, national law distinguishes between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association).

Where they cover access to and supply of goods and services, all the different ET federal and regional laws in Belgium refer to the access to and supply of goods and services available to the public.²²² There is no specification as to what this expression refers to, but it is clear from the preparatory works that this refers to all situations where goods or services are offered on the market, i.e. not reserved to a closed group.²²³

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

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

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

Social housing has been part of the responsibilities of the regions for many years.²²⁴ Since the 2014 Sixth Belgian State Reform, private housing has also become a competence of the regions. Discrimination in housing falls under the Flemish Framework ET Decree (Article 20(1er)(6)), the Walloon ET Decree (Article 5(1er)(9)) and the Housing Code of the Brussels Capital Region.²²⁵

Apart from the anti-discrimination legislative framework adopted at regional level, there are numerous initiatives in Belgium to promote the availability of housing accessible to people with disabilities and older people. It is nevertheless impossible to describe them in this report because the measures differ from one community/region to another. It is worth mentioning the National Association for Housing of Persons with Disabilities (Association nationale pour le logement des personnes handicapées), which is very active on the ground.

In Belgium, the anti-discrimination legal framework applies to everyone, irrespective of their nationality, and discrimination on the ground of nationality is prohibited. However, in practice, there are patterns of housing discrimination against people with a migrant background. However, it is difficult to affirm that discrimination is because of their migrant background, rather than on the grounds of wealth/income (*fortune*, in French), social condition or ethnic origin. For example, on 5 June 2018,²²⁶ the Ghent Appeal Court convicted a real estate agent who had refused to rent an apartment to a refugee family

²²² Access to and supply of *goods* is not covered by the following legislation: Brussels ET Employment Ordinance, Brussels Civil Service ET Ordinance, Cocof Vocation Training ET Decree.

²²³ To the knowledge of the authors of the report, there is still no case law clarifying the notion.

²²⁴ Article 6(1er)(IV) of the Special Act of 8 August 1980; Article 4(1) of the Special Act of 12 January 1989 on the institutions of Brussels.

²²⁵ Brussels Housing Code, 17 July 2003, last modified on 21 December 2018, OJ (*Moniteur belge*), 31 January 2019.

²²⁶ Judgment of 5 June 2018 of the Court of Appeal of Ghent (in Dutch), www.unia.be/files/Documenten/Rechtspraak/Hof_van_Beroep_Gent_5_juni_2018.pdf.

because they did not have a Belgian identity card. The court asserted that this behaviour constituted direct discrimination based on nationality.

It is notable that access to housing is particularly difficult for recognised refugees who, once they obtain their status, have two months to find housing and leave the centre for asylum seekers. Refugees face language problems as well as refusals related to their refugee status or lack of income. In response to this situation, a Belgian NGO, Caritas International, is carrying out various activities to facilitate their access to housing, especially by encouraging private owners to become supportive owners (*propriétaires solidaires*) and by organising 'housing-café's' to encourage meetings between owners and refugees.²²⁷

The *Diversity Barometer: Housing* published by Unia in 2014,²²⁸ gives a better picture of the situation in practice. Furthermore, the Unia report concerning discrimination based on religious belief linked to the consequences of the terrorist attacks,²²⁹ shows that the rise of anxiety *vis-a-vis* the Muslim community in Belgium leads to more discriminatory behaviour reported to Unia, especially in the employment and housing markets.²³⁰

a) Trends and patterns regarding housing segregation for Roma

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

Case law involving discrimination against Travellers in housing is scarce, although there are a certain amount of cases related to difficulties encountered by Travellers in finding a place to stop with their caravan, either temporarily, during the travelling period, or permanently. Given the shortage of sites where Travellers are allowed to stop (especially in the Brussels Capital and Walloon Regions), they are regularly evicted from lands where they have parked their caravan without authorisation. The core of the problem is that the specific lifestyle of Travellers is not (or not sufficiently) taken into account in planning regulations. Moreover, many local authorities are unwilling to accommodate Travellers in their territory.

Thus, given the shortage of stopping sites, many Travellers do not have any other option than to stay on illegal sites, where they live under constant threat of eviction. Thanks to the efforts of Flemish authorities, caravan sites have been established in Flanders and can accommodate at present around half of the Flemish Traveller population. By contrast, there is only one site in the Walloon Region. In the absence of a legal framework, local authorities are reluctant to construct sites for Travellers.²³¹ Moreover, a growing number of local authorities are introducing regulations prohibiting the siting of caravans for more than 24 hours. In addition, when Travellers attempt to place a caravan on a piece of land they have bought or rented, and where they would like to stay part of the year, local authorities almost systematically refuse to deliver the required planning permit. In consequence, many Travellers who wish to keep their traditional lifestyle are compelled to move constantly from one place to the other, which obviously hampers their access to education, employment and social assistance. However, the Walloon *Declaration of Regional Policy 2014-2019* mentions – as did the previous policy – the adoption, in cooperation with the Centre for Mediation of Travellers, of a regional regulation aimed at managing the temporary stay of Travellers on the territory of the municipalities. The Walloon Government also expressed its willingness to finalise the inventory of the places available for large

²²⁷ See, for more details, Caritas International's website: <http://www.caritasinternational.be/fr/projects/asile-et-migration/refugies/logement/housing-cafe-trouver-un-logement/>.

²²⁸ See www.unia.be/fr/publications-et-statistiques/publications/barometre-de-la-diversite-logement

²²⁹ See above, in section 2.1.1.

²³⁰ Unia (201, *Mesures et climat: conséquences post-attentats* June 2017, (www.unia.be/en).

²³¹ La Libre (2015) 'Organiser l'accueil des gens du voyage ? "C'est le vide total"' (*Organising the housing of Travellers? "It's a complete void"*), *La Libre*, 16 July 2015, <https://www.lalibre.be/belgique/organiser-l-accueil-des-gens-du-voyage-c-est-le-vide-total-55a78ffc35708aa436fec27e>.

groups of Travellers. Finally, the Walloon Government committed itself to further support local authorities' projects to develop places where Travellers could stay.²³²

When Travellers lodge complaints, courts generally hold that their location at a site was illegal and the eviction therefore justified; therefore the International Federation of Human Rights (FIDH) lodged a collective complaint in 2010 before the European Committee of Social Rights (ECSR) to challenge the overall situation of Travellers in Belgium by alleging a violation of Article 16 (the right of the family to social, legal and economic protection), Article 30 (the right to protection against poverty and social exclusion) and Article E (non-discrimination clause) of the Revised European Social Charter.²³³ In 2012, the European Committee of Social Rights concluded that there is a violation of the Charter because of: the failure to recognise caravans as dwellings; the lack of sites for Travellers; the state's inadequate efforts to solve the problem; and the failure of policy-makers to sufficiently take into account of the specific circumstances of Traveller families.

In 2013, the Committee of Ministers took note of the statement made by the Belgian Government on the follow-up to the decision of the European Committee of Social Rights and welcomed the measures announced on bringing the situation into conformity with the Charter.²³⁴ These measures included concerted action between the different federal entities in the form of a cooperation agreement, coordinated by the Secretary of State for inclusion and the fight against poverty, and clarification of administrative procedures. However, in its latest available follow-up report on the decision, the ECSR still considered Belgium to be failing to comply with the Charter, considering the absence of an overall recognition of caravans as dwellings (in Flanders and Brussels they are recognised as dwelling, but in Wallonia they are not), the fact that housing quality standards do not take into account the specificities of Travellers' dwellings, and the lack of a coordinated overall policy to combat poverty and exclusion in the Roma community. The ECSR noted the different initiatives taken at the different regional levels (e.g. Brussels Regional Sustainable Development Plan, Walloon Mediation Centre, etc.), but reserved judgment and did not consider those measures were enough to consider Belgium compliant with the Charter.²³⁵

There is not much information on the situation of Roma (i.e. post-1989 Roma) in the field of housing, except that they usually live in very poor areas and in miserable conditions. Given that many are illegal migrants, they rarely apply for social housing. After a visit in September 2015, the Commissioner for Human Rights of the Council of Europe expressed deep concerns for, on the one hand, migrants of Roma origin be they EU or third-country nationals (paragraphs 141-146) and, on the other hand, for Roma, Sinti and Travellers of Belgian nationality (paragraphs 156-166) regarding housing (availability of encampment sites, legal recognition of caravans, domiciliation, refusal of registration in municipalities, etc).²³⁶ He noted that '[l]ittle progress appears to have been achieved since the 2012 Decision of the European Committee of Social Rights'.²³⁷ Moreover, the constant risk of housing eviction is a huge issue and has a profound impact on 'the access of an increasing number of children to education'.²³⁸

²³² Declaration available in French: https://www.wallonie.be/sites/wallonie/files/publications/dpr_2014-2019.pdf.

²³³ *International Federation of Human Rights Leagues (FIDH) v. Belgium*, complaint no. 62/2010, decision on admissibility, 1 December 2010.

²³⁴ Committee of Ministers of the Council of Europe, Resolution CM/ResChS(2013)8, at [wcd.coe.int/ViewDoc.jsp?Ref=CM/ResChS\(2013\)8&Language=lanFrench&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](http://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResChS(2013)8&Language=lanFrench&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383).

²³⁵ ECSR (2018), *Follow-up to Decisions on the Merits of Collective Complaints, Findings 2018*, rm.coe.int/findings-2018-on-collective-complaints/168091f0c7.

²³⁶ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, Strasbourg, 28 January 2016, p. 27 [rm.coe.int/ref/CommDH\(2016\)1](http://rm.coe.int/ref/CommDH(2016)1).

²³⁷ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, p. 30 and seq.

²³⁸ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, p. 3.

As to legislative developments, with regard to the Brussels Region, an ordinance amending the Brussels Housing Code with a view to recognising Traveller dwellings as housing was enacted on 1 March 2012. The Government of the Brussels Capital Region had to define the specific rules for this kind of dwelling by executive regulation. It also had to define the minimum requirements that the sites made available to Travellers should meet and to identify, in particular, what safety standards would apply to itinerant homes. In 2018, this executive regulation has not yet been adopted. Therefore, although the amended ordinance is applicable, it is void as the law presupposes an executive regulation to produce its effects.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Belgium (federal level), the General Anti-Discrimination Federal Act and the Racial Equality Federal Act provide for an exception for genuine and determining occupational requirements (Article 8). To the extent that no exhaustive list of such requirements is specified, it is left to the judge to decide, on a case-by-case basis, whether the conditions are satisfied in order for the exception to apply. It remains debatable whether this is a fully satisfactory solution. However, the Government is authorised to adopt an executive regulation providing a list of examples in order to offer guidance to courts.²³⁹ In its 2017 report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts suggests that consideration be given to the opportunity to adopt one or several executive regulations providing such a list.²⁴⁰

The instruments adopted by the regions and communities contain similar provisions that are in line with the EU requirements.²⁴¹

There is very little case law on the question of genuine and determining occupational requirements.

In respect of age discrimination, the Belgian Council of State considered the maximum age condition to apply for a job at the Brussels Regional Agency for Public Cleanliness. On 26 September 2017, a proceeding for annulment was initiated before the Belgian Council of State²⁴² against a refusal to appoint a candidate for a position at the Brussels Regional Agency for Public Cleanliness because of his age. A regulation provides that 35 is the maximum age to apply for this position. This condition does not apply to workers hired by the Regional Agency for Cleanliness before they were 35. The claimant, who is older, asserts that fixing the maximum age of 35 for candidates to apply for a position of worker for public cleanliness cannot constitute a genuine occupational requirement and is, therefore, direct discrimination based on age, prohibited by the Brussels Civil Service ET Ordinance (Articles 4(6) and 7 to 10). According to the Council of State, this condition is not illegal and is appropriate and necessary to guarantee the legitimate objective that the position can be fulfilled for a certain amount of time by newly appointed workers. Indeed, the Council of State considered that, since the position requires excellent physical health, it is likely that people of a certain age could no longer fulfil the essential requirements of the work at stake. The Council of State also underlined that, in this matter, its control is only a marginal one (standard of abuse of authority) and that it is for the claimant to prove that the requirement is not essential for the position. The proceeding for annulment was rejected.

²³⁹ Recital 18 of the Preamble of the Racial Equality Directive and Recital 23 of the Preamble of the Employment Equality Directive state that 'In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate, and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission' (on the requirement that the Member States report to the European Commission, see Article 18 of the Framework Directive). This last sentence suggests that the notion of 'genuine and determining occupational requirement' should not be left to a case-by-case identification under judicial control, but should be given a precise definition beforehand, such situations being described by the Member State as part of the reporting requirements of the implementation of the Framework Directive. The implementation of Article 6 of the Flemish Framework ET Decree shows that the requirement to identify with precision, *ex ante*, the occupational requirements, which fall within the exceptions of Article 4 of the Racial Equality Directive and of Article 4(1) of the Framework Directive, is achievable.

²⁴⁰ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, p. 46 and para. 107, www.unia.be/en.

²⁴¹ See, for instance, Article 7(2) of the Walloon ET Decree.

²⁴² Belgian Council of State, case no. 239.217, 26 September 2017, www.raadvst-consetat.be/?lang=fr.

As to the ground of disability (or presumed disability), in a case ruled in 2013, the President of the Bruges Labour Court²⁴³ stated that an employer could not disadvantage an employee based on a physical or genetic characteristic and/or an presumed disability in order to respond to the needs and preferences of colleagues and/or customers. According to the court, this kind of direct distinction could neither be considered as a genuine and determining occupational requirement, nor as a positive action, nor as a difference in treatment imposed by, or by virtue of, legislation. In the case in question, the applicant who had syndactyly (a congenital hand malformation) was not hired under a permanent contract because, according to his employer, his congenital hand deformities would not have been presentable for customers and would have prevented him from fully assuming his job.

Also of relevance is the 2016 judgment of the Liège Labour Tribunal convicting a driving school for discrimination against an obese applicant (see section 2.1.1 above).²⁴⁴ The tribunal examined the question whether the weight of the applicant amounted to a genuine and determining occupational requirement that justified the difference of treatment. The tribunal judged that it could not be seen as such, given the function at hand and despite the safety reasons offered by the defendant. Moreover, according to the tribunal, even though not being obese could constitute a genuine and determining occupational requirement, a reasonable accommodation could have been put in place, which the defendant failed to do.

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

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

In Belgium (federal level), the General Anti-Discrimination Federal Act contains a provision (Article 13), which follows almost word-for-word Article 4(2) of the Employment Equality Directive. Without prejudging its interpretation by the courts, it should therefore in principle be seen as compatible with the directive.

Most of the communities/regions have introduced the exception provided in Article 4(2) of Directive 2000/78/EC as drafted at the federal level (German-speaking Community, Walloon Region, French Community, Flemish Community/Region but with a less precise formulation, nevertheless in line with the EU requirements). Neither the decrees of the Cocof of 22 March 2007 and 9 July 2010, nor the Brussels ET ordinances contain any clause relating to the exception provided in Article 4(2) of Directive 2000/78/EC.

Although the concept of an employer with an ethos based on religion or belief is not expressly referred to, some decisions relating to the prohibition of religious symbols at work in the name of neutrality are worth discussing here. They illustrate the blurred lines between direct and indirect discrimination as well as between a genuine and determining occupational requirement (Article 4(1) of Directive 2000/78/EC) and the exception for employers with an ethos based on religion or belief (Article 4(2) of Directive 2000/78/EC). The first case is the Hema case decided by the Tongres Labour Tribunal in January 2013.²⁴⁵ The Hema store (belonging to the Dutch discount retail chain) in Genk (Flanders) had forbidden a Muslim employee who wore a headscarf from working with customers after some had complained. At the beginning of her employment, the Muslim employee was told that the wearing of a headscarf was acceptable, and she was even provided with a Hema headscarf as worn by staff in the Netherlands. However, after receiving many negative reactions from customers, the company asked the Muslim employee to stop wearing her

²⁴³ Judgment no. 12/2552/A and no. 12/2596/A of 10 December 2013 of the President of the Labour Court (*Arbeidsrechtbank*) of Bruges (Flanders).

²⁴⁴ Labour Tribunal of Liège, 20 June 2016, www.unia.be/en.

²⁴⁵ Labour Court (*Arbeidsrechtbank*) of Tongres (Flanders), 2 January 2013, *Joyce V. O. D. B. v. R. B. NV and H. B. BVBA*, judgment no. A.R. 11/2142/A, available on the website of the Centre, www.Unia.be/en/.

headscarf in order to comply with 'the neutral and discreet image of Hema'. As she refused to do so, Hema did not renew her contract. After having consulted the trade unions and with the consent of the employee, Unia decided to bring the matter to the Tongres Labour Court. The main purpose of such a strategic legal action was to get a CJEU preliminary ruling to clarify how far a company can go in seeking to present a 'neutral image' to its customers. Indeed, some companies are currently trying to get neutrality recognised as a belief or conviction, such that a neutral company could be recognised as an 'organisation with an ethos based on religion or belief'. According to Unia, this could not only result in opening the door to discrimination on the basis of religious belief or moral convictions, but also in removing the essential purpose of the very concept of 'organisation with an ethos based on religion or belief'. Furthermore, in the opinion of the Centre, neutrality can hardly be invoked as a genuine and determining occupational requirement.

In its ruling of 2 January 2013, the court held that terminating labour relations by reason of the wearing of a headscarf constituted direct discrimination on the grounds of belief and sentenced the Hema store in Genk to pay six months' salary compensation to the fired employee. In its decision, the labour court noted that the concept of 'genuine and determining occupational requirements' should be used parsimoniously. Evidence in the case showed that the neutrality argument was a fake one invoked to cover the prejudice toward Islam of some clients. However, the court stressed that the Hema store in Genk had, at the time of the case, no clear neutrality policy in the workplace, and consequently, no valid reason to dismiss the Muslim employee on the grounds of her religious beliefs. This might imply that if the Hema store in Genk had clearly stated in its labour regulations that the wearing of religious signs was prohibited to comply with a neutrality policy, it would not have been sentenced.²⁴⁶

In opposition to the previous judgment, in 2011, the Antwerp Labour Court held that the firing of an employee wearing the headscarf in order to preserve the neutral image of the company, was not unreasonable and therefore did not amount to indirect discrimination, even though the company did not have any clear regulation on the neutrality in the workplace at the time of hiring (*Achbita* case).²⁴⁷ This case concerned a Muslim woman who worked as a permanent contract receptionist at G4S Security Services and decided, in April 2006, three years after her hiring, to wear the Islamic headscarf during working hours. She had not had any duty to wear a specific uniform until then. However, a few days after she decided to wear the headscarf at work, she was informed that it would not be tolerated,²⁴⁸ because it was contrary to the neutrality policy of the company. The work regulations of the company were also amended in order to forbid the workers from wearing any visible symbol expressing their political, philosophical or religious beliefs. Refusing to remove her headscarf within the premises of the company, the Muslim employee was laid off. According to the court, the employer could prohibit the wearing of any religious signs by all employees in order to preserve the neutral image of the company.

The applicant brought the case before the Belgian Court of Cassation which decided to submit a preliminary ruling to the CJEU. In the ruling of 9 March 2015,²⁴⁹ the Belgian Court of Cassation first recalled the purpose of the 2000/78/EC Directive (Article 1) as well as the prohibition of direct and indirect discrimination (Article 2). On this basis, considering that the appeal court ruled that there was no direct discrimination and that the applicants claimed that such an interpretation was not compatible with the text of the directive, the Court of Cassation decided to suspend the proceedings and to submit the following preliminary ruling to the Court of Justice of the European Union:

²⁴⁶ Such a ruling is in line with the decision of the Labour Court of Appeal of Brussels in the decision *E.F. v. Club corp.* of 15 January 2008.

²⁴⁷ Judgment no. A.R. 2010/AA/453 and no. A.R. 2010/AA/467 of 23 December 2011 of the Labour Court of Appeal (*Arbeidshof*) of Antwerp.

²⁴⁸ CJEU, judgment of 14 March 2017, *Achbita*, C-157/15, ECLI: EU:C:2017:203.

²⁴⁹ Court of Cassation, 9 March 2015, S.12.0062.N, www.unia.be/en.

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

It is worth noting that a similar preliminary ruling had been submitted by a French jurisdiction before the CJEU the same year.²⁵⁰ The CJEU heard pleadings regarding the two preliminary references on 15 March 2016.

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

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

On 13 July 2016, Advocate General Sharpston gave opposite conclusions on the similar French case C-188/15, considering that a policy requiring an employee to remove her Islamic headscarf when in contact with clients was unlawful direct discrimination.²⁵¹

In a similar case ruled on 18 May 2015, the Brussels Labour Tribunal dismissed an applicant claiming that she had been discriminated against on the ground of religion/belief because her employer refused to allow her to wear the Islamic headscarf.²⁵² Referring to the above-mentioned decisions of 23 December 2011 of the Antwerp Labour Court of Appeal, the court ruled that there was no direct or indirect discrimination. Regarding direct discrimination, it considered that the applicant did not bring any evidence that she had been treated differently from the other employees on the ground of her religion/belief. Regarding indirect discrimination, it noted that the work regulations enshrined a 'neutrality

²⁵⁰ CJEU, Opinion of 13 July 2016, *Bougnaoui*, C-188/15, ECLI:EU:C:2016:553.

²⁵¹ Note that, on 14 March 2017, the CJEU (Grand Chamber) has delivered its judgments in the two cases.

²⁵² Labour Court of Brussels (Tribunal du travail), 18 May 2015, A.R. 14/218/A, www.unia.be/en.

policy' and requested that the employees wear clothes with the name of the company. Therefore, the court concluded that even though this neutrality policy could have disadvantaged the applicant, this was considered as proportionate and reasonably justified. Therefore, the court ruled on the case without waiting for the decision of the CJEU in *Achbita*.

In a ruling handed down on 16 November 2015, the President of the court of first instance of Brussels reached another conclusion.²⁵³ He ruled that the working regulation of Actiris – the Government body responsible for employment in the Brussels Capital Region – prohibiting the wearing of visible philosophical symbols amounted to indirect discrimination against the applicant who was wearing the Islamic veil. According to the court, the prohibition at stake was not legitimate since the regional legislature itself did not impose an 'exclusive neutrality'. Moreover, Actiris did not show that the measure was appropriate and necessary to achieve the aim of neutrality pursued. Finally, the President considered that it was not necessary to wait for the CJEU ruling in the *Achbita* case since there was indeed indirect discrimination in the *Actiris* case, while *Achbita* was not about indirect discrimination but was only related to direct discrimination.²⁵⁴

The CJEU rendered its judgment on *Achbita* on 14 March 2017.²⁵⁵ The CJEU considered that the general ban on wearing religious symbols did not constitute direct discrimination since it was applicable to all employees regardless of their religion. It nevertheless stressed that it could constitute indirect discrimination if it was demonstrated that people with a particular religion were more disadvantaged by this measure. If the proof of this disadvantage is found by the national judge, the measure may however be lawful if it pursues a legitimate aim and it is proportionate. The CJEU underlined that a general ban on the wearing of religious symbols could be justified by a company's aim to maintain a corporate image of neutrality, as that relates to the freedom of the company to conduct a business (Article 16 of the EU Charter). The CJEU moreover considered that it could be proportionate if it only applied to employees in contact with clients and provided that, in the case at stake, the employer tried to offer another position to the employee, where she would not be in contact with clients.

In a ruling of 9 October 2017, the Belgian Court of Cassation²⁵⁶ overturned the decision of the Antwerp Labour Court of 9 March 2015. It followed the interpretation of the CJEU as to the absence of any direct discrimination in the case at hand. However, the Court of Cassation considered that there could be an abuse of the right to dismiss (and indirect discrimination) even in the absence of a fault and even if the wrongful conduct has been committed unknowingly. It underlined that, in principle, an employer could not be held liable, according to Belgian law, for an abuse of the right to dismiss employees when the employer was not able to predict that the dismissal would be unlawful. However, Directive 2000/78, as construed by the CJEU in its former case law (including the case law on equality between women and men), entails, according to the Court of Cassation, the liability of employers committing discrimination even in the absence of a fault and even if the wrongful conduct has been committed unknowingly. Therefore, the Court of Cassation considered that the recognition of the employer's liability for a breach of anti-discrimination rules could not be made conditional on the evidence, brought by the victim of the discrimination, that a fault had been committed. Hence, the labour court decision was unlawful to the extent that it considered that the employer could not be held liable for the breach of the anti-discrimination rules since s/he could not reasonably know that the dismissal was unlawful because of the uncertainty of the case law on the issue and because the employee had not provided sufficient evidence of the existence of a fault. In short, the

²⁵³ Court of First Instance of Brussels, 16 November 2015, No. 13/7828/A.

²⁵⁴ On this question see footnote 134 Chr. Horevoets, S. Vincent, (2016) 'Concepts et acteurs de la lutte contre les discriminations', in E. Bribosia, I. Rorive, S. Van Drooghenbroeck (coord.), *Droit de la non-discrimination: avancées et enjeux, Morceaux choisis et développements récents à la lumière du droit belge, européen et international*, Bruxelles, Bruylant, 2016.

²⁵⁵ CJEU, judgment of 14 March 2017, *Achbita*, C-157/15, ECLI: EU:C:2017:203.

²⁵⁶ Decision of the Court of Cassation, 9 October 2017, S 12.062.N1.

Court of Cassation overturned the judgment of the labour court, except with regard to the consideration that there was no direct discrimination in the case at hand. It therefore follows the interpretation of the CJEU. The case has been referred to the Ghent Labour Court, which is not bound by law to follow the ruling of the Court of Cassation (no *stare decisis* doctrine in Belgium). Unia is still a party to the proceedings, acting in support of Mrs. Achbita.

In a recent case of 28 May 2018,²⁵⁷ similar facts as to the *Achbita* case led to the dismissal of an employee who refused to take off her headscarf, which she started wearing when she came back from her maternity leave. Relying on the Court of Justice's decision (*Achbita*), the Brussels Labour Tribunal considered that the general ban on wearing religious symbols did not constitute direct discrimination since it was applicable to all employees regardless of their religion. It furthermore considered that the headscarf ban also did not constitute indirect discrimination since it was justified by the aim of the company to maintain a corporate image of neutrality and that the rule was proportionate.

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

The question has been debated before the Council of State in a case involving two Flemish public schools that refused to appoint teachers of Islamic religion because of their refusal to remove their headscarf outside the classroom, after teaching their religion courses.²⁵⁸ The two religion teachers filed an action for suspension and annulment of the decision of refusal of their appointments before the Council of State. In two decisions on the actions in suspension handed down on 5 February 2014, the Council of State held that the religious beliefs – and thus related religious symbols – of a religion teacher are inherent to his/her function. It concluded that, *prima facie*, by refusing to appoint an Islamic religion teacher only because she wears a headscarf as a religious symbol and refuses to remove it outside the classroom, after class, the schools have breached Article 24 of the Constitution concerning the neutrality of public education. The Court did not rule this question under the anti-discrimination provisions.²⁵⁹ The Council of State based its rulings on the decision adopted in 17 April 2013,²⁶⁰ in which it annulled the sentence 'when they are in the premises where they give their courses', which was part of the public schools' internal regulation adopted by the city council of Grâce-Hollogne (in the French-speaking part of Belgium). Following these rulings, the wearing of political, ideological or religious symbols, granted to teachers of religion or moral education, is not limited to the premises where they teach their philosophical courses. The Council of State confirmed this case law in a ruling of 25 September 2015 in a similar case.²⁶¹

It is worth noting that the case law of the Council of State discussed above is applicable only to teachers of religion. As a reminder,²⁶² on 27 March 2013,²⁶³ the administrative court (sitting *en banc* - *assemblée générale*) dismissed a maths teacher on her action for annulment (merits of the case) against a regulation adopted by the city council of Charleroi prohibiting the wearing of religious signs by public school teachers.

