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

COUNTRY REPORT
Belgium
Olivier De Schutter
State of affairs up to 8 January 2007

This report has been drafted for the European Network of Legal Experts in the non-discrimination field (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), established and managed by:

human european consultancy
Hooghiemstraplein 155
3514 AZ Utrecht
Netherlands
Tel +31 30 634 14 22
Fax +31 30 635 21 39
office@humanconsultancy.com
www.humanconsultancy.com

the Migration Policy Group
Rue Belliard 205, Box 1
1040 Brussels
Belgium
Tel +32 2 230 5930
Fax +32 2 280 0925
info@migpolgroup.com
www.migpolgroup.com

All reports are available on the European Commission's website:

http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm

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INTRODUCTION

NOTE. The present report was completed on March 1st, 2007, prior to the adoption of four legislative bills proposed by the government, and formally submitted to the House of Representatives on 26 October 2006. These bills were prepared in order both to overcome the difficulties created by the judgment n° 157/2004 delivered by the Constitutional Court (Court of Arbitration) on 6 October 2004 (partially annulling the Federal Antidiscrimination Law of 25 February 2003[1]), and to meet the concerns expressed by the European Commission in its correspondance with the Belgian authorities about the state of implementation of the Racial Equality and Employment Equality Directives. These bills are the following :

1° A first bill (*Projet de loi modifiant la Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie)* provides for the modification of the Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (*Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*), in order to implement both the Racial Equality Directive (2000/43/EC) and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, in one single legislation prohibiting discrimination on grounds of 'race', color, descent, national or ethnic origin, and nationality. In the remainder of this report, this will be referred to as the 'racial equality bill'.

2° The second bill (*Projet de loi tendant à lutter contre la discrimination entre les femmes et les hommes*) provides for the modification of the Law of 7 May 1999 on equal treatment between men and women in working conditions, access to employment and to promotion opportunities, access to self-employment and social security,[2] in order to implement the directives adopted on the basis of Articles 13 EC (Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions,[3] as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002,[4] is mentioned, however the preparatory works of the bill do not mention Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)[5]) and 141 EC (Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services[6]).

3° The third bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*) states explicitly (draft Article 2) that it seeks to implement Directive 2000/78/EC of 27 November 2000. It provides for the prohibition of discrimination on all the grounds other than those dealt with by the two other bills, which either 1° were already present in the Federal Antidiscrimination Law of 25 February 2003 (age, sexual orientation, civil status, birth, property (Fr. 'fortune'), religious of philosophical belief, actual or future state of health, disability, physical characteristic), or 2° were added in order to take into account the concern expressed by the Constitutional Court (then Court of Arbitration) in its judgment n° 157/2004

[1] Law of 25 February 2003 on combating discrimination and amending the Act of 15 February 1993 setting up the Centre for Equal Opportunities and the Fight against Racism, *Moniteur belge*, 17 March 2003.
[2] *Loi sur l'égalité de traitement entre hommes et femmes en ce qui concerne les conditions de travail, l'accès à l'emploi et aux possibilités de promotion, l'accès à une profession indépendante et les regimes complémentaires de sécurité sociale,* Law on equality of treatment between men and women concerning working conditions, access to employment, opportunities for promotion, access to self-employment and social security. *Moniteur belge*, 19 June 1999.
[3] OJ L 39 of 14.2.1976, p.40.
[4] OJ L 269 of 5.10.2002, p.15.
[5] OJ L 204, 26.7.2006, p. 23.
[6] OJ L 373 of 21.12.2004, p.37.

of 6 October 2004 that the list of grounds should not arbitrarily exclude certain grounds which are found in international human rights instruments (political opinion and language), or 3° were added to the list originally mentioned in the 2003 law for other reasons (genetic characteristic, social origin). This will be referred to as the 'general antidiscrimination bill' in the remainder of this report.

4° In addition, a fourth bill (*Projet de loi modifiant le Code judiciaire à l'occasion de la loi du ... tendant à lutter contre certaines formes de discrimination, de la loi du … tendant à lutter contre la discrimination entre les femmes et les hommes, et de la loi du ... modifiant la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme et la xénophobie*) seeks to amend the Code of civil procedure as regards litigation based on the above legislative texts.

At the time of writing, it is still uncertain whether these bills will be adopted prior to the dissolution of the parliamentary assemblies on May 2nd, 2007 (in view of the June 2007 general elections), and if so, whether they will significantly amended in the course of the parliamentary procedure. It has been agreed that the report would mention the bills currently pending, without however prejudging the outcome of the parliamentary procedure. [NOTE. After the completion of this report, the legislative package was approved by a final vote of the Senate on 26 April 2007 and have been published in the official gazette (*Moniteur belge*) on 31 May 2007].

0.1 The national legal system

The complexity of the division of tasks between different levels of government in Belgium constitutes the most serious obstacle to the adequate implementation of the Race and Employment Directives in the Belgian legal order. On 12 June 2006, the Minister of Social Integration and Equal Opportunities requested a first opinion of the Council of State (legislative section) on three draft bills mentioned above which he intended to propose for parliamentary adoption. The Council of State (general assembly of the legislative section) delivered this opinion on 11 July 2006.[7] In that opinion, the Council of State essentially restates and clarifies the existing allocation of powers between the Federal State, the Regions and the Communities in the adoption of antidiscrimination legislation and policy. This may be summarized as follows.

In Belgium's federal system, the competence to legislate on discrimination in the areas covered by the Race and Employment Directives is divided between the Federal State, the three Communities[8] and the three Regions[9], to which extensive legislative powers have been attributed since 1970, and especially since the constitutional reforms of 1980 and 1988, in the fields of education, culture and socio-economic policy[10]. According to the Council of State[11], even where higher-ranking norms (including international obligations imposed on the Belgian State) place obligations on all the organs and powers of the Belgian State, the implementation

[7] Council of State, opinions n° 40.689/AG, 40.690/AG, and 40/691/AG, of 11 July 2006. These opinions are appended to the governmental bill presented to the House of Representatives on 26 October 2006 (doc. 51 2720/001). Following a number of changes to the original bill, a second text was presented to the Council of State, on 2 October 2006. However, the second opinion of the Council of State did not reexamine the question of the division of competences.

[8] French-speaking Community (*Communauté française*), Flemish Community (*Vlaamse Gemeenschap*), German-speaking Community (*deutschsprachigen Gemeinschaft*).

[9] Walloon Region (Région wallonne), Flanders (Vlaams Gewest), and Brussels-Capital (Région de Bruxelles-capitale).

[10] Regions and Communities adopt decrees. These decrees are called ordinances (*ordonnances*) with respect to the Region of Brussels-Capital. The federal legislature (Senate and House of Representatives) adopts laws.

[11] See *Conseil d'État (section de législation), Avis 28.197/1 du 16 février 1999, Documents parlementaires, Chambre des Représentants, session ord. 1998-1999*, no. 2057/1 and 2058/1, pp. 34-36. This is confirmed in the opinion of 11 July 2006.

of those norms must comply with the division of competences regulated by the Constitution[12]: the various entities may not legislate beyond their competences, even under the pretext of ensuring compliance with the State's international obligations.

In principle, the Federal State is responsible for regulating employment contracts[13] and general rules of civil and criminal law. To the extent it takes the form of such rules, anti-discrimination legislation will therefore normally be dealt with at federal level[14]. However, since these residual competences of the Federal State may not be exercised in order to intrude upon areas which are reserved to the Regions or Communities,[15] they may not affect, in particular, the exclusive competence of the Regions and Communities to define the status of their personnel (articles 9 (public bodies) and 87 (personnel of the governments) of the Special Law on institutional reforms of 8 August 1980[16]) ; the exclusive competence of the Communities to define the status of schoolteachers and other personnel in the educational sector (art. 127 § 1, al. 1, 2° of the Constitution)[17]; or the exclusive competence of the Communities in the field of disability policy (Article 5 § 1, II, 4° of the Special Law of 8 August 1980). And, indeed, all the federal entities – the Flemish Community/Region, the Region of Brussels-Capital, the Walloon Region, the French-speaking Community and the German-speaking Community – have taken such initiatives to ensure the implementation of the Race and Employment Directives[18]; but the general rules are nevertheless laid down at federal level. If we take as departure point the areas to which the Racial Equality and Employment Equality Directives apply, we may define the existing situation thus :

- *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[19]), the Constitution and the Special Law of 8 August 1980 provide that:
  - social security is a federal matter (Art. 6 § 1, VI, al. 4, 12° of the Law of 8 August 1980)

[12] The Council of State has confirmed this position on a number of occasions, most recently in its opinion of 11 July 2006 mentioned above. But see also, for instance, the opinion delivered on 10 August 1994 by the Council of State when confronted with the Bill which would later become the Decree of 6 April 1995 on the integration of persons with disabilities (*Décret du 6 avril 1995 relatif à l'intégration des personnes handicapées*) (*Conseil d'État* (*section de législation*), *avis* 23.478/2/V); the opinion delivered on 11 February 2004 on a preliminary version of the German-speaking Community's Decree on the guarantee of equal treatment in the labour market (*Conseil d'Etat (section de législation), avis 36.415/2*) ; or the opinion delivered on 25 March 2004 on a preliminary version of the French-speaking Community's Decree on the implementation of the principle of equal treatment (*Conseil d'Etat (section de législation), avis 36.788/2).*

[13] With regard to employment law, see Art. 6 § 1, VI, al. 4, 12° of the Special Law on institutional reforms of 8 August 1980 (*Loi spéciale de réformes institutionnelles*, *Moniteur belge*, 15 August 1980).

[14] See however the critique of the Law of 25 February 2003 in that respect by J. Velaers, "De horizontale werking van het discriminatieverbod in de antidiscriminatiewet. Enkele constitutionele beschouwingen", in J. Velaers (ed.),*Vrijheid en gelijkheid. De horizontale werking van het gelijkheidsbeginsel en de nieuwe antidiscriminatiewet*, Maklu, Antwerp, p. 289, esp. p. 305. See also J. Vrielink, S. Sottiaux and D. De Prins, "De antidiscriminatiewet. Een artikelgewijze analyse", *NJW*, 2003, p. 258, esp. p. 268.

[15] See the two opinions of the Council of State, respectively from 16 November 2000 and from 21 December 2000: *Conseil d'État* (*sect. légis.*), *Avis* no. 30.462/2 du 16 novembre 2000, Doc., *Sénat, sess.* 2000-2001, 21 décembre 2000, no.2-12/5; and *Conseil d'État* (*sect. légis.*), *avis* no. 32.967/2, of 18 February 2002. In its opinion of 16 November 2000 the Council of State notes that the federal legislature may not use the need to fight against discrimination as a pretext to exercise competences which are attributed exclusively to the Regions or Communities, but in exercising its general competence in the fields of criminal, civil, commercial or employment law, it may affect situations in which the Regions or Communities have the power to adopt measures.

[16] *Moniteur belge*, 15.8.1980.

[17] This is confirmed by the choice made by the bills currently submitted for adoption by the Parliament to exclude these employment relationships, which are covered by Articles 9 and 87 of the Special Law of 8 August 1980 and by Article 127 § 1 al. 1, 2° of the Constitution, from the scope of application of the federal antidiscrimination legislation (see, in particular, Article 4 of the general anti-discrimination bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*)).

[18] See below on the state of implementation of the Racial Equality and Employment Equality Directives (sect. 02).

[19] Article 3(1), (e) to (h) of Directive 2000/43/EC.

- healthcare is essentially a competence of the Communities, except for certain matters including the adoption of framework legislation and health insurance, which remain matters of federal competence (Art. 5 § 1, I, 1°, of the Law of 8 August 1980)
- with a few exceptions, social aid is a competence of the Communities. The exceptions include the adoption of framework legislation on public social assistance centres (centres publics d'aide sociale), which remains a federal competence (Art. 5 § 1, II, 2°, of the Law of 8 August 1980)
- education is a competence of the Communities (Article 127 § 1, 2° of the Constitution)
- social housing is a competence of the Regions (Article 6 § 1, IV of the Law of 8 August 1980), while the Federal State remains competent as regards the rules relating to the private housing market, in particular by regulating the conditions of rent (see Book III, Title VII, chap. II of the Civil Code, most recently amended by the Law of 26 April 2007 [*Loi portant des dispositions en matière de baux à loyer*, *Moniteur belge*, 5.6.2007])
- prohibition of discrimination in the access to and supply of goods and services available to the public should normally be ensured through the adoption of general rules of civil or criminal law prohibiting discrimination, which could be adopted at federal level, however for certain specific areas the Regions or Communities may be competent.

- *With respect to the implementation of the principle of equal treatment in the fields to which both the Race and the Employment Directives apply*, the Law of 8 August 1980 specifically reserves to the federal level the competence to legislate on employment law[20]; the Regions and Communities however have certain competences in the domain of employment policy. The Regions have been granted competences relating to the placement of workers (which includes vocational guidance) and the adoption of programmes for the professional integration of the unemployed[21]; the Communities have been granted competences relating to vocational training[22], although as explained below, in the French-speaking part of the State, vocational training has been regionalised – it has been transferred from the French-speaking Community to the Walloon Region and the Region of Brussels-Capital.

With respect specifically to the *professional integration of disabled persons* however, the Special Law of 8 August 1980 transferred to the Communities competence in the field of *disability policy* (Article 5 § 1, II, 4° of the Special Law of 8 August 1980 (*Loi spéciale de réformes institutionnelles*)). It is unclear whether, for instance, provisions relating to the obligation to provide effective accommodation in the context of employment should be adopted at federal level, as part of general employment anti-discrimination legislation, or at the level of the Communities (or Regions, in cases where the competent community has transferred that competence), as part of the policy on the professional integration of disabled people. The opinion delivered by the Council of State on 11 July 2006 sheds no new light on this question. The government considered however that, in one of the three legislative bills proposed for adoption to the Parliament, it could define denial of reasonable accommodation as a form of prohibited discrimination[23]: the assumption is that the fact that disability policy is in principle allocated to the Communities does not prohibit the Federal State from including a general prohibition to deny reasonable accommodation to a person with a disability, as part of a general antidiscrimination legislation.

[20] Article 6 § 1, VI, al. 5, 12° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.
[21] Art. 6(1), IX, 1° and 2° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.
[22] Article 4, 15° and 16° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.
[23] This is included in the third bill presented to Parliament on 26 October 2006 (*Projet de loi tendant à lutter contre certaines formes de discrimination*), briefly presented in the introductory note above.

Although the Constitution and the Special Law of 8 August 1980 implementing the Constitution have allocated competences between the Federal State, the Regions and the Communities, Article 138 of the Constitution gives the French-speaking Community the option of transferring certain competences to the Walloon Region and to the French Community Commission of the Region of Brussels-Capital (*commission communautaire française*). A decree adopted on that basis[24] gives the Walloon Region and the French Community Commission in the Region of Brussels-Capital the authority to adopt measures to prohibit discrimination in the sphere of vocational training. On the basis of a similar delegation of competences, the German-speaking Community has exercised the competences allocated to the Walloon Region in the area of employment policy by Article 6 § 1, IX of the Special Law of 8 August 1980 on institutional reforms for the territory of the German-speaking Region since 1 January 2000[25].

It will be noted finally that apart from the specific arrangements governing competences in the field of vocational training (Communities)[26] or placement of workers (Regions), certain employment relationships cannot be regulated at federal level, despite the general competence the Federal State has preserved on employment law generally. Indeed, Council of State has confirmed in its opinion of 11 July 2006 that the rules governing the status of personnel (including those employed in the educational systems) of the Regions or Communities are the exclusive competence of the Communities[27], and may not be regulated by the federal legislature[28].

0.2 State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.
Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?

Victims of discrimination, either in employment relationships or in the broader spheres to which the prohibition of discrimination under Directive 2000/43/EC applies, were afforded a certain level of protection in the Belgian legal order before Directives 2000/43/EC and 2000/78/EC were adopted in 2000. In particular, the Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (*Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*), which initially made it a criminal offence to publicly incite discrimination against a person or a group on the basis of race,

[24] Article 3, 4° of the Decree of 19 July 1993 attributing the exercise of certain competences of the French-speaking Community to the Walloon Region and the French Community Commission (*Décret attribuant l'exercice de certaines compétences de la Communauté française à la Région wallonne et à la Commission communautaire française*), *Moniteur belge*, 10 September 1993.
[25] This results from the Decrees of 6 and 10 May 1999 concerning the exercise by the German-speaking Community of the competences of the Walloon Region in the areas of employment and excavations.
[26] It will be noted that, during the parliamentary discussions that led to the adoption of the Anti-discrimination Law of 25 February 2003, an amendment was proposed to explicitly refer to vocational training and vocational guidance among the areas covered, *ratione materiae*, by the Federal Law (Amendment no. 48 by Ms Schauvliege, Doc. parl., Ch., doc. 50-1578/005, p. 10). This amendment was rejected without an explanation. As a result, the current text of the Federal Law of 25 February 2003 should be interpreted as not covering these fields, which fall within the Communities' competences. If the amendment had been successful, the federal legislature would probably be considered as having legislated beyond its powers.
[27] See Article 127 of the Constitution, and for confirmation that this provision of the Constitution implies that the Communities have exclusive competence concerning the definition of the status of staff in the educational system, Constitutional Court (Cour d'arbitrage), Case no.2/2000, 19 June 2000, point B.3.2.
[28] Article 87 of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.

colour, descent or national or ethnic origin, had been extended by the Law of 12 April 1994 to cover the provision of goods and services and employment relationships[29]. Article 2 al. 1 of the Law of 30 July 1981 currently provides certain criminal sanctions against any person who, in providing or offering to provide a service, a good or the enjoyment of a good, commits a discriminatory act against a person on the ground of his or her race, colour, descent, ethnic or national origin[30]. Article 2bis of the Law of 30 July 1981, as amended in 1994, provides criminal sanctions against any person who, in job placement, vocational training, recruitment, execution of the employment contract or dismissal, commits discrimination against a person on the ground of his or her race, colour, descent, origin or nationality. The Law of 30 July 1981 however forms part of criminal legislation, and the evidentiary burdens facing the prosecution in that context – or, indeed, an alleged victim of discrimination – often appear insuperable, because the perpetrator's intent has to be established.

In order to improve the effectiveness of the prohibition of discrimination based on 'race', color, descent, national or ethnic origin, and nationality, the first of the legislative proposals presented on 26 October 2006 (*Projet de loi modifiant la Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie)* provides for the modification of the Law of 30 July 1981. This racial equality bill seeks to take into account both the Racial Equality Directive (2000/43/EC) and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. The proposed amendments seek to extend the scope of the Law of 30 July 1981 (to all forms of discrimination based on 'race', color, descent, national or ethnic origin, and nationality), but to provide for civil sanctions only in most cases, including in the cases which, under the current legislation, may lead to criminal convictions. The civil sanctions include the possibility for the victim to obtain the allocation of a lump sum in compensation in lieu of damages awarded according to the actual prejudice of the victim ; the possibility to seek the immediate cessation of certain discriminatory practices through a judicial order (injunction); and the protection of the victim against reprisals (victimization). Criminal sanctions are provided only in a limited range of cases : apart from the incitement to discrimination, hatred or violence or the propagation of ideas of racial superiority, or the membership of, or assitance to, a group advocating racial discrimination (both in accordance with Article 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination), criminal sanctions may be imposed on public agents (civil servants) committing a discrimination.

On 6 December 1983, Collective agreement n° 38 relating to the recruitment and selection of workers (*convention collective du travail n° 38 concernant le recrutement et la sélection de travailleurs*) was signed, and made obligatory in part in 1999[31]. This collective agreement seeks to protect the worker's right to private life in the process of recruitment, and it has been

[29] The Law was modified again on a minor issue on 7 May 1999, and finally by the Law of 20 January 2003 reinforcing the legislation against racism (*Loi relative au renforcement de la législation contre le racisme, Moniteur belge,*12 February 2003). This last modification amends the Law of 30 July 1981 on minor points in order to contribute to the implementation of Directive 2000/43/EC. In particular, it extends the definition of prohibited discrimination in order to include the instruction to discriminate (addition of one alinea in Article 1 of the Law – see 2.5 below, on the implementation of Art. 2(4) of the Directives).

[30] This takes into account the terminological changes introduced by the Law of 30 January 2003 to the Law of 30 July 1981.

[31] Made obligatory by the Royal Decree (Arrêté royal) of 31 August 1999 (see *Arrêté royal du 31 août 1999 rendant obligatoire la Convention collective du travail n° 38quater du 14 juillet 1999, conclue au sein du Conseil national du travail, modifiant la convention collective du travail n°38 du 6 décembre 1983, modifiée par les conventions collectives du travail no. 38bis du 29 octobre 1991 et 38ter du 17 juin 1998, Moniteur belge*, 21 September 1999). The original text of 1983 was modified by Collective Agreements no. 38bis of 29 October 1991, no. 38ter of 17 July 1998 and lastly no. 38quater of 14 July 1999.

supplemented with a prohibition of discrimination[32]. Article 2bis of Collective agreement n° 38 now reads:

> The employer may not treat candidates in a discriminatory fashion. During the procedure[33], the employer must treat all candidates equally. The employer may not make distinctions on the basis of personal characteristics, when such characteristics are unrelated to the function [to be performed by the prospective employee] or the nature of the undertaking, unless this is either authorised or required by law. Thus, the employer may in principle make no distinction on the basis of age, sex, marital status, medical history, race, colour, descent or national or ethnic origin, political or philosophical beliefs, membership of a trade union or of another organisation, sexual orientation or disability.

Five other instruments, however, have been adopted specifically[34] to ensure the implementation of Directive 2000/43/EC and Directive 2000/78/EC[35]. The most important of these is the Federal Law of 25 February 2003 on combating discrimination and amending the Act of 15 February 1993 setting up the Centre for Equal Opportunities and the Fight against Racism, which seeks to implement both Directives in a large number of matters and going beyond the scope of application ratione materiae of the Race Directive[36]. Although it has been partially annulled by the Constitutional Court (Court of Arbitration) in its judgment of 6 October 2004, the Law (in its present state, following that judgment) provides protection from both direct and indirect discrimination (Art. 2) in large areas of social life: the provision of goods or services when these are offered to the public; access to employment, promotion, conditions of employment, dismissal and remuneration, both in the private and in the public sector; the nomination of a public servant or his/her assignment to a service; reference in an official document; finally, access to and participation in, as well as exercise, of an economic, social, cultural or political activity normally accessible to the public. In most cases where discrimination is indeed committed, civil remedies will be available (the civil provisions of the Law are contained in its Chapter IV). Only exceptionally are certain criminal sanctions provided for discriminatory acts (Chapter III): following the annulment by the Constitutional Court (then Court of Arbitration) of Article 6, § 1, 2nd indent, and of Article 6 § 2 of the Law, these offences only concern those who publicly incite to discrimination, hatred or violence against a person, a group, a community or the members of a community[37]. The condition of publicity[38] which is required for incitement to discriminate to be a criminal offence implies that covert acts of discrimination do not constitute such a criminal offence. In addition, a discriminatory intention (‘abject motive’) behind certain offences may constitute an aggravating circumstance leading to heightened sanctions being imposed on the offender found guilty of having committed them.

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[32] The most recent version of Article 2bis in the Collective Agreement includes two new grounds of prohibited discrimination, sexual orientation and disability. This change, agreed upon by the most representative organisations of employers and workers on 14 July 1999, followed the ratification of the Treaty of Amsterdam of 2 October 1997 by the Belgian law of 10 August 1998 (*Moniteur belge*, 10 April 1999).

[33] The term “procedure” refers both to “recruitment” (referring to all the activities performed by an employer relating to advertising a vacancy) and to “selection” (referring to all the activities performed by an employer relating to hiring a candidate): see Art. 2 of Collective Agreement no. 38.

[34] Although not all these instruments cite the Directives in their Preamble, as they should under Article 16 al. 2 of Directive 2000/43/EC and Article 18 al. 3 of Directive 2000/78/EC.

[35] These instruments also have sought to implement Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002, amending Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 269 of 5.10.2002, p. 15), to which this report however shall not refer to further.

[36] Law of 25 February 2003

[37] Art. 6 § 1, 1st indent, of the Law of 25 February 2003.

[38] These conditions are those defined by Art. 444 of the Criminal Code (*Code pénal*).

As explained above, the government now proposes to abolish the Law of 25 February 2003 and to adopt, instead, a new law (*Loi tendant à lutter contre certaines formes de discrimination*) which would prohibit discrimination on the following grounds : age, sexual orientation, civil status, birth, property (Fr. 'fortune'), religious of philosophical belief, political opinion, language, actual or future state of health, disability, physical characteristic, genetic characteristic, and social origin. Discrimination on the other grounds covered by EU directives will be dealt with in other pieces of legislation : the Law of 30 July 1981, as amended, would cover all forms of discrimination on grounds of 'race', color, descent, national or ethnic origin, and nationality ; and a separate legislation, again, would cover all forms of discrimination on grounds of sex (*Loi tendant à lutter contre la discrimination entre les femmes et les hommes*).

The Regions and Communities have also taken action. The Flemish Community/Region adopted the Decree of 8 May 2002 on proportionate participation in the employment market (*Decreet houdende evenredige participatie op de arbeidsmarkt*)[39], which seeks both to prohibit direct and indirect discrimination on a number of grounds including but not limited to those listed in Article 13 EC, and to encourage the integration of target groups into the labour market by positive action measures (preparation of diversity plans and annual reports on progress made). This Decree has a limited scope of application, as it may only affect fields which fall under the competences of the Flemish Region or Community[40]. It therefore imposes obligations not on all employers, but only on[41]: a) persons or organisations which act as intermediates on the labour market by giving information on employment opportunities, offer vocational guidance and vocational training[42], and generally mediate between supply and demand on the labour market (*intermediaire organisaties*); b) the public authorities of the Flemish Region/Community, including those in the field of education (which is a competence of the Communities in the Belgian federal system); c) other employers and employees with respect only to vocational training and integration of persons with disabilities in the labour market (vocational training and disability policy are a competence respectively of the Communities and Regions in the Belgian federal system). Although the scope of application of the Flemish Decree is thus rather limited, it does have a fairly broad scope of application with respect to one of the prohibited grounds of discrimination, disability. Indeed, although the adoption of general anti-discrimination legislation is a federal competence, disability policy (the integration of disabled persons on the labour market) is a competence of the Regions, and a general prohibition on discrimination against persons with disabilities in the field of employment and occupation thus could be adopted at that level, insofar as it can be justified as an element of disability policy.

The French-speaking Community adopted a decree on the principle of equal treatment (*Décret relatif à la mise en œuvre du principe de l'égalité de traitement*) on 19 May 2004[43]. This text prohibits direct and indirect discrimination, including the instruction to discriminate. It applies to 1° public servants in the French-speaking Community administration, 2° the personnel of certain public interest organs attached to the Community, 3° all levels of education in the French-speaking Community, and 4° the *Centre hospitalier universitaire de Liège*, which is attached to the Community (article 3 § 1). It extends the prohibition of discrimination to the associations subsidised or otherwise recognised by the French-speaking Community (article 3 § 2). The decree specifies that it applies in the domains covered by the

[39] *Moniteur belge*, 26 July 2002, p. 33262.
[40] In contrast to the French-speaking part of Belgium, the Region and Community are merged in the Flemish part.
[41] See Art. 3 of the *Decreet houdende evenredige participatie op de arbeidsmarkt.*
[42] This refers essentially to the Vlaamse Dienst voor Arbeidsbemiddeling (VDAB) and the Vlaams Instituut voor Zelfstandig Ondernemen (VIZO).
[43] *Moniteur belge*, 7 June 2004.

competences of the French-speaking Community, as defined in the Belgian Constitution and the Special Law of 9 August 1980 on institutional reforms.

On 27 May 2004, the Walloon Region adopted a decree on equal treatment in employment and professional training (*Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle*)[44]. This Decree's scope of application is limited to the competences of the Walloon Region, including those attributed to it by the French-speaking Community in 1993[45] in the area of vocational training: the prohibition of discrimination contained under Articles 8 and 9 therefore applies to vocational guidance, socio-professional integration, the placement of workers, the allocation of aid for the promotion of employment, and vocational training, in both the public and the private sectors.

Finally, the German-speaking Community adopted the Decree on the guarantee of equal treatment on the labour market (*Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt*) on 17 May 2004[46]. The Decree implements Directive 2000/43/EC, Directive 2000/78/EC, and Directive 2002/73/EC, with respect only to the bodies or persons who fall under the competence of the German-speaking Community. Therefore, *ratione personae*, the Decree applies to the administration of that Community, to personnel employed in the Community's educational system, to intermediaries (*zwischengeschalteten Dienstleister*) with respect to the services they offer, and to employers with respect to the provision of reasonable accommodation (*angemessenen Vorkehrungen*) to disabled people prescribed by Article 13 of the Decree (Article 3). Article 4 of the Decree defines its scope of application *ratione materiae*. The Decree is to apply in particular to vocational guidance, professional counselling, vocational training and retraining (*Berufsorientierung, der Berufsberatung, beruflichen Aus- und Weiterbildung, Umschulung, Berufsbegleitung, Arbeitsvermittlung und des Zugangs zur Bildung*).

Mention should also be made of the Ordinance adopted by the Region of Brussels-Capital on 26 June 2003 (*Ordonnance relative à la gestion mixte du marché de l'emploi dans la Région de Bruxelles-Capitale*)[47], although this instrument relates to labour market intermediaries rather than than the implementation of Article 13 of the EC Directives as such. Whether public (ORBEM: *l'Office régional bruxellois de l'emploi*) or private (authorised private employment agencies), labour market intermediaries are obliged to respect a general requirement of non-discrimination (Article 4 § 2 of the *Ordonnance*[48] lists one of these entities' obligations as not to commit any discrimination). However, the remainder of the Ordinance is silent about the prohibition of discrimination (although Article 4 § 4 states that labour market intermediaries must abide by legislation concerning the protection of private life vis-à-vis the processing of personal data).

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[44] *Moniteur belge*, 23 June 2004.

[45] See Article 3, 4° of the Decree of 19 July 1993 attributing the exercise of certain competences of the French-speaking Community to the Walloon Region and the French Community Commission (*Décret attribuant l'exercice de certaines compétences de la Communauté française à la Région wallonne et à la Commission communautaire française*), *Moniteur belge*, 10 September 1993.

[46] *Moniteur belge*, 13 August 2004.

[47] *Moniteur belge*, 29 July 2003.

[48] The French text of the provision reads: "*ne pas pratiquer à l'encontre des chercheurs d'emploi de discrimination fondée sur la race, la couleur, le sexe, l'orientation sexuelle, la langue, la religion, les opinions politiques, ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance, le statut matrimonial ou familial, l'appartenance à une organisation de travailleurs, ou tout autre forme de discrimination telle que l'âge ou le handicap. Par dérogation à l'alinéa précédent, des actions positives au besoin de certains chercheurs d'emploi appartenant à un groupe à risques sont toutefois autorisées par le Gouvernement*" "not to exercise vis-a-vis job applicants discrimination based on race, colour, sex, sexual orientation, language, religion, political or other opinions, national or social origin, membership of a national minority, wealth, descent, marital or family status, membership of an employees' organisation such as age or disability. In derogation of the preceding line, positive actions in favour of certain job applicants who belong to a vulnerable group are however permitted by the Government".

The number of these instruments should not obscure the fact, however, that still more needs to be done for implementation to be complete. The remaining shortcomings are divided into five groups. First, certain legislative initiatives need to be taken in order for the process of implementation to be complete:

- The Walloon Region and the Region of Brussels-Capital have not legislated in order to implement the Racial Equality and Employment Equality Directives as regards their own statutory personnel.
- The Commission communautaire française, to which the French-speaking Community has transferred its competences from 1993 in the sphere of vocational training, and the Region of Brussels-Capital, with respect to its own personnel, still have to take action in order to ensure implementation of Directives 2000/43/EC and 2000/78/EC (see paragraph 3.2.1 and 3.2.4 of the report). That this is a competence of the Region of Brussels-Capital, and of no other power, has been confirmed by the Council of State in its opinion of 11 July 2006.
- Since social housing is in principle a competence of the Regions,[49] which the Council of State has clearly reaffirmed in its opinion of 11 July 2006, the Regions should take action in order to ensure the implementation of the Racial Equality Directive in this field, which the federal bills (the general antidiscrimination bill and the racial equality bill) do not cover.

Second, initiatives should be taken to enlarge the competences of the equality body (the Centre for Equal Opportunities and Opposition to Racism) which should be empowered to fulfil the tasks defined under Article 13 of the Race Directive, also with respect to legislation adopted at regional and community level to implement this Directive. This body is currently competent at federal level as it a federal agency, created initially by the Federal Law of 15 February 1993. It is not institutionally linked to either the Regions or the Communities. In order for the regional or community decrees to be monitored by the Centre, a protocol of cooperation must be concluded between the Federal Government and the executive of the relevant Region or Community. However the respective situations of the different Regions and Communities are to be distinguished here:

- The Centre for Equal Opportunities and Opposition to Racism should be competent to contribute to the enforcement of the Decree of 8 May 2002 on proportionate participation in the employment market (*Decreet houdende evenredige participatie op de arbeidsmarkt*)[50], using the same mechanisms as those available at federal level[51]. The Decree on the guarantee of equal treatment on the labour market (*Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt*) adopted by the German-speaking Community on 17 May 2004[52] also provides in Art. 15 that the Executive of the German-speaking Community may entrust one or more organs with the promotion of the principle of equal treatment, including assistance to the victims of discrimination under the Decree

[49] Article 6, § 1er, IV, of the Special Law of 8 August 1980; Article 4, al. 1, of the Special Law of 12 January 1989 on the institutions of Brussels .
[50] *Moniteur belge*, 26.7.2002, p. 33262.
[51] Article 8 al. 1 of the Executive Regulation implementing the Decree of 8 May 2002 stipulates in this respect that the Flemish Government shall conclude a convention with the Centre for Equal Opportunities and the Fight against Racism: see Regulation [of 30 January 2004] of the Flemish Government concerning the execution of the Decree of 8 May 2002 on proportionate participation in the employment market regarding professional orientation, vocational training, career counseling and the action of labour market intermediaries (*Besluit [van 30 Januari 2004] van de Vlaamse regering tot uitvoering van het decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling, B.S.* (*Belgisch Staatsblad / Moniteur belge*), 4 March 2004, p. 12050).
[52] *Moniteur belge*, 13 August 2004.

and the production of reports and recommendations. With regard to monitoring compliance with these two instruments, a protocol thus may be concluded in order to entrust the Centre for Equal Opportunities and Opposition to Racism with the tasks defined in Article 13 of the Race Directive.

