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Country report

Non-discrimination

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

Belgium

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collaboration of Hania Ouhnaoui)

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LIST OF ABBREVIATIONS

BCSO: Framework Ordinance of 25 April 2019 to ensure a diversity policy and to combat discrimination in the local Brussels civil service (Brussels Capital Region)

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

BETO: Ordinance of 5 October 2017 aiming to combat discrimination and promote equal treatment in the Region of Brussels-Capital (Brussels Capital Region)

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

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

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

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

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

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

GED: Decree of 19 March 2012 aiming at fighting certain forms of discrimination (German-speaking Community)

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

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

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

EXECUTIVE SUMMARY

1. Introduction

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

The Belgian state system is divided into three levels: the federal state, the regions and communities. This federal structure has been, and still is, a complicating factor in the implementation of anti-discrimination law, because of the uncertainties concerning the division of competences between the different parts. The sociological and political context is also different in each part of the country. While the French-speaking part of the country (the French Community, Walloon Region and, to a large extent, the Brussels Capital Region) has traditionally chosen a more formal and individual model of combating discrimination close to the French model, the Dutch-speaking part (Flemish Region and Community) has been more willing to promote equal treatment through statistical monitoring and to allow for affirmative action schemes. The stakes are also higher in the Flemish Region and Community, because of some significance in that part of the country of the Vlaams Belang (VB), a far-right, populist nationalistic political party, with recurrent xenophobic tendencies, especially regarding the integration of the Muslim community in Belgian society. Its representation allows this party to influence the debates on issues such as the integration of migrants or the wearing of headscarves by Muslim women in schools or in employment. A study by iVox shows that, in recent years, voters have moved between Vlaams Belang and the Nieuw-Vlaamse Alliantie (N-VA), a right-wing party with very harsh views on policies such as immigration.³ During the federal, regional and European elections of 26 May 2019, these parties gained momentum. N-VA remains the biggest party, and the far-right party Vlaams Belang came in second place. Almost one Flemish voter out of two voted for a nationalist and/or far-right party. On the other hand, the Belgium far-left party (Parti du Travail de Belgique/Partij Van de Arbeid – PTB/PVDA) also gained popularity. They went from 2 to 12 representatives in the chamber, mainly from Wallonia. The bipolarisation between an increasingly right-wing Flanders and an increasingly left-wing Wallonia makes it difficult to form a federal Government. This has led to another major political crisis: between 18 December 2018 and 1 October 2020, the federal Government was at first a caretaker Government and then a kind of 'interim' Government with powers to handle the COVID-19 pandemic (17 March 2020 – 1 October 2020). Since

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

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

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

October 2020, there has been a new federal Government in place. It is led by Alexandre De Croo (Flemish liberal) and is based on a very large coalition of seven political parties (the N-VA, which was the first party in the 2019 elections, is not part of the coalition Government).

2. Main legislation

Belgium is party to most of the important international agreements relevant to counteracting discrimination. However, it has not yet ratified Protocol no. 12 to the European Convention on Human Rights and the Council of Europe Framework Convention for the Protection of National Minorities. Articles 10 and 11 of the Constitution, which prohibit discrimination, are applicable generally, without any restriction either as to the grounds on which the discrimination is based (they require that the principle of equality be respected in relation to all grounds) or as to the situations concerned (they apply to all contexts, going beyond not only employment and occupation, but also the scope of the Racial Equality Directive). These constitutional provisions have been most effective when invoked against either legislative norms or administrative acts.

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

In addition to the federal legislature, the regions and communities have also taken action in their respective fields of competence. In July 2008, the Flemish Community/Region adopted a piece of legislation establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy,⁹ which tackles the same grounds as those covered at the federal level. Its scope relates to employment policy, health care, education, goods and services available to the public (i.e. housing, energy, cultural services), social advantages, and economic, social, cultural and political activities outside the private sphere. This piece of legislation comprises two main parts: (1) the design of a general framework for the implementation of a proactive and preventive policy on equal opportunities; (2) specific provisions against discrimination based on a closed list of grounds very similar to those prohibited at the federal level.

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

⁵ Please note that nationality is meant here as nationality and not citizenship.

⁶ OJ (*Moniteur belge*), 30 May 2007; last modified on 17 August 2013, *Moniteur belge*, 5 March 2014.

⁷ OJ (*Moniteur belge*), 30 May 2007; last modified on 22 May 2014, *Moniteur belge*, 24 July 2014.

⁸ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation* www.unia.be/en.

⁹ Flemish Community/Region, Framework Decree for the Flemish equal opportunities and equal treatment policy, 10 July 2008, OJ (*Moniteur belge*), 23 September 2008; last modified on 28 March 2014, *Moniteur belge*, 1 April 2014.

In December 2008, the French Community (previously called the French-speaking Community) adopted a Decree on the fight against certain forms of discrimination,¹⁰ which tackles the same grounds as those covered at the federal level. It applies to the selection, promotion, working conditions, including dismissals and pay in the public service of the French Community, education and vocational training, health policy, social advantages, membership of and involvement in any professional organisation funded by the French Community, and access to goods and services available to the public.

In November 2008, the Walloon Region adopted a Decree on the fight against certain forms of discrimination, including discrimination between women and men in the fields of economy, employment and vocational training.¹¹ It tackles the same grounds as those covered at the federal level and applies, more precisely, to vocational guidance, socio-professional integration, placing of workers, funding for the promotion of employment, funding for employment and financial incentives to companies in the framework of the economic policy, including social economy and vocational training, in the public and the private sectors. To fill the gaps remaining in its material scope of application, this decree was amended on 19 March 2009 to cover, within the scope of powers of the Walloon Region, social protection (including healthcare and social advantages), supply of goods and services that are available to the public and outside the private and family sphere (including housing), access, participation or any exercise of an economic, cultural or political activity open to the public, as well as employment relationships (under civil status) in departments of the Walloon Government, public authorities depending on the Walloon Region, decentralised bodies (such as provinces, municipalities, etc.) or public centres for social assistance.

In September 2008, the Brussels Capital Region adopted two ordinances to combat discrimination. The first is the Ordinance on the fight against discrimination and equal treatment in the employment field.¹² It tackles the same grounds as those covered at the federal level and chiefly applies to placing of workers and advertising of employment. It is worth noting that this ordinance provides for public allowances and labels for business, implementing diversity plans. The second is the Ordinance on the promotion of diversity and the fight against discrimination in the civil service of the Brussels Capital Region, which was replaced in 2019 by a new framework Ordinance to ensure a diversity policy and to combat discrimination in the local Brussels civil service.¹³ It applies to the employment field in the civil service of the Brussels Capital Region and covers access conditions, selection criteria, promotion and working conditions, including dismissals and pay. By encouraging public institutions to adopt diversity plans, this second ordinance also puts in place a broad policy of equal treatment. As to the fight against discrimination in housing, several ordinances modifying the Brussels Housing Code were also adopted.¹⁴ Finally, on 5 October 2017, the Brussels Capital Region completed its anti-discrimination legal framework by adopting an ordinance aiming to combat discrimination and promote equality, which covers the missing material fields (goods and services, social protection and advantages, access to economic, cultural and social activities, trade union affiliation, and official documents).¹⁵

¹⁰ French Community, Decree on the fight against certain forms of discrimination, 12 December 2008, OJ (*Moniteur belge*), 13 January 2009; last modified on 13 November 2015, OJ (*Moniteur belge*), 8 December 2015.

¹¹ Walloon Region, Decree on the fight against certain forms of discrimination, 6 November 2008, OJ (*Moniteur belge*), 19 December 2008; last modified on 12 January 2012, *Moniteur belge*, 23 January 2012.

¹² OJ (*Moniteur belge*), 16 September 2008, lastly modified on 16 November 2017, OJ (*Moniteur belge*), 21 November 2017.

¹³ OJ (*Moniteur belge*), 16 September 2008, replaced by the Framework Ordinance of 25 April 2019 to ensure a diversity policy and to combat discrimination in the local Brussels civil service, OJ (*Moniteur belge*), 24 May 2019.

¹⁴ Brussels Housing Code, 17 July 2003, lastly modified on 21 December 2018, OJ (*Moniteur belge*), 31 January 2019.

¹⁵ OJ (*Moniteur belge*), 19 October 2017.

On 19 March 2012, the German-speaking Community adopted a new Decree on fighting certain forms of discrimination,¹⁶ which lays down a general framework for combating discrimination within the competence of the German-speaking Community. It is designed to implement anti-discrimination EU law in the following fields: 1) labour relations in the public bodies created or funded by the German-speaking Community, education institutions and the civil service and governmental institutions; 2) education; 3) employment; 4) social advantages; 5) cultural matters; 6) person-related¹⁷ matters; and 7) access to, and supply of, goods and services available to the public. This piece of legislation is very similar to the Federal Anti-Discrimination Acts and covers the same grounds.

The French Community Commission of the Brussels Capital Region (Cocof) adopted the Decree on equal treatment between persons in vocational training on 22 March 2007,¹⁸ which is based on an open list of prohibited criteria. It was amended on 5 July 2012 to include a provision on protection from victimisation. In addition, the Cocof adopted a second Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment on 9 July 2010.¹⁹ The purpose of this legal instrument is to lay down a general and harmonised framework for combating certain forms of discrimination and for promoting equal treatment in the fields of competence of the Cocof, more precisely: school transport and school building management; municipal, provincial, inter-municipal and private facilities with regard to physical education, sports and outdoor life; tourism; social advancement; health policy; assistance for people;²⁰ access to goods and services; access to, participation in and any other exercise of economic, social, cultural or political activities publicly available; and labour relations within public institutions of the Cocof. This piece of legislation is based on a list of prohibited criteria in line with the Federal Anti-Discrimination Acts. It also aims to promote diversity to the extent that each public institution of the Cocof is required to develop a diversity action plan.

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

3. Main principles and definitions

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

The General Anti-Discrimination Federal Act and the Racial Equality Federal Act provide for the possibility of justifying certain differences in treatment directly based on one of the

¹⁶ OJ (*Moniteur belge*), 5 June 2012, lastly modified on 22 February 2016, OJ (*Moniteur belge*), 14 April 2016.

¹⁷ This is a specific Belgian concept, '*matières personnalisables*', which means personal services or policy, such as services for the elderly.

¹⁸ OJ (*Moniteur belge*), 24 January 2008; lastly modified on 5 July 2012, OJ (*Moniteur belge*), 10 September 2012.

¹⁹ OJ (*Moniteur belge*), 3 September 2010.

²⁰ This covers social assistance, integration of migrants, and policies on disabled or older persons.

protected grounds where genuine and determining occupational requirements are concerned, in employment and occupation. The definition of genuine and determining occupational requirements corresponds to that offered in Directive 2000/43/EC and Directive 2000/78/EC. No exhaustive list of such requirements is required and it is left to the judge to decide, on a case-by-case basis, whether the conditions are satisfied in order for the exception to apply. However, the King (i.e. the Government) is authorised to adopt a royal decree providing a list of examples in order to offer guidance to courts.

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

No specific rules exist in relation to multiple discrimination. The Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts suggests in its first 2017 report that multiple discrimination should be included in the legal framework, which should provide appropriate sanctions.²¹

4. Material scope

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

5. Enforcing the law

The General Anti-Discrimination Federal Act and the Racial Equality Federal Act provide for civil and criminal procedural protection of victims of discrimination that is nearly identical with respect to all the prohibited criteria. Alongside one of the guiding principles of the reform that there should be no hierarchy between grounds, only some criminal offences were finally maintained in the Racial Equality Federal Act (discrimination in the provision of goods or a service or in access to employment, vocational training or in the course of a dismissal procedure) and are therefore specific to discrimination based on race and ethnic origin. Victims of discrimination, under the Racial Equality Federal Act and the General Anti-Discrimination Federal Act, may 1) seek a finding that discriminatory provisions in a contract are null and void; 2) seek reparation (damages) according to the usual principles of civil liability (however, the victim may opt for a payment of the lump sums defined in

²¹ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation*, para 151 www.unia.be/en.

the act rather than for damages calculated on the basis of the 'effective' damage); 3) seek from the judge an injunction imposing immediate cessation of the discriminatory practice, under the threat of financial penalties; 4) seek from the judge publication of the judgment finding a discrimination, by the posting of the judicial decision on the premises where the discrimination occurred, or by the publication of the judicial decision in newspapers. These actions are brought before civil courts, or where an employment relationship is concerned, before specialised labour courts. Those sanctions are generally held to be effective, proportionate and dissuasive in the meaning of EU law. However, in its first 2017 report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts, raises several questions as to the dissuasive impact of the sanctions and stresses that this would need further consideration in order to truly assess the effective, proportionate and dissuasive character of the sanctions.²²

The General Anti-Discrimination Federal Act and the Racial Equality Federal Act provide for the legal standing of Unia (known, until 2016, as the Inter-federal Centre for Equal Opportunities), of organisations with a legal interest in the protection of human rights or in combating discrimination, established for at least three years, and of trade unions, to file a suit (civil or criminal) on the basis of the anti-discrimination legislation. However, where the victim of the alleged discrimination is an identifiable (natural or legal) person, their action will only be admissible if they prove that the victim has agreed to their action being filed.

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

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

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

As regards Roma, a 'National Strategy for Roma Integration', adopted in 2012, establishes Belgium's issues and objectives for Roma integration by 2020,²³ and provides for coordination between the federal state, the regions and the communities under the Roma task force, so that every authority can freely take measures according to their areas of responsibility. The Roma task force meets at least twice a year and is the national contact point for the European Commission. However, as highlighted by the Commissioner for

²² Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation*, para 341 www.unia.be/en.

²³ Unia called for an evaluation of this strategy in its 2019 memorandum drafted in view of the federal, regional and European elections of 26 May 2019; Unia (2019) *S'engager pour les droits humains 61 propositions d'Unia pour les élections 2019* (Commit to human rights : 61 proposals for the 2019 elections), pp. 9-10, available at: https://www.unia.be/files/Documenten/Publicaties_docs/Memorandum_pour_les_%C3%A9lections_2019.pdf.

Human Rights of the Council of Europe following his visit in Belgium in September 2015,²⁴ the situation of Roma and Travellers in Belgium regarding housing and education is still worrying. In May 2016, a Belgian National Roma Platform was set up in order to trigger dialogue with all stakeholders and Roma communities in Belgium on the topics of employment, housing and education. Recommendations aimed at political decision-makers were drafted in order to better assess the national strategy for Roma integration. A recent survey conducted by the European Union Agency For Fundamental Rights (FRA) indicates that the living conditions and access to fundamental rights of Roma and Travellers in Belgium remain difficult, especially regarding to housing, education and employment.²⁵ In its March 2020 report, the UN Committee on Economic, Social and Cultural Rights recommended that Belgium should 'ensure effective implementation of the national strategy for the integration of Roma people, through the adoption of an inter-federal action plan including specific measures for Roma women and children and receiving a specific and adequate budget'.²⁶

The UN Committee on the Rights of Persons with Disabilities (CRPD), in its first 2014 report on Belgium, highlighted the absence of a national plan with clear targets and the fact that accessibility is not a priority. The federal Government, in place since 1 October 2020, is committed to launching an action plan on universal accessibility to ensure the structural accessibility of public areas and services.²⁷

6. Equality bodies

Unia²⁸ (formerly the Centre for Equal Opportunities and Opposition to Racism, renamed the Inter-federal Centre for Equal Opportunities in 2014, and Unia in 2016) was initially created in 1993. In 2007, it was given a role in the supervision of all the grounds covered by the Racial Equality Federal Act and the General Anti-Discrimination Act: alleged race, colour, descent, national or ethnic origin, nationality, age, sexual orientation, civil status, birth, property ('fortune', in French), religious or philosophical belief, actual or future state of health, disability, physical or genetic features, political opinion, trade union opinion and social origin (not language). The Institute for Equality of Women and Men is in charge of supervising the grounds covered by the Gender Equality Federal Act: sex/gender and 'related grounds' (i.e. pregnancy, childbirth, maternity, gender reassignment, gender identity and gender expression). In March 2014, Unia became an inter-federal agency, entrusted with the monitoring and implementation of the anti-discrimination law adopted by the regions and the communities. Henceforth, in the event of potential infringement of any of the federal or regional anti-discrimination laws, citizens are able to contact either Unia's main office in Brussels, or the contact points in Flanders and Wallonia.

However, on 30 September 2019, the newly formed Flemish Government announced that it intended to drop out of Unia; Bart de Wever, the chairman of the N-VA, said that the Flemish Government would set up its own equality body. Unia fears that the creation of a Flemish equality body will lead to a lack of clarity and confuse citizens about the role and competence of the various institutions competent to fight against discrimination. Moreover, the Flemish Government is currently responsible for 10 % of the financial resources of Unia and this loss of income will have serious consequences for the running of the centre. Nevertheless, the cooperation agreement, which binds Unia and the Flemish Government,

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

²⁵ European Union Agency For Fundamental Rights (FRA) (2020), 'Roma and Travellers in Belgium - Key results from the Roma and Travellers survey 2019', https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-roma-and-travellers-survey-country-sheet-belgium_fr.pdf.

²⁶ UN Committee on Economic, Social and Cultural Rights (2020) *Concluding observations on the fifth periodic report of Belgium*, E/C.12/BEL/CO/5, 26 March 2020, paragraphs 20-21.

²⁷ Federal Governmental Agreement, 30 September 2020, available (in French): https://www.sfpd.fgov.be/files/1989/accorddegouvernement2020_decroo1.pdf.

²⁸ Unia has chosen to use the abbreviation 'the Centre' to refer to itself, and as such, is referred to as both Unia and the Centre throughout this report (see: www.unia.be/en/).

remains valid until March 2023 and no legal step has been taken at this stage.²⁹ In 2020, no official steps were taken and the question of which model of equality body should be adopted by the Flemish Region does not seem to be settled yet. Unia is in regular contact with the Flemish Minister for Equal Opportunities. However, the renewal of the board of directors of Unia was tricky due to an institutional blockage in the Flemish Parliament. Unia refused to allow a member of Vlaams Belang (a far-right party, which had already introduced bills to abolish Unia altogether) to sit on its board of directors. In the end, it was decided that the former members of the board of directors appointed by the Flemish Parliament should continue to sit to ensure the continuity of the public service. This might weaken the authority of Unia in the Flemish part of the country.³⁰

Unia issues reports, surveys and recommendations within its mandate. It also assists victims of discrimination, and it may file judicial actions, but it is not a quasi-judicial body. In 2019, Unia received 8 478 complaints, opened 2 343 files and launched 18 judicial actions.³¹ The low number of cases relative to the number of opened files is partly due to the capacity of Unia to reach an amicable settlement through mediation. Unia has been established as an autonomous public service. Although placed under the supervision of the federal and regional Parliaments, its independence is guaranteed by legislation and, in practice, it fulfils its mandate in an independent fashion.

7. Key issues

Over the last few years, politicians of the Dutch-speaking nationalist Flemish party (N-VA) have made several statements with racist connotations.³² There is great political concern about this issue, as the N-VA is the biggest party in the Flemish part of Belgium, is part of the Flemish Government and was part of the former federal Government.

In 2017 and 2018, there have been key legal and jurisprudential developments regarding inclusive education in the mandatory school system. In 2014, the UN CRPD expressed its concern about the 'poor accessibility for persons with disabilities, the absence of a national plan with clear targets and the fact that accessibility is not a priority' and the fact that little has been done since then is a cause for concern.³³ The committee noted 'the low number of persons with disabilities in regular employment' and 'the Government's failure to reach targets for the employment of persons with disabilities within its own agencies, as well as the lack of a quota in the private sector'.³⁴ In 2020, the UN Committee of Social Rights decided the case *International Federation of Human Rights Leagues (FIDH) and Inclusion Europe v. Belgium* and unanimously found that there was a violation of Articles 15 and 17

²⁹ <https://www.unia.be/fr/articles/unia-reagit-a-la-decision-de-la-flandre-darreter-leur-cooperation>.

³⁰ Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

³¹ Unia (2020) *Annual statistics report 2019 (Contributing to a more equal society for all)*, available on its website, www.unia.be. Figures for 2020 were not available when this report was submitted (8 March 2021).

³² See for instance: *Het Nieuwsblad* (2018), 'Weer twee N-VA'ers in opspraak door racisme' (*Again two members of the N-VA denounced for racism*), 12 September 2018; Interview with Liesbeth Homans and Mieke Van Hecke, conducted by *De Standaard*, 6 October 2018, in which Liesbeth Homans (prominent N-VA member and Flemish Minister) affirmed: 'Not every Muslim is a terrorist, but every terrorist is a Muslim'; or when then Minister for Home Affairs Jan Jambon said 'a significant part of the Muslim Community danced after the terrorist attacks' (of 22 March 2016 in Brussels): <https://www.demorgen.be/nieuws/jan-jambon-ik-heb-geen-uitspraak-over-dansende-moslims-gedaan~b3f627a4/>. See also the links between the N-VA and the youth group Schild & Vrienden (Shield and Friends) made public in the documentary *Pano* broadcast on the Flemish television in September 2018. The documentary revealed their racist, sexist, anti-Muslim, anti-Semitic, anti-gay agenda: <https://www.vrt.be/vrtnws/nl/2018/09/05/pano-wie-is-schild-vrienden-echt/>. See also how the Minister-President of Flanders, Jan Jambon (N-VA) endorses the misleading allegations that a refugee family can afford a house with just the family allowances they receive (on 30 December 2019): https://www.rtb.be/info/article/detail_racisme-ordinaire-a-la-n-va-philippe-walkowiak?id=10397546.

³³ UN Committee on the Rights of Persons with Disabilities (UNCPRD) (2014), Concluding Observations on the initial report of Belgium adopted by the Committee at its 12th session (15 September – 3 October 2014), paras. 21 – 22.