²⁵⁷ Judgment of 28 May 2018, Labour Tribunal of Brussels, www.unia.be/files/Documenten/Rechtspraak/Tribunal_du_travail_Bruxelles_28_mai_2018.pdf.

²⁵⁸ Council of State, 5 February 2014, n° 226.345 and 226.346, www.raadvst-consetat.be/.

²⁵⁹ However, the Council of State refused to suspend the execution of the challenged decisions and thus rejected both actions in suspension because the applicants did not manage to prove the risk of serious irrevocable prejudice.

²⁶⁰ Council of State, 17 April 2013, n° 223.201, www.raadvst-consetat.be/.

²⁶¹ Council of State, 25 September 2015, n° 232.344, www.raadvst-consetat.be/.

²⁶² Bribosia E. and Rorive, I. (2014) *Belgium country report on measures to combat discrimination – 2013*, available at www.equalitylaw.eu/country/belgium.

²⁶³ Council of State, 27 March 2013, n° 223.042.

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

In Belgium, there are specific provisions concerning religious educational institutions. To a certain extent, these institutions are free to choose the curriculum and values at the core of their teaching. This implies a corresponding obligation for members of these institutions to respect these curricula and values. However, the distinction between the private and the professional spheres should be respected, and disproportionate restrictions should not be imposed on the fundamental freedoms of the staff.²⁶⁴

In its rulings on several actions in annulment launched against the Federal Anti-Discrimination Acts of 10 May 2007, the Constitutional Court²⁶⁵ stated that with respect to Article 13 of the General Anti-Discrimination Federal Act, which makes an exception to prohibited distinctions of treatment for public or private organisations the ethos of which is based on religion or belief, the Court issued a consistent interpretation in line with the principle of legality in criminal matters. The Court asserts first that, in employment, complementary social security schemes and membership in trade unions, those organisations with an ethos based on religion or belief can make a distinction on the ground of religion or belief if that is necessary in regard to the context or the nature of the activity. As to the context, the Court says that it equates to 'the character linked to the ethos of the organisation' (*le caractère lié à la tendance de l'organisation*). The Court carries on by stating that, a distinction on the ground of religion or belief implemented by such an organisation, can be considered as objectively and reasonably justified having in mind the basis (*fondement*) of the organisation.

The courts have only very rarely been given the opportunity to decide on these issues, and they have not established a clear boundary between these conflicting requirements.

In a case involving the Christian Congregation of Jehovah's Witnesses, the applicant, who had been expelled from the Congregation, put into question, not his ban as such, but the instructions given to the members of the congregation to refrain as much as possible from seeing expelled members, even if they are family members. According to the applicant, community members affected by the ban found themselves without social fabric, as they were required not to develop any relation with the external world while being part of the congregation. Confirming the decision of the Liège Court of Appeal,²⁶⁶ which was quashed by the Court of Cassation²⁶⁷ for the reason that it was in breach of the principle of the reversal of the burden of proof, the Mons Court of Appeal held that the applicant did not invoke any pertinent element to presume the existence of discrimination as he was in a similar situation to that of any person properly banned from a group or association. The court also noted that the state's obligations in respect of neutrality and impartiality did not allow it to assess the legitimacy of religious beliefs or the way religious beliefs manifest themselves as part of the principle of the personal autonomy of believers.

- Religious institutions affecting employment in state-funded entities

²⁶⁴ For instance, Article 21 of the Decree adopted on 27 July 1992 by the French Community (*Décret de la Communauté française du 27 juillet 1992 fixant le statut des membres du personnel subsidiés de l'enseignement libre subventionné*, Decree of the French-speaking Community of 27 July 1992 on the status of subsidised staff in free, subsidised education) provides that the personnel of educational institutions must comply with the obligations defined in their employment contract, which result from the specific character of the curriculum of the teaching institution in which they are recruited; however, the same decree states in Article 27 that the right to respect for private life of the employees should not be interfered with.

²⁶⁵ Judgments of the Constitutional Court, nos. 17/2009, 39/2009, 40/2009, 64/2009, delivered on 12 February 2009, 11 March 2009 and 2 April 2009.

²⁶⁶ Appeal Court (*Cour d'appel*) of Liège, 6 February 2006, *Jurisprudence Liège, Mons et Bruxelles*, 2006/15, p. 661664.

²⁶⁷ Court of Cassation, Judgment of 18 December 2008.

In Belgium, religious institutions are permitted to select people (on the basis of their religion) to hire or to be dismissed from a job when that job is in a state entity, or in an entity financed by the state.

Despite the fact that ministers of the six recognised religions are financed by the state, the Belgian Constitution provides that

‘the State does not have the right to intervene either in the nomination or in the installation of ministers of any religion whatsoever, nor to forbid these ministers from corresponding with their superiors, from publishing their acts, except, in the latter case, taking into consideration normal responsibilities in matters of press and publication’ (Article 21(1)).

It is worth noting that public schools have to organise religion courses. Pupils’ parents may choose between one of the six recognised religions or secularism (*morale laïque*).²⁶⁸ Religion teachers are selected and appointed on the basis of a proposal from their own religious authority.²⁶⁹

An interesting case was decided on 12 June 2007 by the President of the Liège Appeal Court in emergency proceedings (*X v. Église protestante unie de Belgique*).²⁷⁰ The Protestant Unified Church of Belgium (Église protestante unie de Belgique) dismissed a pastor. Before the first instance court, he asked to be reinstated but he lost his case because of Article 21 of the Constitution, in line with previous decisions of the Court of Cassation from 20 October 1994 and 3 June 1999. On appeal, he argued that Articles 6, 9 and 13 of the European Convention on Human Rights should prevail over Article 21 of the Belgian Constitution. The appeal judge dismissed the case on several grounds. First, according to the judge, there is no contradiction between Article 21 of the Constitution and the provisions of the ECHR. Secondly, no civil court is entitled to order the reinstatement of a minister of a religion whatever violation of human rights occurred. Thirdly, the judge held that this does not mean that arbitrary dismissals are allowed. In such a case, the only remedy is the payment of damages, not a reinstatement that amounts to a positive injunction. Note that there is no agreement with the Holy See on this issue.

4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)

In Belgium, national legislation does not provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78).

However, although the General Anti-Discrimination Federal Act is silent on this matter, it appears from the explanatory memorandum (*exposé des motifs*) that the Government accepts that the preservation of the fighting force in the army might be a legitimate objective when defining genuine and determining occupational requirements within the

²⁶⁸ Although Belgian law recognises a formal equality between all religions, differences of treatment remain as several religions benefit from official recognition by, or by virtue of law. Six denominations enjoy this status: Catholicism, Protestantism, Judaism, Anglicanism (1870), Islam (1974), and the Orthodox Church (1870, amended in 1985). In addition, in 1993, the Constitution was modified in order to recognise and finance non believers (*laïques*). In 2006, the Belgian Union of Buddhists introduced a request before the Ministry of Justice in order to be recognised as a non confessional philosophical community. Discussions are still ongoing at the political level.

²⁶⁹ Article 21, Decree of 10 March 2006 on the status of religion masters and religion teachers (*Décret relatif aux statuts des maîtres de religion et professeurs de religion*) (French Community), OJ (*Moniteur belge*), 19 May 2006; Article 37, Decree of 27 March 1991 on the status of some staff members in public schools (Flemish Community) (*Decreet betreffende de rechtspositie van bepaalde personeelsleden van het Gemeenschapsonderwijs*), OJ (*Moniteur belge*), 25 May 1991, last modified on 19 December 2014, OJ (*Moniteur belge*), 3 February 2015.

²⁷⁰ The decision is available on the website of the centre for public law of the *Université libre de Bruxelles*, dev.ulb.ac.be/droitpublic/.

army. Therefore the general understanding is that this exception is covered under Article 8 of the General Anti-Discrimination Federal Act (mentioned above in section 4.1).

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

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

The Racial Equality Federal Act enshrines nationality as a prohibited ground. However, the nature of this prohibition is slightly more flexible than for the other grounds covered by the act (presumed race, colour, origin, ethnic or national origin). Whereas, for the latter grounds, differences in treatment may only be justified in certain, limited and specified situations, differences of treatment based on nationality may be justified if they seek to fulfil legitimate objectives by means that are both appropriate and necessary. Nevertheless, this provision explicitly states that direct discrimination based on nationality prohibited by European law will never be justifiable (Article 7(2)).

All the pieces of legislation adopted at regional level now explicitly outlaw discrimination based on nationality. Similar to the Racial Equality Federal Act, there is an open system of justification of direct discrimination based on this discrimination ground (nationality). The Cocof Vocational Training ET Decree²⁷¹ does not provide for a justification system of direct discrimination based on nationality.

The Constitutional Court has already ruled in cases where the applicant claimed being discriminated against on the ground of nationality because of legislative provisions. A lot of these cases are linked to the freedom of movement within the EU and the conditions required to gain access to social, cultural and economic rights.²⁷²

There have also been a fair number of cases related to discrimination on the ground of nationality in the field of social security. In these cases, the Constitutional Court²⁷³ and national courts usually apply the criterion of 'strong consideration', on the basis of the case law of the European Court of Human Rights.²⁷⁴

Articles 10 and 11 of the Constitution protect non-nationals only for differences of treatment *between non-nationals*.²⁷⁵ Concerning differences of treatment between *nationals and non-nationals*, Article 191 guarantees that any foreigner who is on Belgian territory enjoys the protection related to goods and people, apart from the exceptions enshrined in the law. As a consequence, any difference of treatment between Belgians and non-nationals should be reasonably and objectively justified – i.e. justified as a measure necessary to achieve a legitimate aim and proportionate to that aim (in some cases, the illegality of the residence on the territory will be deemed to put non-nationals

²⁷¹ Note that the Cocof ET Decree of 2010 provides that differences of treatment based on nationality may be justified in case of a genuine and determining occupational requirement (Article 10).

²⁷² See a recent case ruled by the Constitutional Court concerning the language conditions that employees of nurseries financed by the Flemish Community have to comply with, Decision no. 97/2014 of 30 June 2014.

²⁷³ See more recently the following cases: Constitutional Court, decision no. 155/2014 of 23 October 2014 and decision no. 12/2013 of 21 February 2013 available on the website of the Court: www.const-court.be/.

²⁷⁴ See Bouckaert, S. (2012) 'Influence de la jurisprudence de la CEDH sur le droit et la jurisprudence belges', in CIECLR, *Différences de traitement en fonction de la nationalité ou du statut de séjour: justifiées ou non?*, 2012, p. 17.

²⁷⁵ See notably Belgian Constitutional Court, cases no. 82/2012, 28 June 2012, B.2.

in a different situation). However, in this case, the scrutiny of the Court is by definition much more lenient.²⁷⁶

Nonetheless, there are some exceptions that concern the exercise of political rights (Article 8(2) of the Constitution) and access to public services (Article 10 of the Constitution), as well as access to the national territory and the right to reside. Moreover, specific administrative authorisations must be obtained by a third-country national who wishes to enter a profession, either in the context of an employment contract or self-employment. Nevertheless, regarding public services, it must be pointed out that most of the regions/communities have opened access to employment in their civil service to EU citizens and third-country nationals, except for certain functions related to the exercise of public power (*puissance publique*) and the protection of national sovereignty (Brussels Capital Region, 2002 and 2004; Flemish Community/Region, 2006; Walloon Region, 2012; French Community, 2012 and 2013).

b) Relationship between nationality and 'racial or ethnic origin'

To the knowledge of the authors of the report, there is no relevant case law where nationality discrimination constitutes ethnic discrimination as well. This could be due to the fact that, since 1981, the Racial Equality Federal Act also prohibits discrimination based on nationality.

However, in March 2012, six NGOs – including the French-speaking and the Flemish human rights leagues – decided to apply to the Constitutional Court for annulment of the Belgian Act of 8 July 2011 on family reunification (Article 9). They argue that, by imposing on Belgian citizens who have not made use of their free movement rights the same conditions (in terms of income and housing) as non-EU citizens in order to get family reunification, and thus by imposing stricter conditions on Belgian citizens than other EU citizens, the new legislation introduces discrimination between Belgian citizens and EU citizens (reverse discrimination). According to the six organisations, it is particularly Belgians of Turkish and Moroccan origin who will be most badly hit by the legislation, which is therefore considered to be discriminatory on the basis of ethnic origin. Individuals or couples asking for family reunification have brought 36 similar actions in annulment before the Constitutional Court. On 26 September 2013, the Constitutional Court handed down a decision on the merits in which it held that Article 40~~ter~~ of the Act of 15 December 1980, as modified by the new Belgian Act of 8 July 2011 on family reunification, does not infringe the right to equality and non-discrimination enshrined in Articles 10 and 11 of the Constitution. According to the Court, the principle of equality and non-discrimination between Belgian citizens and EU citizens may permit, by reason of the specific situation of both categories of persons, certain differences of treatment. The Court noted that the fact that the Belgian legislature transposes EU legislation with regard to EU citizens, by virtue of EU obligations, without simultaneously extending this legislation to a category of persons not subject to it (Belgian citizens who have not made use of their free movement rights), does not in itself infringe the principle of equality and non-discrimination. Furthermore, the Court considered that the differences in treatment between Belgian citizens who have not made use of their free movement rights and EU citizens, regarding the conditions imposed on family reunification in terms of age, income and housing, are based on an objective criterion, are justified by the legitimate aim of controlling migratory flows and do not constitute a disproportionate infringement upon the right to equality and non-discrimination. As a consequence, the Constitutional Court held that these grounds for annulment were not established and rejected the claim regarding these specific grounds.²⁷⁷

²⁷⁶ Lys, Matthieu and Renaud, Bernadette (2013) 'Le principe constitutionnel d'égalité et les étrangers: Du critère de la nationalité à celui du droit de séjour' (2013) 2 *Revue belge de droit constitutionnel* 201.

²⁷⁷ Constitutional Court, judgment no. 121/2013 of 26 September 2013. This decision of the Constitutional Court could be criticised in the light of the case law of the ECtHR according to which only very weighty reasons could justify a difference of treatment on the grounds of nationality (see *Gaygusuz* case law, 1996).

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

a) Benefits for married employees

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

Articles 10 and 11 of the Constitution prohibits discrimination on grounds of civil status, including marriage.²⁷⁸ However, this does not mean that any difference of treatment between a married couple and a couple in another situation is prohibited. A difference in treatment between married and non-married people would be found invalid if not objectively and reasonably justified, i.e. made in order to pursue a legitimate objective and by appropriate and proportionate means.

Moreover, civil status is one of the prohibited grounds of discrimination under the General Anti-Discrimination Federal Act. Discrimination based on marital status may also be challenged directly under all the anti-discrimination statutes adopted at regional level. Thus, a difference in treatment made by an employer between married employees and non-married employees would be found invalid if not objectively and reasonably justified, i.e. made in order to pursue a legitimate objective and by appropriate and proportionate means. Strangely enough, given that marriage has been extended to same-sex couples in Belgium,²⁷⁹ it may be easier to justify differences in treatment between married and non-married couples than it is in countries that do not extend marriage to same-sex couples, since in Belgium, partners who remain unmarried have in principle chosen to do so, and the advantages recognised in respect of marriage should not be considered a potential indirect discrimination against gays or lesbians (unless same-sex marriage would not be available to the persons concerned).

b) Benefits for employees with opposite-sex partners

In Belgium, it would constitute unlawful discrimination in national law if an employer only provided benefits to those employees with opposite-sex partners. This would be in clear breach of Articles 10 and 11 of the Constitution (principles of equal treatment and non-discrimination), but also of the statutory law that seeks to implement the Employment Equality Directive in Belgium.

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

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

Nevertheless, the regulation on health and safety at work in Belgium makes it an obligation for the occupational physician to identify which solutions may be devised in order to promote access to employment for workers whose physical condition makes them unsuitable for certain jobs or for work on certain premises, and therefore the question of whether health and safety exceptions could be invoked by an employer to justify a difference in treatment on grounds of disability or health will depend exclusively on the

²⁷⁸ See, e.g., Constitutional Court, 15 July 1999, Case no. 82/99 (action for annulment of a Decree of the Flemish Region of 15 July 1997 fixing the amount of inheritance rights between people in civil partnerships (*samenwonende, personen vivant ensemble*)). However, the Constitutional Court considered that the legislature could legitimately favour marriage above other forms of (stable) relationships, thereby demonstrating its attachment to the institution of marriage: see Constitutional Court, Case no. 128/98 of 9 December 1998, *Arr. C.A.* 1998, p. 1565, point B.15.3.

²⁷⁹ Act of 13 February 2003 extending marriage to persons of the same sex (*Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil*), OJ (*Moniteur belge*), 28 February 2003.

attitude of the occupational physician, not on that of the employer.²⁸⁰ It is not possible in the context of this report to enter into the details of this regulatory framework.

Nevertheless, it is worth mentioning the exceptions relating to health and safety contained in the regional decrees on the admittance of guide dogs to public places (mentioned in section 2.6 above). The Ordinance of the Brussels Capital Region of 18 December 2008 and the Walloon Decree of 23 November 2006 (the provisions of which are now enshrined in the Walloon Code of Social Action and Health of 29 September 2011)²⁸¹ provide (in Article 4) that the admittance of guide dogs may be refused:

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

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

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

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

In 2011, Unia made recommendations to the federal Ministers for Public Health and Equal Opportunities on the access of guide dogs to hospitals. Unia recommended that the 'Superior Health Council develop a uniform procedure regulating the access to hospitals and healthcare establishments. The general rule should be that persons accompanied by a guide dog should have free access to consultation places, hospital rooms, cafeteria ... It is essential to establish a list of places where guide dogs are not admitted. The procedure must also mention the hygiene precautions to be respected and the way in which the hospital staff can be sensitised to these questions'.²⁸² As a follow-up, the Superior Health Council adopted a new opinion, in May 2014, on access to guide dogs to hospitals, where it reiterated that access to premises, or parts of premises, devoted to intensive care and invasive medical interventions should be prohibited, unless otherwise stated by the Hospital Hygiene Committee.²⁸³

The judgment of 21 November 2011 of a labour court of appeal constitutes a good illustration of exceptions in relation to disability and health/safety. The case concerns a woman with type-1 diabetes (insulin-dependent) who had been working as a storekeeper at the Port of Antwerp since 2004. In 2008, she decided to apply for the position of containers storekeeper, but the occupational doctor considered that she was medically unfit for any function at the Port of Antwerp. The doctor's position relied on internal guidelines, which automatically exclude employees or prospective employees with type-1 diabetes, irrespective of any individual examination and regardless of the position concerned. On this basis, the woman brought an action before the Antwerp Labour Court, which dismissed her action. Unia decided to appeal this judgment with the claimant. The

²⁸⁰ See especially *Arrêté royal du 28 mai 2003 relatif à la surveillance de la santé des travailleurs* (Executive Regulation of 28 May 2003 on monitoring the health of workers), OJ (*Moniteur belge*), 16 June 2003.

²⁸¹ OJ (*Moniteur belge*), 21 December 2011 (*Arrêté du Gouvernement wallon portant codification de la législation en matière de santé et d'action sociale, confirmé par le Décret de la Région wallonne du 1er décembre 2011*).

²⁸² Recommendation available on the website of Unia.

²⁸³ This opinion is available in French and Dutch: www.health.belgium.be/en/node/20840.

Antwerp Labour Court of Appeal²⁸⁴ overruled both the individual decision of the occupational doctor regarding the claimant and the internal guidelines of the Port of Antwerp, which automatically exclude employees or prospective employees with type-1 diabetes from all functions performed at the Port of Antwerp. It held that the fitness to work of an employee, or a prospective employee, with type-1 diabetes, should be considered on a case-by-case basis in relation to the position concerned, so as to be in accordance with the Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination. It examined the discrimination under the ground of 'disability'.²⁸⁵ The Port of Antwerp brought the case before the Belgian Court of Cassation. In a ruling of 14 December 2015, the Court dismissed the argument of the Port of Antwerp and confirmed the decision of the Antwerp Labour Court of Appeal.²⁸⁶

As explained above in section 2.1.1, on 16 October 2017, the Labour Court of Antwerp struck down the general and automatic exclusion from employment of people with diabetes dependent on insulin for security reasons in the Port of Antwerp.

The Mons Court of Appeal ruled in a case related to discrimination on the ground of health in access to services. The applicant, who was wearing a headscarf to hide her baldness caused by chemotherapy, had been refused entry to a bowling alley. The refusal was based on the bowling alley's regulation that prohibits the wearing of any headgear for 'decency and hygiene' reasons. The court judged that the refusal was a consequence of a misinterpretation of the regulation and a communication problem between the employee of the bowling alley and the applicant and did not constitute discrimination since it is not usual practice. This judgment means that since there was miscommunication/unusual practice, the applicant will be able to enter the bowling in the future, but no damages were awarded in the absence of recognised discrimination.²⁸⁷

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

4.7.1 Direct discrimination

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

At the level of the regions and communities, the Flemish Framework ET Decree (Article 23), the Walloon ET Decree (Article 11), the French Community ET Decree (Article 12), the Brussels Civil Service ET Ordinance (Article 10), the Brussels ET Employment Ordinance (Article 13), the German Community ET Decree (Article 8), the Cocof Vocational Training ET Decree (Article 8) and the Cocof ET Decree (Article 11) have all made use of this option to allow proportionate different treatment which is provided by Article 6(1)(a) of Directive 2000/78/EC, in their implementation of Directive 2000/78/EC. The wording of these instruments follows that of Article 6(1)(a) of Directive 2000/78/EC. The Brussels ET Ordinance of 2017 does not provide for this specific exception. This makes sense as it does not transpose Directive 2000/78 because employment is excluded from its scope, given there already is a specific ET ordinance on employment.

²⁸⁴ Judgment of 21 November 2011 of the Labour Court of Appeal (*Arbeidshof*) of Antwerp.

²⁸⁵ www.unia.be/en.

²⁸⁶ Court of Cassation, 14 December 2015, www.unia.be/en. See also a similar decision handed down by the Labour Court of Liège (Tribunal du travail) on 19 August 2015 (summary available on Unia website: www.Unia.be/en). The court judged that the health problems of the applicants had played a role in the lay-off of the latter.

²⁸⁷ Court of Appeal of Mons, 29 September 2015, www.unia.be/en. See *contra* Court of First Instance of Brussels (civil section), 25 January 2011, www.unia.be/en.

a) Justification of direct discrimination on the ground of age

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

The wording of all the provisions referred to at the beginning of this section (4.7.1) follow Article 6(1)(a) of Directive 2000/78/EC and appear to be in conformity with the approach adopted by the CJEU in *Mangold*²⁸⁸ and *Kucukdeveci*.²⁸⁹ For instance, Article 12(1) of the General Anti-Discrimination Federal Act does not provide for age limits, but instead requires a case-by-case examination of any difference of treatment based on age, which may be justified as appropriate or necessary for the attainment of a legitimate objective. Despite the lack of case law interpreting this provision, Belgian law seems compatible with the *Mangold* and *Kucukdeveci* approach.

b) Permitted differences of treatment based on age

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

Before the entry into force of the requirements relating to age of Directive 2000/78/EC, Belgium started an inventory of the items of legislation and regulations imposing differences of treatment on the grounds of age (coordinated by the Federal Public Service of Employment, Labour and Social Dialogue, with the collaboration of Unia). However, at the beginning of 2018 and after several renewals of the Government, these items of legislation and regulations have not been systematically screened yet.

Salary schemes used to progress with age. Since September 2009, all sectors have progressively replaced the age criterion by a criterion taking into account the years of experience accumulated that are relevant for the job in question.

Unia's *Diversity Barometer: Employment*, published in September 2012, reveals the existence of age discrimination practices in the Belgian labour market during the first stage of the selection process, mainly affecting older people.²⁹⁰ The data published by Unia on its activities in 2016 reveal that, between 2015 and 2016, the highest increase in cases opened occurred in age discrimination cases in the field of employment: 106 cases were opened, which is an increase of 126 %. According to Unia, 'this type of discrimination remains underestimated, not taken seriously and, worse, almost socially accepted. Yet, considering the aging of the population and the lengthening of careers, this phenomenon should be tackled structurally'.²⁹¹ According to Unia, although the number of complaints increased in 2016, few cases involving alleged discrimination on the basis of age are brought in court and the majority of the disputes are regulated by way of negotiation and payment of compensation by the employer to the victim. In such cases, the Centre is not entitled to file a suit. The high-profile case before the Ghent Labour Tribunal, involving the conviction of a famous kitchen selling company in Flanders for having directly discriminated against a 59-year-old-applicant in a recruitment procedure could be a starting point for structural change in this respect (above, section 3.2.2).

²⁸⁸ CJEU, judgment of 22 November 2005, *Mangold*, C-144/04, ECLI:EU:C:2005:709.

²⁸⁹ CJEU, judgment of 19 January 2010, *Kucukdeveci*, C-555/07, ECLI:EU:C:2010:21.

²⁹⁰ See Unia (2012) *Diversity Barometer: Employment* (available on the website of the Centre: www.unia.be/en/).

²⁹¹ First data of Unia on discrimination in the field of employment and education – 2016, available on its website (www.unia.be/en/).

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

In Belgium, national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2). The legislation is extremely complex and has been modified on a large number of occasions, but the basic rule is that, since 1 January 2009, men and women may take their pension at 65.²⁹² Other age limits apply in specific sectors, such as underground mining (55 years) or surface mining (60 years). In addition, from 1 January 2013 to 1 January 2016, the early retirement age was progressively raised from 60 to 62, if the employee could prove a minimum number of years of employment (from 35 to 40 by 1 January 2015), with at least one third occupation for each year.²⁹³ The 2014 Federal Governmental Agreement stresses that a new pension reform needs to be set up since, according to the recommendations of the European Council, complementary measures should be taken to delay the exit from the Belgian labour market. The Federal Governmental Agreement states that the age for early retirement is going to be increased to 63 years in 2019 if the employee can prove a minimum number of years of employment (from 41 to 42 by 1 January 2017). Furthermore, according to the agreement, the retirement age will be increased to 66 years by 2025 and to 67 years by 2030.²⁹⁴ The reform was adopted in 2015.²⁹⁵

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

In Belgium, there are special conditions set by law for older and younger workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection.