- By contrast, the Decree on the implementation of the principle of equal treatment (*Décret relatif à la mise en œuvre du principe de l'égalité de traitement*)[53] adopted on 19 May 2004 by the French-speaking Community does not set up any specific enforcement body to monitor the effectiveness of its implementation. In fact, this Decree is silent about enforcement: in particular, it does not seem to comply with either Article 13 of Directive 2000/43/EC, nor Article 9(2) of Directive 2000/78/EC or Article 7(2) of Directive 2000/43/EC given the absence of any provision regarding the right of certain appropriate organisations to engage in, on behalf or in support of the complainant, judicial or administrative procedures which ensure the enforcement of the guarantee of equal treatment offered by the Decree, and the absence of any role of the Centre for Equal Opportunities and Opposition to Racism in the implementation and monitoring of the Decree.
- For the same reasons, although Article 11 of the Decree on equal treatment in employment and professional training (*Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle*)[54] adopted by the Walloon Region on 27 May 2004 provides for a form of monitoring of the Decree by the Institut wallon de l'évaluation, de la prospective et de la statistique (IWEPS) – the IWEPS must essentially report on the application of the Decree and make recommendations - and although the Decree contains clauses providing for a conciliation procedure (Article 12) and specifies that the Walloon Government will designate which services will be entrusted with monitoring the Decree and its implementing regulations (Article 13), these provisions appear insufficient in comparison to what is required by Article 9(2) of Directive 2000/78/EC or Articles 7(2) and 13 of Directive 2000/43/EC.

Third, there are difficulties relating to the existing legal framework, requiring amendments to existing legislation rather than the adoption of new instruments. In this category again a distinction is to be made between the Regions and Communities on the one hand, and the federal level on the other. The hesitance of the Regions and Communities concerning their competence to adopt procedural rules, relating for instance to sanctions (penal or civil), to the *locus standi* of organisations, to the shift of the burden of proof in discrimination cases, or to the powers of the court to which a complaint is filed alleging discrimination, means that the implementation of Council Directives 2000/43/EC and 2000/78/EC remains unsatisfactory on a number of issues which fall under the competences of the Regions and Communities. Specifically:

- Neither the Decree adopted on 19 May 2004 by the French-speaking Community nor the Decree adopted by the Walloon Region on 27 May 2004 seem to accord with the requirement set forth in Article 7(2) of Directive 2000/43/EC or Article 9(2) of Directive 2000/78/EC, and lack any provision giving certain appropriate organisations the power to engage, on behalf or in support of the complainant, in judicial or administrative procedures provided for the enforcement of the guarantee of equal treatment set out by these Decrees (see paragraph 6.2).
- Neither the Decree adopted by the French-speaking Community, the Decree adopted by the Walloon Region, nor the Decree adopted by the German-speaking Community contain any provisions on reprisals. In the view of the author of this report, although this is to be

[53] *Moniteur belge*, 7 June 2004.
[54] *Moniteur belge*, 23 June 2004.

explained by the opinion of the Council of State that Regions and Communities may not legislate on a topic that relates to the regulation of employment contracts, this is in violation with Article 9 of Directive 2000/43/EC and Article 11 of Directive 2000/78/EC.

Fourth, certain difficulties concern the Federal Law of 25 February 2003; all of these should be remedied, however, when this law is amended in order to ensure that it remains workable and effective after the judgment of the Constitutional Court of 6 October 2004 partly annulling this law. These difficulties are:

- The coexistence of the notion of harassment in the Federal Law of 25 February 2003 and in the Law of 4 August 1996 as amended by the Law of 11 June 2002 could be the source of legal uncertainty, as harassment in the workplace would fall under either law, with various consequences concerning, *inter alia*, the protection from reprisals of witnesses of the harassment (no such protection is provided under the Law of 25 February 2003) or the power of the judge to deliver an injunction prohibiting the continuation of the discrimination (*action en cessation*) (this power does not exist under the Law of 4 August 1996). The victim of harassment may have to rely on both statutes simultaneously in order to seek the highest level of protection. In order to remedy this, the bills currently under examination, submitted to the Parliament on 26 October 2006, provide that where the Law of 4 August 1996 (as amended) applies (i.e., in employment relationships), only this law shall be relied upon and not the prohibition of harassment as a form of discrimination in the three anti-discrimination statutes which are currently being proposed.[55]
- Article 3 of the Law of 25 February 2003 mentions that the prohibition of discrimination as laid down in that law does not violate fundamental rights and freedoms stipulated in the Constitution or international treaties: in other words, fundamental rights are recognised by the legislature as retaining their primacy. The Law could have specified that only such restrictions to the prohibition of discrimination which are strictly necessary (and, therefore, which remain within the bounds of proportionality) for the protection of fundamental rights listed by that provision are acceptable; moreover, Article 2(5) of the Directive requires that exceptions to the principle of equal treatment are explicitly laid down in national law, which seems to exclude such a blanket justification. It is therefore to be welcomed that the legislative bills currently pending before the Parliament do not contain such a clause.
- Article 9 of Directive 2000/43/EC imposes on Member States the duty to ensure that not only the employee against whom the discrimination has been committed should be protected from reprisal, but also other employees connected to a complaint or to legal proceedings. The wording of Article 21 of the Law of 25 February 2003 appears too narrow to include this type of protection; although it cannot be excluded that the same problem may be raised by Article 21 of the Flemish Decree of 8 May 2002, this can be dealt with by judicial interpretation without it being imperative to modify the Decree's wording (see paragraph 6.4). However, Article 16 § 5 of the Bill for a Law combating certain forms of discrimination (*Projet de loi tendant à lutter contre certaines formes de discrimination*) and Article 15 § 9 of the racial equality bill (Bill modifying the Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (*Projet de loi modifiant la Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie))* fill this lacuna : these provisions stipulate that not only the victim having filed a complaint, but also any witness, are protected from victimization.
- Article 18 of the Federal Law of 25 February 2003 provides that contractual clauses which are in violation of the prohibition of discrimination as defined in the law shall be

[55] See, e.g., Article 6 of the Bill for a Law combating certain forms of discrimination (*Projet de loi tendant à lutter contre certaines formes de discrimination*).

considered null and void, however this does not extend to collective agreements, nor, for instance, to the internal rules adopted within undertakings, in violation of Art. 16, b), of Directive 2000/78/EC and Article 14, b), of Directive 2000/43/EC (see paragraph 8.2). This lacuna in the Law of 25 February 2003 should be remedied by Article 15 of the general antidiscrimination bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*) and Article 13 of the racial equality bill (*Projet de loi modifiant la Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie),* both of which now refer not only to contractual clauses, but also to any provisions which are in violation of the prohibition of discrimination, and will be considered null and void.

- Finally, it has been pointed out in previous reports that the definition of indirect discrimination in Article 2(2) of the Federal Law of 25 February 2003 is insufficient in that it omits any explicit reference to the principle of necessity, which identifies the relationship between the aim of the allegedly discriminatory provision, criterion or practice and the allegedly discriminatory measure which seeks to fulfil that aim; and in that it does not refer to the legitimacy of the aim pursued by the measure alleged to constitute indirect discrimination. This should be remedied by the laws currently before Parliament for adoption : Article 9 of the general antidiscrimination bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*) and Article 9 of the racial equality bill (*Projet de loi modifiant la Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie)* both refer to the need to justify any measure which may result in an "indirect discrimination" both by the legitimacy of the objective pursued and by the necessity of the measure adopted.

Fifth, it should be emphasized that the general antidiscrimination bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*) and the racial equality bill (*Projet de loi modifiant la Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie)* both contain a "safeguard clause" (Article 11 in both texts) stating that they will not, per se, apply to differences in treatment imposed by another legislation, or by virtue of another legislation : the idea is to ensure that national jurisdictions will not refuse to apply existing legislation because it would be in violation with antidiscrimination legislation ; it is not to immunize any laws or regulations which might be found in violation of the principle of equal treatment, but the procedures will remain the classical ones in cases where a law is found to be potentially unconstitutional (referral to the Constitutional Court, or – more exceptionally – direct application of an international human rights instrument in order to disapply the national legislation in violation with that instrument). Whether these means of ensuring that the requirement of equal treatment be complied with will suffice to weed out existing laws or regulations from any discriminatory clause remains to be seen.

0.3 Case-law

The judgments are presented in chronological order:

Judgment n° 157/2004 of the Constitutional Court, delivered on 6 October 2004

a. Name of the court: Constitutional Court (Cour d'arbitrage)
b. Judgment n° 157/2004 of the Constitutional Court, delivered on 6 October 2004 – see http://www.arbitrage.be/public//f/2004/2004-157f.pdf
c. Name of parties: actions of annulment lodged against the Law of 25 February 2003 combating discrimination and modifying the Law of 15 February 1993 creating a Centre for Equal Opportunities and Against Racism, by members of the Parliament from the extreme-

right "Vlaams Blok" party (now renamed "Vlaams Belang"), and by Mr Storme, who professes his sympathies for this party.

d. Brief summary of the key points of law: The judgment annuls three provisions of the Federal Law of 25 February 2003 (the main piece of legislation implementing Directives 2000/78/EC and 2000/43/EC) and certain words in five other provisions, and it offers a restrictive interpretation of six other provisions of the Anti-discrimination Law. Essentially, the judgment limits the scope of the criminal provisions of the Anti-discrimination Law, but extends the scope of its civil provisions in order to cover a broader range of discriminatory acts, beyond the list of grounds originally contained in the Law. The most striking aspect of the judgment is that the Court decided to extend the scope of application of the Law to all discrimination, direct or indirect, *whichever the ground* on which it is based. Indeed, when the Anti-discrimination Law was adopted, the choice had been made to *limit* the list of prohibited grounds of discrimination: the prohibition of discrimination therefore extended only to discrimination on the grounds of sex, race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, wealth, age, religious or philosophical conviction, actual or future state of health, disability or a physical characteristic. The Constitutional Court considered however that there is no reasonable justification for excluding the applicability of the civil provisions of the law to discrimination practiced, in particular, on grounds of language or political opinion: in the view of the Court, the choice made by the legislature creates the false impression that other forms of discrimination, based in particular on language or political opinion, but which could also be based on other, non-enumerated grounds, would be less worthy of protection (B.5 to B.15). As a consequence, the definitions of direct and indirect discrimination contained in the Law were broadened to prohibit discrimination based on any ground, including – but not limited to – the long list already contained in the original version of the Law, and language and political opinion.

Judgment of 7 December 2004 delivered by the First Instance Tribunal of Antwerp (criminal division)

a. Name of the Court: First Instance Tribunal of Antwerp (criminal division) in the case of the Public Prosecutor and Centre for Equal Opportunities and the Fight against Racism v. H. Neuville

b. Judgment of 7 December 2004 (ref. 4918 – AN56.99.441-03) (available on the website of the Centre for Equal Opportunities and Opposition to Racism: www.diversiteit.be / www.diversité.be)

c. Name of the parties: Public Prosecutor and Centre for Equal Opportunities and the Fight against Racism v. H. Neuville

d. Brief summary of the key points of law: This judgment found the defendant, Mr Neuville, guilty of direct discrimination on the ground of race for having refused to rent his apartment to a Belgian couple of Congolese origin (Masudi-Makiadi) put forward by the rental agency despite the fact that the couple had sufficient income (both had permanent employment) and proposed to show references as proof of their reliability as tenants. The conviction is based on the Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (*Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*), the extension of which by the Law of 12 April 1994 (mentioned in section 0.2, above) made the conviction of Mr Neuville possible. The judgment delivered on 7 December 2004 found that the defendant had committed the offence defined by Article 2 al. 1 of the Law of 30 July 1981[56], but the conviction was suspended for three years (the defendant also had to pay 250 euros in damages to the Centre for Equal Opportunities and the Fight against Racism as a civil party in these proceedings). The tribunal considered that these

[56] Cited above, see footnote 25.

provisions implied a restriction to the freedom of contract, which is not unlimited, but which, when it leads to a refusal to contract, must have an objective and reasonable justification.

Judgment of 19 April 2005 of the president of the First Instance Court (Tribunal de première instance) of Nivelles

a. Name of the court: First Instance Court (Tribunal de première instance) of Nivelles
b. Judgment of 19 April 2005 of the President of the First Instance Court ref. T. N° 3643/05, case n° 04/2400/A (not available electronically).
c. Name of the parties: Centre for Equal Opportunities and Fight against Racism and others v. X
d. The judgment applied the Federal Anti-discrimination Law of 25 February 2003 in a context where a homosexual couple had expressed their interest in renting a house but were finally rejected by the owner for discriminatory reasons: the owner chose to rent the house to a "traditional couple" with whom the owner was familiar, and the rental agency passed on this information to the homosexual couple. The judgment considered that the rental agency did not itself commit a discriminatory act, insofar as it simply gave to the couple against whom the discrimination was committed the information that the house had been rented. However the judgment did conclude with an injunction addressed to the other defendants (the owners of the property) not to repeat the discrimination in the future, under the threat of a fine of 100 euros per violation of that injunction.

Judgment of 14 June 2005 delivered by the Antwerp Court of Appeal (Hof van Beroep te Antwerpen)

a. Name of the court: Antwerp Court of Appeal (Hof van Beroep te Antwerpen)
b. Judgment of 14 June 2005 (ref. AR/2004/2811) (available on http://www.diversiteit.be/CNTR/NL/racism/jurisdiction/r05-06-14_antwerpen.htm).
c. 9 appelants v. Province of Limburg (Provinciebestuur van Limburg)
d. The appeals followed the adoption of new regulations by a professional school in Hasselt (*Provinciale Handelsschool* of Hasselt, which is attached to the Province of Limburg), stating that after 1 September 2004 the wearing of headscarves would be prohibited in classrooms, study rooms and eating areas. Those regulations were then approved by the provincial authorities (*Besluit van de Bestendige Deputatie van de Provincieraad van Limburg*) on 1 July 2004. They were then challenged by the parents of nine girls who wore headscarves on two grounds: the action alleged that the Law of 25 February 2003 had been violated, and that the regulations are in violation of freedom of religion. A first decision was adopted on 5 October 2004 in summary proceedings, denying the injunction sought by the applicants. On 14 June 2005, the Antwerp Court of Appeal decided to reject the appeal filed against this initial decision. It considered that Article 2 § 4 of the Law of 25 February 2003 (which defines the material scope of the application of the prohibition of discrimination) may not be interpreted as including education within its material scope of application: indeed, although the last indent of this provision states that the prohibition of discrimination applies to "access to and participation in, as well as the exercise of, an economic, social, cultural or political activity open to the public", the Court of Appeal noted that this formulation is less explicit than that of Article 3(1) of Directive 2000/43/EC which, by way of contrast, explicitly refers to education under g). The Court of Appeal moreover noted that the freedom of religion as guaranteed under Article 9 ECHR is not an absolute right, but instead may be restricted under certain conditions as specified under Article 9(2) ECHR, and that these conditions were met by the circumstances of the case: indeed, it found that the school regulations were both precise and accessible, that they sought to pursue the legitimate aim of preserving order in the teaching institution and of protecting the rights of others, in particular against unwanted

proselytism, and that any restriction to the applicants' freedom of religion was narrowly tailored to achieve that objective, thus respecting the condition of necessity. The Court of Appeal did not examine the regulations challenged in the light of the non-discrimination clause of the ECHR (Art. 14, in combination with Art. 9 ECHR) or the equality clause of the Belgian Constitution (Art. 10 and 11).

Judgment of 8 July 2005 delivered by the Brussels Commercial Tribunal (Rechtbank van Koophandel)

a. Name of the court: Brussels Commercial Tribunal (Rechtbank van Koophandel te Brussel)
b. Judgment of 8 July 2005 delivered by the Brussels Rechtbank van Koophandel (first instance court which has special competences with regard to businesses) (ref. V.S. 2353/04) (available on the website of the Centre for Equal Opportunities and Opposition to Racism: www.diversiteit.be / www.diversité.be).
c. Van den Brande and the Centre for Equal Opportunities and Fight against Racism v. N.V. Pizza Belgium and others
d. Article 19 § 3 of the Federal Anti-discrimination Law of 25 February 2003 provides that where the alleged victim produces certain facts which may lead to a presumption of discrimination, it will be for the defendant to establish that no such discrimination has in fact taken place. In this case, the alleged victim had entered a Pizza Hut restaurant on 6 October 2003 accompanied by four friends. She also had her guide dog with her as she is visually impaired. When the group entered the restaurant, the initial reaction of the staff was to state that dogs were not allowed in the establishment. According to the alleged victim and her friends, the employees and the manager of the restaurant confirmed their refusal, finally obliging them to leave the restaurant. The defendants on the other hand insisted that they offered to seat the group at one, and then at another table, which the plaintiffs refused. The asserted policy of Pizza Hut is to prohibit dogs in their restaurants with the exception of guide dogs for the blind.

The President of the Tribunal held that the conditions for shifting the burden of proof were not met. Indeed, the parties presented two strikingly contrasting versions of events and, according to the judgment, the "facts" which must be adduced in order to justify a shift of the burden of proof should constitute "established events" ("vaststaande gebeurtenis"); mere declarations by the parties do not suffice. Therefore, concluding that the plaintiffs had not proved their case, the President dismissed their complaint.

Ordinance of 24 August 2005 of the President of the First Instance Court (Tribunal de première instance) of Charleroi

a. Name of the court: First Instance Court (Tribunal de première instance) of Charleroi
b. Judgment of 24 August 2005 of the President of the First Instance Court of Charleroi (ref. REFE 05/454/C-24/08/2005) (not available electronically).
c. Miriem Balil and others v. the French-speaking Community (Communauté française)
d. The judgment denied the injunction sought by the applicants against the modification to the internal regulations of the Vauban Royal Atheneum of Charleroi prohibiting the wearing of headware "ostensibly" expressing a political or religious affiliation in the institution. This decision simply found that the new regulations had not been definitively approved yet, and that there was therefore no urgency justifying the use of the summary procedure. A similar judgment was adopted on the same day concerning another educational institution also in Charleroi (Royal Atheneum of Gilly). These judgments, based on procedural grounds, did not examine the substance of the claims presented by the parents who

argued that their children would be denied the possibility to pursue their education at those schools due to the change in dress code.

Judgment n° 152/2005 of the Constitutional Court, delivered on 5 October 2005

a. Constitutional Court (Cour d'arbitrage)
b. Judgment n° 152/2005 of the Constitutional Court, delivered on 5 October 2005 (available on www.arbitrage.be).
c. A. Geensens and others v. Flemish Region
d. The judgment annuled articles 10 and 126 of the Decree of 7 May 2004 adopted by the Flemish Region on the material organisation and functioning of recognised religions, which stipulated that an elected or appointed member of a church council will be automatically be considered as having resigned when they reach 75 years of age. Church councils are created in order to ensure the proper functioning of churches and, in particular, to manage their finances; the public authorities have to compensate for any situation where a church faces a budgetary deficit, which justifies a certain level of control by the authorities on the way these finances are managed. While rejecting the claim that these provisions constitute an interference with the freedom of religious organisation and the autonomy of churches (Articles 19 and 21 of the Constitution, Article 9 ECHR, and Article 18 of the International Covenant on Civil and Political Rights, in combination with Articles 10 and 11 of the Constitution), the Constitutional Court nevertheless considered that they constituted discrimination on grounds of age. The Court based its conclusion (point B.8) on the finding that imposing such an age limit, although it pursues the legitimate aim of encouraging the renewal of the membership of church councils, and thus more effective and efficient management, nevertheless it is disproportionate insofar as it is based on an absolute presumption that members of church councils aged 75 years of age would no longer be capable of ensuring good management.

Judgment of 30 November 2005, Court of Appeals of Ghent

a. Court of Appeals, Ghent
b. Judgment of 30 November 2005 (see http://www.diversiteit.be/CNTR/NL/racism/jurisdiction/d05-11-30_gent.htm)
c. Centre for Equal Opportunities and Opposition to Racism and André D. v. DD, CD and FD
d. After André D. and his same-sex partner, who sought to rent an apartment through the intermediary of a rental agency, were told by the agency that the owner did not wish to rent her apartment to "two men or two women" – a statement which was repeated in the presence of a legal officer (huissier de justice), a few days afterwards. The Centre for Equal Opportunities and Opposition to Racism and André D. sought to obtain a judicial injunction ordering the cessation of what they considered to constitute discrimination on grounds of sexual orientation. A first judgment, adopted by the President of the Court of First Instance of Ghent on 31 December 2003, denied the application, since the magistrate considered that there was no sufficient evidence of discrimination for it to be justified to shift the burden of proof to the defendants under Article 19 § 3 of the Law of 25 February 2003. In the judgment of 30 November 2005, the Court of Appeals considers that, although discrimination may in principle be proven through such means (the fact that the Government has not adopted a decree specifying the conditions under which "testing" may take place in order to prove discrimination is not an obstacle to establishing a presumption of discrimination by other means), in the instant case, there is no evidence that the actual owners of the property had knowledge of, or intended to practice, discrimination, since the rental agency was in relation only with their mother and not directly with the actual owners. As to the rental agency itself,

the Court considers that it has not committed a discrimination : indeed, André D. and his friend were proposed another apartment for rent by the same agency.

Judgment of 30 November 2006 by the Brussels Industrial Tribunal (*Tribunal du travail*)

a. Industrial tribunal (*Tribunal du travail*) of Brussels
b. Judgment delivered on 30 November 2006 by the Industrial Tribunal
c. Ms D and Centre for Equal Opportunities and Opposition to Racism v. public centre for social aid (CPAS) of Evere
d. This judgment is the first application Article 19 § 3 of the Law of 5 February 2003 which provides for the shifting of the burden of proof in civil actions alleging discriminatory practices. of the judgment finding that such discrimination has been taking place in that administration. Ms D, an epileptic, was not proposed a vacant position after her temporary contract of employment as an ergotherapist had expired in a residence for elderly persons. Although she had been found fit to be employed by the occupational physician (with one reservation : the physician considered that she should not be allowed to drive a service van with passengers), she was told that the refusal to hire her was attributable to her state of health (disability). Despite this, the administration, defendant in this case, alleged that the refusal to recruit Ms D was not attributable to her state of health, although it was ready to admit that the refusal it opposed to Ms D was a result of her lack of 'frankness' by not openly discussing her epileptic condition with the direction and which accommodations were required, and that therefore the relationship of confidence was broken between the two parties. Ms D considered that she was not under any obligation to divulge to the administration that she was an epileptic. The Industrial Tribunal concludes that, since Ms D had indeed to right to keep her disability secret, she could not be reproached to have refused to provide further information on her condition, which moreover was known to the direction. And the tribunal considers that the refusal to hire Ms D was in fact based on her state of health (the fact that she is an epileptic), and is thus discriminatory under Article 2 of the law of 25 February 2003.

Judgment of 24 January 2007 by the Labour Court of Brussels

a. Labour Court of Brussels
b. Judgment of 24 January 2007 by the Labour Court of Brussels
c. Centre for Equal Opportunities and Opposition to Racism v. NV Firma Feryn)
d. In this case where the defendant firm (Feryn) had stated that it did not wish to recruit Moroccans, arguing that its clients did not wish to be served by foreigners or workers of foreign origin, and then did not abide by its pledge to take remedial action, the Labour Tribunal initially concluded (in a judgment of 26 June 2006) that there had been discrimination, but did not impose any financial sanctions on the firm, taking the view instead that the finding of discrimination should constitute sufficient reparation. The Centre for Equal Opportunities and Opposition to Racism appealed. On appeal, the Labour Court considers that an interpretation of the Racial Equality Directive is necessary for the case to be decided, and it asks the ECJ the following questions. **First**, is there "direct discrimination", within the meaning of Article 2(2)(a) of the Racial Equality Directive, where an employer seeks to justify apparently discriminatory practices by the alleged tastes of his clients, who, according to that employer, would be unwilling to be served by persons of a foreign origin ? **Second**, is the existence of "direct discrimination" proven sufficiently by the use of selection criteria (in recruitment processes) which are discriminatory on their face (i.e., even without there being an identified victim of the discrimination)? **Third**, may the discrimination practiced by an employer in one of his undertakings be proven by taking into account the fact that in another of this employer's undertakings (a subsidiary company), the recruitment process results in a situation where only persons of Belgian origin are being recruited? **Fourth**, what is the

meaning of Article 8 of the Racial Equality Directive's expression 'facts from which it may be presumed that there has been direct or indirect discrimination', and in particular: a) to what extent is the past behaviour of a particular respondent (in the case at hand, the fact that in April 2005 the firm Feryn had publicly stated that it did not wish to recruit workers of foreign origin) relevant in establishing a presumption of discrimination? b) may the mere fact that the respondent has exhibited discriminatory behaviour in the past, be deemed sufficient to establish a presumption that the discrimination has persisted? c) may such a presumption be established on the basis of a press communiqué, published jointly by the respondent and the national Equality Body, which contains at the very least an implicit admission of discrimination? d) does the fact that an employer has no employees of foreign origin lead to the presumption of the existence of indirect discrimination on grounds of race or ethnic origin, where the employer has in the past experienced difficulties in recruiting workers in sufficiently high numbers, and moreover proclaimed publicly his unwillingness to recruit workers of foreign origin in the undertaking? e) is one fact sufficient to establish a presumption of discrimination, or is more that one fact required? f) may a presumption of discrimination be established on the basis of the fact that in another company of the same employer, no single person of foreign origin is employed? **Fifth**, under which circumstances must the national court consider that a presumption of discrimination has been rebutted successfully by the respondent? In particular, is such a presumption rebutted by a public declaration in the media from the respondent employer, that he is not discriminating, and that any candidate for the job is welcome to apply for a position in the company? Is it successfully rebutted by the affirmation by the employer that all the positions of garage-door-placers are now filled in his company (although not in the subsidiary company owned by the same employer)? Is it successfully rebutted by the circumstance that the respondent company has a woman (in charge of cleaning) of Tunisian origin within its service? Is it successfully rebutted by the recruitment, as garage-door-placers, of one or more employees of foreign origin, or by the establishment of a diversity plan for the undertaking and the commitment to send all job advertisements to the public employment agency, as initially stated in the joint press communiqué of 27 May 2005? **Sixth**, what implications follow from Article 15 of the Racial Equality Directive, stating that discrimination must be combated through 'effective, proportionate and dissuasive sanctions'? In particular, is it compatible with this requirement that a national court finds discrimination to have occurred, without imposing any sanction, even in the form of a civil compensation? Or must the court order the cessation of the discriminatory practice it has found to exist, as Belgian courts are allowed under the Law of 25 February 2003? Must the court order the publication of the judgment, since this might be considered a proportionate and dissuasive measure sanctioning the finding of discrimination?

1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?
b) Are constitutional anti-discrimination provisions directly applicable?
c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?

Articles 10 and 11 of the Constitution guarantee equality before the law and enjoyment without discrimination of the rights and freedoms accorded to all, without specifying a list of prohibited grounds of discrimination. These equality clauses are applicable generally, without

any restriction either as to the grounds on which the discrimination is based (they require that the principle of equality be respected in relation to all grounds) or as to the situations concerned (they are applicable to all contexts, going beyond not only employment and occupation, but also the scope of Directive 2000/43/EC).

The notions of equality and non-discrimination under Articles 10 and 11 of the Constitution are interpreted in conformity with the classical understanding of non-discrimination in international law, especially as formulated by the European Court of Human Rights[57]: the rules on equality and non-discrimination of the Constitution do not exclude a difference in treatment between certain categories of persons, provided that an objective and reasonable justification may be offered for the criterion of differentiation; the existence of such a justification must be assessed with regard to the aim and the effects of the contested measure and to the nature of the principles applying to the case; the principle of equality is violated where it is established that there is a lack of proportionality between the means used and the aim to be achieved[58]. More recently, the Constitutional Court has elaborated its understanding of the constitutional requirement of non-discrimination by deciding that the legislature may have to offer a reasonable and objective justification for not making a distinction – i.e. offering the same treatment to – in situations which are "essentially different"[59]. This case-law interprets the Constitution as requiring the legislature not to commit indirect discrimination against certain categories. However, this prohibition of indirect discrimination remains relatively underdeveloped and can be invoked only in a limited manner. The requirement to treat distinct situations differently prohibits the adoption of across-the-board rules where this would place a particular disadvantage on certain groups of people. But the Constitutional Court will not systematically analyse the impact of different laws with the aim of repealing legislation that may disproportionately affect certain segments of the population.

In principle, it should be possible to invoke these constitutional requirements in the context of private relationships. This has been the position in the doctrine[60]. It has been alluded to by the Belgian Constitutional Court, the Cour d'arbitrage[61]. It should follow logically from the recognition by Belgian courts that other constitutional provisions may be invoked in the context of private relationships, for instance to void a contractual clause which contravenes a right which is constitutionally protected. However, because of their very general formulation and the delicate problems which would be entailed by their invocation in the field of private relationships, these provisions have never been used to protect an individual from private acts of discrimination by an employer. Their main importance lies in the fact that legislative norms adopted either by the Federal State (Lois/Wetten) or by the Regions or Communities (Décrets/Decreten or Ordonnances/Ordonnanties), and regulations adopted by the executive (Arrêtés royaux/Koninklijke besluiten when adopted by the Federal Government, Arrêtés du gouvernement de la Région ou de l'Exécutif/Besluiten van de regering when adopted by the Executives of the Region), must respect the constitutional principle of equality. The respect of the constitutional principles of equality and non-discrimination is ensured by the power accorded to every person with a legal interest to seek the annulment of a law or an executive regulation, respectively, before the Constitutional Court (Cour d'arbitrage) or the Council of

[57] ECHR, 23 July 1968, *Belgian Linguistic Case* (Series A no. 6), § 10.
[58] Cour d'arbitrage (Constitutional Court), 8 July 1997, Case no. 37/97; Cour d'arbitrage, 13 October 1989, Case no. 23/89, *Sprl. Biorim, Moniteur belge,* 8 November 1989, B.1.3.
[59] Cour d'arbitrage, 2 April 1992, Case no. 28/92, 5.B.4.
[60] See, e.g., M. Tison, "L'égalité de traitement dans la vie des affaires sous le regard du droit belge", *J.T.*, 2002, p. 699; J.-Fr. Romain, "Des principes d'égalité, d'égalité de traitement et de proportionnalité en droit privé", *Rev. Dr. ULB*, 2002, p. 225.
[61] See Constitutional Court judgment no.117/2003 of 17 September 2003, B.8.: "… *si la réglementation générale d'un hôpital privé devait traiter ses médecins hospitaliers de manière discriminatoire, il appartiendrait à ceux-ci de faire valoir leurs droits devant le juge compétent*". "If the general regulations of a private hospital treat hospital doctors in a discriminatory manner, it is up to the latter to assert their rights before a competent judge".

State (Conseil d'Etat, Raad van State – supreme administrative court)[62]. Moreover, if a jurisdiction entertains doubts as to the compatibility of a legislative norm (federal law or decree adopted by a region or a community), it may submit the question to the Cour d'arbitrage by a referral procedure, and the Cour d'arbitrage may then consider a law invalid if it is found to violate the constitutional principles of equality and non-discrimination.

2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

Originally, the Law of 25 February 2003 (which, as already mentioned, constitutes the most important legislation implementing Directives 2000/43/EC and 2000/78/EC in the Belgian legal order, and provides civil remedies to the victims of discrimination in all situations where the Regions and Communities are not exclusively competent) prohibited discrimination on the grounds of sex, race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, wealth, age, religious or philosophical conviction, actual or future state of health, disability or a physical characteristic. This list, although long, remained limited. But since the judgment n° 157/2004 of the Constitutional Court (previously named the Court of Arbitration) of 6 October 2004, that restriction on the scope of the application of the Law of 25 February 2003 has been removed: the rather extensive remedies provided for in that law may now be invoked by the victims of any direct or indirect discrimination, whatever the ground of discrimination.

However, the judgment of 6 October 2004 did not question the choice of the legislator to have a closed list of prohibited grounds of discrimination ; rather, the violation of Articles 10 and 11 of the Constitution resulted from the fact that this list was arbitrary, since it excluded two grounds (language and political opinion) which are found in anti-discrimination provisions of international human rights law such as, in particular, in Article 26 of the International Covenant on Civil and Political Rights. Accordingly, when the government proposed a reform of the existing antidiscrimination legislation and presented to that effect four legislative bills to the Parliament on 26 October 2006, it chose to prohibit discrimination on a limited set of grounds, which however go beyond the grounds listed in the Racial Equality and Employment Equality Directives : the racial equality bill (*Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*) intends to prohibit discrimination on grounds of 'race', color, descent, national or ethnic origin, and nationality ; another bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*) provides for the prohibition of discrimination on all the grounds other than those dealt with by the two other bills, which 1° either were already present in the Federal Antidiscrimination Law of 25 February 2003 (age, sexual orientation, civil status, birth, property (Fr. 'fortune'), religious of philosophical belief, actual or future state of health, disability, physical characteristic), or 2° were added in order to take into account the concern expressed by the Constitutional Court (then Court of Arbitration) in its judgment n° 157/2004 of 6 October 2004 that the list of grounds should not arbitrarily exclude certain grounds which are found in international human rights instruments (political opinion and language), or 3° were added to the list for other reasons (genetic characteristic, social origin). No reference was made to membership of a national minority, although it would have been justified by reference to the list of prohibited

[62] For the competence of the Constitutional Court (Cour d'arbitrage), see Art. 142 of the Constitution.

grounds of discrimination in Article 21 of the EU Charter of Fundamental Rights, because distinct legal regimes should have applied to such membership whether it is defined for instance on the basis of ethnicity, language or religion.[63]

It will be noted that, although only the Federal Law of 25 February 2003 was presented to the Constitutional Court, the reasoning of the Court on the main point of the judgment – that discrimination on the grounds of political opinion or of language is no less deserving of protection than discrimination based on the grounds explicitly enumerated in the original version of the Law of 25 February 2003 – should logically be extended to the other legislation adopted in order to implement the European Community anti-discrimination Directives.

For instance, the Flemish Decree on proportionate participation in the labour market (*Decreet houdende evenredige participatie op de arbeidsmarkt*[64]) adopted on 8 May 2002 by the Flemish Community (exercising its competences jointly with the Flemish Region) lists exhaustively the prohibited grounds of discrimination which it seeks to address (covering sex, "claimed race", colour, descent, national or ethnic origin, sexual orientation, marital status, birth, wealth, age, belief or conviction, present or future state of health, disability or physical characteristic), but it should now be read, in accordance with the constitutional requirement derived by the Constitutional Court from Articles 10 and 11 of the Constitution, as extending its protection to persons discriminated against on other grounds. This however does not extend to the definition of certain "target groups" for the purposes of the positive action measures of the Flemish Decree[65]. "Target groups" must be defined exhaustively, and positive action measures cannot benefit everyone claiming to be victims of discrimination on any ground which they may happen to present.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?
Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?
b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion')?
c) Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?

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[63] Another of the bills presented by the government (*Projet de loi tendant à lutter contre la discrimination entre les femmes et les hommes*) provides for the modification of the Law of 7 May 1999 on equal treatment between men and women in working conditions, access to employment and to promotion opportunities, access to self-employment and social security. This prohibits discrimination based on sex or on assimilated grounds (maternity, pregnancy, transsexualism).

[64] *Moniteur belge.*, 26 July 2002, p. 33262.