³⁴ UN Committee on the Rights of Persons with Disabilities (UNCPRD) (2014), Concluding Observations on the initial report of Belgium adopted by the Committee at its 12th session (15 September – 3 October 2014), paras. 38 – 39.

of the Revised European Social Charter because of the Belgian state's failure to guarantee the right to inclusive education for children with intellectual disabilities within the French Community. A similar ruling was adopted concerning the Flemish Community in 2018 (see below, 3.2.7).³⁵

Concerns about Travellers were also raised in 2014 and 2020, by the European Commission against Racism and Intolerance (ECRI),³⁶ the Committee on the Elimination of Racial Discrimination³⁷ and the Commissioner for Human Rights of the Council of Europe.³⁸ There is still a shortage of properly equipped transit sites for Travellers, in particular in the Walloon Region and in the Brussels Capital Region.

Following the terrorist attacks in Paris and Brussels in 2015 and 2016 respectively, there has been persistent anti-Muslim rhetoric, in both the public and political spheres. This has been realised in calls to ban the wearing of the Islamic veil in many places (which has led to multiple cases)³⁹ and has led to an increase in reports of discrimination on grounds of religion, of which the Muslim community has been the main target.

Another issue of concern is the resurgence of individual racist incidents, as well as debates laying bare structural discrimination based on alleged race and ethnic origin (see below section 11.2.6.). Hopefully, the inter-federal action plan against racism should be adopted in 2021, 20 years after the Durban Conference against racism.⁴⁰

Finally, Unia published a report in September 2020 on the first 200 days of the COVID-19 pandemic in Belgium. This study points to the need to pay particular attention to the disproportionate impact of the measures adopted to fight against the pandemic on vulnerable groups (young people, the elderly, people with disabilities, people living in institutions, people with health issues, isolated people or those who do not correspond to the 'traditional' family model).⁴¹

In a report released in November 2020, Amnesty International Belgium underlines the major human rights violations (right to health, right to life and prohibition of discrimination) suffered by elderly people living in care and nursing homes during the first lockdown in Belgium, which have had disastrous consequences.⁴²

³⁵ ECSR, *International Federation of Human Rights Leagues (FIDH) and Inclusion Europe v. Belgium*, complaint no. 141/2017, decision on the merits, 9 September 2020, <https://hudoc.esc.coe.int/eng#%7B%22sort%22:%5B%22ESCPublicationDate%20Descending%22%2C%22tabview%22:%5B%22document%22%2C%22ESCDcIdentifier%22:%5B%22cc-141-2017-dmerits-en%22%5D%7D>.

³⁶ European Commission against Racism and Intolerance (ECRI) (2014) *ECRI Report on Belgium*. ECRI (2020), *Sixth report on Belgium*, pp. 28-30, <https://rm.coe.int/ecri-sixth-report-on-belgium-/16809ce9f0>.

³⁷ CERD/C/BEL/CO/16-19, 14 March 2014, paras. 18–19.

³⁸ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015.

³⁹ In 2014, see Council of State (administrative section) (*Conseil d'Etat – section d'administration*), 5 February 2014, *X. v. het Gemeenschaponderwijs*, judgments no. 226.345 and 226.346; 14 October 2014, *Sukhjot Singh, X., Sharanjit Singh v. het Gemeenschaponderwijs*, rulings no. 228.751, 228.752, 228.748; 14 October 2014, *X., de vzw Justice and Democracy, Sharanjit Singh, de vzw United Sikhs (Belgium) v. het Gemeenschaponderwijs*, rulings no. 228.753, 228.754, 224.755; Labour Court of Brussels (*Cour du travail de Bruxelles*), 6 March 2014, *H. Amal v. Ministere de la Région Bruxelles-capitale*, R.G. no. 2012/CB/15.

⁴⁰ Schlitz, Sarah (2020) 'General policy note. Gender Equality, Equal Opportunities and Diversity', House of Representatives, 6 November 2020, DOC 55 1580/022 p. 20.

⁴¹ Unia (2020), 'Covid-19. A challenge to human rights', available (in French): https://www.unia.be/files/Documenten/Publicaties_docs/2020_Rapport_Covid_-_FR.pdf.

⁴² Amnesty international (2020), « Les maisons de repos dans l'angle mort. Les droits des personnes âgées pendant l'épidémie de Covid 19 en Belgique » (Nursing homes are a blind spot : the rights of the elderly during the COVID-19 pandemic in Belgium) November 2020, https://www.amnesty.be/IMG/pdf/20201116_rapport_belgique_mr_mrs.pdf.

INTRODUCTION

The national legal system

In the Belgian federal system, the competence to legislate on discrimination in the areas covered by the Racial Equality and Employment Equality Directives is divided between the federal state, the three communities⁴³ and the three regions.⁴⁴ Unlike in the French-speaking part of Belgium, in the Flemish part of the country, the region and community are merged into one body.

With respect to the implementation of the principle of equal treatment in the fields to which only Directive 2000/43/EC applies (social protection, including social security and healthcare; social advantages; education; access to and supply of goods and services which are available to the public, including housing),⁴⁵ the Constitution and the Special Act of 8 August 1980, lastly revised on 6 January 2014 (Sixth Belgian State Reform), provide that:

- social security is a federal matter, except for family allowances⁴⁶ which has been a responsibility of the communities since the Sixth Belgian State Reform of 2014;
- healthcare is essentially a competence of the communities, except for certain matters including the adoption of framework legislation and health insurance, which remain matters of federal competence;
- with a few exceptions, social aid is a competence of the communities;
- education is a competence of the communities, including the status of school teachers and other civil servants or employees working in schools (Article 127(1)(2) of the Constitution);
- social housing, as well as the rules relating to the private housing market, are the responsibility of the regions, since the Sixth Belgian State Reform of 2014;
- prohibition of discrimination in the access to and supply of goods and services available to the public should be dealt with by each competent authority in the sphere of its powers (for instance, public transport falls within the competence of the regions, apart from the national airport and the public railway company, which are the responsibility of the federal state).

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

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

⁴³ The French Community (*Communauté française*) which is referred to as the Federation Wallonia-Brussels (Fédération Wallonie-Bruxelles) in the political and media discourse, the Flemish Community (*Vlaamse Gemeenschap*), and the German-speaking Community (*deutschsprachigen Gemeinschaft*).

⁴⁴ The Walloon Region (*Région wallonne*), the Flanders Region (*Vlaams Gewest*) and the Brussels Capital Region (*Région de Bruxelles-capitale*).

⁴⁵ Directive 2000/43/EC, Article 3(1)(e) to (h).

⁴⁶ Parental leave allowances are still a federal matter.

List of main legislation transposing and implementing the directives

At the federal level:

- Federal Act of 10 May 2007 amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (*Loi tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*) (the Racial Equality Federal Act, REFA).⁴⁷

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

- Federal Act of 10 May 2007 designed to combat certain forms of discrimination (*Loi tendant à lutter contre certaines formes de discrimination*) (the General Anti-Discrimination Federal Act, GAFA).⁴⁸

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

At the regional level:

– **The Flemish Community/Region:**

Framework Decree for the Flemish equal opportunities and equal treatment policy (*Decreet houdende een kader voor het Vlaamse gelijkheidskansen en gelijkebehandelingsbeleid*) of 10 July 2008 implementing European Directive 76/207/EC as modified by Directive 2002/73/EC, Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC (the Flemish Framework ET Decree, FLED).⁴⁹ Its scope relates to the areas of competence of the Flemish Region and the Flemish Community: employment policy, healthcare, education, goods and services available to the public (i.e. housing, energy, cultural services), social advantages, and economic, social, cultural and political activities outside the private sphere. It provides for the prohibition of discrimination on grounds of:

- race,⁵⁰ colour, descent, national or ethnic origin, nationality (cf. Racial Equality Federal Act with some terminological differences);

⁴⁷ OJ (*Moniteur belge*), 30 May 2007; last modified on 17 August 2013, *Moniteur belge*, 5 March 2014.

⁴⁸ OJ (*Moniteur belge*), 30 May 2007; last modified on 17 August 2013, *Moniteur belge*, 5 March 2014.

⁴⁹ OJ (*Moniteur belge*), 10 July 2008; last modified on 28 March 2014, *Moniteur belge*, 1 April 2014.

⁵⁰ 'Alleged' or 'presumed' is not mentioned contrary to the Racial Equality Federal Act.

- age, sexual orientation, civil status, birth, property ('fortune', in French), religious or philosophical belief, political opinion, trade union opinion, language, state of health,⁵¹ disability, physical or genetic features, social origin (cf. General Anti-Discrimination Federal Act with some terminological differences);
- sex/gender, gender identity, gender expression, transgender, pregnancy, childbirth, motherhood (cf. Gender Equality Federal Act with some terminological differences).⁵²

Decree of 8 May 2002 on proportionate participation in the employment market (*Decreet houdende evenredige participatie op de arbeidsmarkt*, FLEMD),⁵³ which seeks both to prohibit discrimination on the grounds listed in Article 19 of the Treaty on the Functioning of the European Union (TFEU), and to encourage the integration of target groups into the labour market by positive action measures (preparation of diversity plans and annual reports on progress made). This decree has a limited scope of application: vocational training, vocational guidance, integration of persons with disabilities in the labour market, public authorities of the Flemish Region/Community, including those in the field of education. When a discriminatory situation is within the scope of the Decree of 8 May 2002, the Flemish Framework ET Decree is not applicable (Article 20(8)).

– **The French Community:**

Decree of the French Community adopted on 12 December 2008 on the fight against certain forms of discrimination (*Décret de la Communauté française du 12 décembre 2008 relatif à la lutte contre certaines formes de discrimination*)⁵⁴ implementing Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC (the French Community ET Decree, FRED).⁵⁵ This decree applies, in the scope of competence of the French Community, to selection, promotion, working conditions, including dismissals and pay, in the public service of the French Community, education and vocational training, health policy, social advantages, membership of and involvement in any professional organisation funded by the French Community, access to goods and services available to the public, and access to and participation in, or any exercise of, an economic, social, cultural or political activity open to the public. The discrimination grounds covered are:

- alleged race, colour, descent, national or ethnic origin, nationality (cf. Racial Equality Federal Act);
- age, sexual orientation, civil status, birth, property ('fortune', in French), religious or philosophical belief, actual or future state of health, disability, physical or genetic features, political opinion, language, social origin, trade union opinion (cf. General Anti-Discrimination Federal Act);
- sex/gender and related grounds: pregnancy, childbirth, motherhood, gender reassignment, gender identity and gender expression (cf. Gender Equality Federal Act).

– **The Walloon Region:**

Decree of 6 November 2008 on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (*Décret de la Région wallonne du 6 novembre 2008 relatif à la lutte contre certaines formes de discrimination, en ce compris la discrimination entre les femmes*

⁵¹ 'Actual and future' are not mentioned contrary to the General Anti-Discrimination Federal Act.

⁵² The Federal Act pertaining to fight against discrimination between women and men (*Loi tendant à lutter contre la discrimination entre les femmes et les hommes*), OJ (*Moniteur belge*) was also adopted on 30 May 2007 (the Gender Equality Federal Act). This act refers to sex/gender and related grounds: pregnancy, childbirth, breastfeeding, motherhood, adoption, medically assisted procreation, gender reassignment, gender identity and gender expression, sexual characteristics, paternity and co-maternity.

⁵³ OJ (*Moniteur belge*), 26 July 2002; last modified on 10 December 2010, *Moniteur belge*, 29 December 2010.

⁵⁴ OJ (*Moniteur belge*), 13 January 2009; last modified on 5 December 2013, *Moniteur belge*, 5 March 2014.

⁵⁵ OJ (*Moniteur belge*), 13 January 2009; last modified on 13 November 2015, *Moniteur belge*, 8 December 2015.

et les hommes, en matière d'économie, d'emploi et de formation professionnelle),⁵⁶ implementing European Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC, as amended on 19 March 2009 in order to extend its material scope (the Walloon ET Decree, WEMD).⁵⁷ This decree covers, in the scope of competence of the Walloon Region, vocational training, vocational guidance, socio-professional integration, placing of workers, funding for the promotion of employment, funding for employment and financial incentives to companies in the framework of the economic policy, including social economy and vocational training, in the public and the private sectors. It also covers: social protection, including healthcare; social advantages; the supply of goods and services that are available to the public and outside the private and family sphere, including housing; access to, participation in, or any exercise of, an economic, cultural or political activity open to the public and statutory relationships in departments of the Walloon Government, public authorities depending on the Walloon Region, decentralised bodies (such as provinces, municipalities, etc.), and public centres for social assistance.

The discrimination grounds covered are:

- alleged race, colour, descent, national or ethnic origin, nationality (cf. Racial Equality Federal Act);
- age, sexual orientation, civil status, birth, property (*'fortune'*, in French), religious or philosophical belief, state of health, disability, physical or genetic features, political opinion, language, social origin, trade union opinion (cf. General Anti-Discrimination Federal Act);
- sex/gender and related grounds: pregnancy, childbirth, motherhood, breastfeeding, gender reassignment, gender identity and gender expression (cf. Gender Equality Federal Act with some terminological differences);
- family status.

– **The German-speaking Community:**

Decree of 19 March 2012 on fighting certain forms of discrimination (*Dekret zur Bekämpfung bestimmter Formen von Diskriminierung*), implementing European Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC (the German Community ET Decree, GED).⁵⁸ It covers: labour relations regarding public bodies created or funded by the German-speaking Community, education institutions and the civil service and governmental institutions; education; employment; social advantages; cultural matters; person-related matters; access to, and supply of, goods and services available to the public.

Apart from the additional ground of parenthood, the discrimination grounds covered are the same as those in the Racial Equality Federal Act, the General Anti-Discrimination Federal Act and the Gender Equality Federal Act.

– **The Brussels Capital Region:**

Ordinance of 4 September 2008 relating to the fight against discrimination and equal treatment in the employment field (*Ordonnance relative à la lutte contre la discrimination et à l'égalité de traitement en matière d'emploi*), implementing the EU Equal Treatment Directive 2006/54/EC and Directives 2000/43/EC, 2000/78/EC in the field of employment as regards Brussels Capital (the Brussels ET Employment Ordinance, BEMO).⁵⁹ The

⁵⁶ OJ (*Moniteur belge*), 19 December 2008; last modified on 12 January 2012, *Moniteur belge*, 23 January 2012.

⁵⁷ OJ (*Moniteur belge*), 10 April 2009.

⁵⁸ OJ (*Moniteur belge*), 5 June 2012; last modified on 22 February 2016, OJ (*Moniteur belge*), 14 April 2016.

⁵⁹ OJ (*Moniteur belge*), 16 September 2008, last modified on 16 November 2017, OJ (*Moniteur belge*), 21 November 2017.

employment field covers, at the regional level, worker placement policies and policies aimed at unemployed persons (as defined in Article 4(9) of the ordinance).

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

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

The Brussels Housing Code contains anti-discrimination provisions. It was last modified on 21 December 2018 by the Region of Brussels-Capital Ordinance amending the Brussels Housing Code to strengthen the fight against discrimination in access to housing.⁶⁰

Finally, an ordinance adopted on 25 April 2019 relates to the promotion of diversity and the fight against discrimination in the local civil service of the Brussels Capital Region (*Ordonnance-cadre visant à assurer une politique de diversité et de lutte contre les discriminations au sein de la fonction publique locale bruxelloise*) (the Brussels Local Civil Service ET Ordinance, BSCO). This ordinance implements Directives 2000/43/EC, 2000/78/EC and 2006/54/EC.⁶¹ It applies to the employment field in the civil service of the Brussels Capital Region and covers access conditions, selection criteria, promotion, and working conditions, including dismissals and pay. Article 4(1) defines the public institutions of the Brussels Capital Region falling within the scope of this ordinance. The discrimination grounds are the same as those enshrined in the Racial Equality Federal Act, the General Anti-Discrimination Federal Act and the Gender Equality Federal Act. In addition to anti-discrimination provisions, the ordinance encourages public institutions to adopt diversity plans. This new ordinance is essentially a rewrite of the previous Ordinance of 4 September 2008, with some minor modifications. The main purpose of the law remains to promote diversity policies within the Brussels civil service, and to lay down a framework to combat discrimination in the workplace.

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

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

First, there is the Decree of 22 March 2007 on equal treatment between persons in vocational training (*Décret relatif à l'égalité de traitement entre les personnes dans la formation professionnelle*), implementing Directives 97/80/EC, 2000/43/EC, 2000/78/EC, 2002/207/EC and 2006/54/EC in the field of vocational training – including vocational guidance, learning, advanced vocational training and retraining (*orientation, formation, apprentissage, perfectionnement et recyclage professionnel*) – in the Brussels Capital Region (the Cocof Vocational Training ET Decree, CEMD).⁶² The discrimination grounds covered in the decree are part of an open list of criteria (or any other ground of

⁶⁰ Brussels Housing Code, 17 July 2003, last modified on 21 December 2018, *Moniteur belge*, 31 January 2019.

⁶¹ OJ (*Moniteur belge*), 24 May 2019.

⁶² OJ (*Moniteur belge*), 24 January 2008; last modified on 5 July 2012, *Moniteur belge*, 10 September 2012.

discrimination') and those referred to in the Racial Equality Federal Act and the General Anti-Discrimination Federal Act (and the Gender Equality Federal Act) are explicitly named.

Secondly, there is the Decree of 9 July 2010 on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (*Décret relatif à la lutte contre certaines formes de discrimination et à la mise en oeuvre du principe de l'égalité de traitement*), implementing Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC (the Cocof ET Decree, CED).⁶³ This decree applies to: school transport and school building management; municipal, provincial, inter-municipal and private facilities with regard to physical education, sports and outdoor life; tourism; social advancement; health policy; assistance for people;⁶⁴ access to goods and services; access to, participation in, and any other exercise of economic, social, cultural or political activities that are publicly available; and labour relations within public institutions of the Cocof. As regards the promotion of diversity within public institutions, each public institution of the Cocof is required to develop a diversity action plan. The discrimination grounds are the same as those enshrined in the Racial Equality Federal Act, the General Anti-Discrimination Federal Act and the Gender Equality Federal Act.

⁶³ OJ (*Moniteur belge*), 3 September 2010 (not modified since then).

⁶⁴ This covers social assistance, integration of migrants, and policy on disabled persons and older persons.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The constitution of Belgium includes two main articles regarding non-discrimination.

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

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

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

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

In June 2020, the Senate adopted a proposal to amend the Constitution by adding a new Article 22ter which states that 'Every person with disabilities has the right to full inclusion in society, including the right to reasonable accommodation'.⁶⁵ The text received the unanimous support of the Senate, apart from the N-VA and the Vlaams Belang members, who abstained. The proposal has still to pass through the House of Representatives in 2021.⁶⁶

⁶⁵ <https://phare.irisnet.be/2020/07/08/un-pas-vers-la-reconnaissance-du-handicap-dans-la-constitution-belge/>; <https://www.gamp.be/new/wp-content/uploads/2020/07/proposition-commune-PS-SPA-CDV-7-169-1-SN1202k7-169-1DP1.pdf>.

⁶⁶ RTBF (2021) 'Constitution soon to recognise the rights of disabled people' https://www.rtbf.be/info/belgique/detail_la-reconnaissance-des-droits-des-personnes-handicapees-bientot-dans-la-constitution?id=10671861.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The grounds of discrimination explicitly prohibited in the main legislation transposing the two EU anti-discrimination directives (as listed in the Introduction) are:

- alleged race, colour, descent, national or ethnic origin, nationality (Racial Equality Federal Act);
- age, sexual orientation, civil status, birth, property (*'fortune'*, in French), religious or philosophical belief, actual or future state of health, disability, physical or genetic features, political opinion, language, social origin, trade union opinion (General Anti-Discrimination Federal Act);
- sex/gender and related grounds: pregnancy, childbirth, motherhood, breastfeeding, adoption, medically-assisted procreation, gender reassignment, gender identity and gender expression, sexual characteristics, paternity and co-maternity (Gender Equality Federal Act).

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

2.1.1 Definition of the grounds of unlawful discrimination within the directives

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

The website of Unia provides some indication of the meaning of the terms, but chiefly relies on broad definitions based on the usual sense of the discrimination grounds.⁶⁷

a) Racial or ethnic origin

The concepts of alleged race and ethnic origin are not defined in Belgian anti-discrimination law. However, it is worth noting that, in its 2013 annual report, Unia focused on racism and on various approaches to it (historical, legal, socio-scientific).⁶⁸

In Unia's 2019 socioeconomic monitoring report, which highlights the stratification of the labour market according to the origin and the migratory history of people, both terms are defined as follows:

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

⁶⁷ www.unia.be/en.

⁶⁸ Unia (2014) *Annual report of Unia 2013 (Discrimination – Diversité)*, pp. 14-31, available on its website www.unia.be/en.

birth), date of registering at the national register and date of acquisition of nationality.⁶⁹

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

Belgian case law does not interpret the terms 'alleged race' and 'ethnic origin' separately. Belgian courts do not draw a clear distinction between the two terms; sometimes they use both of them, and sometimes only one of them without any real consistency.⁷⁰ Occasionally the courts just refer to the pertinent legal provisions without quoting the grounds themselves.⁷¹ There are no recognised ethnic minorities in Belgium, which would benefit by having a special legal status. Minority language could be recognised as a part of ethnicity but discrimination on the grounds of language as such is dealt with separately in Belgian anti-discrimination law and is not under the responsibility of Unia because of the tense relationships between the French-speaking and Dutch-speaking communities. In Belgium, the use of French or Dutch in political life, but also in art, culture, education, etc. is of highly symbolic significance and can give rise to serious political tensions.

In its 2016 and 2017 annual reports, Unia focused on the increase of racism and discrimination related to the post-terrorist climate we are living in.⁷² It also pointed out the significant increase of hate speech on social media.⁷³

Racism remains a persistent issue in Belgium. According to Patrick Charlier (co-director of Unia), the fact that a quarter of the files that Unia opens relate to racially motivated cases illustrates the extent of the issue.⁷⁴

b) Religion and belief

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

In 2017, Unia published a report concerning discrimination based on religious belief, linked to the consequences of the terrorist attacks. The report shows a rise in anxiety *vis-a-vis* the Muslim community in Belgium and more broadly people of North African origin.⁷⁵ This situation leads to more discriminatory behaviour being reported to Unia, especially discrimination against Muslim women wearing the hijab. In its 2018 annual report, Unia noted that 'Current events relating to the ground of religion and belief have focused mainly

⁶⁹ Inter-federal Centre for Equal Opportunities (Unia) (2015) *Socio-Economic Monitoring - Labour Market and Origin*, Federal Public Service on Employment, Labour and Social Dialogue, Brussels, November 2015, pp. 19-20, www.unia.be/en; Unia (2020), *Socio-Economic Monitoring - Labour Market and Origin 2019*, Federal Public Service on Employment, Labour and Social Dialogue, Brussels, March 2020, www.unia.be/en.

