



Executive Summary

Country Report Belgium 2008 on measures to combat discrimination

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1. Introduction

In Belgium, which has a population of slightly over 10 million, the main religions are Roman Catholicism (about 65% of the population are baptised, although a small minority practice regularly), Islam (about 350,000 persons), Protestant and Orthodox (each approx. 100,000 persons). There are estimated to be 40,000 persons of Jewish faith, and 21,000 Anglicans. The country's government type is that of a representative democracy premised upon a bicameral system. The official head of the State is the King (Albert II) who mainly has formal functions. The Prime Minister is the leader of the government. Government always consists of a coalition of different political parties since there are a multitude of parties that get elected into Parliament.

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

Victims of discrimination, either in employment relationships or in the broader spheres to which the prohibition of discrimination under the Racial Equality Directive applies, were afforded a certain level of protection in the Belgian legal order before the European Directives were adopted in 2000. The protection was in particular afforded by the Federal Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia, which was amended on several occasions to increase the scope of the legislation.

The Federal Act of 30 July 1981, however, forms part of criminal legislation, and the evidentiary burdens facing the prosecution in that context – or, indeed, an alleged victim of discrimination – often have appeared insuperable, because the perpetrator’s intent has to be established.

In order to implement the Racial Equality Directive and the Employment Equality Directive, the federal Parliament initially adopted the Act of 25 February 2003 on combating discrimination. The Federal Act of 25 February 2003 was covering numerous grounds of discrimination and, to a certain extent, was going beyond the scope of application *ratione materiae* of the Racial Equality Directive. It was mostly a civil legislation but it enshrined several criminal sanctions. The Federal Act of 25 February was, however, partially overruled by the Constitutional Court in a ruling delivered on 6 October 2004. To overcome the difficulties caused by this overruling and to meet the concerns expressed by the European Commission in its correspondence with the Belgian authorities about the state of implementation of Directive 2000/43/EC and Directive 2000/78/EC, the Federal Act of 25 February 2003 was repealed and new legislation was adopted on 10 May 2007.

2. Main legislation

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

Articles 10 and 11 of the Constitution, which prohibits discrimination, are applicable generally, without any restriction either as to the grounds on which the discrimination is based (they require that the principle of equality be respected in relation to all grounds) or as to situations concerned (they are applicable to all contexts, going beyond not only employment and occupation, but also the scope of the Racial Equality Directive). However, they are rarely invoked in private relationships, because of their very general formulation and the delicate issues which would be entailed by their application in this context, for instance to protect an individual from private acts of discrimination by an employer. These constitutional provisions have been most effective when invoked against either legislative norms or administrative acts which violate the principles of equality and non-discrimination which they contain.

Today, the major anti-discrimination legislation at federal level is embodied in three Acts adopted on 10 May 2007. First, the Federal Act amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia, hereafter the *Racial Equality Federal Act*. This Act aims at implementing both the Racial Equality Directive and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, in one single legislation prohibiting discrimination on grounds of alleged race, colour, descent, national or ethnic origin, and nationality. Secondly, the Federal Act pertaining to fighting certain forms of discrimination, hereafter the *General Anti-discrimination Federal Act* which covers age, sexual orientation, civil status, birth, wealth/income (*fortune*, in French), religious or philosophical belief, actual or future state of health, disability, physical characteristic, political opinion and language, genetic characteristic and social origin. Thirdly, the Federal Act pertaining to fighting against discrimination between women and men, which relates to sex and assimilated grounds, i.e. maternity, pregnancy and transsexualism.

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

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

The Walloon Region adopted a Decree, on 6 November 2008, on the fight against certain forms of discrimination, including discrimination between women and men in the fields of economy, employment and vocational training. It tackles the same grounds as those covered at the federal level and applies, more precisely, to vocational guidance, socio-professional integration, placing of workers, funding for the promotion of employment, funding for employment and financial incentives to companies in the framework of the economic policy, including social economy and vocational training, in the public and the private sectors.

The German-speaking Community adopted a Decree on the guarantee of equal treatment on the labour market on 17 May 2004, which prohibits direct and indirect discrimination with respect only to the bodies or persons who fall under the powers of the German-speaking Community. The grounds concerned are sex, race, colour, descent, national or ethnic origin, sexual orientation, civil status, birth, property, age, religious or philosophical convictions, current or future state of health, disability or physical characteristic.

In June 2007, this Decree was amended in order to comply with EU law in different respects (modification of the definitions of discrimination, victimisation, legal standing of organisations, etc.)

The French Community Commission of the Region of Brussels-Capital (*Cocof*) adopted a Decree on equal treatment between persons in vocational training on 22 March 2007. This piece of legislation prohibits direct, indirect discrimination, instruction to discriminate and harassment based on an open list of suspect criteria.

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

3. Main principles and definitions

The Racial Equality Federal Act and the General Anti-discrimination Federal Act are in line with all the main concepts enshrined in the EU Directives (direct discrimination, indirect discrimination, harassment, instruction to discriminate and victimisation). As in the Directives, discriminations based on assumed characteristics and discriminations based on association with persons with particular characteristics are not expressly forbidden in the Racial Equality Federal Act and in the General Anti-discrimination Federal Act. However, the preparatory works (*travaux préparatoires*) clearly specify that these Acts apply to such discriminations.