[65] These "target groups" have been identified by the Flemish government as "all categories of persons whose level of employment, defined as the percentage of the active population of that category who effectively work, are under the average level of employment for the total Flemish population" (Art. 2(2), al. 1, of the *Besluit [van 30 Januari 2004] van de Vlaamse regering tot uitvoering van het decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling*, *B.S.* (*Belgisch Staatsblad / Moniteur belge*), 4 March 2004, p. 12050 (Regulation [of 30 January 2004] of the Flemish Government concerning the execution of the decree of 8 May 2002 on equitable participation in the employment market concerning professional orientation, vocational training, career counselling and the action of intermediaries on the labour market)).

d) Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination.

a) Definitions of the grounds of prohibited discrimination

None of the grounds mentioned in the Race and Employment Directives which are used in the Belgian legislation were provided with a definition when the implementation took place. These definitions, in effect, were considered as unnecessary, as these concepts – in the context at least of a law prohibiting discrimination – were seen as self-explanatory. Comments are made below, however, on the relationships which may exist between the lack of such definitions in anti-discrimination provisions and the use of such definitions in the context of positive action measures. In fact, because of the risks entailed in processing of such sensitive personal data as those on an individual's race or ethnic origin[66], such processing will be avoided even in the context of positive action measures. It will be noted for instance that the Executive Regulation adopted on 30 January 2004 by the Flemish government to implement certain provisions of the Decree of 8 May 2002, although it details the procedures for implementing "diversity plans" which aim to ensure progress towards proportionate representation in the employment market of identified "target groups" with a view to combating discrimination on grounds of race and ethnic origin in particular, refers (in Article 2 paragraph 2, 1°) not to workers' race or ethnic origin but instead – as a substitute for race or ethnic origin – to "allochtones". These are defined as adult citizens legally residing in Belgium and whose socio-cultural background is of a country not part of the European Union, who may or may not have Belgian nationality and who either have arrived in Belgium as foreign workers or through family reunification, or have obtained the status of refugee or are asylum-seekers whose claims to asylum have not been considered inadmissible, or have a right to residence in Belgium because their situation has been regularised, and who, because of their poor knowledge of the Dutch language and/or their weak socio-economic position, whether or not reinforced by their poor level of education, are disadvantaged. The absence of any reference to the "racial" or "ethnic" background of the individual in such a definition of the "target group" is remarkable if we recall that these plans seek to implement the principle of equal treatment on the grounds of, inter alia, race and ethnic origin. However, processing of data on the race or ethnic origin of any individual would be in violation of the requirements of the data protection law according to the Commission for the Protection of Private Life, which makes reliance on this kind of proxy inevitable.

Disability. With respect to the ground of disability, a distinction should be made between the use of this notion in provisions simply outlawing discrimination on the one hand, and its use in provisions which arrange for certain special measures on the other. Indeed, whether or not described as positive action, such special measures benefiting persons with disabilities need to identify the beneficiaries with greater specificity (on the definition of disability in the context of positive action in favour of persons with disabilities, in particular in setting quantitative objectives for their improved representation in public administrations, see below, sect. 5). Such is not the case, however, as regards a legislation simply prohibiting discrimination on grounds of disability (or assimilated characteristics such as state of health), where the behaviour targeted is the act of discrimination, whether or not the person victim of such behaviour falls under the definition of disability. The definition provided in Case C-13/05, *Chacón Navas*, might in the future be taken into account by the Belgian courts, since there exists no competing definition in national anti-discrimination legislation.

[66] See the Opinion no.7/93 adopted on 6 August 1993 by the Commission for the Protection of Privacy (Commission de protection de la vie privée), which offers a strict interpretation of the limits imposed by the Belgian Law of 8 December 1992 on the protection of private life vis-à-vis the processing of personal data. See www.privacycommissie.be

Thus, the Federal Law of 25 February 2003 does not define the notion of "disabled person" because it simply excludes any form of discrimination, either direct or indirect, *inter alia* on the basis of "current or future state of health, a disability (*handicap*) or a physical characteristic", whatever the severity of impairment – real or imaginary.[67] In the instruments currently presented for adoption by the Parliament, the general anti-discrimination bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*) provides for the prohibition of discrimination, inter alia, on the ground of actual or future state of health, disability, physical characteristic or genetic characteristic ; but, like in the previous legislation, none of these notions are provided a definition in the draft law.

The same can be said of the instruments adopted at the level of the Regions and Communities to implement the Framework Directive. For instance, the Decree on proportionate participation in the labour market adopted on 8 May 2002 by the Flemish Region/Community simply lists among the prohibited grounds of discrimination "present or future state of health, a disability or a physical characteristic", without offering a definition of disability. However, this latter Decree provides a more detailed notion of equal treatment and goes beyond a simple prohibition of discrimination to impose the adoption of diversity plans and annual reporting on the representation of "target groups" ("kansengroepen") in the workforce of the administrations concerned, and the Executive Regulation adopted on 30 January 2004 by the Flemish government to implement certain provisions of this Decree does identify persons with disabilities among these "target groups", and defines them "persons with a physical, sensory, mental or psychological disturbance or limitation which may constitute a disadvantage for an equitable participation in the employment market" (Art. 2(2), al. 2, 2°, of the executive regulation adopted on 30 January 2004) – a definition which, it will be noted, is almost identical to the definition provided in Case C-13/05, *Chacón Navas*. Similarly, other legislation or regulations which afford advantages to disabled persons or encourage their professional integration by incentives to their employer must per necessity define persons with disabilities, in order to identify who will benefit from such advantages or to identify which employers, under which conditions, will be rewarded for the efforts they make in promoting the professional integration of persons with disabilities[68].

Religion. With respect to the definition of "religion" in the context of the prohibition in Belgium of discrimination based on religion or belief, the Belgian courts will likely be guided by European Court of Human Rights case-law which, although it does not provide such a definition, has refused to extend the protection of Article 9 of the European Convention on Human Rights guaranteeing freedom of religion to professed beliefs which cannot be related to an existing religious faith[69]. The protection from discrimination based on religion will most probably be denied to the members of groups defines as "sects" under the Belgian Law of 2

[67] Since the Court of Arbitration (Constitutional Court) delivered its judgment n° 157/2004, this has become less important since, as a result of the annulment of the closed list of grounds of prohibited discrimination, any discrimination, on whichever basis, is prohibited.

[68] See for example the Law on the social rehabilitation of persons with disabilities (*Loi relative au reclassement social des handicaps)* of 16 April 1963, art. 1 of which states that it is addressed to persons whose opportunities for employment are effectively reduced because of an insufficiency or an impairment ("*une insuffisance ou une diminution*") of at least 30 % of their physical capacity or at least 20 % of their mental capacity; the Decree of 6 April 1995 of the Walloon Regional Council on the integration of disabled persons (*Décret relatif à l'intégration des personnes handicapées*) does not quantify the degree of severity of the impairment, but simply states that the impairment must be important enough to require an intervention of the collectivity (Art. 2); the *Décret relatif à l'intégration sociale et professionnelle des personnes handicapées*, adopted on 4 March 1999 by the Commission Communautaire française de la Région de Bruxelles-Capitale, stipulates that to be granted the benefits set out by the Decree, the beneficiary must present a disability which results from an impairment of at least 30 % of physical capacity or at least 20 % of mental capacity (Art. 6 a).

[69] Eur. Comm. HR, *X v. the United Kingdom*, Appl. No. 7291/75, decision of 4 October 1977, DR, 11, p. 55; Eur. Comm. HR, *X v. Federal Republic of Germany*, Appl. No. 4445/70, decision of 1 April 1970, Rep. Vol. 37, p. 119. See C. Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford Univ. Press, 2001, pp. 57-59.

June 1998, which describes these as "any group with a religious or philosophical vocation, or pretending to have such a vocation, which in its organisation or practice performs illegal and damaging activities, causes nuisance to individuals or to the community or violates human dignity"[70]. On the other hand, it is clear that the prohibition of discrimination on grounds of religion will protect members of religious faiths beyond the six religions which, under the Belgian organisation of the relationship between State and Churches, are specifically recognised as being the most representative[71].

Sexual orientation. Heavily influenced by Canadian and Dutch precedents[72], the Decree on equal participation on the labour market adopted by the Flemish Community/Region seeks not only to prohibit direct and indirect discrimination in the areas falling under the competences of the Flemish Community/Region, on the grounds of, *inter alia*, sexual orientation, but also to improve the representation in the labour market of target groups ("kansengroepen"). These target groups are defined in general terms as all groups within the active segment of the population which are under-represented on the labour market. The executive regulation adopted on 30 January 2004 by the Flemish government implementing the Decree of 8 May 2002[73] identifies certain groups which, "in particular", fall under that definition: these groups are persons of non-EU origin and background ("allochtonen"), persons with a disability, workers above 45 years of age, persons who have not completed their secondary education, or persons belonging to the under-represented sex in a specific profession (Art. 2(2), al. 2). Gay, lesbians and bisexuals are not mentioned. Persons of a non-heterosexual orientation are therefore not considered to form a target group for the purpose of the affirmative measures imposed on the administrations of the Flemish Community/Region, the education sector, and labour market intermediaries; in particular, these entities will not have to produce an annual report on the representation of gay, lesbian and bisexuals in their workforce[74]. This obviously is to be explained by the difficulty pointed out by the Flemish Social and Economic Council (*Sociaal-Economische Raad van Vlaanderen* (*SERV*)) in an opinion it delivered on 24 April 2003 on the Decree of 8 May 2002 on proportionate participation in the labour market of quantifying such a representation, as this would only be possible by registering employees' sexual orientation[75].

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[70] Law of 2 June 1998 creating a Centre for information and advice on sects (*Loi du 2 juin 1998 portant création d'un Centre d'information et d'avis sur les organisations sectaires nuisibles et d'une Cellule administrative de coordination de la lutte contre les organisations sectaires nuisibles* (*Moniteur belge*, 25 novembre 1998)).

[71] See the Law of 4 March 1870 (*Loi du 4 mars 1870 sur le temporel des cultes* (*Moniteur belge*, 9 March 1870)), as modified in 1974 (*Loi du 19 juillet 1974 portant reconnaissance des administrations chargées de la gestion du temporel du culte islamique* (*Moniteur belge.*, 23 August 1974)) and 1985 (*Loi du 17 avril 1985 portant reconnaissance des administrations chargées de la gestion du temporel du culte orthodoxe* (*Moniteur belge*, 11 June 1985)). The religions recognised are the Roman Catholic, Anglican, Jewish, and Protestant faiths; more recently, the Muslim and Orthodox faiths have been added to the list. Recognition entails certain financial advantages in a system under which,the most representative religions receive financial support from the State although there is no official or State religion..Since the revision of Article 181 of the Constitution in 1993, delegates of recognised organisations offering moral guidance under a non-religious philosophical conception also have their salaries paid by the State.

[72] The Flemish legislature was inspired by the Canadian 1995 Employment Equity Act as well as the Dutch Law on the Promotion of Labour Participation of Ethnic Minorities (*Wet stimulering arbeidsdeelname minderheden* (*SAMEN*)) of 29 April 1998, which improves on the previous Law on the Promotion of proportional labour participation of ethnic minorities (*Wet bevordering evenredige arbeidsdeelname allochtonen*) of 1 July 1994. The initiative was also stimulated by the desire to achieve the objectives set out in the conclusions of the Lisbon European Council, which aims to increase the level of employment within the active population up to 65 % by 2004 and 70 % by 2010.

[73] *Besluit [van 30 Januari 2004] van de Vlaamse regering tot uitvoering van het decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling, B.S.* (Belgisch Staatsblad), 4 March 2004, p. 12050 (Regulation [of 30 January 2004] of the Flemish Government concerning the execution of the decree of 8 May 2002 on proportionate participation in the employment market concerning professional orientation, vocational training, career guidance and the action of intermediaries on the labour market).

[74] See Art. 5(1) of the Regulation of 30 January 2004.

[75] The independent authority instituted in Belgium to monitor legislation protecting private life vis-à-vis the processing of personal data delivered an opinion on the identification of members of "target groups" to fulfil the objectives of the Flemish Decree on proportionate participation in the labour market of 8 May 2002 (Commission de protection de la vie privée,

These examples illustrate that the need for such a definition – and for the invasion of privacy which may be required to verify whether individuals fall under that definition – does not exist in the same way as in the context of legislation simply prohibiting discrimination, although for an active labour policy promoting the integration of certain target groups into the labour market to be pursued, it may be necessary to adopt a definition of the beneficiaries.

b) Use of equivalent terms in national legislation

In general, neither the grounds covered by the Racial Equality and Employment Equality Directives, nor the additional grounds to which the Law of 25 February 2003 (in its original version[76]) applies, are defined in other parts of national legislation. However, legislation in the field of social security does provide that certain benefits will be attributed to persons which a certain degree of disability, which has to be medically certified.

c) Scope of age-based discrimination

The prohibition of age-based discrimination is not limited to certain ages in current Belgian legislation. It may in principle protect both older and younger people from differences in treatment on grounds of age which cannot be reasonably and objectively justified.

d) Multiple discrimination

This author is not aware of any case-law or legal regulation which explicitly addresses or takes into account situations of multiple discrimination. In fact, the current set of legislative proposals is based on the very opposite idea, according to which any discrimination must be categorized as relative to one identifiable ground, since different legal regimes are set up for each of the three categories which the future legislation should distinguish : 1° 'race', color, descent, national or ethnic origin, and nationality ; 2° sex, or the assimilated grounds (pregnancy, maternity, transsexualism) ; 3° age, sexual orientation, civil status, birth, property, religious of philosophical belief, actual or future state of health, disability, physical characteristic, genetic characteristic, political opinion, language and social origin. It may be presumed that the victim of a multiple discrimination will turn towards the legislation which affords the highest level of protection, since it is very doubtful that the same act can be challenged, under separate laws, although that act might result in a discrimination on more than one ground. In this choice, the victim will also of course have to take into account the availability of evidence of discrimination on any of the possible grounds.

2.1.2 Assumed and associated discrimination

a) Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect assumption.
b) Does national law or case law prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?

Opinion of 15 March 2004, no. 032004, available on www.privacycommissie.be). However, as homosexuals or persons having a certain sexual orientation have not been identified as "target groups", the Opinion does not specifically focus on the registration of certain persons, for instance in the composition of an undertaking's workforce, according to that criterion.

[76] Before the annulment of the list of prohibited grounds by the Court of Arbitration, in its judgment n° 157/2004 of 6 October 2004.

a) Assumed characteristics

It is difficult to anticipate what interpretation the Belgian courts will give to the prohibition of discrimination provided for in Belgian legislation in this respect. At the time of writing, the question has been mooted by the judgment delivered by the Constitutional Court judgement on 6 October 2004, since, as a result of that judgment (which annuls the limited list of prohibited grounds of discrimination), the Federal Law of 25 February 2003 and possibly even the other legislative instruments adopted in Belgium in order to implement Directives 2000/43/EC and 2000/78/EC[77] must be presumed to protect from discrimination based on any ground, including, but not limited to, the grounds listed in Article 13 EC. Whether based on "real" or on "assumed" characteristics relating for example to an individual's religion, sexual orientation or any disabilities, discrimination will be considered to occur whenever a person is treated according to criteria which cannot be reasonably and objectively justified. As a result, it should not matter whether the victim of differential treatment in fact presents the characteristic on which the discrimination is based, or whether this characteristic is only assumed by the author of the discriminatory act[78]. If and when the legislative reforms currently under examination lead to the adoption of the new pieces of legislation which are proposed, the question of whether they cover also discrimination based on certain assumed characteristics (which the individual does not in fact possess) will again become relevant.

b) Discrimination based on being associated with persons presenting a specifically protected characteristic

Where discrimination based on being associated with persons presenting a protected characteristic takes the form of discrimination against a person who has joined an association of persons presenting this characteristic or the mission of which is to defend the rights of such persons, the protection of freedom of association, both under Article 11 of the European Convention of Human Rights and under Article 27 of the Belgian Constitution, should protect the individual from negative consequences which any private person[79] or public body could attach to his/her association with individuals presenting a "suspect" characteristic.

It may also be asked whether groups or organisations created in order to represent certain categories of protected persons (for example, gays and lesbians, or persons with disabilities, or ethnic minorities) or defend their rights would be protected from any form of discrimination under the Law of 25 February 2003. It may be deduced from Article 2(7) of the Federal Law of 25 February 2003 (which mentions "*une discrimination à l'encontre d'une personne, d'un groupe, d'une communauté ou de leurs membres*", "discrimination in relation to a person, a group, a community or its members") that this legislation prohibits direct and indirect discrimination not only against individuals, but also of groups or communities as

[77] Before the judgment of 6 October 2004, the Decree adopted on 19 May 2004 by the French-speaking Community was the only instrument containing a general prohibition of discrimination not limited to strictly enumerated grounds (see Article 2 § 1, 1° of this Decree)..

[78] The same conclusion may be arrived at with respect to race, albeit here also by a different route. The Belgian legislatures have only reluctantly used this notion (as shown by the use of expressions such as "une prétendue race", "een zogenaamd ras"), indeed race corresponds not to an objectively definable characteristic, but rather to the representation of the victim of discrimination in the eyes of its author. A prohibition of discrimination on this ground means, per definition, that the 'race' has been assumed by the author rather than objectively ascertained.

[79] Some examples may be found in Belgian case law where Article 11 ECHR has been recognised as having a direct horizontal effect, i.e. where it has been considered to be a norm which can be invoked within the relationships between private parties. See esp. with respect to transfers from one sporting association to another: Tribunal de première instance, chambre civile Neufchâteau (juridiction des référés), 25 June 1997, *Revue régionale de droit*, 1997, p. 326; Justice de Paix Torhout, 28 June 1994, *Journal des juges de paix*, 1997, p. 254; *Tribunal de première instance, chambre civile Turnhout*, 29 June 1993, *Rechtskundig Weekblad*, 1993-1994, p. 783; *Tribunal de première instance, chambre civile Liège* (*juridiction des référés*), 22 June 1995, *Journal de droit des jeunes*, 1995, p. 421.

such.

In the future, it may be expected that anti-discrimination legislation shall be interpreted as protecting not only individuals with a particular characteristic, but also groups established by such individuals, defending such individuals, or of which such individuals are members. It is true that the draft legislations currently awaiting adoption refer to "persons", without mentioning explicitly groups, communities or their members. But the terminology is not entirely consistent. For instance, reproducing in this regard the EU directives, the "instruction to discriminate" is defined as "any behaviour consisting in enjoining any person to commit a discrimination, on the basis of one of the protected grounds, against a person, *a group, a community or one of its members*" (Article 4, 13°). In Article 23 of the general antidiscrimination bill, which defines as a criminal offence the discrimination committed by a civil servant in the exercise of his or her duties, the discrimination prohibited may be against a person or a group, a community or its members (see Article 23, al. 2, of the general anti-discrimination bill). Article 31 of the general antidiscrimination bill refers to 'legal persons' as potential 'victims', along with natural persons, and both categories of victims may have to agree before an organization files suit on their behalf under the new legislation. This suggests the possibility for groups as such (in particular groups which are recognized to be legal persons and, thus, potentially have a capacity to sue) to complain that they have been discriminated on the basis of one of the protected grounds – for instance, because they defend gay rights, or ethnic minorities. This however will need to be tested in court.

The instruments adopted by the Regions and Communities do not necessarily extend their protection from discrimination beyond individuals to groups, organisations, or "communities". For instance, the Decree on the implementation of the principle of equal treatment adopted on 19 May 2004 by the French-speaking Community adopts a narrower definition of discrimination, limited to a form of treatment affecting a "person"[80]. Because of its particular objective, which is to identify the conditions for recognising labour market intermediaries in the Region of Brussels-Capital, the *Ordonnance* of 26 June 2003 adopted by that Region similarly does not offer a protection to groups as such. The same limitations seem to affect the Decrees adopted respectively by the Walloon Region and the Flemish Community.

Beyond the general protection these provisions offer to persons who are discriminated against following the exercise of their right of freedom of association, it is uncertain whether either the Federal Law of 25 February 2003 or the regional or community instruments implementing the Framework Directives 2000/43/EC and 2000/78/EC will be interpreted as protecting the individual from discrimination based on their association with persons presenting certain characteristics. The wording of these instruments does not make such an interpretation very plausible. The current situation is rather anomalous, since discrimination is now prohibited on any ground in the Law of 25 February 2003 (as a result of the judgment of the Constitutional Court of 6 October 2004), and possibly in other legislative instruments adopted in Belgium in order to implement the Equal Treatment Directives ; therefore nothing in principle should stand in the way of courts finding that discrimination towards a person associated with certain groups should be prohibited under these instruments, because there is no objective and reasonable justification for imposing a disadvantage on that person because of such an association. This will change when the current legislative reform will have been completed, since we will return to a system with a closed list of prohibited grounds of discrimination in the federal legislation.

[80] See Article 2(1), 2° and 3° containing definitions of direct and indirect discrimination.

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

a) How is direct discrimination defined in national law?

Article 2 § 1 of the Federal Antidiscrimination Law of 25 February 2003 defines direct discrimination as a difference in treatment which lacks an objective and reasonable justification. This is of course not satisfactory. The legislative bills currently under examination by the Parliament should improve on this. They define direct discrimination as any 'direct distinction' (defined as 'the situation which occurs whenever, on the basis of a protected ground, a person is treated less favourably than another is treated, has been treated, or would be treated in a comparable situation') which cannot be justified under one of the exceptions provided for under the law.[81] As the next paragraph explains, these exceptions in turn are limitatively defined in order to ensure that the new legislative texts will be in compliance with the requirements of the Employment Equality and Racial Equality Directives.

b) Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).

The *current situation*, at the time of writing, may be described as follows :

Criminal provisions. The Law of 30 July 1981 criminalising certain acts inspired by racism and xenophobia defines "discrimination" for the purposes of that legislation in terms almost identical to those of Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination. It criminalises "any distinction, exclusion, restriction or preference which has or may have the purpose or effect of nullifying or impairing" the enjoyment of the human rights or fundamental freedoms of persons of a particular race or colour, descent, or national or ethnic origin (Art. 1 al. 1 of the Law of 30 July 1981). This definition does not explicitly contain the idea of a comparison with the treatment of another person in a comparable situation, although the reference to an "exclusion, restriction or preference" seems to convey that idea. In fact, the definition contained in the Law of 1981 seems to be broader than that of Article 2(2)(a) of Directive 2000/43/EC, insofar as it includes as prohibited discrimination the idea of a "distinction", whether or not such a "distinction" leads to the imposition of less favourable treatment than that which would be given to another person in a comparable situation. Segregation in conditions of equality, in other words, is prohibited under the Law of 30 July 1981, although it is not strictly included in the definition of direct discrimination under Article 2(2)(a) of Directive 2000/43/EC.

Civil provisions. All the legislative instruments specifically adopted to implement Directives 2000/43/EC and 2000/78/EC prohibit direct discrimination. However, the instruments adopted by the Regions and Communities are more satisfactory than the Federal Law of 25 February 2003 in the means chosen to do so.

The Flemish Decree, and the Decrees adopted by the German-speaking Community, the French-speaking Community and the Walloon Region all define direct discrimination in accordance with the Directives as instances where "one person is treated less favourably than

[81] Article 4, 6° and 7° of the bill seeking to implement the Employment Equality Directive (*Projet de loi tendant à lutter contre certaines formes de discrimination*); Article 4, 6° and 7° of the bill providing for the modification of the Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (*Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*) and seeking to implement the Racial Equality Directive.

another is, has been or would be treated in a comparable situation, on any [prohibited] ground" (Article 2(2)(a) of the Directives)[82]. The Ordinance of the Region of Brussels-Capital of 26 June 2003 (*Ordonnance relative à la gestion mixte du marché de l'emploi dans la Région de Bruxelles-Capitale*) prohibits discrimination in the areas it covers and with respect to the persons it applies to, but offers no definition of discrimination.

Article 2(2) of the Federal Law of 25 February 2003 simply defines direct discrimination as a difference in treatment (whatever the ground, since the Constitutional Court (then Court of Arbitration) annulled the list of protected grounds in its judgment of 6 October 2004) which lacks an objective and reasonable justification. The possibility which is thus left open of offering an objective and reasonable justification of a difference in treatment even when it is based on a ground protected under the Racial Equality or the Employment Equality Directives contrasts, of course, with the formulation of Article 2(2)(a) of these Directives, which define direct discrimination as the less favourable treatment of a person than another is, has been or would be subjected to in a comparable situation on one of the protected grounds. This prohibition is absolute in the Directives, with the sole exception of genuine occupational requirements. However, Article 2(5) of the Law of 25 February 2003 states that differential treatment will only be justified in employment and occupation – i.e., within the scope of application of Directive 2000/78/EC[83] – "where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate". This wording reproduces Article 4(1) of Directive 2000/78/EC (occupational requirements). It seeks to ensure that, despite the difference in formulation between the Belgian Law and the Directive – the former permitting an objective and reasonable justification for a difference in treatment, the latter excluding in principle such a justification – there is no contradiction between the Law of 25 February 2003 and the requirements of the Employment Equality Directive.

However, aside from doubts which may exist as to the compatibility of Article 2(5) of the Law of 25 February 2003 (see below, paragraph 4.1) with the requirements of Art. 4 of Directive 2000/43/EC and Art. 4(1) of Directive 2000/78/EC, there also remains a tension between the formulation of Article 2(2) of the Law of 25 February 2003 and the requirements of Directive 2000/43/EC : this Directive imposes an *absolute* prohibition of differences of treatment based directly on race and ethnic origin in fields other than employment and occupation ; in contrast, in these fields, the Federal Law of 25 February 2003, taken literally, does allow for a justification of such differences in treatment, and it is doubtful that case-law – even if it ensures that the law in interpreted in accordance with the Directive – will suffice to remove that tension completely.

This gap cannot be said to be compensated for by the protection offered to victims of discrimination based on race or ethnic origin in access to goods and services by the Law of 30 July 1981. First, this legislation is ineffective, due in particular to its failure to facilitate the

[82] See Article 2, 8° of the Flemish Decree of 8 May 2002; art. 4 al. 2 of the Decree of the Walloon Region; Article 2 § 1, 2° of the French-speaking Community's Decree.

[83] On its terms at least, the definition offered by Article 2(5) of the Law of 25 February 2003 does not extend to membership of, and involvement in, trade unions or professional organisations (Art. 3(1)(d) of Directive 2000/78/EC): indeed, it only refers to access to employment, working conditions, and nomination to public functions, and not to the broader question of "access to, participation in or other form of exercise of an economic, social, cultural or political activity accessible to the public". But the Belgian courts are under an obligation to apply national law in conformity with the requirements of European Community Law (Case C-106/89, *Marleasing SA* [1990] European Court Reports I-4135 (recital 9); with respect to the interpretation of national rules which were adopted with the purpose of implementing a directive, see Case 14/83, *S. von Colson and E. Kamann* [1984] European Court Reports 1891; and Case 79/83, *D. Harz* [1990] European Court Reports 1921) which will probably compensate for this apparent contradiction, and exclude any justification for less favourable treatment imposed on grounds of sexual orientation with respect to participation in trade unions or professional organisations.

proof of discrimination by alleged victims. Second, the Law of 30 July 1981 does not provide for criminal sanctions for discrimination in the field of education, which falls under the scope of application of Directive 2000/43/EC, unless education is considered to be a "service" under that legislation, which is uncertain. Third, as regards social protection and the allocation of social advantages (the other fields covered by the Racial Equality Directive), the Law of 30 July 1981 may only be invoked in the rare circumstance where the alleged discrimination could be traceable to an individual public servant knowingly committing a prohibited discrimination, under the general requirement of *mens rea* – an intent to commit the violation – in criminal law.

If and when the legislative reforms currently under consideration before the Parliament are completed, this situation will be significantly improved :

The racial equality bill which provides for the modification of the Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (*Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*) seeks to implement the Racial Equality Directive (2000/43/EC) (as well as the 1965 International Convention on the Elimination of All Forms of Racial Discrimination), by prohibiting discrimination on grounds of 'race', color, descent, national or ethnic origin, and nationality. In this second text, a distinction is made between 1° differences in treatment based on 'race', color, descent, national or ethnic origin, and 2° differences in treatment based on nationality. The latter may be justified as means both appropriate and necessary for the fulfillment of legitimate objectives (Article 7 § 2, al. 1), unless this would be in violation of the prohibition of discrimination on grounds of nationality under EU law (Article 7 § 2, al. 2). By contrast, differences in treatment based on 'race', color, descent, national or ethnic origin, are in principle absolutely prohibited (i.e., such differences may not be justified) (Article 7 § 1), with three exceptions : in the field of employment and occupation, where such characteristics constitute a genuine occupational requirement (Art. 8); where the difference in treatment is part of a positive action measure (Art. 10); or where the difference in treatment is imposed by, or by virtue of, another legislation (Art. 11). Since the first two exceptions are directly inspired by the Racial Equality Directive itself, they require no further explanation here. The third exception (called 'coordination clause' in the preparatory works, which refers to the need to coordinate the antidiscrimination laws with other existing legislative acts) is justified, in the view of the government, by the need to avoid that legal provisions will be challenged on the basis of the Law of 30 July 1981 (as amended following the current legislative reform); needless to say, any legal provision allowing a difference of treatment based on 'race', color, descent, national or ethnic origin, may be challenged on the basis of Articles 10 and 11 of the Constitution, or under European and international law.

Under Article 7 of the bill seeking to implement the Employment Equality Directive (*Projet de loi tendant à lutter contre certaines formes de discrimination*), differences in treatment based on one of the grounds listed (which include all the grounds of that directive) are prohibited unless they are justified as means both appropriate and necessary to realize a legitimate objective. However, Article 8 adds that, in the field of employment and occupation, and as regards the grounds listed in Directive 2000/78/EC (age, sexual orientation, religious or philosophical conviction, or disability), only genuine occupational requirements may justify differences in treatment directly based on these grounds, unless the difference in treatment is justified as a form of positive action (Art. 10), or – like under the 'coordination clause' also contained, as we have just seen, in the draft law amending the Law of 30 July 1981 – unless it is imposed or authorized by another legislation (Art. 11). This seeks to ensure the compatibility of the draft law with the requirements of the Employment Equality Directive. In addition, as regards differences in treatment on grounds of age, Article 12

provides for a wide range of situations where such differences may be allowed (in line with Art. 6 of the Employment Equality Directive); and Article 13 (this time as allowed by Article 4 (2) of the Employment Equality Directive) 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.

c) In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?

None of the laws implementing Directive 2000/78/EC specify how a distinction based on age is to be evaluated. This will be left to the courts to determine. The judgment of the Constitutional Court of 5 October 2005 is an encouraging sign.

2.2.1 Situation Testing

a) Does national law permit the use of 'situational testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court.

This has been a contentious issue since the Federal Anti-discrimination Law of 25 February 2003 entered into force. Article 19 § 3 of this Law states that the victim of a discriminatory act may establish a presumption of (direct or indirect) discrimination in a civil case by producing certain evidence, including situation tests. Article 19 § 4 then adds that the proof of discrimination may be established by means of a situation test, which may be performed by a public official, and it adds that an executive decree (Arrêté royal) will define the conditions of admissibility of such situation tests in the context of discrimination suits. However, the consultations on the content of this executive regulation failed, due to the resistance, in particular, of employers' organisations. These consultations also seem to have highlighted the difficulty in pursuing simultaneously two partially incompatible objectives: first, the 'situation tests' should be strictly codified, and their methodology set out, in order to ensure that they will not lead to abuse by alleged victims of discrimination, but also to encourage judges to accept that this will bring about a reversal of the burden of proof; second however, such "situation tests" must not be too arduous to perform, and they should remain a relatively accessible means by which a presumption of discrimination may be established.

However, the fact that the executive decree (Arrêté royal) has not been adopted under Article 19 § 4 of the Law of 25 February 2003, does not mean that situational testing cannot be used by individuals or organisations in order to establish a presumption of discrimination, leading to shift the burden of proof on the shoulders of the defendant. On two occasions (see further hereunder, c)) courts have recognized the validity of this mode of evidence under the Law of 25 February 2003.

In the legislative bills currently under examination, the same solution as already present under the Law of 25 February 2003 has been adopted (see Article 28 of the general antidiscrimination bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*) implementing the Employment Equality Directive ; and Article 28 of the bill implementing the Racial Equality Directive by amending the Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (racial equality bill) (*Projet de loi modifiant la Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme*

ou la xénophobie)). The same doubts exist, however, as to the political will of the government to go through with the adoption of implementing decrees in order to provide more certainty about the admissibility of such situational testing and the legal effects. However, no more than under the existing legislation, should this constitute an insuperable obstacle.

b) Is there any reluctance to use situational testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?

Any reluctance to generalize the use of situational testing in order to establish a presumption of discrimination would appear to come from the side of the potential defendants, in particular employers. This is entirely to be expected. There are no other specific concerns or reluctance.

The Centre for Equal Opportunities and Opposition to Racism had intended to commission a study on this question, and the call for tenders explicitly called for a comparative analysis. However, the Centre received no proposals, and it is therefore doubtful this study will finally be performed.

c) Outline <u>important</u> case-law within the national legal system on this issue.

The Belgian courts traditionally have been quite open to a criminal offence being proven by methods similar to situational testing, unless the method used means someone incites the offence[84]. This case-law may be considered questionable in the light of the requirements of Article 6 § 1 of the European Convention on Human Rights: whereas the European Court of Human Rights considers that the rights of the defendant are violated where the offence is committed because of the acts of the "agent provocateur",[85] the Belgian Court of Cassation considers that if the "agent provocateur" simply creates the opportunity for the offence to be commited, in cases where the criminal intent pre-existed, the defendant's rights are not violated. This case-law may probably be considered to apply also, *mutatis mutandis*, to situation testing in the context of civil suits, as based on the Law of 25 February 2003.

There are at least two examples of "situational testing" under the Federal Antidiscrimination Law of 25 Ferbuary 2003, in which courts have accepted this mode of proof although the implementating executive decree has not been adopted to formalize the methodology. In June 2005, Article 19 § 3 of the Law of 25 February 2003 was relied upon by a couple consisting of two persons of foreign origin, who requested information about an apartment advertised for lease by a rental agency. The agency requested from the couple evidence that they received a salary equivalent to at a minimum three times the amount of the monthly rent. An appointment was set for the next day, however on the same afternoon the couple was informed by the agency that the apartment had finally be rented to another person, an acquaintance of the owner. However, since the apartment was still advertised for rent, the couple asked a friend to contact the agency in order to enquire about the availability of the apartment. After the friend had told the agency that he was enquiring on behalf of friends who were Belgian nationals, an appointment was fixed. The agency then justified its attitude by insisting that the owner preferred older tenants in order to preserve quiet in the house where the owner was also resident. Confronted with these facts, the judge considered that the testimony of the couple and their friend were indeed facts which could establish a presumption of discrimination based on the foreign origin of the plaintiffs. The defendants did not manage to rebut the presumption; in the view of the judge, their asserted preference for an

[84]Court of Cassation, 5 February 1985, *Gaddum, Pasicrisie*, 1985, I, 690; Court of Cassation, 7 February 1979, *Salermo, Pasicrisie*, 1979, I, 665.
[85] See for example ECHR, *Texeira de Castro v. Portugal* judgment of 9 June 1998, Rep. 1998-IV, p. 1463, § 63.

elderly tenant failed in the light of the fact that they finally chose tenants of approximately 40 years old, which does not correspond to "elderly".[86]

The judgment adopted on 30 November 2005 by the Ghent Court of Appeals provides another example (see above for a detailed description). There, the statement by the rental agency that the owner did not wish to rent her apartment to "two men or two women" was first made before the plaintiff (a male individual seeking an apartment for himself and his male partner), before being repeated in the presence of a legal officer (huissier de justice), a few days later. Although it denied the application, the Court of Appeals considered that discrimination may in principle be proven through such means, notwithstanding the fact that the Government has not adopted a decree specifying the conditions under which "testing" may take place in order to prove discrimination.

d) Outline how situation-testing is used in practice and by whom (e.g. NGOs)

Situational testing is not widely relied upon, and where it has been used, it has been on an ad hoc basis, by victims acting spontaneously to strengthen their case, rather than as part of a deliberate strategy by repeat-players such as NGOs or the Centre for Equal Opportunities and Opposition to Racism. While the absence of an executive decree clarifying the methodology of situational testing as well as the weight of this as evidence of discrimination does not prohibit the use of this technique, it obviously has a chilling effect in that it makes the Centre for Equal Opportunities and Opposition to Racism hesitant to develop this on a systematic basis, since it could be exposing itself to the critique that it is "entrapping" potential violators or "provoking" them to discriminate.