⁷⁰ See: Court of first instance (*Correctionele rechtbank*) of Antwerp, judgment no. 2009/4737 of 22 October 2009; Court of Appeal (*Hof van Beroep*) of Antwerp, judgment no. 2009/1837 of 25 February 2009; Court of Appeal (*Cour d'appel*) of Mons, judgment of 13 January 2010; Criminal Court (*Tribunal correctionnel/Correctionele rechtbank*) Dendermonde, judgment no. F.D. 35.98.16/05 AF of 7 February 2014; and Court of Appeal (*Hof van Beroep*) of Brussels, judgment of 10 February 2015. www.unia.be/en.

⁷¹ See Court of first instance of Brussels (Criminal section) (*Tribunal correctionnel de Bruxelles*), judgment no. BR 43.IN.101194/06 of 26 February 2014, www.unia.be/en.

⁷² Unia (2017) *Annual report for 2016*, p. 19 and Unia (2018), *Annual report for 2017*, pp. 58-59, both available on its website, www.unia.be/en.

⁷³ Unia (2018), *Annual report for 2017*, pp. 53-57, available on its website, www.unia.be/en.

⁷⁴ RTBF (2020) 'Interview with Patrick Charlier', 22 June 2020, https://www.rtbf.be/info/societe/detail_25-8-des-discriminations-sont-fondees-sur-des-criteres-raciaux-un-probleme-structurel-unia?id=10526971.

⁷⁵ Unia (2017), *Mesures et climat : conséquences post-attentats*, June 2017, www.unia.be/en.

on the wearing of the hijab'.⁷⁶ In its 2019 report, Unia stressed that most of the cases related to discrimination based on religion concern Islam (86.3%).⁷⁷

c) Disability

Disability is not defined in the anti-discrimination legislation.

Social security legislation provides for benefits for persons with a certain degree of disability, which has to be medically certified. In this context, disability is often defined by reference to an official recognition by a competent authority.⁷⁸ For instance, Collective Agreement No. 99 of 20 February 2009 concerning the level of remuneration for disabled workers and replacing the Collective Agreement No. 26 of 15 October 1975,⁷⁹ applies to disabled workers recognised by a proper authority, namely a regional agency in charge of the social and professional integration of disabled people.⁸⁰

On disability, the explanatory memorandum⁸¹ accompanying the Cooperation Agreement of 19 July 2007, relating to the concept of reasonable accommodation,⁸² explains that

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

By defining disability by reference to the person's environment rather than his/her physical or intellectual characteristics, this commentary seems in line with the definition provided by the Court of Justice of the European Union (CJEU) in *Ring and Skouboe Werge*⁸³ as well as with Article 1 of the UN Convention on the Rights of Persons with Disabilities, which has been ratified by Belgium.

⁷⁶ Unia (2019), *Annual Report for 2018 (Reconnect with human rights)*, pp. 71-75, available on the website, www.Unia.be/en.

⁷⁷ Unia (2020) *Annual statistics report 2019 (Contributing to a more equal society for all)*, available on its website, p.52, www.unia.be.

⁷⁸ Similarly, but outside the field of employment, the Ordinance of the Brussels Capital Region of 18 December 2008 relating to the admittance of guide dogs to public places defines a disabled person as 'any person whose disability is recognised by an authority competent to this end' (last modified on 25 April 2012, OJ (*Moniteur belge*), 5 May 2012).

⁷⁹ Collective Agreement No. 99 of February 2009 (Convention collective de travail n° 99 du 20 février 2009, conclue au sein du Conseil national du Travail, concernant le niveau de rémunération des travailleurs handicapés et remplaçant la convention collective de travail n° 26 du 15 octobre 1975 concernant le niveau de rémunération des travailleurs handicapés occupés dans un emploi normal), made compulsory by the Royal Decree of 28 June 2009, OJ (*Moniteur belge*), 13 July 2009.

⁸⁰ Agence wallonne pour l'intégration des personnes handicapées - AWIPH, Service bruxellois francophone des personnes handicapées, Vlaams Agentschap voor Personen met een Handicap - VAPH and/or Vlaamse Dienst voor Arbeidsbemiddeling en Beroepsopleiding, Dienststelle für Personen mit Behinderung.

⁸¹ The memorandum is a commentary that is not binding but that the courts are likely to consider as a source of reference when interpreting anti-discrimination concepts.

⁸² Cooperation Agreement of 19 July 2007 (Protocole du 19 juillet 2007 entre l'État fédéral, la Communauté flamande, la Communauté française, la Communauté germanophone, la Région wallonne, la Région de Bruxelles-Capitale, la Commission communautaire commune, la Commission communautaire française en faveur des personnes en situation de handicap), OJ (*Moniteur belge*), 20 September 2007.

⁸³ CJEU, judgment of 11 April 2013, *HK Danmark (Ring and Skouboe Werge)*, joined cases C-335/11 and C-337/11, ECLI:EU:C:2013:222.

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

The Labour Court of Liège condemned a driving school for discrimination against an obese candidate on grounds of disability and physical characteristics.⁸⁴ The case concerned a man, M.B. who applied to become a driving instructor. The driving school was interested in M.B.'s profile and invited him for an interview. Two days after the interview, M.B. got an email from the driving school rejecting his application. In the email, the driving school explained to M.B. that his 'physical profile' did not match with what was expected from a driving instructor in the school. He was also asked whether he had already thought about losing weight, as being obese was a handicap for this kind of job. Following that reply, M.B. contacted Unia, which unsuccessfully tried to conciliate all the parties. M.B. decided to bring the case to court and Unia joined the case in support of the claimant. In the first instance ruling, the Liège Labour Court extensively explained the Belgian anti-discrimination law as well as the *Kaltoft* case handed down by the CJEU.⁸⁵ In *Kaltoft*, the CJEU dealt with the question of whether obesity can be considered as coming into the scope of the protected ground of disability. On this basis, the CJEU judged that even though obesity is not a protected ground as such, it amounts to disability when it constitutes a barrier to participating in professional life on the same basis as other workers. The court underlined that it is not important in the present case that M.B. effectively suffers from morbid obesity – which is a disability – since the driving school assumed that he did. In any case, according to the court, the reasons underlying to the refusal of M.B.'s application correspond to the ground of disability or at least and undoubtedly to the ground of 'physical characteristic' – which is another protected ground enshrined in the General Anti-Discrimination Federal Act. Therefore, M.B. was directly discriminated against (and not indirectly, as stated in the opinion of the public prosecutor). The first instance ruling was confirmed by the Labour Appeal Court of Liège on 12 October 2017,⁸⁶ which ruled in addition that the school failed to prove that the refusal of M.B.'s application could be justified under the genuine occupational requirement exception. The labour appeal court however reduced the damages provided for by the labour court, considering that regardless of his disability, M.B. did not fulfil all the job requirements (in particular holding a specific driving licence).

On 16 October 2017, the Antwerp Labour Appeal Court condemned the general and automatic exclusion from employment of people with diabetes dependent on insulin, for security reasons in the Port of Antwerp. An internal rule barred their appointment altogether. The court held that this exclusion constituted discrimination on the ground of disability, which was inadequate and unnecessary to ensure public safety.⁸⁷ In each case, the specific tasks of the job must be considered.

On 20 February 2018, the Brussels Labour Appeal Court rendered a judgment concerning the dismissal of an employee who needed reduced working hours after having suffered from cancer.⁸⁸ When she returned to work after long-term sickness leave, she asked for an adapted schedule, as she was not yet able to reprise a full-time schedule. Her request was refused by her employer and led to her dismissal. For the first time in Belgium, the court recognised that the consequences of having cancer could be considered as a disability. It did so by conscientiously applying the case law of the CJEU defining the notion of disability (in particular, in *HK Danmark*).⁸⁹ The dismissal therefore constituted

⁸⁴ Judgment of 20 June 2016, Labour Court of Liège, www.unia.be/en.

⁸⁵ CJEU, judgment of 18 December 2014, *Kaltoft*, C-354/13, ECLI:EU:C:2014:2463.

⁸⁶ Judgment of 12 October 2017 of the Labour Appeal Court of Liège (in French), www.unia.be/files/Documenten/Rechtspraak/Cour_de_travail_de_Liège_12_octobre_2017.pdf.

⁸⁷ Judgment of 6 October 2017 of the Labour Appeal Court of Antwerp (in Dutch), www.unia.be/files/Documenten/Rechtspraak/Arbeidshof_Antwerpen_16_oktober_2017.pdf.

⁸⁸ Judgment of 20 February 2018 of the Labour Appeal Court of Brussels (in Dutch), www.unia.be/files/Documenten/Rechtspraak/Arbeidshof_Brussel_20_februari_2018.pdf.

⁸⁹ CJEU, judgment of 11 April 2013, *HK Danmark (Ring and Skouboe Werge)*, joined cases C-335/11 and C-337/11, ECLI:EU:C:2013:222.

discrimination based on disability in breach of the General Anti-Discrimination Federal Act. Consequently, the employee was entitled to receive reasonable accommodation from her employer.

d) Age

Age is not defined in the anti-discrimination legislation.

Although Unia's different reports emphasise that it is mostly older people who fall victim to age discrimination, all ages can be and are affected.

An example of age discrimination is the *Dovy Keukens* case, in which a 59-year-old man applied for a job in a kitchen manufacturing company but was refused the job. The employer said he had 'the perfect profile, but for his age'. Dovy Keukens was found to have discriminated on the ground of age in both the first instance court and the appeal court.⁹⁰

e) Sexual orientation

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

The previous inter-federal plan on the fight against homophobic and transphobic violence stressed, in 2013, that sexual orientation is not a choice: 'Sexual orientation is defined on the basis of the gender of individuals for whom an individual has both physical and emotional attraction and affection'.⁹¹

The last inter-federal plan on the matter, adopted in 2018, aims at fighting discrimination and violence towards people based on their sexual orientation, gender identity, gender expression or intersex condition. It provides figures on discrimination against homosexual and bisexual people, as well as transgender or intersex people, but chooses not to provide any definition of sexual orientation (although it does provide definitions for other terms, such as gender identity, intersex people and gay people).⁹²

2.1.2 Multiple discrimination

In Belgium, multiple discrimination is not prohibited by law.

The current set of three Federal Anti-Discrimination Acts, adopted on 10 May 2007, is based on the very opposite idea, according to which any discrimination must be categorised relative to one identifiable ground, since different legal regimes are set up for each of the three following categories: (1) alleged race, colour, descent, national or ethnic origin and nationality (Racial Equality Federal Act); (2) age, sexual orientation, civil status, birth, property ('*fortune*', in French), religious or philosophical belief, actual or future state of health, disability, physical or genetic features, political opinion, language, social origin, trade union opinion (General Anti-Discrimination Federal Act); and (3) sex/gender and related grounds (Gender Equality Federal Act). However, cases do not have to be taken individually and it is possible to submit multiple claims.

⁹⁰ www.unia.be/fr/articles/la-societe-cuisines-dovy-condamnee-pour-discrimination-a-lemploi-sur-base-de-lage.

⁹¹ Institute for Equality between Women and Men (2013) *Inter-federal plan to fight against homophobic and transphobic violence*, 31 January 2013, available on the website of the IEWM: igvm-iefh.belgium.be/fr/avis_et_recommandations/plan_daction_inter-federal_de_lutte_contre_les_discriminations_homophobes_et.

⁹² Belgian Government (2018) *Inter-federal plan to fight against discrimination and violence towards people based on their sexual orientation, gender identity, gender expression or intersex condition*, May 2018, available on the website of the federal Government: fedweb.belgium.be/sites/default/files/Plan_d_action_LGBTI_2018-2019_FR.pdf.

At the regional level, most of the communities/regions have made the choice of adopting a framework equality decree including all the prohibited criteria. According to the French Community and the Flemish Community/Region,⁹³ such a legislative framework was chosen, to a certain extent, because it is better suited to tackling multiple discrimination. The Ordinance amending the Brussels Housing Code to strengthen the fight against discrimination in access to housing, adopted on 21 December 2018,⁹⁴ explicitly mentions that discrimination may be based on several protected grounds (Article 205 of the Housing Code). The same applies to the Walloon ET Decree as of 2019 (Articles 4, 7 and 9).

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

On 11 August 2017, the Liège Labour Court found that the facts at issue revealed double discrimination based on sex and age.⁹⁵ The case concerned a 44-year-old man who applied for an administrative position in a company working in service vouchers. On the same day of his application, he received a refusal justified on the ground that the company essentially works with young girls aged between 20 and 30 years old and that therefore, he could not fit in this tight group. The court rightly found that there was not only a violation of the General Anti-Discrimination Federal Act because of the discrimination based on age, but also a violation of the Gender Equality Federal Act because of the discrimination based on sex. Furthermore, it recognised that the applicant was entitled to receive a double fixed allowance justified by the accumulation of discrimination.

On 29 September 2020, the Antwerp Labour Court found that the facts in a case revealed discrimination based on disability and sex.⁹⁶ The case concerned a pregnant woman with hearing impairment (deafness) who applied for a job, as a bio-engineer, in a pharmaceutical company. During the interview, the applicant stipulated that she could only start working after her maternity leave, as she was close to the end of her pregnancy. The company offered the applicant a temporary administrative position to see whether collaboration was possible regarding her hearing impairment. She declined the offer because of her academic qualifications. The application procedure was interrupted and after a silence of a few months, the applicant was informed that her application had been rejected. The court found that there was double direct discrimination based on disability in breach of the General Anti-Discrimination Federal Act. First, discrimination occurred during the recruitment process as an additional condition was added because of her disability (accepting a temporary assignment below her level so that the company could 'get used' to her disability). Secondly, the decision not to recruit the applicant was discriminatory, since she was a suitable candidate for the position and would have been recruited without her disability. The court also found a third direct discrimination based on pregnancy (assimilated to the ground of sex), in breach of the Gender Equality Federal Act. In this respect, the court pointed to the fact that the company acknowledged that having to wait until the end of the maternity leave had worked to the candidate's disadvantage. The victim was able to claim the compensation provided for by the two federal acts in question. According to the court, if more than one form of discrimination is found, the damages must be cumulated. Both acts provide for a lump-sum indemnity of six months' gross salary. As the claimant was discriminated against three times, the company was ordered to pay damages amounting to 18 months' gross salary. It should be stressed that Unia and the Institute for Equality between Women and Men collaborated in this case of multiple discrimination. The company decided to appeal against the judgment.

This last case is a very good sign of collaboration between Unia and the Institute for Equality between Women and Men. The fact that there are two main distinct equality

⁹³ See the Draft Framework Decree on Equal Opportunities, *Flemish Parliament 2007-2008*, Doc. 1578/1, p. 165.

⁹⁴ OJ (*Moniteur belge*), 31 January 2019.

⁹⁵ Judgment of 11 August 2017, Labour Court of Liège, R.G. 16/294/A.

⁹⁶ Judgment of 29 September 2020, Labour Court of Antwerp, A.R. 19/3232/A, in Dutch: https://www.unia.be/files/Documenten/Rechtspraak/2020_09_29_Arbrb_Antwerpen.pdf.

bodies, the *Federal* Institute for Equality of Women and Men, dealing with gender, and Unia, dealing with all the other protected grounds (apart from language), is usually viewed to be the major obstacle in tackling situations of multiple discrimination. On 20 March 2019, Unia and the Institute for Equality between Women and Men signed a cooperation protocol to formalise a cooperation that has existed for years and to stimulate 'increased and valued exchanges'.⁹⁷

In its 2016 evaluation report, Unia recommends that there should be explicit mention of 'multiple discrimination' in the Anti-Discrimination Federal Acts.⁹⁸ In its 2017 report, the Expert Commission for the Assessment of the Anti-Discrimination Federal Acts explicitly recommended mentioning multiple discrimination in the legal framework, providing for appropriate sanctions and further reflection on the legal standing of the different equality bodies.⁹⁹ Note that the president of this commission was Françoise Tulkens (former vice-president of the ECtHR) and the vice-president was Marc Bossuyt (former president of the Belgian Constitutional Court).

More generally, a 2019 ruling of the Constitutional Court¹⁰⁰ is worth mentioning here. It concerns a case of discrimination based on sex and sexual behaviour. According to a federal act adopted in 2017,¹⁰¹ donation of blood from men who have sexual intercourse with men was subject to a deferral of 12 months from the last sexual intercourse. Before the Constitutional Court, the applicants complained about the difference of treatment between homosexual or bisexual male persons and other people with regard to blood donation. In a 2019 ruling, the Constitutional Court found that the legislation with regard to the donation of fresh frozen plasma violates Articles 10 (equality before the law) and 11 (non-discrimination) of the Constitution and that the difference in treatment based on the 'double ground' of sex and sexual behaviour was not reasonably justified. The Court applied a 'very weighty reason test' inspired by the European Court of Human Rights' approach in cases related to suspect grounds of discrimination. In the Constitutional Court's opinion, less restrictive measures (such as quarantine) could have been envisaged. As a result, Article 8 of the Law of 11 August 2017 on various health-related provisions¹⁰² was repealed with regard to the donation of fresh frozen plasma. Conversely, the Court found that the deferral period is justified with regard to the donation of plasma and other blood components.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

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

As in the directives, discrimination based on assumed characteristics is not expressly forbidden in the Racial Equality Federal Act and in the General Anti-Discrimination Federal Act. However, the preparatory works (*travaux préparatoires*) clearly specify that these acts apply to such discrimination.¹⁰³ The reference to 'alleged race' in the Racial Equality Federal

⁹⁷ <https://www.unia.be/fr/publications-et-statistiques/publications/protocole-daccord-relatif-a-la-collaboration-entre-linstitut-pour-legalite>.

⁹⁸ Unia (2016), *Evaluation of the Anti-Discrimination Federal Acts* (Federal Act of 10 May 2007 amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia and Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination), February 2016, pp. 8 and 62, www.unia.be/en. This statement was repeated in the evaluation report published in February 2017, p. 68.

⁹⁹ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, p. 9 and para. 73, www.unia.be/en.

¹⁰⁰ Constitutional Court, Judgment No. 122/2019 of 26 September 2019, <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/cour-constitutionnelle-26-septembre-2019>.

¹⁰¹ Act of 11 August 2017 on various health provisions (*Loi du 11 août 2017 portant des dispositions diverses en matière de santé*), OJ 28 August 2017.

¹⁰² Act of 11 August 2017 on various health provisions.

¹⁰³ Report Libert, *Doc. Parl. Chambre* 2006-2007, no. 2720/009, pp. 41-42.

Act may be seen as implying *per se* that discrimination based on an assumed characteristic is prohibited.¹⁰⁴

The same applies at the regional level where discrimination based on assumed characteristics are not expressly forbidden in the text of the regional decrees but the prohibition results clearly from the preparatory works. However, in the Flemish Framework ET Decree,¹⁰⁵ the definition of direct discrimination specifically states that it is applicable in cases of discrimination based on an assumed characteristic (Article 16).

The Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts has suggested explicitly mentioning assumed discrimination in the legal framework to ensure legal certainty.¹⁰⁶

b) Discrimination by association

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

As in the directives, discrimination based on association with persons with particular characteristics is not expressly forbidden in the Racial Equality Federal Act and in the General Anti-Discrimination Federal Act. However, during the preparatory works (*travaux préparatoires*), it was stressed that the Court of Justice of the European Union was considering a reference for preliminary ruling in the *Coleman* case¹⁰⁷ and that the federal legislation would be construed in accordance with the CJEU ruling.

On 10 December 2013, the Labour Court (*Arbeidsrechtbank*) of Leuven (Flanders) convicted the manager of a fitness centre for discrimination by association, by reason of an employee's dismissal based on the disability of the employee's younger child. The court sentenced the employer to pay six months' salary compensation and additional damages to the dismissed employee. This is the first conviction handed down by a Belgian court for discrimination by association. It is worth noting that the Leuven Labour Court directly referred to the decision of the CJEU in *Coleman*, to hold that discrimination based on being associated with persons with disability is implicitly forbidden under federal law and constitutes direct discrimination.¹⁰⁸

What is true at the federal level applies at the regional level. In addition, in the Flemish Framework ET Decree,¹⁰⁹ the definition of direct discrimination expressly states that it is applicable in cases of discrimination by association (Article 16). It is the same in the Brussels Capital Region with respect to housing. The Ordinance amending the Brussels Housing Code to strengthen the fight against discrimination in access to housing, adopted on 21 December 2018,¹¹⁰ explicitly mentions discrimination by association (Article 205 of the Housing Code). The Walloon ET Decree also states that direct and indirect discrimination are applicable in cases of discrimination by association (Article 4 (1)(6) and (7)).

In its 2017 evaluation report of the Anti-Discrimination Federal Acts, Unia recommends explicitly mentioning 'assumed and associated discrimination' in the anti-discrimination

¹⁰⁴ Belgium, Racial Equality Federal Act, Articles 3 and 4(4).

¹⁰⁵ Framework Decree for the Flemish equal opportunities and equal treatment policy (*Decreet houdende een kader voor het Vlaamse gelijkekansen en gelijkebehandelingsbeleid*) of 10 July 2008.

¹⁰⁶ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, p. 9 and para. 77 www.unia.be/en.

¹⁰⁷ CJEU, judgment of 17 July 2008, *Coleman*, C-303/06, ECLI:EU:C:2008:415.

¹⁰⁸ Judgment no. 12/1064/A of 10 December 2013 (*Jan V.H. v. BVBA V.*) of the Labour Court of Leuven, available on the website of the Centre, www.unia.be/en.

