

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

COUNTRY REPORT

Belgium

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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:

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

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INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed between different levels of government.

The complexity of the division of tasks between the different levels of government in Belgium and the uncertainties which remain concerning their respective competences in combating discrimination constitute the most serious obstacle to an adequate implementation of the ‘Race’ and Framework Directives in the Belgian legal order. In the federal system of Belgium, the competence to legislate in order to outlaw discrimination in the areas covered by the ‘Race’ and Framework Directives is divided between the Federal State, the three Communities¹ and the three Regions², to which extensive legislative powers have been attributed since 1970, and especially since constitutional reforms of 1980 and 1988, in the fields of education and culture and socio-economic policies³. According to the Council of State⁴, even where higher-ranking norms (including international obligations imposed on the Belgian State) oblige all the organs and powers of the Belgian State, the implementation of those norms must comply with the division of competences regulated by the Constitution⁵: the different entities may not legislate beyond their competences, even under the pretext of ensuring compliance with the international obligations of the State.

In principle, the regulation of employment contracts⁶ and of general rules of civil or criminal law remains within the competence of the Federal State. Therefore, it is at the federal level that anti-discrimination legislation will normally be dealt with⁷. Although some authors argue that each entity within the State should adopt measures prohibiting discrimination for the particular employment relationships which they organise – for example, regional public administrations or schools, which are organised by the Communities –, the two opinions delivered by the Council of State on the Bill which has now become the Law of 25 February 2003 on combating discrimination⁸ did not question the competence of the federal legislator to adopt such a piece of legislation, despite the very broad scope of application of the

¹ French-speaking Community (*Communauté française*), Flemish Community (*Vlaamse Gemeenschap*), German-speaking Community (*deutschsprachigen Gemeinschaft*).

² Walloon Region (Région wallonne), Flanders (Vlaams Gewest), and Brussels-Capital (Région de Bruxelles-capitale).

³ Regions and Communities adopt decrees. These decrees are called ordinances (*ordonnances*) with respect to the Region of Brussels-capital. The Federal legislator (Senate and House of Representatives) adopts laws.

⁴ See Conseil d’État (section de législation), Avis 28.197/1 du 16 février 1999, Documents parlementaires, Chambre des Représentants, session ord. 1998-1999, n° 2057/1 and 2058/1, pp. 34-36.

⁵ The Council of State has subsequently confirmed this position. See for instance, 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*), the opinion delivered on 10 August 1994: Conseil d’État (section de législation), avis 23.478/2/V. See also, most recently, the opinion delivered on 11 February 2004 on a preliminary version of the Decree of the German-speaking Community on the guarantee of equal treatment in the labour market: Conseil d’État (section de législation), avis 36.415/2; and the opinion delivered on 25 March 2004 on a preliminary version of the Decree of the French-speaking Community on the implementation of the principle of equal treatment: Conseil d’État (section de législation), avis 36.788/2.

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

⁷ 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, Antwerpen, p. 289, esp. p. 305. See also J. Vrieliink, S. Sottiaux and D. De Prins, “De antidiscriminatiewet. Een artikelgewijze analyse”, *NJW*, 2003, p. 258, esp. p. 268.

⁸ Act 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.

legislation⁹. Of course, the Regions and Communities may adopt other measures, in the areas where they have a recognised competence to intervene, provided their initiatives do not conflict with constitutional provisions or international treaties¹⁰; 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 Framework Directives¹¹; but the general rules are nevertheless laid down at the federal level.

Although the federal State may legislate on general features of the employment contract (relating for instance to the protection of the remuneration of employees¹² or to certain forms of harassment), and adopt general rules of civil and criminal law, the Special Law of 8 August 1980 on institutional reforms¹³ defines (while implementing the general clauses of the Constitution¹⁴) the allocation of competences between the Federal State and the Regions and the Communities, and therefore attributes certain competences to the Regions and Communities to implement aspects of the ‘Race’ and Framework Directives.

• *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 housing¹⁵), the Constitution and the 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)
- healthcare is essentially a competence of the Communities, except for certain matters including especially the adoption of the framework legislation and health insurance, which remain of federal competence (Art. 5 § 1, I, 1°, of the Law of 8 August 1980)
- social aid is essentially a competence of the Communities, except for, in particular, the adoption of framework legislation on the public centres of social assistance (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)

⁹ 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 n° 30.462/2 du 16 novembre 2000, Doc., *Sénat, sess. 2000-2001*, 21 décembre 2000, n°2-12/5; and *Conseil d’État (sect. légis.)*, avis n° 32.967/2, of 18 February 2002. In its opinion of 16 November 2000 the Council of States notes that the federal legislator 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 his general competence in the fields of criminal law, civil law, commercial law or employment law, it may affect situations in which the Regions or Communities have the power to adopt measures.

¹⁰ In cases of conflict with a federal framework legislation, the Court of Arbitration may have to give judgment as to the division of competences in the constitutional system.

¹¹ See for the Flemish Region/Community, which exercise their competences jointly, the Decree of 8 May 2002 on proportionate participation in the employment market (*Decreet houdende evenredige participatie op de arbeidsmarkt*), *Moniteur belge*, 19 June 2002. For the Region of Brussels-Capital, see the *Ordonnance relative à la gestion mixte du marché de l’emploi dans la Région de Bruxelles-Capitale*, of 26 June 2003 (*Moniteur belge*, 29 July 2003). For the Walloon Region, 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*) has been adopted on 27 May 2004 (*Moniteur belge*, 23 June 2004). The French-speaking Community has adopted 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*) on 19 May 2004 (*Moniteur belge*, 7 June 2004). The German-speaking Community has adopted a draft Decree (*Dekretentwurf bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt*), the official publication of which in the *Moniteur belge* is imminent.

¹² See the Law of 12 April 1965 concerning the protection of the remuneration of workers.

¹³ *Loi spéciale de réformes institutionnelles*, *Moniteur belge*, 15 August 1980 (modified a number of times since).

¹⁴ See Article 39 of the Constitution (stating that a special law will define the domains in which the Regions are competent to adopt decrees); and Art. 128 § 1 of the Constitution (stating that the ‘*matières personnalisables*’ for which the Communities are competent will be defined in a special law).

¹⁵ Article 3(1), (e) to (h) of Directive 2000/43/EC.

- housing is a competence of the Regions (Article 6 § 1, IV of the Law of 8 August 1980)
 - prohibition of discrimination in the access to and supply of goods and services which are 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 by the 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 Framework Directives apply*, the Law of 8 August 1980 specifically reserves to the federal level the competence to legislate on employment law¹⁶; the Regions and Communities however, have certain competences in the domain of employment policy. The Regions have received competences relating to the placement of workers (which includes vocational guidance) and the adoption of programmes for the professional integration of the unemployed¹⁷; the Communities have received competences relating to vocational training¹⁸, although as explained below, in the French-speaking part of the State, vocational training has been regionalized – 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 the 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 the Federal level, as part of a general antidiscrimination legislation in the field of employment, or at the level of the Communities (or Regions where the competent Community has transferred that competence), as part of the policy on the professional integration of persons with disabilities.

Although the Constitution and the Special Law of 8 August 1980 implementing the Constitution have allocated the competences between the Federal State, the Regions and the Communities, Article 138 of the Constitution provides for the possibility for the French-speaking Community to transfer certain competences to the Walloon Region and to the French Community Commission of the Region of Brussels-Capital (*commission communautaire française*). As a result of a decree adopted on that basis¹⁹, the Walloon Region and the French Community Commission in the Region of Brussels-Capital may adopt measures to prohibit discrimination in the sphere of vocational training – as this is a competence which has been attributed to them by the French-speaking Community –. On the basis of a similar delegation of competences, 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 are exercised by the German-speaking Community for the territory of the German-speaking Region, since 1 January 2000²⁰.

¹⁶ Article 6 § 1, VI, al. 5, 12° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.

¹⁷ Art. 6(1), IX, 1° and 2° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.

¹⁸ Article 4, 15° and 16° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.

¹⁹ 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.

²⁰ 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.

It will be noted finally that apart from the specific arrangements governing the competences in the field of vocational training (Communities)²¹ or placement of workers (Regions), certain employment relationships as such cannot be regulated at the Federal level, despite the general competence the Federal State has preserved on employment law generally. Indeed, 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 Communities²², and may not be regulated by the Federal legislator.²³

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.

A certain protection of victims of discrimination, either in employment relationships or in the broader spheres to which the prohibition of discrimination under Directive 2000/43/EC applies, already existed in the Belgian legal order before Directives 2000/43/EC and 2000/78/EC was adopted in 2000. In particular, the Law of 30 July 1981 criminalizing 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 to discrimination against a person or a group on the basis of 'race', colour, ascendancy 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 relationships²⁴. Article 2 al. 1 of the Law of 30 July 1981 now provides for certain criminal sanctions against any person who, providing or offering to provide a service, a good or the enjoyment of a good, commits a discrimination against a person on the ground of his or her 'race', colour, descent, ethnic or national origin²⁵. Article 2bis of the Law of 30 July 1981, as amended in 1994, provides for criminal sanctions against any person who, in placement, vocational training, recruitment, execution of the employment contract or dismissal, commits a discrimination against a person on the ground of his or her race, colour, descent, origin or nationality. The Law of 30 July 1981 however is a criminal legislation, and the evidentiary burdens facing the accusation in that context – or, indeed, the person who alleges to be a victim of discrimination – often appear insuperable.

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*

²¹ It will be noted that, during the parliamentary discussions which would lead to the adoption of the Antidiscrimination 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 n° 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 belong to the competences of the Communities. If the Amendment had been successful, the Federal legislator would probably be considered as having legislated beyond its powers.

²² See Article 127 of the Constitution, and for confirmation that this provision of the Constitution implies that the Communities have an exclusive competence concerning the definition of the status of the personnel in the educational system, C.A. (*Cour d'arbitrage*), Case n°2/2000, 19 June 2000, point B.3.2.

²³ Article 87 of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.

²⁴ 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, 12.2.2003*). 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 hereunder, at 2.5., on the implementation of Art. 2(4) of the Directives).

²⁵ This takes into account the terminological changes introduced by the Law of 30 January 2003 in the Law of 30 July 1981.

travailleurs) was signed, before being made obligatory in part in 1999.²⁶ This collective agreement seeks to protect the right to private life of the worker in the process of recruitment, and it has been completed with a prohibition of discrimination²⁷. Article 2bis of Collective agreement n° 38 now reads:

The employer may not treat the candidates in a discriminatory fashion. During the procedure^[28], the employer must treat all the 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, civil status, medical history, race, colour, ascendancy 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 specifically²⁹ to ensure the implementation of Directive 2000/43/EC and Directive 2000/78/EC³⁰. The most important of these is a legislation adopted at the federal level, the 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 material going even beyond the scope of application *ratione materiae* of the Race Directive³¹. The Law protects 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; the mention in an official document; the distribution, publication or exposition to the public of a text, an opinion, a sign or any other support including a discrimination; at last, 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 of the Law of 25 February 2003 describes the offences based on the notion of discrimination, both direct and indirect, defined in Art. 2. These offences only concern a) those who publicly incite to discrimination, to hate or violence against a person, a group, a community or the members of a community, b) those who give a publicity to their intention to commit discrimination, or c) the public servants who commits a discrimination, as defined by the Law, in the exercise of their public

²⁶ 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 n° 38bis du 29 octobre 1991 et 38ter du 17 juin 1998, *Moniteur belge*, 21 September 1999). The original text of 1983 was modified by the collective agreements n° 38bis of 29 October 1991, n° 38ter of 17 July 1998 and lastly n° 38quater of 14 July 1999.

²⁷ 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).

²⁸ The term of ‘procedure’ refers both to the ‘recruitment’ (referring to all the activities performed by an employer which relate to the announcement of a vacancy) and to the ‘selection’ (referring to all the activities performed by an employer which relate to hiring a candidate): see Art. 2 of Collective Agreement n° 38.

²⁹ Although not all these instruments cite explicitly 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.

³⁰ 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.

³¹ Loi du 25 février 2003 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, *Moniteur belge*, 17 March 2003.

functions³². Although situations might be imagined where these offences will be committed in the employment context (public incitement to discriminate made in the workplace, employee boasting about the “selective” procedures he/she has put in place, e.g.), it is in general very doubtful that these provisions will serve in this context, because the incitement to discrimination or the public vindication of discrimination is only made an offence if it takes place in a context characterised by certain conditions of publicity³³, and because covert acts of discrimination are thus not criminalized. The criminal provisions of the Law of 25 February 2003 will only be useful in the implementation of the ‘Race’ and Framework Directives essentially with respect to discrimination committed by public servants in the exercise of their functions; they will hardly ever be invoked in the private sector.

The Regions and Communities have acted also. 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*)³⁴, 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 position action measures (preparation of diversity plans and annual reports on progress made). This Decree has a limited scope of application, as it may only touch upon fields which fall under the competences of the Flemish Region or Community³⁵. It therefore imposes obligations not on all employers, but only on³⁶ : a) persons or organisations which act as intermediaries on the labour market by giving information on employment opportunities, offer vocational guidance and vocational training³⁷, and generally mediate between offer and demand on the labour market (*intermediaire organisaties*); b) the public authorities of the Flemish Region/Community, including the field of education (which is a competence of the Communities in the Belgian federal organisation); c) the 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 organisation). Although the scope of application of the Flemish Decree is thus rather limited, it does have a rather broad scope of application with respect to one of the prohibited grounds of discrimination, i.e. disability. Indeed, although the adoption of general anti-discrimination legislation would be 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 implementation of the principle of equal treatment (*Décret relatif à la mise en œuvre du principe de l'égalité de traitement*) on 19 May 2004³⁸. This text prohibits direct and indirect discrimination, including the instruction to discriminate. It applies to 1° public servants of the administration of the French-speaking Community, 2° the personnel of certain public interest organs depending of the Community, 3° all levels of education in the French-speaking Community, and 4° the *Centre hospitalier universitaire de Liège*, which depends of the Community (article 3 § 1). It extends the prohibition of discrimination to the associations subsidized or otherwise recognized by the French-speaking Community (article 3 § 2). The decree specifies that it applies in the

³² Art. 6 of the Law.