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

a) How is indirect discrimination defined in national law?

Criminal law. As mentioned in 2.2. above, the Law of 30 July 1981 criminalising certain acts inspired by racism and xenophobia defines "discrimination" for the purposes of that law in terms almost identical to those of Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination. However, the concept of "indirect discrimination", although not explicitly identified as such, is included in slightly wider terms in that definition. Where the UN Convention on the Elimination of All Forms of Racial Discrimination states that "'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which *has the purpose or effect of* nullifying or impairing" the enjoyment of human rights and fundamental freedoms, the Belgian Law of 30 July 1981 defines discrimination as including "any distinction, exclusion, restriction or preference which *has or may have (ayant ou pouvant avoir) the purpose or effect of* nullifying or impairing" such enjoyment (Art. 1 al. 1 of the Law of 30 July 1981). As a result of this definition of discrimination, a person may be found criminally liable for imposing a condition on access to or provision of goods and services (Art. 2), or for adopting a measure in employment (Art. 2bis) if these conditions or measures have or may have as their purpose or effect to nullify or restrict the enjoyment of the human rights or fundamental freedoms of persons of a particular race or colour, descent, or national or ethnic origin.

In the bill implementing the Racial Equality Directive by amending the Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (racial equality bill) (*Projet de loi*

[86] Court of First Instance of Brussels (Civ. Bruxelles (réf.)), 3 June 2005, judgment no.05/1289/A, ref. T no.1264/05, published in the *Revue de droit des étrangers*, 2005, no.133, p. 220.

modifiant la Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie) – one of the bills currently awaiting approval –, Article 4, 9° defines indirect discrimination as an 'indirect distinction' on the basis of one of the protected grounds ('race', color, descent, national or ethnic origin, and nationality), which cannot be justified under title II of the Act. Article 4, 8° in turn defines 'indirect distinction' as the situation which occurs whenever an apparently neutral provision, criterion or practice, may result in ('est susceptible d'entraîner') a particular disadvantage for persons characterised by one of those protected grounds. Thus, under this draft legislation, the definition of indirect discrimination has been aligned with that of the Racial Equality Directive which it seeks to implement, although by the detour of the strange (and perhaps antonymous) notion of 'indirect distinction'. It will be recalled that this proposal also decriminalizes certain offences linked to discrimination on grounds of 'race', color, descent, national or ethnic origin, and nationality, inter alia because the criminalization of indirect discrimination was considered to be problematic as regards the requirement of legal certainty.

Civil provisions. According to the reformulation of Article 2(2) of the Law of 25 February 2003 which results from the judgment of the Constitutional Court of 6 October 2004, indirect discrimination exists where a provision, criterion or practice, while apparently neutral, produces a disadvantage for certain persons, unless this provision, criterion or practice has a reasonable and objective justification. Article 2(2) of the Federal Law of 25 February 2003 thus omits an explicit reference to the principle of necessity, which identifies the relationship between the aim of the provision, criterion or practice and the measure which seeks to fulfil the aim. The same remark can be made about the definition of "indirect discrimination" offered in Article 4 al. 3 of the Decree (*Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle)* adopted by the Walloon Region. The omission in the Federal Law and in the Decree adopted by the Walloon Region may be of little practical consequence, as the notion of "reasonable" justification implicitly refers to a requirement of proportionality and the judge will seek to conform his or her interpretation of Article 2(2) of the Law of 25 February 2003 or Article 4 of the Walloon Decree with the definition of indirect discrimination contained in the Directives. It is regrettable, however, that this provision of the Federal Law[87] does not refer to the legitimacy of the aim pursued by the measure alleged to constitute indirect discrimination.

The other regional and community instruments are generally closer to the Directives they seek to implement than federal legislation. Thus, under the Flemish Decree on proportionate participation in the employment market, indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons belonging to certain protected groups at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary: Article 2(2)(b) of Directives 2000/43/EC and 2000/78/EC has been simply reproduced in Article 2 of the Decree, which defines the notion of indirect discrimination. Similarly, the Decree implementing the Directives for the German-speaking Community contains a definition of "indirect discrimination" which replicates precisely the formulation in German of the Framework Directive, Article 2(2)(b) of which seems to provide a greater degree of protection than its English formulation. Article 2 of the *Dekret* defines indirect discrimination as occuring where an apparently neutral provision, criterion or practice "could" put a person[88] at a particular disadvantage compared with other persons, unless the measure is objectively justified by a legitimate aim and the means of

[87] The Decree adopted by the Walloon Region does contain the requirement that an apparently neutral measure which imposes a particular disadvantage on members of a protected category should be justified by a legitimate objective.

[88] Again, as a result of the judgment of the Constitutional Court of 6 October 2004, it seems justified to read the Decree as providing protection from discrimination, on whichever ground it is alleged to have occurred.

achieving that aim are appropriate and necessary (compare with the expression "would" in the English version of the Framework Directive; the French version uses the expression "*est susceptible de"*). Article 2 § 1, 3° of the French-speaking Community's Decree also reproduces the wording of the Directive, thus containing the requirement of necessity.

Under the general antidiscrimination bill currently presented for adoption (*Projet de loi tendant à lutter contre certaines formes de discrimination*), which seeks to implement Directive 2000/78/EC of 27 November 2000, indirect discrimination is defined in Article 4, 9° as an 'indirect distinction' on the basis of one of the protected grounds (age, sexual orientation, civil status, birth, property (Fr. 'fortune'), religious of philosophical belief, political opinion, language, actual or future state of health, disability, physical characteristic, genetic characteristic, social origin), which cannot be justified under title II of the Act. Article 4, 8° in turn defines 'indirect distinction' as the situation which occurs whenever an apparently neutral provision, criterion or practice, may result in ('est susceptible d'entraîner') a particular disadvantage for persons characterised by one of those protected grounds. Thus, under this draft legislation, the definition of indirect discrimination has been aligned with that of the Employment Equality Directive which it seeks to implement, although again by the detour of the notion of 'indirect distinction'.

b) What test must be satisfied to justify indirect discrimination?

There is no such thing as 'justifying indirect discrimination' and this question is not well formulated. The author is assuming that what is asked is whether and how apparently neutral measures which may result in putting persons with a certain characteristic at a particular disadvantage may be justified, and under which conditions.

Apparently neutral measures which may result in putting persons with a certain characteristic at a particular disadvantage may be justified, under the current legislation, in the conditions described in the preceding paragraph. The draft legislation current awaiting adoption will result in a better alignment of the federal legislation with the regime of indirect discrimination under the directives. Article 9 of the legislative bills currently under examination provide that such apparently neutral measures may only be justified if they are objectively justified by a legitimate objective which they seek to fulfill by means which are both appropriate and necessary (the formulation is the same in the general antidiscrimination bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*) implementing the Employment Equality Directive, and in the racial equality bill implementing the Racial Equality Directive by amending the Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (*Projet de loi modifiant la Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie)*). Article 9 al. 2 of the general antidiscrimination bill adds that, as regards apparently neutral measures resulting in imposing a particular disadvantage on persons with disabilities, they may be justified by the fact that no reasonable accommodation can be adopted. Incidentally, this demonstrates that discrimination resulting from the failure to provide 'reasonable accommodation' is considered as indirect discrimination, rather than as direct discrimination, although Article 14 of the general antidiscrimination bill lists the denial of reasonable accommodation, along with direct discrimination, indirect discrimination, the instruction to discriminate and harassment as various forms of discrimination.

In addition, 'indirect distinctions' (i.e., apparently neutral measures which may result in a particular disadvantage for persons characterised by one of those protected grounds) may be justified by the need to adopt positive action measures (Article 10 of the general antidiscrimination bill (*Projet de loi tendant à lutter contre certaines formes de*

discrimination) implementing the Employment Equality Directive, and Article 10 of the racial equality bill (*Projet de loi modifiant la Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*)); by the fact that the adoption of such measures is imposed by, or by virtue of, other legislations (these are the 'coordination clauses' also referred to earlier, located in Article 11 of both bills).

In addition to those 'general justifications', 'specific justifications' (concerning specific grounds) exist in the general antidiscrimination bill implementing the Employment Equality Directive : they concern a variety of circumstances in which apparently neutral measures imposing a particular disadvantage on persons on grounds of age may be justified (Article 12 of the general antidiscrimination bill); and public or private organisations whose ethos is based on religion or philosophical belief (Article 13 of the general antidiscrimination bill).

c) Is this compatible with the Directives?

The Federal Antidiscrimination Law of 25 February 2003, currently in force, does not require that the aim pursued by the allegedly discriminatory (albeit apparently neutral) measure should be legitimate ; nor does it require a relationship of necessity between that aim and the measure contested. The draft legislation currently under examination in Parliament should remedy this.

d) In relation to age discrimination, does the law specify how a comparison is to be made?

It does not.

2.3.1 Statistical Evidence

a) Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court.

The Federal Law of 25 February 2003 currently allows for this mode of proof in civil cases (Art. 19 § 3). An identically worded provision may be found in the Decree on equal treatment in employment and professional training (*Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle*) adopted by the Walloon Region on 27 May 2004 (*Moniteur belge*, 23 June 2004) (art. 17)[89]. Although statistics as such are mentioned explicitly neither in the Flemish Decree of 8 May 2002 on proportionate participation on the labour market (*Moniteur belge*, 26 August 2002), nor in the Decree of 17 May 2004 of the German-speaking Community on equal treatment on the labour market (*Décret relatif à la garantie de l'égalité de traitement sur le marché du travail*), it would seem that this mode of proving discrimination is allowed under Article 14 of the Flemish Decree and Article 18 of the German-speaking Community Decree, both of which provide for shifting the burden of proof in civil cases[90]. Such statistics have not so far been invoked in the context of judicial proceedings.

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[89] No such provision, by contrast, may be found in the Decree on the implementation of the principle of equality of treatment, *Décret relatif à la mise en oeuvre du principe de l'égalité de traitement,* adopted on 19 May 2004 by the French-speaking Community (*Moniteur belge*, 7 June 2004). This may be attributable to the fact that the French-speaking Community considered that the matter of proving discrimination was a procedural question, relating to the definition of the powers of courts, which is a matter to be regulated at federal level.

[90] Article 14 of the Flemish Decree of 8 May 2002 reads in its relevant part "Any person who can show an interest can bring an action to the competent jurisdiction in order to ensure the application of the provisions of this decree. When that person brings facts before that jurisdiction which lead to the presumption of direct or indirect discrimination, the burden of proof for the non-violation of the principle of equality of treatment reverts to the defendant".
("*Toute personne faisant preuve d'un intérêt peut intenter une action auprès de la juridiction compétente afin de faire appliquer les dispositions du présent décret. Lorsque cette personne invoque devant cette juridiction des faits faisant*

On this point, the legislative bills implementing respectively the Employment Equality Directive (general antidiscrimination bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*): see Art. 28 § 1) and the Racial Equality Directive (racial equality bill (*Projet de loi modifiant la Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*) (see Art. 28 § 1) simply reproduce the existing situation.

b) Is the use of such evidence commonly used? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?

With respect to the grounds of discrimination listed in the Race and Framework Directives, statistical data have not so far been invoked in the context of judicial proceedings. This is to be explained by the fact that the data which should be relied upon are not available, due to the restrictions imposed by the legislation relating to the protection of personal data (and the interpretation thereof of the Commission for the protection of private life, the independent supervisory authority). The Centre for Equal Opportunities and Opposition to Racism is however keeping this question under review. The interministerial conference however has still not authorized an experience which the Centre had proposed to lead in this regard, called 'Socio-economic monitoring of origins', which intended to test the feasibility of developing statistics in order to identify any situations of discrimination.

c) Please illustrate the most important case law in this area.

There exists no case-law in this area.

d) Are there national rules which permit data collection? Please answer in respect of all 5 grounds.

The question must be answered separately with regard to employment, and with regard to other fields:

Employment

Data relating to race or ethnic origin, religion, disability (health) or sexual orientation are regarded as sensitive data (Article 6 § 1 of the Federal Law of 8 December 1992 on the protection of the right to private life with respect to the processing of personal data[91]) and their processing is prohibited under Belgian law unless – with respect to disability – this is justified by the employer's need to comply with its obligations under social security legislation (Article 6 § 2, h) of the Federal Law of 8 December 1992). There are exceptions to this general prohibition, however:

First, under Art. 6 § 2, b), of the Law of 8 December 1992, the employer may process sensitive personal data relating to employees where this is required in order to comply with

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présumer l'existence d'une discrimination directe ou indirecte, la charge de la preuve quant à la non-violation du principe de l'égalité de traitement, incombe à la partie défenderesse"). The wording of Article 18 of the Decree adopted on 17 May 2004 by the German-speaking Community is identical.

[91] *Loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel*, *Moniteur belge*, 18 March 1992. This legislation was amended by a Law 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).

the employer's obligations under labour law. This exception (as well as that provided under Art. 6 § 2, f) stating that the processing of sensitive personal data is permitted where this would be required in the context of judicial proceedings) may plausibly be invoked by the employer who could justify processing data considered sensitive in order to protect him- or herself from a suit alleging discrimination by seeking to improve diversity in the workforce in order to ensure that no statistics will be presented to demonstrate that the employer has been discriminating in recruitment or promotion[92].

This exception may be invoked by the public services of the Flemish-speaking Community, who are in an exceptional position in this respect. These services have to file annual reports and action plans on progress towards the proportionate representation of all target groups in the workforce, and thus they have to keep records of the representation of these different groups (Article 7 of the Flemish Decree of 8 May 2002 on proportionate participation on the labour market). These target groups have been identified by the Flemish government as "all categories of persons whose levels of employment, defined as the percentage of the active population of that category who effectively work, are under the average level of employment for the total Flemish population"[93]: these groups are persons of non-EU origin and background ("allochtonen"), persons with a disability, workers above 45 years of age, persons who have not completed secondary education, and persons belonging to the under-represented sex in a specific profession (Art. 2(2), al. 2).

Second, under Art. 6 § 2, l) and Art. 7 § 2, e) of the Law of 8 December 1992 (the latter provision concerning data relating to health) the processing of sensitive personal data may be justified by law, decree or ordinance for any legitimate public interest. The Commission for the protection of privacy (Commission de protection de la vie privée), the independent authority monitoring compliance with this legislation, delivered an opinion where it considered that the processing of sensitive personal data in order to implement the affirmative duty to promote the equal treatment of certain target groups (under the system set up by the Flemish Decree of 8 May 2002) was authorised under these provisions. The Commission also confirmed an opinion n° 7/93 it had delivered on 6 August 1993, according to which the processing of personal data relating to membership of a cultural or ethnic minority was acceptable insofar as the objective is to grant certain specific advantages to those persons (under a positive action scheme) and if the data collected relate to the person's country of birth, or to that of the parents or grand-parents. In this way, this opinion implicitly opposes the processing of personal data relating directly to racial or ethnic origin, whether for

[92] It should be emphasised that, as recalled by the Commission for the Protection of Private Life (Opinion no.7/93 of 6 August 1993, cited above), even though Article 6 § 2 of the Law of 8 December 1992 allows the processing of sensitive data in certain well-defined circumstances, the other conditions stipulated by the Law of 8 December 1992 must be fully respected. Thus in particular, only data which are relevant and proportionate to a legitimate and well-defined objective may be processed (Art. 5 of the Law of 8 December 1992); and the data subject must be able to exercise the rights recognised in Art. 4 and 9 to 13 of the Law (right of access and rectification, right to a remedy). In accordance with Article 5 of the Law of 8 December 1992, although the consent of the data subject may legitimate the processing of personal data (including sensitive data where it is not prohibited) – with, however, the reservations mentioned below in this paragraph of the report, concerning the validity of consent in the context of the employment relationship – this is not necessarily required, if there is another objective legitimising the processing of personal data. To the knowledge of the author however, despite this being a theoretical possibility under the current state of Belgian legislation, neither ethnic monitoring nor other forms of monitoring of the composition of the workforce under the other categories protected from discrimination are as such performed by Belgian companies. The public services of the Flemish-speaking Community are an exception in this regard, as the next paragraph details.

[93] Art. 2(2), al. 1, of the *Besluit [van 30 Januari 2004] van de Vlaamse regering tot uitvoering van het decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling*, *B.S.* (*Belgisch Staatsblad / Moniteur belge*), 4.3.2004, p. 12050 (Regulation [of 30 January 2004] of the Flemish Government concerning the execution of the decree of 8 May 2002 on equitable participation in the employment market concerning professional orientation, vocational training, career counselling and the action of intermediaries on the labour market)).

affirmative action purposes or otherwise[94]. The Flemish Decree does not include racial or ethnic minorities as such among target groups, but only persons of foreign origin ("allocthonen").[95]

Third, under Belgian law, the written consent of the person concerned (the data subject) may also justify the processing of sensitive data (Art. 6 § 2, a), of the Law of 8 December 1992). However, this is not particularly easy to justify in the context of employment, due to the imbalance in the employer/employee relationship. Although the Commission for the protection of private life has repeatedly stated in three successive opinions that the employee's consent should be considered a sufficient justification for the processing of sensitive personal data (see Opinion n°8/99 of 8 March 1999, Opinion n°25/99 of 23 July 1999, and Opinion n°3/2004 of 15 March 2004), the Belgian government preferred to adopt the strict approach to the notion of "freely given consent" mentioned in Article 2, h) of Directive 95/46/EC, and thus took the view that consent could not constitute such a justification in an employment relationship, because we cannot presume in that the positions of the parties will be sufficiently equal. Therefore, Article 27 of the Executive Decree of 13 February 2001 implementing the Law of 8 December 1992 excludes that written consent may constitute a justification for processing of sensitive data, in employment relationships or in other relationships where, due to the imbalance in the relationship between the parties, consent cannot be considered "freely given"[96]. According to Art. 27 al. 2, this rule does not apply however where processing of such data is justified by the need to grant an advantage to the workers concerned: the example is given of accommodating religious practices, however this exception presumably also could be invoked with regard to positive action programmes for instance. Whether a person seeking social housing or registering a child in school for example, also finds him- or herself in a situation of dependency in the sense of Article 27 of the Executive Decree of 13 February 2001 and whether this person's consent may suffice to legitimate the processing of data in situations where this would be otherwise allowable has not been decided yet. It will be noted however that, in the only situation other than employment where positive actions are being adopted in Belgium – where special measures are being taken by the French-speaking and Flemish Communities to promote the integration of the children of newly arrived immigrants – such measures have been targeted not on the basis of race or ethnic origin, or on the basis of any other sensitive data, but on the basis of the nationality of the parents[97].

2.4 Harassment (Article 2(3))

a) How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.

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[94] As a result of the limits imposed by the protection of private life vis-à-vis the processing of personal data, in the interpretation given to the law of 8 December 1992 by the Commission for the Protection of Private Life, it would not be allowable for the Flemish Government to define the "Roma" or the "Sinti" as a target group, for instance; nor would it be permissible for an employer to monitor on his/her own initiative the representation of the Roma or the Sinti in the workforce.

[95] Commission de protection de la vie privée, *Projet de décret du gouvernement flamand autorisant certains membres du personnel de l'Administration de l'Emploi du Ministère de la Communauté flamande à traiter des données à caractère personnel relatives aux personnes issues des "kansengroepen" ("groupes à potential") en vue de promouvoir une participation proportionnelle sur le marché de l'emploi* (avis no.3/2004, 15 March 2004).

[96] *Koninklijk besluit ter uitvoering van de wet van 8 december 1992 tot bescherming van de persoonlijke levenssfeer / Arrêté royal portant exécution de la loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel, Moniteur belge*, 13 March 2001 ("*lorsque la personne concernée se trouve dans une situation de dépendance vis-à-vis du responsable du traitement, qui l'empêche de refuser librement son consentement*", "when the person concerned is in a situation of dependency with regard to the person responsible for processing the data, which prevents him from freely refusing his consent").

[97] These measures are described in further detail below.

Both the Federal Law of 25 February 2003 and the Decree adopted by the German-speaking Community identify harassment (*harcèlement*, *pesterijen*, *Belästigung* in the original German language version of the German-speaking Community's Decree) as a form of discrimination, and define the notion in strict conformity with the Directives[98] – although only the Decree proposed for the German-speaking Community explicitly defines harassment as a form of *direct* discrimination[99].

The Flemish Decree of 8 May 2002 also refers to harassment; however, after having offered a definition of harassment (*intimidatie*) which closely replicates the wording of the Directives[100], it then states that "[T]he principle of equal treatment implies the absence of any form of direct or indirect discrimination or of harassment in the employment market"[101]. In the Flemish Decree therefore, the concept of harassment remains analytically separate from that of discrimination. This categorisation could be of more than purely conceptual importance. In particular, Article 5(2) of the Flemish Decree presents a long list of (13) forms of conduct which are prohibited, but the definitions of these prohibitions systematically refer to conduct which may lead to discrimination, thereby seemingly excluding "harassment" from the forms of conduct which the Decree formally prohibits. Article 9 of the Decree, which concerns the establishment of an authority promoting proportionate participation and equal treatment, the two guiding principles of the Flemish Decree, mentions that such an authority will have the competence, in particular, to assist victims of discrimination in filing their complaints: should this be read as excluding assistance to victims of harassment, which the Decree distinguishes from discrimination per se? Perhaps more worryingly, Article 11 of the Decree provides that those who commit discrimination may be sentenced to a prison sentence and/or to the payment of a fine: would it not be in contradiction with the principle of strict interpretation of criminal provisions to extend this clause to acts of harassment? For these reasons, and because of the difficulties of interpretation it could create in the future, the choice to present harassment as a violation of the principle of equal treatment but as distinct from either direct or indirect discrimination may be criticized.

Article 442bis of the Penal Code introduced by the Law of 30 October 1998 already criminalises harassment in general[102]. Moreover, under Article 11 of the Law of 25 February 2003, when harassment (as defined under Article 442bis of the Penal Code) is committed with a discriminatory purpose – i.e. when it appears to be a "hate crime", motivated by hostility towards a person because of a particular characteristic suspected as being possessed by the victim – the penalties may be doubled[103]. Finally, the Law of 11 June 2002 on the protection against violence and moral or sexual harassment at work inserted a new Chapter Vbis ("*Dispositions spécifiques concernant la violence et le harcèlement moral ou sexuel au travail"*) into the Law of 4 August 1996 (*Loi du 4 août 1996 relative au bien-être des travailleurs lors de l'exécution de leur travail*), again with a similar object[104].

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[98] See Article 2(6) of the Law.
[99] See Article 5(2) of the Decree on ensuring equal treatment on the labour market.
[100] See Article 2, 11° of the Decree.
[101] Article 5(1), 2° of the Decree.
[102] Article 442bis of the Penal Code refers to "*Quiconque aura harcelé une personne alors qu'il savait ou aurait dû savoir qu'il affecterait gravement par ce comportement la tranquillité de la personne visée*" ("Anyone who has harrassed another when he knew, or should have known, that he would seriously affect the peace of mind of the person concerned by this behaviour").
[103] New Article 422bis of the Penal Code, introduced by Article 11 of the Law of 25 February 2003.
[104] *Loi du 11 juin 2002 relative à la protection contre la violence et le harcèlement moral ou sexuel au travail*, *Moniteur belge*, 22 June 2002 (Law of 11 June 2002 on protection against violence and moral or sexual harrassment at work). See also, the 11 July 2002 *Circulaire relative à la protection des travailleurs contre la violence et le harcèlement moral ou sexuel au travail* (*Moniteur belge*, 18 July 2002) giving detailed instructions on the implementation by employers of the legislation of 11 June 2002,

The coexistence of the notion of harassment in the Federal Law of 25 February 2003 and in the Law of 4 August 1996 as amended by the Law of 11 June 2002 could create legal uncertainty, as it is obvious that harassment in the workplace could fall under either law. In order to remedy this, the bills currently under examination, submitted to the Parliament on 26 October 2006, provide that where the Law of 4 August 1996 (as amended) applies (i.e., in employment relationships), only this law shall be relied upon and not the prohibition of harassment as a form of discrimination in the three anti-discrimination statutes which are currently being proposed.[105]

Neither the Decree adopted by the Walloon Region on 27 May 2004 nor the Decree adopted on 19 May 2004 by the French-speaking Community refer to harassment. This omission is deliberate. It is based on the idea that the prohibitions of harassment which already exist at federal level[106] should be considered sufficient, and that any further action would be redundant. Moreover, the Council of State has clearly stated its opinion that the adoption at federal level of the Law of 4 August 1996 on the welfare of workers when carrying out their work constituted an exercise by the federal legislature of its general competences in regulating the employment relationship, and that in principle the Regions and Communities could not legislate on the same subject-matter without exceeding their own competences[107].

b) Is harassment prohibited as a form of discrimination?

Harassment is currently prohibited as a form of discrimination in the Federal Law of 25 February 2003, and as direct discrimination in the Decree adopted by the German-speaking Community on 17 May 2004. It is not treated as a form of discrimination by the Flemish Decree of 8 May 2002, although this Decree sees it as part of the requirement of equal treatment. The other legislative instruments implementing the Directives do not include a reference to harassment, because of the existence at federal level of the Law of 4 August 1996 on the welfare of workers while carrying out their work (*Loi du 4 août 1996 relative au bien-être des travailleurs lors de l'exécution de leur travail)* which, since its amendment in 2002, contains a general prohibition of harassment in the workplace that was considered sufficient.

On this point, the legislative bills implementing respectively the Employment Equality Directive (general antidiscrimination bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*)) and the Racial Equality Directive (racial equality bill (*Projet de loi modifiant la Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*) simply reproduce the existing situation. Both texts list harassment as a form of prohibited discrimination (Art. 14 and Art. 12, respectively).

c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?

Reference is made to footnotes 100 to 102, above.

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[105] See, e.g., Article 6 of the general antidiscrimination bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*).

[106] Or for the protection of the personnel of the French-speaking Community: see esp. *the Arrêté du gouvernement de la Communauté française du 26 juillet 2000 organisant la protection des membres du personnel des services du Gouvernement de la Communauté française et de certains organismes d'intérêt public contre le harcèlement sexuel ou moral sur les lieux de travail* (Government Decree of the French-speaking Community of 26 July 2000 on the protection of members of personnel in the services of the French-speaking Community's Administration and other public interest bodies against sexual or moral harrassment in the workplace).

[107] See the Council of State Opinion on the section of legislation no. 24.143/1 of 16 March 1995 on the draft law which was later to become the Law of 4 August 1996; and, more recently, Opinion no. 36.415/2 delivered on 11 February 2004 on the draft decree of the German-speaking Community on the guarantee of equal treatment in the employment market.

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

Criminal provisions. In 2003[108], the Law of 30 July 1981 criminalising certain acts inspired by racism and xenophobia was modified in order to contribute to the implementation of Directive 2000/43/EC by inserting the instruction to discriminate as one of the prohibited forms of discrimination in an alinea. in Art. 1.

Of course, the Law of 30 July 1981 only concerns discrimination based on race or colour, descent, or national or ethnic origin, and not the prohibited grounds of discrimination under Directive 2000/78/EC. Nevertheless, as a result of the amendment of 2003, an instruction to commit discrimination, whether deliberate or not, in the provision of services or the access to goods (Art. 2), or in access to employment and occupational training and dismissal (Art. 2bis), is a criminal offence.

Civil provisions. Article 2(7) of the Federal Law of 25 February 2003 replicates the wording of Article 2(4) of Directive 2000/78/EC stating that an instruction to discriminate shall be considered to be a form of prohibited discrimination. Moreover, Article 67 al. 2 of the Criminal Code (according to which those who give instructions to commit a criminal offence shall be considered accomplices and thus criminally liable) applies to the criminal sanctions which this Law attaches to discrimination committed by public servants in the exercise of their duties[109]. An instruction to commit a discriminatory act on the grounds of race, colour, descent, ethnic or national origin, which the Law of 30 July 1981 defines as a criminal offence, is also considered an offence under Article 67 al. 2 of the Criminal Code which is made applicable to the offences defined by the Law of 30 July 1981 by Article 6 of that Law. At the level of the Regions and Communities, Article 2, 10° of the Flemish Decree of 8 May 2002, Article 2(2) of the Decree of the French-speaking Community, Article 7 of the Decree adopted by the Walloon Region, and Article 5(1) of the Decree adopted by the German-speaking Community of 17 May 2004 provide that the instruction to discriminate should be considered an act of discrimination.

Legislative bills currently pending examination. The legislative bills implementing respectively the Employment Equality Directive (general antidiscrimination bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*)) and the Racial Equality Directive (bill amending the Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (*Projet de loi modifiant la Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*) both list the instruction to discriminate as a form of prohibited discrimination (Art. 14 and Art. 12, respectively).

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

a) How does national law implement the duty to provide reasonable accommodation for disabled people? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. e.g. does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?

[108] *Loi du 20 janvier 2003 relative au renforcement de la législation contre le racisme, Moniteur belge***,** 12 February 2003.
[109] See Art. 16 of the Law of 25 February 2003.

Federal State. Article 2, § 3, of the Federal Law of 25 February 2003 currently provides that the absence of reasonable accommodation for a person with a disability is a prohibited form of discrimination. The Law adopts a negative formulation, prohibiting the refusal to provide for a reasonable accommodation, rather than a positive formulation which imposes an obligation to provide such accommodation, as in Article 5 of the Framework Directive. "Reasonable accommodation" is defined as accommodation which does not impose a disproportionate burden, or for the cost of which compensation may be obtained from public funds. The inclusion of the absence of reasonable accommodation in the definition of discrimination represents a true innovation in Belgian law. Although the legislation in force before the adoption of the Federal Law of 25 February 2003 did not ignore the concept of reasonable accommodation, it defined it as accommodation deemed necessary for a disabled person's employment for which the employer may seek compensation. There was, however, no *obligation on the employer to provide such reasonable accommodation* or, for that matter, to seek compensation for any investment he/she decided (voluntarily) to make. This remains the status of "reasonable accommodation", for instance, under Title VIII of the Executive Decree of 5 November 1998 on promoting the equality of opportunities of persons with disabilities on the employment market (*Arrêté du Gouvernement wallon du 5 novembre 1998 visant à promouvoir l'égalité des chances des personnes handicapées sur le marché de l'emploi*)[110].Under this law, the employer may request compensation for costs of adapting a disabled person's work post in so far as such an adaptation is considered necessary, but he or she is not obliged to provide such an adaptation.

The general antidiscrimination bill currently awaiting adoption, which abrogates the Law of 25 February 2003 and prohibits discrimination on a number of grounds, including all the grounds mentioned in the Employment Equality Directive, states that the refusal to put in place reasonable accommodations for a person with a disability should be considered a form of discrimination. The notion of reasonable accommodation does not extend beyond the situation of persons with disabilities. Article 4, 12° of the draft law reproduces almost word to word the definition of "reasonable accommodation" in Article 5 of the Employment Equality Directive, although with one major difference : whereas the Directive only refers to reasonable accommodation (in line with the scope of application of the directive) in the field of employment, the draft law refers to all the fields to which the antidiscrimination law shall apply ('les domaines pour lesquels cette loi est d'application'), which includes, but is not limited to, work and employment. Therefore the obligation to provide reasonable accommodation is a general, transversal requirements, an integral part of the general prohibition of discrimination on grounds of disability.

Flemish Region/Community. In the Decree adopted on 8 May 2002 by the Flemish Region/Community, reasonable accommodation is described as a requirement entailed by the principle of equal treatment, however the reasonable accommodations mentioned in Art. 5 § 4 do not appear under the definitions either of direct discrimination, or of indirect discrimination[111], which may be attributed both to the vague character of the "reasonable accommodations" ("redelijke aanpassingen") called for by this Decree, and to the broad definition of the concept of reasonable accommodation, which is mentioned without specific reference to disability, but as a *general* requirement of equal treatment. According to Art. 5 § 4 of the Decree, the concept entails that the employer to whom the Decree applies (or persons or organisations acting as labour market intermediaries) should take appropriate measures

[110] The Executive Decree of 5 November 1998 is based on Article 15 of the Decree of 6 April 1995 on the integration of persons with disabilities states that the Agence wallonne pour l'intégration des personnes handicapées (AWIPH) may subsidise, under the conditions defined by the Walloon Government, the acquisition, the construction or the transformation of infrastructure or equipment for persons with disabilities.

[111] Compare with Art. 2 § 2, b), ii) of the Framework Directive.

where needed in a particular case to enable a person to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden, according to the same clause, shall not be disproportionate when it is sufficiently remedied by existing measures. The wording of this provision is of course borrowed from Article 5 of the Framework Directive 2000/78/EC, except for its extension beyond disabled persons.

Region of Brussels-Capital. Article 26, 4° of the Decree on the social and professional integration of disabled persons (*Décret relatif à l'intégration sociale et professionnelle des personnes handicapées*) adopted on 4 March 1999 by the Commission Communautaire française de la Région de Bruxelles-Capitale[112] provides that the Executive of that organ will stipulate the conditions under which its administration will be authorised to compensate the employer for the costs of any accommodation of the employee which is considered necessary. The compensation should cover the full cost of the accommodation provided, if it is deemed necessary (Art. 31). As under the Decree of the Walloon Government of 5 November 1998[113], however, the employer is under no obligation to provide this form of reasonable accommodation to his/her disabled employee. Nevertheless, these laws make it possible for employers to draw upon public grants for providing reasonable accommodation, and they indirectly impact on the employer's level of obligation to provide this kind of accommodation. Indeed, under the Federal Law of 25 February 2003, the Flemish Decree and the Decree of the German-speaking Community (see under), 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. This situation should not change if and when the general antidiscrimination bill, still awaiting adoption at the time of writing, is adopted, thus substituting a new legislation in lieu of the existing Federal Law of 25 February 2003.

German-speaking Community. The Decree adopted by the German-speaking Community includes in Art. 13 a provision on the obligation to provide reasonable accommodation the wording of which paraphrases that of Council Directive 2000/78/EC (Art. 5) and of the Federal Law of 25 February 2003. As in these instruments, the use of the notion is reserved to persons with disabilities.

French-speaking Community. Article 8 of the Decree adopted on 19 May 2004 by the French-speaking Community provides that reasonable accommodation should be provided to persons with disabilities, "in order to make it possible for the person with a disability to receive training, unless this imposes a disproportionate burden".

The emphasis on accommodation for education or training is regrettable. Read *a contrario*, this would imply that a failure to provide other forms of necessary accommodation would not be considered to constitute a form of discrimination under the terms of Article 8 of the Decree. However, the Decree applies, for instance, to all services of the French-speaking Community[114], and not only to those services or institutions which provide education or training. Everyone subject to the requirement of non-discrimination in the Decree should be obliged to provide reasonable accommodation, *in whatever form is appropriate*.