¹⁰⁹ Framework Decree for the Flemish equal opportunities and equal treatment policy (*Decreet houdende een kader voor het Vlaamse gelijkekansen en gelijkebehandelingsbeleid*) of 10 July 2008.

¹¹⁰ OJ (*Moniteur belge*), 31 January 2019.

acts.¹¹¹ The Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts also suggests explicitly mentioning discrimination by association in the legal framework to ensure legal certainty.¹¹²

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

a) Prohibition and definition of direct discrimination

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

The Racial Equality Federal Act and the General Anti-Discrimination Federal Act define direct discrimination as any 'direct distinction' (described as 'the situation which occurs whenever, on the basis of a protected ground, a person is treated less favourably than another is treated, has been treated, or would be treated in a comparable situation')¹¹³ which cannot be justified under one of the exceptions provided for under the act.¹¹⁴ As explained just below (in point b), these exceptions in turn are restrictively defined in order to ensure that those legislative texts are in compliance with the requirements of the directives.

All the pieces of regional anti-discrimination legislation now define direct discrimination in line with EU requirements.¹¹⁵ However, it is worth noting that the definition of direct discrimination in the Flemish Decree of 10 July 2008 (Article 16(1)) and the Decree of the German Community of 19 March 2012 (Article 5(4)), as currently worded, could be formally read as allowing for derogations to direct discrimination, which is not possible under the directives.

b) Justification for direct discrimination

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

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

¹¹¹ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, p. 67-69, www.unia.be/en.

¹¹² Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, p. 9 and para. 81, www.unia.be/en.

¹¹³ To the knowledge of the authors of the report, the use of the term 'a person' has not been interpreted as excluding groups of persons from protection.

¹¹⁴ Belgium, General Anti-Discrimination Federal Act, Article 4(6) and (7) and Article 14; Racial Equality Federal Act, Article 4(6) and Article 12.

¹¹⁵ Even if direct discrimination is correctly defined by the Flemish Framework ET Decree as taking place when 'someone is treated less favourably than another person is, has been or would be treated in a comparable situation', it is worth mentioning that there is an error in the French translation of the decree published in the OJ (*Moniteur belge*) where it is stated that direct discrimination occurs when 'someone is treated less favourably than another person in a comparable situation'.

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

In the General Anti-Discrimination Federal Act, differences in treatment based on one of the listed grounds (age, sexual orientation, civil status, birth, property (*'fortune'*, in French), religious or philosophical belief, actual or future state of health, disability, physical or genetic features, political opinion, trade union opinion, language, and social origin) are prohibited unless they are justified as means both appropriate and necessary to realise a legitimate objective (Article 7).

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

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

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

a) Prohibition and definition of indirect discrimination

In Belgium, indirect discrimination is prohibited in national law.¹¹⁶ It is defined.

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

¹¹⁶ Racial Equality Federal Act, Article 12 and General Anti-Discrimination Federal Act, Article 14.

alia because the criminalisation of indirect discrimination was considered to be problematic as regards the requirement of legal certainty in criminal law.

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

b) Justification test for indirect discrimination

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

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

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

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

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

2.3.1 Statistical evidence

a) Legal framework

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

Data relating to race or ethnic origin, religion, disability (health) or sexual orientation were regarded as sensitive data under Article 6(1) of the Federal Act of 8 December 1992 on the protection of the right to private life with respect to the processing of personal data,¹¹⁷ and their processing was prohibited under Belgian law.

Since the entry into force of the GDPR, this 1992 law has been repealed and replaced by the Federal Act of 30 July 2018 concerning the protection of physical persons regarding the processing of personal data.¹¹⁸

¹¹⁷ *Loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel*, OJ (*Moniteur belge*), 18 March 1992. This legislation was amended by a Federal Act of 11 December 1998, OJ (*Moniteur belge*), 3 February 1999, in order to implement Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23 November 1995, p. 31).

¹¹⁸ OJ (*Moniteur belge*), 5 September 2018, www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2018073046.

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

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

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

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

On 13 December 2011, the International Federation of Human Rights Leagues (FIDH) lodged a collective complaint with the European Committee of Social Rights (ECSR) against Belgium, to challenge the situation of highly dependent disabled adults in need of reception facilities and accommodation, and their relatives. It is worth noting that one of the findings of the ECSR, in its 18 March 2013 decision on the merits, is that there is a violation of Article 30 (right to protection from poverty and social exclusion) of the Revised European Social Charter because the Belgian state's failure to collect reliable data and statistics throughout the territory of Belgium in respect of highly dependent persons with disabilities prevents an 'overall and coordinated approach' to the social protection of these persons and constitutes an obstacle to the development of targeted policies concerning them.¹¹⁹

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

In Belgium, statistical evidence may be admitted under national law in order to establish indirect discrimination. It could also be relied upon to establish direct discrimination.

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

¹¹⁹ *International Federation of Human Rights Leagues (FIDH) v. Belgium*, complaint no. 75/2011, decision on the merits, 18 March 2013.

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

Legislative preparatory works are of no great help. 'General statistics' are said to be those gathered at the macro-economic level (national or regional) and the Court of Justice of the European Union has made reference to their use in gender discrimination.¹²⁰ According to the preparatory works, the shift of the burden of proof could also come from 'specific statistics' related to the group to which the victim belongs (for instance, at the level of the company). 'Elementary statistics' are statistics that do not provide conclusive evidence of the disproportionate impact of a neutral provision, criterion or practice but which lead to a presumption of disproportionate impact.¹²¹

In its 2009 rulings concerning several actions in annulments against the Federal Anti-Discrimination Acts, the Constitutional Court stressed that the facts leading to the reversal of the burden of proof cannot be of general character but must be attributed specifically to the author of the distinction. Consequently, the Court stated that it is not enough to establish through statistics that a neutral criterion disadvantages persons characterised by a protected ground of discrimination. According to the Court, it must also be shown that the defending party was *aware* of that situation.¹²² In the opinion of the authors of this report, that statement of the Court is in complete breach of EU law and in complete contradiction to the intention of the Belgian legislature.

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

b) Practice

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

To the knowledge of the authors of this report (as confirmed in the 2017 report of the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts),¹²³ with respect to the grounds of discrimination listed in the Racial Equality and Employment Equality Directives, statistical data have not so far been invoked in the context of judicial proceedings and have not been used to design positive action measures. This is to be explained by the fact that the data which should be relied upon are not available, due to the restrictions imposed by the legislation relating to the protection of personal data (and the interpretation thereof by the Belgian Privacy Commission – the Data Protection Agency). However, it is worth noting that the *Diversity Barometer: Employment*, published

¹²⁰ For instance, CJEU, judgment of 6 February 1996, *Lewark*, Case C-457/93, ECLI:EU:C:1996:33, paragraphs 29-30.

¹²¹ Report Libert, *Doc. Parl. Chambre* 2006-2007, No. 51-2720/0009, p. 80-81.

¹²² Constitutional Court (*Cour constitutionnelle*), Decision of 12 February 2009, No. 17/2009, para. B.93.3; Decision of 11 March 2009, No. 39/2009, para. B.52; Decision of 2 April 2009, No. 40/2009, para. B.97.

¹²³ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, para. 111 www.unia.be/en.

by Unia at the end of 2012, relied upon statistical data to assess the employment rates of certain target groups (age, national origin, disability) over time.¹²⁴ Similarly, the socio-economic monitoring reports of 2013, 2015, 2017 and 2019 highlight the stratification of the labour market according to the origin and the migratory history of people.¹²⁵

Unia stresses that the concept of indirect discrimination is still not very well known in Belgium and that the question of intent remains an issue in some cases in practice (there is a confusion between disguised direct discrimination and indirect discrimination).¹²⁶ This is also underlined in the 2017 report of the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts.¹²⁷

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

In the Federal Act of 4 August 1996 on the welfare of workers while carrying out their work,¹²⁸ 'moral harassment at work' is defined as

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

This provision applies to the relationships, during working time, between employers and workers,¹²⁹ including trainees and students carrying out an internship, but not to domestic workers (housekeepers) and volunteers.¹³⁰

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

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

This provision has a general scope of application.

Since the entry into force of the Act of 22 May 2014 aiming to combat sexism in public spaces,¹³¹ forms of sexual harassment and street sexual harassment committed in public

¹²⁴ Unia (2012) *Diversity Barometer: Employment*, available on the website of the Centre, www.unia.be/en.

¹²⁵ Unia (2015) *Socio-Economic Monitoring - Labour Market and Origin*, Federal Public Service on Employment, Labour and Social Dialogue, Brussels, November 2015, www.unia.be/en.

¹²⁶ Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

¹²⁷ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, para. 66, www.unia.be/en.

¹²⁸ *Loi relative au bien-être des travailleurs lors de l'exécution de leur travail*, last modified on 15 May 2014, OJ (*Moniteur Belge*), 18 June 2014, Article 32ter(2).

¹²⁹ To be applicable, this provision requires a relationship of authority between the parties concerned.

¹³⁰ Except if the victim can prove a relationship of authority (Article 2(1) to (4) of the *Loi relative au bien-être des travailleurs lors de l'exécution de leur travail*, last modified on 15 May 2014, OJ (*Moniteur Belge*), 18 June 2014).

¹³¹ Act of 22 May 2014 aiming to combat sexism in public space (*Loi du 22 mai 2014 tendant à lutter contre le sexisme dans l'espace public et modifiant la loi du 10 mai 2007 tendant à lutter contre la discrimination*

places are punishable. The law states that any person who behaves, in public or in the presence of witnesses, in a way that tends to consider a person inferior or to despise this person because of his or her sex or even to reduce him or her to a sexual dimension may be punished.¹³²

In Belgium, harassment explicitly constitutes a form of discrimination.

Both the Racial Equality Federal Act (Article 12) and the General Anti-Discrimination Federal Act (Article 14) prohibit harassment as a form of discrimination and define it with the same wording as Directive 2000/43/EC and Directive 2000/78/EC.¹³³ All regional anti-discrimination legislation has been harmonised with the federal acts (and consequently with the directives) and prohibit harassment as a form of discrimination.

It is worth keeping in mind the consistent interpretation of the Constitutional Court's 2009 ruling, in line with the principle of legality in criminal matters.¹³⁴ Indeed, in this ruling, the Court states that Article 4(10) of the General Anti-Discrimination Federal Act and the Racial Equality Federal Act, which defines the notion of harassment, does not specify that this behaviour could be punished if it has the consequence of creating an intimidating, hostile, degrading, humiliating or offensive environment, *without any intention on the part of the offender to create such an environment*. On this basis, it seems that the Court requires an intention to be proven more generally, i.e. in civil matters as well. This interpretation may raise an issue of lack of compliance with EU and national law since both define harassment as unwanted conduct related to a protected criterion. If behaviour has the effect of creating a bad environment amounts to a prohibited harassment, no specific intention is required under EU and national law. Consequently, the interpretation of the Court should be strictly applied only to criminal matters – and not to civil matters – to be in compliance with EU law and national law.

The coexistence of the notion of harassment in the former Federal Anti-Discrimination Act of 25 February 2003 and in the Act of 4 August 1996 on the welfare of workers while carrying out their work as subsequently amended, created legal uncertainty, as harassment in the workplace could fall under either of the two acts. In order to solve the problem, the Racial Equality Federal Act (Article 6) and the General Anti-Discrimination Federal Act (Article 6) provide that in employment relationships, only the Act of 4 August 1996 is applicable.¹³⁵ This exclusion was justified during legislative preparatory works on the basis that the 1996 act puts in place detailed procedures in favour of victims and is especially tailored to tackle harassment at the workplace.

In its first report (2017), the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts stresses that the definition of harassment in the Act of 4 August 1996 on the welfare of workers is not in line with EU law, as it requires 'several acts' (i.e. a pattern of repetitive behaviour), whereas the equality directives do not require such a condition. The Expert Commission recommends amendment of the Act of 4 August 1996 so as to bring it in line with EU law.¹³⁶

b) Scope of liability for harassment

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

entre les femmes et les hommes afin de pénaliser l'acte de discrimination), OJ (*Moniteur belge*) 24 July 2014.

¹³² Please note that nothing in the definition of the offence excludes individuals of the same sex.

¹³³ See also the Gender Equality Federal Act (Article 19).

¹³⁴ Constitutional Court (*Cour constitutionnelle*), Decision of 12 February 2009, no. 17/2009, para. B.53.4; Decision of 11 March 2009, no. 39/2009, para. B.25.4; Decision of 2 April 2009, no. 40/2009, para. B.33.4.

¹³⁵ See also the Gender Equality Federal Act (Article 7).

¹³⁶ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, p. 9 and para. 86, www.unia.be/en.

Following the general principles of civil liability, the employer may be held liable when an employee commits a fault, which causes the damage for which the victim seeks reparation (the rule is codified in Article 1384(3) of the Civil Code). Thus, the employer would be liable for any discrimination practised by his/her employee following this general rule because of the existence of a hierarchical link between the employee and the employer, whether or not any fault had been committed by the employer. The purpose of this presumption of responsibility by the employer is to ensure that victims of the faults committed by employees carrying out their jobs will be compensated, as the employer will have to be insured against the risk of any such liability. According to Article 18 of the Act of 3 July 1978 on employment contracts,¹³⁷ the employer must cover the cost of damages granted to the victim of discrimination caused by his/her employee. However, if the employer proves that the employee acted intentionally or recklessly, the employee might be held personally liable.

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

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

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

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

Under Article 20 of the Racial Equality Federal Act and Article 22 of the General Anti-Discrimination Federal Act, incitement to commit discrimination and incitement to hatred, violence or segregation against a person or against a group, a community or its members, on the basis of a protected ground of discrimination, is a criminal offence, if it is done under public conditions, as defined by Article 444 of the Criminal Code. In this respect, the Constitutional Court held that the offence contained in Article 20 of the Racial Equality Federal Act requires a special *mens rea (dol special)*, i.e. the intent of inciting or encouraging hatred or discriminatory or violent behaviours.¹³⁸ The French Community ET Decree (Article 52), the Walloon ET Decree (Article 23), the German Community ET Decree (Article 25) and the Cocof ET Decree (Article 20) contain similar provisions to the federal acts.

In Belgium, instructions explicitly constitute a form of discrimination.

¹³⁷ Federal Act of 3 July 1978 on employment contracts (*Loi du 3 juillet 1978 relative aux contrats de travail*), OJ (*Moniteur belge*), 22 August 1978, last modified on 26 December 2013 (*Moniteur belge*), 31 December 2013).

¹³⁸ Constitutional Court (*Cour constitutionnelle*), decision no. 40/2009 of 11 March 2009.

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

b) Scope of liability for instructions to discriminate

In Belgium, the instructor and the discriminator are liable.

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

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

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

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

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

In Belgium, the duty on employers to provide reasonable accommodation for people with disabilities is included in the law and is defined.

The definition adopted at the federal and regional levels is very close to that of Article 5 of the Employment Equality Directive (unless specified otherwise). The major difference is that the duty to provide reasonable accommodation to persons with disabilities extends far

beyond the field of employment and relies on the scope of competence of each legislature.¹³⁹

- The General Anti-Discrimination Federal Act provides that the refusal to put in place reasonable accommodation for a person with a disability is a form of prohibited discrimination (Article 14).¹⁴⁰ A definition is provided in Article 4(12) of the General Anti-Discrimination Federal Act.
- The Flemish Framework ET Decree defines the denial of reasonable accommodation as a form of prohibited discrimination. The definition is provided in Article 19. In the Decree adopted on 8 May 2002 by the Flemish Region/Community, reasonable accommodation is described as a requirement entailed by the principle of equal treatment, however the reasonable accommodation mentioned in Article 5(4) does not appear under the definitions of either direct discrimination or indirect discrimination,¹⁴¹ which may be attributed both to the vague character of the 'reasonable accommodation' ('*redelijke aanpassingen*') called for by this decree, and to the broad definition of the concept of reasonable accommodation, which is mentioned without specific reference to disability, but as a *general* requirement of equal treatment. According to Article 5(4) of the decree, the concept means that the employer to whom the decree applies (or persons or organisations acting as labour market intermediaries) should take appropriate measures where needed in a particular case to enable a person to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden, according to the same provision, must not be disproportionate when it is sufficiently remedied by existing measures. The wording of this provision is of course borrowed from Article 5 of Directive 2000/78, except for its extension beyond persons with disabilities.
- In the French Community, Article 3(9) of the French Community ET Decree reproduces almost word for word the definition enshrined in Article 5 of Directive 2000/78/EC.
- The Walloon ET Decree defines the denial of reasonable accommodation for persons with disabilities in line with Directive 2000/78/EC and provides that it is a form of prohibited discrimination (Article 15(6)).
- In the Brussels Capital Region, the Brussels ET Ordinance, the Brussels ET Employment Ordinance and the Brussels Local Civil Service Ordinance define reasonable accommodation for person with disabilities in line with EU requirements (Articles 5(11); 4(18) and 4(8)).

The Cocof Vocational Training ET Decree correctly defines the duty of reasonable accommodation for persons with disabilities (Article 7). The Cocof ET Decree also provides that denying reasonable accommodation to a person with a disability amounts to discrimination (Article 9(2)). Moreover, Article 26(4) of the Decree on the social and professional integration of persons with disabilities¹⁴² provides that the executive of the Cocof will stipulate the conditions under which its administration will be authorised to compensate the employer for the costs of any accommodation of the employee that is considered necessary. The compensation should cover the full cost of the accommodation provided, if it is deemed necessary (Article 31). This

¹³⁹ The material scope of each piece of ET legislation is described above, in the introduction to this report.

¹⁴⁰ Note also that Article 9 of the General Anti-Discrimination Federal Act demonstrates incidentally that discrimination resulting from the failure to provide 'reasonable accommodation' is considered as indirect discrimination.

¹⁴¹ Compare with Article 2(2)(b)(ii) of the Employment Equality Directive.

¹⁴² *Décret relatif à l'intégration sociale et professionnelle des personnes handicapées*, adopted on 4 March 1999, OJ (*Moniteur belge*), 3 April 1999.

legislation makes it possible for employers to draw upon public grants for providing reasonable accommodation, and they could indirectly impact on the employer's level of obligation to provide this kind of accommodation resulting from the other decree. Indeed, generally speaking, the burden imposed on the employer as a result of the obligation to provide reasonable accommodation will not be considered disproportionate if the employer may apply for public funds.

Due to the fact that the concept of reasonable accommodation appears in different laws, the federal Government, the regions and the communities have sought to reach a common understanding of this notion, in order to ensure its uniform implementation throughout the country, whatever the legal basis on which the person with a disability may seek to rely. A cooperation agreement (which is legally binding) was concluded between the relevant public authorities.¹⁴³ It defines the concept of reasonable accommodation as a 'concrete measure aimed to neutralise the limitative impact of a non-appropriate environment on the participation of a person with disabilities'. The agreement gives examples and further explanations of such measures, which could be material or otherwise, as well as collective or individual. It also provides that the reasonable accommodation must be efficient, must ensure equal participation of the person with disabilities as well as autonomous participation, and must ensure the security of the person. The agreement then defines a non-exhaustive list of criteria to determine whether the measure is reasonable. This takes into account the financial impact of the measure (assessed on the basis of possible financial interventions by the state and the financial capacity of the employer), as well as its organisational impact, the frequency of use of the accommodation, the impact on the quality of life of other persons with disabilities, the impact on the general environment or other people, the lack of appropriate alternatives, and the non-application of current compulsory rules. Finally, the agreement puts in place a monitoring mechanism, requiring each authority to collect information on reasonable accommodation and examples of best practice.

More generally, it is worth noting that in June 2020, the Senate adopted a proposal to amend the Constitution by adding a new Article 22*ter*, which states that 'Every person with disabilities has the right to full inclusion in society, including the right to reasonable accommodation'.¹⁴⁴ The text received the unanimous support of the Senate, apart from the N-VA and the Vlaams Belang, whose members abstained. The proposal has still to pass through the House of Representatives in 2021.¹⁴⁵

b) Case law

On 9 March 2015, the Mons and Charleroi Labour Court ruled that a funeral company had discriminated against an employee with multiple sclerosis.¹⁴⁶ The company had refused modifications to the employee's schedules and the nature of his tasks and, a few weeks later, he was laid off. The court considered that the applicant had brought some evidence that discrimination had occurred (the burden of proof shifted to the company – Article 28 GAFA) and concluded that multiple sclerosis could be considered as a disability. Concerning direct discrimination, the court ruled that it could not be excluded that the employee's dismissal was linked to his multiple sclerosis, which it held to be a disability. Furthermore, it considered that the company did not justify the extent to which the modifications of the applicant's schedule and working tasks were not reasonable and constituted a disproportionate burden.

¹⁴³ OJ (*Moniteur belge*), 20 September 2007.

¹⁴⁴ <https://phare.irisnet.be/2020/07/08/un-pas-vers-la-reconnaissance-du-handicap-dans-la-constitution-belge/>; <https://www.gamp.be/new/wp-content/uploads/2020/07/proposition-commune-PS-SPA-CDV-7-169-1-SN1202k7-169-1DP1.pdf>.

¹⁴⁵ RTBF (2021) 'Constitution soon to recognise the rights of disabled people', https://www.rtb.be/info/belgique/detail_la-reconnaissance-des-droits-des-personnes-handicapees-bientot-dans-la-constitution?id=10671861.

¹⁴⁶ Labour Court of Mons and Charleroi (*Tribunal du travail*), 9 March 2015, R.G. 14/436/A, www.unia.be/en.

In a case discussed above (in section 2.1.1.c), the Liège Labour Court¹⁴⁷ condemned a driving school for direct discrimination against an obese candidate on grounds of disability and physical characteristic. The fact that the driving school had even not considered the issue of reasonable accommodation was also taken into account to decide the case against the school.

On 20 February 2018, the Brussels Labour Court rendered a judgment on appeal concerning the dismissal of an employee who could not maintain her working hours, after having suffered from cancer (reported above in section 2.1.1.c).¹⁴⁸ Although Belgian law recognises state of health as a protected criterion, the refusal of reasonable accommodation on this ground does not amount to discrimination. Therefore, by considering that the consequences of the cancer of an employee amounted to a disability due to the extended duration of the sickness, the court enhanced her protection by giving her a right to reasonable accommodation.