³³ These conditions are those defined by Art. 444 of the Criminal Code (*Code pénal*).

³⁴ *Moniteur belge*, 26.7.2002, p. 33262.

³⁵ In contrast to the French-speaking part of Belgium, the Region and Community are merged in the Flemish part.

³⁶ See Art. 3 of the *Decreet houdende evenredige participatie op de arbeidsmarkt*.

³⁷ This refers essentially to the Vlaamse Dienst voor Arbeidsbemiddeling (VDAB) and the Vlaams Instituut voor Zelfstandig Ondernemen (VIZO).

³⁸ *Moniteur belge*, 7.6.2004.

domains covered by the 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*)³⁹. This scope of application of this Decree is limited to the competences of the Walloon Region, including those attributed to it by the French-speaking Community in 1993⁴⁰ in the area of vocational training : under Articles 8 and 9 therefore, the prohibition of discrimination it contains applies to vocational guidance, socio-professional integration, the placement of workers, the allocation of aids 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 2004⁴¹. 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 powers of the German-speaking Community. Therefore, *ratione personae*, the Decree applies to the administration of that Community, to the personnel of the educational system of the Community, to the intermediaries (*zwischen geschalteten Dienstleister*) with respect to the services they offer, to employers with respect to the provision to persons with disabilities of the reasonable accommodation (*angemessenen Vorkehrungen*) 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 Ordonnance 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*)⁴², although this instrument relates to the conditions of recognition of intermediaries on the labour market rather than to implementation of the Article 13 EC Directives as such. Whether public (ORBEM: *l'Office régional bruxellois de l'emploi*) or private (authorised private employment agencies), the intermediaries on the labour market are obliged to respect a general requirement of non-discrimination (Article 4 § 2 of the *Ordonnance*⁴³ lists as one of the obligations of these entities not to commit any discrimination). However, the rest of the ordinance is silent about the prohibition of discrimination (although Article 4 § 4 states that the intermediaries on the labour market must abide by the applicable legislation concerning the protection of private life vis-à-vis the processing of personal data).

³⁹ *Moniteur belge*, 23.6.2004.

⁴⁰ 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*), *M.B.*, 10.9.1993.

⁴¹ *Moniteur belge*, 13.8.2004.

⁴² *Moniteur belge*, 29.7.2003.

⁴³ 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'.

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

- The Commission communautaire française, to which the French-speaking Community has transferred its competences since 1993 in the sphere of vocational training, and of the Region of Brussels-Capital, with respect to its own personnel, still must act in order to ensure implementation of Directives 2000/43/EC and 2000/78/EC (see para. 3.2.1 and 3.2.4 of the report).

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 organization of the burden of proof in discrimination cases, or to the powers of the court before which a complaint is filed alleging a discrimination, results in a situation where the implementation of Council Directives 2000/43/EC and 2000/78/EC remains unsatisfactory on a number of issues, with respect to the domains falling under the competences of the Regions and Communities in the Belgian Federal system of allocation of competences. 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, in the absence of any provision on the possibility for certain qualified organisations to engage, on behalf or in support of the complainant, judicial or administrative procedures provided for the enforcement of the guarantee of equal treatment offered by these Decrees (see para. 6.2).
- Neither the Decree adopted by the French-speaking Community, nor 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 explained by the opinion of the Council of State that Regions and Communities may not legislate on a topic which belongs to the regulation of the employment contract, this is in violation with Article 9 of Directive 2000/43/EC and Article 11 of Directive 2000/78/EC.
- Neither the Decree adopted by the French-speaking Community, nor the Decree adopted by the Walloon Region, provide for an adequate supervision of these decrees by an independent body. A possibility should be created to conclude a protocol of agreement between the French-speaking Community and the Walloon Region, on the one hand, the Federal Government, on the other hand, to invest the Centre for Equal Opportunities and the Fight against Racism with such a supervisory role as the Centre exercises under the Law of 25 February 2003 and shall be exercising both under the Flemish Decree of 8 May 2002 and the Decree of the German-speaking Community of 17 May 2004 (see para. 7).

Second, there are difficulties with the existing legal framework. Some of these difficulties concern the Federal Law of 25 February 2003; they should be remedied when this law will be amended in order to ensure that the law will remain workable and effective after the judgment of the Court of Arbitration of 6 October 2004 partly annulling the law⁴⁴. These difficulties are:

⁴⁴ A ministerial committee composed of the Minister of Social Integration and the Equality of opportunities, the Minister of Justice and the Minister of the Interior adopted a Federal Action Plan against Racist, Anti-Semitic and Xenophobic Violence

- 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 legislation, with different 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*) (such a possibility 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 through their combination.
- Article 3 of the Law of 25 February 2003 mentions that the prohibition of discrimination as laid down in that legislation does not violate fundamental rights and freedoms stipulated in the Constitution or international treaties : in other terms, fundamental rights are recognized by the legislator 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 those fundamental rights mentioned in that provision will be 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 such as that seemingly provided by Article 3 of the Law of 25 February 2003.
- 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 also such a protection; although it cannot be excluded that the same problem may be raised in the face of Article 21 of the Flemish Decree of 8 May 2002, this can be saved by judicial interpretation without it being imperative to modify the wording of the Decree (see para. 6.4).
- 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, 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 para. 8.2).

A third category of lacuna, though important, should be remedied by judicial interpretation, in conformity with the *Marleasing* principle according to which national law should be interpreted, insofar as possible, to fulfil the objectives of the Directive:

- The definition of indirect discrimination in Article 2(2) of the Federal Law of 25 February 2003 omits an 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 the aim; and it does not refer to the legitimacy of the aim pursued by the measure alleged to be constitutive of indirect discrimination.

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?

Belgium has notified to the Commission that it intended to defer the implementation of Directive 2000/78/EC to 2 December 2006 in relation to both age and disability.

0.3 Case-law

Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

Although a certain level of protection from discrimination based on one of the grounds prohibited by Directives 2000/43/EC and 2000/78/EC existed in the Belgian legal order before the adoption of legislative instruments aiming specifically to implement those directives, only one decision so far can be said to relate to the application and interpretation of the directives as such. This is the judgment delivered on 6 October 2004 by the Court of Arbitration (Constitutional Court) partially annulling the Law of 25 February 2003. Another recent judgment may be mentioned, although it is based not on an instrument specifically implementing either of the directives, but on the Law of 30 July 1981 criminalizing certain acts inspired by racism or xenophobia (*Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*), a criminal legislation by which Belgium adopted after it ratified the United Nations Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965⁴⁵. These two decisions are summarized below, following the proposed template.

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

- a. Name of the court : Court of Arbitration
- b. Judgment n° 157/2004 of the Court of Arbitration, delivered on 6 October 2004 – see <http://www.arbitrage.be/public/f/2004/2004-157f.pdf>
- c. Name of the 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 Antidiscrimination Law. Essentially, the judgment limits the scope of the criminal provisions of the Antidiscrimination Law, but extends the scope of its civil provisions in order to cover a broader range of discriminatory acts, beyond the list of suspect grounds originally contained in the Law. The most striking aspect of the judgment is that the Court decides 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 Antidiscrimination Law was adopted, the choice had been made to enumerate *limits* which are the prohibited grounds of discrimination : the prohibition of discrimination therefore extended only to discrimination on the grounds of sex, race, colour, ascendancy, national or ethnic origin, sexual orientation, civil status, birth, wealth, age, religious or philosophical conviction, actual or future state of health, disability or a physical characteristic. The Court of Arbitration considers 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 legislator creates the false impression that other forms of discrimination, based in

⁴⁵ U.N.T.S., n° 195. See the Belgian Law of 7 August 1975, *Moniteur belge*, 11 December 1975.

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 are 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, 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 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) (not available yet on the web)
- 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 finds 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) proposed by the rental agency despite the fact that the couple had sufficient revenues (both had a fixed employment) and proposed to show references as proof of their reliability as tenants. The conviction is based on the Law of 30 July 1981 criminalizing 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 above in this report, at 0.2.) made the conviction of Mr Neuville possible. The judgment delivered on 7 December 2004 finds that the defendant has committed the offence defined by Article 2 al. 1 of the Law of 30 July 1981,⁴⁶ but the conviction is suspended for a probatory period of three years (the defendant is 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 considers that these provisions imply 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.

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 recognized 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

⁴⁶ Cited above, see text corresponding to fn. 25.

require that the principle of equality be respected with respect 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 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 the requirement of non-discrimination in international law, especially as formulated by the European Court of Human Rights⁴⁷: 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 exists no reasonable relationship of proportionality between the means used and the aim sought to be realised⁴⁸. More recently, the Constitutional Court has enriched its understanding of the constitutional requirement of non-discrimination by deciding that the legislator may have to offer a reasonable and objective justification for not making a distinction between – i.e., offering the same treatment to – situations which are “essentially different”⁴⁹. This case-law interprets the Constitution as requiring the legislator not to commit indirect discrimination against certain categories. However, this prohibition of indirect discrimination remains relatively underdeveloped and of limited invocability. The requirement to treat distinct situations differently prohibits the adoption of across-the-board rules where this would place a particular disadvantage on certain categories. But the Court of Arbitration will not systematically engage in a disparate impact analysis, to strike down legislation which may disproportionately affect certain segments of the population.

In principle, these constitutional requirements should be capable of being invoked in the context of private relationships. This has been the position of the doctrine⁵⁰. It has been alluded to by the Belgian Constitutional Court, the Court of Arbitration⁵¹. It should follow logically from the recognition by Belgian courts that the 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 both 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 recognized to every person with a legal interest to seek the annulment of the legislation or executive regulation, respectively, before the Constitutional Court (Cour d’arbitrage) or the Council of State (Conseil d’Etat, Raad van

⁴⁷ ECtHR, 23 July 1968, *Belgian Linguistic Case* (Series A n° 6), § 10.

⁴⁸ *Cour d’Arbitrage*, 8 July 1997, Case n° 37/97; *Cour d’Arbitrage*, 13 October 1989, Case n° 23/89, *Sprl. Biorim, Moniteur belge*, 8 November 1989, B.1.3.

⁴⁹ *Cour d’Arbitrage*, 2 April 1992, Case n° 28/92, 5.B.4.

⁵⁰ 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.

⁵¹ See C.A., judgment n°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”.

State – supreme administrative court)⁵². 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 Court d'arbitrage by a referral procedure, and the Cour d'arbitrage may upon such a referral consider a legislation to be 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 for 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, ascendancy, national or ethnic origin, sexual orientation, civil status, birth, wealth, age, religious or philosophical conviction, actual or future state of health, disability or a physical characteristic. This list, although it is a long one, remained exhaustive. But since the judgment of the Court of Arbitration of 6 October 2004, that restriction to the scope of application of the Law of 25 February 2003 has been removed : the rather extensive remedies provided for in that legislative now may be invoked by the victims of any direct or indirect discrimination, whichever the ground on which the discrimination is based.

It will be noted that, although only the Federal Law of 25 February 2003 was presented to the Court of Arbitration, 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 legislations 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*⁵³) adopted on 8 May 2002 by the Flemish Community (exercising its competences jointly with the Flemish Region), although it lists exhaustively the prohibited grounds of discrimination which it seeks to address (covering sex, “so-called race”, colour, ascendancy, national or ethnic origin, sexual orientation, civil status, birth, fortune, age, belief or conviction, present or future state of health, disability or physical characteristic), should now be read, in accordance with the constitutional requirement derived by the Court of Arbitration from Articles 10 and 11 of the Constitution, as extending its protection to persons discriminated 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 Decree⁵⁴. “Target groups” per definition must be defined

⁵² On the competence of the Cour d'arbitrage, see Art. 142 of the Constitution.

⁵³ *Mon. b.*, 26.7.2002, p. 33262.

⁵⁴ 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*

exhaustively, and such positive action cannot benefit all persons who may claim 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?*
- 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)?*

a) Definitions of the grounds of prohibited discrimination

None of the grounds mentioned in the 'Race' and Framework Directives which are used in the Belgian legislation have been 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 legislation prohibition 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 either in related fields, or even in the context of anti-discrimination legislation, in the context of positive action measures. In fact, because of the risks entailed for the processing of such sensitive personal data as those relating to the 'race' or ethnic origin of an individual,⁵⁵ 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 modalities of implementation of the 'diversity plans' which should ensure progress towards a 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 para. 2, 1^o) not to the 'race' or the ethnic origin of the workers, but instead to 'allochtones', defined as adult citizens legally residing in Belgium and whose socio-cultural background is to a country not part of the European Union, who may or may not have the 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 regularized, 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 scolarity, are disadvantaged. The absence of any reference to the 'racial' or 'ethnic' background of the individual in such a definition of the 'target group' whose 'members' positions should be improved through diversity plans is striking if we recall that these plans seek to implement the principle of equal treatment on the grounds of, inter alia, 'race' and ethnic origin.

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)).