Walloon Region. Article 6 of the Decree on equal treatment in employment and professional training (*Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle*) adopted on 27 May 2004 by the Walloon Region provides that reasonable

[112] *Moniteur belge.*, 3 April 1999.
[113] See above, note 96.
[114] See Article 3, 1° of the Decree.

accommodations must be made, implying that the employer must take the appropriate measures, according to needs identified in a specific situation, in particular to allow for training or support to socio-professional integration to be given to a disabled person, unless this would impose a disproportionate burden.

This formulation may be criticised for the same reasons as the one presented by the French-speaking Community's Decree, mentioned above. There appears to be no reason to restrict the forms under which effective accommodation may have to be provided: although the definition in the Decree of the Walloon Region is slightly broader, as it refers not only to training but also to assistance in order to facilitate socio-professional integration, it is doubtful whether this extends, for instance, to the removal of certain architectural barriers impeding access to the workplace or occupation within a particular occupation. Of course, this restrictive approach is to be explained by the limited scope of application, *ratione materiae*, of the Decree, which restricts itself to implementing the principle of equal treatment as defined in the Race Directive and the Framework Directive with respect to the employment policy of the Region[115]. However, to the extent that the Decree applies to certain persons, whether private (for instance private employment agencies) or public administrations, it would have been preferable to stipulate that these persons are commiting discrimination where they do not provide any accommodation which may be required for the integration of persons with disabilities, where this would not impose on them a disproportionate burden. The current situation may create a source of confusion, as those to whom the Decree of the Walloon Region is addressed may be led to believe that the form of accommodation they must provide should not go beyond training and assistance.

Although the concept of "reasonable accommodations" appears in different laws, the Federal Government, the Regions and Communities have sought to arrive at a common understanding of this notion, in order to ensure that it will be uniformly applied throughout the country, whatever the legal basis on which the person with a disability may seek to rely. With that aim in mind, a Protocol has been produced by the Interministerial conference on persons with disabilities (*Conférence interministérielle en faveur des personnes handicapées*) on 10 May 2004, although it currently only has the status of a memorandum of understanding and still has to be translated into a cooperation agreement between the State, the Regions and Communities in order to become legally binding. The document lists a number of examples of what constitutes a "reasonable accommodation", and identifies examples of criteria which could lead to the conclusion that the accommodation requested is not reasonable as follows: a disproportionate financial cost; a disproportionate disorganisation of public service; the scale of an employer's activities; the threat to safety; the disturbance to general organisation; the exceptionally bad economic climate; the little use which would be made of the accommodation by those for whom it is designated; the ineffectiveness of the accommodation in contributing to the participation and the integration of persons with disabilities and so on The Protocol explicitly states, *inter alia*, that the availability of financial assistance from the State or other public entities is to be taken into account when judging whether a particular accommodation will be "reasonable".

It should also be noted that the Federal Public Service (Ministry) of Employment, Work and Social Dialogue published a brochure with the collaboration of the Centre for Equal Opportunities and Opposition to Racism which describes in detail, with a number of concrete examples, what the obligation to provide reasonable accommodation may entail[116]. This is clearly an example of a good practice from which other States could seek inspiration, as it

[115] See Article 8 of the Decree.
[116] The brochure may be downloaded from http://www.meta.fgov.be

constitutes a most useful tool, especially for businesses, clarifying their legal obligations and providing illustrations of which steps should be taken in order to ensure compliance.

Finally, it should be mentioned that the government has recently proposed the adoption of a law seeking to ensure that guide dogs will be admitted into public places. This legislation would impose the admission of guide dogs unless a refusal of entry is justified by a legal obligation or by reasons of hygiene, public health or security[117].

b) Does failure to meet the duty count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?

As regards fields which are a federal competence, the failure to meet the duty to provide reasonable accommodation constitutes a form of discrimination, currently under the Law of 25 Federal 2003, and in the future under the new legislation which will be adopted in lieu of the existing Federal Law of 25 February 2003, if and when the general antidiscrimination bill, still awaiting adoption at the time of writing, is adopted. For details and for an explanation of the situation under the instruments adopted by the Regions and Communities, the reader is referred to the preceding paragraph.

c) Has national law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?

As mentioned in the answer to the preceding question, the Flemish Decree of 8 May 2002 on proportionate representation does not restrict the notion of "reasonable accommodations" for disabled people and could therefore also apply in principle to persons of a particular religion or ethnic origin. This Decree however has a limited scope of application.

d) Does national law require buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?

The Framework Law (loi cadre) of 17 July 1975[118] first introduced the requirement for buildings accessible to the public to be accessible to the disabled. The implementing decrees were adopted on 9 May 1977[119]; they define norms for the construction of new buildings or for their renovation. However, since 1980, legislation on construction is a competence of the Regions[120].

In the *Walloon Region*, a Code on the Land and Urban Planning was adopted in 1984. This legislation has been modified on a number of occasions, and most recently by a Decree of the Walloon Government of 25 January 2001 stipulating that a building permit will only be issued

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[117] This legislation has been proposed by the Secretary of State for Families and Disabled People (Secrétaire d'Etat aux Familles et aux Personnes handicapées) after a broad consultation with the actors concerned. See the press release of 8 September 2005 of the Ministry of Social Security (Service public fédéral sécurité sociale), available at http://socialsecurity.fgov.be/FR/index.htm

[118] Law of 17 July 1975 on the access of persons with disabilities to buildings accessible to the public (*Wet van 17 Juli 1975 betreffende de toegang van gehandicapten tot gebouwen toegankelijk voor het publiek*), *Belgisch Staatblad (Moniteur belge),* 19 August 1975.

[119] *Koninklijk Besluit van 9 mei 1977 genomen in uitvoering van de wet van 17 juli 1975 betreffende de toegang van gehandicapten tot gebouwen toegankelijk voor het publiek, Belgisch Staatblad (Moniteur belge),* 8 June 1977.

[120] However the Federal Government still is competent for the rules on traffic on public roads. See for example the Ministerial circular of 3 April 2001 on reserved parking for persons with disabilities *(Ministeriële omzendbrief van 3 april 2001 betreffende het voorbehouden van parkeerplaatsen voor personen met een handicap* (B.S. 05.05.2001); modified *Ministeriële omzendbrief van 25 april 2003 betreffende parkeerplaatsen, voorbehouden voor personen met een handicap* (*Moniteur belge* 25 April 2003)).

if the buildings concerned[121] (in fact, all buildings which are not private habitations) are made accessible to disabled people. The Decree of the Walloon Government of 20 May 1999 defines the norms to which these buildings must conform (these norms relate to parking lots, the size and characteristics of entrances, the size of doors, the characteristics of staircases and elevators, etc.). Certain deviations may be authorised, in particular for architectural reasons, for transformations to an existing building.

In the *Region of Brussels-Capital*, apart from the Law of 17 July 1975 mentioned above, buildings accessible to the public must comply with Title IV "Accessibility of buildings by persons with limited mobility" of the Regional Regulation on urbanism approved by the Decree of the Government of the Region of Brussels-Capital of 11 April 2003 (*Arrêté du Gouvernement de la Région de Bruxelles-Capitale du 11 avril 2003 arrêtant les Titres I à VII du Règlement régional d'urbanisme applicable à tout le territoire de la Région de Bruxelles-Capitale*). Both the buildings concerned and the norms which apply to their construction and renovation roughly correspond to what is prescribed for the territory of the Walloon Region.

In the *Flemish Region*, the Framework Law of 1975 and its implementing Decrees of 1977 are still in force. This framework is now considered outdated, however, and an initiative is expected shortly.

It cannot be ruled out that a violation of the legislative provisions which have been cited will be considered as discrimination for failure to provide reasonable accommodation in the sense of the anti-discrimination legislation adopted either at federal or at regional or community level[122]. However this author knows of no case where the question of the relationship between these two sets of norms has been raised.

2.7 Sheltered or semi-sheltered accommodation/employment

a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for disabled workers?

In Belgium, the notion of sheltered employment has existed since the Law of 16 April 1963 created the National fund for the social rehabilitation of the disabled (*Fonds national de reclassement social des handicapés*). This legislation created sheltered workplaces (then known as *ateliers protégés*, now called *entreprises de travail adapté* (ETA)).[123] These are entreprises which offer disabled people the opportunity to work in adapted conditions. In the Walloon Region for instance[124], all disabled workers whose ability is considered to be at least 20% (mental disability) or 30% (physical disability) of that of a non-disabled worker may

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

[122] The contribution to this debate of the non-profit organisation GAMAH (Groupe d'action pour une meilleure accessibilité aux personnes handicaptées asbl) should be underlined. In particular, they have developed an indicator of the accessibility of public buildings, called 'indice passé-partout' (www.ipp-online.org).

[123] In the Walloon Region, a Government Decree of 23 January 1997 defines the conditions under which such ETAs may be recognised. In 2000, 61 ETAs were recognised and supported by the Walloon Agency for the Integration of Persons with Disabilities (Agence wallonne pour l'intégration des personnes handicapées (AWIPH)), a total of 5786 workers were employed in those ETA on 30 September 1999. In Brussels, 15 enterprises are recognised as ETAs, constituted as non-profit organisations. It may be noted that, apart from the ETAs, there are also centres for the distribution of work at home (Centre de Distribution de Travail à Domicile (CDTD)).

[124] See *Arrêté du Gouvernement wallon du 7 novembre 2002 relatif aux conditions auxquelles les enterprises de travail adapté sont agrees et subventionnées (Moniteur belge*, 7 January.2003) (Decree of the Walloon Government of 7 November 2002 on the conditions according to which ETAs are accepted and subsidised).

work in these structures[125]. Moreover non-disabled workers may also be employed, provided that the proportion of such workers in the company does not exceed 30%[126]. The workers in these structures are fully covered by legislation on employment and the collective agreements in force; from the legal point of view, only the conditions under which their salaries are paid (a minimum of 35% of minimum wage paid by the sheltered workplace or the Centre de Distribution de Travail à Domicile, Centre for the Distribution of Work at Home, a maximum of 55% paid by the State) differ from the conditions applicable to all other workers.

b) Would such activities be considered to constitute employment under national law?

Such activities would clearly be considered to constitute employment under national law if the question were posed in these terms. For instance, these employees receive unemployment benefits if they lose their job[127].

3. PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

No such requirements have been formulated in the national laws implementing the Directives. Nor are such requirements contained in the draft laws pending for adoption at the time of writing.

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

Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

The "'persons" protected. Groups or organisations are currently protected from any form of discrimination under the Law of 25 February 2003, as may be deduced from Article 2(7) (see above, 2.1.2.)[128]. However, it is uncertain whether the instruments adopted by the Regions or Communities in order to implement Directives 2000/43/EC and 2000/78/EC will be similarly interpreted to protect not only natural persons but also legal persons, although the term of "persons" which these laws use is broad enough to be interpreted in this way by the courts. Although the preparatory works are silent on this point, it may be presumed that this broader interpretation shall prevail.

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[125] The Commission Technique d'Orientation et de Reclassement Professionnel (COTOREP) evaluates whether an individual worker fulfils this condition.

[126] Art. 3 of the *Arrêté du Gouvernement wallon du 7 novembre 2002 relatif aux conditions auxquelles les enterprises de travail adapté sont agrees et subventionnées*, cited above in note 116.

[127] *Arrêté royal du 24 juin 1971 relatif aux allocations de chômage accordées aux travailleurs handicaps* (Royal Decree of 24 June 1971 on unemployment benefits paid to disabled workers).

[128] Although, currently at least (this should change in the future), the Law of 30 July 1981 criminalising certain acts inspired by racism and xenophobia is not strictly speaking a law implementing Directive 2000/43/EC, it defines as a criminal offence certain forms of discrimination which Member States are to prohibit under this Directive. It should be noted that the Law of 30 July 1981 prohibits direct and indirect discrimination in access to goods and services not only as committed against natural persons, but also as committed against "a group, a community or its members", which would seem to extend the prohibition to discrimination against legal persons (see Art. 2 al. 2 of the Law).

As already mentioned under section 2.1.2. above, whether in the future antidiscrimination federal law will be interpreted so as to protect not only natural persons but also legal persons, where such persons are victims of a discrimination based on one prohibited ground, may be doubted. The draft legislations currently awaiting adoption refer to "persons", without mentioning explicitly groups, communities or their members. But the terminology is not entirely consistent. For instance, reproducing in this regard the EU directives, the "instruction to discriminate" is defined as "any behaviour consisting in enjoining any person to commit a discrimination, on the basis of one of the protected grounds, against a person, *a group, a community or one of its members*" (Article 4, 13°). In Article 23 of the general antidiscrimination bill, which defines as a criminal offence the discrimination committed by a civil servant in the exercise of his or her duties, the discrimination prohibited may be against a person or a group, a community or its members (see Article 23, al. 2, of the general anti-discrimination bill). These arguments are not decisive, however, as regards the possibility for groups as such (in particular groups which are recognized to be legal persons and, thus, potentially have a capacity to sue) to complain that they have been discriminated on the basis of one of the protected grounds – for instance, because they defend gay rights, or ethnic minorities. This will need to be tested in court.

The "persons" liable for discrimination. Both natural and legal persons are prohibited from committing the types of discrimination defined in the instruments implementing the directives. This requires no specific explanation where civil liability is concerned: although the applicable laws are silent on this issue, this seems to be the only plausible interpretation in line with the courts' existing practice. With respect to the criminal clauses contained in the relevant instruments, Belgian criminal law has extended to legal persons all offences which could be committed by natural persons through the Law of 4 May 1999[129].

3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

Civil liability of the employer for discrimination committed by the employee. Following the general principles of civil liability, the employer may be held liable when an employee commits a fault which causes the damage for which the victim seeks reparation (the rule is codified in Art. 1384, al. 3, of the Civil Code). Thus, the employer would be liable for any discrimination practiced by his/employee following this general rule because of the existence of a hierarchical link between the employee and the employer, and whether or not any fault may be found to have been committed by the employer. The purpose of this presumption of responsibility by the employer is to ensure that victims of the faults committed by employees carrying out their jobs will be compensated, as the employer will have to be insured against the risk of any such liability. According to Article 18 of the Law of 3 July 1978 on employment contracts[130], the employer will have to support the cost of the damages granted to

[129] On the sanctions which can be imposed on legal persons where they are criminally liable, see Article 7bis of the Penal Code, inserted by the Law of 4 May 1999.

[130] *Loi du 3 juillet 1978 relative aux contrats de travail, Moniteur belge*, 22.8.1978 (Law of 3 July 1978 on employment contracts).

the victim of the discrimination caused by his/her employee, unless the employer proves that the employee has acted intentionally or recklessly.

Civil liability of service-providers for the acts of third parties. Although Article 1384 al. 2 of the Civil Code provides in principle that a person may be held civilly liable not only for the damage they have caused by their own behaviour, but also for the damage caused by persons for whom they are responsible, service providers will only be liable for the acts of third parties in one specific instance: schoolteachers may be held responsible for the damage caused by their pupils when under their surveillance (Art. 1384 al. 4 of the Civil Code). For instance, teachers or the school management could be held liable for the racial harassment of a child on the premises of a school. This would not extend to a landlord's responsibility for the discriminatory acts of tenants, or to a restaurant owner for the discriminatory acts of his/her patrons, with whom no such relationship of subordination exists.

Criminal liability for the acts of another person. Article 67, al. 2, of the Criminal Code (*Loi du 8 juin 1867 portant le nouveau Code pénal*) provides that those who gave instructions to commit a criminal offence shall be considered accomplices. This provision is in principle applicable to the criminal offences currently described in the Law of 25 February 2003[131], but the scope of applicability remains very limited[132]. Moreover, under the Law of 25 February 2003, with respect to discrimination committed by a public servant in the exercise of his/her functions, obedience to an order received from a hierarchical superior excludes criminal liability of the individual public servant who has in fact committed the discriminatory act: if discrimination is indeed established, only these superiors will be fined or imprisoned in the terms provided by the law. Article 67 al. 2 of the Criminal Code also applies to offences defined in the Law of 30 July 1981 criminalising certain acts inspired by racism and xenophobia, implying that an employer who has instructed his/her employees to commit discrimination must be considered to have committed a discriminatory act, and will be liable. Moreover, Article 2bis, al. 2, of the Law of 30 July 1981 criminalising certain acts inspired by racism and xenophobia, states that the employer is civilly liable for paying fines to which his/her employees have been sentenced.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

Under the legislative framework at the time of writing, not all these situations are covered by antidiscrimination legislation. In particular, the Walloon Region and the Region of Brussels-Capital have not legislated in order to implement the Racial Equality and Employment Equality Directives as regards their own statutory personnel. In addition, since the the French-speaking Community has attributed its competences, insofar as the Region of Brussels-Capital is concerned, to the French Community Commission (*commission communautaire française*), this body should legislate in order to prohibit discrimination in vocational training in the Region of Brussels-Capital, as regards the French-speaking Community, but it has failed to do

[131] See Art. 16 of the Law of 25 February 2003.

[132] Only exceptionally are certain criminal sanctions provided for discriminatory acts, under Chapter III of the Law of 25 February 2003 : following the annulment by the Court of Arbitration of Article 6, § 1, 2nd indent, and of Article 6 § 2 of the Law, these offences only concern those who publicly incite to discrimination, hatred or violence against a person, a group, a community or the members of a community.

so. The proposals currently made by the federal government, contained in the four legislative bills it presented to the Parliament in October 2006, will not suffice to remedy this, since these lacunae can only be filled by the Regions and the French Community Commission concerned.

The current situation is the following :

Criminal provisions. Article 2bis of the Law of 30 July 1981 criminalising certain acts inspired by racism and xenophobia defines discrimination as a criminal offence, whether deliberate or not, which consists in denying a person access to employment or to occupational training, in creating working conditions in the execution of the contract of employment, or in dismissing a person, on the basis of race or colour, descent, or national or ethnic origin. This extends to public and private employment and occupation, without any restriction.

Civil provisions. The five instruments adopted in order to implement in the Belgium Directives 2000/43/EC and 2000/78/EC (six if the amendment to the Law of 30 July 1981 is included; seven if the Ordinance of 26 June 2003 of the Region of Brussels-Capital is included) have a scope of applicability limited to the respective competences of each entity (Federal State, Region or Community), which makes it very difficult to describe in summary form the overall material scope of application of these instruments. The Federal Law of 25 February 2003 prohibits direct and indirect discrimination, *inter alia*, with regard to access to employment or self-employment, and working conditions, in both the private and the public sector (Art. 2(4)).

The prohibition of discrimination formulated in the Flemish Decree of 8 May 2002 on proportionate participation in the employment market extends *ratione materiae* to access to employment (including self-employment) and vocational guidance and training. This Decree, however, applies only to situations which fall under the competences of the Flemish Region or Community. The Decree forbids: making reference to the grounds it enumerates[133] in the description of conditions or criteria in employment intermediation, or to other criteria which could lead to discrimination on the basis of the prohibited grounds (Art. 5 § 2, 1°); presenting certain employment opportunities as better suited to persons presenting one of the prohibited characteristics (2°); impeding access to placement services on the basis of justifications which, explicitly or implicitly, relate to one of the prohibited grounds of discrimination (3°); mentioning or alluding to one of the prohibited grounds in job advertisements (4°); using one of the prohibited grounds as an access or selection criterion for any function, in whichever sector of industry including access to self-employed activities, or resorting to conditions which could lead to discrimination on any of these grounds (5°); denying or discouraging access to employment on the basis of either of the prohibited grounds or on the basis of reasons which implicitly refer to such grounds (6°); referring to either of the prohibited grounds in the description of conditions or criteria for access to vocational guidance, vocational training or career guidance (7°); referring in information or publicity to vocational guidance, vocational training or career guidance as better suited to persons defined by reference to such prohibited grounds (8°); denying access to vocational guidance, vocational training or career guidance, on the basis of a prohibited ground or for reasons which implicitly refer to such a ground (9°); imposing conditions for the award and delivery of titles, diplomas, etc., which are defined differently according to one's race, colour, etc. (10°); referring to either of the prohibited grounds in the definition of working conditions or conditions of

[133] The prohibition of discrimination is formulated as to: sex, "claimed race", colour, descent, national or ethnic origin, sexual orientation, marital status, birth, wealth, age, belief or conviction, present or future state of health, disability or physical characteristic. It is however an open question whether, after the judgment of the Constitutional Court of 6 October 2004, the Flemish Decree should not be seen to extend beyond those grounds to any kind of discrimination.

dismissal, or referring to conditions and criteria which, although not referring explicitly to these grounds, may lead to discrimination on the basis of such grounds (11°); defining or applying criteria or conditions in employment and dismissal which are based on any of the prohibited grounds (12°); and using techniques or tests in vocational guidance, vocational training, career guidance or employment intermediation which may lead to direct or indirect discrimination (13°).

The Decree on the principle of equal treatment adopted by the French-speaking Community on 19 May 2004[134] prohibits direct and indirect discrimination, including the instruction to discriminate1° by public servants of the administration of the French-speaking Community; 2° by the staff of certain public interest bodies which are attached to the Community; 3° at all levels of education in the French-speaking Community; and 4° with respect to the *Centre hospitalier universitaire de Liège*, which attached to the Community (article 3 § 1). It extends the ban on discrimination to associations subsidised or otherwise recognised by the French-speaking Community (article 3 § 2). The French-speaking Community would be exceeding its limited competences if it were also to legislate against discrimination with regard to access to self-employment, to employment generally, or to statutory office beyond those of the Community.

The Decree on equal treatment in employment and professional training (*Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle)* adopted on 27 May 2004 by the Walloon Region has a scope of application limited to the Region's competences in the domains of employment policy and retraining: the prohibition of discrimination under its Articles 8 and 9 therefore, applies to vocational guidance, socio-professional integration, the placement of workers, the allocation of aids for stimulating employment, and vocational training, in both the public and the private sectors. The material scope of the prohibition of discrimination formulated in this decree remains limited, which may be partly attributed to the fact that the Walloon Region may not legislate against discrimination beyond its competences. It is clear, however, that with respect to access to statutory office within the Region, it is for the Region to act. The Decree of the Walloon Region fails to do so. It may be said therefore that, in this respect, the Walloon Region has not implemented Directives 2000/43/EC and 2000/78/EC to the full extent of its competences.

The Decree adopted by the German-speaking Community extends its scope of application, *ratione personae*, to the Community's administration, staff employed in the Community's education system, intermediaries with respect to the services they offer, and employers with respect to their provision of reasonable accommodation for disabled people as prescribed by Article 13 of the Decree (Article 3). Article 4 of the Decree defines its scope of application *ratione materiae*. The Decree is to apply in particular to vocational guidance, professional counselling, vocational training and retraining.

Although some relationships or situations are arguably covered by more than one instrument, which may create co-ordination problems, we should pay careful attention to other situations which remain insufficiently covered by the existing instruments combating discrimination. In particular, it would seem that, despite the adoption by the Region of Brussels-Capital of the Ordinance of 26 June 2003, there is no guarantee that the principle of equal treatment as defined in Directives 2000/43/EC and 2000/78/EC is fully implemented with regard to the competences allocated to the Region of Brussels-Capital. The scope of application of the prohibition of discrimination in the Ordinance is restricted to "employment activities" defined as including[135]:

[134] *Moniteur belge*, 7 June 2004.
[135] Article 2, 1 of the Ordinance.

- activity consisting of matching supply and demand on the employment market (intermediaries in the strict sense);
- the activity of temporary recruitment agencies who employ people to be put at the disposal of other "users" on a temporary basis;
- lastly, other services facilitating access to employment.

Under the Belgian constitutional scheme however, the Regions have been granted competence in the field of employment policy (including placement and professional integration)[136], which implies that any positive action measures – as authorised although not compulsory under the Directives – should be adopted at the level of the Regions rather than at federal level. More importantly when examining compatibility with the requirements of the Directives, the Regions alone are competent to regulate the employment relationship between the Region and the personnel of the regional administrations[137]. The Region of Brussels-Capital, however, has not implemented Directives 2000/43/EC and 2000/78/EC with respect to its own statutory personnel.

Moreover, since 1993 the French-speaking Community has attributed to the French Community Commission (*commission communautaire française*) the power to exercise its competences in the field of vocational training for the Region of Brussels[138]. Therefore, quite apart from the unsatisfactory protection from discrimination offered by the Ordinance of 26 June 2003 whenever it is applicable, this restricted scope of application may be problematic when compared to the scope of application of Directive 2000/78/EC, as defined in Article 2(1) of the Directive. Indeed, the French Community Commission has not acted, as it should have, to apply the principle of equal treatment in the field of vocational training. At the time of writing therefore the implementation of the Directives adopted on the basis of Article 13 EC still remain incomplete in Belgium.

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

The reader is referred to the remarks made in the preceding paragraph. Although the legislative instruments adopted in order to implement the Racial Equality and Employment Equality Directives apply, in principle, both to the public and the private sectors, the Council of State (general assembly of the legislative section) has confirmed in its opinion on 11 July 2006[139] that although, in principle, the Federal State is responsible for regulating employment contracts[140] and for adopting general rules of civil and criminal law, the Regions and Communities are exclusively comptent to define the status of their personnel (this follows from articles 9 (public bodies) and 87 (personnel of the governments) of the Special Law on

[136] Article 6 § 1, IX of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.
[137] See Article 87 of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.
[138] See Article 3, 4° of the Decree of 19 July 1993 attributing the exercise of certain competences of the French-speaking Community to the Walloon Region and the French Community Commission (*Décret attribuant l'exercice de certaines compétences de la Communauté française à la Région wallonne et à la Commission communautaire française*), *Moniteur belge*, 10 September 1993.
[139] Council of State, opinions n° 40.689/AG, 40.690/AG, and 40/691/AG, of 11 July 2006. These opinions are appended to the governmental bill presented to the House of Representatives on 26 October 2006 (doc. 51 2720/001). Following a number of changes to the original bill, a second text was presented to the Council of State, on 2 October 2006. However, the second opinion of the Council of State did not reexamine the question of the division of competences.
[140] With regard to employment law, see Art. 6 § 1, VI, al. 4, 12° of the Special Law on institutional reforms of 8 August 1980 (*Loi spéciale de réformes institutionnelles*, *Moniteur belge*, 15 August 1980).

institutional reforms of 8 August 1980[141]). Therefore, the general rules adopted at federal level, currently under the Law of 25 February 2003, and later under the new legislations under examination by the Parliament, this will not suffice to remedy the lacunae identified above concerning the statutory personal of the Walloon Region and the Region of Brussels-Capital.

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

a) Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

See paragraph 3.2.1 above, and the qualification made in 3.2.2 which applies here.

b) In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 ?

Occupational pensions are regulated by a set of regulations, the most important of which is the Royal Decree (n° 50) of 21 December 1967 (*arrêté royal n° 50 du 24 octobre 1967 relatif à la pension de retraite et de survie des travailleurs salariés*), modified a very large number of times since it was initially adopted.[142] The compatibility with the requirements of non-discrimination and equality of treatment of these regulations is to be ensured by the Constitutional Court, or (as regards executive regulations) by the Council of State, on the basis both of Articles 10 and 11 of the Constitution and of the applicable international human rights treaties (in particular, as regards the requirement of non-discrimination, Article 14 of the European Convention on Human Rights and Article 26 of the International Covenant on Civil and Political Rights).

Each of the three legislative bills proposed for adoption by the Parliament at the time of writing, contains a 'safeguard clause', referred to above, stipulating that these laws will not, per se, apply to differences in treatment imposed by another legislation, or by virtue of another legislation : they will only apply to administrative practices in the fields they cover, and not to laws or regulations which define the legal regime, for instance, for the allocation of pensions. Whether these means of ensuring that the requirement of equal treatment be complied with will suffice to weed out existing regulations in the field of occupational pensions from any discriminatory clause remains to be seen.

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

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

In the Belgian federal system, *vocational guidance* (as part of employment policy) is a competence of the Regions[143], although the Walloon Region has delegated that competence to

[141] *Moniteur belge*, 15.8.1980.
[142] The most recent amendment was by the Royal Decree of 15 September 2006 : see Arrêté royal du 15 septembre 2006 modifiant l'arrêté royal du 21 décembre 1967 portant règlement du régime de pension de retraite et de survie des travailleurs salariés, Moniteur belge, 29.9.2006.
[143] Article 6 § 1, IX of the Special Law of 8 August 1980 on institutional reforms.

the German-speaking Community for the territory of the German-speaking Region as of 1 January 2000[144]. The Flemish Region/Community (on 8 May 2002), the Walloon Region (on 27 May 2004) and the German-speaking Community (on 17 May 2004) have adopted Decrees in order to prohibit discrimination in vocational guidance. The Region of Brussels-Capital should still legislate in order to do so.

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[145], although the French-speaking Community has delegated that competence to, respectively, the Walloon Region (for the population of that Region) and the French Community Commission (*commission communautaire française*) of the Region of Brussels-Capital (for the French-speaking population of the Region of Brussels-Capital). This latter body has not acted yet in order to legislate against discrimination in vocational training. In this respect too, the implementation of Directives 2000/43/EC and 2000/78/EC remains incomplete.

Finally, *education* is a competence of the Communities in the Belgian federal system. All the three communities have acted in order to prohibit discrimination in this field, at all levels of education, including the University level.

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

This is an area for which the federal level is competent. Although the membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided by such organisations (Art. 3(1), (d), of the Directive), are not explicitly covered by Article 2 § 4 of the Belgian Law of 25 February 2003, the very broad formulation of this clause (which includes "*les conditions d'emploi et de travail*" "employment and working conditions" in the definition of the material scope of application of the Law) must be interpreted as covering this form of activity.

The laws which, in the near future, should replace the Federal Law of 25 February 2003, in order to implement the Racial Equality and Employment Equality Directives with respect to the federal competences, explicitly include the membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided by such organisations (Art. 3(1), (d), of the Directive), in their scope of application (see Art. 5 § 1, 7° of the general antidiscrimination bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*)).

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

Social security is principle regulated by legislation adopted at federal level (Art. 6 § 1, VI, al. 4, 12° of the Law of 8 August 1980). Healthcare and social aid, on the other hand, are essentially a competence of the Communities (Art. 5 § 1, I, 1°, and II, 2°, of the Law of 8 August 1980). But whether discrimination results from a statutory scheme adopted by a law (federal) or a decree (community), the Cour d'arbitrage (Constitutional Court) may find that it violates Articles 10 and 11 of the Constitution, and if necessary annul the discriminatory

[144] See above, footnote 20 and corresponding text.
[145] Article 4, 15° and 16° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.

provision. As illustrated by Constitutional Court judgment no.152/2005 on 5 October 2005, the case-law on discrimination based on sex should be transposed, without any major difficulty, to the other grounds mentioned in Article 13 EC. The Council of State (section of administration) has the same competence with respect to executive regulations (*Arrêtés*) implementing the relevant legislation.

The situation existing under the current legislative framework will not be substantially modified when the legislative bills currently presented to the Parliament for adoption will be adopted. The two pieces of legislation implementing the Racial Equality Directive and the Employment Equality Directive (respectively, the racial equality bill (*Projet de loi modifiant la Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie)* and the general antidiscrimination bill (*Projet de loi tendant à lutter contre certaines formes de discrimination*)) both state explicitly that they apply to social security (Article 5 § 3). But the practical impact of this may be limited by the "safeguard clause" referred to above, which states that any measures contained in a law or adopted by virtue of a law should not be subordinated to these antidiscrimination legislations, but only to the Constitution and international law. Therefore, only administrative practices are covered by the prohibitions contained in the general antidiscrimination bill and the racial equality bill. To the extent that any contested measure in the field of social security is contained in a legislative instrument or implements a legislative provision, it should only be verified that it complies with Articles 10 and 11 of the Constitution, and equality clauses of international instruments. Although the Constitutional Court sanctions both direct and indirect forms of discrimination, it is uncertain whether the broad clauses of the Constitution present the required clarity and precision which an adequate implementation of the Directives would seem to require.

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

Belgium has not sought to rely on this exception.

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

This covers a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.

The current situation may be described as follows. Article 2 of the Law of 30 July 1981 criminalising certain acts inspired by racism and xenophobia (where discrimination is alleged to have been committed on the grounds of race or colour, descent, ethnic or national origin) and especially Article 2 § 4 of the Federal Law of 25 February 2003 (which now concerns discrimination on any ground) contain prohibitions of discrimination which, *ratione materiae*, apply generally to the provision of goods or services, or even – under Article 2 § 4 of the Law of 25 February 2003 – to all activities which are not "private" but in principle open to the public (i.e. to access to and participation in economic, social, cultural or political activities open to the public). "Social advantages" in the sense of advantages granted by private or public actors to the general public are therefore in principle covered by this general non-discrimination provision.

Social advantages are explicitly mentioned in the bills of 26 October 2006 currently under discussion before the Parliament (Art. 5 § 1, 3° of the general antidiscrimination bill and of the racial equality bill). Therefore they shall clearly be covered by the future legislation, if and when these bills are adopted. But there is an important proviso. As a result of the 'safeguard clause' which the bills include (Art. 11), the prohibition of discrimination will only apply to administrative practices (i.e. the implementation, by the public authorities, of the existing regulations), and not to the laws or regulations which stipulate the level of advantages each individual or family shall be allowed.

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

This covers all aspects of education, including all types of schools. Please also consider cases of segregation in schools, affecting notably the Roma community. If these cases exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

Education is a competence of the Communities in the Belgian federal system.[146] The Communities are therefore exclusively competent to adopt legislation prohibiting discrimination in the field of education, as has been explicitly confirmed by the Council of State in his opinion of 11 July 2006. Certain measures have been adopted which prohibit discrimination in education, but in general terms and without this being related to the implementation of the EU directives. Rather, these measures seek to facilitate the integration of newly arrived migrant children ; and to encourage access of children with disabilities in the mainstream education system :

- Article 88 of the decree adopted by the French-speaking Community on education at the primary and secondary level (*Décret du 24 juillet 1997 définissant les missions prioritaires de l'enseignement fondamental et de l'enseignement secondaire et organisant les structures propres à les atteindre*[147]) prohibits the refusal to accept a child on the basis of social origin, sex or race. Both the French-speaking and the Flemish Community have adopted innovative decrees[148] seeking to promote equal opportunities for all children, whatever their socio-economic background, thus developing a policy of positive action seeking to remedy deficiencies of the least fortunate children. Moreover, both the French-speaking and the German-speaking Community have developed special measures in favour of the integration of the children of newly arrived immigrants.[149] Comparable measures having also been adopted by the Flemish Community[150].