The labour market is harder to access for younger and older workers. Employers tend to doubt the efficiency of older workers. The economic activity rate of people aged between 55 and 64 is particularly low in Belgium (in 2012, it was 39.5 %, compared to an EU-28 average of 48.8 %).²⁹⁶ Unia's *Diversity Barometer: Employment*, published in September 2012, as well as subsequent statistical reports, show that discriminatory practices in the Belgian labour market during the first stage of the selection process mainly affect older people (those over 45).²⁹⁷ On 27 June 2012, the National Labour Council agreed Collective Agreement No. 104 concerning the creation of a plan for the employment of older workers. This CLA was made mandatory by the Royal Decree of 28 October 2012. The measure is consistent with the objective set by Belgium in implementation of the Europe 2020 strategy

²⁹² Article 2 of the Executive Regulation of 23 December 1996 executing Articles 15, 16 and 17 of the Act of 26 July 1996 on the modernisation of social security and assuring the viability of the legal pension schemes (*Arrêté royal portant exécution des articles 15, 16 et 17 de la loi du 26 juillet 1996 portant modernisation de la sécurité sociale et assurant la viabilité des régimes légaux des pensions*), as modified most recently by the Acts of 28 December 2011 and of 20 July 2012.

²⁹³ Article 4 of the Executive Regulation of 23 December 1996 executing Articles 15, 16 and 17 of the Act of 26 July 1996 on the modernisation of social security and assuring the viability of the legal pension schemes (*Arrêté royal portant exécution des articles 15, 16 et 17 de la loi du 26 juillet 1996 portant modernisation de la sécurité sociale et assurant la viabilité des régimes légaux des pensions*), as modified most recently by the Act of 19 December 2014, OJ (*Moniteur belge*), 29 December 2014.

²⁹⁴ Belgian Federal Governmental Agreement 2014 – 2019, p. 30. The agreement is available in French on the following website: www.premier.be/fr/accord-de-gouvernement.

²⁹⁵ Belgian Federal Act of 10 August 2015 aiming at increasing the minimum retirement age, setting up the access conditions to early retirement schemes (*Loi du 10 Août 2015. - visant à relever l'âge légal de la pension de retraite, les conditions d'accès à la pension de retraite anticipée et l'âge minimum de la pension de survie*), O.J. (*Moniteur belge*), 21 August 2015.

²⁹⁶ Article 4 of the Executive Regulation of 23 December 1996 executing Articles 15, 16 and 17 of the Act of 26 July 1996 on the modernisation of social security and assuring the viability of the legal pension schemes (*Arrêté royal portant exécution des articles 15, 16 et 17 de la loi du 26 juillet 1996 portant modernisation de la sécurité sociale et assurant la viabilité des régimes légaux des pensions*), as modified most recently by the Act of 19 December 2014, OJ (*Moniteur belge*), 29 December 2014.

²⁹⁷ See Unia (2012) *Diversity Barometer: Employment* www.unia.be/en/ and the latest statistical report of 2018 : www.unia.be/files/Documenten/Jaarrapport/Rapport_Chiffres_2018_FR.pdf.

to achieve by 2020 a participation rate of workers aged 55 to 65 by 50 %. Furthermore, to address this problem, all regions (employment policy being a competence of the regions) are putting in place schemes ensuring a smooth transition from full-time active employment to retirement. These schemes include financial incentives to remain active part-time; 'tutoring' initiatives, encouraging older workers to transmit their knowledge to younger workers (a task for which older workers may be trained); so-called 'landing jobs', the purpose of which is to encourage older workers to remain active in the voluntary sector as well as training younger workers (this latter formula was devised by the Flemish Region for workers above 45 years of age). A number of efforts, which include financial incentives, have been made in order to encourage the continued vocational training and retraining of older workers. These schemes and incentives are generally available to workers over 45 or 50 years of age. Other financial measures aim at encouraging older workers to return to work.

In 2017, an average of 13.1 % of young people (19.8 % in Brussels and 16.4 % in Wallonia but only 9.8 % in Flanders) were NEET (not in education, employment or training). Wallonia and Brussels are among the lowest NEET figures in the EU. Many actions plans have been adopted under the European Youth Guarantee and the Europe 2020 objectives.

- People with caring responsibilities.

A vast array of measures seek to improve the balance between family and working life. Most of these measures seek to improve the chance for both mothers and fathers to take care of their children. Certain measures seek to support the professional integration of people caring for children with disabilities. For example, Executive Regulation (*Arrêté royal*) of 15 July 2005 modified the regulation on career interruptions for workers in the private sector who assist or provide care to a member of the family or the household who is seriously ill.²⁹⁸ Moreover, the same regulation provides for a rise in social security benefits to employees who choose to stop working in order to take care of a family or household member.

4.7.3 Minimum and maximum age requirements

In Belgium, there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

The list of exceptions where minimum or maximum age requirements are imposed in relation to access to employment is a very long one. A full recital of the list of exceptions is beyond the scope of this report. As an example, labour court judges must be at least 25 years old, labour courts of appeal judges and non-professional judges sitting in commercial courts must be at least 30 years old, *juges de paix* (lowest-level judges) and Police Tribunal judges must be at least 35 years old and Constitutional Court judges must be at least 40 years old when they take office. However, these conditions of age are linked to other conditions, such as professional experience.

One should also highlight in this respect the decision of the Brussels Labour Appeal Court (*Arbeidshof*) of 29 February 2008 in a case on the age limit fixed to be admitted to a training course to become a football referee in the first division. In this case, a football referee was taking a training course to become a referee in the first division, but when he was 38 years old, the Belgian Royal Football Union took the decision that, because of his age and his future career prospects, he could not continue the training. That decision was taken in accord with a working plan endorsed by a trade union association, which fixed 36

²⁹⁸ Executive Regulation of 15 July 2005 modifying the Executive Regulation of 10 August 1998 instituting the right to career interruption in order to assist or provide care to a seriously ill household or family member (*Arrêté royal du 15 juillet 2005 modifiant l'arrêté royal du 10 août 1998 instaurant un droit à l'interruption de carrière pour l'assistance ou l'octroi de soins à un membre du ménage ou de la famille gravement malade*), OJ (*Moniteur belge*), 28 July 2005.

years old as the limit to be admissible to that kind of training. In emergency proceedings, the President of the labour tribunal ruled that the decision was not discriminatory. This decision was reversed on appeal when the labour court ruled that unjustified discrimination on the ground of age had occurred.²⁹⁹ As a matter of fact, the decision was clearly based on the age of the referee (it mentioned the age of the future referee, his career prospects and the working plan of the trade union association) and the football union could not rely on the genuine and determining occupational requirement justification, because the court considered that the union had brought no argument that the referee's situation fell in the scope of that justification. As a consequence of this finding, the court ordered the suspension of the union's decision and ruled that the referee should be entitled to carry on his training.

In a case from 2014, the Brussels Labour Tribunal ruled that an airline company discriminated against a pilot on the ground of his age by not admitting him to a traineeship because of his age (55 years old).³⁰⁰

As reported above (under section 4.1), in 2017, a proceeding for annulment was unsuccessfully brought before the Council of State against a refusal to appoint a candidate for a position at the Brussels Regional Agency for Public Cleanliness because of his age. According to the Council of State, the maximum age of 35 for applying to a position of public cleanliness worker can be considered as a genuine occupational requirement since the role requires the worker to be in excellent physical condition.³⁰¹

4.7.4 Retirement

a) State pension age

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

If an individual wish to work longer, the pension can be deferred.

An individual can collect a pension and still work (under certain conditions which go beyond the scope of this report).³⁰²

Since 2009, the legal pensionable age - at which individuals become entitled to a state pension - is 65 years for both women and men.³⁰³ The legal pensionable age will be raised to 66 in 2025 and to 67 in 2030.

b) Occupational pension schemes

In Belgium, there is normal age (65 years old, the state pension age) when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

If an individual wishes to work longer, payments from such occupational pension schemes cannot be deferred.

²⁹⁹ Labour Appeal Court (*Arbeidshof*) of Brussels, 29 February 2008, *Barbry Geert v. VZW Koninklijke Belgische Voetbalbond*, no. 087518. This decision is available in Dutch at the following address: www.unia.be/fr/jurisprudence-alternatives/jurisprudence/cour-du-travail-de-bruxelles-29-fevrier-2008.

³⁰⁰ Judgment of the Labour Court of Brussels (*Tribunal du travail*) of 5 September 2014, www.unia.be/fr.

³⁰¹ Judgment of the Council of State no. 239.217, of 26 September 2017, www.raadvst-consetat.be/?lang=fr.

³⁰² See the website of the federal Ministry for Pensions (*Service public fédéral des pensions*) - in French: www.sfpd.fgov.be/fr.

³⁰³ Article 2 of the Executive Regulation of 23 December 1996 executing Articles 15, 16 and 17 of the Act of 26 July 1996 on the modernisation of social security and assuring the viability of the legal pension schemes (*Arrêté royal portant exécution des articles 15, 16 et 17 de la loi du 26 juillet 1996 portant modernisation de la sécurité sociale et assurant la viabilité des régimes légaux des pensions*), as modified most recently by the Acts of 28 December 2011 and of 20 July 2012.

An individual can collect a pension and still work.

Occupational pension schemes are based on a contract between the employer and an insurance company. When the employee reaches the state pension age, the employer stops contributing to their pension insurance.

An individual may be in receipt of a pension and still work, within certain limits. One of the changes brought about by the Federal Act of 23 December 2005 on the solidarity pact between generations is that these limits have been relaxed somewhat in order to encourage workers receiving a pension to maintain a certain level of economic activity. The 2014 Governmental Agreement provided that the limits of income of a professional activity concurrent with pension rights would be completely abolished.³⁰⁴ Moreover, the length of career required to get pension rights would be harmonised between the public and the private sectors. Indeed, from 2016 onwards, years of studies are no longer considered as part of the length of career required to have access to pension rights in the public sector.

c) State imposed mandatory retirement ages

In Belgium, there is no state-imposed mandatory retirement age in the private sector. Public servants, however, retire automatically at 65 years. On top of that, there are some exceptions to the mandatory retirement age of 65 laid down in the public sector. For instance, as regards judges, the mandatory retirement age is 70 for Court of Cassation and Council of State judges and 67 for other judges of the judiciary. In addition, at the federal level, a civil servant might carry on working beyond 65 years providing that s/he addresses a formal request to her/his chief officer who agrees to a one year extension, which is renewable.³⁰⁵

An important public debate surrounding the raising of the pension(able) age to 67 (see paragraph a, immediately above) was the recognition of a list of 'arduous occupations', such as nurses, police officers, construction workers, etc. who would benefit from an earlier retirement age due to the heavy toll that their job demands. This was one of the key elements to be decided by the 2014-2019 legislature. However, the Government and the social partners were unable to reach an agreement and the matter has been pushed back for the next Government to decide.

d) Retirement ages imposed by employers

In Belgium, national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally. The 'normal' pension(able) age referred to above is not necessarily the age where retirement is required. In the private sector, workers may work beyond normal pension age, and their employer may not force them to retire. The employer may do so only by following the usual procedure of dismissal.³⁰⁶ According to the Act of 3 July 1978 on employment contracts, contractual clauses providing that the mere fact of reaching normal pension(able) ages ends the contract are void (Article 36). However, Article 83(1) of the act provides that the employer may terminate the employment contract when the employee reaches the 'normal' pension(able) age with a reduced notice period

³⁰⁴ See Federal Governmental Agreement, 11 October 2014, available in French and Dutch: www.premier.be/sites/default/files/articles/accord_de_gouvernement_-_Regeerakkoord.pdf.

³⁰⁵ See the Ministerial Decree of 11 September 2012 to implement Article 3 of the Royal Decree of 12 May 1927 on the age of retirement of officers, employees and service people of state administrations (*Arrêté ministériel du 11 septembre 2012 portant exécution de l'article 3 de l'arrêté royal du 12 mai 1927 relatif à l'âge de la mise à la retraite des fonctionnaires, employés et gens de service des administrations de l'Etat*). Details in French on the official website of the Federal Government: www.fedweb.belgium.be/fr/fin_de_carriere/travailler_apres_65_ans/#.UgNUmuCyuJl.

³⁰⁶ An employer may dismiss a worker without giving a reason for termination, provided that he or she gives notice or pays the compensation prescribed by law. However, in the event of a contested termination of employment, it is for the employer to prove that the dismissal is not unfair.

of six months (three months if the employee has been in continuous employment for less than five years).³⁰⁷ This article also provides for a reduced notice period in the event of the resignation of the employee after the age of 60 years. Therefore, when an employee reaches the normal pension(able) age, the employer still has to put an end to the contractual relationship and to give formal notice and the notice period will be reduced in this case. If the worker continues to work after having reached the normal pension(able) age, the pension will be calculated on the basis of the most favourable years.

Bear in mind that in the public sector, apart from some exceptions (see paragraph c, above), retirement is automatic and compulsory, and fixed at 65 years for both men and women.

e) Employment rights applicable to all workers irrespective of age

In Belgium, the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age as long as they remain in employment.

According to Article 36 of the Act of 3 July 1978 on employment contracts,³⁰⁸ clauses providing that the fact of having reached the age of state or occupational pension terminate the contract, are void. However, an employee who is older than 65 who is dismissed is not entitled to a period of notice longer than 26 weeks. In other words the period of notice might be shortened due to the pension(able) age of the employee (see paragraph d, above).

Note that the payment of social benefits (sickness, unemployment, early retirement and so on) stops when the legal pension(able) age is reached. A beneficiary of social benefits is therefore forced to take his/her pension at the state pension age.

f) Compliance of national law with CJEU case law

In Belgium, national legislation is partially in line with the CJEU case law on age regarding compulsory retirement. Apart from the public sector, where retirement is automatic and compulsory at the age of 65 years (with a few exceptions), there is no compulsory retirement age in the private sector. In the private sector, workers may work beyond the pension(able) age of 65 years, and their employer may not force them to retire; to do so the employer still has to terminate the contractual relationship by giving formal notice, even if the notice period will be reduced in this case. Therefore, except for the public sector, which is likely to constitute one of the items for discussion in the process of screening Belgian legislation and regulations for potential age-based discrimination, Belgian law is in line with the CJEU case law on age regarding compulsory retirement as regards the private sector. However, the reduced notice period provisions to terminating the contractual relationship in the private sector (mentioned in section 4.7.4.d) might possibly be out of line with the CJEU case law.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Belgium, national law (indirectly) permits age or seniority to be taken into account in selecting workers for redundancy.³⁰⁹ Indeed, the employer must make available a

³⁰⁷ The Constitutional Court confirmed the compliance of Article 83(1) of the Act of 3 July 1978 on employment contracts with the principle of equality and non-discrimination contained in Articles 10 and 11 of the Constitution and with Article 6(1) of Directive 2000/78/EC (see judgment no. 107/2010 of 30 September 2010 of the Constitutional Court, available on the website of the Court: www.const-court.be/).

³⁰⁸ Federal Act of 3 July 1978 on employment contracts (*Loi du 3 juillet 1978 relative aux contrats de travail*), OJ (*Moniteur belge*), 22 August 1978.

³⁰⁹ Redundancy procedures are regulated in Belgian law by Collective Agreement (*Convention collective du travail*) No. 10 of 8 May 1973 on collective layoffs; Collective Agreement No. 24 of 2 October 1975 on

redundancy plan, indicating in particular the number of workers concerned, specifically divided by sex, age, and professional category, as well as the reasons for the decision. This means that the impact of the decision on older workers will be part of the collective discussion, which takes place with workers' representatives.

b) Age taken into account for redundancy compensation

In Belgium, national law provides compensation for redundancy. This compensation allocated to the workers who are laid off, covering a period normally of four months following the layoff (as defined by Collective Agreement No. 10 of 8 May 1973 on collective layoffs, Collective Agreement no. 24 of 2 October 1975), is calculated as 50 % of the difference between their previous remuneration and the unemployment benefit that the laid-off workers will receive. It will therefore probably be more expensive for the employer to lay off older workers because their level of remuneration will on average be higher, but strictly speaking the level of compensation is not linked to the age of the worker.

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

In Belgium, national law does not include express exceptions that seek to rely on Article 2(5) of the Employment Equality Directive. In any case, the anti-discrimination provisions must be interpreted in line with other fundamental rights and freedoms enshrined in the Belgian Constitution and in the European Convention on Human Rights or the Charter of Fundamental Rights of the EU.

4.9 Any other exceptions

In Belgium, there are no other specific exceptions in the General Anti-Discrimination Federal Act and the Racial Equality Federal Act regarding the criteria covered in the directives. It is nevertheless worth highlighting that positive action measures are dealt with in these federal acts as a 'general motive of justification' (see below in section 5). The 'safeguard provision', as referred to in section 11.1 below, is also mentioned under the chapters on 'general motives of justification'.

informing and consulting workers' representatives in collective layoffs; the Executive Regulation (*Arrêté royal*) of 24 May 1976 on collective layoffs; the Act of 13 February 1998 containing provisions promoting employment, and the Executive Regulation (*Arrêté royal*) of 30 March 1998 implementing Articles 63 and 66(2) of chap. VII, Collective Layoffs, of the Act of 13 February 1998. Moreover account should be taken of Directive 98/59/EEC of 20 July 1998 when interpreting these provisions.

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

a) Scope for positive action measures

In Belgium, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is allowed under certain conditions in national law.

- Federal level

The General Anti-Discrimination Federal Act and the Racial Equality Federal Act provide that differences in treatment based on a protected ground do not amount to discrimination when a measure of positive action is concerned (Article 10(1) of both acts). Such a measure has to respect four conditions, which are based on the case law of the Constitutional Court³¹⁰ (Article 10(2) of both acts). First, any positive action should be a response to situations of *manifest inequality*, i.e. it must be based on a demonstration that a clear imbalance between the groups will remain in the absence of such action. Secondly, the removal of this inequality should be identified as a public goal. In this respect, the federal Government must authorise the adoption of positive action measures through an executive regulation (*arrêté royal*) (Article 10(3) of both acts).³¹¹ In 2018, the Government eventually took the initiative to adopt an executive regulation fixing the conditions for positive action as recognised in the three anti-discrimination laws of 10 May 2007.³¹² It provides a legal framework for employers who wish to give a boost to certain groups of the underrepresented population on the labour market. Thanks to it, employers can now set aside internships or jobs for people from these groups or launch recruitment campaigns for them. Thirdly, the 'corrective measures' must be of a temporary nature. As a response to a situation of proven manifest imbalance, these measures must be abandoned as soon as their objective – to remedy this imbalance – is reached. Fourthly, these corrective measures should not disproportionately restrict the rights of others.

- Regions and communities

Since the conditions defined by the Constitutional Court for the admissibility of positive action are derived from Articles 10 and 11 of the Constitution, rather than from rules specific to the federal level, the regions and communities must also comply with them. Similar to the federal acts, the conditions under which positive action is admitted are explicitly included in the Flemish Framework ET Decree (Article 26), the Walloon ET Decree (Articles 12 and 14), the French Community ET Decree (Article 6), the Brussels ET Ordinance (Article 14), the Brussels Civil Service ET Ordinance (Article 12) and the Brussels ET Employment Ordinance (Article 11), the Cocof ET Decree (Article 13) and the German Community ET Decree (Article 11). It is worth highlighting that the Brussels Civil Service ET Ordinance is not only dedicated to the fight against discrimination but also to the promotion of diversity in the public bodies of the Brussels Capital Region, in particular through the preparation of diversity action plans (Articles 5 and 6).

As in the General Anti-Discrimination Federal Act, Article 6 of the French Community ET Decree provides that a direct or indirect difference of treatment is not discriminatory when it takes the form of a positive action measure. Article 6(2) defines the conditions under which such positive action can be adopted. The former paragraph 3 provided that it is for the Government (of the French Community) to define the hypothesis and conditions to implement positive action measures in an executive regulation. In the absence of the adoption of such an executive regulation, on 13 November 2015, the Parliament of the

³¹⁰ Constitutional Court (*Cour d'Arbitrage*), 27 January 1994, Case no. 9/94, recital B.6.2. The Council of State has aligned itself with this understanding of the constitutional limits imposed on positive action: see Opinion no. 28.197/1 on the Bill subsequently became the Act of 7 May 1999 on equal treatment between men and women in conditions of occupation, access to employment and promotion, access to a self-employed profession, and social security.

³¹¹ In addition, where positive action measures are adopted in the field of work and employment, the social partners are consulted, via the competent bodies established respectively in the private and the public sectors (Article 10(4)).

³¹² OJ (*Moniteur belge*), 1 March 2019.

French Community brought an amendment to the ET Decree by adding a fourth paragraph to Article 6. This paragraph provides that, in the absence of an executive regulation, a judge is competent to scrutinise the validity of positive action, except in the field of employment. Henceforth, even in the absence of an executive regulation, private and public actors can adopt positive action measures, which will be assessed case by case in court.

The Flemish Decree of 8 May 2002 on the proportionate representation of target groups in employment stands out in this respect. Its objective is achieved through action plans for diversity and annual reporting. One of its guiding principles, therefore, may be said to constitute a form of positive action, in the broad sense of this expression as used in the Racial Equality and Employment Equality Directives. The Cocof Vocational Training ET Decree (Article 9) and the Ordinance of 26 June 2003 of the Brussels Capital Region (Article 4(2)) do not adopt the same affirmative concept of equality as that of the Flemish Decree of 8 May 2002, but nevertheless provide for positive action measures, which are defined in conformity with the definition offered by the Employment Equality Directive.

b) Quotas in employment for people with disabilities

Systems of quotas for recruiting workers who have been officially recognised or registered as disabled only exist in the public sector. The rate of manpower to be reached differs from one public body to another: 3 % within the federal public administration, 2.5 % in the Walloon Region, 2 % in the Brussels Capital Region, 5 % in the Cocof (Brussels) and 3 % in the Flemish Region.³¹³ A common problem in this area is that of effective enforcement: reports show that quantitative objectives for the integration of persons with disabilities are usually not met (for example, in 2012, workers with disabilities made up only 1.54 % of the federal public service). This was highlighted in 2014, in the first report on Belgium delivered by the Committee on the Rights of Persons with Disabilities, which noted

‘with concern the low number of persons with disabilities in regular employment. The Committee also notes the Government’s failure to reach targets for the employment of persons with disabilities within its own agencies, as well as the lack of a quota in the private sector’ (paragraph 38).³¹⁴

Efforts in this direction continue. Unia asked five Belgian universities to carry out a survey about the rights of people with disabilities in order to determine whether the needs of people with disabilities are being met in Belgium. The results of the survey were published in October 2014.³¹⁵ In the conclusions of the survey, Jozef De Witte, former director of Unia, stated that there is still a lot to do in Belgium to comply with the UN Convention. He claimed that public authorities are primarily responsible for implementing the Convention. He highlighted the crucial role of civil society and noted that Unia, as an independent mechanism, has an important role to play in putting in place a forum on questions of disabilities. Finally, he said that too little was done in Belgium between 2009 and 2014 and that the different bodies should make great efforts to catch up in the following years.

It is worth noting that some regional funds, which finance such employment assistance measures, do not give subsidies to the public administrations when the quota requirement are not reached. This is an important issue since such a refusal to give subsidies may jeopardise the access to regular employment of people with disabilities, creating a vicious

³¹³ For a detailed presentation of this body of legislation, see the first report of Belgium before the UN Committee for the rights of persons with disabilities, available online at the following address: tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/BEL/1&Lang=en.

³¹⁴ UNCRPD (2014) *Final Observations of the Committee for the Rights of Persons with Disabilities*, at tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBEL%2fCO%2f1&Lang=en.

³¹⁵ See the report available in French on the website of the Centre: www.unia.be/fr/publications-et-statistiques/publications/la-consultation-des-personnes-en-situation-de-handicap-sur-leurs-droits-fondamentaux-resultats-et-recommandations.

circle. In this context, Unia called on the regional funds to grant subsidies to support the hiring of people with disabilities even though the required quotas had not been reached.³¹⁶

³¹⁶ See the parallel report of Unia on the UNCPRD. For the the French version, www.unia.be/files/Z_ARCHIEF/rapport_parallele_crpdpdf, p. 42.

6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

- a) Available procedures for enforcing the principle of equal treatment

In Belgium, the following procedures exist for enforcing the principle of equal treatment (judicial – civil and criminal – and, in most cases, alternative dispute resolution, such as mediation).

- Federal level

The General Anti-Discrimination Federal Act and the Racial Equality Federal Act provide for a civil and criminal procedural protection of victims of discrimination nearly identical for all the prohibited grounds. Only some criminal offences that are not in the General Anti-Discrimination Federal Act were maintained in the Racial Equality Federal Act (discrimination in the provision of goods or a service – Article 24 – or in access to employment, vocational training or in the course of a dismissal procedure – Article 25) and are therefore specific to discrimination based on race and ethnic origin. Victims of discrimination, under both acts, may

- seek a finding that discriminatory provisions in a contract are null and void (Article 15 and Article 13 respectively).
- seek reparation (damages) according to the usual principles of civil liability (Articles 18 and 16 respectively), although the victim may choose a payment of the lump sums defined in the act rather than damages calculated on the basis of the 'effective' damage (the lump sum consists of EUR 1 300, reduced to EUR 650 if the defendant provides evidence that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element; in the field of employment, this predefined sum amounts to six months' salary, reduced to three months if the employer demonstrates that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element; see below in section 6.5). In its 2017 evaluation report, Unia showed that the very low lump sum discourages victims from lodging a complaint before courts, especially in the field of goods and services, including housing.³¹⁷
- seek from the judge that he/she delivers an injunction imposing immediate cessation of the discriminatory practice, under the threat of financial penalties (Articles 19 and 20 and Articles 17 and 18 respectively).³¹⁸ However, Unia recently pointed out that this does not accelerate the process, even though that is the procedure's primary aim.³¹⁹
- seek from the judge that he/she imposes the publication of the judgment finding discrimination, by the posting of the judicial decision on the premises where the discrimination occurred, or by the publication of the judicial decision in newspapers (Articles 20(3) and 18(3) respectively).

These actions are brought before courts of first instance (civil section) or labour courts where an employment relationship is concerned.

In addition, the acts provide for criminal liability in limited circumstances. First – although this goes beyond the scope of the Racial Equality or the Employment Equality Directives – incitement to commit discrimination, or incitement to hatred or violence against a group defined by certain characteristics, is a criminal offence, if it is done under public conditions

³¹⁷ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 10 and 81 www.unia.be/en.

³¹⁸ It is a criminal offence to refuse to comply with a judgment delivered under this provision (Article 24).

³¹⁹ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 10 and 36 www.unia.be/en.

as defined by Article 444 of the Criminal Code (Articles 22 and 20 respectively). Secondly, civil servants who, in the exercise of their functions, commit discrimination may be criminally convicted (Article 23 in both acts).