⁵⁵ See the Opinion n°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 <http://www.privacy.fgov.be/>

b) Use of equivalent terms in national legislation

Disability. With respect to the ground of disability, a distinction should be made however 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 – whether described or not as positive action – benefiting persons with disabilities and which, therefore, should be identified with greater specificity. 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, on the basis of “current or future state of health, a disability (*handicap*) or a physical characteristic”, whatever the severity of impairment – real or imaginary⁵⁶. 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 for 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. On the other hand, as this latter Decree provides for a richer notion of equal treatment, going 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, the Executive Regulation adopted on 30 January 2004 by the Flemish government to implement certain provisions of the Decree of 8 May 2002 does identify persons with disabilities among these “target groups”, and defines them “persons with a physical, sensorial, mental or psychic disturbance or limitation which may constitute a disadvantage for an fair participation in the employment market” (Art. 2(2), al. 2, 2^o, of the executive regulation adopted on 30 January 2004). Similarly, other legislations 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 whom will benefit from such advantages or which employers, under which conditions, will be rewarded for the efforts they make in promoting the professional integration of persons with disabilities⁵⁷.

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 be guided by the case-law of the European Court of Human Rights 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 faith⁵⁸. 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 June 1998, which describes these as “any group with a religious or philosophical vocation, or pretending to have such a vocation, which in its organization or practice, performs illegal and

⁵⁶ The terms used in the original Law of 25 February 2003 were already broad. Since the judgment of the Court of Arbitration of 6 October 2004, any questions concerning the conditions under which discrimination may be said to have occurred on the basis of “current or future state of health, a disability (*handicap*) or a physical characteristic” has become irrelevant.

⁵⁷ See, eg, the Law on the social rehabilitation of persons with disabilities (*Loi relative au reclassement social des handicapés*) of 16 April 1963, art. 1 of which states that it is addressed to persons whose possibilities of employment of whom are effectively reduced because of an unsufficiency 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 recognized the advantages of the Decree, the beneficiary must present a disability which results from an impairment of at least 30 % of the physical capacity or at least 20 % of the mental capacity (Art. 6 a).

⁵⁸ Eur. Comm. HR, *X v. the United Kingdom*, Appl. N° 7291/75, decision of 4 October 1977, DR, 11, p. 55 ; Eur. Comm. HR, *X v. Federal Republic of Germany*, Appl. N° 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.

damaging activities, causes nuisance to individuals or to the community or violates human dignity”⁵⁹. 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 organization of the relationship between State and Churches, are specifically recognized as being the most representative⁶⁰.

Sexual orientation. Heavily influenced in that respect by Canadian and Dutch precedents⁶¹, the *Decreet houdende evenredige participatie op de arbeidsmarkt* 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 underrepresented on the labour market. The executive regulation adopted on 30 January 2004 by the Flemish government, implementing the Decree of 8 May 2002⁶², 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 therefore are not considered to form a target group for the purpose of the affirmative measures imposed to the administrations of the Flemish Community/Region, to the sector of education, and to the intermediate agencies on the employment market, with respect to the listed target groups; in particular, these entities will not have to prepare an annual report on the evolution of the representation of gay, lesbian and bisexuals in their workforce⁶³. 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 – to quantify such a representation, as this would only be possible by the registration of the sexual orientation of employees⁶⁴.

⁵⁹ Law of 2 June 1998 creating a Centre of 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)).

⁶⁰ See the Law of 4 March 1870 (Loi du 4 mars 1870 sur le temporel des cultes (*M.B.*, 9 mars 1870)), as modified in 1974 (Loi du 19 juillet 1974 portant reconnaissance des administrations chargées de la gestion du temporel du culte islamique (*M.B.*, 23 août 1974)) and 1985 (Loi du 17 avril 1985 portant reconnaissance des administrations chargées de la gestion du temporel du culte orthodoxe (*M.B.*, 11 juin 1985)). The religions thus recognized are the Roman catholic, the Anglican, the Israelite, and the 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, although there is no official or State religion, the most representative religions receive financial support from the State. Since the revision of Article 181 of the Constitution in 1993, delegates of recognized organisations offering moral assistance under a non-religious philosophical conception also have their salaries paid by the State.

⁶¹ The Flemish legislator was inspired by the Canadian 1995 *Employment Equity Act* as well as by the Dutch Law on the Promotion of Labour Participation of Ethnic Minorities (*Wet stimuleren arbeidsdeelname minderheden (SAMEN)*) of 29 April 1998, which improves on the previously existing Law on the Promotion of proportional labour participation of Ethnic Minorities (*Wet bevordering evenredige arbeidsdeelname allochtonen*) of 1 July 1994. The initiative was also stimulate by the desire to achieve the objectives set forth in the conclusions of the Lisbon European Council, which vowed to upgrade the level of employment within the active population up to 65 % by 2004 and 70 % by 2010.

⁶² 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).

⁶³ See Art. 5(1) of the Regulation of 30 January 2004.

⁶⁴ The Independent Authority instituted in Belgium to supervise the 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, 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, the need for such a definition – and for the invasions into the privacy of individuals which may be required to verify whether they fall under that definition – does not exist in the same way in the context of legislation simply prohibiting discrimination.

c) Scope of age-based discrimination

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

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 prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?

a) Assumed characteristics

It is difficult to anticipate on this issue what interpretation the Belgian courts shall be giving to the prohibitions of discrimination provided for in the Belgian legislation. However, since the judgment of the Court of Arbitration of 6 October 2004, 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/EC⁶⁵ 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, e.g., to the religion, the sexual orientation or any disabilities of an individual, discrimination will be considered to occur whenever a person is treated according to irrelevant criteria, which cannot be reasonably and objectively justified. It should therefore not matter whether the victim of a differential treatment in fact presents the characteristic on which the discrimination is based, or whether this characteristic is only assumed in the view of the author of the discriminatory act⁶⁶.

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

Opinion of 15 March 2004, n° 032004, available on <http://www.privacy.fgov.be/>. However, as homosexuals or persons having a certain sexual orientation have not been identified as 'target groups', the Opinion has not specifically at the registration of certain persons, for instance in the composition of the workforce of an undertaking, according to that criterion.

⁶⁵ 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 exhaustively enumerated grounds (see Article 2 § 1, 1° of this Decree)..

⁶⁶ The same conclusion may be arrived at with respect to ‘race’, albeit here also by a different route. The Belgian legislators 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.

Where the discrimination based on being associated with persons presenting a suspect characteristic takes the form of discrimination against a person having joined an association of persons presenting this characteristic or the social purpose 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 the negative consequences which any private person⁶⁷ or public body would want to attach to his/her association with individuals presenting a ‘suspect’ characteristic. Moreover, 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”) that this legislation prohibits direct and indirect discrimination not only against individuals, but also of groups or communities as such. 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 *Décret relatif à la mise en oeuvre du principe de l’égalité de traitement* adopted on 19 May 2004 by the French-speaking Community adopts a narrower definition of discrimination, as limited to a form of treatment affecting a “person”⁶⁸. Because of its particular objective, which is to identify the conditions of recognition of intermediaries in the employment market 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 suspect characteristics. The wording of these instruments does not make such an interpretation very plausible. On the other hand, insofar as discrimination is now prohibited on any ground in the Law of 25 February 2003 (as a result of the judgment of the Court of Arbitration of 6 October 2004), and possibly in the other legislative instruments adopted in Belgium in order to implement the Equal Treatment Directives, nothing in principle should stand in the way of courts finding that discrimination based on a person associated with certain groups should be protected under these instruments, because there is no objective and reasonable justification for imposing a disadvantage on that person because of such an association.

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

a) How is direct discrimination defined in national law?

⁶⁷ Some examples may be found in Belgian case law where Article 11 ECHR has been recognised as having direct horizontal effect, i.e., where it has been considered to be a norm invocable 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 (jurisdiction 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 (jurisdiction des référés)*, 22 June 1995, *Journal de droit des jeunes*, 1995, p. 421.

⁶⁸ See Article 2(1), 2° and 3°, containing the definitions of direct and indirect discrimination.

Criminal provisions. The Law of 30 July 1981 criminalizing 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 criminalizes as prohibited discrimination “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 on its terms at least to be broader than that of Article 2(2)(a) of Directive 2000/43/EC, insofar as it includes as a prohibited discrimination the idea of a “distinction”, whether or not such a “distinction” leads to the imposition of a less favourable treatment than that which would be given to another person in a comparable situation. Segregation in conditions of equality, in other terms, 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, the Decree adopted by the German-speaking Community, the Decree of the French-speaking Community, and the Decree adopted by the Walloon Region define direct discrimination in accordance with the Directives, as instances where “one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any [prohibited] ground” (Article 2(2)(a) of the directives)⁶⁹. 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 and with respect to the persons it applies to, but offers no definition of discrimination.

After the partial annulment by the judgment of the Court of Arbitration of 6 October 2004, Article 2(2) of the Federal Law of 25 February 2003 simply defines direct discrimination as a difference in treatment which lacks an objective and reasonable justification. The possibility thus left open of offering an objective and reasonable justification of a difference in treatment even when it is based on a specifically protected ground contrasts, of course, with the formulation of Article 2(2)(a) of the directives, which define as direct discrimination the less favourable treatment made to a person than another is, has been or would be in a comparable situation, because of one of the protected grounds. This prohibition is absolute in the Directives, with the sole exception of genuine occupational requirements. With regard to that last exception however, Article 2(5) of the Law of 25 February 2003 states that a differential treatment will only be justified in employment and occupation – i.e., within the scope of application of Directive 2000/78/EC⁷⁰ – “where, by reason of the nature of the particular

⁶⁹ 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 Decree of the French-speaking Community.

⁷⁰ On its 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 in 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 obligation under which Belgian courts are 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 already Case 14/83,

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 that of 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 admitting of an objective and reasonable justification being offered 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 Framework Directive.

However, apart from the doubts which may exist as to the compatibility with the requirements of Art. 4 of Directive 2000/43/EC and Art. 4(1) of Directive 2000/78/EC of the choice made by the Belgian legislator when it included Article 2(5) in the Law of 25 February 2003 (see hereunder, para. 4.1), there 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, and it is doubtful that the case-law – even if it ensures that the law is interpreted in accordance with the directive – will suffice to remove that tension completely.

This lacuna cannot be said to be compensated 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, because of the lack of effectiveness of this legislation and its failure, in particular, to facilitate the proof of discrimination by the alleged victims. Moreover, 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; and its invocability in the context of social protection and the allocation of social advantages would be limited to 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.

In order to ensure the compatibility of the Belgian legislation with Directive 2000/43/EC, the Law of 25 February 2003 should be amended and the definition of direct discrimination reinforced to clarify that, where a less favourable treatment is imposed on grounds of race or ethnic origin, of religion or belief, of sexual orientation, of age or disability, no justification shall be considered admissible.

It should be emphasized that it would not be in violation of the judgment of the Court of Arbitration of 6 October 2004 to enumerate exhaustively the prohibited grounds of discrimination, if direct discrimination is defined as under the Directives, rather than as under the current formulation of the Law of 25 February 2003. Indeed, the Court of Arbitration considered that it was arbitrary not to include certain grounds of discrimination such as language or political opinion, *in a system which defines prohibited discrimination as a difference in treatment which cannot be objectively and reasonably justified*, because in such a system there is no justification for leaving out certain grounds of discrimination⁷¹. It would be constitutionally permissible, in other terms, when redefining the concept of direct discrimination in accordance with the directives, to return to a closed list of prohibited grounds of discrimination.

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 a less favourable treatment imposed on grounds of sexual orientation with respect to participation in trade unions or professional organisations.

⁷¹ See Recital B.13. of the judgment.

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 preceding paragraph has described the problem resulting from the definition of direct discrimination in the Federal Law of 25 February 2003. This concerns all grounds of discrimination. In their implementation of Directive 2000/78/EC, the Walloon Region and the French-speaking Community have moreover made use of the possibility provided for in Article 6 of that Directive with respect to differences of treatment based on age; in the case of the Walloon Region, the wording chosen creates a potential incompatibility with that provision of the Directive, as argued under para. 4.7.1. below.

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 legislations 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.

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

a) How is indirect discrimination defined in national law?

Criminal law. As mentioned in 2.2. here above, the Law of 30 July 1981 criminalizing 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. However, the concept of “indirect discrimination”, although not explicitly identified as such, is included in that definition in terms slightly more encompassing. 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 to access 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.

Civil provisions. According to Article 2(2) of the Law of 25 February 2003, in the reformulation which results from the judgment of the Court of Arbitration of 6 October 2004, indirect discrimination exists where a provision, a criterion or a practice, while apparently neutral produce a disadvantage for certain persons, unless this provision, this criterion or this practice have 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 suspect provision, criterion or practice and the suspect 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 as 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 to the definition of indirect discrimination contained in the directives this legislation sought to implement. It is regrettable, however, that this provision of the Federal Law⁷² does not refer to the legitimacy of the aim pursued by the measure alleged to be constitutive of an indirect discrimination.

The other regional and Community instruments are generally closer to the Directives they seek to implement than the Federal legislation. Thus, under the Flemish *Decreet houdende evenredige participatie op de arbeidsmarkt*, indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons belonging to certain protected categories 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 that of the formulation in German of the Framework Directive, Article 2(2)(b) of which seems to be more protective than in its English formulation. Article 2 of the *Dekret* defines indirect discrimination to occur where an apparently neutral provision, criterion or practice “could” (compare with the expression “would” in the English version of the Framework Directive; the French version uses the expression “*est susceptible de*”), put a person⁷³ at a particular disadvantage compared with other persons, unless the measure is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Article 2 § 1, 3°, of the Decree of the French-speaking Community also reproduces the wording of the Directive, thus containing the requirement of necessity.

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

See the preceding paragraph.

c) Is this compatible with the Directives?

The requirements relating to the legitimacy of the aim pursued by the allegedly discriminatory measure and to the relationship of necessity which must exist between that aim and the measure contested should be included in a future revision of Article 2(2) of the Law of 25 February 2003. However, the Belgian courts should be convinced to interpret the wording of this provision in conformity with the more precise wording of the directives this legislation seeks to implement.