- In order to promote the integration into mainstream educational system of children with a mental disability, the Flemish Government has adopted a decree supporting

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[146] Article 127, § 1, al. 1, 2° of the Constitution.
[147] *Moniteur belge*, 23 September 1997.
[148] *Décret de la Communauté française du 27 mars 2002 modifiant le décret du 30 juin 1998 visant à assurer à tous les élèves des chances égales d'émancipation sociale, notamment par la mise en oeuvre de discriminations positives et portant diverses measures modificatives, Moniteur belge*, 16 April 2002 (Decree of the French-speaking Community of 27 March 2002 modifying the decree of 30 June 1998 aiming to ensure all pupils equal opportunities for social emancipation, notably by applying positive discriminiation and various modification measures); D*écret de la Communauté flamande du 26 juin 2002 relatif à l'égalité des chances en éducation-I (1), Moniteur belge*,14 September 2002 (Decree of the Flemish Community of 26 June 2002 on equality of opportunity in education).
[149] *Décret de la Communauté française du 14 juin 2001 visant à l'insertion des élèves primo-arrivants dans l'enseignement organise ou subventionné par la Communauté française, Moniteur belge*, 17 July 2001 (errtaum, 12 September 2001) (Decree of the French-speaking Community of 14 June 2001 on the integration of first-generation immigrant pupils into education organised or subsidised by the French-speaking Community); *Décret de la Communauté germanophone du 17 décembre 2001 visant la scolarisation des élèvres primo-arrivants, Moniteur belge*, 4 April 2002 (Decree of the German-speaking Community of 17 December 2001 on schooling for first-generation immigrant pupils).
[150] *Décret de la Communauté flamande du 28 février 2003 relatif à la politique flamande d'intégration civique, Moniteur belge*, 8 May 2003. (Decree of the Flemish Community of 28 February 2003 on the Flemish civil integration policy).

supplementary hours in teaching institutions (in order to ensure the provision of pedagogical support to children with a mental disability) and subsidies for institutions organising "type 2" (specially adapted) classes[151]. Similarly, a cooperation agreement (approved by a decree of 1 March 2004 of the French-speaking Community) between the French-speaking Community and the French-speaking Community Commission (Commission communautaire française) seeks to support teaching institutions (in either the mainstream or the special educational system) which children with a disability are attend[152]. And a decree of 3 March 2004 of the French-speaking Community seeks to reorganise the special educational system for children and adolescents with specific needs[153].

In addition, the personnel of the education sector, as they are Community public servants from a statutory point of view, are protected under the Flemish Decree of 8 May 2002[154] and the Decree adopted on 17 May 2004 by the German-speaking Community[155]. In implementing the Race and Employment Directives, the French-speaking Community has chosen to extend the prohibition of direct and indirect discrimination stipulated by the Decree of 19 May 2004 to the field of education (this comprises all levels: primary, secondary, higher),[156] however it is unclear whether this concerns only discrimination in employment in he sector connected to the Community or also discrimination based on race and ethnic origin, as practiced against schoolchildren or their parents.

This leaves open an important gap, which concerns the protection of schoolchildren from discrimination on the grounds of race or ethnic origin. Neither the Flemish nor the German-speaking Communities have adopted specific legislation to implement the Racial Equality Directive in the sector of education, however ; nor, of course, has such legislation been adopted to protect from discrimination on the other Article 13 EC grounds.

The absence of any specific legislation prohibiting discrimination in the field of education may be problematic. Despite the generality of the terms used by Article 2(4) of the Federal Law of 25 February 2003, it is uncertain whether the prohibition of discrimination contained in federal legislation shall be considered to apply also to the sector of education, which is an exclusive competence of the Communities. This uncertainty has been further reinforced by the judgment delivered on 14 June 2005 by the Antwerp Court of Appeal, which considered that Article 2 § 4 of the Law of 25 February 2003 may not be interpreted as to include the field of education within its material scope of application (see above, paragraph 0.3). The new antidiscrimination bills which are now presented for adoption by the Parliament specify that they do not affect areas which fall under the competences of the Regions and Communities, and – as has been confirmed by the opinion delivered by the Council of State on 11 July 2006 – this excludes education from their scope of application.

School absenteeism and dropout constitute a serious problem among the Roma, Sinti and Traveller communities, in Belgium, particularly in secondary education. A large number of children do not complete secondary school. According to a survey carried out in 1994 in the Flemish Region among Travellers and Gypsies, the large majority of children (94.6% for the former category, 81% for the latter) were enrolled at school, yet absenteeism increased with

[151] Decree of the Flemish Government on the integration of children with a moderate or severe mental disability in primary and secondary education (*Arrêté du Gouvernement flamand relatif à l'intégration d'élèves présentant un handicap intellectuel modéré ou sévère dans l'enseignement primaire et secondaire ordinaire*), *Moniteur belge.*, 2 March 2004.
[152] *Moniteur belge*, 3 June 2004.
[153] *Décret du 3 mars 2004 de la Communauté française organisant l'enseignement spécialisé, Moniteur belge.*, 3 June 2004 (Decree of 3 March 2004 of the French-speaking Community on special education).
[154] See Art. 3, 2° and Art. 2, 6° of the Flemish Decree of 8 May 2002.
[155] See Art. 2 § 1, 4° and Art. 3 of the Decree of the German-speaking Community of 17 May 2004.
[156] See Art. 3 § 3 of the Decree of 19 May 2004.

age. Only 67.8% of Gypsy children attended secondary school[157]. The situation was particularly worrying among the Roma of Belgian nationality: only 18.8% of these children attended primary school and none attended secondary school. A survey carried out in 2004 on the Brussels Roma who had recently arrived from Eastern Europe also revealed a problem of school absenteeism and dropout among this population[158]. Moreover, according to figures for 2001 from the Flemish Centre for Minorities (VMC), the majority of children from these communities were directed towards technical and vocational education, in the way children from disadvantaged social backgrounds generally are. These figures remain patchy and make it difficult to identify the precise causes of the dropout and absenteeism of the Roma communities, although they do suggest that the lack of measures to assist Roma children in mainstream educational institutions may be the main reason why the dropout figures are so high.

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

Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.

The current situation, at the time of writing, is the following :

Criminal provisions. Article 2 of the Law of 30 July 1981, since its amendment by the Law of 12 April 1994, criminalises discrimination when committed in the provision of services or a good. Although the UN Convention on the Elimination of All Forms of Racial Discrimination of 1965 to which Belgium is a party, explicitly mentions “the right of access to any place or service *intended for use by the general public*, such as transport, hotels, restaurants, cafes, theatres and parks” (Art. 5, f – author’s emphasis), it would not seem that the goods and services concerned would only be those available to the public : private rentals, for instance, are certainly included, and only those services the extension of the prohibition to discrimination to which would potentially conflict with the right to respect for private life as protected under Article 8 of the European Convention on Human Rights, should be considered excluded from this provision.

Civil provisions. Art. 2(4) of the Federal Law of 25 February 2003 prohibits discrimination, *inter alia*, in providing or offering goods and services to the public. The Law does not specify what this expression refers to, but it is clear from the preparatory work for this legislation that this refers to all situations where goods or services are offered on the market, i.e. not reserved to a closed group.

If and when the legislative bills presented by the government on 26 October 2006 will be adopted, the prohibition of discrimination they impose will apply, inter alia, to the supply of goods and services (Article 5, § 1, 1°, in both the general antidiscrimination bill and the racial equality bill).

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

To which aspects of housing does the law apply? Are there any exceptions?

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[157] T. Machiels, *Keeping the Distance or Taking the Chances, Roma and Travellers in Western Europe*, Brussels, ENAR, March 2002, (www.enar-eu.org/en/publication/Romaengl.pdf), p.17

[158] *Les Roma de Bruxelles*, publication of the Regional Integration Centre, Foyer Bruxelles asbl, September 2004, pp. 36 et seq.

Under the existing legislation at the time of writing, the prohibition of discrimination, both in the private and in the public housing fields, is a criminal offence under Article 2 of the Law of 30 July 1981 (following the amendment to this legislsation by the Law of 12 April 1994). This is exemplified by the judgment of 7 December 2004 delivered by the First Instance Tribunal of Antwerp (criminal division) in the case of *Neuville* (see above in this report, paragraph 0.3). Such a use of the Law of 30 July 1981, however, remains highly exceptional. In principle, the prohibition of discrimination under the Federal Law of 25 February 2003 should also apply to the housing market, without restriction. This is implied by the generality of Article 2(4) of the Law ; and it makes civil remedies available to victims of discrimination in this area.

However, this question now should be seen in a quite different light. The opinion delivered by the Council of State on 11 July 2006 excludes the competence of the federal State to legislate in this area, since housing is in principle a competence of the Regions.[159] Taking into account this concern, the bills presented by the government on 26 October 2006 now are silent on this issue. The Regions should take action in this regard. For the moment, they have failed to do so. For the Flemish Region, the Decree of 8 May 2002 on proportionate participation in the employment market only applies to employment. For the Walloon Region, the Decree of 27 May 2004 also concerns only equal treatment in employment and professional training. And the Region of Brussels-Capital, finally, has taken no initiative to implement the Racial Equality or the Employment Equality Directives.

4. EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

Federal State.
The current situation is as follows. The *Law of 30 July 1981 criminalising certain acts inspired by racism and xenophobia* defines as a criminal offence discrimination based on race or colour, descent, or ethnic or national origin. It does not provide an exception for genuine and determining occupational requirements.[160] As to the *Federal Law of 25 February 2003*, it defines direct discrimination as a difference in treatment which cannot be reasonably and objectively justified (Art. 2(2)), thus leaving open the possibility that an objective and reasonable justification of a difference in treatment may be offered even when it is based on a prohibited ground (see paragraph 2.2 above). Article 2(5) of the Law of 25 February 2003 states however that differential treatment will only be justified in employment and occupation[161] "where, by reason of the nature of the particular occupational activities

[159] Article 6, § 1er, IV, of the Special Law of 8 August 1980; Article 4, al. 1, of the Special Law of 12 January 1989 on the institutions of Brussels .
[160] Nor is such an exception provided for in the UN Convention on the Elimination of All Forms of Racial Discrimination of 1965 to which Belgium is a party, although that Convention does mention the right to work among the rights which should be ensured without discrimination (Art. 5, e, i).
[161] On these terms at least, the precision offered by Article 2(5) of the Law of 25 February 2003 does not extend to membership of, and involvement in, trade unions or professional organisations (Art. 3(1)(d) of Directive 2000/78/EC): indeed, it only refers to access to employment, working conditions, and nomination to public functions, and not to the broader question of "access to, participation in or other form of exercise of an economic, social, cultural or political activity accessible to the public". But Belgian courts are under an obligation to apply national law in conformity with the requirements of European Community Law (Case C-106/89, *Marleasing SA* [1990] European Court Reports I-4135 (recital 9); with respect to the interpretation of national rules which were adopted with the purpose of implementing a directive, see

concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate". This wording reproduces that of Article 4 of Directive 2000/43/EC and Article 4(1) of Directive 2000/78/EC (occupational requirements) and seeks to ensure that, at least with respect to employment and occupation, there will no contradiction between the Law of 25 February 2003 and the requirements of the Framework Directive.

The general antidiscrimination and racial equality bills presented to Parliament on 26 October 2006 both provide for the possibility of justifying certain differences in treatment directly based on one of the protected grounds where genuine and determining occupational requirements are concerned, in employment and occupation (the exception does not apply to the other areas covered by these texts) (Art. 8 of both bills). The definition of genuine and determining occupational requirements corresponds to that offered in Article 4 of Directive 2000/43/EC and Article 4(1) of Directive 2000/78/EC. However, to the extent that no exhaustive list of such requirements is drawn – it is left to the judge to decide, on a case-by-case basis, whether the conditions are satisfied in order for the exception to apply, although the King (i.e., the government) is authorized to adopt a decree provided a list of examples in order to offer guidance to courts –, it remains debatable whether this is a fully satisfactory solution[162].

Regions and Communities.
The instruments adopted by the Regions and Communities contain similar formulations. Thus, Article 5 of the Decree on the implementation of the principle of equal treatment adopted on 19 May 2004 by the French-speaking Community mentions that there will be no direct discrimination where a difference in treatment is made on the basis of a prohibited ground "where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate" – a formulation which replicates that of Article 4 of Directive 2000/43/EC or Article 4(1) of Directive 2000/78/EC. Article 5 al. 1 of the Decree on equal treatment in employment and professional training (*Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle*) adopted by the Walloon Region on 27 May 2004 contains an identical provision.

While it stipulates that the prohibition on reference to certain characteristics may be removed in certain cases, Article 6 of the Flemish Decree on proportionate participation in the employment market of 8 May 2002 entrusts the Flemish government with the task of identifying which positions in particular are concerned by this "genuine occupational requirements" exception, after consultation with the Flemish Socio-Economic Council. However, although Article 4 of the Regulation of 30 January 2004 of the Flemish

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Case 14/83, *S. von Colson and E. Kamann* [1984] European Court Reports 1891; and Case 79/83, *D. Harz* [1990] European Court Reports 1921) will probably compensate for this apparent contradiction, and exclude any justification of less favourable treatment imposed on grounds of sexual orientation with respect to participation in trade unions or professional organisations.

[162] Recital 18 of the Preamble of the Race Directive and Recital 23 of the Preamble of the Framework Directive state that "In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. *Such circumstances should be included in the information provided by the Member States to the Commission*" (on the requirement that the Member States report to the European Commission, see Article 18 of the Framework Directive). This last sentence suggests that the notion of "genuine and determining occupational requirement" should not be left to a case-by-case identification under judicial control, but should be given a precise definition beforehand, such situations being described by the Member State as part of the reporting requirements of the implementation of the Framework Directive. The implementation of Article 6 of the Flemish Decree shows that the requirement to identify with precision, ex ante, the occupational requirements which are concerned by the exceptions of Article 4 of the Race Directive and of Article 4(1) of the Framework Directive, by no means imposes a burden impossible to meet.

Government implementing the decree of 8 May 2002 on proportionate participation in the employment market does identify in which professional occupations sex may constitute such a genuine occupational requirement – and thus the reference to sex may be justified – no such list is proposed in the executive regulation with respect to the other grounds. Article 6 of the Flemish Decree of 8 May 2002 clearly seems to limit this exception to situations identified by the Executive. Therefore it would seem that, in the domains covered by the Flemish Decree, the exception for "genuine occupational requirements" will have no role to play with respect to the grounds covered by the Race and Framework Directives.

4.2 Employers with an ethos based on religion or belief

a) Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?

Federal State
During parliamentary debates preceding the adoption of the Law of 25 February 2003, there were attempts to include either a provision closely following the wording of Article 4(2) of the Directive[163], or even more broadly, to exclude the applicability of the Law to organisations or activities which are based on religious or philosophical grounds[164]. These amendments were rejected. Churches may nevertheless take into account the religion or belief of employees[165], but in doing so they will be restricted by the strict formulation of Article 2(5) of the Law of 25 February 2003 (see above, 4.1) which is directly inspired by Article 4(1) of the Employment Equality Directive and only tolerates differences in treatment directly based on religion or belief, in the context of employment and occupation, where this corresponds to a genuine occupational requirement, and where the requirements of legitimacy and proportionality are respected.

The general antidiscrimination bill of 26 October 2006 contains a provision (Art. 13) which is almost word to word a reproduction of Article 4(1) of the Employment Equality Directive. Without prejudging its interpretation by the courts, it should therefore in principle be seen as compatible with the Directive.

Regions and Communities
Neither the Flemish Decree of 8 May 2002 on the proportionate participation on the employment market, the Decree on the implementation of the principle of equal treatment adopted on 19 May 2004 by the French-speaking Community, the Decree adopted on 17 May

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[163] See, e.g., Amendment no.53 presented within the Justice Committee of the Chamber of Representatives by Ms J.Schauvliege (*Documents parlementaires, Chambre des Représantants, session* 2001-2002, *Projet de loi tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme, Rapport fait au nom de la Commission de la justice par M. J. Arens et Mme K. Lalieux*, 26 July 2002, doc. 50 1578/008, pp. 45-47). The proposed amendment was rejected by 9 votes against it. There were four abstentions.

[164] See, e.g., Amendment no.78 presented within the Justice Committee of the Chamber of Representatives by Mr. Bart Laeremans (*Documents parlementaires, Chambre des Représantants, session* 2001-2002, *Projet de loi tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme, Rapport fait au nom de la Commission de la justice par M. J. Arens et Mme K. Lalieux*, 26 July 2002, doc. 50 1578/008, pp. 49-50). The proposed amendment stipulated that *"La présente loi n'est pas applicable à l'organisation interne des religions et des organisations philosophiques reconnues par le Roi ni à toutes les activités qui procèdent dune vision religieuse ou philosophique"*, *"*This law is not applicable to the internal organisation of religions and philosophical organisations recognised by the King, nor to any activity carried out with religious or philosophical aims*"* It was rejected by nine votes to two, with two abstentions.

[165] In the field of education, see the Law of 29 May 1959 modifying certain provisions of legislation on education (*Loi modifiant certaines dispositions de la législation sur l'enseignement*), and in the recent case-law, *Conseil d'Etat*. (4th chamber), 20 December 1985, *Van Peteghem*, no.25.995, *Rechtskundig weekblad*, 1986-1987, colonne 246, with the observations of W. Lambrechts,"Het statuut van de godsdienstleerkrachten in het Rijksonderwijs en het tweede huwelijkna echtscheiding", col. 246; case also commented in O. De Schutter and S. Van Drooghenbroeck, *Droit international des droits de l'homme devant le juge national*, Bruxelles, Larcier, 2000, p. 287.

2004 by the German-speaking Community, nor the Decree of the Walloon Region of 27 May 2004 contain clauses using the exception in Article 4(2) of Directive 2000/78/EC.

b) Are there any specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination?

In the specific context of religious educational institutions, the legislature has occasionally stipulated that these institutions were at liberty to choose the curriculum and values on which teaching would be based. This implies a corresponding obligation for members of these institutions to respect these curricula and values. However, the distinction between the private and the professional spheres should be respected, and disproportionate restrictions should not be imposed on the fundamental freedoms of the staff[166]. 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.

4.3 Armed forces and other specific occupations

a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?

The current Federal Law of 25 February 2003 is silent on this; so is the general antidiscrimination bill of 26 October 2006, which seeks to implement the Employment Equality Directive. However, it appears from the explanatory memorandam it adjoined to its proposals to the Parliament that the government understands the notion of genuine and determining occupational requirements as including situations where the ability for the armed forces to fulfil their duties would be at stake. Therefore the understanding is that this exception is covered under Article 13 of the general antidiscrimination bill, mentioned under 4.2. a) above.

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

No.

4.4 Nationality discrimination

Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Art 3(2) in both Directives).
a) How does national law treat nationality discrimination?

The Constitutional Court has considered (since a judgment of 14 July 1994) that non-nationals are protected by Articles 10 and 11 of the Constitution prohibiting discrimination. Any difference of treatment between Belgians and non-nationals should be reasonably and objectively justified, i.e. justified as a measure necessary to achieve a legitimate aim and proportionate to that aim. In principle therefore, non-nationals benefit from the same legal

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

protection as Belgians. The exceptions concern the exercise of political rights (Article 8 al. 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 non-national who wishes to enter a profession, either in the context of an employment contract or self-employment.

The racial equality bill, currently pending before Parliament, further reinforces the protection of foreigners from discrimination, by defining nationality as a prohibited ground. However, the regime of this prohibition is slightly more flexible than for the other grounds covered by the racial equality bill ('race', color, descent, ethnic or national origin) : whereas, for the latter grounds, differences in treatment may only be justified in certain, limitatively enumerated situations, differences of treatment based on nationality may be justified if they seek to fulfil legitimate objectives by means which are both appropriate and necessary (Art. 7(2)).

b) Are there exceptions in anti-discrimination law that seek to rely on Art 3(2)?

No.

4.5 Work-related family benefits

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner. Certain employers limit these benefits to the married partners or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

(a) Does national law permit an employer to provide benefits that are limited to those employees who are married?

Articles 10 and 11 of the Constitution prohibits discrimination on grounds of civil status, including marriage.[167] This was also a prohibited ground under the list initially contained in the Federal Anti-discrimination Law of 25 February 2003 (that list has now been annulled by the Constitutional Court on 6 October 2004[168]). And it is one of the prohibited grounds of discrimination under the general antidiscrimination bill of October 2006.

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[167] See, e.g., Constitutional Court (Cour d'arbitrage), 15 July 1999, Case no. 82/99 (action for annulment of a Decree of the Flemish Region of 15 July 1997 fixing the tariff of succession rights of cohabitants (*samenwonende, personnes vivant ensemble*)). However, the Constitutional Court considered that the legislature could legitimately favour marriage above other forms of (stable) relationships, thereby demonstrating its attachment to the institution of marriage: see Constitutional Court, Case no. 128/98 of 9 December 1998, *Arr. C.A.* 1998, p. 1565, point B.15.3. ("*En traitant différemment ces catégories de personnes en matière de droits de succession, le législateur décrétal est resté cohérent avec le souci, manifesté en droit civil, de protéger une forme de vie familiale qui, à son estime, offre de meilleures chances de stabilité. Les mesures fondées sur cette conception sont compatibles avec la Constitution, étant donné que, compte tenu du régime de l'impôt sur les revenus applicable selon qu'il y a ou non mariage, elles ne sont pas disproportionnées à l'objectif légitime poursuivi*" "By treating differently these categories of persons in respect of succession rights, the legislature has shown consistency in its concern, demonstrated in civil law, to protect a type of family life which, in its estimation, gives better chances of stability. Measures based on this concept are compatible with the Constitution, given that, taking into consideration the tax regime which applies depending on if there is a marriage or not, they are not disproportionate to the legitimate aim pursued". It should be added that, neither in that case nor in other cases presented to the Constitutional Court, was the argument raised – or, for that matter, met – that favouring marriage would constitute a direct or indirect discrimination against homosexual couples, who have no access to that institution. This controversy now is a moot in the Belgian legal order.

[168] The original version of the Law of 25 February 2003 included marital status ('état civil'), i.e. the status of being married or non-married, among the prohibited grounds of discrimination. The prohibition of discrimination under this legislation is now general, i.e. the list of grounds is not limited since the Constitutional Court annulled this list in its judgment of 6 October 2004.

Thus, a difference in treatment made by an employer between married employees and non-married employees would be found invalid if not objectively and reasonably justified, i.e. made in order to pursue a legitimate objective and by appropriate and proportionate means. Paradoxically, it may be easier to justify differences in treatment between married and non-married couples in Belgium, as marriage has been extended to same-sex couples[169], than in countries which do not extend marriage to same-sex couples, since in Belgium, partners who remain unmarried have in principle chosen to do so, and the advantages recognized to marriage should not be considered a potential indirect discrimination against gays or lesbians (unless same-sex marriage would not be available to the persons concerned). Similar reasoning may apply concerning a difference in treatment which an employer might apply between employees who are only cohabiting de facto on the one hand, and those who are either married or "legal cohabitants"[170] on the other. Although it should have a reasonable justification if it is not to be considered discriminatory, such a difference in treatment may not be denounced as indirect discrimination against homosexuals.

Discrimination based on marital status may also be challenged under the Flemish Decree of 8 May 2002, the decree adopted by the German-speaking Community, or the decree adopted on 27 May 2004 by the Walloon Region, as all these laws identify marital status (*état civil, burgerlijke stand, Zivilstand*) as a prohibited ground of discrimination. The Ordinance of 26 June 2003 adopted by the Region of Brussels-Capital contains a similar prohibition (Article 4). Only the Decree adopted on 19 May 2004 by the French-speaking Community does not explicitly provide for such a prohibition, however this Decree contains a non-exhaustive list of prohibited grounds of discrimination[171] and therefore any difference of treatment based on marital status should be examined for its potentially discriminatory character in the situations covered by the Decree.

It may be interesting to note in this context that, prior to the extension of marriage to same-sex couples, Belgium had chosen to facilitate family reunification for non-married partners, whether for opposite sex or same-sex partners, in order to avoid reliance on marriage as the exclusive criterion for family reunification purposes resulting in discrimination againt homosexual couples. A circular adopted on 30 September 1997 by the Ministry of the Interior[172] authorises both Belgian nationals and aliens established in Belgium or authorised to reside in Belgium for periods of more than three months to be joined in Belgium by a person with whom they have a "stable relationship" ("relation durable"). Although it benefits also heterosexual *de facto* couples, this extension of the right to family reunification – beyond that already provided for by the Law of 15 December 1980 on the status of aliens – was explicitly justified at the time by the need to put an end to the discrimination against homosexuals, as this discrimination was seen to have its source in a definition of the right to family reunification based on marriage, and thus, on an institution at that time unavailable to homosexuals. Interestingly, the reasons stated for adopting the circular explicitly considered that an advantage recognised to married couples is considered to be discrimination based on sexual orientation, as marriage in 1997 was unavailable to homosexuals. This is similar to the line of argument that a difference of treatment based on pregnancy is a form of discrimination

[169] Law 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 civ*il), *Moniteur belge*, 28 February.2003.

[170] In Belgium, "legal cohabitation" was created by the Law of 23 November 1998 (*Loi instaurant la cohabitation légale, Moniteur belge*, 12 January 1999; this legislation entered into force after the adoption of the Royal Decree (Arrêté royal) of 14 December 1999, *Moniteur belge*, 23 December 1999). This is an institution open to all, including in particular same-sex or different-sex couples.

[171] See Art. 2 § 1, 1° of the Decree.

[172] *Circulaire du 30 septembre 1997 relative à l'octroi d'une autorisation de séjour sur la base de la cohabitation dans le cadre d'une relation durable, Moniteur belge* 14 November 1997.

based on sex, because only women – not men – may become pregnant[173]: as only homosexuals cannot marry, any legal provision favouring marriage is to be considered as discrimination based on sexual orientation, inspite of not being directly targeted at homosexuals.

(b) Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?

This would be in clear violation not only with Articles 10 and 11 of the Constitution, but also of all the instruments, adopted or in draft form, which seek to implement the Employment Equality Directive in Belgium. I cannot see how it could possibly be justified under these texts.

4.6 Health and safety

Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?
Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?

There are no such explicit exceptions in the legislative instruments adopted in order to implement the Directives. Of course, it could be argued that under the current Article 3 of the Federal Law of 25 February 2003, which states that it is without prejudice to the obligation to respect the fundamental rights and freedoms recognised in Belgium, any restriction on the principle of equal treatment which would be justified by the need to protect the health and safety of others (co-workers and the general public), or even of the individual concerned (as when a particular occupation would be potentially damaging for a disabled person's medical condition), would be justifiable.[174] But the regulation of health and safety at work in Belgium makes it an obligation for the occupational physician to identify which solutions may be devised in order to promote access to employment for workers whose physical condition makes them unsuitable for certain jobs or for work on certain premises, and therefore the question of whether health and safety exceptions could be invoked by an employer to justify a difference in treatment on grounds of disability or health will depend exclusively on the attitude of the occupational physician, not on that of the employer[175]. It is not possible in the context of this report to enter into the details of this regulatory framework.

4.7 Exceptions related to discrimination on the ground of age

4.7.1 Direct discrimination

a) Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?

Federal State
The Federal Law of 25 February 2003 did not establish a special regime for justifying differences in treatment based on age. But Article 12 of the general antidiscrimination bill,

[173] Case C-177/88, *Dekker* [1990] ECR I-3941, Recital 12 (judgment of 8 November 1990).
[174] No such general exception is provided under the general antidiscrimination bill currently under discussion.
[175] See especially *Arrêté royal du 28 mai 2003 relatif à la surveillance de la santé des travailleurs* Royal Decree of 28 May 2003 on monitoring the health of workers, *Moniteur belge.*, 16 June 2003.

currently under examination by the Parliament, does contain such a regime. Mangold stands for the proposition that cannot be reconciled with Article 6(1) of the Employment Equality Directive a national legislation which applies age limits 'regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned', without showing that such age limit is objectively necessary to the attainment of a legitimate objective such as the vocational integration of unemployed older workers (para. 65). Since Article 12 § 1 of the general antidiscrimination bill does not provide for age limits, but insteads requires a case-to-case examination of any difference of treatment based on age, which should be justified as appropriate or necessary for the attainment of a legitimate objective, this seems compatible both with the letter of Article 6(1) of the Employment Equality Directive and with the *Mangold* case-law.

Regions and Communities
The Flemish Decree of 8 May 2002 does not create a special regime for justifying differences of treatment based on age, as would be authorised under Article 6 of Directive 2000/78/EC. But the Walloon Region, the German-speaking Community and the French-speaking Community have made use of this option in their implementation of Directive 2000/78/EC.

Article 6 of the French-speaking Community's Decree on the principle of equal treatment states that, with respect to differences of treatment based on age, no discrimination will be deemed to exist where there exists an objective and reasonable justification for the difference in treatment, i.e. where the difference in treatment pursues a legitimate objective by means which are appropriate and necessary. Similarly, Article 14 of the Decree adopted on 17 May 2004 by the German-speaking Community states, in a wording identical to that of Article 6 of Directive 2000/78/EC, that differences in treatment based on age may be justified as appropriate and necessary to fulfil a legitimate objective. The wordings of these instruments follow that of Article 6(1), al. 1, of Directive 2000/78/EC, and it is in conformity with the approach adopted by the European Court of Justice in *Mangold*.

In contrast, in the case of the Walloon Region, the wording chosen creates a potential incompatibility with that provision of the Directive. Art. 5 al. 2 of the Decree adopted on 27 May 2004 by the Walloon Region in order to implement Directives 2000/43/EC and 2000/78/EC – although inserted in an article the first indent of which related to essential occupational requirements – provides for the possible justification of differences in treatment based on age, in particular where this favours the socio-professional integration of certain categories or corresponds to positive action measures. The wording of this clause does not contain the requirement that the objective pursued must be legitimate; nor does it require that the measure creating the difference in treatment be appropriate and necessary for fulfilling that objective. As clearly highlighted by the *Mangold* case-law, this creates a problem of compatibility with Articles 2(2)(a) and 6 of Directive 2000/78/EC.

It will be recalled that, in its judgment no.152/2004 of 5 October 2004 referred to above (this report, paragraph 0.3.), the Constitutional Court found discrimination on grounds of age on the basis of Articles 10 and 11 of the Constitution, following a reasoning quite similar that of the European Court of Justice in Mangold – which, indeed, simply applies to age to traditional criteria for establishing whether a particular difference in treatment is discriminatory. Therefore Art. 5 al. 2 of the Decree adopted on 27 May 2004 by the Walloon Region is not immune from being held unconstitutional, even within the Belgian legal order.

b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?

The amount of laws and regulations which refer to age is overwhelming. After Belgium notified the Commission its intention to make use of the option offered by Art. 18 al. 2 of the Directive, it prepared for the entry into force of the requirements relating to age in line with Directive 2000/78/EC on 2 December 2006 by making a compilation of laws and regulations imposing differences of treatment on grounds of age(coordinated by the Federal Public Service of Employment, Labour and Social Dialogue). These laws and regulations are now being screened in order to identify which differences in treatment based on age may be justified and remain in force, and which have to be removed under the Directive.

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

c) Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2) ?

Yes, national legislation does allow for this. While the legislation is extremely complex and has been modified on a large number of occasions, the basic rule is that men may take pension at 65 years of age, and women at 64 (if the pension begins between 1 January 2006 and 1 December 2008) or 65 (after 1 January 2009). Other ages apply in specific sectors, such as employees of the civil aviation (55 years, even less under certain conditions of seniority), of the commercial navy (60 years), underground mining (55 years) or surface mining (60 years). In addition, after one attains 60 years of age, it may be possible to be pensioned provided one has a minimum of 35 years of employment, with at least 1/3 occupation for each year.

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

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

Older workers. As is well known, the economic activity rate of people aged between 55 and 64 is particularly low in Belgium (28.1%, compared to an EU average of 40.2%; only Poland, Slovenia and Slovakia have a lower rate). The average career of Belgian employees is relatively short: 36.6 years against the EU-15 average of 41.1. The current situation is the legacy of a period where the main objective was to limit to number of job-seekers by discouraging potential workers from seeking employment and by encouraging early retirement[176]. Moreover, the labour market is not particularly welcoming for older workers, both because potential employers doubt their efficiency, and because sectoral agreements guarantee minimum wages based on seniority or age, making older workers expensive to hire. In order to redress this situation, the Regions and Communities developed in 2003-2004 a system of "competence validation", meaning that workers may have the skills acquired through professional experience checked and certified through "competence centres"[177]. Moreover, all Regions (employment policy being a competence of the Regions) have put in place schemes facilitating the smooth transition from full-time active employment to retirement. These schemes include : financial incentives to remain active part-time while receiving remuneration with a less-than-proportionate reduction; "tutoring" initiatives, encouraging older workers to transmit their knowledge to younger workers (a task for which older workers may be trained); so-called "landing jobs", the purpose of which is to encourage

[176] See the Belgian National Action Plan for Employment 2004, paragraph 5.1.1.
[177] This was the subject of a cooperation agreement between the Regions and Communities concluded on 24 July 2003.

older workers to remain active in the voluntary sector as well as training younger workers (this latter formula was devised by the Flemish Region for workers above 45 years of age). A number of efforts, which include financial incentives, have been made in order to encourage the continued vocational training and retraining of older workers. These schemes and incentives are generally available to workers above 45 years of age or above 50 years of age. In the framework of the European initiative EQUAL with the support of the European Social Fund, campaigns have also been organised in order to improve the image of older workers (initiative "45+" in the German-speaking Community).

Belgium has also sought to encourage the return to work of older workers, in particular by allocating a bonus of 159 euros per month to older unemployed workers taking up employment[178]. Moreover, the Law of 5 September 2001 gave workers aged 45 years or more who are made redundant the right to receive an "outplacement" payment from their employer, which discourages the laying off of older workers. The procedures for exercising this right were defined by collective bargaining concluded at the national level within the National Council for Work (Conseil national du travail)[179]. In order to further discourage such redundancies, employers pay reduced social contributions for workers aged 58 years or more (since 2004: 55 years or more)[180]. The recruitment of older workers is greatly rewarded, with reductions in remuneration costs which may total 10,000 euros per year. In 2003 a Royal Decree was adopted, providing subsidies for certain investments made by employers in order to improve the working conditions of older workers (55 years or more)[181]. Moreover, a Royal Decree (*Arrêté royal*) of 5 June 2002 encourages persons aged over 50 years to become self-employed through support to starting a business.

It is clear that these measures are required in order to combat the structural and combined effects of a number of measures which had been taken in order to resolve the question of unemployment by encouraging and facilitating departure from the employment market[182]. Early retirement is open to laid-off workers after 58 years of age (50 years when they have been laid off from enterprises considered to be in difficulty); 107,915 workers took early retirement in 2003. Unemployed people of 58 years of age or above may not register as job seekers, and yet receive full unemployment benefit; there were 146,417 unemployed in this situation in 2003. Moreover, seniority implies a number of advantages, in particular higher remuneration, which discourage employers from taking on older workers and, when they are employed, to retain them, for instance by not including them in layoff procedures. Only recently have these advantages been compensated by specific incentives to recruit older workers, making their recruitment or retention more attractive to the employer.