On 30 June 2020, the Council of State referred a preliminary ruling to the CJEU on the obligation to provide reasonable accommodation, asking the Court if a worker who is no longer able to perform the function he previously held, as a result of his disability, must be reassigned to another function or not.¹⁴⁹ The case concerned a maintenance worker employed by HR Rail who was recognised as disabled in June 2018 following the fitting of a pacemaker (a device sensitive to electromagnetic fields, which are present on railway tracks). Shortly afterwards, he was examined at the company's regional medical centre and declared permanently unfit to perform the duties for which he had been recruited, with the specification that, pending the decision to dismiss him, he could occupy an appropriate post meeting the following requirements: 'moderate activity, no exposure to magnetic fields, not at altitude or exposed to vibrations'. The applicant was then assigned to a position as a warehouseman. He appealed against the declaration of unfitness before the company's medical appeals commission, which confirmed the decision. He was then dismissed and brought an action for annulment of the dismissal before the Council of State.

c) Definition of disability and non-discrimination protection

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

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

In Belgium, failure to meet the duty of reasonable accommodation in employment for people with disabilities is recognised as a form of discrimination.

As regards fields that are a federal competence, the failure to meet the duty to provide reasonable accommodation constitutes a form of discrimination.¹⁵⁰ In the federal as well as in the regional anti-discrimination laws, the duty to provide reasonable accommodation for disabled people is required unless such measures would impose a disproportionate burden on the bearer of such a duty, but this burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability public policy. The potential sanctions and remedies in the event of a failure to meet the duty of reasonable accommodation are the same as those imposed for unlawful discrimination: payment of damages either on the basis of the 'effective' damage, or on the basis of the

¹⁴⁷ Judgment of 12 October 2017 of the Labour Court of Liège (in French), www.unia.be/files/Documenten/Rechtspraak/Cour_de_travail_de_Liège_12_octobre_2017.pdf.

¹⁴⁸ Judgment of 20 February 2018 of the Labour Court of Brussels (in Dutch), www.unia.be/files/Documenten/Rechtspraak/Arbeidshof_Brussel_20_februari_2018.pdf.

¹⁴⁹ Council of State (administration section), *Gonzalez Lopez v. HR Rail*, 30 June 2020, judgment no. 247.959 (pending before the CJEU, Case 485/20).

¹⁵⁰ For more details and for a description of the law in the regions and communities, the reader is referred to section 2.6.a of this report.

lump sums defined in the law; judicial injunction (*action en cessation*); the decision may be posted publicly; and the defendant may be subject to financial penalties (*astreintes*) in the case of non-compliance with a judicial order.¹⁵¹

As an example, in the case involving an employee with multiple sclerosis (reported above in section 2.6.b), the court sentenced the funeral company to pay EUR 17 319.48 compensation for damages, which was equivalent to six months' salary.¹⁵²

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

On 16 July 2014,¹⁵³ the Court of First Instance of Brussels condemned one of the most influential press agents in Belgium and its company for having discriminated against an independent journalist who was in a wheelchair. The agent had refused to organise an interview between the journalist and an artist and had used discriminatory words about the journalist's situation. The court judged that the journalist had been directly discriminated against on the ground of disability. According to the court, he had also been discriminated against because of the refusal to make reasonable accommodation to give him the opportunity to interview an artist by providing an accessible location for the interview. The court pronounced an injunction imposing the cessation of the discriminatory practice under the threat of a daily fine of EUR 1 000. In addition, it sentenced the press agent to the payment of a lump sum of EUR 1 300 in damages. The court relied on Article 28 of the General Anti-Discrimination Federal Act providing the shifting of the burden of proof. On this basis, it held that the written transcriptions of the phone call between the journalist and the press agent could amount to a presumption of discrimination.

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

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

At the federal level, the duty to provide reasonable accommodation for persons with disabilities extends to all the fields to which the General Anti-Discrimination Federal Act applies (Article 4(12)), which go far beyond employment.¹⁵⁴ The definition is the same whether reasonable accommodation is implemented within or outside the employment field. The Flemish Framework ET Decree, the French Community ET Decree, the German Community ET Decree and the Cocof ET Decree similarly define the scope of the duty of reasonable accommodation as applying to all the material areas they cover. The Walloon ET Decree also seems to extend the duty of reasonable accommodation beyond employment (Article 4(13)). The Walloon Government is in charge of defining more precisely the notion of reasonable accommodation and its modality of application (Article 13). However, it has not yet done so.

On 18 July 2017, the Court of First Instance of Brussels dealt with a case concerning reasonable accommodation for a man in a wheelchair at a railway station in Flanders (Thielen).¹⁵⁵ The national railway company refused to put in place the reasonable accommodation requested in order for this man to get on the train at this station. The

¹⁵¹ See below, in section 6.5 of this report.

¹⁵² Labour Court of Mons and Charleroi (*Tribunal du travail*), 9 March 2015, R.G. 14/436/A, www.unia.be/en.

¹⁵³ Court of First Instance of Brussels (civil section), 16 July 2014, RG 13/13580/A, www.unia.be/en.

¹⁵⁴ See above, introduction to this report.

¹⁵⁵ Judgment of 18 July 2017, Court of First Instance of Brussels, www.unia.be/files/Documenten/Rechtspraak/Nederlandstalige_rechtbank_van_eerste_aanleg_Brussel_18_juli_2017.pdf.

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

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

In 2009, the President of the first instance court of Ghent¹⁵⁶ made a judgment in a case in which the applicants were parents of three deaf children attending regular school. The parents claimed that five to nine hours a week of interpreting at school was insufficient as it would make it difficult, if not impossible, for their children to follow the courses. They claimed that the refusal to grant their children more interpreting hours amounted to a denial of reasonable accommodation. The judge, referring to an opinion of the then Dutch Commission for Equal Treatment (*Commissie Gelijke Behandeling*) of 9 February 2005,¹⁵⁷ held that the way of handling a request for reasonable accommodation may in itself amount to a denial of such accommodation. In his opinion, this was the case here, notably because the procedure established by the Flemish Government did not take into account the individual needs of each child for the distribution of interpreting hours among the children. As a consequence, the judge held that the Flemish Community had denied reasonable accommodation to the deaf claimants by allowing them no more than nine hours of deaf interpreting a week at school. The Flemish Community launched an appeal against this decision, but the Ghent Court of Appeal confirmed it on 7 September 2011.¹⁵⁸ In these decisions, the President of the first instance court of Ghent, and the Ghent Court of Appeal respectively shifted the burden of proof to the Flemish Government as a result of a presumption that reasonable accommodation had been denied to the deaf claimants. The judge inferred this presumption from the observations that: 1) deaf students had been granted a greater amount of interpreting hours in the past; 2) Dutch hearing-impaired students have in principle a right to an interpreter during 100 % of school hours; and 3) the Flemish Government did not contest that more support for deaf children was to be desired.¹⁵⁹

On 7 November 2018, the First Instance Court of Antwerp rendered a judgment on inclusive education.¹⁶⁰ A pupil with Down's syndrome who had completed his first year in a nursery school was prevented from re-enrolling in the same school for his second year. The school officials carried out a kind of enquiry among the teachers to find out who was ready to welcome him into their classroom and to provide suitable support. Apart from the pedagogical assistants, no teacher responded positively. As a result, the school asked the parents to look for another school. Given the evident discriminatory treatment, the equality body Unia decided to go to court. The judge found that refusing to enrol the child in these circumstances was a denial of reasonable accommodation, which is discriminatory within the meaning of the Flemish Decree of 10 June 2008 on equal opportunities and equal treatment.

¹⁵⁶ Judgment of 15 July 2009 of the President of the first instance court (*Tribunal de première instance – Rechtbank van eerste aanleg*) of Ghent (emergency proceedings).

¹⁵⁷ Opinion no. 2005-18, available on the website of the Commission: www.mensenrechten.nl/publicaties/oordelen/2005-18.

¹⁵⁸ This decision is available in Dutch on the Unia website: www.unia.be/fr/jurisprudence-alternatives/jurisprudence/cour-dappel-de-gand-7-septembre-2011.

¹⁵⁹ Judgment of 15 July 2009 of the President of the first instance court (*Tribunal de première instance – Rechtbank van eerste aanleg*) of Ghent (emergency proceedings).

¹⁶⁰ Judgment of 7 November 2018, Court of First Instance of Antwerp (in Dutch), www.unia.be/files/Documenten/Rechtspraak/Rechtbank_Eerste_aanleg_Antwerpen_7_november_2018.pdf.

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

The judge confirmed that specialised education for disabled students must remain the exception. It therefore considered that all the necessary adjustments are in principle reasonable until their disproportionate nature is established. Furthermore, the school chiefly focused on what the pupil was unable to do and, on the problems faced by the teachers. It is precisely this kind of prejudice that the public authorities wanted to avoid by adopting the Decree implementing various measures for the inclusion of children with disabilities in mainstream education in the Flemish Community.

In September 2016, Unia published a new edition of a booklet aimed at education professionals in order to guide them in the inclusion of pupils with disabilities at school. The booklet aims at clarifying the duty of reasonable accommodation provided in the anti-discrimination legislation.¹⁶¹ Moreover, in 2018, it published *Diversity Barometer: Education*.¹⁶² This most recent diversity barometer measuring discrimination and inequalities in the education system, was the result of long-term scientific research carried out by KU Leuven-HIVA, the learning and diversity research Centre of Ghent University and ULB-GERME. It emphasised a real concern about the inclusion of pupils with disabilities in Belgium's education system, and particularly the difficulties of parents in obtaining reasonable accommodation measures for their children.

It is worth noting that the European Committee of Social Rights (ECSR) condemned Belgium twice, in 2018 and in 2020, because of the Belgian state's failure to guarantee the right to inclusive education for children with intellectual disabilities within the Flemish Community¹⁶³ and the French Community¹⁶⁴ (both cases are reported below in section 3.2.7 of this report).

On 31 March 2006, the Council of Ministers (at federal level) adopted a legislative bill seeking to ensure, as a matter of principle, the admittance of guide dogs in public places.¹⁶⁵ In June 2006, the Council of State considered that the federal state was not competent to deal with the matter. Since then, some pieces of legislation have been adopted at the regional level. For instance:

- the Walloon Region adopted the Decree of 23 November 2006 concerning the accessibility of persons with disabilities accompanied by a guide dog to public

¹⁶¹ Unia (2016) 'A l'école de ton choix avec un handicap: les aménagements raisonnables dans l'enseignement', (Attending the school of your choice with a disability: reasonable accommodation in teaching), available on the Unia website, www.unia.be.

¹⁶² See Unia (2018) *Diversity Barometer: Education* (available on the Unia website: www.unia.be/en/).

¹⁶³ ECSR, *Mental Disability Advocacy Centre (MDAC) v. Belgium*, No. 109/2014, decision on the merits, 29 March 2018, [https://hudoc.esc.coe.int/eng#%7B%22fulltext%22:%5B%22Mental%20Disability%20Advocacy%20Centre%20\(MDAC\)%20v.%20Belgium%22%5D,%22sort%22:%5B%22ESCPublicationDate%20Descending%22,%22ESCDcIdentifier%22:%5B%22reschs-2018-3-en%22%5D%7D](https://hudoc.esc.coe.int/eng#%7B%22fulltext%22:%5B%22Mental%20Disability%20Advocacy%20Centre%20(MDAC)%20v.%20Belgium%22%5D,%22sort%22:%5B%22ESCPublicationDate%20Descending%22,%22ESCDcIdentifier%22:%5B%22reschs-2018-3-en%22%5D%7D).

¹⁶⁴ ECSR, *International Federation of Human Rights Leagues (FIDH) and Inclusion Europe v. Belgium*, No. 141/2017, decision on the merits, 9 September 2020, <https://hudoc.esc.coe.int/eng#%7B%22sort%22:%5B%22ESCPublicationDate%20Descending%22,%22tabview%22:%5B%22document%22,%22ESCDcIdentifier%22:%5B%22cc-141-2017-dmerits-en%22%5D%7D>.

¹⁶⁵ For a brief presentation in English of the regulatory framework applicable in Belgium as to guide dogs, see the website of the Belgian Assistance Dog Federation: www.badf.be/EN/toegangsrechtEN.html.

- places,¹⁶⁶ and the executive regulation to that decree was finally adopted on 2 October 2008;¹⁶⁷
- the Brussels Capital Region adopted an ordinance to the same effect on 18 December 2008,¹⁶⁸ followed by an executive regulation on 22 October 2009;¹⁶⁹
 - the Flemish Community/Region also passed a Decree on 20 March 2009¹⁷⁰ and the executive regulation to that decree was finally adopted on 29 March 2013.¹⁷¹

Even before this specific legislation was applicable, on 4 November 2009, the Court of First Instance of Termonde found the owner of a restaurant in Sint-Niklaas (a town located in the Flemish part of Belgium) who had refused entry to his restaurant to a customer's guide dog, guilty of discrimination. The owner had called upon the regulation relating to food hygiene. However, the Federal Royal Decree of 7 February 1997 relating to the general hygiene of foodstuffs¹⁷² provided for an exception in favour of guide dogs, including in a period of training. The Court condemned the restaurant owner for discrimination on the basis of disability, holding that guide dogs are not comparable to domestic animals. The victim was awarded the maximum fixed-rate compensation of EUR 1 300 for moral damage.¹⁷³ On 6 December 2012, the Court of Appeal of Ghent confirmed this decision.¹⁷⁴

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

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

However, the Flemish Decree of 8 May 2002 on proportionate representation of target groups in employment¹⁷⁵ does not restrict the notion of reasonable accommodation to persons with disabilities and could therefore also apply in principle to grounds other than disability. It has not yet been applied with respect to other grounds.

¹⁶⁶ OJ (*Moniteur belge*), 8 December 2006.

¹⁶⁷ Wallonia, *Arrêté du Gouvernement wallon portant exécution du décret du 23 novembre 2006 relatif à l'accessibilité aux personnes handicapées accompagnées de chiens d'assistance des établissements et installations destinés au public*, OJ (*Moniteur belge*), 29 October 2008, p. 57345. See also the *Arrêté du Gouvernement wallon du 27 avril 2010 fixant les modèles de la demande d'agrément et du carnet prévus par les articles 4, § 2, et 9, § 1er, de l'arrêté du Gouvernement wallon du 2 octobre 2008*. This regulation is included in the executive regulation of the Walloon Government codifying the legislation in the field of health and social action, 29 September 2011.

¹⁶⁸ Ordinance concerning the accessibility of persons with disabilities accompanied by a guide dog to public places (*Ordonnance relative à l'accès des chiens d'assistance aux lieux ouverts au public*), OJ (*Moniteur belge*), 14 January 2009, p. 1527 (last modified on 19 April 2012).

¹⁶⁹ Executive Regulation of Ordinance concerning the accessibility of persons with disabilities accompanied by a guide dog to public places (*Arrêté portant exécution de l'ordonnance du 18 décembre 2008 relative à l'accès des chiens d'assistance aux lieux ouverts au public*), OJ (*Moniteur belge*), 9 December 2009.

¹⁷⁰ Decree concerning the accessibility of persons with disabilities accompanied by a guide dog to public places (*Decreet houdende de toegankelijkheid van publieke plaatsen voor personen met een assistentiehond*), OJ (*Moniteur belge*), 8 May 2009.

¹⁷¹ Executive Regulation of the Flemish Government defining the modalities of the certification procedure of guide dogs, provided by Article 4 of the Decree of 20 March 2009 concerning the accessibility of persons with disabilities accompanied by a guide dog to public places (*Besluit van de Vlaamse Regering betreffende de regels inzake de attestatie van assistentiehonden, vermeld in artikel 4 van het decreet van 20 maart 2009 houdende de toegankelijkheid van publieke plaatsen voor personen met een assistentiehond*), OJ (*Moniteur belge*), 13 May 2013.

¹⁷² Now repealed and replaced by the Royal Decree of 22 December 2005 relating to the hygiene of foodstuffs (*Arrêté royal relatif à l'hygiène des denrées alimentaires*), OJ (*Moniteur belge*), 30 December 2005.

¹⁷³ Judgment of 4 November 2009 of the President of the First Instance Court of Termonde (emergency proceedings), *Centre for Equal Opportunities and Opposition to Racism and Ludwina De Lathauwer v. Komebar and Simun Ramic* (unpublished). For more details, see the website of Unia, www.unia.be/en.

¹⁷⁴ Judgment no. 2010/AR/264 of 6 December 2012 of the Court of Appeal of Ghent (available on www.unia.be/en).

¹⁷⁵ *Decreet houdende evenredige participatie op de arbeidsmarkt*, OJ (*Moniteur belge*), 26 July 2002, last modified on 10 December 2010 (OJ (*Moniteur belge*), 29 December 2010).

It might also be worth mentioning that on 16 September 2016, the Brussels Labour Court,¹⁷⁶ found that a company had directly discriminated, on the ground of the current or future state of health, against a worker who had tendonitis and who had asked for a part-time position for medical reasons. The employer refused this request and dismissed the worker a few weeks later. According to the labour court, the worker had no right to reasonable accommodation since there was not sufficient evidence of the sustainable nature of her disease and she was not held as disabled. The firing was nevertheless discriminatory, and the employer was sentenced to pay compensation of EUR 20 000 to the former employee. An *a contrario* reasoning could lead to the possibility of a reasonable accommodation duty on the ground of current state of health where the long-term nature of the disease is proved. That was the reasoning behind the judgment of 20 February 2018 (reported above in section 2.1.1.c) where the consequences of a cancer were recognised as constituting a disability requiring reasonable accommodation.¹⁷⁷

Regarding specific issues such as days off work for religious reasons, workers do not have the right to take an extra day off for a holiday of a philosophical or religious nature outside the 10 official public holidays in Belgium. However, they can take occasional leave in very particular cases (there are different regimes in the public and private sectors).¹⁷⁸

¹⁷⁶ Judgment of 16 December 2016 of the Labour Court of Brussels (in French), www.unia.be/files/Documenten/Rechtspraak/Tribunal_du_travail_francophone_16_septembre_2016.pdf.

¹⁷⁷ Judgment of 20 February 2018 of the Labour Court of Brussels (in Dutch), www.unia.be/files/Documenten/Rechtspraak/Arbeidshof_Brusseel_20_februari_2018.pdf.

¹⁷⁸ See Unia's factsheet, 'Jours de congé et diversité religieuse' (Days off and religious diversity), <https://www.unia.be/fr/criteres-de-discrimination/convictions-religieuses-ou-philosophiques/pratiques-religieuses/jours-de-conge>.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

It is notable that there is no obstacle to the anti-discrimination legislation applying to persons with irregular status.

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

a) Protection against discrimination

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

The anti-discrimination legislation explicitly addresses situations where the victim is a legal person in the provisions on the admissibility of the action of an interest group, which requires the victim's agreement (the agreement of the victim is needed in both situations: natural or legal person). This is provided in Article 5(1) of both federal Acts of 10 May 2007) and also in all the regional pieces of legislation.

b) Liability for discrimination

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

Both natural and legal persons are prohibited from committing the types of discrimination defined in the instruments implementing the directives (Article 5(1) of both federal acts of 10 May 2007). This requires no specific explanation where civil liability is concerned. Although the applicable acts are silent on this issue, this seems to be the only plausible interpretation in line with the courts' existing practice. Under the criminal clauses contained in the relevant instruments, Belgian criminal law has extended to legal persons all offences, which could be committed by natural persons through the Federal Act of 4 May 1999.¹⁷⁹ All regional pieces of legislation also impose their obligations on both natural and legal persons.

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

a) Protection against discrimination

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

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

¹⁷⁹ On the sanctions, which can be imposed on legal persons where they are criminally liable, see Article 7*bis* of the Criminal Code, inserted by the Act of 4 May 1999.

acts). All regional pieces of legislation also apply, in their fields of competence, to both the private and public sectors, including public bodies.

b) Liability for discrimination

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

3.2 Material scope

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

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

The current situation is the following:

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

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

- The Racial Equality Federal Act and the General Anti-Discrimination Federal Act prohibit direct and indirect discrimination, *inter alia*, with regard to access to employment or self-employment, in both the private and the public sector (Article 5(1)(5)).¹⁸⁰
- The prohibition of discrimination enshrined in the Flemish Decree of 8 May 2002 on proportionate participation in the employment market extends *ratione materiae* to access to employment (including self-employment) and vocational guidance and training. However, this decree applies only to situations that fall under the competence of the Flemish Region or Community.¹⁸¹
- The French Community ET Decree also applies to access to employment regarding its own public service (Article 8). More precisely, it applies to: (1) the statutory employment relationships in the public bodies created or funded by the French Community; (2) the education institutions; and (3) the civil service and governmental institutions.
- The Walloon ET Decree has a scope of application limited to the Walloon Region's competence in the area of employment policy and retraining. The prohibition of discrimination applies, *inter alia*, to access to employment and placing of workers, in

¹⁸⁰ Both acts refer to 'working relationships', as described in their Articles 5(2).

¹⁸¹ For more details, see above, in the introduction.

- the public and the private sectors (Articles 4(1) and 5). It also applies to statutory employment relationships in departments of the Walloon Government, public authorities depending on the Walloon Region, decentralised bodies (such as provinces, municipalities, etc.), and public centres for social assistance (Article 5(2)).
- The German Community ET Decree applies to labour relations regarding its own public service and to employment (including access to employment) (Article 4(1) and (3)), with regard to public bodies created or funded by the German-speaking Community, education institutions and the civil service and governmental institutions of the German-speaking Community (Article 3(11)). It also covers the employment policy of the German-speaking Community (Article 3(13)).
 - In the Brussels Capital Region, the Brussels ET Employment Ordinance covers worker placement policies and the policies aimed at unemployed persons (as defined in Article 4(9)). The Brussels Local Civil Service ET Ordinance relates to the promotion of diversity and the fight against discrimination in the civil service of the Brussels Capital Region. It applies to the employment field in the civil service of the Brussels Capital Region and covers (as defined in Article 4(10)) notably access conditions. Article 4(1) defines the specific public institutions of the Brussels Capital Region falling within the scope of the ordinance. The Cocof Vocational Training ET Decree covers vocational guidance, learning, advanced vocational training and retraining in the Brussels Capital Region (Article 11). The Cocof ET Decree relates to the fight against certain forms of discrimination and to the implementation of the principle of equal treatment in the fields of competences of the Cocof, including labour relations within public institutions of the Cocof (Article 4(2)), which covers access to employment and vocational guidance, etc. (Article 5(9)). Article 5(19) defines the specific public institutions of the Cocof falling within the scope of the decree.