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

None of the instruments adopted to implement the Directives specifies how a comparison is to be made where an indirect discrimination on the ground of age is alleged.

⁷² The Decree adopted by the Walloon Region does contain the requirement that the apparently neutral measure which imposes a particular disadvantage on the members of a protected category by justified by the realisation of a legitimate objective.

⁷³ Again, as a result of the judgment of the Court of Arbitration of 6 October 2004, it seems justified to read the Decree as protecting from discrimination, on whichever ground it is alleged to have occurred.

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.*

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-speaking version of the German-speaking Community Decree) as a form of discrimination, and define the notion in strict conformity with the Directives⁷⁴ – although only the Decree proposed for the German-speaking Community explicitly assimilates harassment as a form of *direct* discrimination⁷⁵.

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 Directives⁷⁶, 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'⁷⁷. 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 institution of an authority which should promote 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? More worrisome perhaps, 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 fee: 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 contested.

Article 442bis of the Penal Code, introduced by the Law of 30 October 1998, already criminalises harassment in general⁷⁸. 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 held by the victim – the penalties may be doubled⁷⁹. At last, a 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'*) in a Law of

⁷⁴ See Article 2(6) of the Law.

⁷⁵ See Article 5(2) of the 'Dekretentwurf bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt'.

⁷⁶ See Article 2, 11°, of the Decree.

⁷⁷ Article 5(1), 2°, of the Decree.

⁷⁸ 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'.

⁷⁹ New Article 422bis of the Penal Code, introduced by Article 11 of the Law of 25 February 2003.

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 object⁸⁰.

Therefore, it may be asked, is the inclusion of the notion of harassment in the definition of discrimination in the Federal Law of 25 February 2003 not redundant? This was the view of the legislative section of the Council of State, in the second opinion it gave on the draft Bill, when it was pending before the Chamber of Representatives⁸¹. Indeed, 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 legislation. When confronted with an action by a victim alleging that harassment as occurred, which legislation should the judge apply? This choice may produce very concrete consequences. For instance, under Art. 32duodecies(7) of the Law of 4 August 1996 as amended in 2002, witnesses of the harassment are protected from forms of reprisals by the employer; there is no such protection under the Law of 25 February 2003. On the other hand, under the Law of 25 February 2003, the victim of any form of discrimination – including, presumably, harassment – may request that the judge deliver an injunction prohibiting the continuation of the discrimination (action en cessation), where such a possibility does not exist under the Law of 4 August 1996. The coexistence of these regimes is regrettable, as there is no clear criterion to choose between the two pieces of applicable legislation.

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 level⁸² 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 the federal level of the Law of 4 August 1996 on the well-being of the workers in the execution of the contract of employment constituted an exercise by the federal legislator 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 competences⁸³.

b) Is harassment prohibited as a form of discrimination?

Harassment is 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

⁸⁰ *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. See also, giving detailed instructions on the implementation by employers of the legislation of 11 June 2002, 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).

⁸¹ See *Conseil d'État (sect. légis.)*, *Avis n°32.967/2 du 4 février 2002*, *Doc. Ch., sess. 2001-2002*, 18 février 2002, doc. 50 1578/002, p. 7. Of course, the inclusion of the prohibition of harassment in the Law of 25 February 2003 would ensure that a civil action may be lodged against the harasser, with the possibility of a shift of the burden of proof under Article 19(3) of the Law. However, Art. 32undecies of the Law of 4 August 1996, inserted in that Law by the Law of 11 June 2002, provides in similar terms for such a reversal of the burden of proof, as it provides that "Where a person having a legal interest establish before the competent court facts from which it may be presumed that there has been violence or moral or sexual harassment in employment, it shall be for the respondent to prove that there has been no such violence or moral or sexual harassment committed".

⁸² 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.

⁸³ See the Opinion of the section of legislation of the Council of State n° 24.143/1 of 16 March 1995, on the draft text which was later to become the Law of 4 August 1996; and, more recently, the Opinion n° 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.

May 2004. It is not treated as a species 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 (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 which was considered sufficient.

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

See above, and the reference in footnote 73.

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

Criminal provisions. In 2003⁸⁴, the Law of 30 July 1981 criminalizing certain acts inspired by racism and xenophobia was modified in order to contribute to the implementation of Directive 2000/43/EC by the insertion in the definition of the forms of discrimination prohibited by that legislation the instruction to discriminate. This amendment consisted in the insertion of a paragraph in Art. 1 of the Law, where that definition is located, which includes the instruction to discriminate in the definition of discrimination.

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 a discrimination, whether purposeful 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 criminally punishable.

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) is applicable to the criminal sanctions which this Law attaches to discrimination committed by public servants in the exercise of their duties⁸⁵. An instruction to commit a discrimination 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 such 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.

⁸⁴ Loi du 20 janvier 2003 relative au renforcement de la législation contre le racisme, *Moniteur belge*, 12.2.2003.

⁸⁵ See Art. 16 of the Law of 25 February 2003.

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. is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?

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?

Federal State. Article 2, § 3, of the Federal Law of 25 February 2003 provides that the absence of reasonable accommodation for a person with a disability is a form of discrimination prohibited under that legislation. The Law adopts a negative formulation, prohibiting the refusal to provide for a reasonable accommodation, rather than a positive formulation, imposing an obligation to provide such accommodation, as in Article 5 of the Framework Directive. The "reasonable accommodation" is defined as the accommodation which does not impose a disproportionate burden, or whose burden is compensated. The inclusion of the absence of reasonable accommodation in the definition of discrimination represents a true innovation in Belgian law. The legislation in force before the adoption of the Federal Law of 25 February 2003, although they do not ignore the concept of reasonable accommodation, define this concept as the accommodation the employer may be compensated for if it is deemed necessary for the employment of a disabled person, but *without there being an obligation imposed on the employer to provide such a reasonable accommodation* or, for that matter, to seek compensation for whichever investment he/she decides – voluntarily – to make. This is the status of "reasonable accommodation", for instance, under Title VIII of the Executive Decree of 5 November 1998 on the promotion of the equality of chances 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*)⁸⁶: the employer may request compensation for the adaptation costs of the working post occupied by a disabled person insofar as such an adaptation is considered necessary, but he is not obliged to provide for such an adaptation.

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 discrimination⁸⁷, which may be attributed both to the vague character of the "reasonable accommodations" ("redelijke aanpassingen") called for by the *Decreet*, and to the broad definition of the concept of reasonable accommodation, which is mentioned without a 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 the persons or organisations acting as intermediates on the labour market) should take appropriate measures where needed in a particular case, to enable a person to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden, according to the same clause, shall not be disproportionate when it is sufficiently remedied by existing measures. The wording of this

⁸⁶ 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 subsidize, under the conditions defined by the Walloon Government, the acquisition, the construction or the transformation of infrastructure or equipment for persons with disabilities.

⁸⁷ Comp. with Art. 2 § 2, b), ii) of the Framework Directive.

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 *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-Capitale⁸⁸ provides that the Executive of that organ will stipulate the conditions under which its administration will be authorized to compensate the employer for the costs of the accommodation of the working post, which is recognized as necessary. The compensation should cover the full cost of the accommodation provided for, if it is deemed necessary (Art. 31). Like under the Decree of the Walloon Government of 5 November 1998⁸⁹, however, the employer is under no obligation to provide this form of reasonable accommodation to his/her disabled employee. Nevertheless, these texts make it possible for employers to draw upon public grants for the provision of reasonable accommodation, and they indirectly impact on the level of the obligation of the employer to provide such an accommodation : indeed, under the Federal Law of 25 February 2003, under the Flemish Decree and under the Decree of the German-speaking Community (see hereunder), the burden imposed on the employer because of the obligation to provide reasonable accommodation will not be considered disproportionate if the employer may request the aid of public funds.

German-speaking Community. The Decree adopted by the German-speaking Community comprises 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. Like 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 a training, unless this imposes a disproportionate burden”.

The emphasis on education or training as a means to provide effective accommodation is regrettable. Read *a contrario*, this would imply that a failure to provide other forms of accommodation as may be required 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 Community⁹⁰, and not only to those services or institutions which provide education or training. All the addressees of the requirement of non-discrimination as imposed by the Decree should be imposed an obligation to provide reasonable accommodation, *under whichever form it appears to be required*.

Walloon Region. Article 6 of the *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 accommodations must be made, implying that the operator takes the appropriate measures, according to the needs identified in a concrete situation, in particular to allow for a training or an aid to socio-professional integration to be granted to the person with a disability, unless this would impose a disproportionate burden.

⁸⁸ *Moniteur belge.*, 3.4.1999.

⁸⁹ See above, text corresponding to note 90.

⁹⁰ See Article 3, 1°, of the Decree.

This formulation may be criticized for the same reasons as the one offered in the Decree of the French-speaking Community, recalled above. There appears to be no reason to restrict the forms under which effective accommodation may have to be provided : although the definition retained 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 Region⁹¹. 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 discriminating where they do not provide any accommodation which may be required for the integration of persons with disabilities, if this does not impose on them a disproportionate burden. The current situation may create the 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.

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.

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 protected from any form of discrimination under the Law of 25 February 2003, as may be deduced from Article 2(7) of that legislation (see above, 2.1.2.)⁹². 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 texts resort to is broad enough to be thus interpreted by the courts. Although the preparatory works are silent on this point, it may be presumed that this broader interpretation shall prevail.

⁹¹ See Article 8 of the Decree.

⁹² Although the Law of 30 July 1981 criminalizing certain acts inspired by racism and xenophobia is not strictly speaking a legislation implementing Directive 2000/43/EC, it defines as a criminal offence certain forms of discrimination which the 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).

The 'persons' liable for discrimination. Both natural and legal persons are prohibited from committing the discriminations defined in the instruments implementing the directives. This requires no specific explanation where civil liability is concerned : although the applicable texts are silent on this issue, this seems to be the only plausible interpretation, in line with the existing interpretative practice of courts. With respect to the criminal clauses contained in the relevant instruments, the Belgian criminal law has extended to legal persons all offences which could be committed by natural persons, since a law of 4 May 1999⁹³.

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's civil liability may be triggered when an employee commits the fault which causes the damage the victim seeks reparation from (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 such a presumption of responsibility of the employer is to ensure that the victims of the faults committed by the employees in the fulfilment of their functions 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 the employment contract⁹⁴, the employer will have to support the cost of the damages afforded to 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 one may be civilly liable not only for the damage one has caused by one's own behaviour, but also for the damage caused by persons for whom one must answer, 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, racial harassment of a child on the premises of a school could trigger the liability of the schoolteachers or the direction of the school. This would not extend to a responsibility of the landlord for the discriminatory acts of their tenants, or of 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 shall be considered accomplices of the criminal offence those who gave instructions to commit it. This provision shall be applicable to the criminal offences described in the Law of 25 February 2003⁹⁵, but the scope

⁹³ 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.

⁹⁴ Loi du 3 juillet 1978 relative aux contrats de travail, *Moniteur belge*, 22.8.1978.

⁹⁵ See Art. 16 of the Law of 25 February 2003.

of applicability of which remains very limited⁹⁶. Moreover, under the Law of 25 February 2003, with respect to the discrimination committed by the public servant in the exercise of his/her functions, the compliance with an order received from his/her hierarchical superior excludes the criminal liability of the individual public servant who has in fact committed the discrimination : 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 the offences defined in the Law of 30 July 1981 criminalizing certain acts inspired by racism and xenophobia, implying that the employer having instructed his/her employees to commit a discrimination must be considered to have him- or herself committed such discrimination, and will have his criminal liability engaged. Moreover, Article 2bis, al. 2, of the Law of 30 July 1981 criminalizing certain acts inspired by racism and xenophobia, states that the employer is civilly liable for the payment of the fines to which his/her employees have been condemned.

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?

Criminal provisions. Article 2bis of the Law of 30 July 1981 criminalizing certain acts inspired by racism and xenophobia defines as a criminal offence the discrimination, whether purposeful or not, which consists in denying to 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. It should be recalled from the outset that the five instruments adopt 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 to 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 vocation guidance and training. This Decree, however, applies only to situations which fall under the competences of the Flemish Region or Community. The Decree prohibits the persons it is addressed to refer to the suspect grounds it enumerates⁹⁷ in the description of conditions or criteria in employment

⁹⁶ These offences as defined under Chapter III of the Law of 25 February 2003 only concern a) those who *publicly incite* to discrimination, to hate or violence against a person, a group, a community or the members of a community on the basis of one of the prohibited grounds of discrimination, b) those who *give a publicity to their intention* to commit discrimination, or c) the public servants who commits a discrimination, as defined by the Law, in the exercise of their public functions.

⁹⁷ The prohibition of discrimination is formulated as to: sex, 'pretended race', colour, ascendancy, national or ethnic origin, sexual orientation, civil status, birth, fortune, age, belief or conviction, present or future state of health, disability or physical

intermediation, or to other criteria which could lead to discrimination on the basis of the prohibited grounds (Art. 5 § 2, 1°); to present certain employment opportunities as better suited to persons presenting one of the prohibited characteristics (2°); to impede access to placement services on the basis of justifications which, explicitly or implicitly, relate to one of the prohibited grounds of discrimination (3°); to mention one of the prohibited grounds in job announcements, or to allude to either of these grounds (4°); to use one of the prohibited grounds as an access or selection criterion for any function, in whichever sector of industry – this includes access to self-employed activities –, or to resort to conditions which could lead to discrimination on any of these grounds (5°); to deny or discourage 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°); to refer to either of the prohibited grounds in the description of conditions or criteria for access to vocational guidance, vocational training or career guidance (7°); in information or publicity about vocational guidance, vocational training or career guidance, to refer to these as better suited to persons defined by reference to such prohibited grounds (8°); to deny access to vocational guidance, vocational training or career guidance, on the basis of a prohibited ground or of reasons which implicitly refer to such ground (9°); to impose conditions for the award and delivery of titles, diplomas, etc., which are defined differently according to one's race, colour, etc. (10°); to refer to either of the prohibited grounds in the definition of working conditions or conditions of dismissal, or to refer to conditions and criteria which, although not referring explicitly to these grounds, may lead to discrimination on the basis of such grounds (11°); to define or to apply criteria or conditions in employment and dismissal which are based on any of the prohibited grounds (12°); to use techniques or tests which, in vocational guidance, vocational training, career guidance or employment intermediation, may lead to direct or indirect discrimination (13°).