Young workers. In the Conclusions XVII-2 (2005) adopted concerning Belgium under Article 7 of the 1961 European Social Charter, the European Committee of Social Rights recalls that under Art. 7 paragraph 5 of the Charter (fair remuneration), salaries of 30% below the minimum salary for adults are acceptable for workers aged between 15 and 16 years old, and that a difference of 20% may be tolerated for workers between 16 and 18 years old. As to the apprentices, the Committee reads Article 7 paragraph 5 of the European Social Charter as

[178] Arrêté royal du 11 juin 2002. This measure is in force since 1 July 2002; the level of the bonus was increased in 2004.
[179] Convention collective du travail (no. 82) of 10 July 2002.
[180] This represented a gain of 1,600 euros per year per worker, which since 2004 has been increased to 4,000 euros.
[181] *Arrêté royal du 30 janvier 2003 fixant les critères, les conditions et les modalités pour l'octroi de la subvention de soutien des actions relatives à la promotion de la qualité des conditions de travail des travailleurs âgés et fixant le montant de cette subvention* Royal Decree of 30 January 2003 establishing the criteria, conditions and procedures for granting a subsidy for supporting actions relating to the promotion of good quality working conditions for older workers and fixing the amount of that subsidy (*Moniteur belge*, 7 February 2003).
[182] See also on this the OECD publications on Belgium, especially the report *Ageing and Employment Policies* (2005) and the *Economic Survey – Belgium 2005*.

requiring that they receive at least a third of the starting salary or minimum wage of an adult at the beginning of the apprenticeship, and at least two thirds at the end.

In its Conclusions XVII-2 (2005) concerning Belgium, the Committee notes that according to the report presented by Belgium, in 2001 the minimal pay for apprentices in the Region of Brussels-Capital (as defined by a government decree (*arête gouvernemental*)) corresponded to 19% of the minimum wage of an adult worker during the first year, 26% during the second year, and 34% during the third year. Although one should also take into account the fiscal and social exemptions benefiting the apprentices, the Committee concludes that Belgium does not comply with Article 7 paragraph 5 of the Charter as the level of remuneration is situated under the minimum level prescribed by the Charter in the Committee's understanding.

The same Conclusions XVII-2(2005) note that Belgian law allows for certain exceptions to the general prohibition of night work of young workers. The Royal Decree of 4 April 1972 authorises night work for young workers in certain well-defined sectors – for instance, stage actors. Article 34bis of the Law of 16 March 1971 on work authorises work until 11pm in cases of force majeure. As Belgium could not provide the Committee with statistical information on how many young workers were concerned by these exceptions, the Committee concluded that Article 7 paragraph 8 of the European Social Charter had not been satisfactorily implemented, as it has not been demonstrated that the legal prohibition on night work applies to the large majority of young workers.

People with caring responsibilities. A vast array of measures seek to improve the balance between family and working life. Most of these measures, which shall not be described here, seek to improve the chance for both mothers and fathers to take care of their children. Certain measures however deserve to be highlighted specifically in this report, as they seek to support the professional integration of people caring for children with disabilities. For example, in 2004 the Region of Brussels-Capital set up a new service of care at home in order to provide help to families with children with disabilities.

Perhaps even more significantly, a Royal Decree 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[183]. For an "isolated" worker, i.e. a worker living alone with one or more children under his or her care, the interruption which may be taken when they have a child aged 16 or less is doubled: the period of interruption passes from 12 months (for complete interruption; 24 months where the worker switches to half-time or to 20%) to 24 months (complete interruption; 48 months where the worker continues working part time). Moreover, the same Decree provides for a rise in social security benefits to employees who choose to stop working in order to take care of a family or household member: the rise is 100 euros per month in situations where they completely suspend their career, 50 euros where a worker under 50 years switches to 50%, and 38.5 euros where an isolated worker under 50 years of age switches to 20%.

Current reforms. More recently, the Federal Government has presented what it called the "Solidarity pact between generations in Belgium" ("*Pacte de solidarité entre les générations en Belgique*"). This set of reforms was initially presented on 11 October 2005 and recently led to the adoption of the Law of 23 December 2005[184] (further regulations should implement this

[183] *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* (1) Royal Decree of 15 July 2005 modifying the Royal Decree of 10 August 1998 instituting the right to career interruption in order to assist or provide care to a seriously ill household or family member, *Moniteur belge.*, 28 July 2005.

[184] *Loi du 23 décembre 2005 relative au pacte de solidarité entre les generations*, Law of 23 December 2005 on the solidarity pact between the generations, *Moniteur belge*, 30 December 2005.

law). Their main objective is to raise the level of activity among older workers, as the measures described above have not achieved the desired results. The main measures in the "Solidarity Pact" are as follows:

1. Encouraging the professional integration of younger workers by a) fiscal incentives to the employer and by a specific "tutorial bonus" granted to the employer, and by b) paying a bonus to young workers who have completed training;
2. Encouraging a longer career a) by raising the level of revenue which workers may receive in addition to their pension; b) by raising the level of pensions which workers working beyond 60 years of age may receive, targeting especially workers over 62 who continue to work until the official pension age (65 years); c) by cutting from 16.5% to 10% the tax on complementary pensions paid by the employer where the worker has worked until 65 years of age; d) by making it easier for workers of 55 years or more to reduce their working time by 20 % (as this should encourage older workers to remain in employment); and e) by creating financial incentives for recruiting workers aged 50 years or more.
3. Discouraging early departure from employment: after 2008, the normal age for pre-retirement will be 60 years (it is currently 58 years) (with the exception of the heaviest jobs), and moreover men should have at least 30 years of work before retiring (35 years in 2012), 26 years for women (this limit will be raised by two years every four years until it equals the limit imposed for men);
4. Reform of the mechanisms on collective redundancies decisions in the context of restructurations of undertakings.

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

The list of exceptions where minimum or maximum age requirements are imposed in relation to access to employment is a very long one, even on the basis of the fragmentary information this author possesses.[185] Any systematic analysis of this information (even listing the regulations implied occupies some 40 pages) would require many weeks of work.

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

a) Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?

[185] In a letter of 20 March 2007, following a request from this author, the Federal Public Service (Ministry) Employment, Work and Social Dialogue sent a provisional compilation of the existing measures which could be problematic under the prohibition of age-based discrimination. However, the tables are still incomplete, since not all the ministerial departments consulted provided this information to the FPS Employment, Work and Social Dialogue, despite the fact that initial request was made in January 2006, and that a reminder was sent in September 2006.

Since 1 January 2003, the normal retirement age for women has been 63 years. The legal age of retirement of men is 65 years. These ages are being progressively equalised in accordance with the requirements of EC Law: every three years, the age of retirement of women is postponed of one year, and full equalisation with the situation of men will be achieved in 2009 at an age of 65 years.

This "normal" retirement age 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, which requires the employer to provide a reason for the dismissal. If the worker does continue to work after having reached the normal retirement age, the pension will be calculated on the basis of the most favourable years, i.e. those during which pay was highest. In the public sector however, retirement is automatic and compulsory, and fixed at 65 years for both men and women.

An individual may be in receipt of a pension and still work, within certain limits. One of the changes brought about by the Law of 23 December 2005 on the Solidarity Pact between generations mentioned above is that these limits have been relaxed somewhat in order to encourage workers receiving a pension to maintain a certain level of economic activity.

b) Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?

c) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?

There is no state-imposed mandatory retirement age in the private sector; public servants however retire automatically at 65 years. The author is not aware of any plans to modify this in the future. This is likely to constitute one of the items for discussion in 2006 in the process of screening Belgian laws and regulations for potential age-based discrimination, referred to above.

d) Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?

e) Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment or are these rights lost on attaining pensionable age or another age (please specify)?

The law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment.

For these above questions, please indicate whether the ages are different for women and men.'

4.7.5 Redundancy

a) Does national law permit age or seniority to be taken into account in selecting workers for redundancy?
b) If national law provides compensation for redundancy, is this affected by the age of the worker?

Redundancy procedures are regulated in Belgian law by Collective agreement (convention collective du travail – CCT) no. 10 of 8 May 1973 on collective layoffs, Collective agreement no.24 of 2 October 1975 on informing and consulting workers' representatives in collective layoffs; the Royal Decree of 24 May 1976 on collective layoffs; the Law of 13 February 1998 containing provisions promoting employment, and Royal Decree of 30 March 1998 implementing Articles 63 and 66 § 2 of chap. VII, Collective Layoffs, of the Law of 13 February 1998. Moreover account should be taken of Directive 98/59/EEC of 20 July 1998 when interpreting these provisions.

Age is only indirectly relevant to the selection of workers for redundancy. Indeed, the employer must make available a redundancy plan, indicating in particular the number of workers concerned, specifically divided by sex, age, and professional category, as well as the reasons for the decision. This means that the impact of the decision on older workers will be part of the collective discussion which takes place with workers' representatives. Moreover the employer must pay special compensation to workers affected by redundancy for a period normally of four months following the layoff. This compensation (as defined by Collective agreement no. 10 of 8 May 1973 on collective layoffs, Collective agreement no.24 of 2 October 1975) is calculated as 50% of the difference between their previous remuneration and the unemployment benefit the workers laid off receive. It will be more expensive for the employer to lay off older workers because their level of remuneration will on average be higher.

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

Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive?

See above, paragraph 4.6.

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

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

a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case-law or relevant legal/political discussions on this topic.
b) Do measures of positive action exist in your country? Which are the most important?
Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of disabled persons to the labour market and any related to Roma.

The Federal State. Article 4 of the Federal Law of 25 February 2003 does not forbid the adoption or maintenance of measures which seek to prevent or compensate certain disadvantages in order to ensure full equality in practice[186]. However, as confirmed by the Constitutional Court judgment of 6 October 2004[187], such measures will have to conform to the relatively strict conditions imposed by the case-law of the Belgian Constitutional Court (Cour d'arbitrage). Positive action, when it leads to imposing differences in treatment between groups of people on the basis of a discriminatory characteristic[188] is seen as a restriction imposed on the right to equal treatment – the right of each individual to be judged according to his or her abilities, needs, or merits, rather than on the basis of characteristics such as sex, national origin or religious affiliation. Such a form of positive action will be considered discriminatory unless four conditions are fulfilled, which the Constitutional Court identified in judgement no. 9/94 of 27 January 1994[189]: first, such "positive discrimination" must constitute be in response to situations of manifest inequality, i.e. it must be based on a clear demonstration that a clear imbalance between the groups will remain in the absence of such action; second, the legislature must have identified the need to remedy such an imbalance – in other words, a private party may not introduce a positive discrimination scheme, such an initiative must be based on a legislative mandate; third, the "corrective measures" must be of a temporary nature: as a response to a situation of demonstrated manifest imbalance, these measures must be abandoned as soon as their objective – to remedy this imbalance – is attained; fourth, these corrective measures must not reach further than is required, i.e. they must be restricted to what is strictly necessary, so that the limitation of the right to equality will remain within well-defined boundaries: the cure must not appear worse than the evil to be combated. Although the wording of Article 4 of the Federal Law of 25 February 2003 is not completely in line with these requirements, the Constitutional Court has considered that, insofar as it is not implemented beyond the limits set forth in its judgment no. 9/94 of 27 January 1994, it should not be repealed as unconstitutional[190].

This solution has now been reaffirmed in the general antidiscrimination bill and in the racial equality bill presented to Parliament on 26 October 2006. Both these texts provide that differences in treatment based on a protected ground may be justified, but only under the conditions mentioned above, which are based on the case-law of the Constitutional Court (see Art. 10 § 2 of both texts). In addition, these texts clarify the second of the four conditions enumerated above, by clarifying that the King (the government) must, within the limits of these conditions, authorize the adoption of positive action measures by the adoption of a Royal Decree to that effect (Art. 10 § 3).[191]

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[186] Since the judgement of the Constitutional Court of 6 October 2004, Article 4 of the Law should not be limited to the adoption of positive action measures which seek to prevent or compensate disadvantages for members of categories defined by a "suspect" ground as under the initial version of the Law. See that judgment, Recital B.77.

[187] Recital B.79.

[188] Some forms of positive action, while designed to improve the representation of certain target groups in certain spheres of social life, will not take the form of measures introducing a difference in treatment between distinct categories, on the basis of a suspect characteristic: consider, for example the publication of job advertisements in periodicals directed towards a particular ethnic community, or encouraging minority applications, whilst subjecting the candidates from those communities to the same selection criteria and avoiding the setting of "quotas" or any numerical goals to be achieved in the representation of those target groups.

[189] 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 Law 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.

[190] Judgment no. 157/2004 of 6 October 2004, Recital B.79.

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

Regions and Communities. Since the conditions defined by the Constitutional Court fot the admissibility of positive action are derived from Articles 10 and 11 of the Constitution, rather than from rules specific to the federal level, they also must be complied with by the Regions and Communities where they would intend such measures to be adopted. The Flemish Decree of 8 May 2002 on the proportionate representation of target groups in employment stands out in this respect, since its objective is achieved through action plans for diversity and annual reporting : one of its guiding principles, therefore, may be said to constitute a form of positive action, in the broad sense of this expression as used in the Race and Framework Directives. The German-speaking Community's Decree does not adopt the same affirmative conception of equality as that of the Flemish Decree of 8 May 2002, but nevertheless does provide for positive action measures (*positiven Maßnahmen*), which are defined in conformity with the definition offered by the Framework Directive (Art. 16). Similarly, Article 7 of the Decree adopted on 19 May 2004 by the French-speaking Community mentions that the principle of equal treatment forbids the maintenance or adoption of measures with the objective of preventing or compensating for disadvantages linked to one of the grounds protected from discrimination. Article 10 of the Decree adopted by the Walloon Region on 27 May 2004 adopts a bolder formulation, as it states that the Walloon Government "maintains and adopts" positive action provisions, "in order to fulfil the principle of equal treatment". Of course, the formulation remains too vague to identify an obligation imposed on the Walloon executive to take action in this regard; nevertheless the formulation is worth emphasising, as it presents the adoption of positive action as a consequence of the requirement for equal treatment, rather than as an exception to that principle. Any implementation of these provisions by the adoption of positive action measures should conform to the limits identified by the Constitutional Court from Articles 10 and 11 of the Constitution, as recalled above.

Apart from the definition of target groups under the Flemish Decree of 8 May 2002 and its implementing regulation of 30 January 2004, this reporter is not aware of any attempt to adopt positive action schemes under the provisions cited above[192]. However, the adoption of positive action schemes in favor of persons with disabilities deserves a separate comment.

Positive action benefiting persons with disabilities. The Law on the social reintegration of disabled persons (*Loi relative au reclassement social des handicapés*)[193] was adopted in 1963. Art. 21 aimed to impose on certain employers, both in the private and in the public sector, an obligation to employ a certain number of workers with disabilities, resulting in system of quotas for recruiting disabled workers, both in the public sector and to a lesser extent in the private sector. In relation to the Federal administration, Art. 25 of the Law of 22 March 1999 on various measures in public administration (*Loi portant diverses mesures en matière de fonction publique*)[194] now has abrogated Art. 21 of the Law of 16 April 1963, and provides for the recruitment of persons with disabilities by the Federal authorities and certain public institutions[195]. The Federal Government has implemented Art. 25 of the Law of 22 March 1999 by stipulating in a Royal Decree initially approved by the Council of Ministers in 25 February 1999 that in the future 2.5 % of the posts in the Federal Administration should be set aside for disabled people, whom moreover will be supported by an "accompanying agent" (*agent d'accompagnement*) to guide them in adapting their working station and check that the

[192] The Commission on intercultural dialogue has noted with regret that, whereas positive action measures are common with respect to women, the young or persons with disabilities, they are considered with much more suspicion when they concern cultural minorities or persons of a foreign origin: see Commission du dialogue interculturel, *Rapport final*, 2005, p. 62, see http://www.antiracisme.be or http://www.dialogueinterculturel.be/fr/edito.asp.

[193] *Moniteur belge.*, 23 April 1963. This is a law adopted at federal level before the delegation of its subject matter to the Regions and Communities, and which therefore today is only partially applied, for example, some of its provisions have been superseded by legislation adopted in one Region but remaining valid in the others.

[194] *Moniteur belge.*, 30 April 1999.

[195] See Article 25 of the Law of 22 March 1999

working area is accessible.[196] Similar measures have been adopted by the Walloon Region for the administrations and services within the Region's remit (Article 10, 2nd al., of the Decree of 6 April 1995 on the integration of persons with disabilities[197]), by the French-speaking Community Commission of the Region of Bruxelles-Capitale (Article 32 of the Decree on the social and professional integration of persons with disabilities (*Décret relatif à l'intégration sociale et professionnelle des personnes handicapées),* adopted on 4 March 1999 by the Commission Communautaire française de la Région de Bruxelles-Capitale), and by the Flemish Region/Community. It is unnecessary here to describe these schemes in detail.

A common problem in this area is that of effective enforcement, in both the public and the private sectors: in fact, reports show that quantitative objectives for the integration of persons with disabilities are usually not met[198]. Efforts in this direction nevertheless continue. On 6 October 2005, a Royal Decree[199] was adopted in order to encourage the effective integration of disabled people within the federal administration. To this effect, the Royal Decree defines the notion of "a person with a disability" (*personne handicapée*) in a more restrictive sense than the instruments implementing directive 2000/78 (Art. 1): a person with a disability is a person recognised as disabled by the relevant agencies (Agence wallonne pour l'Intégration des Personnes handicapées, Vlaams Agentschap voor Personen met een Handicap, Service bruxellois francophone des Personnes handicapées, Dienststelle für Personen mit Behinderung) or by the Flemish Employment Office (Vlaamse Dienst voor Arbeidsbemiddeling en Beroepsopleiding (VDAB)); a person receiving allowances or disability benefits on the basis of the Law of 27 February 1987 on allowances to disabled persons; a person holding a certificate from the relevant directorate of the Ministry for Social Security (Service public fédéral Sécurité sociale) for social or fiscal benefits; and the victim of an occupational injury whose incapacity has been recognised as being of 66% or more. Under Article 3 of the Decree, persons recognised as "with disabilities" may be put on reserve lists for access to jobs in the public administration for an unlimited period of time. During selection procedures, disabled people will be put on separate list, which should allow the selection bureau for the public administration (Selor) to facilitate compliance by the public administration with legal obligations with regard to the quotas of disabled people which they should employ. Moreover, it would appear from the answer to a parliamentary question that the government plans to propose a Royal Decree imposing a 3% quota of persons with disabilities in all public services[200].

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[196] A few days after the cut-off date for this report, the government adopted the Royal Decree of 5 March 2007 organizing the recruitment of persons with disabilities in the federal administrative public service (*Arrêté royal du 5 mars 2007 organisant le recrutement des personnes handicapées dans la fonction publique administrative fédérale*), *Moniteur belge*, 16.3.2007 (providing for a positive action scheme aiming at achieving the goal of persons with disabilities representing 3% of the federal public service (they are estimated to represent 4.5 % of the total population), by obliging the departments which do not fulfil this benchmark to recruit qualified candidates who are considered 'persons with disabilities').

[197] *Décret (du Conseil régional wallon) du 6 avril 1995 relatif à l'intégration des personnes handicapées*, Decree (of the Walloon Regional Council) of 6 April 1995 on the integration of disabled people, *Moniteur belge*, 25 May 1995; implemented by the *Arrêté du 14 janvier 1999 du Gouvernement wallon relatif à l'emploi de personnes handicapées dans les Services du Gouvernement et dans certains organismes d'intérêt public*, the Decree of 14 January 199 of the Walloon Government on employment of disabled people in government services and in certain public interest bodies, *Moniteur belge*, 29 January 1999.

[198] See the figures presented in *AlterEchos* no.153 of 17 November 2003, p. 3, and commented in the *Report on the situation of fundamental rights in Belgium in 2003*, presented to the EU Network of Independent Experts on Fundametnal Rights, pp. 124-125. This report is available (in French) on www.cpdr.ucl.ac.be/cridho.

[199] *Arrêté royal du 6 octobre 2005 portant diverses mesures en matière de sélection comparative de recrutement et en matière de stage*, Royal Decree of 6 October 2005 on various measures concerning comparative selection in recruitment and concerning work placements, *Moniteur belge*, 25 October 2005.

[200] See the request for explanations from Ms Anke Vandermeersch to the relevant Minister (Ministre de la Fonction publique, de l'Intégration sociale, de la Politique des grandes villes et de l'Égalité des chances) on "positions open to persons with disabilities in public service" (nº 3-1100), Sénat, sess. ord. 2005-2006, *Annales*, 3-134.

6. REMEDIES AND ENFORCEMENT

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

a) What procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation)?
b) Are these binding or non-binding?
c) Can a person bring a case after the employment relationship has ended?

In relation to each, please note whether there are different procedures for employment in the private and public sectors.
In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?

The existing legal framework. The current system is as follows. An individual victim of discrimination based on race or colour, descent, ethnic or national origin – in fact, on the grounds protected by Directive 2000/43/EC – has a choice of two routes. He/she may seek to obtain a criminal conviction of the author of the discrimination, if it occurs either in the provision of a service or a good (Art. 2 of the Law of 30 July 1981) or in access to employment or to vocational training or in the course of dismissal procedures (Art. 2bis). In this case the victim may file a complaint with the public prosecutor or an investigating judge, or even summon directly the defendant before the criminal division of a tribunal (*citation directe*). However the burden of proof in criminal procedures is entirely on the prosecution, and this route will not be the most effective in the majority of cases. Very few criminal convictions have been pronounced on the basis of the law of 30 July 1981; convictions which have been secured were in situations where the racist act was openly practiced, for instance accompanied with racist statements which could leave no doubt about the intent to commit the act prohibited by the law. On the other hand, the symbolic value of such a criminal conviction is important, and the victim may receive a sum in compensation for the damage caused by the criminal act.

The more promising route – and the only one available for victims of discrimination on a ground other than race or ethnic or national origin, or of discrimination even on the basis of race or ethnic or national origin outside the scope of application of the Law of 30 July 1981 – will be to seek civil remedies by relying on the Federal Law of 25 February 2003, Chapter IV of which contains civil provisions. The Law nullifies any contractual clauses which go against its provisions, making this law paramount (Art. 18); it gives the judge the power to deliver an injunction prohibiting the continuation of the discriminatory practice when aggrieved parties lodge an injunction procedure ("action en cessation") alleging discrimination (Art. 19); it also gives the judge the power to order the cessation of that practice, under the threat of a fine (*astreinte*) (Art. 20). These actions are brought before civil tribunals (*tribunal de première instance, rechtbank van eerste aanleg*), or where an employment relationship is concerned, before specialised tribunals (*tribunal du travail, arbeidsrechtbank*). There is no difficulty in bringing a claim after the employment relationship has ended.

The Centre for Equal Opportunities and the Fight against Racism may file a suit under the Law of 25 February 2003 (Art. 31(1) of the Law). In other words, it may act as a private prosecutor, by lodging a complaint and requesting damages even when the victim is not identified or is the "collectivity" (for instance, where a person publicly incites discrimination,

or where it appears that an employment agency systematically commits discrimination.). However, where there is an identified individual victim (either a natural or a legal person), the Centre may only file a suit with the agreement of the victim (Art. 31(3) of the Law). This is valid in all fields covered by the Law of 25 February 2003, which includes, but goes beyond, those to which Directive 2000/43/EC applies. The same system has been retained under the racial equality bill and the general antidiscrimination bill proposed by the government on 26 October 2006 (see below, 6.2.).

For the sake of completeness, it should be added that the Law of 25 February 2003 also contains criminal provisions (Chapter III of the Law). These however will be of limited use, as explained previously in this report. They will be relied on in two situations[201]: a) where a person openly incites hatred or discrimination, or violence, on the basis of one of the grounds enumerated by the Law, in the conditions of publicity defined by Article 444 of the Penal Code (see Art. 6(1) of the Law of 25 February 2003[202]); and b) where certain offences defined in the Penal Code are committed with an "abject motive", i.e. with discriminatory intent (hate crimes) (Articles 7 to 14 of the Law of 25 February 2003)[203]. In most of these situations – and always in situations a) and b) – a conciliation procedure is available, under the Law of 10 February 1994 which makes mediation possible for all offences punishable by an imprisonment of at a maximum of two years[204].

The instruments adopted by the Regions and Communities are less developed in terms of the procedures they provide in order to uphold the right not to be discriminated against. This is at least partly to be attributed to uncertainties which remain about their competence to adopt such measures. Although the Regions and Communities may, when adopting Decrees[205], adopt ancillary penal clauses to ensure that these Decrees contain effective sanctions, they have in principle no competence in criminal law, which remains a federal domain – only the Federal legislature, for instance, may amend the Criminal Code. And although controversies exist on this point, it is doubtful that the Regions and Communities may, when adopting Decrees in domains falling within their competence, include provisions about the competences of courts and tribunals or the conditions under which they will exercise these competences[206]. This uncertainty – or this incapacity – has constituted a serious obstacle for the full implementation of Directives 2000/43/EC and 2000/78/EC in the Belgian legal order. In particular, it may explain the failure of the Walloon Region and the French-speaking

[201] Article 6(2) of the Law of 25 February 2003 also initially provided that a public servant who commits an act of discrimination has committed an offence, unless he/she was acting following the orders of a hierarchical superior (who then would be criminally liable) (Art. 6(2) of the Law of 25 February 2003). In its judgment of 6 October 2004, the Constitutional Court (Cour d'Arbitrage) annulled this provision, which it considered to be incompatible with the principle of legality (Article 7 ECHR and Art. 12 of the Constitution).

[202] The Constitutional Court (Cour d'Arbitrage) annulled one indent of this provision, which made it an offence to publicly announce one's intention to commit a discriminatory act: the Court considered that this constituted a disproportionate restriction on freedom of expression, especially taking into account the very broad understanding of prohibited discrimination in the Federal Law of 25 February 2003.

[203] These offences which may thus lead to stronger convictions if driven by such an "abject motives" are: sexual assaults (*attentats à la pudeur ou viols:* Art. 372 to 375 *Code pénal*); homicide (Art. 393 to 405bis *Code pénal*); refusal to assist a person in danger (Art. 422bis and 422ter *Code pénal*); deprivation of liberty (Art. 434 to 438 *Code pénal*); harassment (Art. 442bis *Code pénal*); attacks against the honor or the reputation of an individual (Art. 443-453 *Code pénal*); putting a property on fire (Art. 510-514 *Code Pénal*); destruction or deterioration of goods or property (Art. 528-532 *Code Pénal*). Except for the offence of harassment, these situations are not normally met in the field of employment and occupation.

[204] This law has inserted Article 216ter in the Code of Criminal Procedure (*Code d'instruction criminelle*) to create a form of *médiation pénale*.

[205] *"Ordonnances"* for the Region of Brussels-Capital.

[206] For instance, Article 18 of the Flemish Decree on equal participation on the labour market, *Decreet houdende evenredige participatie op de arbeidsmarkt*, of 8 May 2002 intended to modify the Judicial Code (Code judiciaire), specifically Article 581 of that Code listing the situations in which the employment tribunal (*tribunal du travail*) may deliver injunctions on the basis of proceedings requesting the cessation of a practice considered *prima facie* illegal (*action en cessation*). A compromise had to be reached after the Federal Government planned to refer this to the Constitutional Court (Cour d'arbitrage), considering that the Flemish Community may not on its own initiative modify this law.

Community to comply with Article 9(2) of Directive 2000/78/EC and Article 7(2) of Directive 2000/78/EC.

Another difficulty is due, more broadly, to different understandings concerning the level at which the different aspects of these Directives should be implemented in the Belgian legal order. For instance, to justify the fact that when adopting the Decree on the implementation of the principle of equal treatment of 19 May 2004 the French-speaking Community adopted neither civil nor penal sanctions to ensure that any violations of the principle of equal treatment will be sanctioned effectively, the authors of the text mention that such civil or penal sanctions, to the extent they are required by Directives 2000/43/EC and 2000/78/EC, are provided for in the Federal Law of 25 February 2003, which is sufficient. The French-speaking Community's Decree in fact contains only one provision stipulating that discrimination committed by an agent of the Community will lead to disciplinary sanctions (see Article 9). However, this approach is based on the presumption that the Federal Law of 25 February 2003 applies to situations which in principle fall under the competences of the Communities – for instance, the relationship between the Community and staff in educational institutions – making it unnecessary for the Regions and Communities to further enact certain remedies against discrimination committed within their domains of competence. This presumption however is at least debatable, and probably incorrect.

The new antidiscrimination bills. If and when the general antidiscrimination bill and the racial equality bill are adopted, the procedural protection of victims of discrimination on the basis, respectively, of 'race', color, descent, national or ethnic origin, and nationality (racial equality bill), and of age, sexual orientation, civil status, birth, property (Fr. 'fortune'), religious of philosophical belief, political opinion, language, actual or future state of health, disability, physical characteristic, genetic characteristic, and social origin (general antidiscrimination bill) will be identical – and indeed, it was one of the guiding principles of the reform proposed that there should exist no hierarchy between grounds. *Victims of discrimination,* under both bills, may a) seek a finding that discriminatory provisions in a contract are null and void (Art. 15 of the general antidiscrimination bill; Art. 13 of the racial equality bill); b) seek a reparation (damages) according to the usual principles of civil liability (Art. 18 and 16 respectively), although the victim now may opt for a payment of the lump sums defined in the law (1300 euros, reduced to 650 euros if the defendant provides evidence that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element ; or, in the field of employment, 6 months' salary, reduced to 3 months if the employer demonstrates that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element) rather than for a damage calculated on the basis of the 'effective' damage (see further in this report, 6.5.) ; c) seek from the judge that he/she delivers an injunction imposing immediate cessation of the discriminatory practice, under the threat of financial penalties (Art. 19 and 20 of the general antidiscrimination bill; Art. 17 and 18 of the racial equality bill)[207] ; d) seek from the judge that he/she imposes the publicity of the judgment finding a discrimination, by the posting of the judicial decision on the premises where the discrimination occurred, or by the publication of the judicial decision in newspapers (Art. 20 § 3 and 18 § 3 respectively). In addition, the bills provide in limited circumstances for a criminal liability in cases of discrimination. First – but this goes beyond the scope of behaviors which the Racial Equality or Employment Equality Directives cover –, the incitement to commit a discrimination, or the incitement to hatred or violence against a group defined by certain characteristics, is a criminal offence, if it is done under conditions of publicity (Art. 22 and 20 respectively). Second, civil servants

[207] It is a criminal offence to refuse to comply with a judgment delivered under this provision (Art. 24).

who, in the exercise of their functions, commit a discrimination, may be criminally convicted (Art. 23 in both bills).[208]

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

Please list the ways in which associations may engage in judicial or other procedures
a) in support of a complainant
b) on behalf of one or more complaints (please indicate if class actions are possible)

Under Federal legislation

The legal standing of associations in criminal procedures. It has long been realised in the field of anti-discrimination law that the combined action by the public prosecutor (who has the authority to prosecute criminal offences) and by the individual victim (who may seek damages by lodging a civil action claiming reparation, but also file a complaint to the public prosecutor or the investigating judge), may not suffice. The Law of 30 July 1981 criminalising certain acts inspired by racism and xenophobia therefore provided, rather exceptionally in Belgian procedural law[209], that certain associations whose mission is to defend human rights and combat racism and discrimination could claim damage as a result of a violation of the provisions of this legislation (see Art. 5 of the Law of 30 July 1981). This extension of legal interest has an important consequence: such an association acting as a private prosecutor may overcome both the inertia of the public prosecutor 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. The Centre for Equal Opportunities and the Fight against Racism was later set up by the Law of 15 February 1993 as an agency which, although placed under the supervision of the Prime Minister, nevertheless functions independently (see further this report, paragraph 6.5), and it received similar powers under the Law of 30 July 1981. However, both the Centre for Equal Opportunities and the Fight against Racism and associations who have a recognised legal interest in combating racism may only launch proceedings on the basis of the Law of 30 July 1981 with the agreement of the individual victim for certain offences defined in the Law including discrimination in employment (but not, notably, discrimination in the provision of goods or services).

The legal standing of associations in civil procedures. The Federal Law of 25 February 2003 has largely borrowed from the Law of 30 July 1981 with respect to the *locus standi* of organisations. The Centre for Equal Opportunities and the Fight against Racism has now received powers with respect to all grounds of discrimination (see art. 31 of the Law of 25 February 2003, which therefore complies with Art. 9(2) of Directive 2000/78/EC). In addition, article 31 (n. 2°, 3° and 4°) of the Law of 25 February 2003 also provides that every public utility institution and every association which has been legally founded for at least five years and states as its objective the defence of human rights or the fight against discrimination, as well as workers' and employers' organisations may file a suit on the basis

[208] The racial equality bill contains supplementary criminal provisions in Art. 21 and 22, which correspond to the implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

[209] Indeed, the principle is that the so-called "collective interest" asserted by an association which seeks to base its right to file a legal action on the basis of the mission defined in its internal statutes, will not suffice, if the rights of the association (to the protection of its property, its honour or reputation) are not violated as such. According to the Court of Cassation, if another solution were to prevail, citizens forming an association could impose on the authorities an obligation to prosecute, even in cases where the public prosecutor would find it not opportune to do so (Cour de Cassation, 24 November 1982, *Pasicrisie,* 1983, I, p. 361)). This position has been confirmed since on a number of occasions by the Court of Cassation. See, most recently, Cour de Cassation, 19 September 1996, *Revue critique de jurisprudence belge,* 1997, p. 105).

of this Law, although these organisations also may only do so with the agreement of the victim, if there is an identifiable victim. Thus, this legislation – like the law of 30 July 1981 – provides for associational standing to a certain extent (the concept of class action *stricto sensu*, understood as a mechanism implying that a "representative plaintiff" will sue in the name of the class and obtain a judgment binding on all the members of that class, is unknown in Belgian law).

The new antidiscrimination bills. The general antidiscrimination bill and the racial equality bill presented to Parliament on 26 October 2006 reproduce the system already established by the Law of 25 February 2003 as regards the legal standing of the Centre for Equal Opportunities and Opposition to Racism, of organizations with a legal interest in the protection of human rights or in combating discrimination, established since at least three years,[210] and of representative unions, who may file suit on the basis of the antidiscrimination legislation (Art. 29 and 30, in both bills). However, where the victim of the alleged discrimination is an identifable (natural or legal) person, their action will only be admissible if they prove that the victim has agreed to their action being filed (Art. 31).

Under decrees adopted at Region/Community level

The Flemish Decree of 8 May 2002 (see Article 16) and the Decree adopted by the German-speaking Community (see Article 20) have solutions similar to that of the Federal Law of 25 February 2003, and which the new legislative bills will reproduce at federal level. The organisations which pursue the objective of protecting human rights and combating discrimination may engage in judicial actions to lodge a complaint about discrimination, although they may only do so with the consent of the victim if the discrimination has affected a particular legal or natural person. By way of contrast, it does not seem that the Decree adopted by the Walloon Region on 27 May 2004, nor the Decree adopted on 19 May 2004 by the French-speaking Community, accord with Article 9(2) of Directive 2000/78/EC. Indeed, these latter instruments do not provide for organisations which have a legally recognised interest in combating discrimination to engage in procedures in support of the victim.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

Federal law

Criminal procedures. The principle of the presumption of innocence in criminal law is mostly considered to exclude the introduction into criminal procedures of rules shifting the burden of proof from the victim or prosecution to the defendant. This, at least, is the reasoning guiding Art. 8(3) in Directive 2000/43/EC and Art. 10(3) in Directive 2000/78/EC. The Law of 30 July 1981 criminalising certain acts inspired by racism and xenophobia follows this same logic: it does not contain provisions on the burden of proof; the offence must be proven by the prosecution and the victim of the alleged discrimination. The same applies to the criminal provisions contained in the Federal Law of 25 February 2003, or to those contained in the general antidiscrimination bill and the racial equality bill of 2006 (see Articles 27 and 28 in both bills).