On 10 February 2015, the Brussels Appeal Court handed down a decision in an important case relating to discrimination on the grounds of race and ethnic origin concerning the access to temporary work.¹⁸² The applicants (the French NGO, SOS Racisme, and the Belgian leftist trade union organisation, the FGTB) claimed that the well-known temporary work agency, Adecco, was listing jobseekers depending on their race and ethnic origin. Native Belgian people without foreign roots were registered in the computer system under the code 'BBB', by reference to the Belgian breed of Cattle '*Blanc Bleu Belge*' ('White Blue Belgian'). The system was put in place to please some clients who did not want to hire people with a foreign origin. In first instance, the Court sentenced Adecco to pay EUR 25 000 of damages to the first applicant and EUR 1 to the second applicant.¹⁸³ On appeal, the Court upheld the decision and also held Adecco liable for discrimination. The liability was assessed under a provision of the Civil Code (Article 1384(3)), according to which an employer is liable for his/her employees' civil offences committed during the employment relationship (irrefutable presumption of liability). As to damages, the Brussels Appeal Court sentenced Adecco to pay a much higher compensation (EUR 25 000 to all applicants), stressing that a mere symbolic sentence of EUR 1 does not meet the requirement of an effective and dissuasive sanction as imposed by European law. The conviction is important, as the practice was first denounced by Unia more than a decade ago and the first attempt to denounce the discriminatory practice before the Courts had failed for procedural reasons.

On 16 January 2019, the Antwerp Labour Appeal Court rendered another judgment in a case relating to discrimination on the grounds of national and ethnic origin during a recruitment procedure.¹⁸⁴ The applicant applied for a job and in response, he received an email saying, 'Another foreign name'. When he called the company, they replied that 'not all foreign workers have good intentions' and that they cost more in terms of social security

¹⁸² Court of Appeal of Brussels, 10 February 2015, www.unia.be/en.

¹⁸³ Note that this difference between the two applicants could be explained by their respective claims. The Belgian leftist Trade Union organisation the 'FGTB' had only required one euro as symbolic damages.

¹⁸⁴ Labour Appeal Court of Antwerp, Judgment No. 2017/11/581 of 16 January 2019, https://www.unia.be/files/Documenten/Rechtspraak/Arbeidshof_Antwerpen_16_januari_2019.pdf.

than they bring in for the company. There is no doubt from the facts and evidence that national and/or ethnic origin played a role in the selection procedure. The Labour Appeal Court of Antwerp pointed out that negative prejudices and generalisations about the person's Moroccan and/or Arab origin influenced the decision. The Labour Appeal Court stated that there was direct discrimination on the ground of ethnic/national origin, which is contrary to the Racial Equality Federal Act (Article 12). The Court sentenced the company. First, it ordered the immediate cessation of the company's discriminatory practice and prohibited the company from applying criteria related to national and/or ethnic origin to the detriment of any person applying to the company during the selection or recruitment process, under the threat of financial penalties (*astreintes*). Secondly, it imposed the sanction of publicising the judgment, by the posting of the decision for one month in the offices and workshops of the company, where it could be visible to the workers. Finally, it sentenced the defendant to pay moral and material damages to the victim which corresponded to six months' pay.

On 2 May 2016, the Ghent Labour Court¹⁸⁵ convicted a company for having directly discriminated against a 59-year-old-applicant in a recruitment procedure. M.S. (the victim) applied to a company (the defendant) for a job as an independent kitchen seller, on the basis of a vacancy published online. He received the following reply: 'Dear M, you seem like having the perfect profile for the job except for your age – I am sorry for being so straightforward about this, but it is probably better that you know the reason why I do not invite you for interview'. The applicant reported the case to Unia, which launched a conciliation procedure that failed. As a consequence, Unia decided to bring the case before the Ghent Labour Court, which ruled that M.S. had 'undoubtedly' ('*onmiskenaar*') been directly discriminated against on the ground of age. According to the court, the fact that the company had negative experiences with older workers because they supposedly had encountered difficulty with software programmes could not be considered to be an objective justification. The stereotypical view according to which older candidates are less likely to deal with software programmes was rejected altogether. In an in-depth reasoning, the jurisdiction sentenced the company. First, it ordered the immediate cessation of the company's discriminatory practice, under the threat of financial penalties (*astreintes*) (EUR 1 000 for each new offence) (Article 20 of the General Anti-Discrimination Federal Act). Secondly, it imposed the sanction of publicising the judgment, by the posting of the decision for one month at the company headquarters, where it could be visible for the workers and the next candidates for a job and in the shops of the company, where it could be visible for clients and members of the board. Interestingly, the tribunal judged that the publication of the decision in newspapers would be disproportionate. Finally, it sentenced the defendant to pay moral and material damages of EUR 25 000 to the victim, which correspond to six months of remuneration determined *ex aequo et bono*.

In a 2017 case reported above (in section 2.1.1.c), the Liège Labour Court¹⁸⁶ convicted a driving school of direct discrimination against an obese candidate on grounds of disability and physical characteristic.

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

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

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

¹⁸⁵ Judgment of 2 May 2016 of the Labour Court of Gent (in Dutch), www.unia.be/en.

¹⁸⁶ Judgment of 12 October 2017 of the Labour Court of Liège (in French), www.unia.be/files/Documenten/Rechtspraak/Cour_de_travail_de_Liège_12_octobre_2017.pdf.

Under the same conditions as for access to employment, to self-employment or to occupation detailed above (section 3.2.1), the federal and regional anti-discrimination laws (except for the Cocof Vocational Training ET Decree) prohibit direct and indirect discrimination, *inter alia*, with regard to employment and working conditions, including pay and dismissals. In this respect, the Brussels Labour Appeal Court, in a judgment of 12 March 2013, held that the notion of dismissal, enshrined in the General Anti-Discrimination Federal Act of 2007, should be broadly interpreted, so as to consider the incidence of *force majeure* (allowing a contractual party to suspend or terminate the performance of its obligations when certain circumstances beyond the control of the parties arise, making performance impossible) as a form of dismissal.¹⁸⁷

On 16 September 2016, in a case reported above (in 2.6.f), the Brussels Labour Court¹⁸⁸ convicted a company of having directly discriminated, on the ground of the current or future state of health, a worker who had tendonitis and who asked to work part-time for medical reasons. The employer refused this request and dismissed the worker a few weeks later.

In a case decided on 25 October 2016, the Ghent Labour Court convicted a company for having dismissed an employee who had been on a long-term sick leave (due to cancer) and who got pregnant during this leave. The dismissal relied on the fact that the 'continuity of her work was compromised'. The tribunal first considered that the employee had not sufficiently demonstrated unequal treatment based on gender. Enough evidence was produced to presume discriminatory treatment based on her state of health and the employer was unable to show that the dismissal was not based on the state of health of the worker. At this stage, the tribunal had to assess whether the difference in treatment could be reasonably justified (note that contrary to direct discrimination based on disability, direct discrimination based on the state of health can be justified under the Anti-Discrimination Federal Act). According to the tribunal, this could be the case in three situations: (1) the difference in treatment pursues a legitimate aim and respects the principle of proportionality; (2) the difference in treatment is prescribed by law; and (3) It constitutes a lawful positive action. As the dismissal did not come under any of these exceptions, the tribunal ruled that the dismissal amounted to unjustified direct discrimination on the ground of the state of health of the worker. The company was sentenced to pay a compensation of six months' salary and a fine of one euro for symbolic compensation to Unia (which took part in the proceedings).¹⁸⁹

More recently, on 20 February 2018, the Brussels Labour Court considered that the dismissal of an employee who was unable to work her contractually agreed working hours, due to facing the consequences of cancer, was in breach of the Anti-Discrimination Federal Act.¹⁹⁰ The Court, by considering that the consequences due to her cancer were constitutive of a disability due to their durability, enhanced her protection by giving her a right to reasonable accommodation.

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

¹⁸⁷ Judgment No. 2011/AB/631 of 12 March 2013 of the Labour Appeal Court (*Arbeidshof*) of Brussels.

¹⁸⁸ www.unia.be/files/Documenten/Rechtspraak/Tribunal_du_travail_francofone_16_septembre_2016.pdf.

¹⁸⁹ The Institute for Equality between Women and Men also took part to the procedure, but its request was declared inadmissible as unequal treatment based on gender was not held sufficiently proven. Note that, in this case, the claim for gender discrimination and the claim for discrimination on the grounds of state of health were made distinctly and not articulated as multiple or intersectional discrimination.

¹⁹⁰ Judgment of 20 February 2018 of the Labour Court of Brussels (in Dutch), www.unia.be/files/Documenten/Rechtspraak/Arbeidshof_Brussel_20_februari_2018.pdf.

the other, the employee would no longer be able to work full time, for an indefinite period of time, or maybe forever (disability).

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

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

In the Belgian federal system, vocational guidance (as part of employment policy) is a competence of the regions,¹⁹¹ although the Walloon Region transferred that competence to the German-speaking Community for the territory of the German-speaking Region on 1 January 2000. The Flemish Region/Community (Decree of 8 May 2002 on proportionate participation in the employment market), the Walloon Region (Walloon ET Decree), the German-speaking Community (German Community ET Decree) and the Region of Brussels-Capital (Brussels ET Employment Ordinance) prohibit discrimination in vocational guidance. The German Community ET Decree does not explicitly prohibit discrimination in vocational guidance, but it applies to employment policy, which should include vocational guidance.

Vocational training extends presumably, to advanced vocational training and retraining, but probably not to practical work experience, which is a competence of the regions under employment policy. Vocational training is a competence of the communities.¹⁹² The French Community has nevertheless delegated that competence (in the Belgian interpretation of the term, which differs from the European concept of vocational training that has been extended to university courses or technical courses) to, respectively, the Walloon Region (for the population of that region) and the Commission communautaire française (Cocof) of the Brussels Capital Region (for the French-speaking population of the Brussels Capital Region). This latter body adopted the Cocof Vocational Training ET Decree on 22 March 2007 in order to implement the relevant European directives in the field of vocational training – including vocational guidance, learning, advanced vocational training and retraining. The Walloon ET Decree covers vocational training and validation of skills in its material scope (Article 5(8)). The French Community ET Decree also includes, in its material scope, vocational training but in the European understanding of the term (Article 3(14)).

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

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

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

This is an area in which the federal level is competent to a large extent. The Racial Equality Federal Act and the General Anti-Discrimination Federal Act explicitly include the

¹⁹¹ Article 6(1), IX of the Special Federal Act of 8 August 1980 on institutional reforms.

¹⁹² Article 4(15) and (16) of the Special Federal Act of 8 August 1980 on institutional reforms.

membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided by such organisations (Article 3(1)(d) of the Directive), in their scope of application (Article 5(1)(7) of both federal acts).

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

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

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

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

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

In a recent case decided on 9 July 2020, the Constitutional Court ruled that Article 2 of the Federal Act of 27 February 1987 on allowances for people with disabilities was in breach of the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution). This provision does not allow entitlement to allowances for people with disabilities (income replacement allowance and integration allowance) to be granted to adults who have not reached the age of 21. According to the Constitutional Court, this is an unjustified distinction between adults with disabilities, depending on whether or not they have reached the age of 21.¹⁹³

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

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

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

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

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

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

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

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

Education is a competence of the communities in the Belgian federal system.¹⁹⁴ The communities are therefore exclusively competent to adopt legislation prohibiting discrimination in education.

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

In 2018, Unia published its *Diversity Barometer: Education*,¹⁹⁵ which is based on a study made by three Belgian universities identifying the risks of discrimination of pupils on the

¹⁹³ Constitutional Court, Judgment No. 103/2020 of 9 July 2020, <https://www.const-court.be/public/f/2020/2020-103f.pdf>.

¹⁹⁴ Article 127, Section 1(1) and (2) of the Constitution.

¹⁹⁵ Unia (2018) *Diversity Barometer: Education*, available at: <https://www.unia.be/en/publications-statistics/publications/diversity-barometer-education-2018>.

ground of their social or ethnic origin, disability or sexual orientation at school. The study focuses on compulsory education (6-18 years) and is based on interviews with teachers and school directors, surveys and behaviour tests. It points out important systemic deficiencies in Belgian educational systems resulting in discrimination against some groups of pupils (pupils from a lower socioeconomic background, pupils of foreign origin, pupils with disabilities). These deficiencies are notably caused by the organisation of the education system (public funding, freedom for parents to choose the school, and budget allowed according to the number of students), which often results in a distribution of the pupils among the different schools according to their socioeconomic background. Another factor explaining inequalities at school in Belgium is the existence of different educational programmes, some of which are more valued than others. Early orientation to one of them often further enhances inequality.

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

- the adoption of measures to increase the objectivity of methods of examining the existence of discrimination at school;¹⁹⁶
- a registration procedure which better contributes to social diversity, including the adoption of quotas for 'priority' students (target groups victim of discrimination) in each school;
- providing additional clarity regarding the powers, role and capacity of the 'class councils', which are composed by teachers, with regards to decisions related to orientation;
- taking seriously the question of harassment at school;
- a longer common core programme at schools for pupils to avoid orientation based on the social or ethnic origin;
- the introduction of measures combating harassment of LGBT students;
- adopting general measures for more accessibility at school and a better adoption of reasonable accommodation measures for students with a disability by schools.

These recommendations are important in practice and in supporting inclusive education.

In Belgium, the general approach to education for pupils with disabilities gives rise to problems.

In 2004, the Flemish Government adopted a decree supporting supplementary hours in schools (in order to ensure the provision of pedagogical support to children with intellectual disability) and subsidies for institutions organising 'type 2' (specially adapted) classes.¹⁹⁷ Moreover, on 21 March 2014, a decree to promote the inclusion of children with disabilities in mainstream schools was adopted.¹⁹⁸ Similarly, a cooperation agreement (approved by the Decree of 1 March 2004 of the French Community) between the French Community and the Cocof seeks to support schools (in either the mainstream or the special educational system), which welcome children with disability.¹⁹⁹ In addition, the Decree of 3 March 2004 of the French Community seeks to reorganise the special educational system for children and adolescents with specific needs.²⁰⁰ As explained by the Commissioner for Human

¹⁹⁶ Please note that the school inspection is organised at the level of the Communities as the federal level is not competent as to education. Recommendations are 'soft law' but they could guide the school inspection while checking the implementation on the Decree on inclusive education.

¹⁹⁷ Executive Regulation of the Flemish Government on the integration of children with a moderate or severe intellectual disability in primary and secondary education (*Arrêté du Gouvernement flamand relatif à l'intégration d'élèves présentant un handicap intellectuel modéré ou sévère dans l'enseignement primaire et secondaire ordinaire*), OJ (*Moniteur belge*), 2 March 2004.

¹⁹⁸ Flemish Decree of 21 March 2014 on measures for pupils with specific education needs, OJ (*Moniteur belge*), 28 August 2014 (*Decreet betreffende maatregelen voor leerlingen met specifieke onderwijsbehoeften*).

¹⁹⁹ OJ (*Moniteur belge*), 3 June 2004.

²⁰⁰ *Décret du 3 mars 2004 de la Communauté française organisant l'enseignement spécialisé*, OJ (*Moniteur belge*), 3 June 2004 (Decree of 3 March 2004 of the French-speaking Community on special education, as lastly modified on 17 October 2013). This decree was modified by a Decree of 13 January 2011 which

Rights, in the German-speaking Community, 'a transition from segregated education towards inclusion was undertaken as of 2009. Geographically isolated specialised schools were banned and rebuilt close to ordinary schools in order to develop interactions between the two types of schools'.²⁰¹ As education sector staff are public servants of the communities (from a statutory point of view), they are protected by the Flemish Decree of 8 May 2002²⁰² and the German-speaking Community ET Decree, adopted on 19 March 2012.²⁰³

However, these initiatives are far from being satisfactory. The Committee on the Rights of Persons with Disabilities, in 2014,²⁰⁴ and the Commissioner for Human Rights of the Council of Europe, in 2016,²⁰⁵ have severely criticised the Belgian education system, as it fails to promote the full inclusion of children with disabilities in mainstream education.

As reported above (see section 2.6), in September 2016, Unia published a new edition of a booklet aimed at professionals in the education system in order to guide them in the inclusion of pupils with disabilities at school. The booklet aims to clarify the duty of reasonable accommodation provided in the anti-discrimination legislation.²⁰⁶ Unia and the Flemish Office of the Children's Rights Commissioner (*Kinderrechtencommissariaat*) published a joint text on 3 December 2018 on the right to inclusive education, which covers how to carry out a correct proportionality test of the measures and the interest of the child.²⁰⁷

In 2018 and in 2020, the European Committee of Social Rights (ECSR) condemned Belgium because of the Belgian state's failure to guarantee the right to inclusive education for children with intellectual disabilities within the Flemish Community²⁰⁸ and the French Community (Wallonia-Brussels Federation).²⁰⁹ In both cases, Unia filed an amicus brief. In both cases, the ECSR found a violation of Articles 15 (right of persons with disabilities to independence, social integration and participation in the life of the community) and 17 (right of children and young persons to social, legal and economic protection) of the Revised European Social Charter. Conversely, the Committee decided that there was no violation of Article E in conjunction with Articles 15 and 17. According to the Committee, Articles 15 and 17 encompass discrimination on the ground of disability. The allegations of discrimination on the basis of socioeconomic origin ('low-income families would not be able to mobilise adequate resources to enable the pupil to be directed to mainstream education') were not upheld by the Committee due to the lack of 'specific evidence' to support them.²¹⁰

included a new provision (Article 147, para. 2) obliging mainstream schools to demonstrate willingness to integrate children with specific needs in some conditions.

²⁰¹ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, para. 110 p. 22.

²⁰² See Article 3(2) and Article 2(6) of the Flemish Decree of 8 May 2002.

²⁰³ See Article 3(11) of the German Community ET Decree of 19 March 2012.

²⁰⁴ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session* (15 September – 3 October 2014): www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx.

²⁰⁵ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, Strasbourg, 28 January 2016, pp. 2 and 21 and seq.

²⁰⁶ Unia (2016) 'A l'école de ton choix avec un handicap: les aménagements raisonnables dans l'enseignement'.

²⁰⁷ Unia/Kinderrechtencommissariaat (2018), 'Kwaliteitsvol inclusief onderwijs in het belang van het kind, peut être consulté', available on the website of Unia, see www.unia.be.

²⁰⁸ ECSR, *Mental Disability Advocacy Centre (MDAC) v. Belgium*, No. 109/2014, decision on the merits, 29 March 2018, [https://hudoc.esc.coe.int/eng#%7B%22fulltext%22:%5B%22Mental%20Disability%20Advocacy%20Centre%20\(MDAC\)%20v.%20Belgium%22%5D,%22sort%22:%5B%22ESCPublicationDate%20Descending%22%5D,%22ESCDcIdentifier%22:%5B%22reschs-2018-3-en%22%5D%7D](https://hudoc.esc.coe.int/eng#%7B%22fulltext%22:%5B%22Mental%20Disability%20Advocacy%20Centre%20(MDAC)%20v.%20Belgium%22%5D,%22sort%22:%5B%22ESCPublicationDate%20Descending%22%5D,%22ESCDcIdentifier%22:%5B%22reschs-2018-3-en%22%5D%7D).

²⁰⁹ ECSR, *International Federation of Human Rights Leagues (FIDH) and Inclusion Europe v. Belgium*, complaint no. 141/2017, decision on the merits, 9 September 2020, <https://hudoc.esc.coe.int/eng#%7B%22sort%22:%5B%22ESCPublicationDate%20Descending%22%5D,%22tabview%22:%5B%22document%22%5D,%22ESCDcIdentifier%22:%5B%22cc-141-2017-dmerits-en%22%5D%7D>.

²¹⁰ ECSR, *International Federation of Human Rights Leagues (FIDH) and Inclusion Europe v. Belgium*, no. 141/2017, decision on the merits, 9 September 2020, paras. 195-197 and 210.

These European condemnations illustrate the extent to which the legislative reactions are still insufficient. In the French Community, a decree concerning inclusive social advancement education was adopted on 29 June 2016. This decree establishes the right for any student with disabilities to seek reasonable accommodation from the Council of Studies and through a reference person. An appeal can be made to the Commission for Inclusive Social Advancement Education. In addition, on 7 December 2017,²¹¹ the French Community adopted another decree concerning the reception, the assisting and the maintenance of children with specific needs in basic and secondary education. This decree provides arrangements for consultation on and the implementation of reasonable accommodation for students with disability. It also creates a conciliation procedure and an appeal to an ad hoc committee, in which Unia will sit 'on a voluntary and advisory basis'. However, it also raises some concerns on the understanding of the right to reasonable accommodation, which is much too limited in view of legal texts and case law. In particular, the decree makes the right to reasonable accommodation conditional on the fact that the pupil's situation 'does not make it necessary to send him or her to specialised education according to the provisions of the Decree of 3 March 2004 organising special education' (Article 4(1)). Under anti-discrimination legislation and the UN CRPD, the refusal of reasonable accommodation constitutes discrimination. In other words, the accommodation is a right as soon as that is reasonable, rather than a mere 'possibility'. This right must be open to all students with disabilities within the meaning of the UN convention and international jurisprudence. Therefore, this additional condition does not comply with the law. Furthermore, the new decree excludes from ordinary schools, students with specific needs that 'call into question the learning objectives defined by the inter-jurisdictional reference frameworks' (Article 4(4)). This provision goes against the concept of an inclusive education system that should allow for flexible study programmes, learning methods and forms of assessment adapted to all students.²¹²

Issues with inclusive education occur not only within primary and secondary schools, but also in the university environment. For example, on 25 October 2018, the Council of State suspended a university-college examination board's decision, because it was discriminatory and against the Constitution.²¹³ The case concerned a student who was about to graduate as a natural science teacher but eventually failed because of his low score in French, even though the university had been aware for years of his dyslexia and dysorthographia.