The Decree on the implementation of the principle of equal treatment adopted by the French-speaking Community on 19 May 2004⁹⁸ prohibits direct and indirect discrimination, including the instruction to discriminate, 1° against public servants of the administration of the French-speaking Community, 2° against personnel of certain public interest organs depending on 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 depends on 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 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 contracts generally, or to statutory office beyond those of the Community.

The Decree (*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 competences of the Region in the domains of employment policies and retraining : under its Articles 8 and 9, therefore, the prohibition of discrimination applies to vocational guidance, socio-professional integration, the placement of workers, the allocation of aids for the promotion of employment, and vocational training, in both the public and the private sectors. The material scope of the prohibition of discrimination formulated in the directive 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

characteristic. It is however an open question whether, after the judgment of the Court of Arbitration of 6 October 2004, the Flemish Decree should not be seen to extend beyond those grounds to any kind of discrimination.

⁹⁸ *Moniteur belge*, 7 June 2004.

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 administration of that Community, to personnel of the educational system of the Community, to intermediaries with respect to the services they offer, to employers with respect to the provision to persons with disabilities of the reasonable accommodation 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 problems of co-ordination 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 Ordonnance of 26 June 2003, this does not ensure 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 under the Belgian federal system of allocation competences. The scope of application of the prohibition of discrimination in the Ordonnance is restricted to the “employment activities” defined as including⁹⁹ :

- the activity consisting in helping offer and demand on the employment market to meet (the intermediaries in the strict sense);
- the activity of employment of interim agencies, employing persons who will 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 received the competence in the field of employment policy (including placement and professional integration),¹⁰⁰ which implies that any positive action measures – as authorized although not compulsory under the Directives – should be adopted at the level of the Regions rather than at the Federal level. More importantly in the context of the examination of the 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 administrations¹⁰¹. 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.¹⁰² 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 *commission communautaire française* has not acted, as it

⁹⁹ Article 2, 1, of the Ordonnance.

¹⁰⁰ Article 6 § 1, IX of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.

¹⁰¹ See Article 87 of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.

¹⁰² 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.

should have, to implement the principle of equal treatment in the field of vocational training. At the date of writing, therefore, the implementation of the Directives adopted on the basis of Article 13 EC still remain incomplete in Belgium.

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

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))

See paragraph 3.2.1 above. Although Article 2(4) of the Law of 25 February 2003 includes within its broad scope of application the definition of 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, and explicitly extends the prohibition of discrimination to statutory office (the nomination, promotion or affectation of a public servant), the statutory personnel of the Regions and Communities may not be protected under this clause, given the exclusive competence of the federal entities for the regulation of the status of their personnel.

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

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.

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.

In the Belgian federal system, *vocational guidance* (as part of employment policy) is a competence of the Regions¹⁰³, although the Walloon Region has delegated that competence to the German-speaking Community for the territory of the German-speaking Region, since 1 January 2000¹⁰⁴. 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 still should legislate in order to do so.

Vocational training (extending, presumably, to advanced vocational training and retraining, but probably not to practical work experience, which is a competence of the Regions under employment policy) is a competence of the Communities¹⁰⁵, 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*

¹⁰³ Article 6 § 1, IX of the Special Law of 8 August 1980 on institutional reforms.

¹⁰⁴ See above, fn. 20 and corresponding text.

¹⁰⁵ Article 4, 15° and 16° of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.

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.

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 a field 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 on a particular profession, including the benefits provided by such organizations (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” in the definition of the material scope of application of the Law) must be interpreted as covering this form of activity¹⁰⁶.

In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

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

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?

Social security would in principle be regulated by legislation adopted at the 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 a discrimination results from a statutory scheme adopted by Law (Federal) or Decree (Communities), the Court of Arbitration may find that it violates Articles 10 and 11 of the Constitution, and if necessary annul the discriminatory provision. Although, to the knowledge of the reporter, the Court of Arbitration has never annulled a legislation for a discrimination on grounds of race or ethnic origin, of religion or convictions, of sexual orientation, or of age, the case-law on discrimination based on sex should be transposed, without any major difficulty, to these other grounds. The Council of State (section of administration) has the same competence with respect to executive regulations (*Arrêtés*) implementing the relevant legislation. Although the Court of Arbitration 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.

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

¹⁰⁶ The preparatory works of the Law leave no doubt on this question: see esp. the statement by Mme L. Onkelinx, vice-Prime Minister and Minister of Employment and Equality of Opportunities, before the Justice Committee of the Chamber of Representatives (*Documents parlementaires, Chambre des Représentants, 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, p. 37).

This covers a broad category of benefits that may be provided by either public or private actors, for example, 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.

Article 2 of the Law of 30 July 1981 criminalizing certain acts inspired by racism and xenophobia (where a 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 recognized by private or public actors to the general public are therefore in principle covered by this general non-discrimination provision.

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

This covers all aspects of education, including all types of schools.

Education is a competence of the Communities in the Belgian federal system¹⁰⁷. In exercising this competence, the Communities have adopted certain provisions prohibiting discrimination in education. For instance, Article 88 of the Decree adopted by the French-speaking Community organizing education at the levels of primary and secondary education (*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*¹⁰⁸) prohibit 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 decrees¹⁰⁹ 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 favoured 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 immigrants¹¹⁰, comparable measures being adopted also by the Flemish Community¹¹¹.

Neither the Flemish nor the German-speaking Communities have adopted specific legislation to implement the Directives in the sector of education, however the personnel of these sectors, as they are statutorily public servants of the Communities, are protected under the Flemish Decree of 8 May 2002¹¹² and the Decree adopted on 17 May 2004 by the German-speaking Community¹¹³. In implementing the ‘Race’ and Employment Directives, the French-speaking

¹⁰⁷ Article 127, § 1, al. 1, 2° of the Constitution.

¹⁰⁸ *Moniteur belge*, 23.9.1997.

¹⁰⁹ *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 mesures modificatives*, *Moniteur belge*, 16.4.2002; *Décret de la Communauté flamande du 26 juin 2002 relatif à l’égalité des chances en éducation-I (1)*, *Moniteur belge*, 14.9.2002.

¹¹⁰ *Décret de la Communauté française du 14 juin 2001 visant à l’insertion des élèves primo-arrivants dans l’enseignement organisé ou subventionné par la Communauté française*, *Moniteur belge*, 17.7.2001 (erratum, 12.9.2001); *Décret de la Communauté germanophone du 17 décembre 2001 visant la scolarisation des élèves primo-arrivants*, *Moniteur belge*, 4 avril 2002.

¹¹¹ *Décret de la Communauté flamande du 28 février 2003 relatif à la politique flamande d’intégration civique*, *Moniteur belge*, 8.5.2003.

¹¹² See Art. 3, 2° and Art. 2, 6° of the Flemish Decree of 8 May 2002.

¹¹³ See Art. 2 § 1, 4° and Art. 3 of the Decree of the German-speaking Community of 17 May 2004.

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),¹¹⁴ however it is unclear whether this concerns only discrimination in employment in that sector which depends of the Community or also discrimination based, i.a., on race and ethnic origin, as practiced against schoolchildren or their parents.

The absence of any specific legislation prohibiting discrimination in the field of education may be problematic, because, 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 the federal legislation shall be considered to apply also to the sector of education, which is an exclusive competence of the Communities. This is a further example of the obstacle on a full and adequate implementation of the directives which is created by the uncertain state of the allocation of competences with respect to the elimination of discrimination.

In order to promote the integration into the mainstream educational system of children with a mental disability, the Flemish Government has adopted a Decree supporting supplementary hours in the teaching institutions (in order to ensure the provision of pedagogical support to children with a mental disability) and subsidies for institutions organizing « type 2 » (specially adapted) classes.¹¹⁵ 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 attending.¹¹⁶ And a Decree of 3 March 2004 of the French-speaking Community seeks to reorganize the special educational system for children and adolescents which have specific needs.¹¹⁷

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.

Criminal provisions. Article 2 of the Law of 30 July 1981, since the amendment of this legislation by the Law of 12 April 1994, criminalizes discrimination when committed in the provision of services or a good. There is no explicit restriction to goods and services available to the public, however this is clearly the meaning attached to this provision. One argument in favour of this latter interpretation might be that 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 – my emphasis); another argument is that any broader scope of application of the prohibition to discrimination would potentially conflict with the right to respect for private life as protected under Article 8 of the

¹¹⁴ See Art. 3 § 3 of the Decree of 19 May 2004.

¹¹⁵ 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), *M.B.*, 2 mars 2004.

¹¹⁶ *M.B.*, 3 juin 2004.

¹¹⁷ Décret du 3 mars 2004 de la Communauté française organisant l'enseignement spécialisé, *M.B.*, 3 juin 2004.

European Convention on Human Rights, which may not be presumed to be the intent of the legislator.

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

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

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

Criminal provisions. Article 2 of the Law of 30 July 1981, since the amendment of this legislation by the Law of 12 April 1994, criminalizes discrimination in both the private and the public housing markets. This is exemplified by the recent judgment of the criminal division of a tribunal in Antwerp (see above in this report, para. 0.3). Such a use of the Law of 30 July 1981, however, remains highly exceptional. In the press communiqué welcoming the judgment, the Centre for Equal Opportunities and the Fight Against Racism recalls the difficulties faced by victims in proving discrimination on the housing market, noting that there are only two precedents (where a rental company and a landlord had publicly – by the content of their advertisement of the property to be rented – showed their intention to commit a discrimination)¹¹⁸, although the Centre receives on average 55 complaints each year about such alleged discrimination, representing 7% of the complaints for racial discrimination they are presented with.

Civil provisions. In principle, the prohibition of discrimination under the Federal Law of 25 February 2003 should apply to the housing market, without any restriction. This is implied by the generality of Article 2(4) of the Law. However, according to certain media reports¹¹⁹, social housing associations in the region of Antwerpen are allocating cheap housing – for which the demand largely exceeds the offer of available apartments – by giving a preference to Flemish-speaking households, which may amount to an indirect discrimination on the basis of ‘race’ or ethnic origin, and the impact of which policy on the ratio between Belgians and non-nationals benefiting from social housing is demonstrated¹²⁰. This practice, which has been only recently revealed, is illegal under the Federal Law of 25 February 2003, in the view of the author of this report. It cannot be excluded that victims of these practices will file complaints against them in order to seek reparation and discontinuation of this policy.

¹¹⁸ Although that press communiqué mentions two precedents in the case-law, this reporter could only identify one such case : see Criminal Tribunal (Tribunal correctionnel) Anvers, 21 June 1996 (housing rental agency having stipulated that the tenant must be Belgian by nature” (“van nature Belg”), available on www.antiracisme.be/fr/jurisprudence/jp_intro.htm

¹¹⁹ De Standaard, 30.12.2004; La Libre Belgique, 31.12.2004.

¹²⁰ The organization already applying the policy of “Flemish-speaking families first” accepted only 17,5 % of demands from non-nationals; this percentage was of 49,7 % and 56,7 % for the two other major social housing organisations in the region of Antwerp. See *La Libre Belgique*, 31.12.2004.

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?

The Law of 30 July 1981 criminalizing certain acts inspired by racism and xenophobia defines as a criminal offence discrimination based on ‘race’ or colour, descent, or ethnic or national origin, and does not provide an exception for genuine and determining occupational requirements. 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, also of course that Convention mentions the right to work among the rights which should be ensured without discrimination (Art. 5, e, i).

The Federal Law of 25 February 2003. It will be recalled that Article 2(2) of the Federal Law of 25 February 2003 defines direct discrimination as a difference of treatment which cannot be reasonably and objectively justified, 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 suspect ground (see here above, para. 2.2 of this report). Article 2(5) of the Law of 25 February 2003 states however that a differential treatment will only be justified in employment and occupation¹²¹ “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 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. It remains debatable whether this is a fully satisfactory solution.¹²²

Regional and Community instruments. The instruments adopted by the Regions and Communities contain similar formulations. Thus, Article 5 of the *Décret relatif à la mise en oeuvre du principe de l'égalité de traitement* adopted on 19 May 2004 by the French-speaking Community mentions that there will be no direct discrimination where a difference in

¹²¹ On its 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 in 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 obligation under which Belgian courts are 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 already 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 a less favourable treatment imposed on grounds of sexual orientation with respect to participation in trade unions or professional organisations.

¹²² 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.

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 *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 to refer to certain characteristics may be removed in certain cases, Article 6 of the Flemish *Decreet houdende evenredige participatie op de arbeidsmarkt* of 8 May 2002 entrusts the Flemish government with the task to identify which positions in particular are concerned by this ‘genuine occupational requirements’ exception, after consulting the Flemish Socio-Economic Council. However, although Article 4 of the Regulation of 30 January 2004 of the Flemish 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 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 the invocability of this exception to the situations which the Executive will have identified. Therefore it would seem that, in the domains covered by the Flemish Decree, the ‘genuine occupational requirements’ exception 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?*

During the parliamentary discussions preceding the adoption of the Law of 25 February 2003, there were attempts to include in the legislation under discussion either a provision closely following the wording of Article 4(2) of the Directive¹²³, or even more broadly, excluding the applicability of the Law to organisations or activities which are based on religious or philosophical grounds¹²⁴. These amendments were rejected. Churches may nevertheless organise themselves by taking into account religion or belief of those involved¹²⁵, but in doing so they will be restricted by the strict formulation of Article 2(5) of the Law of 25 February 2003 (see here above, 4.1) which, directly inspired from Article 4(1) of the Framework

¹²³ See, e.g., Amendment n°53 presented within the Justice Committee of the Chamber of Representatives by Ms J. Schauvliege (*Documents parlementaires, Chambre des Représentants, 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 4 abstentions.