For the sake of completeness, it should be added that where certain offences defined in the Criminal Code are committed with an 'abject motive', i.e. with discriminatory intent (hate crimes), this might be held as an aggravating circumstance (Articles 33-42 of the General Anti-Discrimination Federal Act).³²⁰ In this respect, on May 2012, the murder of a young homosexual man was the first murder treated as a homophobic hate crime by the Belgian judicial authorities under new anti-discrimination law.³²¹ The four perpetrators were condemned to life sentences for premeditated murder, with homophobic hate crime as an aggravating circumstance. Reacting to an increase of homophobic violence reported by Unia, the previous federal Government prepared a draft law to punish crimes committed with an 'abject motive' with more severe sanctions. The federal Act amending Article 405*quater* of the Criminal Code was adopted on the 14 January 2013 and published on the 31 January 2013.³²² In another case, the Liège Criminal Court convicted the perpetrator of murder with premeditation, considering the homophobic intent as an aggravating circumstance.³²³ The murderer was sentenced to 25 years in prison. Several NGOs acted as a civil party at the trial, including Unia.³²⁴

In a case where about 15 people – mainly undocumented migrants and homeless people – were victims of violent and degrading treatment by railway police officers, the perpetrators were brought by the public prosecutor before the Brussels court of first instance (criminal section). They were charged with the use of violence by a police officer without any legitimate reason with the 'abject motive', i.e. with discriminatory intent (hate crimes). On 26 February 2014, the court convicted 11 out of 14 defendants. The nature and the degree of the sentences varied depending on the role of the perpetrators in the violent acts, and whether they had previous criminal convictions; they ranged from: sentence of community service of 60 hours, prison sentence of 1 year to 40 months with probation that was combined, in some cases, with a fine between EUR 500 and 600. It is worth noting that the abject motive (discriminatory intent) was recognised against the four police officers in the cases in which Unia intervened.³²⁵

³²⁰ These offences which may thus lead to stronger convictions if driven by such an 'abject motive' are: sexual assaults (*attentats à la pudeur ou viols*: Articles 372 to 375 of the Criminal Code); homicide (Articles 393 to 405*bis* of the Criminal Code); refusal to assist a person in danger (Articles 422*bis* and 422*ter* of the Criminal Code); deprivation of liberty (Articles 434 to 438 of the Criminal Code); harassment (Article 442*bis* of the Criminal Code); attacks against the honor or the reputation of an individual (Articles 443-453 of the Criminal Code); putting a property on fire (Articles 510-514 of the Criminal Code); destruction or deterioration of goods or property (Articles 528-532 of the Criminal Code). Except for the offence of harassment, these situations are not normally met in the field of employment and occupation.

³²¹ In this particular case, Ihsane Jarfi, a Muslim gay man of 32 years old, disappeared, on 22 April 2012, after a night out in a gay bar in Liège (one of the main cities of Wallonia). His body was discovered in a field by two hikers, one week after his disappearance. According to witnesses, after having left the gay bar, on the night of the 22 of April, Ihsane Jarfi was approached by four men in a car, parked before a night club often frequented by the LGBTQ+ community. He entered the car for unknown reasons, but voluntarily. The perpetrators in the case confirmed they wanted to 'teach him a lesson' and 'make fun of him' by beating him up and letting him out naked in a field in the middle of the night. Thanks to the fact that one of the men present in the car used the victim's phone to send a text message, the four suspects were identified. The perpetrators told the police that the victim was still alive when they left him in the field.

³²² *Loi du 14 janvier 2013 modifiant l'article 405quater du Code pénal et l'article 2 de la loi du 4 octobre 1867 sur les circonstances atténuantes*, OJ (Moniteur belge), 31 January 2013.

³²³ During the night of 24-25 July 2012, in the Avroy park of Liège, a 61-year-old homosexual man was killed with a hammer. The perpetrator immediately confessed his crime. He explained to the police that he had come to this park frequented by many homosexuals with the intention of killing one of them. He wanted to take revenge on a homosexual who allegedly raped him when he was young.

³²⁴ The decision of the Criminal Court of Liège is not available. However, additional information is available on the following website: www.unia.be/en.

³²⁵ Judgment of the Court of First Instance of Brussels (criminal section) of 26 February 2014, available on the following website: www.unia.be/en.

- **Regions and communities**

With the adoption of the various ET decrees and ordinances since 2008, the systems of remedies put in place in the regions and communities copy to a large extent those of the federal anti-discrimination acts and are in line with the European requirements.³²⁶

All the procedures described above are binding. In most of the situations involving discriminatory acts, a conciliation procedure is also available, under the Act of 10 February 1994, which makes mediation possible for all offences punishable by imprisonment of a maximum of two years.³²⁷ Some regional anti-discrimination statutes also expressly provide for a conciliation procedure. Moreover, equality bodies (Unia and the gender equality body) in their assistance to victims, have developed non-binding procedures to reach an amicable settlement. In addition, the labour inspectorate is entitled to report cases of discrimination at work.

Finally, it is also worth highlighting that some Belgian municipalities have taken initiatives in order to protect victims of discrimination. For example, in 2013, the municipalities of Ghent approved a regulation relating to the activities of doormen. All the clubs, bars and restaurants of the city have to display the phone number '8989' on their front window. On this basis, victims or witnesses of any discrimination can send a direct text message reporting the alleged discrimination. The contact points (*meldpunten*) will study any complaint and contact the victims/witnesses within the week. The police services must also follow-up of complaints.³²⁸

b) Barriers and other deterrents faced by litigants seeking redress

If the victim wants to file a complaint him/herself, along with or without the Centre or another organisation aimed at fighting discrimination, he/she will need to instruct a lawyer, at his/her own expenses. According to Article 508(1) and following of the Judicial Code, people with low incomes can benefit from legal aid, which is entirely or partially free. However, due to budget cuts and reduced public spending, getting legal aid is becoming increasingly difficult. Moreover, as Unia pointed out in its 2017 evaluation report, it is very difficult for applicants who do not fall within the conditions of legal aid to bring a claim before courts because of the numerous obstacles of such procedures (very high costs and the payment of a procedural indemnity in case of dismissal).³²⁹

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

There is no specific time limit prescribed by law to seek a judicial injunction imposing the cessation of a discriminatory practice, which therefore does not seem to be a deterrent to seeking redress. There is nevertheless a controversy as to the possibility of bringing an action in cases where the breach has already been accomplished and has exhausted its effects (e.g. the author of the discrimination has already rented the goods after refusing to rent them to the victim of discrimination). The first decisions in this matter seem to adopt a broad conception of the interest that must be demonstrated by the victim in order to take action, particularly when there is a danger that the violation will be repeated.³³⁰ In

³²⁶ The system of remedies put in place at regional level is described in detail in the Flash Reports of the European Equality Law Network.

³²⁷ This legislation has inserted Article 216ter in the Code of Criminal Procedure (*Code d'instruction criminelle*) to create a form of criminal mediation.

³²⁸ Unia (2014) *2013 Report*, available on the website of the Centre, www.unia.be/en.

³²⁹ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 10 and 58 www.unia.be/en.

³³⁰ Wautelet, P. (2009) 'Les garanties de la non-discrimination: sanctions civiles et aspects de procédure dans les lois fédérales luttant contre la discrimination', (The non-discrimination safeguards: civil sanction and procedural aspects in the Federal Acts fighting against discrimination), in Wautelet, P. (ed.), *Le droit de la lutte contre la discrimination dans tous ses états*, C.U.P., Anthemis, Liège, 2009, p. 236.

2014, the Brussels Labour Court ruled on this issue. In this case, the claimant was asked by the administration of the Brussels Capital Region to choose between removing her headscarf and not doing the one-month job for which she had been hired as a student. The Centre wrote to the administration condemning such a discriminatory practice. Subsequently, the administration informed the claimant that she could work for the rest of the month and could wear her headscarf, as 'exceptional derogation'. The applicant refused this 'gentlemen's agreement' and brought the case before the President of the Brussels Labour Tribunal in emergency proceedings, asking the judge to order the administration to cease the discriminatory practice. In an admissibility decision adopted on 24 October 2012, the President held that the claimant had an actual and existing legal interest since there was no guarantee that she could enjoy the above-mentioned 'exceptional derogation' in the future, in any new application. However, the President of the Brussels Labour Tribunal dismissed the applicant on the merits. The applicant lodged an appeal before the Labour Court of Brussels, which ruled that the action of the applicant was inadmissible. The court held that the injunction procedure aimed to stop an illegal act: the act at stake should have still existed. Indeed, the injunction procedure could not be used merely to hear from the judge that an act was illegal when the act in issue had already ceased. However, the court said that the judge could recognise the illegal character of a practice – though it had already ceased – if a risk of repetition existed which was not the case *in casu* because the claimant had refused the gentlemen's agreement and no longer worked for the administration of the Brussels Capital Region. Moreover, according to the court, since the claimant was not a student at the time of the hearing, she was not likely to apply for such a job again.

In its 2017 evaluation report, Unia recommends fixing a reasonable time limit, such as five years, for all labour law actions based on the Racial Equality Federal Act or the General Anti-Discrimination Federal Act.³³¹ The Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts stresses the potential difficulties linked with the coexistence of different time limits in the field of anti-discrimination law depending on the type of action (civil, criminal, labour). However, the commission has said that it needs to consider this issue further before formulating recommendations.³³²

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

c) Number of discrimination cases brought to justice

In Belgium, there are no available statistics on the number of cases related to discrimination brought to justice.

d) Registration of discrimination cases by national courts

In Belgium, discrimination cases are not registered as such by national courts. There is no data on the number of discrimination cases brought to justice or dealt with by national courts.

³³¹ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 9 and 84 www.unia.be/en.

³³² Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, pp. 77-80 and para. 247-262, www.unia.be/en.

It is noteworthy that, in application of the Common Circular (*circulaire commune*) for an efficient policy of monitoring and prosecution with respect to every ground of discrimination, adopted on 16 December 2013 (see section 9, below), the police services and the prosecution departments have to identify and register the cases related to discrimination and 'hate crime'. The contact prosecutor for discrimination has the obligation to manage the process of identification and registration. According to the circular, the registration of such cases and the follow-up are crucial to gathering data and statistics on the number of cases related to discrimination brought to justice and to get a better knowledge of that issue. However, as far as the authors of this report are aware, such statistics and data are not available. In its 2017 evaluation report, Unia called on the prosecution departments to better implement the common circular in respect of several different issues.³³³

In its 2014 report on Belgium, the European Commission against Racism and Intolerance (ECRI) asked the Belgian authorities to 'ensure that the new regulations for collecting data on racist and homo/transphobic incidents are applied in practice so that specific and reliable information on hate speech offences and the reaction of the criminal justice system is made available'.³³⁴

Finally, in 2017, Unia initiated a lawsuit in 13 cases related to discrimination or hate crimes.³³⁵

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

a) Engaging on behalf of victims of discrimination (representing them)

In Belgium, certain associations or organisations and representative unions are entitled, under both federal and regional Anti-Discrimination legislations, to act on behalf of victims of discrimination under certain conditions.

- Federal level

In criminal procedures, it has long been realised in the field of anti-discrimination law that combined action by the public prosecutor (who has the authority to prosecute criminal offences) and by the individual victim (who may seek damages by lodging a civil action claiming reparation, but also file a complaint to the public prosecutor or the investigating judge), may not suffice. The Act of 30 July 1981 criminalising certain acts inspired by racism and xenophobia, therefore provided, rather exceptionally in Belgian procedural law,³³⁶ that certain associations and representative unions, which statutorily pursue missions of combating racism and discrimination, could claim damages on behalf of the victim as a result of a violation of the provisions of this legislation (Article 32 of the current Racial Equality Federal Act). Later, Unia, which was set up by the Act of 15 February 1993 as an independent body, received similar powers under criminal statutory law.

³³³ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 7 & 28 www.unia.be/en.

³³⁴ Report available on the website of the CoE, <http://www.coe.int/>.

³³⁵ Unia (2018) *Annual report for 2017*, available on its website, www.Unia.be/en, p. 65.

³³⁶ The principle is that the so-called 'collective interest' asserted by an association which seeks to base its right to file a legal action on the basis of the mission defined in its internal statutes, will not suffice, if the rights of the association (to the protection of its property, its honour or reputation) are not violated as such. According to the Court of Cassation, if another solution were to prevail, citizens forming an association could impose on the authorities an obligation to prosecute, even in cases where the public prosecutor would find it not opportune to do so (Cour de Cassation, 24 November 1982, *Pasicrisie*, 1983, I, p. 361). The Court of Cassation confirmed its position on a number of later cases (e.g., Cour de Cassation, 19 September 1996, *Revue critique de jurisprudence belge*, 1997, p. 105). However, the Act of 31 July 1981 provides for exceptions to this rule, allowing unions and associations under certain conditions to pursue damages on behalf of the victim in the collective interest.

In civil procedures, the General Anti-Discrimination Federal Act (Articles 29 and 30) and the Racial Equality Federal Act (Articles 31 and 32) provide for the legal standing of Unia, of certain organisations and of representative unions.

- **Regional level**

The Flemish Decree of 8 May 2002 (Article 16), the German Community ET Decree (Article 13), the Cocof Vocational Training ET Decree (Article 14) and the Cocof ET Decree (Article 28) have solutions similar to that of the Anti-Discrimination Federal Acts of 10 May 2007. This is also true of the Flemish Framework Decree (Article 41), the Walloon ET Decree (Article 31), the French Community ET Decree (Article 39),³³⁷ the Brussels ET Ordinance (Article 16), the Brussels Civil Service ET Ordinance and the Brussels ET Employment Ordinance.

At both federal and regional level, associations willing to claim damages on behalf or in support of claimants, for a violation of the anti-discrimination legislation, must have had a legal personality for at least three years³³⁸ and a legal interest in the protection of human rights or in combating discrimination. This uniform system is provided by Article 32(1) of the Racial Equality Federal Act, Article 30 of the General Anti-Discrimination Federal Act, Article 16 of the Flemish Decree of 2002, Article 13 of the German Community ET Decree, Article 14 of the Cocof Vocational Training ET Decree (2007) and Article 28 of the Cocof ET Decree (2010), Article 41 of the Flemish Framework Decree, Article 31 of the Walloon ET Decree, Article 39 of the French Community ET Decree, Article 16 of the Brussels ET Ordinance, Article 27 of the Brussels ET Employment Ordinance and Article 25 of the Brussels Civil Service ET Ordinance. However, it is worth noting that under the German Community ET Decree and the Cocof ET Decree, associations, which have a legal personality at the moment of the discriminatory act (but have not necessarily had it for three years), may engage in proceedings on behalf or in support of complainants. Furthermore, under the Cocof Vocational Training ET Decree, associations willing to engage in proceedings on behalf or in support of complainants must have had a legal personality for at least five years.

Both at the federal and the regional levels, where the victim of the alleged discrimination is an identifiable (natural or legal) person, actions of the entities entitled to act on behalf or in support of them will only be admissible if they prove that the victim has agreed to their action being filed. This principle is provided for by the General Anti-Discrimination Federal Act (Article 31), the Racial Equality Federal Act, (Article 33), the Decree of the Flemish Framework ET Decree (Article 40), the Walloon ET Decree (Article 32), The French Community ET Decree (Article 40), the German Community ET Decree (Article 14), the Cocof Vocational Training ET Decree (Article 14), the Cocof ET Decree (Article 28), the Brussels ET Ordinance (Article 16), the Brussels Civil Service ET Ordinance (Article 34) and the Brussels Civil Service ET Ordinance (Article 27).

The extension of legal interest in a case where a person has been a victim of discrimination to Unia, representative unions and associations has an important consequence. Such entities acting as private prosecutors may overcome both the inertia of the public prosecutor (in criminal proceedings) and the unwillingness of the victim to file a complaint by which, if he/she seeks damages, the victim obliges the investigating judge to commence an investigation. However, these entities may only launch proceedings on the basis of the federal or regional anti-discrimination laws with the agreement of the individual victim, and they have absolutely no legal duty to act on behalf or in support of the victim in the event of any violation of these laws.

³³⁷ French Community ET Decree, Article 38 provides that the IECO and the Institute for the Equality of Women and Men are competent to file a suit on the basis of the decree.

³³⁸ In the procedure it had launched against Belgium, the European Commission took the view that the requirement of being established for a minimum of five years was too burdensome. The choice to lower the requirement to three years' existence is a response to this concern.

Like the victim of discrimination, Unia, representative unions and associations may ask the court for an injunction in order to stop the discriminatory behaviour. They may engage in criminal proceedings to obtain the conviction of the person responsible for discrimination when he/she has committed an offence under an anti-discrimination act. They also may engage in civil proceedings to obtain damages for the victim (in this case they can choose between full compensation for the damage or lump-sum compensation fixed by law). Therefore, these entities may seek and obtain the same remedies as the victim of discrimination, and benefit from the same protection.

b) Engaging in support of victims of discrimination (joining existing proceedings)

In Belgium, certain associations or organisations and representative unions are entitled, under both federal and regional anti-discrimination legislation, to act in support of victims of discrimination, under exactly the same conditions (as described in section 6.2.a, above).

c) Actio popularis

In Belgium, national law allow associations, organisations or trade unions to act, under certain circumstances, in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

As described above (sections 6.2.a and 6.3.b), the federal and regional anti-discrimination legislation provides for the legal standing of associations to a certain extent. Although the concept of *actio popularis* involving a 'representative claimant' acting in court in the name of a collective interest, is unknown in Belgian law, if there is no identified victim, Unia, associations, organisations or trade unions may act on their own behalf to challenge a breach of the anti-discrimination legislation.

In the case of Unia, this *actio popularis* power gained European visibility and recognition in the *Feryn* case before the CJEU.³³⁹ This case concerned the question whether a public statement by Feryn's director that his company would not recruit persons of Moroccan origin because the company's customers did not want them in their homes could be seen as applying a discriminatory recruitment policy. Unia's predecessor took the case to court on its own behalf, given the lack of an identifiable victim. Ireland and the United Kingdom questioned the legal standing of the equality body in the absence of an identifiable victim. Therefore the CJEU in its seminal judgment analysed this issue and established that the Racial Equality Directive does not preclude national legislation granting the equality body the right to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant.³⁴⁰ The CJEU went on to rule that such public statements constitute direct discrimination and are enough to shift the burden of proof and sanctions must be effective, proportionate and dissuasive, even where there is no identifiable victim.³⁴¹

In the *Adecco* case (see 3.2.2), the Appeal Court of Brussels confirmed the decision of the court of first instance (civil section) on the grounds of admissibility and rejected the argument by Adecco that the French NGO SOS Racism – one of the applicants – would lack legal standing because its interest would be restricted to discrimination happening in France. Interpreting Article 32(1) of the Racial Equality Federal Act (providing that associations willing to claim damages on behalf or in support of complainants, in case of violation of the anti-discrimination legislations, must have a legal personality for at least three years and a legal interest in the protection of human rights or in combating discrimination) in the light of European law, the court held that there was no territorial requirement and that an association could bring a non-discrimination claim irrespective of

³³⁹ CJEU, judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, C-54/07, ECLI:EU:C:2008:397.

³⁴⁰ CJEU, judgment of 10 July 2008, *Feryn* C-54/07, ECLI:EU:C:2008:397, section 27.

³⁴¹ CJEU, *Feryn*, Case C-54/07, ECLI:EU:C:2008:397.

the location of its head office.³⁴² Although there were thousands of jobseekers discriminated against on the grounds of their race and ethnic origin in this case, Adecco and SOS Racism were not acting on behalf or in support of named claimants in this case.

d) Class action

In Belgium, national law does not allow associations, organisations or trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.³⁴³ Like the concept of *actio popularis*, the concept of class action, understood as a mechanism implying that a 'representative claimant' will sue in the name of a class and obtain a judgment binding on all the members of that class, is unknown in Belgian law. Unia, representative unions and associations may engage in civil or criminal proceedings in cases of a violation of anti-discrimination legislation, but only on behalf or in support of one identified victim of discrimination.

The Antwerp Labour Appeal Court, in a 25 June 2008 ruling, made an interesting statement on the range of the injunction procedure (*action en cessation*) aimed at putting an end to discriminatory behaviour. It considered that Unia could request the ending of a discriminatory practice against a defined group of people who may, in the future, be discriminated against. This involves the recognition of a kind of collective injunction procedure. The scope of the collective injunction procedure is, however, limited to the person (or the entity) who discriminates or who is responsible for the discrimination and to the practice or the measure that the judge considered in breach of the equal treatment principle.³⁴⁴

It is worth noting that, in its evaluation report, eventually adopted by the executive board in 2017, Unia recommends the creation of a collective redress mechanism in anti-discrimination law, such as the class action existing in the field of consumer protection.³⁴⁵

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

In Belgium, national law, at both Federal and Regional levels, provide for a shift of the burden of proof from the complainant to the respondent in civil procedures

- Federal level

Both Federal Anti-Discrimination Acts provide for shifting the burden of proof in all the jurisdictional procedures, except the criminal ones (Article 27 of the Racial Equality Federal Act and Article 29 of the General Anti-Discrimination Federal Act). A victim seeking damages in reparation of the alleged discrimination, on the basis of Article 1382 of the Civil Code, can produce evidence – such as 'statistical data' or recurrence tests, for instance – which could lead the judge to presume that discrimination has occurred, thus obliging the defendant to demonstrate that, contrary to that presumption, there has been no discrimination. Initially, the idea was that the conditions under which situation testing must be performed and may be considered valid were to be defined by a further executive regulation. Although a number of consultations have taken place on the content of this executive regulation, both within the Ministry of Labour and Employment and the Ministry

³⁴² Appeal Court of Brussels, 10 February 2015, www.unia.be/en.

³⁴³ The only exception relates to consumer law. Since September 1, 2014, a collective redress action may be brought against a company that causes harm to consumers (Federal Act of 28 March 2014 which provides for the insertion of a Title 2 in the Book XVII ('Special Court proceedings') of the Code of Commercial law. This new part of the Code is entitled 'collective redress action').

³⁴⁴ Labour Appeal Court (*Arbeidshof*) of Antwerp, 25 June 2008, no. 54470, *Centre for Equal Opportunities and Opposition to Racism v. B&G*.

³⁴⁵ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 7 and 58 www.unia.be/en.

of Justice, no agreement could be reached, due, in part,³⁴⁶ to a strong opposition from employers' organisations (see section 2.2.1, above).

In its decisions issued in 2009 on several actions of annulment against the 2007 Federal Anti-Discrimination Acts, the Constitutional Court gave a misleading view on the shift of the burden of proof mechanism.³⁴⁷ The Court referred to the judge's power of assessment to allow the reversal of the burden of proof as if the judge had a discretionary power to allow such a reversal or not.

It is worth noting that in its 2017 evaluation report, Unia observed that in many cases it is almost impossible for the applicant to bring the proof of the discrimination despite the principle of the shift of the burden of proof. Moreover, judges do not always accurately apply this principle. The burden of proof is therefore often too heavy for the applicant.³⁴⁸ The Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts suggests the drafting of a good practice guide in order to better identify which facts should count as having sufficient weight to trigger the switch of the burden of proof. Such a guide should include an analysis of the case law of the CJEU and the ECtHR, but also good practice found in other Member States.³⁴⁹

- **Regional level**

The regional anti-discrimination statutes, adopted since 2008, all include a provision dealing with the shifting of the burden of proof directly inspired by the federal acts and are therefore in line with the EU requirements.

Earlier instruments are less detailed in this respect. Article 14 of the Flemish Decree of 8 May 2002 provides for the reversal of the burden of proof in the context of civil actions brought on the basis of the decree – the mechanism will not apply in criminal procedures³⁵⁰ – although the decree remains vague as to which facts should count as being of sufficient weight to prompt the switch of the burden of proof. There will be, therefore, a great deal of room for judicial interpretation. The judge will have to consider what weight should be afforded to the facts presented by the victim, and whether these facts lead to a presumption that discrimination may have occurred. Both decrees of the Cocof provide for a very similar system (Article 13(2)-(3) of the Cocof Vocational Training ET Decree and Article 25 of the Cocof ET Decree).

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

In Belgium, there are legal measures of protection against victimisation.

- **Federal level**

The General Anti-Discrimination Federal Act and the Racial Equality Federal Act extend the protection from reprisals to victims filing a complaint and to any witness in the procedure (persons having otherwise assisted in the preparation or the filing of the complaint are not included, however, in the protection from reprisals). Article 17 of the General Anti-Discrimination Federal Act provides for protection of an employee who has filed a complaint

³⁴⁶ These consultations seem to have highlighted the difficulty there is in pursuing simultaneously two partially incompatible objectives: first, the situation tests should be strictly codified, and their methodology stipulated, to ensure that they will not lead to abuse by alleged victims of discrimination, but also to encourage the judge to accept that this will result in the reversal of the burden of proof; second, such situation tests must not be too burdensome to perform, and they should remain a relatively accessible means by which a presumption of discrimination may be established.

³⁴⁷ Constitutional Court (*Cour constitutionnelle*), 12 February 2009, 11 March 2009 and 2 April 2009, decision no. 17/2009, para. B.93.4; decision no. 39/2009, para. B.53; decision no. 40/2009, para. B.98, available on the website of the Court: www.const-court.be.

³⁴⁸ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 10, 22 and 58 www.unia.be/en.

³⁴⁹ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 86-89, para. 300 www.unia.be/en.

³⁵⁰ See Directive 2000/78/EC, Article 10(3).

against discrimination or on whose behalf a complaint has been filed, in the field of employment. This protection is extended to witnesses (Article 17(9)). Article 16 of the General Anti-Discrimination Federal Act provides a similar protection from victimisation in fields other than employment; in this context, too, the protection extends to witnesses (Article 16(5)). Where an employment relationship is concerned, the victim of reprisals by way of a dismissal, can, either themselves or through the organisation of which the victim is a member (and who represents that victim) ask for their reintegration, at the same level and under the same conditions as those prior to the dismissal. This is the case until a judicial decision has been made establishing that there has been discrimination. Articles 14 (outside the employment field) and 15 (in the field of employment) of the Racial Equality Federal Act contain identical protections against reprisals. All those regimes of protection imply a reversal of the burden of proof. However, they are only applicable to victims and witnesses of act of discrimination, which is more restrictive than the directives.

In a 28 December 2010 ruling, the Ghent Labour Court of Appeal confirmed a strict interpretation of the protection of witnesses against reprisal. The appeal court decided that the protection of a witness against reprisal (as enshrined in Article 15(9) of the Racial Equality Federal Act) only applies to a person who acknowledges the facts of the case in a signed and dated document as part of the trade union investigation of the presumed discrimination or to a person who appears as a witness in the proceeding before the labour inspector.³⁵¹ This interpretation could be applicable to the three Federal Anti-Discrimination Acts of 2007.

In its 2017 report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts suggests extending the protection against reprisals to any person intervening as a counsel, defender or in support of the alleged victim of discrimination.³⁵²

- **Regional level**

The Flemish Framework Decree provides for quite extensive protection against reprisals because it applies to the whole material scope of the decree and not only to the area of employment. Moreover, it concerns not only the victims but also witnesses and legal representatives of the victims (Articles 37 and 38).

All the other regional ET statutes provide for protection against victimisation, in their respective material scope, following the model of the Federal Anti-Discrimination Acts. Except for the Cocof decrees, which are in line with the directives,³⁵³ they lay down rules on protection from victimisation that are only applicable to victims and witnesses to the act of discrimination, which is more restrictive than the directives.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) Applicable sanctions in cases of discrimination – in law and in practice

- **Federal level**

Under the General Anti-Discrimination Federal Act and under the Racial Equality Federal Act, the victim of discrimination may seek damages according to the usual principles of civil liability (Articles 18 and 16 respectively), or opt for a payment of the lump sums defined in the law. Damages are payable each time a discriminatory practice is proven to have occurred (in line with the general rule in non-contractual civil liability enshrined in

³⁵¹ *Rechtskundig Weekblad*, 2011-12, no. 29, 17 March 2012, p. 1304-1305.