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

Concerning reasonable accommodation, there are vivid controversies related to which authority is competent to legislate. The widespread opinion today is that, although disability policy is allocated to the Communities, this does not prohibit the Federal State or the Regions providing that denying reasonable accommodation to a person with a disability amounts to indirect discrimination.

The General Anti-discrimination Federal Act provides that the refusal to put in place reasonable accommodations for a person with a disability is a form of prohibited discrimination. The notion of reasonable accommodation does not extend beyond the situation of persons with disabilities and is defined in conformity with the Employment Equality Directive, although with one major difference.

Whereas the Directive only refers to reasonable accommodation in employment, the General Anti-discrimination Federal Act refers to all the fields to which it shall apply which go far beyond employment.

No specific rules exist as regards situations of multiple discriminations, nor are there any plans to introduce such rules in the future.

4. Material scope

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

5. Enforcing the law

The General Anti-discrimination Federal Act and the Racial Equality Federal Act provide for civil and criminal procedural protection of victims of discrimination nearly identical with respect to all the prohibited criteria. Alongside one of the guiding principles of the reform that there should be no hierarchy between grounds, only some criminal offences that are not in the General Anti-discrimination Federal Act were finally maintained in the Racial Equality Federal Act (discrimination in the provision of a good or a service or in access to employment, vocational training or in the course of a dismissal procedure) and are therefore specific to discrimination based on race and ethnic origin. Victims of discrimination, under both Acts, may 1) seek a finding that discriminatory provisions in a contract are null and void; 2) seek reparation (damages) according to the usual principles of civil liability (however, the victim may opt for a payment of the lump sums defined in the Act rather than for damages calculated on the basis of the 'effective' damage); 3) seek from the judge an injunction imposing immediate cessation of the discriminatory practice, under the threat of financial penalties; 4) seek from the judge publication of the judgment finding a discrimination, by the posting of the judicial decision on the premises where the discrimination occurred, or by the publication of the judicial decision in newspapers. These actions are brought before civil tribunals, or where an employment relationship is concerned, before specialised tribunals.

The General Anti-discrimination Federal Act and the Racial Equality Federal Act provide for the legal standing of the Centre for Equal Opportunities and Opposition to Racism, of organisations with a legal interest in the protection of human rights or in combating discrimination, established for at least three years, and of trade unions, which may file a suit (civil or criminal) on the basis of the anti-discrimination legislation. However, where the victim of the alleged discrimination is an identifiable (natural or legal) person, their action will only be admissible if they prove that the victim has agreed to their action being filed.

Both Federal Acts provide for shifting the burden of proof in all the jurisdictional procedures except the criminal ones. The victim seeking damages in reparation of the alleged discrimination will be allowed to produce certain evidence – such as “statistical data” or “recurrence tests” as two examples – which, when presented in court, could lead the judge to presume that discrimination has occurred, thus obliging the defendant to demonstrate that, contrary to that presumption, there has been no discrimination. It should be stressed that “recurrence tests” are closely linked to situation testings but are less controversial to be mentioned in full words in the text of the legislation.

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

6. Equality bodies

The Centre for Equal Opportunities and Opposition to Racism was created by an Act of Parliament of 15 February 1993, most recently amended on 10 May 2007 in order to give the Centre a role in the supervision of other grounds of discrimination than race, colour, descent national or ethnic origin and nationality (i.e. all the grounds covered by the General Anti-discrimination Act, apart from language).

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

The Centre will most probably soon be entrusted with the monitoring and implementation of most of the legislative instruments adopted by the Regions and the Communities. This body is still currently a federal agency and is not institutionally linked to any Regions or Communities. In order to empower the Centre for Equal Opportunities to play a role at regional level, a Protocol of Collaboration or a Cooperation Agreement has to be concluded between the Federal Government and the Government of each Region and Community concerned. According to the information the authors were able to gather, two Protocols of Collaboration were signed in 2009, with the Walloon Region and the French-speaking Community.

These Protocols allow the Centre to fulfil all its traditional missions, apart from filing legal suits, in the fields covered by the Decrees of the Walloon Region and of the French-speaking Community. At the moment of drafting this report, such a Protocol was under discussion with the Region of Brussels-Capital, but its formalisation depends on the results of the Regional elections (June 2009). There is presently no Protocol with the Flemish Community/Region, which has nevertheless given public funding to the Centre for Equal Opportunities to participate in the creation of 13 contact points in the larger cities of Flanders (training, exchanges of good practices, etc.). To the knowledge of the authors, the German-speaking Community and the *Cocof* have not yet designated any equality body in relation to their anti-discrimination law nor have they contacted the Centre in this respect. In the future, there could be a formal Cooperation Agreement between the Federal Government and the Government of each Region and Community that would revise the missions, funding and organisation of the Centre for Equal Opportunities and Opposition to Racism, which would formally become an inter-federal Centre.