¹²⁴ See, e.g., Amendment n°78 presented within the Justice Committee of the Chamber of Representatives by Mr. Bart Laeremans (*Documents parlementaires, Chambre des Représentants, 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 d’une vision religieuse ou philosophique’. It was rejected by 9 votes to 2, with 2 abstentions.

¹²⁵ In the field of education, see the Law of 29 May 1959 (*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*, n°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 huwelijk na 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, at p. 287.

Directive, 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 complied with.

Neither the Flemish Decree of 8 May 2002 on the proportionate participation on the employment market, nor the Décret relatif à la mise en oeuvre du principe de l'égalité de traitement adopted on 19 May 2004 by the French-speaking Community, nor the Decree adopted on 17 May 2004 by the German-speaking Community, nor the Decree of the Walloon Region of 27 May 2004, contain clauses using the exception of 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 legislator has occasionally recalled that these institutions were at liberty to choose on which pedagogical project and values their teaching would be based. This implies a correlative obligation for the members of these institutions to respect those projects and values. However, this obligation must respect the distinction between the private and the professional spheres, and should not lead to disproportionate restrictions being imposed on the fundamental freedoms of the personnel¹²⁶. The courts have only very rarely been given the opportunity to decide on these issues, and certainly they have not settled on a well-defined 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)?

No.

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?

Since a landmark judgment of the Court of Arbitration of 14 July 1994, non-nationals are protected, in Belgium, by Articles 10 and 11 of the Constitution which prohibit

¹²⁶ 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*) provides that the personnel of the educational institutions must comply with the obligations defined in their employment contract, which result from the specific character of the pedagogical project 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.

discrimination. Therefore any difference of treatment between Belgians and non-nationals should be reasonably and objectively justified, i.e., justified as a measure necessary for the realisation of a legitimate aim and proportionate to that aim. In principle, therefore, all the legal protections benefiting the Belgians benefit non-nationals. The exceptions concern the exercise of political rights (Article 8 al. 2 of the Constitution) and access to public service (Article 10 of the Constitution), as well as access to the national territory and right to reside on that territory; moreover, specific administrative authorisations must be obtained by the non-national who wishes to enter into a professional occupation, either in the context of a contract of employment or in the self-employment.

b) Are there exceptions in anti-discrimination law that seek to rely on Art3(2)?

No.

4.5 Family benefits

Work-related benefits include, for example, survivor's pension entitlements, free or discounted travel for certain family members, free or discounted health insurance, parenting leave to care for the child of a partner, etc.

a) How does the law treat work-related family benefits that are restricted to opposite-sex couples (whether married or unmarried)?

Any difference in treatment between same-sex couples and different-sex couples would be clearly in violation of Articles 10 and 11 of the Constitution (where that difference in treatment is made in a legislative instrument), or in violation of the Federal Law of 25 February 2003 (where such a difference in treatment is imposed, for instance, by an employer) or, where applicable, the instruments adopted by the Regions and Communities implementing Directive 2000/78/EC.

b) Is there an exception in the national law, particularly in relation to sexual orientation discrimination, for national laws on marital status and work-related benefits dependent thereon (Recital 22, Directive 2000/78)?

In Belgium, there exists since 14 December 1999 a regime of “legal cohabitation” created by the Law of 23 November 1998¹²⁷. This is an institution open to all, including in particular same-sex or different-sex couples. As to civil marriage, it has been opened to same-sex couples by the Law of 13 February 2003¹²⁸. Both the institutions of “legal cohabitation” and of “marriage” are now open to all individuals, whatever their sexual orientation. Therefore, reserving certain advantages to married couples – or, for instance, to both married couples and couples registered under a contract of “legal cohabitation” – could not be challenged as a form of indirect discrimination based on sexual orientation : because marriage is open to homosexuals, favouring marriage does not impose on homosexuals any particular disadvantage, although they may, as may heterosexuals, prefer not to marry. However, such a difference of treatment based on the civil status of persons could be challenged not only under the Federal Law of 25 February 2003 (which even in its original version – before the judgment of the Court of Arbitration of 6 October 2004 – referred to “état civil”, “burgerlijke status”, as a prohibited ground of discrimination), but also under the Flemish Decree of 8 May

¹²⁷ *Loi instaurant la cohabitation légale, Moniteur belge*, 12.1.1999). This legislation entered into force after the adoption of the Royal Decree (Arrêté royal) of 14 December 1999, *Moniteur belge*, 23.12.1999.

¹²⁸ *Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil, Moniteur belge*, 28.2.2003.

2002, the Decree adopted by the German-speaking Community, or the Decree adopted on 27 May 2004 by the Walloon Region, as all these legislations identify civil 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 discrimination¹²⁹ and therefore any difference of treatment based on the civil status should be examined for its potentially discriminatory character in the situations covered by the Decree.

c) In states where other forms of legally-recognised partnership exist (e.g. registered partnership), does the law permit restrictions on work-related family benefits that exclude such couples?

No.

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. However, it could be argued that under Article 3 of the Federal Law of 25 February 2003, which states that it is without prejudice of the obligation to respect the fundamental rights and freedoms recognized in Belgium, any restriction to the principle of equal treatment which would be justified by the need to protect the health and safety of others (the co-workers and the general public), or even of the individual concerned (as when a particular occupation would be potentially damaging for the medical condition of a person with a disability), would be justifiable. In general, 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 of workers whose physical condition makes them unsuitable for certain jobs or for work on certain premises¹³⁰. 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?

Neither the Federal Law of 25 February 2003, nor the Flemish Decree of 8 May 2002 create a special regime of justification for differences of treatment based on age, as would be authorized under Article 6 of Directive 2000/78/EC (see however this paragraph, under b), for the revision of the Law of 25 February 2003 in this regard). But the Walloon Region and the

¹²⁹ See Art. 2 § 1, 1°, of the Decree.

¹³⁰ See especially *Arrêté royal du 28 mai 2003 relatif à la surveillance de la santé des travailleurs*, *Moniteur belge*, 16.6.2003.

French-speaking Community have made use of this possibility in their implementation of Directive 2000/78/EC; in the case of the Walloon Region, the wording chosen creates a potential incompatibility with that provision of the Directive.

Article 6 of the Decree on the implementation of the principle of equal treatment of the French-speaking Community 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. The wording follows that of Article 6(1), al. 1, of Directive 2000/78/EC.

Similarly, 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 paragraph of which related to essential occupational requirements – provides for the possibility of justifying differences of 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 to the fulfilment of that objective. This creates a problem of compatibility with Articles 2(2)(a) and 6 of Directive 2000/78/EC.

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 for the fulfilment of a legitimate objective.

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. In order to prepare for the entry into force of the requirements relating to age of Directive 2000/78/EC on 2 December 2006 (Belgium has notified it intended to make use of the possibility offered by Art. 18 al. 2 of the Directive), a first compilation of such laws and regulations has been made by the competent ministerial department (Department of Employment, Labour and Social dialogue), and a request has now been made to other ministerial departments to list those laws and regulations in force which refer to age. After that list will have been completed, a screening will be made 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. Moreover, it is highly probable that the Law of 25 February 2003 will be substantially revised, with the aim not only of taking into account reports such as these or the evaluation presented by the European Commission, but also of amending the Law in order to make it workable after the adoption of the judgment of the Court of Arbitration of 6 October 2004. In the process of that revision, it may be proposed that a special clause be inserted in the law specifying the conditions under which differences of treatment based on age may be justified, as authorized under Article 6(1) of Directive 2000/78/EC.

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.

Under the European Employment Strategy, Belgium has pursued its efforts recently to promote the professional integration of the elderly and thereby improve the employment rate within the active segment of the population¹³¹. For 2010, it has set the objective of delaying of 5 years the average age of retirement, which in Belgium was at 58 years old (as compared to 61 years on the average in the EU). Therefore, since 1 July 2002, the new unemployed are obliged until 57 years of age (58 years of age since 1 July 2004) to register as job seekers, and to accept all adequate job offer. This measure seeks to combat “disguised pre-retirements”, whereby the employer compensated the worker for the difference between his/her previous salary and the unemployment benefits received by the worker laid off, a practice which accelerated the departure of the older workers from the employment market. Moreover, in all Regions (employment policy being a competence of the Regions), schemes have been set in place which facilitate a smooth transition from full-time active employment to retirement. These schemes include financial incentives to remain active part-time while perceiving a remuneration with a less-than-proportionate reduction, and “tutoring” initiatives, encouraging the older workers to transmit their knowledge to younger workers (a task for which the elderly workers may be trained), as well as “landing jobs” which encouraged older workers to remain active in the voluntary sector as well as for the training of younger workers (this latter formula being 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 after 45 years of age or after 50 years of age. In the framework of the European initiative EQUAL with the support of the European Social Fund, campaigns have also been organized 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 premium of 159 euros per month to older unemployed workers taking up an employment¹³². Moreover, the Law of 5 September 2001 has created a right of workers laid off when aged 45 years or more, to receive from their employer an “outplacement” premium, which discourages the laying off of older workers. A collective bargaining concluded at the national level within the Conseil national du travail¹³³ has defined the modalities of the exercise of this right. In order to further discourage such laying offs, employers pay reduced social contributions on workers aged 58 years or more (since 2004 : 55 years or more)¹³⁴. The recruitment of older workers is strongly rewarded, with reductions of the remuneration costs which may total 10.000 euros per year. Moreover, a Royal Decree (*Arrêté royal*) of 5 June 2002 encourages self-employment by persons aged over 50 years, by a system of aid to the creation of an undertaking.

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 the departure from the employment market. Pre-retirement is open to laid-off workers after 58 years of age (50 years when they have been laid off from undertakings considered to be in difficulty); there were 107,915 pre-retired workers in 2003. Unemployed of 58 years of age or above may not register as job seekers, and yet receive their full unemployment benefits; there were 146,417 unemployed in this situation in 2003. Moreover, seniority implies a number of advantages, in particular a higher

¹³¹ Much of the information which follows is borrowed from the Belgian National Action Plan on Employment 2003.

¹³² Arrêté royal du 11 juin 2002. This measure is in force since 1 July 2002; the level of the premium has been augmented in 2004.

¹³³ Convention collective du travail (n° 82) of 10 July 2002.

¹³⁴ This represented a gain of 1.600 euros per year per worker, which since 2004 has been augmented to 4.000 euros.

remuneration, which are a disincentive to recruit older workers and, when they are employed, to retain them, for instance in layoff procedures. Only recently have these advantages been compensated by specific incentives to recruit older workers, making their recruitment or retainment more attractive to the employer.

The 2004 National Action Plan on Employment for Belgium evaluates the results of these policies. It notes that, in 2003, the level of activity for workers aged 55-64 years was of 28,1 %, which although it constitutes an improvement since 2002, remains one of the lowest levels in the Union (EU average 40,2 %).

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment and training?

See above, para. 4.7.1. of this report, at b). An evaluation is currently being made of all the laws and regulations referring to age, in order to assess their compatibility with the requirements of the Directive. The author of this report shall be informed of its results and transmit the information when it will be available.

4.7.4 Retirement

a) What is the retirement age? Have there been recent changes in this respect or are any planned in the near future?

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

It should be stressed that this “normal” age of retirement is not necessarily the age of required retirement. In the private sector, workers may work beyond that age of normal pension, and their employer may not oblige them to retire; the employer may do so only by following the usual procedure of dismissal. If the worker does continue to work after having reached the normal age of retirement, the pension will be calculated on the basis of the most favourable years, i.e., those during which the remuneration was highest. In the public sector however, the retirement is *ex officio* and compulsory, and fixed at 65 years of age for both men and women.

Furthermore, workers may retire at any time after 60 years of age, provided they have worked for a total of 34 years. This is valid for both men and women.

b) Does national law require workers to retire at a certain age?

c) Does national law permit employers to require workers to retire because they have reached a particular age? In this respect, does the law on protection against dismissal apply to all workers irrespective of age?

For both of the above questions, please indicate whether the ages differ for women and men.

See para. above.

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) n° 10 of 8 May 1973 on collective layoffs, Collective agreement n°24 of 2 Octobre 1975 concerning the information and consultation of the representatives of workers in collective layoffs; the Royal Decree of 24 May 1976 on collective layoffs; the Law of 13 February 1998 containing provisions in favour of 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 in the interpretation of those provisions of Directive 98/59/EEC of 20 July 1998.

Age is only indirectly relevant to the selection of workers for redundancy. Indeed, the employer must notify the 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. Thus the impact of the decision on older workers will be part of the collective discussion which shall take place with the 'workers' representatives. Moreover the employer must pay a special compensation to workers affected by a redundancy decision, for a period normally of four months following the layoff. This compensation (as defined by Collective agreement n° 10 of 8 May 1973 on collective layoffs, Collective agreement n°24 of 2 Octobre 1975) is calculated as 50% of the difference between their previous remuneration and the unemployment benefits the workers laid off shall receive. In that sense, because their level of remuneration will normally on the average be higher, it will be more expensive for the employer to lay off older workers.

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 in this report, para. 4.6.

4.9 Any other exceptions

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

None.

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

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?

Do measures of positive action exist in your country? Which are the most important?

Refer, in particular, to the measures related to disability and any quotas for access of disabled persons to the labour market.