³⁵² Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, pp. 11 and 86 and para. 286, www.unia.be/en.

³⁵³ Article 26(8) of the Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment of July 2010 and Article 15/1 of the Decree on equal treatment between persons in vocational training of 2007 (the protection applies also to any person intervening as a witness, counsel, defender or support of the alleged victim of discrimination).

Article 1382 of the Civil Code). The choice of the victim to seek the payment of damages either on the basis of the 'effective' damage, or on the basis of the lump sums defined in the law, aims to ensure the effectiveness of the sanctions provided for instances of discrimination. These different sanctions may apply whether the discrimination occurs in private or public employment, or in a field outside employment covered by ET legislation. The victim can also request that:

- the court rules that the discriminatory provisions enshrined in a contract are null and void (Article 15 of the General Anti-Discrimination Federal Act and Article 13 of the Racial Equality Federal Act);
- the court delivers an injunction ordering the immediate cessation of the discriminatory practice, under the threat of financial penalties (*astreintes*) (Articles 19 and 20 of the General Anti-Discrimination Federal Act and Articles 17 and 18 of the Racial Equality Federal Act);
- the court imposes the publication of the judgment finding discrimination, by the posting of the judicial decision on the premises where the discrimination occurred, or by the publication of the judicial decision in newspapers (Article 20(3) of the General Anti-Discrimination Federal Act and Articles 18(3) of the Racial Equality Federal Act).

The decisions handed down by the Commercial Court and the Ghent Court of Appeal in the case *Centre for Equal Opportunities and Opposition to Racism v. B.V.B.A. Kuoni Travel Belgium*³⁵⁴ provide a good example of the applicable sanctions in Belgian law. The case concerns a deaf man used to self-sufficient travelling who called upon the services of a travel agency to book a package tour in Jordan. Believing that his security would not be correctly assured because of his difficulties in communicating with the local population, the travel agency refused to offer its services, unless an independent guide accompanied the deaf man at his own expense. After several mediation attempts, Unia brought an action before the Ghent Commercial Court (*Tribunal de commerce*), alleging that simple adjustments should have been made by the travel agency. The Ghent Commercial Court ruled in favour of Unia and convicted the travel agency of failing to provide reasonable accommodation to the victim, and therefore refusing to allow him to participate in the package tour of Jordan. The travel agency was sentenced to pay a lump sum of EUR 650 and a civil fine (*astreinte*) of EUR 1 000 for every possible new offence noticed and per diem if the offence continued. Furthermore the travel agency had to advertise the judgment in its Ghent branch and on its website, and to publish it at its own expense in the media. In a decision of 20 January 2011, the Ghent Court of Appeal confirmed the judgment of the Ghent Commercial Court, but decided to sentence the travel agency to pay a lump sum of EUR 1 300 (and not just EUR 650 as had been decided in the first instance).

The previously mentioned *Feryn* case is another good example (see section 6.2.c, above). After the decision of the CJEU of 10 July 2008 (Case C-54/07), the Labour Appeal Court (*Cour du travail*) of Brussels delivered its judgment on 28 August 2009.³⁵⁵ The court ruled that Mr. Feryn, by publicly declaring that his firm was not recruiting any employees of Moroccan origin, was directly discriminating. It ordered the cessation of the discriminatory practice and the publication of this judicial injunction in several newspapers.

In addition, some discriminatory acts (racial discrimination in the provision of goods or services and in employment) are also punishable as crimes. These offences, which fall under the scope of Directive 2000/43/EC, may lead to imprisonment (one month to a year), fines (EUR 250 to 5 000), or to both sanctions combined, and even to the loss of their civil and political rights for a certain time, meaning that during this time the offender cannot be a civil servant, nor be elected, nor sit in representative bodies (Article 25 of the General

³⁵⁴ Judgment no. 7302 of 29 September 2010 of the Commercial Court (*rechtbank van koophandel*) of Ghent and Decision of 20 January 2011 of the Court of Appeal of Ghent.

³⁵⁵ Judgment of 28 August 2009 of the Labour Appeal Court (*Cour du travail*) of Brussels after the preliminary ruling of the Court of Justice of the European Union of 10 July 2008 (Case C-54/07).

Anti-Discrimination Act and Article 27 of the Racial Equality Federal Act). Moreover the victim has the option of claiming compensation for the damage caused by the offence. Actually, these criminal offences have been very rarely prosecuted and have led to very few convictions because of the difficulties in finding the person who is criminally liable (burden of proof issue).

- **Regional level**

The ET statutory law adopted by the regions and communities in 2008 is directly inspired by the system of sanctions provided for in the Federal Anti-Discrimination Acts.

b) Ceiling and amount of compensation

In Belgium, there is no ceiling for compensation as such, but the victim is entitled to choose the lump sums defined in the law rather than asking for damages calculated on the basis of the 'effective' loss (EUR 1 300, reduced to EUR 650 when the defendant provides evidence that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element, or, in the field of employment, six months' salary, reduced to three months' salary if the employer shows that the disputed measure would have been adopted anyway, even in the absence of the discriminatory element).

There is no information available as to the average amount of compensation awarded to victims of discrimination.

c) Assessment of the sanctions

The 2007 Federal Anti-Discrimination Acts significantly improved the system of sanctions available to victims of discrimination, bringing Belgium nearer to a situation where discrimination leads to 'effective, proportionate and dissuasive' sanctions. The fact that victims can choose fixed rate damages was presented by the federal legislature as a way to improve the effectiveness of remedies.

However, in its 2017 report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts, raises several questions as to the dissuasive impact of the sanctions. Even though the commission intends to give further consideration to the matter in order to truly assess the effective, proportionate and dissuasive character of the sanctions, it is already suggesting increasing the lump sums in cases of discrimination outside the field of labour relations and to provide for their indexation.³⁵⁶

The ET statutory laws adopted by the regions and communities in 2008 are directly inspired by the system of sanctions provided for in the Federal Anti-Discrimination Acts. Those sanctions must therefore also be held as being effective, proportionate and dissuasive. The situation is less clear regarding the older regional decrees. The Flemish Decree of 8 May 2002 on proportionate participation in the labour market also contains a criminal clause (Article 11 – the author of a discriminatory act may be sentenced to a prison term from one month to one year or/and to a fine). It also provides that the court might order the cessation of the discriminatory practice (Article 15). The duty of reporting under the Flemish Decree on proportionate participation in the labour market is part of the general duties to report of the entities to which the decree is addressed. The 2007 Ccof Vocational Training ET Decree provides only for disciplinary sanctions against civil servants or for the suspension of the official approval of the public body whose practice was held discriminatory by a court (Article 16). It is doubtful whether this decree fulfils the European requirements regarding sanctions.

³⁵⁶ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, pp. 95-100 and para. 341, www.unia.be/en.

It should also be added that there are no specific sanctions to tackle the issue of structural discrimination, such as desegregation plans.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

In Belgium, the Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination (in this report, the Centre³⁵⁷ or Unia) is the equality body designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive.

From its creation in 1993³⁵⁸ until 2014, the body was called the 'Centre for Equal Opportunities and Opposition to Racism and Discrimination' (CECLR) and was a federal body, only competent in respect of both Federal Anti-Discrimination Acts. It was not institutionally linked to the regions and communities, and was therefore not competent in respect of regional statutory ET law. In order to empower the Centre for Equal Opportunities to play a role at regional level, the federal state, the regions and the communities signed a Cooperation Agreement on 12 June 2013. The Centre for Equal Opportunities and Opposition to Racism and Discrimination became an *inter-federal* centre competent to promote equal opportunities and fight any kind of distinction, exclusion or restriction based on the prohibited grounds contained in various anti-discrimination instruments adopted at both regional and federal levels.

The new Inter-federal Centre for Equal Opportunities has been fully operational since March 2014.³⁵⁹ Henceforth, in cases of potential infringement of any of the federal or regional anti-discrimination legislation, citizens are able to contact either the main office of the Centre in Brussels or contact points in Flanders or Wallonia.³⁶⁰ Since the entry into force of the Cooperation Agreement of 2013, these contact points fall directly under the responsibility of Unia. As a consequence, whether a potential discrimination case is submitted to the main office or to a local contact point, Unia is the centralised equality body competent to assist victims and file legal actions with respect to federal as well as regional ET law (Cooperation Agreement of 12 June 2013, Article 6). In 2015, two years after the entry into force of the Cooperation Agreement of 12 June 2013, 4 554 people had contacted the Centre to report discrimination cases and 904 of them had come through the contact points. As has been pointed out by the Centre itself, the goal of the Cooperation Agreement has been achieved in this respect.³⁶¹

Another Cooperation Agreement was also planned in order to turn the Institute for the Equality of Women and Men into an inter-federal institute, but the process could not be achieved under the former legislature for political reasons. This project seems to have been abandoned, as there is no reference to this Cooperation Agreement or to a future inter-federal centre for the equality of women and men in the 2014 Federal Governmental Agreement.³⁶²

³⁵⁷ It is the abbreviation chosen by the Centre itself (see, on its website: www.unia.be/en/).

³⁵⁸ The Centre for Equal Opportunities and Opposition to Racism was created by a Federal Act of 15 February 1993 (OJ (*Moniteur belge*), 19 February 1993).

³⁵⁹ Since 15 March 2014 (date of the entry into force of the Cooperation Agreement of 12 June 2013), all the details regarding the missions, organisation and functioning of the Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination are enshrined in the Cooperation Agreement (and no longer in the Federal Act of 15 February 1993).

³⁶⁰ There are presently 13 contact points in Flanders. In Wallonia, a collaboration currently exists with 10 'Wallonia Spaces' ('Espaces Wallonie'). There are 4 Unia contact points covering 4 sub-regions. A list of the contact points is available at the following address: www.unia.be/en/contacting-unia/our-local-contact-points.

³⁶¹ Unia (2016) *Annual report for 2015 (Discrimination – Diversité)*, available on its website, www.unia.be/en, p. 27.

³⁶² Interview with Patrick Charlier, deputy director of Unia, 28 March 2017.

It must be stressed that the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts, in its 2017 report, made recommendations on the institutional structure of the Belgian equality bodies:

‘12. (§148) The Commission recommends to inter-federalise the Institute for the Equality of Women and Men by the means of a Cooperation Agreement between the Federal State, the Regions and Communities.

13. (§§ 152-153) The Commission recommends creating a one-stop shop system, virtual if necessary, to help citizens easily identify the competent body for handling their case. (...) The Commission also recommends setting up a concerted action structure between the different existing bodies promoting equal opportunities. This structure could adopt special measures to combat multiple discrimination situations, falling under the competence of more than one body.

14. (§155) The Commission recommends that the authorities continue their work in order to create without further delay a National Human Rights Institution, in compliance with the “Paris Principles”³⁶³.

Although there was a reference to ‘the creation of a “national mechanism of Human rights”, in conformity with the international commitments’ in the 2014 Federal Governmental Agreement, the process of the creation of such an institution has not been achieved under the current federal Government and is still pending at the beginning of 2019.³⁶⁴ Belgium is under political pressure to accelerate the process of the creation of a national human rights institution as it had committed to set up such a mechanism at the last two universal periodical reviews of the United Nations Human Rights Council. The creation of a new mechanism or institution is designed to fully implement the United Nations ‘Paris Principles’ on the status and functioning of national institutions for the protection and promotion of human rights.

Meanwhile, in March 2014, the Centre launched a collaborative human rights network. On 13 January 2015, a protocol of collaboration was signed between all federal and regional independent public bodies, accessible to citizens, that are active in the field of human rights in order to foster cooperation in this field and exchange good practice (i.e., Federal Ombudsmen, Walloon Ombudsman, Ombudsman of the German-speaking Community, General Delegate to the Rights of the Child, Commission for the Protection of Privacy, High Council of Justice, Institute for the Equality of Women and Men, Standing Police Monitoring Committee or Committee P, etc.). This human rights network meets on a monthly basis, with a rotating chair. According to Patrick Charlier, deputy director of Unia, collaboration

³⁶³ Commission d’évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d’évaluation 2017*, www.unia.be/en.

³⁶⁴ After the cut-off date of this report, it was thanks to the political crisis at the end of 2018 and the departure of the N-VA from the federal Government that the process could fruitfully be relaunched at the beginning of 2019. To bring the project to a successful conclusion before the end of the legislature in April 2019, a pragmatic approach has been adopted to prioritise an institute for the protection and promotion of human rights at the federal level, while expecting that it should become ‘inter-federal’, in a second stage, to cover the areas of competence of the regional entities. On 25 April 2019, the Belgian Federal Chamber of Representatives adopted a legislative act that would allow the creation of a Federal Institute for the Protection and the Promotion of Human Rights. This is the first Institute universally competent for Human Rights, unlike the several different specialised bodies (e.g. **Unia**: competent for discrimination; **Myria**: migrants’ rights; **IEFH**: gender equality, ...), whose respective jurisdictions will remain untouched. In order to achieve an overall coverage of fundamental rights, it was decided to define the competence of the new Institute in a ‘complementary’ or ‘residual’ way. Thus, this new Federal Institute would be competent to ensure the respect of all fundamental rights, in the federal fields not covered by an existing specialised body. The Institute should work in close cooperation with the specialised public bodies active in the field of human rights and take part in the platform for Human Rights. At this stage it is not entirely clear which role the Institute is going to play in the field of discrimination as it will have to define its action in complementarity with the mandate of Unia and the Institute for the Equality of Women and Men. The Institute will have a consultative role, and will be able to intervene in front of the judiciary and the Constitutional Court.

in the network, (which has been chaired by Unia since 2016) is very efficient. This could be a starting point for the future national human rights mechanism.³⁶⁵

b) Political, economic and social context for the designated body

There have been several debates concerning Unia recently, most of which were launched by Flemish politicians from the N-VA.

First, the Belgian Federal Secretary of State for Equal Opportunities, Zuhair Demir (N-VA, appointed on 24 February 2017) harshly criticised the Inter-federal Centre for Equal Opportunities and Opposition to Racism (Unia) in a Flemish newspaper (*Het Nieuwsblad*) just after her appointment.³⁶⁶ The Secretary of State questioned whether Unia still pursued its goals. She considered that Unia is poorly viewed by citizens because of its tone, which is too moralising. She furthermore stressed that Unia looked ridiculous by opening positions only for women. Furthermore, according to the Secretary of State, the majority of issues that Unia works on are raised by French-speaking people.

Secondly, the Flemish Minister for Equal Opportunities, Liesbeth Homans (N-VA) has also made comments in the same direction by pointing out that, in her view, Unia is not neutral nor objective and that it protects 'allochtonous' people more than Belgian citizens.³⁶⁷ This has been challenged by Unia.

At the same time, some Flemish politicians called for the separation of Unia into two bodies, one in charge of Flemish cases and the other in charge of French cases. M. Storme, a member of the board of directors, supported this opinion.³⁶⁸

In November 2017, the Flemish Minister for Equal Opportunities asked for an independent study on Unia's functioning and neutrality.³⁶⁹ She pledged in front of the Flemish Parliament to obtain an audit. Ms Homans claimed Unia was partial, and was more likely to accept complaints from Moroccans or Muslims than from a blonde, Flemish woman. She demanded direct access to Unia's database, which centralises the complaints. Unia refused, however, since it is under the control of the Parliament and not of the Government (much less of one minister).³⁷⁰

As for the budget, Unia is protected, at least temporarily, since the yearly amount allocated is enshrined in the Cooperation Agreement of 2013, including indexation. If there were a political will to cut Unia's budget, it would have to be agreed upon by all regional and federal Governments. To date, there has been no serious menace of budget cuts. However, it must be noted that there have been parliamentary questions on the cost, considered exorbitant, of the *Achbita* case before the CJEU.³⁷¹

The public perception of Unia is quite different in Brussels and Wallonia compared with Flanders. From the French-speaking side, Unia is generally viewed as a centre for expertise and a valuable tool for people suffering discrimination, whereas in the Flemish part of the

³⁶⁵ Interview with Patrick Charlier, co-Director of Unia, 28 March 2017.

³⁶⁶ La Libre (2017) 'Zuhair Demir charge Unia, "obsédé par les discussions sur le Père Fouettard' www.lalibre.be/actu/politique-belge/zuhair-demir-charge-unia-obsede-par-les-discussions-sur-le-pere-fouettard-58b1275dcd70e898180d11c1.

³⁶⁷ Homans: 'Als Unia geen inzage geeft, ga ik op zoek naar andere structuren', www.knack.be/nieuws/belgie/homans-als-unia-geen-inzage-geeft-ga-ik-op-zoek-naar-andere-structuren/article-normal-927173.html.

³⁶⁸ 'La N-VA veut un Unia flamand: "Le problème, ce sont les francophones"', www.levif.be/actualite/belgique/la-n-va-veut-un-unia-flamand-le-probleme-ce-sont-les-francophones/article-normal-620687.html.

³⁶⁹ 'Unia: la majorité flamande veut une étude indépendante, après une nouvelle polémique avec Homans' www.sudinfo.be/1990792/article/2017-11-17/Unia-la-majorite-flamande-veut-une-etude-independante-apres-une-nouvelle-polemie.

³⁷⁰ Interview with Patrick Charlier, co-Director of Unia, 24 January 2018.

³⁷¹ Interview with Patrick Charlier, co-Director of Unia, 24 January 2018.

country, the perception is more partisan and certain parts of the population question its independence and impartiality. However, direct assaults on Unia remain exceptional.

c) Institutional architecture

Unia assumes a specific mandate under Article 33(2) of the CRPD, which provides that an independent body must promote, protect and follow up on the application of the Convention (Article 3(1)(b) of the the Cooperation Agreement of 12 June 2013). For this purpose, a multidisciplinary department of seven full-time equivalent employees was especially set up to carry out the new missions of the Centre. The department designs a three-year strategic plan and a one-year action plan. There is a support committee of 23 people (11 Dutch-speaking, 11 French-speaking and 1 German-speaking) belonging to associations of people with disabilities, the academia and social partners, which is in charge of the representation and participation of civil society within the context of the missions carried out by the department. It is responsible for approving the three-year strategic plan and the one-year action plan prepared by the service.

The main focus of Unia is still equality and non-discrimination, as the mandate under Article 33 is integral part of it, even if the scope of the CRPD is broader as it enshrines the whole range of human rights for persons with a disability. According to the authors of this report, there is no risk of dilution or less visibility of the equality mandate.

d) Status of the designated body/bodies – general independence

i) Status of the body

Unia has the status of an 'independent public service' (*service public autonome*).

The Inter-federal Centre is managed by a board of directors composed of 20 members: 10 members appointed by the House of Representatives and 10 members (plus a member of the German-speaking Community for matters concerning the German-speaking Community), appointed by the Parliaments of the regions and communities. Members of the inter-federal board are appointed on the basis of their competence, experience, independence and moral authority. They are academics, social partners and part of the judiciary and civil society. The inter-federal board must be a pluralist body (Article 8(2) of the Cooperation Agreement of 12 June 2013). The board members are appointed for six years, but their mandate is renewable twice. The lack of independence, criticised by several international bodies,³⁷² which resulted from the appointment of the board of the Centre by the Government has been solved by the adoption of the Cooperation Agreement. In February 2015, the first inter-federal board was appointed by the Parliaments.³⁷³ The Presidents are Fahim de Leener and Bernadette Renault. The board elected them on 10 September 2015.

The appointment of the two deputy directors (joint management on a double parity: gender – male/female - and linguistic – Dutch/French speaking) took more time than initially planned. In early December 2015, Patrick Charlier and Els Keytsman were appointed as the two deputy directors of the new Inter-

³⁷² UN Committee on the Rights of Persons with Disabilities (2015), *Concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session* (15 September – 3 October 2014), section 48: www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx. Moreover, in the 2014 Concluding observations, the Committee on the Elimination of Racial Discrimination is concerned 'that the board of the new Centre is appointed by the Executive, which may compromise its independence' (CERD/C/BEL/CO/16-19, 14 March 2014, para. 7).

³⁷³ The list of the members is available at the following address (in French): www.unia.be/fr/propos-dUnia/membres-du-conseil-dadministration-dUnia.

federal Centre. Their six-year mandate is renewable twice.

On 2 July 2015, the board of directors approved the rules of procedures in order to implement Article 10(3) of the Cooperation Agreement of 12 June 2013.³⁷⁴

In 2018, Unia has 106 full-time equivalent employees. This amounts to a significant increase in just five years as, in 2015, there were only 85 full-time equivalent employees working at Unia.

The Centre is required to submit an annual report to the federal and regional Parliaments on the fulfilment of its responsibilities, the use of its resources and its functioning. This annual report is designed to justify the use of its resources and its functioning. The Centre is also compelled to send a copy of this annual report for informative purposes to each federal or regional Government (Article 7 of the Cooperation Agreement of 12 June 2013).

The budget awarded to the Centre has evolved over the last years. It is worth noting that, since 2013, the budget is included in the Cooperation Agreement of 12 June 2013, which allows for greater stability regarding the funding:

- 2009: EUR 4 480 000;
- 2010: EUR 7 140 000 (this increase in the budget is a late adaptation of the extension of the missions of the Centre, which took place in 2003 - 12 persons were added to the staff which increased from 74 to 86 people);
- 2011: EUR 7 260 000;
- 2012: EUR 7 189 000;
- 2013: EUR 7 596 000;
- 2014: EUR 7 705 200;
- 2015: EUR 7 840 000;
- 2016: EUR 7 915 000;
- 2017: EUR 8 080 000;
- 2018: EUR 8 222 000.

ii) Independence of the body

The independence of the Inter-federal Centre is explicitly referred to in the Cooperation Agreement approved on 12 June 2013 (Article 2(1) and Article 3(3): 'the Centre accomplishes its mission independently, in conformity with the Paris Principles').³⁷⁵

Generally, the Centre is able to function independently and calmly, but (media-driven) political pressure and interference cannot always be excluded.³⁷⁶ In 2014, the appointment of Matthias Storme to the board of directors was very controversial because Storme, a lawyer and law professor, is a well-known fierce opponent of the ET legislation and the equality body in charge of their implementation. He has launched actions for annulment against almost all the provisions of the Federal Anti-Discrimination Acts of 10 May 2007 (the Racial Equality Federal Act, the General Anti-Discrimination Federal Act and the Gender Equality Federal Act), which were rejected by the Constitutional Court on 12 February 2009. In addition, in 2004, he publicly stated that the conviction for racism of the Vlaams Blok almost morally obliged him to vote for the

³⁷⁴ OJ (*Moniteur Belge*), 22 July 2015, p. 46958 Entry into force 1 August 2015.

³⁷⁵ As previously mentioned in this report, since 15 March 2014 (date of the entry into force of the Cooperation Agreement of 12 June 2013), all the details regarding the missions, organisation and functioning of the Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination are enshrined in the Cooperation Agreement (and no longer in the Federal Act of 15 February 1993).

³⁷⁶ See also the developments above under 7.b(i).

extreme-right and that the anti-discrimination law was a 'blunder and an attack against democracy'.³⁷⁷ Still taking a libertarian tone, he also stated that 'to discriminate is a fundamental freedom'. In 2017, he supported the schism of the Centre. However, according to Patrick Charlier, the co-director of Unia, the board of directors has been able to fulfil its mandate and to work in a satisfactory manner.³⁷⁸

e) Grounds covered by the designated body/bodies

The Centre is competent for all the protected grounds listed in the federal and regional anti-discrimination legislation, apart from language and gender³⁷⁹ (i.e. presumed race, colour, origin, national or ethnic origin, nationality, age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion, trade union opinion, genetic characteristic and social origin) (Article 3(1)(a) of the Cooperation Agreement of 12 June 2013).

Unia continues to fight against every form of discrimination based on the protected grounds which it is competent for, but it has also listed a set of priorities in its three-year strategic plan (2016-2018): national or ethnic origins, religious or philosophical beliefs, and disabilities. This choice is justified in the second strategic axis of the plan, linked to the two UN conventions covering these grounds (CERD, UNCPRD).³⁸⁰ These grounds are also the most often invoked in the complaints that Unia receives. Unia decided not to construct its 2019-2021 strategic plan on the basis of particular grounds, but to base it on the need to develop prevention, promotion and knowledge and to work together with other organisations to reach out to citizens and public authorities.³⁸¹

Apart from complaints concerning disabilities, which are treated by a specific department, there is a cross-cutting approach towards complaints. The individual reports department is made of 25 full-time equivalent employees working at Unia or at the decentralised contact points across the country. After a first selection, the complaints are divided according to their material scope (employment, goods and services, housing, education, internet, others), rather than according to the discrimination grounds.

The Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts underlined the difficulty raised by the existence of a plurality of bodies promoting equality. In its report of February 2017, it recommended the creation of a one-stop shop for the filing of complaints and the establishment of a structure of coordination for the different bodies.³⁸² This is most important in tackling multiple or intersectional discrimination (gender plus another ground).

f) Competences of the designated body/bodies – and their independent exercise

Articles 4, 5 and 6 of the Cooperation Agreement creating the Inter-federal Centre, define the tasks of the Centre and the means it may use in order to fulfil them. These provisions state that the Centre's objective to promote equal opportunities is fulfilled through producing studies and reports, making recommendations, helping any person seeking

³⁷⁷ Le Soir (2014) 'Le N-VA Matthias Storme nommé administrateur du Centre interfédéral pour l'Egalité des Chances', *Le Soir*, 25 October 2014, available on the website of this newspaper: www.lesoir.be.

³⁷⁸ Le Soir (2014) 'La N-VA a nommé Matthias Storme au poste d'administrateur de l'institution. Ses partenaires n'y voient rien à redire', *Le Soir*, 27 October 2014, available on the website of this newspaper: www.lesoir.be.

³⁷⁹ Pregnancy, birth, maternity leave and transgender are assimilated to gender.

³⁸⁰ Unia (2016) *Plan stratégique 2016-18, Une société inclusive avec une place pour chacun*, 2016, p. 18, available in French at the following address: www.unia.be/fr/publications-et-statistiques/publications/plan-strategique-2016-2018une-societe-inclusive-avec-une-place-pour-chacun.

³⁸¹ Unia (2018) *Strategic Plan (2019-2021)*, available at www.unia.be/files/Documenten/Publicaties_docs/Plan_Strate%CC%81gique_2019-2021.pdf.

³⁸² Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, pp. 10 and 56-57, para. 152-153, www.unia.be/en.

advice on his or her rights and obligations, taking legal action, collecting and analysing statistics and case law relating to the application of the federal and regional anti-discrimination legislation, and obtaining information in order to make enquiries of the relevant authority in cases where the Centre has reasons to believe that discrimination may have been committed, pursuant to those pieces of legislation.

i) Independent assistance to victims

As explained on its website, Unia receives discrimination reports on a daily basis, either directly or through the local contact points. The attention that the Centre devotes to these reports from the first contact is essential for proper monitoring. A large number of requests for intervention are rapidly answered by providing information or referral to other authorities or organisations. Other questions require more work: racist or homophobic attacks, conflicts between employers and employees, discrimination in the housing sector, racist remarks and incitement to hatred on the internet, etc. In such situations, the Centre actively intervenes and provides practical support for the victims.