In its 55 recommendations addressed to Belgium in 2019, the United Nations Committee on the Rights of the Child calls, among others, for the inclusion of children with disabilities in mainstream education.²¹⁴

Unia has called on schools to pay special attention to vulnerable groups of pupils during the COVID-19 pandemic, especially pupils with disabilities.²¹⁵ In addition, Communities have allocated an additional budget of several million euros to provide computers to pupils who do not have access to a suitable device that is necessary to follow distance learning classes at home.²¹⁶

²¹¹ Decree of 7 December 2017 on the reception, accompaniment and maintenance of basic and secondary education for pupils with special needs (*Décret du 7 décembre 2017 relatif à l'accueil, à l'accompagnement et au maintien dans l'enseignement ordinaire fondamental et secondaire des élèves présentant des besoins spécifiques*), OJ (*Moniteur belge*), 1 February 2018, www.gallilex.cfwb.be/document/pdf/44807_000.pdf.

²¹² See: UN CRPD, General Comment No. 4 (2016) on the right to inclusive education, Articles 14 and 26.

²¹³ Council of State (section of administration), *Baijot v. la Haute Ecole Galilée*, 25 October 2018, judgment no. 242.794, www.unia.be/files/Documenten/Rechtspraak/Conseil_detat_25_octobre_2018.pdf.

²¹⁴ UN Committee on the Rights of the Child (2019) *Concluding observations on the combined fifth and sixth reports of Belgium*, CRC/C/BEL/CO/5-6, 28 February 2019.

²¹⁵ Unia (2020) 'Distance learning: Unia requests special attention for vulnerable groups', <https://www.unia.be/fr/articles/cours-a-distance-unia-demande-une-attention-particuliere-pour-les-groupes-vulnerables>.

²¹⁶ RTBF (2020) 'Coronavirus: Flanders has already distributed 12,500 laptops to underprivileged students', https://www.rtbf.be/info/belgique/detail_coronavirus-la-flandre-a-deja-distribue-12-500-pc-portables-a-ses-eleves-defavorises?id=10506130; RTBF (2020) '10 million euros for computers for students in the

a) Trends and patterns regarding Roma pupils

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

According to surveys carried out in 1994,²¹⁷ 2001 and 2004,²¹⁸ school absenteeism and dropout rates constitute a serious problem among the Roma, Sinti and Traveller communities, in Belgium, particularly in secondary education. A large number of Roma children do not complete secondary school. Moreover, the majority of children from these communities are directed towards technical and vocational education, in the way in which children from disadvantaged social backgrounds are generally directed. The figures remain patchy and make it difficult to identify the precise causes of the dropout and absenteeism of pupils from Roma communities, although they do suggest that the lack of measures to assist Roma children in mainstream educational institutions may be the main reason why the dropout figures are so high.²¹⁹ The Delegate General for the Rights of the Child, an independent public body appointed by the Wallonia-Brussels Federation, is concerned about the extreme poverty of Traveller children, which is one of the reasons why these children are not being brought to school regularly

'the exclusion of the families is reflected in the children at various levels: they cannot wash in the morning, they miss heating during winter, they are victims of the stress caused by forced evictions and their environment is unhealthy (...).'²²⁰

These issues have been confirmed by the Commissioner for Human Rights of the Council of Europe in his 2016 report following his visit in Belgium in September 2015. The Commissioner expressed his deep concerns about the low participation of Roma and Traveller children in education. He highlighted the following issues:²²¹

- the very high dropout and absenteeism rates as well as a growing number of children not attending school at all;
- the constant risk of housing eviction which seriously affects the access of an increasing number of children to education;
- enrolment denials;
- the disproportionately high rate of Roma and Traveller children enrolled in special education, due among other factors, to a lack of proficiency in the language of education.²²²

In May 2016, based on an initiative of the Belgian national contact point for Roma, the Social Integration Federal Public Service launched the Belgian National Roma Platform. The platform (or forum) is supervised by a pilot committee made of staff of the federal and regional administrations, NGOs active at the local level and Unia. The aim of this forum is

Wallonia-Brussels Federation', https://www.rtb.be/info/belgique/detail_10-millions-d-euros-pour-fournir-des-ordinateurs-a-20-000-eleves-en-federation-wallonie-bruxelles?id=10620142.

²¹⁷ Machiels, T. (2002) *Keeping the Distance or Taking the Chances, Roma and Travellers in Western Europe*, Brussels, ENAR, March 2002, p. 17.

²¹⁸ Regional Integration Centre (2004) *Les Roma de Bruxelles*, Foyer Bruxelles asbl, September 2004, p. 36 & sq.

²¹⁹ For a study on the schooling of Roma children in Belgium, see King Baudouin Foundation (2009) 'Schooling of Roma children in Belgium. The parent's voice', www.kbs-frb.be/~media/Files/Bib/Publications/Older/PUB2009-1857-SchoolingRomaChildren.pdf.

²²⁰ Délégué Général aux Droits de l'Enfant (2009), 'Rapport relatif aux incidences et aux conséquences de la pauvreté sur les enfants, les jeunes et leurs familles' (Report on the incidences and effects of poverty on children, young people and their families), 2009, pp. 30-32.

²²¹ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, Strasbourg, 28 January 2016, pp. 28-29 and 31-32.

²²² According to a 2010 study carried out in the city of Leuven, 27 % of the Roma and Traveller children surveyed were enrolled in specialised schools.

to trigger dialogue between stakeholders and Roma communities in Belgium. The Belgian National Roma Platform benefits from EU and federal funding.²²³

There is still little information available on school attendance or the level of education of the Traveller community. The few studies and reports carried out on this subject showed specific patterns factually (not formally) amounting to segregation, including an overrepresentation in the special educational system.²²⁴ This is why Unia conducted a survey to determine the participation of Traveller children in education.²²⁵ This survey, published in the beginning of 2018, especially recommends promoting inclusive education, improving the housing situation of this community and investing in research related to those issues.²²⁶ A 2020 survey conducted by the European Union Agency For Fundamental Rights (FRA) showed that the school enrolment rate is 70 % among Roma children aged 4-6 years and 95 % among Roma children aged 6-15 years, while it is 39 % among Travellers of the same age.²²⁷

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

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

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

In Belgium, as in other countries of Europe, there has been some debate on the legality of the burkini ban (body-covering swimwear) in swimming pools. This debate is directly related to the access of Muslim women to goods and services, in this case to public swimming pools. On 5 July 2018, the Ghent First Instance Court ruled in two judgments that the ban of burkinis in two municipal swimming pools was unlawful.²²⁸ Relying on the ECtHR case law, the judge stressed that it is not the role of the court to discuss whether the Muslim religion imposes or not the wearing of such clothing. The legitimacy of such a

²²³ Report 2018-2019 mentioned at <https://www.mi-is.be/fr/themes/pauvrete/integration-des-roms/plateforme-nationale-belge-pour-les-roms/annee-activite-3-2018>.

²²⁴ Unia (2018) *Annual Report for 2017*, www.unia.be/files/Documenten/Jaarrapport/UNIA-rapport2017_FR-AS.pdf.

²²⁵ Unia (2017) 'Participation à l'enseignement des enfants des Gens du voyage en Belgique', December 2017, www.unia.be/files/Documenten/Aanbevelingen-advies/Participation_%C3%A0_l'enseignement_des_Gens_du_voyage.pdf.

²²⁶ Those recommendations were reiterated in the 2019 memorandum drafted by Unia in view of the federal, regional and European elections of 26 May 2019; Unia (2019) *S'engager pour les droits humains 61 propositions d'Unia pour les élections 2019* (Commit to human rights : 61 proposals for the 2019 elections).

²²⁷ European Union Agency For Fundamental Rights (FRA) (2020), 'Roma and Travellers in Belgium - Key results from the Roma and Travellers survey 2019', p.3, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-roma-and-travellers-survey-country-sheet-belgium_fr.pdf.

²²⁸ Judgment of 5 July 2018 of the First Instance Court of Ghent (in Dutch): for the swimming pool of Van Eyck: [www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_\(zwembad_Van_Eyck\).pdf](http://www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_(zwembad_Van_Eyck).pdf); for the swimming pool of Merelbeke: [www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_\(zwembad_Merelbeke\).pdf](http://www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_(zwembad_Merelbeke).pdf).

practice is not an issue that the court should consider. As to the discrimination issue, the Ghent First Instance Court ruled that the burkini ban does not amount to direct discrimination since it stems from the general internal rules of the swimming pool, which require the wearing of a swimming suit to access the pool. However, there is indirect discrimination against Muslim women willing to wear a burkini for religious reasons.

In its most recent annual report, published in 2020, Unia stresses that there has been an increase in complaints from women who are banned from practising sport in sports halls because of their headscarves.²²⁹

According to the court, justifications on grounds of security or hygiene do not stand up to scrutiny, especially when considering the opinion of a regional health agency. It rightly points out that although a requirement of neutrality may be imposed upon the providers of public services, the same cannot be required from the users of these services.

a) Distinction between goods and services available publicly or privately

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

Where they cover access to and supply of goods and services, all the different ET federal and regional laws in Belgium refer to the access to and supply of goods and services available to the public.²³⁰ There is no specification as to what this expression refers to, but it is clear from the preparatory works that this refers to all situations where goods or services are offered on the market, i.e. not reserved to a closed group.²³¹

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

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

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

Social housing has been part of the responsibilities of the regions for many years.²³² Since the 2014 Sixth Belgian State Reform, private housing has also become a competence of the regions. Discrimination in housing falls under the Flemish Framework ET Decree (Article 20(1er)(6)), the Walloon ET Decree (Article 5(1er)(3)) and the Housing Code of the Brussels Capital Region.²³³

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

²²⁹ Unia (2020), *Annual Report for 2019 (Contributing to a more equal society for all)*, p. 34, see its website, www.Unia.be/en.

²³⁰ Access to and supply of *goods* is not covered by the following legislation: Brussels ET Employment Ordinance, Brussels Local Civil Service ET Ordinance, Cofoc Vocation Training ET Decree.

²³¹ To the knowledge of the authors of the report, there is still no case law clarifying the notion.

²³² Article 6(1er)(IV) of the Special Act of 8 August 1980; Article 4(1) of the Special Act of 12 January 1989 on the institutions of Brussels.

²³³ Brussels Housing Code, 17 July 2003, last modified on 21 December 2018, OJ (*Moniteur belge*), 31 January 2019.

nationale pour le logement des personnes handicapées), which is very active on the ground.

In Belgium, the anti-discrimination legal framework applies to everyone, irrespective of their nationality, and discrimination on the ground of nationality is prohibited. However, in practice, there are patterns of housing discrimination against people with a migrant background. However, it is difficult to affirm that discrimination is because of their migrant background, rather than on the grounds of property (*'fortune'*, in French), social condition or ethnic origin. For example, on 5 June 2018,²³⁴ the Ghent Appeal Court convicted a real estate agent who had refused to rent an apartment to a refugee family because they did not have a Belgian identity card. The court asserted that this behaviour constituted direct discrimination based on nationality.

It is notable that access to housing is particularly difficult for recognised refugees who, once they obtain their status, have two months to find housing and leave the centre for asylum seekers. Refugees face language problems as well as refusals related to their refugee status or lack of income. In response to this situation, a Belgian NGO, Caritas International, is carrying out various activities to facilitate their access to housing, especially by encouraging private owners to become supportive owners (*propriétaires solidaires*) and by organising 'housing-café's' to encourage meetings between owners and refugees.²³⁵

The *Diversity Barometer: Housing* published by Unia in 2014,²³⁶ gives a better picture of the situation in practice. Furthermore, the Unia report concerning discrimination based on religious belief linked to the consequences of the terrorist attacks,²³⁷ shows that the rise of anxiety *vis-a-vis* the Muslim community in Belgium leads to more discriminatory behaviour reported to Unia, especially in the employment and housing markets.²³⁸

a) Trends and patterns regarding housing segregation for Roma

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

Belgium has chosen to go beyond the scope of the directives in the area of housing and services available to the public. National anti-discrimination law is used to prevent Roma and Travellers from ending up with a shortage of stopping sites, which would be considered to be discrimination under national law.

Case law involving discrimination against Roma and Travellers in housing is scarce. There is not much information on the situation of Roma (i.e. post-1989 Roma) in the field of housing, except that they usually live in very poor areas and in miserable conditions. There are cases related to difficulties encountered by Travellers in finding a place to stop with their caravan, either temporarily, during the travelling period, or permanently. Given the shortage of sites where Travellers are allowed to stop (especially in the Brussels Capital and Walloon Regions), they are regularly evicted from lands where they have parked their caravan without authorisation. The core of the problem is that the specific lifestyle of Travellers is not (or not sufficiently) taken into account in planning regulations. Moreover, many local authorities are unwilling to accommodate Travellers in their territory.

When Travellers lodge complaints, courts generally hold that their location at a site was illegal and the eviction therefore justified; therefore the International Federation of Human

²³⁴ Judgment of 5 June 2018 of the Court of Appeal of Ghent (in Dutch),

www.unia.be/files/Documenten/Rechtspraak/Hof_van_Beroep_Gent_5_juni_2018.pdf.

²³⁵ See, for more details, Caritas International's website: www.caritasinternational.be/fr/projects/asile-et-migration/refugies/logement/housing-cafe-trouver-un-logement/.

²³⁶ See www.unia.be/fr/publications-et-statistiques/publications/barometre-de-la-diversite-logement.

²³⁷ See above, in section 2.1.1.

²³⁸ Unia (2017), *Mesures et climat: conséquences post-attentats* June 2017, (www.unia.be/en).

Rights (FIDH) lodged a collective complaint in 2010 before the European Committee of Social Rights (ECSR) to challenge the overall situation of Travellers in Belgium by alleging a violation of Article 16 (the right of the family to social, legal and economic protection), Article 30 (the right to protection against poverty and social exclusion) and Article E (non-discrimination clause) of the Revised European Social Charter.²³⁹ In 2012, the European Committee of Social Rights concluded that there is a violation of the Charter because of: the failure to recognise caravans as dwellings; the lack of sites for Travellers; the state's inadequate efforts to solve the problem; and the failure of policy-makers to sufficiently take into account of the specific circumstances of Traveller families. In its latest available follow-up report on the decision in 2018, the ECSR still considered Belgium to be failing to comply with the Charter.²⁴⁰

As to legislative developments, caravans are now recognised as dwellings in the three regions. In Flanders, caravans are explicitly taken into consideration since their inclusion in the Flemish Housing Code in 2004.²⁴¹ With regard to the Brussels Region, an ordinance amending the Brussels Housing Code was enacted on 1 March 2012. The Government of the Brussels Capital Region had to define the specific rules for this kind of dwelling by executive regulation. It also had to define the minimum requirements that the sites made available to Travellers should meet and to identify, in particular, what safety standards would apply to itinerant homes. In 2020, this executive regulation had still not been adopted. Therefore, although the amended ordinance is applicable, it is of no legal effect as the law presupposes an executive regulation to produce its effects. In May 2019, the Walloon Housing Code was amended in order to expand residential facilities for Travellers, so as to include mobile homes (such as caravans) and tiny houses ('*habitations légères*') as legal types of housing.²⁴² The executive regulations necessary for the new law to produce its effects were adopted on 3 December 2020. They had still not been published by the end of 2020 (and therefore are not yet in force). These regulations define the minimum requirements and safety standards that these dwellings should meet, the criteria for rental permits, etc. According to the Walloon Government these dwellings could be an answer to the challenge of housing for all.

In its 2020 report, the European Commission against Racism and Intolerance once again criticised Belgium for the lack of sites for Travellers. While the Flemish Region offers five well-equipped active transit sites, 'the only short-term transit site in the Brussels-Capital Region was closed in July 2012 and there are just 27 residential places. In the Walloon Region, there is a specially equipped site in Namur while two other sites (...) are not yet ready. Eight other municipalities (...) offer reception facilities on one or more sites, with varying standards of layout and equipment'.²⁴³ ECRI considers that there is still a shortage of transit and permanent sites. The Belgian authorities have informed ECRI that measures are being taken to improve the situation: 'For the period 2016-19, the Flemish Region has made grants for the acquisition, fitting out, extension and renovation of transit sites' and 'the Walloon Region awards grants to local authorities wishing to provide sites for

²³⁹ *International Federation of Human Rights Leagues (FIDH) v. Belgium*, complaint no. 62/2010, decision on admissibility, 1 December 2010.

²⁴⁰ ECSR (2018), *Follow-up to Decisions on the Merits of Collective Complaints, Findings 2018*, rm.coe.int/findings-2018-on-collective-complaints/168091f0c7. On the same line, see Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, p. 30 and seq.

²⁴¹ Decree of 19 March 2004 (*Decreet tot wijziging van het decreet van 15 juli 1997 houdende de Vlaamse Wooncode en van het decreet van 4 februari 1997 houdende de kwaliteits- en veiligheidsnormen voor kamers en studentenkamers*), OJ (*Moniteur belge*), 13 July 2004.

²⁴² Decree of 2 May 2019 amending the Walloon Housing and Sustainable Housing Code and the Decree of 15 March 2018 relating to residential leases with a view to including the notion of '*habitations légères*' (*Décret du 2 mai 2019 modifiant le Code wallon du Logement et de l'Habitat durable et le décret du 15 mars 2018 relatif au bail d'habitation en vue d'y insérer la notion d'habitation légère*), OJ (*Moniteur belge*), 11 July 2019.

²⁴³ ECRI (2020), *Sixth report on Belgium*, paragraphs 87-91, <https://rm.coe.int/ecri-sixth-report-on-belgium-/16809ce9f0>.

Travellers'.²⁴⁴ Although Brussels established a grants policy similar to that of the Flemish Region, ECRI considered that 'a satisfactory way of ensuring an adequate number of residential places has still not been found. As a result, between 2003 and 2018 the number of long-term places, public and private, for Travellers fell from 60 to 27. Yet the number of such families who live in Brussels for various reasons, such as birth, education or employment, and who are in need of a place, has doubled from about 70 to 140'.²⁴⁵

In May 2019, Patrick Charlier (co-director of Unia) and Bernard De Vos (delegate-general for the rights of children in the French Community) reacted to a large-scale police intervention in which the caravans of 90 families of Travellers were seized. They stressed that these seizures have had disastrous side effects. Children, women and elderly found themselves overnight without any shelter or resources. As they put it, 'the current situation is a gross violation of human rights in general and of children's rights in particular'.²⁴⁶ In June 2019, several UN special rapporteurs questioned Belgium about the disproportionate effects of these seizures, especially in relation to housing.²⁴⁷ In July 2019, the European Roma Rights Centre (ERRC) submitted a summary complaint with a request for an interim measure to the European Committee of Social Rights 'given the flagrant nature of the breaches of the European Social Charter (Revised), and the irreparable harm that is taking place'. The immediate measures requested include returning 'the caravans seized (...) to their owners who have been left homeless, or to provide adequate accommodation for the families who have been left homeless as a result'.²⁴⁸ In its latest reply to the proceedings in November 2019, the Belgian Government contests the facts (including stating that the caravans cannot be returned because they were allegedly stolen) and considers 'the allegations of discrimination and unjustified deprivation of social rights of a particular community to be manifestly inadmissible'.²⁴⁹ The Committee declared the complaint admissible on 14 May 2020 and decided to indicate immediate measures such as 'to guarantee that persons whose caravans have been seized are not rendered homeless or forced to live in unacceptable living conditions'.²⁵⁰

In April 2020, another police intervention occurred at two Traveller sites in Wallonia, during which caravans and property were seized. The ERRC submitted a new summary complaint with a request for interim measures to the European Committee of Social Rights, claiming that 'these actions were carried out without consideration of the proportionality of the measure and without offering an alternative solution in return (...) and have placed the affected families in direct exposure to hardships and health risks associated with Covid-19 in breach of (...) provisions of the Charter'.²⁵¹ The immediate measures requested include stopping the seizing of caravans during the COVID-19 pandemic and returning the caravans already seized or providing adequate alternative accommodation. According to the Belgian Government, the interim measures requested should all be rejected.²⁵²

²⁴⁴ ECRI (2020), *Sixth report on Belgium*, paragraph 88.

²⁴⁵ ECRI (2020), *Sixth report on Belgium*, paragraph 88.

²⁴⁶ Patrick Charlier and Bernard De Vos, 16 May 2019, <https://www.unia.be/fr/articles/saisie-des-caravanes-des-gens-du-voyage-une-situation-critique-pour-les-familles>.

²⁴⁷ Doc No. UA BEL 2/2019 by Dainius Puras, Leilani Farha, Fernand de Varennes and E. Tendayi Achiume, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?qId=24630>.

²⁴⁸ *European Roma Rights Centre (ERRC) v. Belgium*, pending complaint No. 185/2019.

²⁴⁹ *European Roma Rights Centre (ERRC) v. Belgium*, pending complaint No. 185/2019: case document No. 4, Further response from the Government on admissibility and request for immediate measures, <https://rm.coe.int/cc185casedoc4-fr-nouvelle-replique-gvt-recevabilite-et-mesure-immediat/16809940fa>.

²⁵⁰ ECSR, *European Roma Rights Centre (ERRC) v. Belgium*, pending complaint No. 185/2019: decision on admissibility and on immediate measures, <https://hudoc.esc.coe.int/eng#%7B%22sort%22:%5B%22ESCPublicationDate%20Descending%22%5D,%22ESCDcIdentifier%22:%5B%22cc-185-2019-dadmissandimmed-en%22%5D%7D>.

²⁵¹ ECSR, *European Roma Rights Centre (ERRC) v. Belgium*, pending complaint No. 195/2019.