Article 4 of the Federal Law of 25 February 2003 provides that this Law does not forbid the adoption or maintenance of measures which, to ensure full equality in practice, seek to prevent or compensate certain disadvantages¹³⁵. However, as confirmed by the judgment of the Constitutional Court of 6 October 2004¹³⁶, such measures will have to conform to the relatively strict conditions imposed by the case-law of the Belgian Constitutional Court (Court of Arbitration). Positive action, when it leads to imposing differences in treatment between categories on the basis of a suspect characteristic¹³⁷, 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 Court of Arbitration has identified in a judgement n° 9/94 of 27 January 1994¹³⁸: first, such 'positive discrimination' must constitute an answer to situations of manifest inequality, i.e., it must be based on a clear demonstration that, in the absence of such action, a clear imbalance between the groups will remain; second, the legislator must have identified the need to remedy such an imbalance – in other terms, a private party may not take the initiative of introducing a scheme of positive discrimination, 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 Court of Arbitration has considered that, insofar as it is not implemented beyond the limits set forth in its judgment n° 9/94 of 27 January 1994, it should not be struck down as unconstitutional¹³⁹.

As to the Flemish Decree of 8 May 2002, one of its guiding principles – the proportionate representation of target groups in employment, achieved through action plans for diversity and annual reporting obligations – may be said to constitute a form of positive action, in the broad sense of this expression which is used in the 'Race' and Framework Directives. The Decree adopted by the German-speaking Community, in contrast with the Flemish Decree of 8 May 2002, does not provide for such affirmative measures, it does provide for the possibility of 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

¹³⁵ Since the judgement of the Court of Arbitration 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.

¹³⁶ Recital B.79.

¹³⁷ 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, e.g., 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.

¹³⁸ *Cour d'Arbitrage*, 27 January 1994, Case n° 9/94, recital B.6.2. The Council of State has aligned itself with this understanding of the constitutional limits imposed on the tool of positive action: see Opinion n° 28.197/1 on the Bill which would become 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 complementary regimes of social security.

¹³⁹ Judgment n° 157/2004 of 6 October 2004, Recital B.79.

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 in this provision 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 of 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 Court of Arbitration from Articles 10 and 11 of the Constitution, as recalled above.

Since 1963, when the Law on the social reintegration of disabled persons (*Loi relative au reclassement social des handicapés*)¹⁴⁰ was adopted, Art. 21 of which intended to impose on certain employers, both from the private and from the public sector, an obligation to employ a certain number of workers with disabilities, there has been in Belgium a tradition of imposing the recruitment of workers with disabilities under a system of quotas, both in the public sector and to a lesser extent in the private sectors. With respect to the Federal administration, Art. 25 of the Law of 22 March 1999 (*Loi portant diverses mesures en matière de fonction publique*)¹⁴¹ 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 institutions¹⁴². 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 persons with disabilities, whom moreover will be supported by an “accompanying agent” (“agent d’accompagnement”) to guide them in the accommodation of their working post and verify the accessibility of the working area. Similar measures have been adopted by the Walloon Region for the administrations and services depending of the Region (Article 10, 2nd al., of the Decree of 6 April 1995 on the integration of persons with disabilities¹⁴³), 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 they face is that of effective enforcement, in both the public and the private sectors.

¹⁴⁰ *Mon. b.*, 23.4.1963. This is a legislation adopted at the federal level before the delegation of its subject matter to the Regions and Communities, and which therefore today is only partially applied, some of its provisions, e.g., being superseded by legislation adopted in one Region but remaining valid in the others.

¹⁴¹ *Mon. b.*, 30.4.1999.

¹⁴² See Article 25 of the Law of 22 March 1999

¹⁴³ Décret (du Conseil régional wallon) du 6 avril 1995 relatif à l’intégration des personnes handicapées, *Mon. b.*, 25.5.1995; 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, *Mon. b.*, 29.1.1999.

6. REMEDIES AND ENFORCEMENT

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

What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)? Are these binding or non-binding?

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 individual victim of a 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 between two routes. He/she may seek to obtain the 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 procedure, weighs entirely on the accusation, and this route will mostly not be the most efficient for that reason. Very few criminal convictions have been pronounced on the basis of the law of 30 July 1981; whichever convictions have occurred 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 another ground 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 the civil provisions. The Law provides for the invalidity of any contractual clauses which go against its provisions, making this law imperative (Art. 18); it gives the judge the power to deliver an injunction prohibiting the continuation of the discriminatory practice, when the 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 the civil tribunals (tribunal de première instance, rechtbank van eerste aanleg), or where the employment relationship is concerned, before specialized tribunals (tribunal du travail, arbeidsrechtbank).

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 terms, 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 to discriminate, or where it appears that an employment agency systematically commits discrimination e.g.). 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).

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 three situations: a) where a person openly incites to hatred or discrimination, or to violence, on the basis of one of the suspect 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); b) where a public servant commits an act of discrimination, unless he/she was acting following the orders of a hierarchical superior (who then will be criminally liable) (Art. 6(2) of the Law of 25 February 2003); c) where certain offences defined in the Penal Code are committed with an 'abject motive', i.e., with a discriminatory intent (hate crimes) (Articles 7 to 14 of the Penal Code)¹⁴⁴. For most of these situations – and always in situations a) and b) –, a conciliation procedure is available, under a Law of 10 February 1994 which makes mediation possible for all offences punishable by an imprisonment of at a maximum of two years¹⁴⁵.

It will be noted that in certain cases, persons with limited mobility could encounter problems of accessibility of certain public buildings, especially courthouses, in the absence of a requirement in the Belgian legislation that these buildings be accessible to all.

The instruments adopted by the Regions and Communities are less developed in terms of which procedures they provide for in terms of effectively upholding the right not to be discriminated against. This is at least partly to be attributed to the uncertainties which remain about their competences to adopt such measures. Although the Regions and Communities may, when adopting Decrees¹⁴⁶, adopt ancillary penal clauses to ensure that these Decrees are effectively sanctioned, they have in principle no competence in the criminal law, which remains a federal domain – only the Federal legislator, 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 modalities under which they will exercise these competences¹⁴⁷. 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 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 the different understandings which still coexist 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 *Décret relatif à la mise en oeuvre du principe de l'égalité de traitement* on 19 May 2004, the French-

¹⁴⁴ 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.

¹⁴⁵ This law has inserted Article 216ter in the Code of Criminal Procedure (*Code d'instruction criminelle*) to create a form of *médiation pénale*.

¹⁴⁶ 'Ordonnances' for the Region of Brussels-Capital.

¹⁴⁷ For instance, Article 18 of the Flemish *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 envisaged to refer this to the Court of Arbitration (*Cour d'arbitrage*), considering that the Flemish Community may not on its own motion modify this text.

speaking Community has 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 would be sufficient. The Decree of the French-speaking Community in fact contains only one provision according to which 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 in the Belgian Federal system – for instance, to the relationship between the Community and its personnel in the field of education – making it unnecessary for the Regions and Communities to further enact certain remedies against discrimination committed within their domains of competence. It is uncertain whether the courts will adopt this view, however.

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

What are the criteria for an association to engage in judicial or other procedures?

a) in support of a complainant?

b) on behalf of one or more complainants?

The legal standing of associations in criminal procedures. It has long been realized in the field of anti-discrimination law that the combined action of the *ministère public*, with a competence to launch prosecutions where criminal offences are committed, and of the individual victim, who may not only seek damages by lodging a civil action claiming reparation, but also file a complaint in the hands of the public prosecutor or the investigating judge, may not suffice. The Law of 30 July 1981 criminalizing certain acts inspired by racism and xenophobia therefore provided – what is rather exceptional in Belgian procedural law¹⁴⁸ – that certain associations, whose social purpose is the defence of human rights and the fight against racism and discrimination, could claim having been caused a damage because of a violation of the provisions of this legislation (see Art. 5 of the Law of 30 July 1981). Such an extension of the cognisable legal interest has an important consequence: both the inertia of the *ministère public* 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, may be overcome, by such an association instituted as a private attorney general. Later, when the Centre for Equal Opportunities and the Fight against Racism was set up by the Law of 15 February 1993 as an agency which, although organically placed under the supervision of the Prime Minister's Services, nevertheless is functionally independent (see further this report, para. 6.5), it received a similar competence in the context of the Law of 30 July 1981. However, both the Centre for Equal Opportunities and the Fight against Racism and associations whose legal interest to combat discrimination is recognized 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).

¹⁴⁸ 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 social purpose defined in its internal statutes, will not suffice, if the rights of the association (to the protection of its property, its honour or reputation, i.e.) 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 *ministère public* would find it not opportune to do so *Cour de cassation*, 24 November 1982, *Pasierisic*, 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).

The legal standing of association 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 organizations. The Centre for Equal Opportunities and the Fight against Racism has now received competence 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 entity of public utility and every association which enjoys legal personality of at least five years and states as its objective the defence of human rights or the fight against discrimination, as well as representative organisations of workers and employers, may file suit on the basis of this Law, although these organisations also may only do so with the agreement of the victim, if there is an identifiable victim.

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. The organisations which pursue the objective of protecting human rights and combating discrimination may engage in judicial actions to complain about the discriminations prohibited under these instruments, although they may only do so with the consent of the victim if the discrimination has affected a legal or natural person in particular. 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 any possibility by such organisations having a legally recognized 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).

Criminal procedures. The principle of the presumption of innocence in criminal law is mostly considered to exclude the introduction in criminal procedures of rules shifting the burden of proof from the victim or the accusation 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 criminalizing 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.

Civil procedures. Article 19(3) of the Federal Law of 25 February 2003, located in the chapter containing the civil provisions, provides for the possibility of 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 authorized to bring forward certain facts – Art. 19 mentions ‘statistical data’ and ‘tests de ¹⁴⁹ situation’,¹⁵⁰ as two examples – which, when put forward before a judge, could lead the judge to presume that discrimination has occurred, thus

¹⁴⁹ Also known as ‘testing’ : the person suspect of committing discrimination is ‘put to the test’ by the presentation of fictitious candidates to a job, to renting an apartment, etc., in order to identify whether or not he/she will treat different candidates in a discriminatory fashion.

¹⁵⁰ Also known as ‘testing’ : the person suspect of committing discrimination is ‘put to the test’ by the presentation of fictitious candidates to a job, to renting an apartment, etc., in order to identify whether or not he/she will treat different candidates in a discriminatory fashion.

obliging the defendant to demonstrate that, contrary to that presumption, there has been no discrimination¹⁵¹. The conditions under which 'situation tests' must be performed and may be considered valid will be defined by a further executive regulation (Royal Decree). Although a number of consultations have taken place on the content of this executive regulation, both within the Ministry of Labour and Employment and within the Ministry of Justice, no draft text is available yet, although,¹⁵² although a proposal is announced for March 2005.

The instruments adopted by the Regions and Communities have adopted a variety of approaches. Their failure to fully implement on this question the requirements of the Directives may be attributed, again, to the hesitation concerning the classification of rules relating to the evidentiary burden: if these rules are classified as of a procedural nature, the Regions and Communities indeed are not competent; if they are classified as substantive, defining the extent of the protection from discrimination, then the Regions and Communities should act with respect to the subject matters for which they have received a competence. Thus for instance, 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 in its sphere of 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 of discrimination were already contained in 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 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 procedures¹⁵³ –, although the Decree remains vague as to which facts should count as weighing sufficiently to impose this switch of the burden of proof from the alleged victim to the defendant. There will be, therefore, a large 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 create 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 shifting the burden of proof of discrimination. This possibility is excluded with respect to criminal procedures. Like in the Flemish Decree of 8 May 2002, the facts which may lead to such a consequence are not specified.

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

¹⁵¹ 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 are discussed in O. De Schutter, *Les techniques particulières de preuve 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.

¹⁵² 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 ascertained, to ensure that they will not lead to abuse by alleged victims of discrimination, but also to encourage the judge before which the results of such tests are presented 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.

¹⁵³ See Art. 10(3) of Directive 2000/78/EC.

What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses)

Except on one relatively minor issue¹⁵⁴, Article 21 of the Law of 25 February 2003 and Article 12 of the Flemish Decree of 8 May 2002 are phrased in identical terms. It will therefore suffice to describe the regime laid down in the former provision. 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 the employee, he/she may not be dismissed unless for reasons unrelated to that complaint or that procedure. During 12 months after a complaint has been filed, or, when a legal suit has been introduced, during three months after a final decision has been adopted and the litigation thus terminated, there is a presumption that the dismissal or the unilateral modification of the employment conditions by the employer are a form of reprisal against the employee: indeed, the burden is on the employer to prove that the dismissal or the modification of the 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 reintegration of the employee into his previous position, or the restoration of the conditions under which he/she was previously employed. A refusal of the employer to reintegrate into the workforce the employee whose dismissal appears to have been motivated by a desire to sanction the complaint or the legal action filed by the victim, may be very costly to the employer, who may be obliged to compensate the employee either according to the prejudice effectively caused, or by paying the equivalent of six months' remuneration.

Article 9 of Directive 2000/43/EC¹⁵⁵ should be read as imposing 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 a protection beyond the individual complainant. This remark also applies to 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 witnesses¹⁵⁶.

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 with 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 the conditions of employment) (see Article 23 of the draft proposal : *Schutz vor einer Entlassung*). That provision was removed from the proposed Decree, in the version submitted to the discussion of the Council of the German-speaking Community on 26 April 2004, following an observation by the Council of State, made in the opinion it delivered on 11 February 2004 on the initial proposal for a Decree that legislating on this question –

¹⁵⁴ Comp. 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 reintegrated in his/her previous function or receive a compensation worth 6 months' salary where the competent jurisdiction has found that discrimination has occurred.