The statistics in the annual report demonstrate the effectiveness of the treatment of the cases. It must however be noted that the coexistence of multiple bodies for the promotion of equality can create confusion for the victims of discrimination – especially the powers shared between Unia and the Institute for the Equality of Women and Men – in cases of multiple discrimination based both on gender and on a protected ground covered by Unia. More broadly, this multitude of relevant bodies can damage the visibility of Unia and its ability to raise its visibility to the public.³⁸³

Since the reorganisation of the Centre into an inter-federal body, there are 25 staff members in charge with the treatment of individual complaints. This seems sufficient to treat the cases within a reasonable time. The cooperation between Unia's head office and the local contact points is also successful. Unia's budget is sufficient to support the strategic litigation cases that the board decides to pursue. However, it must be noted that there have been parliamentary questions on the cost, considered exorbitant, of the *Achbita* case before the CJEU.³⁸⁴ Moreover, in 2018, Unia has encountered for the first time some financial difficulties and a slight budget deficit, due to the significant increase in the volume of work, and the increase of staff linked to the different commitments of Unia. From 2013 to 2018, the amount of reports and of cases opened has practically doubled. The number of full-time workers has increased from 85 in 2015 to 106 in 2018. Unia is currently preparing to return to a balanced budget, which should happen by 2020.

ii) Independent surveys and reports

In Belgium, the designated body does have the competence to conduct independent surveys and publish independent reports.

Unia exercises this function in fully independent manner. This independence is guaranteed through close cooperation on a regular basis with: associations in the field of discrimination; Belgian and European universities; and institutions such as the King Baudouin Foundation. In this context, it organises trainings, seminars and programmes for the exchange of information and practical experience.

³⁸³ Evaluation Commission of Anti-Discriminations Federal Acts (2017) *First Report*, February 2017, paragraph 151.

³⁸⁴ Interview with Patrick Charlier, co-Director of Unia, 24 January 2018.

Unia publishes an annual report based on its daily practice and Belgian case law.³⁸⁵ It also publishes general surveys related to discrimination issues including socioeconomic monitoring reports, which aim to get a clear view of the situation on the labour market depending on the ethnic origin and/or migration background of workers. The first socioeconomic monitoring report was written in 2013, a second one in 2015 and the most recent one in 2017. The latter showed that ethnic origin and migration background still remain criteria generating inequalities on the labour market. In 2014, the employment rate of people of Belgian origin was 73 %, compared to 42.5 % for people from sub-Saharan Africa, 42.2 % for people from a European country outside the EU, 44.3 % for people from Maghreb countries and 46 % for people from EU candidate countries (mainly from Turkey). Unia co-director, Els Keytsman, emphasises that 'Even with the same diploma, people of Belgian origin usually have greater success on the labour market than others. This indicates that our economy is not able to make the most of everyone's skills.'

Unia has also produced several diversity barometers in different fields (on employment (2012), housing (2014), and education (2018)), which map out different aspects of Belgian society, such as the degree of discrimination, the degree of tolerance and the degree to which target groups characterised by their origin, age, disability, or other characteristics contribute to Belgian society. The independence of these barometers is guaranteed through the close collaboration with universities.

Unia's regular budget funds are supplemented by funds from different ministers in order to carry out surveys in optimal conditions. The last diversity barometer, measuring discrimination and inequalities in the education system, was the result of long-term scientific research carried out by several research centres of Belgian universities. In order to carry out this study and the subsequent report, Unia received funding from the three community ministers of basic education and the Minister for Equal Opportunities of the French-speaking Community. Unia coordinated the research, and through a combination of the results of the study and the expertise of Unia, formulated political recommendations.

By combining its regular funding and other public resources, Unia has sufficient resources in order to carry out its mission to conduct independent surveys and publish independent reports.

iii) Recommendations

In Belgium, the designated body does have the competence to issue independent recommendations on discrimination issues.

Although under the supervision of the federal and regional Parliaments (formerly the Prime Minister), the Centre fulfils its mandate in an independent manner.

Unia formulates recommendations for all levels of government. These recommendations focus on improving the legislation and developing action plans or seeking a better understanding by the political leaders of specific new phenomena. In addition, the federal, regional and community authorities increasingly rely on the expertise of Unia.³⁸⁶ Since 2014 and the entry into force of the Cooperation Agreement, there is a new department for public policies at

³⁸⁵ For the last annual report available, see Unia (2017) *Annual report for 2016* (For an inclusive society. Where to start?), available on its website, www.unia.be/en.

³⁸⁶ For a more detailed presentation of those activities of the Centre, see its website, www.unia.be/en/.

Unia, with representatives of the federal Government and each region and community to ensure the link between federal and regional policies.³⁸⁷

By relying on surveys and statistics that are the result of independent and informed research, Unia can effectively measure discrimination phenomena and recommend specific courses of action to public authorities, in order to deal with them accordingly.

iv) Other competences

As explained above, Unia has a specific mandate under Article 33(2) of the CRPD, which provides that an independent body must protect and follow up on the application of the Convention.

Moreover, Unia organises campaigns in order to raise awareness and inform the public. It provides customised training and tools for fighting for equal opportunities and against discrimination and formulates targeted advice and recommendations for organisations and Government authorities.

It also set up online training on anti-discrimination laws where it answers questions about diversity in the workplace. In this respect, the 'eDiv' initiative is worth mentioning: it is a free online training tool on anti-discrimination law, aimed at fostering diversity in companies by providing employers with practical situations and solutions.³⁸⁸ In its last annual report published in 2016, Unia stresses the success of this tool: since its creation, 3 426 users have registered and the free database counts 14 109 hits.³⁸⁹

In December 2017, Unia won the Agoria e-Gov prize in the innovation category, rewarding specifically the disability module in the eDiv.³⁹⁰ Unia has also been lauded for another awareness campaign: in November 2017, at The Extraordinary Film Festival in Namur, Unia has won the prize for best communication movie for its disabilities campaign, '*J'ai un handicap et j'ai des droits*'.³⁹¹

g) Legal standing of the designated body/bodies

In Belgium, the Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination (Unia) has legal standing to bring discrimination complaints on behalf (or not) of an identified victim.

The General Anti-Discrimination Federal Act and most of the regional statutory laws give Unia the power to file suits, and thus to contribute to the defence of legal principles in the name of the public interest. Where the alleged violation has an identifiable victim (who can be a natural or legal person), the power of Unia to file a suit is conditional upon the consent of the victim and is used for an intervention supporting the victim's case. The main reason for this legal avenue (rather than representing the victim) is that sometimes the action of the victim and the action of Unia may differ. Therefore, Unia wishes to remain able to define its strategy of action without undermining or being undermined by the victim's

³⁸⁷ Interview with Patrick Charlier, Deputy Director of Unia, 28 March 2017.

³⁸⁸ For more details on this initiative, see the website www.ediv.be/.

³⁸⁹ Unia (2016) *Annual Report for 2015 (Discrimination - Diversity)*, p. 35, available on the website, www.Unia.be/en.

³⁹⁰ For more details, see the Unia website: and www.unia.be/fr/articles/Unia-remporte-le-prix-de-linnovation-aux-e-gov-awards-2017.

³⁹¹ For more details, see the Unia website: www.unia.be/fr/sensibilisation-et-prevention/campagnes/jai-des-droits.

strategy before the court.³⁹² A leading example of Unia's use of such legal standing can be observed in the seminal *Achbita* judgment of the CJEU (see section 4.2, above).³⁹³ The case was taken to court by Ms Achbita, supported by her trade union, who alleged that she was a victim of discrimination. Unia's predecessor, the Centre for Equal Opportunities and Opposition to Racism appears as a claimant in the case as it joined the case intervening on the side of Ms Achbita.

If there is no identified victim, Unia may act on its own behalf to denounce a breach of the anti-discrimination legislation. This kind of *actio popularis* power granted to Unia gained European visibility and recognition in the *Feryn* case before the CJEU (see section 6.2, above).³⁹⁴

Unia may also intervene as *amicus curiae* in cases concerning discrimination, when such intervention is possible according to judicial procedure law. However, Unia has no power to launch *ex officio* investigations. This mechanism appears to be in conformity with Article 9(2) of the Racial Equality Directive.

In a typical case of an individual person asking Unia to intervene in an instance of discrimination, Unia first appraises the facts. If the allegation does not appear ill founded, Unia seeks to obtain an amicable settlement with the alleged discriminator. Because the discriminator may fear the bad publicity of a lawsuit for alleged discrimination, they may be tempted to accept this process, even in situations where it may be difficult to prove that discrimination occurred. Where such an amicable settlement seems unsatisfactory, because of blatant discrimination or non-cooperation with the defendant, Unia may suggest that the victim file a suit. If the victim agrees, Unia is competent to bring the case to court. Other organisations, which aim to fight discrimination and protect human rights, as well as trade unions, have the same competence (see section 6.2, above).

Unia has been particularly efficient in providing advice and legal assistance to victims of discrimination. It is especially renowned for its practice of assisting the victim in having the alleged perpetrator of the discrimination to agree to some form of amicable settlement. Unia has developed significant expertise in this discreet way to proceed. In addition, local anti-discrimination 'contact points' have been established in several towns and cities in Flanders (13) and in Wallonia (4) in addition to the collaboration with the 10 'Wallonia Spaces' ('*Espaces Wallonie*'). This ensures that day-to-day discriminatory practices can be fought against in close consultation with local and provincial authorities, and with local integration centres, associations, neighbourhood committees, etc. Since the conclusion of the Cooperation Agreement of 12 June 2013, these anti-discrimination 'contact points' fall directly under the responsibility of Unia:

'The Centre provides access to its services, including to persons with disabilities, and organises, in addition to the central contact point, in collaboration with the Regions, provinces and municipalities, contact points at the local level, where a report may be filed. These contact points must be sufficiently distributed geographically in order to ensure easy access to citizens' (Article 6 of the Cooperation Agreement).

The legal standing of the Centre is expressly defined in several parts to the Cooperation Agreement, namely in the federal state,³⁹⁵ the Walloon Region,³⁹⁶ the French

³⁹² Input to the article from Emmanuelle Bribosia and Isabelle Rorive, country experts for Belgium in the European Network of Legal Experts in Gender Equality and Non-Discrimination.

³⁹³ CJEU, judgment of 14 March 2017, *Achbita*, C-157/15, ECLI: EU:C:2017:203.

³⁹⁴ CJEU, judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, C-54/07, ECLI:EU:C:2008:397.

³⁹⁵ Belgium, General Anti-Discrimination Federal Act, Articles 16, 17, 18.

³⁹⁶ Walloon ET Decree, Articles 30 & 31.

Community³⁹⁷ and the Flemish³⁹⁸ Community in the framework of the missions of Unia (Article 3 of the Cooperation Agreement) and of the different anti-discrimination norms (Article 6(3) of the Cooperation Agreement). The other entities broadly authorise human rights organisations to file lawsuits within the scope of the legislative provisions but do not expressly give legal standing to the Centre.³⁹⁹ However, according to Unia, there is no doubt in practice that the Centre can directly take legal action on the basis of the decrees and ordinances listed in the Cooperation Agreement.⁴⁰⁰

In 2017, Unia initiated a lawsuit in 13 cases related to discrimination or hate crimes: five cases relate to racism, antisemitism or revisionism (Holocaust denial); four relate to discrimination on the grounds of disability; two relate to discrimination on the ground of religion or philosophical belief, and one for each of the following grounds: age and wealth (*fortune*). They are all cases where no amicable settlement could be found and which 'needed more legal certainty or which were particularly serious'.⁴⁰¹

h) Quasi-judicial competences

In Belgium, Unia is not a quasi-judicial institution.

i) Registration by the body/bodies of complaints and decisions

In Belgium, Unia registers the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are available to the public.

Such data are part of the annual report published on its website,⁴⁰² which lists the number of complaints received by ground and field, the number of complaints regarding which a file was opened and the number of cases in which the Centre launched a lawsuit.

In 2010, Unia received 3 608 complaints, 4 162 in 2011, 4 226 in 2012, 3 713 in 2013 and 4 627 in 2014. In 2015, Unia received 4 554 complaints, it opened a file in 1 596 cases and launched a lawsuit in 14 cases. In 2016, Unia received 5 619 complaints, it opened a file in 1 907 cases and launched a lawsuit in 18 cases.

In 2017,⁴⁰³ Unia received 6 602 individual complaints (an increase of 17.5 % on 2016) and opened 2 017 files (an increase of 5.8 % on 2016). This increase is likely to be related to a combination of factors, including greater media exposure, an increased accessibility at the local level, and targeted actions. The sectors for which it opened the most files are: employment (up 13.5 %) and police / justice (up 26.6 %). The number of complaints in relation to 'life in society' has also increased by 11.3 %. As regards the criteria: the highest increases concern racial criteria (up 12 %), wealth (up 34.4 %) and health status (up 52.9 %).

Specifically, in 2017, Unia opened 572 files related to discrimination in employment, 471 files related to the access to goods and services, 326 related to discrimination issues on the internet or in the media, 225 files concerning education, 158 files related to life in society, 117 cases concerning the police and the justice system, 37 concerning social protection and finally 91 related to other areas. Regarding the discrimination grounds, in 2017, about 782 opened files concerned racial discrimination, 149 concerned discrimination

³⁹⁷ French Community ET Decree, Articles 37, § 2 & 38.

³⁹⁸ Flemish Framework ET Decree, Article 40 and Executive Regulation (Flemish Community) of 16 May 2014, OJ (*Moniteur Belge*), 27 June 2014.

³⁹⁹ Brussels Civil Service ET Ordinance, Article 27; Brussels ET Ordinance, Article 25; German Community ET Decree, Article 13; Cocof Vocational Training ET Decree, Article 14(1); Cocof ET Decree, Article 28(1).

⁴⁰⁰ Interview with Patrick Charlier, Deputy Director of Unia, 14 April 2015.

⁴⁰¹ Unia (2018) *Annual report for 2017 (Refusing Inertia)*, available on its website, www.unia.be/en, p. 65.

⁴⁰² Unia (2018) *Annual report for 2017 (Refusing Inertia)*, see also Unia (2017) *Annual report for 2016 (For an inclusive society. Where to start?)*, available on its website, www.unia.be/en.

⁴⁰³ Please note that data for 2018 was not yet available at the time of drafting of this report.

based on age, 84 were based on sexual orientation, 516 were based on disability, 319 were based on religious beliefs, 96 related to the wealth status and there were 133 on the state of health. Moreover, Unia launched 13 judicial actions.⁴⁰⁴

According to Els Keytsman, Unia's co-director, these numbers do not indicate that there is more discrimination in Belgian society but that there is growing awareness of discrimination and that people are reporting it more.

The low number of court cases compared to the figures of files opened reflects the policy of the Centre to reach constructive, out-of-court settlements and to seek alternative measures, designed to help victim and perpetrator alike, even once legal action has been initiated. In addition, the Centre tends only to go to court when strategic litigation is at stake: 'if the case is highly relevant from a social point of view (to establish a legal precedent (...) or clarify a point of law) or if the facts of the case are particularly serious (such as flagrant hate crimes)'.⁴⁰⁵

j) Stakeholder engagement

Unia collaborates on a regular basis with all major stakeholders.

There is no formal channel of cooperation with civil society associations, except in the field of disability. In this field, a support committee of 23 people (11 Dutch-speaking persons, 11 French-speaking persons and 1 German-speaking person) belonging to associations of people with disabilities, academia and social partners, is in charge of the representation and participation of civil society within the framework of the missions carried out by the department focusing on disability. It is responsible for approving the three-year strategic plan and the one-year action plan prepared by the department focusing on disability.

Regarding the other grounds of discrimination, the contacts are regular but informal (cf. LGBTQI associations or *Minderhedenforum*, etc.). The absence of a more structured framework might mean that cooperation is not always effective and depends on interpersonal relationships.

Unia regularly organises events and training sessions with both employers and workers organisations. Protocols of collaboration have been adopted between Unia and the three main trade unions. Discussions with the main employer organisations also take place, for instance in order to implement the new legislation on situation testing and to build the online disability training tool (eDiv).⁴⁰⁶

In addition, Unia works with public authorities such as the federal police. They have been working together closely since 1996 in order to promote equality within the police. This partnership is governed by an agreement between the Belgian Minister of the Interior and the Centre. This creates a clear framework in which the police and the Centre can continue to work in partnership to fight discrimination, hate speech and hate messages. A report is issued on an annual basis about this collaboration.⁴⁰⁷ This collaboration includes diversity training, support for practice diversity and for structural diversity management projects.

Generally, one might consider that Unia engages with most of the relevant stakeholders in order to fulfil its mandate and mission to promote equality and fight against discrimination. The support committee set up in the field of disability discrimination could serve as a model for structuring relationships with civil society organisations active in the fight against discrimination on other grounds.

⁴⁰⁴ Unia (2018) *Annual report for 2017 (Refusing Inertia)* available on its website, www.unia.be/en, pp. 61-65.

⁴⁰⁵ Unia (2018) *Annual report for 2017 (Refusing Inertia)*.

⁴⁰⁶ Interview with Patrick Charlier, co-Director of Unia, 24 January 2018.

⁴⁰⁷ www.unia.be/fr/publications-et-statistiques/publications/collaboration-avec-la-police-federale-rapport-annuel-2016.

k) Roma and Travellers

Since the new structure was put in place in 2014, one full-time employee, in the public policies department of Unia, is specifically in charge of Roma discrimination issues.⁴⁰⁸ In 2015, Unia organised several roundtables between journalists and members of the Roma community, in order to raise awareness of the negative stereotypes that are conveyed in the media.⁴⁰⁹ Since 2013, 185 cases of potential discrimination against Roma have been opened. These numbers are however decreasing each year (52 in 2013 and 2014 against 14 in 2018).⁴¹⁰ Moreover, Unia was associated with the work conducted by the Roma task force, which adopted a 'National Strategy for Roma Integration', issued in March 2012. It defines issues and objectives for Roma integration by 2020, and provides for coordination between the federal state, the regions and the communities within the Roma task force, so that every authority can take measures according to their responsibilities. The Roma task force meets at least twice a year and is the national contact point for the European Commission.

Since May 2016, Unia has also participated in the pilot committee of the Belgian National Roma Platform, set up by the Belgian national contact point for Roma.

⁴⁰⁸ Interview with Patrick Charlier, Deputy Director of Unia, 28 March 2017.

⁴⁰⁹ For more information, see: www.unia.be/en/se-rencontrer-pour-se-comprendre.

⁴¹⁰ See Unia (2019) *Annual statistics report 2018*. www.unia.be.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The Federal Anti-Discrimination Acts were widely publicised in 2007, in particular through brochures presenting the main provisions of the law and identifying a list of organisations and administrations involved in their implementation. Seminars on the content of the law in the context of employment took place in 2007 as part of a European project dedicated to the dissemination of information about legal protection against discrimination. The Federal Anti-Discrimination Acts were also translated into sign language.⁴¹¹ Furthermore, the Centre organised several training afternoons in the major cities of the country for the benefit of local organisations and professionals (integration centres, municipalities, lawyers, associations, etc.). In addition, the federal Minister for Equal Opportunities funded the creation, in 2007-2008 and 2008-2009, of an inter-university Chair on 'Law and discrimination', involving academics from three universities for the French-speaking part of the project. Each year, 30 hours of training on anti-discrimination law has been delivered by scholars from those universities. Attendance was free and it was part of the continuing training of lawyers and judges.

In early 2016, Unia launched its new website which is much more user-friendly and published a leaflet called 'For equality, against discrimination. How can we help?' in order to clarify its role and missions to the public.⁴¹² The eDiv initiative (reported in section 7.f, above), is also worth mentioning. Unia has also been lauded for another awareness campaign on disabilities: '*J'ai un handicap et j'ai des droits*'.⁴¹³

Currently, Unia has three newsletters through which it disseminates information: one on Unia's activities in general, another focuses on disability and a third one focuses on the legal action that Unia undertakes.

In its 2017 report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts suggests strengthening the training for judges, police services and labour inspectorates, in collaboration with Unia. The commission has also stressed the need for training adapted to the different groups of the public concerned by the anti-discrimination legislation, in particular employers.⁴¹⁴

At the very end of 2018, after the change in the federal Government, an awareness campaign against racism, called *#stopracisme*, with the slogan '*le racisme, ça sert à quoi?*' (Racism, what gives?), was launched, in collaboration with Unia. This was done on the initiative of the equal opportunities department and with the support of the federal Government, despite the absence of the federal action plan that the Government was supposed to adopt following the 2001 Durban Conference.

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

⁴¹¹ For more details on those initiatives, see Unia (2018) *Annual Report for 2017 (Discrimination - Diversity)*, p. 122 and seq., available on the website of the Centre, www.unia.be/en.

⁴¹² The folder is available at the following address: www.unia.be/files/Documenten/Unia_folder_EN_220116.pdf.

⁴¹³ For more details, see the Unia website: www.unia.be/fr/sensibilisation-et-prevention/campagnes/jai-des-droits.

⁴¹⁴ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, pp. 95-100 and para. 208, www.unia.be/en.

Overall, Unia engages with most of the relevant stakeholders in order to fulfil its mandate and mission to promote equality and fight against discrimination. The support committee set up in the field of disability discrimination could serve as a model for structuring the relationships with the civil society organisations active in the fight against discrimination on other grounds.

On 22 March of each year, an 'Anti-Discrimination Day' is organised, which provides further opportunities to disseminate this information, and in which a range of social and human rights non-governmental organisations, as well as the social partners, engage on the issue of combating discrimination and promoting diversity.

Furthermore, on 18 March 2008, the federal Government decided to initiate a national debate on multiculturalism and diversity named the 'Assizes on Inter-culturalism'. Its aim was to discuss with the main actors how to promote a society of diversity and integration, without discrimination, where all cultural specificities are respected, as well as where a set of common values could be shared. The work eventually led to a final report, which was submitted to the federal Vice-Prime Minister, Minister of Employment and Equal Opportunities in charge of Immigration and Asylum, Mrs Joëlle Milquet, on 8 November 2010. This final report contains 67 recommendations grouped by themes: education; employment; governance; goods and services (health and housing); community work, culture and media. The report was heavily criticised and most of these recommendations were not given any follow-up.⁴¹⁵

In May 2018, a coalition of over 30 associations active in the fight against racism and discrimination proposed 11 key actions to be included in the yet-to-be-adopted federal action plan against racism.

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

Social partners have been actively involved in dissemination activities.

First, Unia has regularly organised events with both employers and workers organisations and has also set up training sessions in cooperation with these organisations.

Secondly, as mentioned above, in 1999 the social partners concluded Collective Agreement No. 38 in the National Council for Labour (Conseil National du Travail), the main provisions of which have now been transposed and made compulsory through executive regulation (*arrêté royal*). In the interprofessional agreement 2007-2008, 'diversity and non-discrimination' was one of the four policy issues especially under focus.⁴¹⁶ In line with this commitment, a new collective agreement was signed on 10 December 2008 and was made compulsory by the Executive Regulation of 11 January 2009 (Collective Agreement No. 95 relating to equality of treatment at all stages of the employment relationship). Moreover, as mentioned above, in the interprofessional agreement 2011-2012, adopted on 18 January 2011, the gradual harmonisation of the social status of labourers (*ouvriers*) and employees (*employés*) was one of the four policy issues under focus. Thereby, an act was adopted, on 12 April 2011, as a first step to gradually equalising the social status of labourers and employees regarding the notice period.⁴¹⁷ A second act was adopted on 23

⁴¹⁵ Ringelheim, J. (2015) 'Du Dialogue aux Assises: heurts et malheurs de l'interculturalité en Belgique', in Bribosia, E. & Rorive, I. (eds), *L'accommodement de la diversité religieuse. Regards croisés: Canada, Europe, Belgique*, P.I.E. Peter Lang, 2015, pp. 67-68.

⁴¹⁶ Note that there is nothing in this respect in the interprofessional agreement 2009-2010.

⁴¹⁷ Belgium, Act of 12 April 2011 amending the Act of 1 February 2011 on the extension of anti-crisis measures and the execution of the inter-professional agreement, and executing the compromise of the Government related to the project of inter-professional agreement (*Loi modifiant la loi du 1er février 2011 portant la prolongation de mesures de crise et l'exécution de l'accord interprofessionnel, et exécutant le compromis du Gouvernement relatif au projet d'accord interprofessionnel*), *Moniteur belge*, 28 April 2011.

December 2013 (in force on 1 January 2014), so as to provide for a single notice period system for both labourers and employees and removing the 'waiting day' (*jour de carence*) system so that labourers as well as employees are entitled to a guaranteed remuneration from the first day of illness.⁴¹⁸

Thirdly, within the Federal Public Service (Ministry) of Employment, a specific taskforce was set up on this issue in July 2001 (*cellule entreprise multiculturelle*), with the active cooperation of Unia, and in order to establish more systematic links with the social partners.

In the Flemish Community/Region, the dialogue between social partners has taken place through the establishment of a 'diversity' committee in the Flemish Economic and Social Council, in which the most representative workers and employers unions are represented. Diversity is also promoted actively by the workers unions, which have benefited from specialised consultants in diversity whose task is to promote diversity and offer solutions to any resistance facing policies aimed at improving diversity within the workforce.

In the Flemish Region/Community, it is particularly remarkable that the Flemish Government concluded a number of agreements with businesses at the sectorial level, which encourage diversity, promote specific measures for the integration of migrant workers, and provide for codes of conduct in favour of diversity and against discrimination at the level of companies. In addition, a range of initiatives has been taken in order to actively promote the employment of members of (traditionally underrepresented) 'target groups', in particular persons of non-native origin (*allochtones*) and persons with disabilities. Thus, for instance, the '*Jobkanaal*' project, launched by the Flemish business network VOKA, or the 'diversity' focal point of the UNIZO (Association of Small and Medium-sized Enterprises), contribute to diversity in employment.

The other regions and communities have also adopted measures, some of which have actively involved social partners.

d) Addressing the situation of Roma and Travellers

As mentioned above (in section 5), the Belgian Inter-ministerial Conference on Social Integration created a Roma task force on 21 March 2011, in order to develop an integrated action plan to draw up proposals to improve Roma integration in Belgium. Work conducted by the task force led to a 'National Strategy for Roma Integration', issued in March 2012. It defines issues and objectives for Roma integration by 2020, and provides for more coordination between the federal state, the regions and the communities through the Roma task force, so that every authority can freely take measures according to its responsibilities. The task force meets at least twice a year and is the national contact point for the European Commission.

In 2014 and 2015, Unia organised several roundtables between journalists and members of the Roma community, in order to raise awareness of the negative stereotypes that are conveyed in the media.⁴¹⁹ Nevertheless, the Commissioner for Human Rights stressed, in its last report on Belgium, that 'the authorities should also take measures to combat stereotypes and prejudices against Roma in society more actively, notably by raising awareness of the history of Roma in Europe'.⁴²⁰

⁴¹⁸ OJ (*Moniteur belge*), 31 December 2013, (*Loi du 26 décembre 2013 concernant l'introduction d'un statut unique entre ouvriers et employés en ce qui concerne les délais de préavis et le jour de carence ainsi que de mesures d'accompagnement*).

⁴¹⁹ For more information, see www.unia.be/en/se-rencontrer-pour-se-comprendre.

⁴²⁰ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, paragraph 140, rm.coe.int/16806db735.