[210] The European Commission took the view that the requirement of being established since a minimum of five years was too heavy. The choice to lower the requirement to three years' existence is an answer to this concern.

Civil procedures. Article 19(3) of the Federal Law of 25 February 2003, located in the chapter containing civil provisions, provides for shifting the burden of proof. The victim seeking damages in reparation of the alleged discrimination, on the basis of art. 1382 *Code Civil*, will be authorised to produce certain evidence – Art. 19 mentions "statistical data" and "tests de situation"[211] as two examples – which, when presented to a judge, could lead the judge to presume that discrimination has occurred, thus obliging the defendant to demonstrate that, contrary to that presumption, there has been no discrimination[212]. Initially, the idea was that the conditions under which situation tests must be performed and may be considered valid were to be defined by a further executive regulation (Royal Decree). Although a number of consultations have taken place on this executive regulation's content both within the Ministry of Labour and Employment and within the Ministry of Justice, no agreement could be reached, due, in part,[213] to a strong opposition from employers' organisations.

Despite the failure to have such an Executive Decree adopted which would strengthen the evidence of discrimination through "testing", the very same solution has been reproduced in the general antidiscrimination bill and in the racial equality bill, presented to Parliament on 26 October 2006. These (see Art. 27-28) allow for the shifting of the burden of proof through all available, including "statistics" and "testing" ; and they too anticipate the adoption of a Royal Decree describing the methodology of "testing".

Regions and Communities

The instruments adopted by the Regions and Communities have adopted a variety of approaches. Their failure to fully implement the requirements of the Directives in this respect may be attributed, again, to their hesitation concerning rules relating to the evidentiary burden: if these are procedural rules contributing to defining the powers of courts, they are not competent; if they are substantive rules, defining the extent of protection from discrimination, they should act with respect to the areas in which they are competent. Thus, the Decree adopted by the French-speaking Community does not contain specific rules governing the proof of discrimination – a situation which is, in regard of Directive 2000/78/EC, problematic, although it is to be explained by the understanding of the French-speaking Community that all it could do within of the scope of its competence was to impose obligations on the public servants of the Community, backed by the threat of disciplinary sanctions, whilst any civil or criminal sanctions for discrimination were already outlined by the Federal Law of 25 February 2003.

The other instruments adopted at regional or community level go further, however. The Decree adopted by the Walloon Region contains (in Article 17) a rule on the burden of proof, drafted in accordance with Article 8(1) of Directive 2000/43/EC and Article 10(1) of the Directive 2000/78/EC. Article 14 of the Flemish Decree of 8 May 2002 provides for the

[211] Also known in French simply as "testing": the person suspect of committing discrimination is "put to the test" by the presentation of fictitious candidates to a job, to rent an apartment etc. in order to identify whether or not he/she will treat different candidates in a discriminatory fashion.

[212] Article 19(3) of the Law of 25 February 2003. Statistical data and situation tests are therefore merely *exemplative* of the kinds of facts which could be brought forward to reverse the burden of proof in discrimination cases presented in civil proceedings. The legal and methodological difficulties raised by these modes of proof se are discussed in O. De Schutter, *Les techniques particulières de prevue dans le cadre de la lutte contre la discrimination*, Centre pour l'égalité des chances et la lutte contre le racisme – Migration Policy Group, March 2003.

[213] These consultations seem to have highlighted the difficulty there is in pursuing simultaneously two partially incompatible objectives: first, the situation tests should be strictly codified, and their methodology stipulated, to ensure that they will not lead to abuse by alleged victims of discrimination, but also to encourage the judge to accept that this will result in the reversal of the burden of proof; second however, such situation tests must not be too burdensome to perform, and they should remain a relatively accessible means by which a presumption of discrimination may be established.

reversal of the burden of proof in the context of civil actions brought on the basis of the Decree – the mechanism will not apply in criminal procedures[214] – although the Decree remains vague as to which facts should count as weighing sufficiently to impose the switch of the burden of proof. There will be, therefore, a great deal of room for judicial interpretation: the judge will have to consider what weight should be afforded to the facts presented by the victim, and whether these facts lead to a presumption that discrimination may have occurred. The same remark can be made concerning the Decree adopted by the German-speaking Community. Article 18 of this Decree provides for the possibility of certain facts being presented to the judge leading to the burden of proof shifting. This possibility is excluded with respect to criminal procedures. As in the Flemish Decree of 8 May 2002, the facts which may lead to this are not specified.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, or person that help the victim of discrimination to present a complaint)

Federal legislation

The existing regime. Article 21 of the Law of 25 February 2003 first states the principle that, when a complaint of discrimination or a legal action have been filed by an employee, he/she may not be dismissed unless for reasons unrelated to that complaint or that procedure. For 12 months after a complaint has been filed, or when a legal suit has been initiated, for three months after the final decision has been made and the case has been concluded, there is a presumption that dismissal or unilateral modification of employment conditions by the employer are a form of reprisal against the employee: indeed, it is up to the employer to prove that dismissal or modification of employment conditions are unrelated to the complaint made by the employee, or to the legal procedure he/she initiated. Should the employer fail to prove this, the employee or the union of which he/she is a member may request the reinstatement of the employee into his/her previous position, or the restoration of the conditions under which he/she was previously employed. A refusal of the employer in this regard may be very costly as the employer may be obliged to compensate the employee either according to the damage effectively caused, or by paying the equivalent of six months' remuneration.

In the view of this author however, Article 9 of the Racial Equality Directive and Article 11 of the Employment Equality Directive[215] should be read as imposing the duty on Member States to also ensure that employees or other persons connected to a complaint or to legal proceedings are protected from reprisal: for instance, not only the employee against whom the discrimination has been committed, but also witnesses, or members of the union which has assisted in the complaint, should be protected. However, the wording of Article 21 of the Law of 25 February 2003 seems too narrow to include also such protection beyond the individual complainant.

The new antidiscrimination bills. The possible lacuna mentioned above is remedied by the bills presented by government on 26 October 2006. Both the general antidiscrimination bill and the racial equality bill extend the protection against reprisals from victims filing a complaint, to any witness in the procedure (persons having otherwise assisted in the preparation or the filing of the complaint are not included, however, in the protection from

[214] See Art. 10(3) of Directive 2000/78/EC.
[215] Article 11 of Directive 2000/78/EC is phrased in narrower terms, however, referring to "employees" instead of "persons" having to be protected from reprisals, than Article 9 of Directive 2000/43/EC.

reprisals). Article 17 of the general antidiscrimination bill provides for a protection of the employee who has filed a complaint for a discrimination in the field of employment, or on whose behalf a complaint has been filed. This protection is extended to witnesses (Art. 17 § 9). A similar protection from victimisation is provided in fields other than employment by Article 16 of the general antidiscrimination bill ; in this context too, this protection extends to witnesses (Art. 16 § 5). The main difference between the two regimes is that, where the employment relationship is concerned, until a judicial decision has been adopted establishing that there has been a discrimination, the victim of reprisals under the form of a dismissal by the employer or the organisation of which the victim is a member (and who represents that victim) is to ask for the reintegration of that person, at the same level and under the same conditions as prior to the dismissal. Articles 14 (outside the employment field) and 15 (in the field of employment) of the racial equality bill contain identical protections against reprisals.

Regions and Communities

Except on one relatively minor issue[216], Article 12 of the Flemish Decree of 8 May 2002 is phrased in terms identical to Article 21 of the Law of 25 February 2003. Just like it is uncertain whether this latter provision protects from reprisals not only the victim of a discrimination who has filed a complaint, but also witnesses or other persons who have helped file the complaint, there is an uncertainty about the scope of the protection under Article 12 of the Flemish Decree of 8 May 2002, although it would appear from the formulation of this provision that it cannot be excluded that, by judicial interpretation, the protection could be extended beyond the plaintiff, for instance to witnesses[217].

Neither the Decree adopted by the French-speaking Community nor the Decree adopted by the Walloon Region contain any provisions on reprisals. In the view of the author of this report, this is in violation of Article 11 of Directive 2000/78/EC and with Article 9 of Directive 2000/43/EC. The Decree adopted by the German-speaking Community presents the same deficiency. It should be added however that the initial version of that Decree (version of 26 November 2003) did contain a provision protecting the worker from reprisals (either in the form of a dismissal constituting a disguised sanction or in the form of a unilateral modification of employment conditions) (see Article 23 of the draft proposal: *Schutz vor einer Entlassung*). That provision was removed from the proposed Decree in the version submitted to discussion by the Council of the German-speaking Community on 26 April 2004, following an observation by the Council of State in the opinion it delivered on 11 February 2004 on the initial proposal for a Decree that legislating on this question – conditions of dismissal – may go beyond the powers of the German-speaking Community[218]. This provides a clear illustration of the difficulties the Regions and Communities may face when implementing Directives where the limits attached to their competences are unclear, and where they risk legislating beyond their attributed powers in order to fulfil their obligations under EC Law.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.
b) Is there any ceiling on the maximum amount of compensation that can be awarded?

[216] Compare Article 21(5) of the Law of 25 February 2003 with Article 12(5) of the Decree of 8 May 2002. The Federal Law is more protective, to the extent that it provides that the worker may be reinstated in his/her previous position or receive compensation equivalent to 6 months' salary where the competent jurisdiction finds that discrimination has occurred.
[217] See Article 12(1) of the Flemish Decree.
[218] See Opinion L. 36.415/2 delivered by the administration section of the Council of State on 11 February 2004.

c) Is there any information available concerning:
- the average amount of compensation available to victims
- the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?

Federal legislation

Legislation currently in force. Certain discriminatory acts on the ground of race and ethnic origin in the provision of goods or services or in certain aspects of access to employment and to vocational training and dismissal which fall under the scope of Directive 2000/43/CE may lead to criminal sanctions under the Law of 30 July 1981 criminalising certain acts inspired by racism and xenophobia. The offences committed under the Law of 30 July 1981 which fall under the scope of Directive 2000/43/EC (racial discrimination in the provision of goods or services and in employment as specified above) may lead to imprisonment (one month to a year), fines (the equivalent of 50 to 1,000 euros), or to both sanctions combined. Moreover the victim will have the option of claiming compensation for the damage caused by the offence, although the level at which such compensation is determined by the courts has been generally very low, and in many cases purely symbolic.

The Federal Law of 25 February 2003 has of course a much broader scope of application, as it covers all grounds of discrimination and all situations which are not considered to belong to the "private" sphere, and provides for sanctions, both criminal and civil, which can be summarised as follows[219]:

	Prohibition to discriminate	**Sanction**
Criminal	Discrimination by public servant/official in the exercise of his/her functions	Imprisonment from 2 months to 2 years (10 to 15 years if discrimination is committed by forging the signature of a public official) (Art. 6(2) of the Law of 25.2.2003)
Criminal	Harassment as defined under Art. 442bis of the Penal Code (Art. 11 of the Law of 25.2.2003)	The sanctions provided in Art. 442bis Penal Code (imprisonment from 15 days to 2 years of fine) may be doubled if the act has a discriminatory motive
Civil	Any form of direct or indirect discrimination, including harassment	• contractual clause incompatible with the prohibition may be made void (Art. 18 of the Law of 25.2.2003)[220] • discriminatory practice may be ordered to cease (judicial injunction) (Art. 19(1) of the Law of 25.2.2003), the decision may be posted publicly (Art. 19(2)), and the addressee (defendant) may be subject to fines (*astreintes*) in the case of non-compliance with a judicial order (Art. 20)
Civil	Victimisation	Where a dismissal is proven to be a form of reprisal, the employer may have to reinstate the employee to his/her previous position, and back pay is due (Art. 21(3) of the Law of 25.2.2003); damages otherwise may

[219] On the sanctions which can be imposed on legal persons where they are criminally liable, see Article 7bis of the Penal Code, inserted by the Law of 4 May 1999.
[220] See below, paragraph 8.2.

		be sought, presumed to be equivalent to 6 months' pay

Damages will be payable every time discrimination is proven to have occurred; this is not stated explicitly in the Law of 25 February 2003 but it is the general rule in non-contractual civil liability, which will be applicable (art. 1382 Civil Code).

This system is hardly satisfactory. First, only in very exceptional circumstances will it be possible to arrive at a criminal conviction for a discriminatory act, since proving the intent of the accused will be very difficult. Second, as regards the civil remedies available, the damages awarded are mostly symbolic : while any material damage will be compensated where it is proven, the moral damage incurred because of the discrimination is usually considered to be compensation by the payment of one symbolic euro. The new antidiscrimination bills represent a significant improvement in this regard, and bring us nearer to a situation where discrimination leads to "effective, proportionate and dissuasive" sanctions.

The new antidiscrimination bills. Under the general antidiscrimination bill and under the racial equality bill, the victim of a discrimination may seek a reparation (damages) according to the usual principles of civil liability (Art. 18 and 16 respectively), although the victim now may opt for a payment of the lump sums defined in the law (1300 euros, reduced to 650 euros if the defendant provides evidence that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element ; or, in the field of employment, 6 months' salary, reduced to 3 months if the employer demonstrates that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element) rather than for a damage calculated on the basis of the 'effective' damage. In addition, due to the insistence of certain non-governmental organisations, the limited range of discriminatory acts which, under the Law of 30 July 1981 in its current formulation, may lead to criminal sanctions (see Art. 2bis : racial discrimination in the provision of goods or services and in employment), will remain considered criminal offences. However, it will be noted that these criminal offences were only very rarely prosecuted and led to very few convictions because of the difficulties in finding a person criminally liable ; moreover, the choice which is now open to the victim to seek the payment of damages either on the basis of the 'effective' damage, or on the basis of the lump sums defined in the law, should contribute to the effectiveness of the sanctions provided for instances of discrimination.

Regions and Communities

For the same reasons as those mentioned previously in the context of the rules relating to the burden of proof (see above, paragraph 6.3), the instruments adopted by the Regions and Communities are much less detailed on the question of sanctions. The Decree adopted on 19 May 2004 by the French-speaking Community provides no sanctions, except disciplinary proceedings against the agents of the Community who have committed discrimination. The Decree adopted by the German-speaking Community provides for penal sanctions, but only when a person publicises his/her intention to discriminate, within the conditions provided by Article 444 of the Penal Code (Article 17 of the Decree). The Decree adopted by the Walloon Region on 27 May 2004 provides that a person voluntarily or knowingly committing discrimination may be convicted to a prison term of eight days to a year and to a fine running from 100 to 1,000 euros, or to one of the penal sanctions given (Article 14). It also provides that in civil proceedings where discrimination is alleged, the competent judge may grant an injunction to ensure that the discrimination ceases ("action en cessation") (Article 15); the Decree refers to the procedure described in the Federal Law of 25 February 2003. The

Flemish Decree of 8 May 2002 on proportionate participation in the labour market also contains a penal clause (Article 11 – the author of a discriminatory act may be sentenced to a prison term from one month to one year or/and to a fine; in contrast, in the Walloon Decree, the imposition of a criminal sanction is not limited to instances of intentional discrimination, but rather it covers, as in the Federal Law of 25 February 2003, all forms of prohibited discrimination, even indirect and therefore possibly unintentional). It also provides that the competent jurisdiction may impose an order that the discrimination ceases (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 whom the Decree is addressed.

It could also be added that there are no specific sanctions to tackle the issue of structural discrimination, such as desegregation plans or specific injunctions to secure housing for Travellers or to secure education in mainstream classes for their children.

7. SPECIALISED BODIES

Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question if there is any data regarding the activities of the body (or bodies), include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

a) Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin?
b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.
c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.
d) Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?
e) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?
f) Is the work undertaken independently?

Federal level

The Centre for Equal Opportunities and Opposition to Racism (Centre pour l'égalité des chances et la lutte contre le racisme / Centrum voor Gelijkheid van Kansen en Racismebestrijding / Zentrum für die Chancengleichheit und die Bekämpfung des Rassismus)[221] was created by an Act of Parliament of 15 February 1993[222], modified most recently by the Law of 25 February 2003 in order to give the Centre a role in monitoring this Law, thus extending its remit not only to all grounds of prohibited defined in Article 13 EC, but also to the supplementary grounds stipulated in the original version of the Law of 25

[221] This is the literal translation of the French, Flemish and German official titles of the Centre. The website of the Centre chose to translate the title into English as "Centre for Equal Opportunities and Opposition to Racism". See www.antiracisme.be
[222] *Moniteur belge*, 19 February 1993. The Act of 15 February 1993 is available, in English translation, from the Centre's website.

February 2003 (Art. 23, 24[223] and 31 Law of 25 February 2003). The Centre is responsible to the Prime Minister of the Belgian Federal Government, however it fulfils its mandate in an independent fashion (see Art. 3, al. 1 of the Law of 15 February 1993). The author of this report has frequent contacts with the Centre, and he has never formed the impression that this independence was limited in any way. Articles 2 and 3 of the Law of 15 February 1993, as amended, define both the tasks of the Centre and the means it may use in order to fulfil them. These provisions state that the Centre's objective to promote equal opportunities is fulfilled through producing studies and reports, making recommendations, helping any person seeking advice on his or her rights and obligations, taking legal action, collecting and analysing statistics and case-law relating to the application of the law of 30 July 1981 and the law of 25 February 2003, and obtaining information in order to make enquiries of the competent authority in cases where the Centre has reasons to believe that discrimination may have been committed, pursuant to the Laws of 30 July 1981 and 25 February 2003.

As already mentioned (paragraph 6.2), the Federal Law of 25 February 2003 which takes inspiration from the Law of 30 July 1981 on Racism and Xenophobia, by giving the Centre for Equal Opportunities and Opposition to Racism the power to file suits on the basis of legislative provisions, and thus to contribute to the defence of legal principles in the name of the public interest. Where the alleged violation has an identifiable victim (who can be a natural or legal person)[224], the power of the Centre to file suit is conditional upon the consent of the victim (Art. 31, *in fine*, of the Law). This mechanism appears to be in conformity with Art. 9(2) of the Employment Equality Directive.

In a typical case of an individual person asking to the Centre to intervene in an instance of discrimination, the Centre will appraise the facts given, and in most cases where the allegation is not ill founded it will seek to obtain an amicable settlement with the alleged discriminator. Because the discriminator may fear the bad publicity a suit for alleged discrimination would bring, he may be tempted to accept this, even in situations where it may be difficult to prove that discrimination has occurred. Where such an amicable settlement seems unsatisfactory, because the discrimination is flagrant or because the defendant does not co-operate, the Centre may propose to the victim to file a suit. If the victim consents, the Centre will proceed, as the law authorises it to do. The Centre for Equal Opportunities and Opposition to Racism is not alone in possessing this competence; other organisations who aim to fight discrimination and protect human rights and trade unions may also do so (see below, paragraph 6.2).

The Centre for Equal Opportunities and the Fight against Racism (see paragraph 6.5 of this report) has been particularly efficient in providing advice and legal assistance to victims of discrimination. It is particularly noteworthy for its practice of seeking to assist the victim in having the alleged perpetrator of the discrimination to agree to some form of amicable settlement, in which the Centre, albeit in a discrete fashion, has developed significant expertise.[225] In addition, anti-discrimination centres have been established in 18 towns and cities throughout Belgium, ensuring that day-to-day discriminatory practices can be combated in close consultation with local and provincial authorities and with local integration centres, associations, neighbourhood committees, etc.

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[223] These provisions modify Articles 2 and 3 of the Law of 15 February 1993 establishing the Centre for Equal Opportunities and Fight against Racism. These modifications seek 1) to enlarge the competences of the Centre, beyond combating discrimination based on race, colour, descent, ethnic or national origin, to discrimination based on the other grounds now listed by the Law of 25 February 2003; and 2) to grant the Centre the right to file actions based on this latter legislation.

[224] In some cases, there is be no victim, but the Law is nevertheless violated: this would be the case, for instance, if an employer publicly boasts that thanks to the "'selective" recruitment procedures he has introduced no homosexual will ever be hired – this should be considered an offence as defined under Article 6(1) of the Law, and the associations or organisations listed in Article 31 will be considered to have an interest in filing a claim to initiate prosecution.

[225] See Annex A to the latest activity report of the Centre for Equal Opportunities and the Fight against Racism (Report 2004, *Vers l'élargissement (Towards Enlargement)*), available from www.antiracisme.be

The new antidiscrimination bills presented on 26 October 2006 seek to reaffirm the role of the Centre for Equal Opportunities and Opposition to Racism, which should be competent to file legal actions on the basis of all grounds mentioned in both the racial equality bill and the general antidiscrimination bill, with the exception of language.

Regions and Communities

The Centre for Equal Opportunities and Opposition to Racism is a federal agency, not institutionally linked to either the Regions or the Communities. In order for regional or community decrees to be monitored by the Centre, a protocol of cooperation must be concluded between the Federal Government and the executive of the relevant Region or Community. The Centre for Equal Opportunities and the Fight against Racism should be granted the competence to contribute to the enforcement of the Decree of 8 May 2002 under the same mechanisms as those available at federal level[226]. The Decree adopted by the German-speaking Community provides in Art. 15 that the Executive of the German-speaking Community may entrust one or more organs with the promotion of the principle of equal treatment, including assistance to the victims of discrimination under the Decree and the production of reports and recommendations. A protocol should be concluded in order to assign this duty to the Centre for Equal Opportunities and the Fight against Racism at federal level.

The Decree adopted on 19 May 2004 by the French-speaking Community does not set up any specific enforcement body to monitor the effectiveness of its implementation. In fact, this Decree is silent about enforcement: in particular, it does not seem to comply with either Article 13 of Directive 2000/43/EC, Article 9(2) of Directive 2000/78/EC or Article 7(2) of Directive 2000/43/EC, given the absence of any provision regarding the right of certain eligible organisations to engage in judicial or administrative procedures on behalf or in support of the complainant, hence ensuring the enforcement of the guarantee of equal treatment afforded by the Decree, and given the absence of any role of the Centre for Equal Opportunities and Fight against Racism in the implementation and monitoring of the Decree.

For the same reasons, although Article 11 of the Decree on equality of treatment in employment and professional training (*Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle*) adopted by the Walloon Region on 27 May 2004 provides for a form of monitoring by the Institut wallon de l'évaluation, de la prospective et de la statistique (IWEPS): the IWEPS must report on the application of the Decree and make recommendations on the basis of its evaluations. Although the Decree contains clauses providing for a conciliation procedure (Article 12) and specifies that the Walloon Government will designate which services will be entrusted with monitoring the Decree and its implementing regulations (Article 13), these provisions appear insufficient in comparison to the requirements of Article 9(2) of Directive 2000/78/EC or Articles 7(2) and 13 of Directive 2000/43/EC.

[226] Article 8 al. 1 of the Executive Regulation implementing the Decree of 8 May 2002 stipulates in this respect that the Flemish Government shall conclude a convention with the Centre for Equal Opportunities and the Fight against Racism: see Regulation [of 30 January 2004] of the Flemish Government concerning the execution of the decree of 8 May 2002 on proportionate participation in the employment market concerning professional orientation, vocational training, career counselling and the action of intermediaries on the labour market, cited above.

8. IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State
a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)
b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and
c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

Federal level

The Law of 25 February 2003 was widely publicized after it was adopted, in particular through brochures presenting the main provisions of the law and identifying a list of organisations and administrations involved in its implementation. On March 22nd each year, an "Anti-discrimination Day" is organized, which provides further opportunities to disseminate this information, and in which a range of social and human rights non-governmental organizations, as well as the social partners, engage on the issue of combating discrimination and promoting diversity.

Social partners have been actively involved. First, the Centre for Equal Opportunities and Opposition to Racism has regularly organised events with both employers' and workers' organisations, and has also set up training sessions in cooperation with these organisations. Second, as mentioned above, the social partners have concluded in 1999 Collective Agreement n°38 within the National Work Council (Conseil National du Travail), the main provisions of which have now been transposed and made obligatory by a Royal Decree. Third, within the Federal Public Service (Ministry) of Employment, a specific taskforce has been set up on this issue since July 2001 (*cellule entreprise multiculturelle*), with the active cooperation of the Centre for Equal Opportunities and Opposition to Racism, and in order to establish more systematic links with the social partners.

Regions and Communities

In the *Flemish Region/Community*, it is particularly remarkable that the Flemish government concluded a number of agreements with businesses at the sectoral level which encourage diversity, promote specific measures for the integration of migrant workers, and provide for codes of conduct in favor of diversity and against discrimination at the level of the undertaking. In addition, the dialogue between social partners has taken place through the establishment of a 'diversity' committee within the Flemish Economic and Social Council, in which the most respresentation workers' and employers' unions are represented.

In addition, a range of initiatives have been taken in order to promote actively the employment of members of (traditionally underrepresented) 'target groups', in particular persons of non-native origin (allochtones) and persons with disabilities. Thus for instance, the 'Jobkanaal' project launched within the Flemish network of undertakings VOKA, or the 'diversity' focal point of the UNIZO (association of small and middle-size enterprises), contribute to diversity in employment. Diversity is also promoted actively by the workers' unions, who have benefited from specialized consultants in diversity whose task it is to

promote diversity and offer solutions to any resistance facing policies aiming at improving diversity within the workforce.

The other Regions and Communities have also adopted measures, some of which have actively involved social partners. The list of such initiatives is too long to be reproduced here.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

b) Are any laws, regulations or rules contrary to the principle of equality still in force?

Article 18 of the Federal Law of 25 February 2003 provides that contractual clauses which are in violation of the prohibition of discrimination as defined in the law shall be considered null and void. This however does not extend to collective agreements, nor, for instance, to the internal rules adopted by undertakings. The Law of 25 February 2003 in that respect stipulates a narrower protection than the Law of 7 May 1999 on equal treatment between men and women in working conditions, access to employment and to promotion opportunities, access to self-employment and social security[227]. Art. 18 of the latter provides that regulatory provisions (other than legislative acts) which are in violation of the principle of equal treatment as defined in the Law of 7 May 1999 are null and void.

The formulations of the general antidiscrimination bill and of the racial equality bill presented on 26 October 2006 are wider, and therefore comply better with Art. 16, b) of Directive 2000/78/EC and Article 14, b) of Directive 2000/43/EC. Indeed, Article 15 of the general anti-discrimination bill and Article 13 of the racial equality bill mention not only that contractual clauses, but also any “provisions” contrary to the prohibition of discrimination, shall be considered null and void. However, this should be read in combination with the “safeguard clauses” (contained in Article 11 in both texts) stating that they will not, per se, apply to differences in treatment imposed by another legislation, or by virtue of another legislation. As a result of this clause, national jurisdictions will not refuse to apply existing legislation because it would be in violation with antidiscrimination legislation, but they may (and indeed, they are under an obligation to) refer any potentially discriminatory legislation to the Constitutional Court (until recently called the Court of Arbitration) so that this jurisdiction may find a legislation to be invalid if it is in violation of the equality and non-discrimination clauses of Art. 10 and 11 of the Constitution. As a result, where discriminations (potentially violating the Racial Equality or Employment Equality Directives) have their source in legal provisions or in implementing regulations, they will not be nullified simply through the passing of the antidiscrimination legislations under discussion ; they will have to be found to be invalid, on an *ad hoc* basis, by the courts.

It is not possible to identify on a systematic basis which laws, regulations or rules still in force may conflict with the principle of equal treatment. First, there are too many texts which would

[227] *Loi sur l’égalité de traitement entre hommes et femmes en ce qui concerne les conditions de travail, l’accès à l’emploi et aux possibilités de promotion, l’accès à une profession indépendante et les regimes complémentaires de sécurité sociale,* Law on equality of treatment between men and women concerning working conditions, access to employment, opportunities for promotion, access to self-employment and social security. *Moniteur belge*, 19 June 1999.

have to be screened to that effect, especially if we include undertakings' internal rules, for which the problem of accessibility also exists. Second, in many cases, the evaluation of the compatibility of these texts will require an interpretation of the requirements of the Directives which may be difficult to perform. Only the most overtly discriminatory legislation or regulations could be identified by such a screening.

9. OVERVIEW

The Federal Law of 25 February 2003, the main instrument implementing the Racial Equality and Employment Equality directives at the federal level, was far from a perfect instrument, in part because it was adopted on the basis, not only of the need to implement those directives, but also as a result of preexisting attempts to improve the antidiscrimination legal framework in Belgium on the basis of entirely different premises. While the judgment of the Constitutional Court (then Court of Arbitration) partially annulling the 2003 Law on 6 October 2004 was initially considered extremely problematic (since it made this law almost inapplicable in certain respects, and led to a great amount of confusion as to its remaining scope), it now appears, in retrospect, that it has created a welcome opportunity to revise fundamentally the legislative framework adopt at federal level, in order to stick closer to the directives and to take into account a number of remarks made by the European Commission in correspondence with the Belgian authorities. Indeed, the general antidiscrimination bill and the racial equality bill, both presented to the Parliament for adoption on 26 October 2006, answer almost all concerns raised by the adoption of the Law of 25 February 2003, and appear much more closely inspired by the EC Directives. A number of problems remain[228] :
1° The Council of State has failed in its opinion of 11 July 2006 to provide clear guidelines concerning the division of tasks between the federal level, the Regions and the Communities in the implementation of the EC directives, therefore a number of doubts remain as to the precise scope of competences of the latter. Yet, certain lacunae are by now are clearly identified : they concern, in particular, the field of education (which is a competence of the Communities) or the statutory personnel of the Regions and Communities (which they, and not the federal legislation, should regulate).
2° The competences of the Centre for Equal Opportunities and Opposition to Racism (the Equality Body under Art. 13 of the Racial Equality Directive) should as a matter or urgency be extended to allow this body to contribute to the monitoring and implementation of the legislative instruments adopted at Region and Community levels.
3° The 'safeguard clause' (Article 11 of both the general antidiscrimination bill and the racial equality bill) implies that any law (or regulation implementing a legislative provision) which might be considered discriminatory under the EC directives shall not be voided by the adoption of the antidiscrimination legislative framework currently under discussion. 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 ad hoc, case-to-case approach left in the hands of courts, might be insufficient.

10. CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

At the *federal level*, antidiscrimination policy is in the hands of the Minister in charge of the public service, equal opportunities and social integration, Mr Christian Dupont (PS – French-speaking socialist party). His counterparts are, for the *Walloon Region*, the Minister of Health,

[228] A longer list is provided here above, under 0.2. State of implementation.

of Social Action and of Equal Opportunities, Ms Christiane Vienne (PS); for the *Flemish Region/Community,* the Minister of Social Economy and Equal Opportunities : Ms Kathleen Van Brempt. There is no equivalent member of the government specifically in charge of equal opportunities in the other parts of the country (*French-speaking Community*, *German-speaking Community* and *Region of Brussels-Capital*). This author is convinced that the absence of a strong coordination taskforce between the different levels of the State in order the arrive at a coherent implementation of the EC Directives in this field is the single most serious obstacle to full compliance of Belgium with its obligations under EC Law.

Annex

1. Table of key national anti-discrimination legislation

2. Table of international instruments

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country BELGIUM Date 1.3.2007

Title of Legislation (including amending legislation)	**In force from:**	**Grounds covered**	**Civil/Administrative/ Criminal Law**	**Material Scope**	**Principal content**
Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (*Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*), as amended by the Laws of 12 April 1994, of 7 May 1999, and of 20 January 2003	22.2.2003 (entry into force of most recent amendments)	Race, colour, descent, ethnic and national origin	Criminal	Public and private employment, access to goods or services	prohibition of direct and indirect discrimination, including instruction to discriminate
Law of 15 February 1993 establishing the Centre for Equal Opportunities and the Fight Against Racism, amended most recently by Law of 25 February 2003	27.3.2003 (entry into force of the most recent amendments)	All grounds	Administrative, civil, criminal	Public and private employment, access to goods or services, all activities open to public	Setting up of an independent equality body
Law of 25 February 2003 on combating discrimination and amending the Act of 15 February 1993 setting up the Centre for Equal Opportunities and the Fight against Racism	27.3.2003	All grounds	Administrative, civil, criminal	Provision of goods and services; 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; reference in an official document; the distribution, publication or exposition to the public of a text, an opinion, a sign or any other material including discriminatory references; economic, social, cultural or political activities	Prohibition of direct and indirect discrimination, civil remedies, and criminal provisions

				normally accessible to the public	
Flemish Region/Community: Decree of 8 May 2002 on proportionate participation in the employment market (*Decreet houdende evenredige participatie op de arbeidsmarkt*)	6.8.2002	All grounds	Civil and criminal	Access to employment, vocational training, promotion, working conditions, but only applicable to a) labour market intermediaries; b) the public authorities of the Flemish Region/Community, including the field of education; c) the other employers with respect only to vocational training and integration of persons with disabilities in the labour market	Prohibition of direct and indirect discrimination
French-speaking Community: Decree of 19 May 2004 on the implementation of the principle of equal treatment (*Décret relatif à la mise en œuvre du principe de l'égalité de traitement*)	17.6.2004	All grounds	Civil and disciplinary	Applies to a) public servants in the French-speaking Community's administration, b) the personnel of certain public interest organs subject to the Community, c) all levels of education in the French-speaking Community, and d) the Centre hospitalier universitaire de Liège	Prohibition of direct and indirect discrimination, including the instruction to discriminate
Walloon Region: Decree of 27 May 2004 on equal treatment in employment and professional training (*Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle*)	3.7.2004	All grounds	Civil and criminal	Vocational guidance, socio-professional integration, the placement of workers, the allocation of funding for stimulating employment, and vocational training, in both the public and the private sectors	Prohibition of direct and indirect discrimination in

German-speaking Community: Decree of 17 May 2004 on the guarantee of equal treatment on the labour market (*Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt*)	23.8.2004	All grounds	Civil and criminal	Vocational guidance, professional counselling, vocational training and retraining, applies to the administration of the German-speaking Community; staff employed in the Community's education system; employment intermediaries; and employers with respect to the provision of reasonable accommodation to people with disabilities	Prohibition of direct and indirect discrimination
Region of Brussels-Capital: Ordinance of 26 June 2003 on the joint management of the labour market in the Region of Brussels-Capital. (*Ordonnance relative à la gestion mixte du marché de l'emploi dans la Région de Bruxelles-Capitale*)	9.8.2003	All grounds	Administrative	Access to employment	Prohibition of discrimination imposed on labour market intermediaries.

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country BELGIUM Date 08.01.2007

Instrument	**Signed (yes/no)**	**Ratified (yes/no)**	**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)	yes	yes 14.6.1955	no	N/A	yes
Protocol 12, ECHR	yes	no		N/A	
Revised European Social Charter	yes	yes 2.3.2004		Protocol on collective complaints ratified 23.6.2003	
Framework Convention on the Protection of National Minorities 1995	yes	no			
International Covenant on Civil and Political Rights	yes	yes 21.4.1983	no	Ratified Optional Protocol on 17.5.1994	yes
International Covenant on Economic, Social and Cultural Rights	yes	yes 21.4.1983	no	N/A	no
Convention on the Elimination of All Forms of Racial Discrimination	yes	yes 7.8.1975	no		yes
Convention on the Elimination of Discrimination Against Women	yes	yes 10.7.1985	no	Optional protocol signed 12.1999	yes
ILO Convention No. 111 on Discrimination	yes	yes 22.3.1977	no		yes
Convention on the Rights of the Child	yes	yes	no	N/A	yes