¹⁵⁵ Article 11 of Directive 2000/78/EC is drawn in narrower terms (referring to 'employees' instead of 'persons' having to be protected from reprisals).

¹⁵⁶ Indeed, see Article 12(1) of the Flemish Decree.

conditions of dismissal – may go beyond the powers of the German-speaking Community¹⁵⁷. 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 fulfilment of their obligations under EC Law.

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

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.

Are there any ceilings on the maximum amount of compensation that can be awarded?

Is there any information available concerning 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?

Certain discriminatory acts constituting a discrimination 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 application of Directive 2000/43/CE, may lead to criminal sanctions under the Law of 30 July 1981 criminalizing certain acts inspired by racism and xenophobia. The offences committed under the Law of 30 July 1981 which fall under the scope of application of Directive 2000/43/EC (racial discrimination in the provision of goods or services and in employment as specified above) may lead to sanctions of imprisonment (one month to a year) or to fines (the equivalent of 50 to 1.000 euros), or to both sanctions combined. Moreover the victim will have the possibility to claim 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, in many cases purely symbolic.

The Federal Law of 25 February 2003 which 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, provides for sanctions, both criminal and civil, which can be summarized thus¹⁵⁸ :

	Prohibition to discriminate	Sanction
Criminal	Discrimination by public servant/officer in the exercise of his/her functions	Imprisonment from 2 months to 2 years (10 to 15 years if discrimination committed by forging the signature of a public officer) (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	• contractual clause incompatible with the prohibition may be

¹⁵⁷ See Opinion L. 36.415/2 delivered by the administration section of the Council of State on 11 February 2004.

¹⁵⁸ 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.

	harassment	voided (Art. 18 of the Law of 25.2.2003) ¹⁵⁹ • 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 imposed fines (astreintes) in case of non-compliance with the judicial order (Art. 20)
Civil	Victimisation	Where a dismissal is proven to be a form of reprisal, the employer may have to reintegrate the employee at his/her previous position, and back pay is due (Art. 21(3) of the Law of 25.2.2003); damages otherwise may be sought, presumed to be equivalent to 6 months' remuneration

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

For the same reasons as those mentioned previously in the context of the rules relating to the burden of proof (this report, para. 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 which 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 given penal sanctions (Article 14). It also provides that in civil proceedings alleging a discrimination, 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 discrimination may be sentenced to a prison term from one month to one year or/and to a fine; in contrast to what is provided by the Walloon Decree, the imposition of a criminal sanction is not limited to instances of intentional discrimination, but rather it covers, like in the Federal Law of 25 February 2003, all forms of prohibited discrimination, even indirect and therefore possibly unintentional). Also it provides that the competent jurisdiction may impose an order that the discrimination ceases (Article 15). The reporting obligations under the Flemish Decree on proportionate participation in the labour market are part of the general reporting obligations of the entities to whom the Decree is addressed.

¹⁵⁹ See further this report, at para. 8.2.

7. SPECIALISED BODIES

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

Does a ‘specialised body’ or ‘bodies’ exist for the promotion of equal treatment irrespective of racial or ethnic origin? 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.

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.

Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?

Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?

Is the work undertaken independently?

The Centre for Equal Opportunities and the Fight against 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*)¹⁶⁰ was created by an Act of Parliament of 15 February 1993¹⁶¹, modified most recently by the Law of 25 February 2003 in order to give the Centre a role in the supervision of 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 February 2003 (Art. 23, 24¹⁶² and 31 Law of 25 February 2003). The Centre was established as an autonomous public service, in response to proposals by the Royal Commissioner for Immigration Policy and the emergence of extremist movements in Belgium. It is organically attached directly 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 never did he receive the impression that this independency 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 tools it may use in order to fulfil them. These provisions state that the Centre's objective to promote equal opportunities is fulfilled through the preparation of studies and reports, addressing recommendations, aid any person seeking advice pertaining to the extent of his or her rights and obligations, take legal action, collect and analyze statistics and case-law relating to the application of the law of 30 July 1981 and the law of 25 February 2003, and obtain information so as to ask the competent authority, when the Centre provides facts that point to presumed discrimination, pursuant to the Laws of 30 July 1981 and 25 February 2003, and to apprise the Centre of the results of the analysis of the facts in question.

This report has already mentioned (para. 6.2), the Federal Law of 25 February 2003, seeking its inspiration from the Law of 30 July 1981 on Racism and Xenophobia, gives to the Centre for Equal Opportunities and the Fight against Racism the power to file suit on the basis of the provisions of the legislation, and thus to contribute to the preservation of legality in the name of the public interest. Where the alleged violation has an identifiable victim (who can be a

¹⁶⁰ This is the literal translation of the French, Flemish and German official denominations 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

¹⁶¹ *Moniteur belge*, 19.2.1993. The Act of 15 February 1993 is available, in English translation, from the website of the Centre.

¹⁶² These provisions modify Articles 2 and 3 of the Law of 15 February 1993 instituting 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, ascendancy, ethnic or national origin, to discrimination based on the other grounds listed now in the Law of 25 February 2003; and 2°) to recognize to the Centre a right to file actions based on this latter legislation.

natural or legal person)¹⁶³, the power of the Centre to file suit remains however 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 Framework Directive 2000/78/EC.

In the 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 a friendly settlement with the alleged discriminator. Because the discriminator may fear the bad publicity a suit against him for alleged discrimination would result in, he may be tempted to accept this, even in situations where it may be difficult to prove that discrimination has occurred. Where such a friendly 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 to this, the Centre will go ahead, as the Law authorises the Centre to do. Not only the Centre for Equal Opportunities and the Fight against Racism has this competence, but also other organisations whose social aims are the fight against discrimination or the protection of human rights, and trade unions (see hereunder, para. 6.2 of this report).

The Centre for Equal Opportunities and the Fight against Racism (on which see para. 6.5 of this report) has been particularly efficient in the advice and legal assistance it provides to victims of discrimination. Particularly noteworthy are its practice of seeking to mediate between the victim and the alleged perpetrator of the discrimination, a practice in which the Centre, albeit in a discrete fashion, has developed an important expertise¹⁶⁴, and the setting up of decentralized anti-discrimination centres. Through these centres, set up in 18 towns and cities throughout Belgium, day-to-day discriminatory practices can be combated in close consultation with local and provincial authorities and with the local integration centres, associations, neighbourhood committees, etc.

The Centre for Equal Opportunities and the Fight Against 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, on the one hand, the executive of the relevant Region or Community, on the other hand. The Centre for Equal Opportunities and the Fight against Racism should be competent to contribute to the enforcement of the Decree of 8 May 2002 under the same mechanisms as those available at the Federal level¹⁶⁵. 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 preparation of reports and recommendations. A protocol should be concluded in order to assign this mission to the Centre for Equal Opportunities and the Fight against Racism existing at the federal level.

¹⁶³ In some cases, there will 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' procedures he has introduced in the recruitment process, 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 obtain that a prosecution is launched.

¹⁶⁴ See Annex A to the latest report of activities of the Centre for Equal Opportunities and the Fight against Racism (Report 2004, *Vers l'élargissement (Towards Enlargement)*), available from www.antiracisme.be

¹⁶⁵ 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.

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, neither 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 seem to be complied with in the absence of any provision regarding the possibility for certain qualified 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 in 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 *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 supervision 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 on the basis of its evaluations –, 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 the surveillance of 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.

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.

Racial discrimination. The Centre for Equal Opportunities and Fight against Racism is competent to deal with complaints for racial discrimination under either the Law of 30 July 1981 or, since it entered into force on 27 March 2003, the Law of 25 February 2003. The last date available concern the year 2003, and are presented in the 2004 Report of the Centre, para. 2.2.2. These data which concern only racial discrimination show in particular that 17% of the requests made to the Centre, many of which were considered to be complaints in the formal sense requiring an intervention, concern employment, which therefore constitutes the sphere in which allegations of racial discrimination are most frequent. It will also be noted that 1/10 of the files related to the behaviour of public authorities.

The methods according to which the complaints are dealt with by the Centre are also described in the 2004 Report of activities, 2.2.5 As already emphasized, mediation (the search for an amicable solution) plays an important role. It was resorted to in 24% of complaints for alleged racial discrimination. In 51% of the complaints, the Centre delivered an opinion, stating its view as to whether there was a violation of the law. In 5% of the cases, suit was filed with the competent tribunal (representing a total of 45 files, including 14 in which the Centre was a party to the proceedings as a civil party under the Law of 30 July 1981 : see para. 3.1. of the annual report 2004). A focus exclusively on judicial procedures would therefore offer a very distorted picture of the reality of the activities of the Centre with regard to complaints for racial discrimination.

Non-racial discrimination. The Law of 25 February 2003 extending the competences of the Centre for Equal Opportunities and the Fight against Racism entered in force on 27 March 2003. Although a team was constituted immediately within the Centre to deal with complaints for non-racial discrimination, the reorganisation of the Centre was effective only in September 2003. The “racial discrimination” and “non-racial discrimination” services are now separate entities, with 9 persons working in the latter service. The files opened for alleged

non-racial discriminations during the year 2003 concerned disability (30,5 %), health (19,1 %), sexual orientation (13,1%), age (7,5 %) and religious or philosophical conviction (6,0%).

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)

For the moment, little has been done on this field. The Department (Federale Overheidsdienst / Service public federal) of Employment, Labour and Social Dialogue however plans a conference in March 2005 including the public authorities, the unions, and non-governmental organisations, the objective of which will be to examine the efforts which have been made in order to implement the directives and the results which have been achieved. During the Spring of 2005, training should also be organized for magistrates by the competent service, the Superior Judicial Council (Conseil supérieur de la justice : Hoge Raad van Justitie). These initiatives all should contribute to the dissemination of information to all relevant stakeholders.

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?

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 void however does not extend to collective agreements, nor, for instance, to the internal rules adopted within undertakings. The Law of 25 February 2003 in that respect chose a narrower protection than that of the Law of 7 May 1999 on equal treatment between men and women in working conditions, access to employment and to possibilities of promotion, access to self-employment and complementary regimes of social security¹⁶⁶, Art. 18 of which 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. If and when the Law of 25 February 2003 will be amended, it would be advisable, taking into account Art. 16, b), of Directive 2000/78/EC and Article 14, b), of Directive 2000/43/EC, that Article 18 of the Law of 25 February 2003 be thus extended.

It is not possible to identify on a systematic basis which laws, regulations or rules still in force might conflict with the principle of equal treatment. First, there are too many texts which would have to be screened to that effect, especially if we include rules internal to

¹⁶⁶ *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 régimes complémentaires de sécurité sociale, Moniteur belge, 19.6.1999.*

undertakings, for which a 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 delicate to perform. Only the most overtly discriminatory legislations or regulations could be identified by such a screening.

9. OVERVIEW

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.

It might be added that the present state of the Belgian implementation of the Directives is still in a state of flux. The judgment delivered by the Court of Arbitration (Constitutional Court) on 6 October 2004 is largely inapplicable : it contains a number of contradictions which make it difficult to interpret, and thus to implement without further legislative amendments; it results in giving a much too broad scope of application to the prohibition of discrimination in the Law of 25 February 2003 ; finally, it would seem to have to apply beyond the Law of 25 February 2003 itself, to the Decrees adopted by the Regions and Communities which contain a limited list of prohibited grounds of discrimination, not including in that list language or political opinion. Therefore a large consultation is taking place between the Federal, Regional and Community level since a few months, under the coordination of the Federal Minister of Equal Opportunities Mr Dupont, in order to a) clarify the questions relating to the division of competences in the implementation of the EU Equal Treatment Directives, for which an opinion has been requested from a number of constitutional law specialists; and b) identify which further initiatives should be taken in order to ensure the full and adequate implementation of the Directives in a better coordinated fashion. This consultation is now arriving at its final stages and proposals should be made within the next few months, perhaps immediately after the Summer.

10. COORDINATION AT NATIONAL LEVEL

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

The Department of Employment, Labour and Social dialogue (Service public fédéral Emploi, Travail et Concertation sociale) has been designated as having to coordinate the implementation of the Directives in Belgium. A number of meetings have been organized, on an average on a biannual basis since 2002, in order to ensure that all the actors – including representatives of the Regions and Communities – act in a coordinated fashion.

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 31.12.2004

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/Criminal Law	Material Scope	Principal content
Law of 30 July 1981 criminalizing 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 modifications)	'Race', colour, descent, ethnic and national origin	Criminal	Public and private employment, access to goods or services	prohibition of direct and indirect discrimination, incl. 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 or 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; the mention in an official document; the distribution, publication or exposition to the public of a text, an opinion, a sign or any other support including a discrimination; 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) intermediates on the labour market; 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 1° public servants of the administration of the French-speaking Community, 2° the personnel of certain public interest organs depending of the Community, 3° all levels of education in the French-speaking Community, and 4° with respect to 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 aids for the promotion of employment, and vocational training, in both the public and the	Prohibition of direct and indirect discrimination in

				private sectors	
German-speaking Community: Decree of 17 May 2004 on the guarantee of equal treatment on the labor market (Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt)	23.8.2004	All grounds	Civil and criminal	Vocational guidance, professional counseling, vocational training and retraining, applies to the administration of the German-speaking Community, to the personnel of the educational system of the Community, to the employment intermediaries, to employers with respect to the provision to persons with disabilities of the reasonable accommodation	Prohibition of direct and indirect discrimination
Region of Brussels-Capital : Ordonnance of 26 June 2003 (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 the intermediaries on the labour market

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country BELGIUM

Date 31.12.2004

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non-discrimination	Right 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	?	yes
Protocol 12, ECHR	yes	no		?	
Revised European Social Charter	yes	yes 2.3.2004		Protocol on collective complaints ratified 23.6.2003	
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	?	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