As explained above (under section 5.b), in 2016, a Belgian National Roma Platform was set up as the Belgian national contact point for Roma.⁴²¹ In 2017, it released its recommendations to the Belgian public authorities⁴²² and now mainly organises information sessions and workshops.

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

a) Mechanisms

The formulations of the General Anti-Discrimination Federal Act and of the Racial Equality Federal Act comply with Article 16(b) of Directive 2000/78/EC and Article 14(b) of Directive 2000/43/EC. Indeed, Article 15 of the General Anti-Discrimination Federal Act and Article 13 of the Racial Equality Federal Act mention not only that contractual clauses, but also any 'provisions' contrary to the prohibition of discrimination, shall be considered null and void.⁴²³ However, this should be read in combination with the 'safeguard provisions' (contained in Article 11 of both acts) stating that they will not, *per se*, apply to differences in treatment imposed by another legislation, or by virtue of another legislation. As a result of this clause, national jurisdictions will not refuse to apply existing legislation because it would be in violation of anti-discrimination legislation, but they should refer any potentially discriminatory legislation to the Constitutional Court so that this jurisdiction may find a law to be invalid if it is in violation of the equality and non-discrimination clauses of Articles 10 and 11 of the Constitution. As a result, where discrimination (potentially violating the Racial Equality Directive or the Employment Equality Directive) has its source in legal provisions or in implementing regulations, they are not nullified simply through the adoption of the anti-discrimination law – they will have to be found to be invalid, on an *ad hoc* basis, by the courts.

Since 2008, all the regional ET laws include a provision similar to the federal one. They are therefore in line with the directives, with the exception of the problem referred to above of the 'safeguard provision', which follows the same model as the federal one.

b) Rules contrary to the principle of equality

It is not possible to identify, on a systematic basis, which acts, regulations or rules may conflict with the principle of equal treatment. First, due to the complexity of the Belgian system (federal state, with regional/communities' competencies), there are too many texts, which would have to be screened to that effect, especially if we include internal rules of companies (that are not accessible as such, anyway). Secondly, in many cases, the evaluation of the compatibility of these texts would require an interpretation of the requirements of the directives, which may be difficult to perform. Taking into account this disclaimer, according to this report, there is no act, regulation or rule that is apparently contrary to the principle of equality.

⁴²¹ More information available in French at the following link: www.mi-is.be/fr/themes/pauvrete/integration-des-roms/la-plateforme-nationale-belge-pour-les-roms.

⁴²² The recommendations are available in French online: www.mi-is.be/fr/themes/pauvrete/integration-des-roms/la-plateforme-nationale-belge-pour-les-roms-2/annee-dactivite-0.

⁴²³ On 2 April 2009, the Constitutional Court cancelled the words 'in advance' (*par avance*) in Article 15 of the General Anti-Discrimination Federal Act (decision no. 64/2009, para. B.13.2 and B.13.3).

9 COORDINATION AT NATIONAL LEVEL

At the federal level, from 2017, anti-discrimination policy was in the hands of the Secretary of State, Zuhair Demir (N-VA - Nationalist Flemish Party).⁴²⁴ She was replaced by Kris Peeters (Flemish Christian Party) at the end of 2018 when she resigned together with all the other N-VA federal ministers. Kris Peeters was already in charge of economy, employment and external business and is currently also in charge of the fight against poverty, equal opportunities and disabled persons.

His counterparts are:

- in the Walloon Region, the Minister of Civil Engineering, Health, Social Action and Heritage, Mrs Alda Greoli (French-speaking Humanist Party);
- in the Flemish Region/Community, the Minister of Home Affairs, Inburgering (integration of migrants), Housing, Equal Opportunities and Fight against Poverty: Mrs Liesbeth Homans (Dutch-Speaking Nationalist Flemish Party);
- in the French Community, the Minister of Education in the field of social advancement (*promotion sociale*), Youth, Women's rights and Equal Opportunities: Mrs Marie-Martine Schyns (French-speaking Humanist Party);
- in the Brussels Capital Region, the Secretary of State for Development, Cooperation, Road Safety, Technology (*Informatique régionale et communale et de la Transition numérique*) and Equal Opportunities: Mrs Bianca Debaets (Dutch-speaking Centre Party);
- In the German-speaking Community, the Minister of Family, Health and Social Affairs: Mr Antonios Antoniadis (Socialist Party).

At an early stage of the implementation of the EU anti-discrimination directives, the absence of strong coordination between the different levels of the state was certainly the most serious obstacle to the full compliance of Belgium with its obligations under EU law. There has been significant improvement in this respect as the regions and communities have shown a willingness to harmonise their statutory law with federal legislation. Moreover, the federal state, the regions and the communities approved a Cooperation Agreement, on 12 June 2013, to turn the Centre for Equal Opportunities and Opposition to Racism into an inter-federal centre. The independent Inter-federal Centre for Equal Opportunities (Unia), which has been operational since March 2014, is competent with regard to the various pieces of ET legislation adopted at both regional and federal levels. However, as explained above (section 7), the 2014 Federal Governmental Agreement is silent on the other project of turning the Institute for the Equality of Women and Men into an inter-federal institute. There is only a commitment to design a national human rights mechanism, according to Belgium's international obligations. Such a mechanism should allow full implementation of the United Nations 'Paris Principles' on the status and functioning of national institutions for the protection and promotion of human rights (see section 7, above).

Two other elements of the 2014 Federal Governmental Agreement aim to foster greater coherence in equal opportunities policies. First:

- the creation of an Equal Opportunities Unit in the federal administration. This 'Pilot Group Diversity' was set up in December 2014 within the federal administration. It is made of internal and external experts in the field of diversity and meets four times a year. Its role is:
 - to develop a vision of a federal management of diversity;
 - to coordinate the 'plan-program' and prioritise the projects;
 - to manage and attribute the central budgets;

⁴²⁴ Please note that, in February 2017, she was replaced by Zuhair Demir, following an internal reorganisation within the national Flemish Party (N-VA).

- to give advices and report at the political level.⁴²⁵

Secondly,

- the assessment of the anti-discrimination legislation in order to have a better coordination of these laws and to enhance effectiveness.⁴²⁶ It is worth noting that a decree establishing the composition of an expert commission for the assessment of the 2007 Anti-Discrimination Acts was eventually adopted on 18 November 2015. This commission was set up in 2016 and is composed of twelve members: two representatives of the judiciary, two lawyers, four members proposed by the National Labour Council and four members proposed by the Ministry for Equal Opportunities. Its president is Françoise Tulkens, the former vice-president of the European Court of Human Rights and the vice-president is Marc Bossuyt, the former president of the Belgian Constitutional Court. The commission carried out its work during the second part of 2016 and beginning of 2017. It heard 10 experts in the field of non-discrimination, including P. Charlier (the director of Unia), M. Pasteel and L. Stevens, (the directors of the Institute for Equality of Women and Men) and E. Bribosia, I. Rorive and J. Jacquemain (members of the European network of legal experts in gender equality and non-discrimination). The final report was submitted to the federal Secretary of State in charge of Equal Opportunities and to the federal Parliament, in February 2017.⁴²⁷ This report (146 pages) makes a number of recommendations including:
 - taking into account multiple discrimination in the legal framework and providing for appropriate sanctions;
 - expressly mentioning discrimination by association in statutory law;
 - adopting regulation to better define situations of genuine and determining occupational requirement;
 - putting in place a one-stop shop for victims of discrimination;
 - giving the competence to the labour inspectors to carry out situation testing, including 'mystery calls';
 - more training in anti-discrimination law for the judiciary, the police, the labour inspectorate as well as some training to employers;
 - a better protection against victimisation;
 - developing positive action through the adoption of regulations;
 - transposing Article 15 of Directive 2006/54/EC on the rights of an employee after maternity leave.

In addition, in its *Annual Report for 2014*, Unia highlighted as best practice the cross-cutting approaches of equal opportunities and anti-discrimination policies developed in Flanders, since 2005 and more recently in the Wallonia-Brussels Federation.⁴²⁸

Furthermore, Common Circular (*circulaire commune*) 13/2013 for an efficient policy of monitoring and prosecution with respect to every ground of discrimination, approved by the Association of General Prosecutors, the former Minister of Justice, and the former Vice-Prime Minister, Minister of the Interior and in charge of Equal Opportunities was presented to police officers and judicial authorities, on 16 December 2013. The circular aims to strengthen the cooperation between the justice departments and the police departments,

⁴²⁵ For further information, see www.fedweb.belgium.be/fr/a_propos_de_l_organisation/administration_federale/mission_vision_valeurs/Eg_alite_des_chances_et_diversite/Les_acteurs/groupe-de-pilotage.

⁴²⁶ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, www.unia.be/en.

⁴²⁷ The full report is available (in French) at the following address: www.unia.be/files/Documenten/Aanbevelingen-advies/Commission_dévaluation_de_la_législation_fédérale_relative_à_la_lutte_contre_les_discriminations.pdf.

⁴²⁸ Unia (2015) *Annual report for 2014 (Discrimination – Diversité)*, p. 13, available on its website, www.unia.be/en.

so as to ensure better recording and prosecution of all forms of discrimination and hate crimes, including homophobic discrimination and cyberhate. In criminal matters, this circular compels the prosecution departments and the police services to register all criminal cases implying a discriminatory intent on the basis of the following grounds: gender, disability, racism/xenophobia, and homophobia. This should provide for better statistics. Moreover, this circular provides for the appointment of a 'coordinating prosecutor' (*magistrat coordonnateur*) who is in charge of its implementation. This prosecutor is the contact person for Unia. Other prosecutors and labour auditors are in charge of discrimination issues in their respective departments (prosecution departments and labour departments) as well as public servants in police services. The circular defines their missions. According to the Centre's *Annual Report for 2015*, the potential of this circular has not yet been fully exploited, notwithstanding the training organised by Unia in order to improve implementation.⁴²⁹ In its 2017 evaluation report, Unia again recommends better implementation of the common circular. In particular, all the judicial districts should appoint a coordinating prosecutor in charge of the implementation of the circular.⁴³⁰

In its *Annual Report for 2014*, Unia, acknowledging the difficulties of such a process, had stressed the need for an inter-federal action plan against racism, racial discrimination, xenophobia and intolerance. Such a commitment had already been made at the federal level after the Durban world conference against racism in 2001. However, more than 18 years later, such a plan has not yet been adopted and is not even mentioned in the 2014 Federal Governmental Agreement. The Committee for the Elimination of Racial Discrimination urged Belgium to speed up the adoption of such a plan.⁴³¹ Moreover, in its 2014 report on Belgium, ECRI considered that:

'after the incidents surrounding the case of Sharia4Belgium, the authorities announced a plan to boost the fight against 'racism and radicalism'. These phenomena would be tackled in a transversal way; prevention, coordination and law enforcement would be the key elements of the plan. ECRI is of the opinion that this plan should be combined with an assessment of the application and effectiveness of the 2007 acts as recommended earlier in this report, in particular the provisions prohibiting hate speech'.⁴³²

However, in 2016, a preliminary study on the feasibility of such an inter-federal action plan against racism, racial discrimination, xenophobia and intolerance was submitted to the Secretary of State in charge of equal opportunities,⁴³³ although no follow-up has been put in place at the time of writing this report.⁴³⁴ In May 2018, a collective of more than 30 associations active in the fight against racism and discrimination recalled in the House of Representatives that Belgium is not fulfilling its commitments regarding the action plan. They proposed several key steps that were met with enthusiasm by the opposition parties, but nothing has changed since.⁴³⁵ The then-Secretary of State for Equal Opportunities, Zuhair Demir, caused quite a media storm when she announced her desire to transform the action plan against racism into a 'living together' plan, which would also focus on anti-

⁴²⁹ Unia (2016) *Annual report for 2015 (Discrimination – Diversité)*, pp. 15-16, available on its website, www.unia.be/en.

⁴³⁰ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, p. 7, www.Unia.be/en.

⁴³¹ Periodic Report on Belgium, CERD/C/BEL/CO/16-19.

⁴³² ECRI (2014) *Report on Belgium*, para. 57: www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Belgium/BEL-CbC-V-2014-001-ENG.pdf.

⁴³³ Dr. Saïla Ouald Chaïb, under the scientific supervision of Prof. Eva Brems (UGent), 'Racisme in België. 15 jaar na de Durban verklaring: tijd voor een interfederale actie plan tegen racisme' (Racism in Belgium 15 years after the Durban Declaration: time for an inter-federal action plan against racism), 2 September 2016. (Interview with Patrick Charlier, co-Director of Unia, 28 March 2017).

⁴³⁴ Dr. Saïla Ouald Chaïb, under the scientific supervision of Prof. Eva Brems (UGent), 'Racisme in België. 15 jaar na de Durban verklaring: tijd voor een interfederale actie plan tegen racisme' (Racism in Belgium 15 years after the Durban Declaration: time for an inter-federal action plan against racism), 2 September 2016. (Interview with Patrick Charlier, co-Director of Unia, 28 March 2017).

⁴³⁵ fr.metrotime.be/2018/05/22/actualite/la-belgique-a-la-traine-dans-lelaboration-dun-plan-national-contre-le-racisme/.

autochthonous (anti-white) racism, since she believed that autochthonous people are 'a minority' in some cities. At the end of 2018, the Government resigned, which puts the action plan *de facto* on the agenda of the next legislature. An awareness campaign has been launched by Unia (see section 8.1.a, above).

In 2018, a new intergovernmental action plan against discrimination and violence against LGBTI people was published.⁴³⁶ This plan updates the 2013 action plan that focused on homophobic and transphobic violence,⁴³⁷ in order to include violence and discrimination on the basis of sexual orientation, gender identity, gender expression or intersexuality. According to the plan, special attention will be given to intersectionality, namely to LGBTI with disabilities or from an ethnic minority. The plan mobilises the responsibilities of the different regional Ministers for Equality, as well as federal Ministers of Justice, Internal Affairs, Foreign Affairs, Social Affairs, Employment and Asylum and Migration. In total, the plan contains 22 overall objectives and 115 specific measures. Among the most notable measures are the criminalisation of discrimination on grounds of sexual orientation, gender identity, gender expression or intersexuality; structural instead of project-based funding of NGOs; flagging of countries unsafe to visit for LGBTI people; defence of LGBTI rights in international situations; periodic review of the prohibition to donate blood for homosexual or bisexual men; special care for LGBTI asylum seekers; sensitivity and awareness-raising campaigns around intersexuality; better medical care for LGBTI people, in particular follow-up of psychological help for LGBTI victims of harassment and/or violence. The different NGOs in the field of LGBTI rights welcomed the ambitious action plan, but were sceptical given the limited timeframe of the plan's implementation, which would have to be before the 2019 European, federal and regional elections on 26 May.⁴³⁸ The message of the plan was also somewhat undermined as barely three months after its presentation, the Secretary of State for Asylum and Migration, Theo Francken (N-VA) - one of the signatories of the plan - posted a message on Facebook saying: 'Men who wear make-up, men who wear lingerie and handbags, men who have babies... Is it me or is the world going crazy? Long live the normal man who doesn't need all this nonsense to feel good about himself'. He deleted the message after condemnation from both within and outside his political party, but did not apologise.

⁴³⁶ Belgian Government (2018) *Intergovernmental plan to fight against discrimination and violence towards people based on their sexual orientation, gender identity, gender expression or intersex condition*, May 2018, available on the website of the federal Government, fedweb.belgium.be/sites/default/files/Plan_d_action_LGBTI_2018-2019_FR.pdf.

⁴³⁷ Belgian Government (2013) *Intergovernmental plan to fight against homophobic and transphobic violence*, 31 January 2013, available on the website of the Institute for Equality between Women and Men [igvm-
iegh.belgium.be/fr/avis_et_recommandations/plan_daction_interfederal_de_lutte_contre_les_discriminations_homophobes_et](https://iegh.belgium.be/fr/avis_et_recommandations/plan_daction_interfederal_de_lutte_contre_les_discriminations_homophobes_et).

⁴³⁸ www.beout.be/2018/05/11/nieuw-actieplan-tegen-homofobie-en-transfobie-beloofd-veel-maar-heeft-weinig-tijd-voor-uitvoering/.

10 CURRENT BEST PRACTICES

- The publication of several diversity barometers by Unia. These diversity barometers provide data and statistics, which are crucial to addressing discrimination issues in the fields of employment, housing and education in Belgium.⁴³⁹ The last one, published in 2018, focuses on measuring discrimination and inequalities in the education system.⁴⁴⁰ In particular, it identifies the risks of discrimination against pupils on the ground of their social or ethnic origin, disability or sexual orientation at school. It was the result of long-term scientific research carried out by KU Leuven-HIVA, the learning and diversity research centre of Ghent University and ULB-GERME. In order to carry out this study and the subsequent report, Unia received funding from the three community Ministers of Basic Education and the Minister of Equal Opportunities of the French-speaking Community. Unia coordinated the research, and political recommendations have been formulated through a combination of the results of the study and the expertise of Unia.
- In December 2018, the Senate voted unanimously for a resolution against antisemitism. This resolution aims to make the Government appoint a national coordinator of the fight against antisemitism; to reinstate the antisemitism watch unit and to have better and clearer annual statistics on the number of antisemitic aggressions, the number of cases opened and the number of actual convictions.

⁴³⁹ Available on the website of Unia www.unia.be/fr/publications-et-statistiques/statistiques/tudes-statistiques-dunia.

⁴⁴⁰ Unia (2018) *Diversity Barometer: Education*, www.unia.be/files/Documenten/Publicaties_docs/1210_UNIA_Barometer_2017_-_FR_AS.pdf.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

- The definition of direct discrimination by the Flemish Decree of 10 July 2008 (Article 16(1)) and by the Decree of the German Community of 19 March 2012 (Article 5(4)), as it is currently worded, could be formally read as allowing for derogations to direct discrimination, which is prohibited under the provisions of the directives (see section 2.2.a, above).
- In 2009, the Constitutional Court stated that Article 4(10) of both the General Anti-Discrimination Federal Act and the Racial Equality Federal Act, which defines the notion of harassment, does not specify that this behaviour could be punished if it has the consequence of creating an intimidating, hostile, degrading, humiliating or offensive environment, without any intention of the offender to create such an environment.⁴⁴¹ On this basis, it seems that the Court requires an intention to be proven more generally, i.e. in civil matters as well. This interpretation may raise an issue of lack of compliance with EU and national law since both define harassment as an unwanted conduct related to a protected criterion. If a behaviour which has the effect of creating a bad environment amounts to a prohibited harassment, no specific intention is required under EU and national law. Consequently, the interpretation of the Constitutional Court should be strictly applied to criminal matters – and not to civil matters – to be in compliance with EU law and national law.
- In addition, in its first 2017 report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts stresses that the definition of harassment in the Act of 4 August 1996 on the welfare of workers is not in line with EU law, as it requires ‘several acts’ (i.e. a pattern of repetitive behaviour) whereas the equality directives do require such a condition. The expert commission recommends the amendment of the Act of 4 August 1996 so as to bring it in line with EU law⁴⁴² (see section 2.4, above).
- In order to fully implement the directives, it is necessary to include, in the material scope of the regional decrees, ‘membership of, and involvement in, an organisation of workers or employers or any organisation whose members carry on a particular profession’ that is financed by the relevant community or region. Only the French Community (French Community ET Decree of 12 December 2008, Article 4(5)), the Cocof (Cocof ET Decree of 9 July 2010, Article 5(9)) and the Brussels Capital Region (Brussels ET Ordinance, Article 4(5)) have done it. Regarding the Walloon Region and the Flemish-speaking Community, one could consider that this is implicitly included in the phrase, ‘the access, participation or whatever exercise of an economic, social, cultural or political activity open to the public’ which is used in both ET decrees. The statutory ET law of the Brussels Capital Region and of the German-speaking Community should be completed in this respect (see section 3.2.5, above).
- In Belgium, national legislation is partially in line with the CJEU case law on age regarding compulsory retirement. Apart from the public sector, where retirement is automatic and compulsory at the age of 65 years (with a few exceptions), there is no compulsory retirement age in the private sector. In the private sector, workers may work beyond the retirement age of 65 years and their employer could not force them to retire. To do so the employer still has to terminate the contractual relationship by giving formal notice, even if the notice period will be reduced in this case. Therefore, except for the public sector, which is likely to constitute one of the items for discussion in the process of screening Belgian legislation and regulations for potential age-based discrimination, Belgian law is in line with the CJEU case law on age regarding compulsory retirement. However, the reduced notice period

⁴⁴¹ Constitutional Court (*Cour constitutionnelle*), Decision of 12 February 2009, no. 17/2009, para. B.53.4; Decision of 11 March 2009, no. 39/2009, para. B.25.4; Decision of 2 April 2009, no. 40/2009, para. B.33.4.

⁴⁴² Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, p. 9 and para. 86, www.Unia.be/en.

provisions to end the contractual relationship in the private sector might possibly be out of line with the CJEU case law (see section 4.7.4.d and 4.7.4.f, above).

- In its 2009 rulings concerning several actions in annulments against the Federal Anti-Discrimination Acts, the Constitutional Court stressed that the facts leading to the reversal of the burden of proof cannot be of general character but must be attributed specifically to the author of the distinction. Consequently, the Court stated that it is not enough to establish through statistics that a neutral criterion disadvantages persons characterised by a protected ground of discrimination. According to the Court, it must also be shown that the defending party was aware of that situation.⁴⁴³ In the opinion of the authors of this report, that statement of the Court is in complete breach of EU law and in complete contradiction to the intention of the Belgian legislature (see section 6.3, above).
- There is a problem regarding victimisation because Belgian law only protects victims, their representatives and witnesses against victimisation while the EU directives cover 'all persons' involved. Only the Cocof ET Decree and the Flemish Framework ET Decree are in line with the directives regarding protection against reprisals (see section 6.5, above).
- The 'safeguard provision' (Article 11 of both the General Anti-Discrimination Federal Act and the Racial Equality Federal Act) implies that any statutory law (or regulation implementing a legislative provision), which might be considered discriminatory under the EU directives, will not be voided by the adoption of the anti-discrimination legislative framework. It may be necessary, therefore, to launch a full-scale screening of the existing legislation and regulations in order to ensure that any discriminatory provisions are identified and removed, since a purely case-by-case approach left in the hands of courts might be insufficient.
- The Decree of 7 December 2017⁴⁴⁴ adopted by the Government of the French Community concerning the reception, assisting and maintenance of children with specific needs in basic and secondary education raises some concerns. This decree provides, *inter alia*, arrangements for the consultation on and implementation of reasonable accommodation for disabled students. It also creates a conciliation procedure and an appeal to an ad hoc committee in which Unia will sit 'on a voluntary and advisory basis'. However, there are some concerns about the interpretation of the right to reasonable accommodation, which is much too limited in view of legal texts and case law. In particular, the decree conditions the right to reasonable accommodation on the fact that the pupil's situation 'does not make it necessary to send him or her to specialized education according to the provisions of the decree of 3 March 2004 organising special education' (Article 4(1)). Under anti-discrimination legislation and the UN CRPD, the refusal of reasonable accommodation constitutes discrimination. In other words, the provision is a right as soon as that is reasonable, not a 'possibility'. This right must be open to all students with disabilities within the meaning of the UN convention and international jurisprudence. This additional condition therefore does not comply with the law.

In addition, the new decree closes the door of ordinary schools to students with specific needs that 'call into question the learning objectives defined by the inter-jurisdictional reference frameworks' (Article 4(4)). This provision goes against an inclusive education system, which should allow for flexible study programmes, learning methods and forms of assessment adapted to all students (see CRPD, General Comment n°4 (2016) on the right to inclusive education, Articles 14 and 26).

⁴⁴³ Constitutional Court (*Cour constitutionnelle*), Decision of 12 February 2009, no. 17/2009, para. B.93.3; Decision of 11 March 2009, no. 39/2009, para. B.52; Decision of 2 April 2009, no. 40/2009, para. B.97.

⁴⁴⁴ Decree of 7 December 2017 concerning the reception, the assisting and the maintenance of children with specific needs in the basic and secondary education (*Décret relatif à l'accueil, à l'accompagnement et au maintien dans l'enseignement ordinaire fondamental et secondaire des élèves présentant des besoins spécifiques*), OJ (*Moniteur belge*), 1 February 2018 www.gallilex.cfwb.be/document/pdf/44807_000.pdf.

11.2 Other issues of concern

1) Political context

In its 2014 report on Belgium, ECRI noted that

'since its fourth report on Belgium a number of leaders of and militants from extremist parties have continued making statements in public against the other linguistic Community in the name of extreme nationalism combined with intolerant and xenophobic arguments against foreigners and minority groups. ECRI considers that this exploitation of the climate of political tension that exists between the linguistic Communities is particularly deplorable as it not only encourages inter-Community prejudice and stereotyping but can fuel hatred also against ethnic minorities and migrants.'⁴⁴⁵

This statement has resonated in recent years during which politicians of the Dutch-Speaking Nationalist Flemish Party (N-VA) have made several statements with racist connotations.⁴⁴⁶ This is troubling because the N-VA is the biggest party in Flanders (and thus Belgium), and is in both the Federal and Flemish Governments (even though they quit the federal Government in November 2018, which in turn led to the resignation of the Government). There is also the far-right party Vlaams Belang, which systematically makes overtly racist (in particular Islamophobic) statements, however they are electorally much smaller (although things have changed since the cut-off date of the report) and there is a *cordon sanitaire* against them.

In September 2018, the Flemish television show *Pano* made a documentary on the youth group Schild & Vrienden (Shield and Friends), who described themselves as a Flemish-nationalist group of students. The documentary revealed their racist, sexist, anti-Muslim, antisemitic, anti-gay agenda, and also showed that they had infiltrated the public sphere, namely the Youth Parliament and local election lists of the N-VA. Their president, Dries Van Langenhove, publicly supported the N-VA and Vlaams Belang. After the documentary, many N-VA members were quick to denounce its content, however there were members of Schild & Vrienden on the local elections lists of the N-VA who had not been banned. Furthermore, the N-VA left the Government at the end of 2018, after disagreements on the Belgian ratification of the Global Compact for Safe, Orderly and Regular Migration (the Marrakesh Agreement). This is despite the fact that the Government, and especially the Secretary of State in charge (Theo Francken, N-VA), were well aware of the content of the Marrakesh Agreement, and had not opposed its ratification months earlier when the question was on the table. This has also led to severe division among the population, and the organisation of a violent 'March against Marrakesh'.

In October 2018, the University VUB published a study that demonstrates the widespread discrimination practices in the Antwerp housing market. The study responded to almost 1 000 housing advertisements in perfect Dutch, once signed with a Belgian name, once with an Arab name. In 40 % of the cases the 'Flemish' candidate was immediately invited to visit the apartment, but not the 'Arab' candidate. Unia, among others, called for the city council to carry out situation testing. The Flemish Minister for equal opportunities, Liesbeth Homans (N-VA) and the Antwerp city councillor in charge of housing, Fons Duchateau (also

⁴⁴⁵ ECRI (2014) *Report on Belgium*, para 51.

⁴⁴⁶ Cf., for instance: Het Nieuwsblad (2018) 'Weer twee N-VA'ers in opspraak door racisme' (*Again two members of the N-VA denounced for racism*), *Het Nieuwsblad*, 12 September 2018; Interview with Liesbeth Homans and Mieke Van Hecke, conducted by *De Standaard*, 6 October 2018, in which Liesbeth Homans (prominent N-VA member and Flemish Minister) affirmed: 'Not every Muslim is a terrorist, but every terrorist is a Muslim'; or when Minister for Home Affairs, Jan Jambon, said 'a significant part of the Muslim Community danced after the terrorist attacks (of 22 March 2016 in Brussels)': <https://www.demorgen.be/nieuws/jan-jambon-ik-heb-geen-uitspraak-over-dansende-moslims-gedaan~b3f627a4/>.

N-VA), rejected the study, calling it inaccurate and an electoral strategy to undermine the N-VA.

Around the same time, Liesbeth Homans said during an interview, “not all Muslims are terrorists, but all terrorists are Muslims”.⁴⁴⁷

In 2017, many debates concerning Unia occurred and were mostly launched by Flemish politicians from the N-VA. In 2018 these incessant attacks have died down a bit.

2) Inertia and/or lack of political will

Beyond this tense political climate, there is also a worrying inertia at the political level regarding several issues central to the fight against discrimination:

- Belgium has not yet ratified Protocol No. 12 to the European Convention on Human Rights. There was no commitment to a forthcoming ratification in the 2014 Federal Governmental Agreement.
- Despite the repeated calls of Unia (i.e. in the 2014 memorandum drafted by Unia in view of the federal, regional and European elections of 25 May 2014) and of the UN Council for Human Rights for an inter-federal action plan against racism, no follow-up has been put in place at the time of writing this report. In May 2018, a collective of over 30 associations active in the fight against racism and discrimination noted in the House of Representatives that Belgium is not fulfilling its commitments regarding the action plan. They proposed several key measures that were met with enthusiasm by the opposition parties, but nothing has changed since.⁴⁴⁸ The then Secretary of State for Equal Opportunities, Zuhair Demir, caused quite a media storm when she announced her desire to transform the action plan against racism into a ‘living together’ plan, which would also focus on anti-autochthonous (anti-white) racism, since she believed that autochthonous people are ‘a minority’ in some cities .
- As highlighted by the Commissioner for Human Rights of the Council of Europe following his visit in Belgium in September 2015 (and reported above in section 3.2.8 and 3.2.10),⁴⁴⁹ the situation of Roma and Travellers in Belgium is still worrying regarding housing and education. Despite the adoption of some measures by the regional authorities, it seems that there is a lack of political will to improve the precarious situation of these vulnerable groups. It remains to be seen how the Belgian National Roma Platform set up in 2016 is going to improve the situation.
- In its 2017 evaluation report, Unia pointed out that the fight against discrimination is not a priority for the relevant judicial, administrative and disciplinary authorities and that the anti-discrimination legislation is not well applied.⁴⁵⁰

3) Issue of effectiveness

- A fair amount of cases decided in court and the 2017 report of the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts show that there is still a noticeable lack of knowledge of the anti-discrimination law – especially of the notion of indirect discrimination – by the professionals in charge of its implementation.
- As pointed out in the 2014 ECRI report on Belgium, there was still a shortage of properly equipped transit sites for Travellers, in particular in the Walloon Region and in the Brussels Capital Region. This was also emphasised by the Committee on the

⁴⁴⁷ www.standaard.be/cnt/dmf20181005_03813443.

⁴⁴⁸ fr.metrotime.be/2018/05/22/actualite/la-belgique-a-la-traine-dans-lelaboration-dun-plan-national-contre-le-racisme/.

⁴⁴⁹ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, rm.coe.int/16806db735.

⁴⁵⁰ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 10 and 58 www.unia.be/en.

Elimination of Racial Discrimination in its *Concluding observations on the sixteenth to nineteenth periodic reports of Belgium*⁴⁵¹ and by the Commissioner for Human Rights of the Council of Europe, after the last visit in Belgium, in September 2015.⁴⁵²

- As underlined by the three Unia diversity barometers on employment, housing and education, there are still many discriminatory practices in these fields. Just as the OECD and the European Commission have done, the third socio-economic monitoring report, published in 2017, underlines the alarming situation of inequalities on the Belgian labour market. This was also stressed by the Committee on the Elimination of Racial Discrimination:

‘despite numerous measures taken by the State party at the Federal, Regional and Community levels, migrants and persons of foreign origin continue to face obstacles to the full enjoyment of economic, social and cultural rights. In particular, the Committee is concerned at reports that persons of foreign origin, especially those from non-European Union countries, face structural discrimination in the field of employment, where ‘ethnic stratification’ seems to exist. The Committee is further concerned at difficulties faced by such persons in accessing housing (Article 5).’⁴⁵³

The federal state, the communities and the regions should take appropriate measures to tackle such issues.

- Concerning the rights of people with disabilities, at least two points stressed by the UN Committee on the Rights of Persons with Disabilities, which echo the above-mentioned observations, are noteworthy. First, the Committee expresses its concern about the

‘poor accessibility for persons with disabilities, the absence of a national plan with clear targets and the fact that accessibility is not a priority. It notes that government action has focused primarily on accessibility for persons with physical disabilities and that few measures have been taken to promote accessibility for persons with hearing, visual, intellectual or psychosocial disabilities.’⁴⁵⁴

Secondly, the Committee notes ‘the low number of persons with disabilities in regular employment’ and ‘the Government’s failure to reach targets for the employment of persons with disabilities within its own agencies, as well as the lack of a quota in the private sector.’⁴⁵⁵

4) Religious symbols

The numerous judicial rulings involving the highest courts in Belgium (such as the Constitutional Court, the Court of Cassation and the Council of State) show that the issue of religious symbols (and the wearing of the Islamic veil in particular) is still a very controversial one in Belgium (see sections 3.2.8 and 4.2, above).

5) Resurgence of individual racist incidents, as well as debates laying bare structural discrimination based on presumed race and ethnic origin

⁴⁵¹ CERD/C/BEL/CO/16-19, 14 March 2014, paras. 18–19.

⁴⁵² Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, rm.coe.int/16806db735.

⁴⁵³ Committee on the Elimination of Racial Discrimination (2014), *Concluding observations on the sixteenth to nineteenth periodic reports of Belgium*, CERD/C/BEL/CO/16-19, 14 March 2014, para. 15.

⁴⁵⁴ Committee on the Rights of Persons with Disabilities (2015), *Concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session* (15 September – 3 October 2014), para. 21 – 22.

⁴⁵⁵ Committee on the Rights of Persons with Disabilities (2015), *Concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session* (15 September – 3 October 2014), para. 38 – 39.

Another issue of concern is the resurgence of both individual racist incidents, as well as debates laying bare structural discrimination based on presumed race and ethnic origin. At the end of the summer of 2018, three incidents gained media attention: at Pukkelpop, a music festival popular with young people, two black girls were harassed during a concert, with several people singing racist chants ("Cutting hands, Congo is ours"), making Hitler salutes and pulling their hair. Around the same time, a black teenager was pushed onto train rails by a group of people, who called him racist slurs and were physically abusive. Finally, in September 2018, Cecila Djunga, a presenter at the Rtbf (French-speaking State television channel), came forward about the stream of racist messages that she had received.

These incidents are not helped by the fact that Belgium still struggles with the acknowledgement of its colonial past: there is persistent opposition to those who would like to see statues and street names of King Leopold II removed; the renovation of the Africa museum (which formerly glorified colonisation) was not done with the input of the African community; history classes on Belgian colonialism are often devoid of criticism; and contrary to other European countries, Belgium does not feel like it needs to make reparations for the colonial period.

Furthermore, the former Secretary of State for Equal Opportunities, Zuhair Demir, caused quite a media storm when she announced her desire to transform the action plan against racism into a 'living together' plan, which would also focus on anti-autochthonous (anti-white) racism, since she believed that autochthonous people are 'a minority' in some cities. To date, no action plan has been adopted.

All these incidents and debates are corroborated by the fact that Unia has received 866 racist reports in 2018 in contrast to 782 in 2017. Over 25 % of those cases concerned racism in goods and services, while in almost 100 cases it was a question of a racist society as a whole (racist slurs while working or going out). In 16 cases, Unia went to court.

12 LATEST DEVELOPMENTS IN 2018

12.1 Legislative amendments

- Decree of 7 December 2017 adopted by the Government of the French Community concerning the reception, assisting and maintenance of children with specific needs in basic and secondary education.⁴⁵⁶ This decree provides, *inter alia*, arrangements for consultation on and implementation of reasonable accommodation for students with disability. It also creates a conciliation procedure and an appeal to an ad hoc committee in which Unia will sit 'on a voluntary and advisory basis'.
- The Federal Act of 15 January 2018 containing various provisions in matters of employment (Chapter 9)⁴⁵⁷ inserted new provisions into the Federal Social Penal Code in order to enable labour inspectors to use mystery calls for the purposes of collecting evidence of criminal offences as defined by the three Acts of 10 May 2007.
- The Brussels Capital Region Ordinance 'amending the Brussels Housing Code to strengthen the fight against discrimination in access to housing' was adopted on 21 December 2018.⁴⁵⁸ The officers of the Regional Inspection Service are henceforth entitled to carry out situation tests and mystery calls (Article 214*bis* of the Housing Code). In addition, the new legislation explicitly mentions that discrimination may be based on several protected grounds (Article 205 of the Housing Code). Moreover, discrimination by association is explicitly forbidden (Article 205 of the Housing Code).

12.2 Case law

Name of the court: First Instance Court of Antwerp

Date of decision: 7 November 2018

Name of the parties: /

Reference number: /

Address of the webpage:

www.unia.be/files/Documenten/Rechtspraak/Rechtbank_Eerste_aanleg_Antwerpen_7_november_2018.pdf

Brief summary: A pupil with Down's syndrome who had completed his first year in a nursery school was prevented from re-enrolling in the same school for his second year. The school officials carried out a kind of inquiry among the teachers to find out who was ready to welcome him into their classroom and to provide suitable support. Apart from the pedagogical assistants, no teacher responded positively. As a result, the school asked the parents to look for another school. Given the conspicuous discriminatory treatment, the equality body, UNIA, decided to go to court.

The judge found that refusing to enrol the child in these circumstances was a denial of reasonable accommodation, which is discriminatory within the meaning of the Flemish Decree of 10 June 2008 on equal opportunities and equal treatment.

The reasonable accommodation required was mainly organisational. The pupil had the right to 5.5 hours of complementary support with an 'IOK' teacher (a teacher who is trained for inclusive education), and with trainee teachers. The IOK teacher was not only hired for the pupil in question – a fact which has been confirmed since she continued working in the school even after the pupil left. The trainee teachers were hired as part of a cooperation between the school and higher education institutions, and they also stayed after the pupil left. The judge refuted that such accommodation would be excessive from both an organisational and a financial point of view.

⁴⁵⁶ Decree of 7 December 2017 concerning the reception, the assisting and the maintenance of children with specific needs in the basic and secondary education (*Décret relatif à l'accueil, à l'accompagnement et au maintien dans l'enseignement ordinaire fondamental et secondaire des élèves présentant des besoins spécifiques*), OJ (*Moniteur belge*), 1 February 2018 www.gallilex.cfwb.be/document/pdf/44807_000.pdf.

⁴⁵⁷ OJ (*Moniteur belge*), 5 February 2018.

⁴⁵⁸ OJ (*Moniteur belge*), 31 January 2019.

The judge confirmed that specialised education for disabled students must remain the exception. It is therefore considered that all the necessary adjustments are in principle reasonable until their disproportionate nature is established. Furthermore, the school chiefly focused on what the pupil was unable to do and, on the problems faced by the teachers. It is precisely this kind of prejudice that the public authorities wanted to avoid by adopting the Decree that implements various measures for the inclusion of children with disabilities in mainstream education in the Flemish Community. By this judgment, the court fostered inclusive education.

Name of the Court: Council of State

Date of decision: 25 October 2018

Name of the parties: *Nicolas Baijot v. La haute École Galillée*

Reference number: 242.794

Address of the webpage:

www.unia.be/files/Documenten/Rechtspraak/Conseil_detat_25_octobre_2018.pdf

Brief summary: The case concerned a student who was about to graduate as a natural science teacher but was refused because of his low score in French, even though the university had been aware for years of his dyslexia-dysorthographia. The Council of State suspended the college examination board's decision because it was discriminatory and against the Constitution. The decision should mean that the student was able to graduate, but there has been no public follow-up in order to verify this.

Name of the Court: First Instance Court of Ghent

Date of decision: 5 July 2018

Name of the parties: /

Reference number: /

Address of the webpage:

[www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_\(zwembad_Van_Eyck\).pdf](http://www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_(zwembad_Van_Eyck).pdf)

and

[www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_\(zwembad_Merelbeke\).pdf](http://www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_(zwembad_Merelbeke).pdf)

Brief summary: The Tribunal of Ghent ruled in two first instance judgments that the ban on burkinis in two municipal swimming pools is unlawful. Relying on the ECtHR case law, the judge stressed that it is not the role of the court to discuss whether the Muslim religion imposes or not the wearing of such clothing. The legitimacy of such a practice is not an issue that the court should consider. As to the discrimination issue, the tribunal of Ghent ruled that the burkini ban does not amount to direct discrimination since it stems from the general internal rules of the swimming pool, which require the wearing of a swimsuit to access the pool. However, there is indirect discrimination against Muslim women willing to wear a burkini for religious reasons. According to the Tribunal of Ghent, justifications on grounds of security or hygiene do not stand up to scrutiny, especially when considering the opinion of a regional health agency. It rightly points out that although a requirement of neutrality may be imposed upon the providers of public services, the same cannot be required from the users of these services.

Name of the Court: Appeal Court of Ghent

Date of decision: 5 June 2018

Name of the parties: *Interfederaal Centrum Voor Gelijke Kansen en Bestrijding Van Discriminatie en Racisme (UNIA) v. WV N.V.*

Reference number: 2017/AR:1272

Address of the webpage:

www.unia.be/files/Documenten/Rechtspraak/Hof_van_Beroep_Gent_5_juni_2018.pdf

Brief summary: The Appeal Court of Ghent condemned a real estate agent who had refused to rent an apartment to a refugee family because they did not have a Belgian identity card. The court reasserted that this behaviour constituted direct discrimination

based on nationality. The court ordered the agency to cease and desist with a penalty of EUR 500 per day.

Name of the Court: Labour Tribunal of Brussels (3rd Ch.)

Date of decision: 28 May 2018

Name of the parties: /

Reference number: 16/7231/A

Address of the webpage:

[www.unia.be/files/Documenten/Rechtspraak/Tribunal du travail Bruxelles 28 mai 2018.pdf](http://www.unia.be/files/Documenten/Rechtspraak/Tribunal_du_travail_Bruxelles_28_mai_2018.pdf)

Brief summary: This case has similar facts as to the *Achbita* one (2017). An employee, working as a cashier, refused to take off her headscarf, which she started wearing when she came back from her maternity leave, and that led to her dismissal. Relying on the CJEU decision in *Achbita*, the Brussels Labour Tribunal considered that the general ban on wearing religious symbols did not constitute direct discrimination since it was applicable to all employees regardless of their religion. It furthermore considered that the headscarf ban also did not constitute indirect discrimination, since it was justified by the aim of a company to maintain a corporate image of neutrality and the rule was proportionate.

Name of the Court: First Instance Tribunal of Antwerp (Mechelen section)

Date of decision: 14 May 2018

Name of the parties: /

Reference number: 18M000038

Address of the webpage:

[www.unia.be/files/Documenten/Rechtspraak/Correctionele rechtbank Mechelen 14 mei 2018.pdf](http://www.unia.be/files/Documenten/Rechtspraak/Correctionele_rechtbank_Mechelen_14_mai_2018.pdf)

Brief summary: A police commissioner published a racist message on social media, where he wrote under the picture of one of his colleague: "Why should I give you the hand? I don't like your colour". The tribunal strictly applied the law on incitement to hatred and cleared the defendant. Indeed, even if the judge had made a harsh critique of the attitude adopted by the Police Commissioner, they applied strictly the requirement of the proof of the existence of an intent to incite hatred and found that there was no intention to incite such hatred. The difficulty in proving such intention undermines the effectiveness of the struggle against racism.

Name of the court: Labour Court of Brussels (3rd Ch.)

Date of decision: 20 February 2018

Name of the parties: /

Reference number: 2016/AB/959

Address of the webpage:

[www.unia.be/files/Documenten/Rechtspraak/Arbeidshof Brussel 20 februari 2018.pdf](http://www.unia.be/files/Documenten/Rechtspraak/Arbeidshof_Brussel_20_februari_2018.pdf)

Brief summary: The judgment on appeal concerned the dismissal of an employee who needed adapted working hours, after recovering from cancer. Indeed, when she returned to work after her long-term sickness leave, she asked for an adapted schedule, which was refused by her employer and led to her dismissal. For the first time in Belgium, the court recognised that the consequences of having had cancer could be considered as a disability. It did so by conscientiously applying the case law of the CJEU defining the notion of disability (case C-335/11, *HK Danmark (Ring and Lone Skouboe Werge)*). The dismissal therefore constituted discrimination based on disability in breach of the Anti-Discrimination Federal Act. Although Belgium law recognises state of health as a protected criterion, discrimination on this basis does not entail the right to reasonable accommodation. Therefore, by considering that the consequences due to the cancer of an employee was constitutive of a disability due to their durability, the court enhanced her protection, because employees with disabilities should have a right to reasonable accommodation, and the request for reduced working hours would be considered as such.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Belgium
Date: 31 December 2018

<p>Title of the law: Act criminalising certain acts inspired by racism or xenophobia</p> <p>Abbreviation: Racial Equality Federal Act</p> <p>Date of adoption: 30 July 1981</p> <p>Latest relevant amendment: amended by the Acts of 12 April 1994, of 7 May 1999, of 20 January 2003 and of 10 May 2007</p> <p>Entry into force: 9 June 2007 (entry into force of the Federal Act of 10 May 2007 amending the Act of 30 July 1981)</p> <p>Web link: http://www.ejustice.just.fgov.be/loi/loi.htm</p> <p>Grounds covered: Alleged race, colour, origin, ethnic and national origin and nationality</p> <p>Civil, administrative and criminal law</p> <p>Material scope: Access to and provision of goods and services including private housing; labour relations; social advantages; social protection; membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations; economic, social, cultural or political activities normally accessible to the public</p> <p>Principal content: Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment; civil remedies, and criminal provisions</p>
<p>Title of the law: Act pertaining to fight against certain forms of discrimination</p> <p>Abbreviation: General Antidiscrimination Federal Act</p> <p>Date of adoption: 10 May 2007</p> <p>Latest relevant amendment: 17 August 2013</p> <p>Entry into force: 9 June 2007</p> <p>Web link: http://www.ejustice.just.fgov.be/loi/loi.htm</p> <p>Grounds covered: Age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion, trade union opinion and language, genetic characteristic and social origin</p> <p>Civil administrative and criminal law</p> <p>Material scope: Access to and provision of goods and services including private housing; labour relations; social advantages; social protection; membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations; economic, social, cultural or political activities normally accessible to the public</p> <p>Principal content: Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment; civil remedies, and criminal provisions</p>
<p>Title of the law: Decree on proportionate participation in the employment market (Flemish Community/Region)</p> <p>Abbreviation: /</p> <p>Date of adoption: 8 May 2002</p> <p>Latest relevant amendment: 10 December 2010</p> <p>Entry into force: 1 October 2002</p> <p>Web link: http://www.ejustice.just.fgov.be/loi/loi.htm</p> <p>Grounds covered: Gender, alleged race, ethnic origin, religion or belief, disability, age and sexual orientation</p> <p>Civil, administrative and criminal law</p> <p>Material scope: Access to employment, vocational training, promotion, working conditions, but only applicable to a) labour market intermediaries; b) the public authorities of the Flemish Region/Community, including the field of education; c) the other employers with</p>

respect only to vocational training and integration of persons with disabilities in the labour market

Principal content: Prohibition of direct and indirect discrimination, instruction to discriminate and harassment

Title of the law: Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (Walloon Region)

Abbreviation: The Walloon ET Decree

Date of adoption: 6 November 2008

Latest relevant amendment: 12 January 2012

Entry into force: 30 December 2008

Web link: <http://www.ejustice.just.fgov.be/loi/loi.htm>

Grounds covered: All grounds listed in Article 19 TFEU plus nationality, colour, ancestry and national or social origin, civil status (married/non-married), birth, wealth/income, political opinion, trade union opinion, language, present or future state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave, gender reassignment and transgender

Civil, administrative and criminal law

Material scope: Economy; employment and vocational training in the public and the private sectors; social protection, including health care; social advantages; access to and supply of goods and services available to the public and outside private and family sphere, including social housing; access, participation or any exercise of an economic, cultural or political activity open to the public and statutory relationships in departments of the Walloon Government, public authorities depending on the Walloon Region, decentralised bodies (such as provinces, municipalities, etc.), public Centres for social assistance

Principal content: Prohibition of direct and indirect discrimination, instruction to discriminate, harassment and sexual harassment and the failure to provide reasonable accommodation for persons with disabilities; civil remedies, and criminal provisions

Title of the law: Ordinance aiming to combat discrimination and promote equal treatment (Region of Brussels-Capital)

Abbreviation: Brussels ET Ordinance

Date of adoption: 5 October 2017

Latest relevant amendment: N/ A

Entry into force: 29 October 2017

Web link:

<http://www.ejustice.just.fgov.be/eli/ordonnance/2017/10/05/2017031347/justel>

Grounds covered: All grounds listed in Article 19 TFEU plus political opinion, civil status (married/non-married), birth, wealth/income, language, state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave, transgender, nationality, colour, ancestry, national or social origin, trade union belief

Civil, administrative and criminal law

Material scope: Social protection and advantages, access to goods and services, access to economic, social and cultural activities, affiliation to trade unions or employers' representative organisations, official documentation

Principal content: Prohibition of direct and indirect discrimination, harassment and sexual harassment and instruction to discriminate; civil remedies, and criminal provisions

Title of the law: Ordinance related to the fight against discrimination and equal treatment in the employment field (Region of Brussels-Capital)

Abbreviation: Brussels ET employment Ordinance

Date of adoption: 4 September 2008

Latest relevant amendment: 16 November 2017

Entry into force: 26 September 2008

Web link: <http://www.ejustice.just.fgov.be/loi/loi.htm>

<p>Grounds covered: All grounds listed in Article 19 TFEU plus political opinion, civil status (married/non-married), birth, wealth/income, language, state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave, transgender, nationality, colour, ancestry, national or social origin, trade union belief</p> <p>Civil, administrative and criminal law</p> <p>Material scope: Employment field which covers, at that regional level, the placement of workers policies and the policies dedicated to unemployed persons</p> <p>Principal content: Prohibition of direct and indirect discrimination, harassment and sexual harassment and instruction to discriminate; civil remedies, and criminal provisions</p> <p>Principal content: Prohibition of direct and indirect discrimination, harassment and sexual harassment and instruction to discriminate; civil remedies, and criminal provisions</p>
<p>Title of the law: Ordinance related to the promotion of diversity and the fight against discrimination in the civil service of the Region of Brussels-Capital</p> <p>Abbreviation: The Brussels Civil Service ET Ordinance</p> <p>Date of adoption: 4 September 2008</p> <p>Latest relevant amendment: /</p> <p>Entry into force: 26 September 2008</p> <p>Web link: http://www.ejustice.just.fgov.be/loi/loi.htm</p> <p>Grounds covered: All grounds listed in Article 19 TFEU plus political opinion, civil status (married/non-married), birth, wealth/income, language, state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave, transgender, nationality, colour, ancestry, national or social origin</p> <p>Civil, administrative and criminal law</p> <p>Material scope: Employment field in the civil service of the Region of Brussels-Capital: access conditions, criteria selection, promotion, work conditions, including dismissals and pay</p> <p>Principal content: Prohibition of direct and indirect discrimination, harassment and sexual harassment and instruction to discriminate; civil remedies, and criminal provisions</p>
<p>Title of the Law: Decree on equal treatment between persons in vocational training (Commission communautaire française [Cocof])</p> <p>Abbreviation: Cocof Vocational Training ET Decree</p> <p>Date of adoption: 22 March 2007</p> <p>Latest relevant amendments: 5 July 2012</p> <p>Entry into force: 24 January 2008</p> <p>Web link: http://www.ejustice.just.fgov.be/loi/loi.htm</p> <p>Grounds covered: All grounds (open list of suspect criteria)</p> <p>Administrative and disciplinary</p> <p>Material scope: Vocational training, including vocational guidance, learning, advanced vocational training and retraining</p> <p>Principal content: Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment</p>
<p>Title of the Law: Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (Commission communautaire française [Cocof])</p> <p>Abbreviation: The Cocof ET Decree</p> <p>Date of adoption: 9 July 2010</p> <p>Latest relevant amendments: /</p> <p>Entry into force: 3 September 2010</p> <p>Web link: http://www.ejustice.just.fgov.be/loi/loi.htm</p> <p>Grounds covered: age, sexual orientation, civil status, birth, property, religious or philosophical belief, political or trade union opinion, language, actual or future state of health, disability, physical or genetic characteristic, sex, pregnancy, motherhood, childbirth, gender reassignment, nationality, alleged race, skin colour, origin and national, ethnic or social origin</p>

Civil, administrative and criminal law

Material scope: School transport and school building management; municipal, provincial, inter-municipal and private facilities with regard to physical education, sports and outdoor life; tourism; social advancement; health policy; assistance for people; access to and supply of goods and services; access, participation and any other exercise of economic, social, cultural or political activities publicly available; labour relations within public institutions of the *Cocof*

Principal content: Prohibition of direct and indirect discrimination, instruction to discriminate, harassment and sexual harassment and the failure to provide reasonable accommodation for persons with disabilities; civil remedies, and criminal provisions

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Belgium

Date: 31 December 2018

Instrument	Date of signature	Date of ratification	Derogations/reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	04.11.1950	14.06.1955	No	N/A	Yes
Protocol 12, ECHR	04.11.2000	Not ratified	N/A	N/A	N/A
Revised European Social Charter	03.05.1996	2.03.2004	No	Ratified Protocol on collective complaints on 23.6.2003	Yes
International Covenant on Civil and Political Rights	10.12.1968	21.04.1983	No	Ratified Optional Protocol on 17.5.1994	Yes
Framework Convention for the Protection of National Minorities	3.07.2001	Not ratified	N/A	N/A	N/A
International Covenant on Economic, Social and Cultural Rights	12.12.1968	21.04.1983	No	N/A	Yes
Convention on the Elimination of All Forms of Racial Discrimination	17.08.1967	7.08.1975	No		Yes
Convention on the Elimination of Discrimination	17.07.1980	10.07.1985	No	Ratified Optional Protocol 17.6.2004	Yes

Instrument	Date of signature	Date of ratification	Derogations/reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
n Against Women					
ILO Convention No. 111 on Discrimination	25.06.1958	22.03.1977	No		Yes
Convention on the Rights of the Child	16.01.1990	16.12.1991	No	N/A	Yes
Convention on the Rights of Persons with Disabilities	30.03.2007	2.07.2009	No	Ratified Optional Protocol on 2.7.2009	Yes

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