²⁵² ECSR, *European Roma Rights Centre (ERRC) v. Belgium*, pending complaint No. 195/2019: case document No. 2, Observations by the Government on admissibility and request for immediate measures, <https://rm.coe.int/cc195casedoc2-fr-observations-du-gvt-sur-la-recevabilite-et-la-demande/16809f1592>.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Belgium (federal level), the General Anti-Discrimination Federal Act and the Racial Equality Federal Act provide for an exception for genuine and determining occupational requirements (Article 8). To the extent that no exhaustive list of such requirements is specified, it is left to the judge to decide, on a case-by-case basis, whether the conditions are satisfied in order for the exception to apply. It remains debatable whether this is a fully satisfactory solution. However, the federal Government is authorised to adopt a royal decree providing a list of examples in order to offer guidance to courts.²⁵³ In its 2017 report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts suggests that consideration be given to the opportunity to adopt one or several royal decrees providing such a list.²⁵⁴

The instruments adopted by the regions and communities contain similar provisions that are in line with the EU requirements.²⁵⁵

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

In respect of age discrimination, on 26 September 2017, a proceeding for annulment was initiated before the Belgian Council of State²⁵⁶ against a refusal to appoint a candidate for a position at the Brussels Regional Agency for Public Cleanliness because of his age. A regulation provides that 35 is the maximum age to apply for this position. This condition does not apply to workers hired by the Regional Agency for Cleanliness before they were 35. The claimant, who is older, asserts that fixing the maximum age of 35 for candidates to apply for a position of worker for public cleanliness cannot constitute a genuine occupational requirement and is, therefore, direct discrimination based on age, prohibited by the former Brussels Civil Service ET Ordinance (Articles 4(6) and 7 to 10). According to the Council of State, this condition is not illegal and is appropriate and necessary to guarantee the legitimate objective that the position can be fulfilled for a certain amount of time by newly appointed workers. Indeed, the Council of State considered that, since the position requires excellent physical health, it is likely that people of a certain age could no longer fulfil the essential requirements of the work at stake. The Council of State also underlined that, in this matter, its control is only a marginal one (standard of abuse of authority): it is only competent to censure, on appeal, any manifest error of assessment which a public authority may have committed. According to the ruling of the Council of State, 'in the present case, the public authority had discretion in fixing that age and the fact that it chose the age of 35 appears to be objective and reasonable. Although the applicant questions the relevance of that choice, he does not, however, show how that

²⁵³ Recital 18 of the Preamble of the Racial Equality Directive and Recital 23 of the Preamble of the Employment Equality Directive state that 'In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate, and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission' (on the requirement that the Member States report to the European Commission, see Article 18 of the Framework Directive). This last sentence suggests that the notion of 'genuine and determining occupational requirement' should not be left to a case-by-case identification under judicial control, but should be given a precise definition beforehand, such situations being described by the Member State as part of the reporting requirements of the implementation of the Framework Directive. The implementation of Article 6 of the Flemish Framework ET Decree shows that the requirement to identify with precision, *ex ante*, the occupational requirements, which fall within the exceptions of Article 4 of the Racial Equality Directive and of Article 4(1) of the Framework Directive, is achievable.

²⁵⁴ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, p. 46 and para. 107, www.unia.be/en.

²⁵⁵ See, for instance, Article 7(2) of the Walloon ET Decree.

²⁵⁶ Belgian Council of State, case no. 239.217, 26 September 2017, www.raadvst-consetat.be/?lang=fr.

decision would be manifestly unreasonable in the light of the specific characteristics of the post concerned' (our translation). The proceeding for annulment was rejected.

As to the ground of disability (or presumed disability), in a case ruled in 2013, the President of the Bruges Labour Court²⁵⁷ stated that an employer could not disadvantage an employee based on physical or genetic features and/or a presumed disability in order to respond to the needs and preferences of colleagues and/or customers. According to the court, this kind of direct distinction could neither be considered as a genuine and determining occupational requirement, nor as a positive action, nor as a difference in treatment imposed by, or by virtue of, legislation. In the case in question, the applicant who had syndactyly (a congenital hand malformation) was not hired under a permanent contract because, according to his employer, his congenital hand deformities would not have been presentable for customers and would have prevented him from fully assuming his job.

Also of relevance is the 2016 judgment of the Liège Labour Court convicting a driving school for discrimination against an obese applicant (see section 2.1.1.c. above).²⁵⁸ The court examined the question whether the weight of the applicant amounted to a genuine and determining occupational requirement that justified the difference of treatment. The court judged that it could not be seen as such, given the function at hand and despite the safety reasons offered by the defendant. Moreover, according to the court, even though not being obese could constitute a genuine and determining occupational requirement, a reasonable accommodation could have been put in place, which the defendant failed to do.

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

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

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

Although the concept of an employer with an ethos based on religion or belief is not expressly referred to, some decisions relating to the prohibition of religious symbols at work in the name of neutrality are worth discussing here. They illustrate the blurred lines between direct and indirect discrimination as well as between a genuine and determining occupational requirement (Article 4(1) of Directive 2000/78/EC) and the exception for employers with an ethos based on religion or belief (Article 4(2) of Directive 2000/78/EC).

The first case is the *Hema* case decided by the Tongres Labour Court in January 2013.²⁵⁹ The Hema store (belonging to the Dutch discount retail chain) in Genk (Flanders)²⁶⁰ had forbidden a Muslim employee who wore a headscarf from working with customers after some had complained. At the beginning of her employment, the Muslim employee was told that the wearing of a headscarf was acceptable, and she was even provided with a Hema headscarf as worn by staff in the Netherlands. However, after receiving many negative

²⁵⁷ Judgment no. 12/2552/A and no. 12/2596/A of 10 December 2013 of the President of the Labour Court (*Arbeidsrechtbank*) of Bruges (Flanders).

²⁵⁸ Judgment of the Labour Court of Liège, 20 June 2016, www.unia.be/en.

²⁵⁹ Labour Court (*Arbeidsrechtbank*) of Tongres (Flanders), 2 January 2013, *Joyce V. O. D. B. v. R. B. NV and H. B. BVBA*, judgment no. A.R. 11/2142/A, available on the website of the Centre, www.Unia.be/en/.

²⁶⁰ Genk is a much smaller town than Ghent, which is also mentioned in the report.

reactions from customers, the company asked the Muslim employee to stop wearing her headscarf in order to comply with 'the neutral and discreet image of Hema'. As she refused to do so, Hema did not renew her contract. After having consulted the trade unions and with the consent of the employee, Unia decided to bring the matter to the Tongres Labour Court. The main purpose of such a strategic legal action was to get a CJEU preliminary ruling to clarify how far a company can go in seeking to present a 'neutral image' to its customers. Indeed, some companies are currently trying to get neutrality recognised as a belief or conviction, so that a neutral company could be recognised as an 'organisation with an ethos based on religion or belief'. According to Unia, this could not only result in opening the door to discrimination on the basis of religious belief or moral convictions, but also in removing the essential purpose of the very concept of 'organisation with an ethos based on religion or belief'. Furthermore, in the opinion of Unia, neutrality can hardly be invoked as a genuine and determining occupational requirement. In its ruling of 2 January 2013, the court held that terminating labour relations by reason of the wearing of a headscarf constituted direct discrimination on the grounds of belief and sentenced the Hema store in Genk to pay six months' salary compensation to the fired employee. In its decision, the labour court noted that the concept of 'genuine and determining occupational requirements' should be used parsimoniously. Evidence in the case showed that the neutrality argument was a fake one invoked to cover the prejudice toward Islam of some clients. However, the court stressed that the Hema store in Genk had, at the time of the case, no clear neutrality policy in the workplace, and consequently, no valid reason to dismiss the Muslim employee on the grounds of her religious beliefs. This might imply that if the Hema store in Genk had clearly stated in its labour regulations that the wearing of religious signs was prohibited to comply with a neutrality policy, it would not have been sentenced.²⁶¹

The second case is the well-known *Achbita* case which concerned a Muslim woman who worked as a permanent contract receptionist at G4S Security Services and decided, in April 2006, three years after her hiring, to wear the Islamic headscarf during working hours. She had not had any duty to wear a specific uniform until then. However, a few days after she decided to wear the headscarf at work, she was informed that it would not be tolerated,²⁶² because it was contrary to the neutrality policy of the company. The work regulations of the company were also amended in order to forbid the workers from wearing any visible symbol expressing their political, philosophical or religious beliefs. Refusing to remove her headscarf within the premises of the company, the Muslim employee was laid off. According to the Antwerp Labour Appeal Court, which decided the case on 23 December 2011, the employer could prohibit the wearing of any religious signs by all employees in order to preserve the neutral image of the company, even though the company did not have any clear regulation on neutrality in the workplace at the time of hiring.²⁶³

The applicant then brought the case before the Belgian Court of Cassation²⁶⁴ which decided to submit the case to the CJEU for a preliminary ruling. The question referred to the CJEU only concerned the issue of direct discrimination. The CJEU rendered its judgment in *Achbita* on 14 March 2017.²⁶⁵ The Court considered that the general ban on wearing religious symbols did not constitute direct discrimination since it was applicable to all employees regardless of their religion. It nevertheless stressed that it could constitute indirect discrimination if it was demonstrated that people with a particular religion were more disadvantaged by this measure. In a ruling of 9 October 2017, the Belgian Court of

²⁶¹ Such a ruling is in line with the decision of the Labour Court of Appeal of Brussels in the decision *E.F. v. Club corp.* of 15 January 2008.

²⁶² CJEU, judgment of 14 March 2017, *Achbita*, C-157/15, ECLI: EU:C:2017:203.

²⁶³ Judgment Nos. A.R. 2010/AA/453 and A.R. 2010/AA/467 of 23 December 2011 of the Labour Court of Appeal (*Arbeidshof*) of Antwerp.

²⁶⁴ Court of Cassation, 9 March 2015, S.12.0062.N, www.unia.be/en.

²⁶⁵ CJEU (GC), judgment of 14 March 2017, *Achbita*, C-157/15, ECLI: EU:C:2017:203. It is worth noting that the CJEU issued another ruling in Grand Chamber on the same day in the *Bougnaoui* French case C-188/15. It considered that a policy requiring an employee to remove her Islamic headscarf when in contact with clients (to please the will of clients not to see any headscarf) was unlawful direct discrimination.

Cassation²⁶⁶ overturned the decision of the Antwerp Labour Court, except with regard to the consideration that there was no direct discrimination in the case at hand, following the interpretation of the CJEU in this respect. The case was then referred to the Ghent Labour Court as the Court of Cassation is not competent to decide the case on the facts. Unia, the equality body, was still a party to the proceedings, acting in support of Mrs. Achbita.

The Ghent Labour Appeal Court²⁶⁷ had to determine whether a dismissal motivated by the wearing of a headscarf, in application of a neutrality policy of the company, was likely to constitute indirect discrimination based on religion or belief. On 12 October 2020, the Ghent Labour Appeal Court ruled that the policy of general neutrality did not disadvantage Muslim women more than others. All G4S workers are required to refrain from revealing their religious, political or philosophical beliefs. In any case, the separation between state and church does not allow the court to distinguish these beliefs according to their importance. In the end, the Ghent Labour Appeal Court decided that there was no indirect discrimination because it was not proved that people with a particular religion were more disadvantaged by this neutrality policy of the company. Since no indirect distinction could be established in the absence of a particular disadvantage for a protected group, there would not even be a need for justification. Nevertheless, the Court carried out the justification test (referred to as the *Bilka* test), which consists in determining whether or not an indirect distinction is justified in the pursuit of a legitimate aim. According to the court, the policy of neutrality is a legitimate aim and the measure is appropriate, necessary and proportionate to this aim. The Appeal Court also held that the employer did not have to consider alternatives such as the wearing of a neutral headscarf or the transfer to another position where the employee would not be in contact with clients.

The decision of the Ghent Labour Appeal Court could be criticised in the light of its reasoning regarding its definition of the protected group (not taking into account the particular situation of Muslim women who wish to wear a headscarf at work) and its definition of indirect discrimination (which means taking into account the *actual* effects of the measure despite the fact that it applies equally to all). This decision is final as Unia decided not to bring the case before the Court of Cassation one last time.

It is worth noting that during the proceedings of the *Achbita* case, other similar cases were decided. For instance, on 18 May 2015, the Brussels Labour Court dismissed an applicant claiming that she had been discriminated against on the ground of religion/belief because her employer refused to allow her to wear the Islamic headscarf.²⁶⁸ Referring to the above-mentioned decisions of 23 December 2011 of the Antwerp Labour Court of Appeal, the Brussels Labour Court ruled that there was no direct or indirect discrimination. Regarding direct discrimination, it considered that the applicant did not bring any evidence that she had been treated differently from the other employees on the ground of her religion/belief. Regarding indirect discrimination, it noted that the work regulations enshrined a 'neutrality policy' and requested that the employees wear clothes with the name of the company. The Brussels Labour Court concluded that even though this neutrality policy could have disadvantaged the applicant, this was considered as proportionate and reasonably justified. It did not wait for the decision of the CJEU in the *Achbita* case.

In a ruling handed down on 16 November 2015, the President of the First Instance Court of Brussels reached another conclusion.²⁶⁹ He ruled that the working regulation of Actiris – the Government body responsible for employment in the Brussels Capital Region – prohibiting the wearing of visible philosophical symbols amounted to indirect discrimination against the applicant who was wearing the Islamic veil. According to the court, the prohibition at stake was not legitimate since the regional legislature itself did not impose

²⁶⁶ Decision of the Court of Cassation, 9 October 2017, S 12.062.N1.

²⁶⁷ Judgment No. 2019/AG/55 of 12 October 2020 of the Labour Court of Appeal (*Arbeidshof*) of Ghent, https://www.unia.be/files/Documenten/Rechtspraak/2020_10_12_Arbh._Gent.pdf.

²⁶⁸ Labour Court of Brussels (*Tribunal du travail*), 18 May 2015, A.R. 14/218/A, www.unia.be/en.

²⁶⁹ Court of First Instance of Brussels, 16 November 2015, No. 13/7828/A.

an 'exclusive neutrality'. Moreover, Actiris did not show that the measure was appropriate and necessary to achieve the aim of neutrality pursued. Finally, the President considered that it was not necessary to wait for the CJEU ruling in the *Achbita* case since there was indeed indirect discrimination in the *Actiris* case, while *Achbita* was not about indirect discrimination but was only related to direct discrimination.²⁷⁰

In another case, (of 28 May 2018),²⁷¹ similar facts to those in the *Achbita* case led to the dismissal of an employee who refused to take off her headscarf, which she started wearing when she came back from her maternity leave. Relying on the Court of Justice's decision in *Achbita*, the Brussels Labour Court considered that the general ban on wearing religious symbols did not constitute direct discrimination since it was applicable to all employees regardless of their religion. It furthermore considered that the headscarf ban also did not constitute indirect discrimination since it was justified by the aim of the company to maintain a corporate image of neutrality and that the rule was proportionate.

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

The question was debated before the Council of State in a case involving two Flemish public schools that refused to appoint teachers of Islamic religion because of their refusal to remove their headscarf outside the classroom, after teaching their religion courses.²⁷² The two religion teachers filed an action for suspension and annulment of the decision of refusal of their appointments before the Council of State. In two decisions on the actions in suspension handed down on 5 February 2014, the Council of State held that the religious beliefs – and thus related religious symbols – of a religion teacher are inherent to his/her function. It concluded that, *prima facie*, by refusing to appoint an Islamic religion teacher only because she wears a headscarf as a religious symbol and refuses to remove it outside the classroom, after class, the schools have breached Article 24 of the Constitution concerning the neutrality of public education. The Court did not rule this question under the anti-discrimination provisions.²⁷³ The Council of State based its rulings on the decision adopted in 17 April 2013,²⁷⁴ in which it annulled the sentence 'when they are in the premises where they give their courses', which was part of the public schools' internal regulation adopted by the city council of Grâce-Hollogne (in the French-speaking part of Belgium). Following these rulings, the wearing of political, ideological or religious symbols, granted to teachers of religion or moral education, is not limited to the premises where they teach their philosophical courses. The Council of State confirmed this case law in a ruling of 25 September 2015 in a similar case.²⁷⁵

It is worth noting that the case law of the Council of State discussed above is applicable only to teachers of religion. As a reminder,²⁷⁶ on 27 March 2013,²⁷⁷ the administrative court (sitting *en banc* - *assemblée générale*) dismissed a maths teacher on her action for annulment (merits of the case) against a regulation adopted by the city council of Charleroi prohibiting the wearing of religious signs by public school teachers.

²⁷⁰ On this question see footnote 134 Chr. Horevoets, S. Vincent, (2016) 'Concepts et acteurs de la lutte contre les discriminations', in E. Bribosia, I. Rorive, S. Van Drooghenbroeck (coord.), *Droit de la non-discrimination: avancées et enjeux, Morceaux choisis et développements récents à la lumière du droit belge, européen et international*, Bruxelles, Bruylant, 2016.

²⁷¹ Judgment of 28 May 2018, Labour Court of Brussels, www.unia.be/files/Documenten/Rechtspraak/Tribunal_du_travail_Bruxelles_28_mai_2018.pdf.

²⁷² Council of State, 5 February 2014, Nos. 226.345 and 226.346, www.raadvst-consetat.be/.

²⁷³ However, the Council of State refused to suspend the execution of the challenged decisions and thus rejected both actions in suspension because the applicants did not manage to prove the risk of serious irrevocable prejudice.

²⁷⁴ Council of State, 17 April 2013, No. 223.201, www.raadvst-consetat.be/.

²⁷⁵ Council of State, 25 September 2015, No. 232.344, www.raadvst-consetat.be/.

²⁷⁶ Bribosia E. and Rorive, I. (2014) *Belgium country report on measures to combat discrimination – 2013*, available at: www.equalitylaw.eu/country/belgium.

²⁷⁷ Council of State, 27 March 2013, No. 223.042.

In its recommendations of December 2019 on the Periodic Report of Belgium, the UN Committee for Human Rights says it is

'concerned about the prohibition against the wearing of religious symbols at work, in certain public bodies and by teachers and students at public schools, which could result in discrimination and the marginalization of certain persons belonging to religious minorities (arts. 2, 3, 18 and 26).'

It recommends that Belgium

'reconsider its legislation on the wearing of religious symbols and clothing in public, at work and in schools, in accordance with its obligations under the Covenant, in particular in respect of the right to freedom of thought, conscience and religion and the right to equality before the law.'²⁷⁸

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

In Belgium, there are specific provisions relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination in the context of employment.

In Belgium, there are specific provisions concerning religious educational institutions. To a certain extent, these institutions are free to choose the curriculum and values at the core of their teaching. This implies a corresponding obligation for members of these institutions to respect these curricula and values. However, the distinction between the private and the professional spheres should be respected, and disproportionate restrictions should not be imposed on the fundamental freedoms of the staff.²⁷⁹

In its rulings on several actions in annulment launched against the Federal Anti-Discrimination Acts of 10 May 2007, the Constitutional Court²⁸⁰ stated that with respect to Article 13 of the General Anti-Discrimination Federal Act, which makes an exception to prohibited distinctions of treatment for public or private organisations the ethos of which is based on religion or belief, the Court issued a consistent interpretation in line with the principle of legality in criminal matters. The Court asserts first that, in employment, complementary social security schemes and membership in trade unions, those organisations with an ethos based on religion or belief can make a distinction on the ground of religion or belief if that is necessary in regard to the context or the nature of the activity. As to the context, the Court says that it equates to 'the character linked to the ethos of the organisation' (*le caractère lié à la tendance de l'organisation*). The Court carries on by stating that, a distinction on the ground of religion or belief implemented by such an organisation, can be considered as objectively and reasonably justified having in mind the basis (*fondement*) of the organisation.

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

²⁷⁸ UN Human Rights Committee (2019), *Concluding observations on the sixth periodic report of Belgium*, CCPR/C/BEL/CO/6, 6 December 2019, paragraphs 17-18.

²⁷⁹ For instance, Article 21 of the Decree adopted on 27 July 1992 by the French Community (*Décret de la Communauté française du 27 juillet 1992 fixant le statut des membres du personnel subsidiés de l'enseignement libre subventionné*, Decree of the French-speaking Community of 27 July 1992 on the status of subsidised staff in free, subsidised education) provides that the personnel of educational institutions must comply with the obligations defined in their employment contract, which result from the specific character of the curriculum of the teaching institution in which they are recruited; however, the same decree states in Article 27 that the right to respect for private life of the employees should not be interfered with.

²⁸⁰ Judgments of the Constitutional Court, nos. 17/2009, 39/2009, 40/2009, 64/2009, delivered on 12 February 2009, 11 March 2009 and 2 April 2009.

In a case involving the Christian Congregation of Jehovah's Witnesses, the applicant, who had been expelled from the Congregation, put into question, not his ban as such, but the instructions given to the members of the congregation to refrain as much as possible from seeing expelled members, even if they are family members. According to the applicant, community members affected by the ban found themselves without social fabric, as they were required not to develop any relation with the external world while being part of the congregation. Confirming the decision of the Liège Court of Appeal,²⁸¹ which was quashed by the Court of Cassation²⁸² for the reason that it was in breach of the principle of the reversal of the burden of proof, the Mons Court of Appeal held that the applicant did not invoke any relevant element to presume the existence of discrimination as he was in a similar situation to that of any person properly banned from a group or association. The court also noted that the state's obligations in respect of neutrality and impartiality did not allow it to assess the legitimacy of religious beliefs or the way religious beliefs manifest themselves as part of the principle of the personal autonomy of believers.

4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19, Directive 2000/78)

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

However, although the General Anti-Discrimination Federal Act is silent on this matter, it appears from the explanatory memorandum (*exposé des motifs*) that the Government accepts that the preservation of the fighting force in the army might be a legitimate objective when defining genuine and determining occupational requirements within the army. Therefore, the general understanding is that this exception is covered under Article 8 of the General Anti-Discrimination Federal Act (mentioned above in section 4.1).

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

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

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

All the pieces of legislation adopted at regional level now explicitly outlaw discrimination based on nationality. Similar to the Racial Equality Federal Act, there is an open system of justification of direct discrimination based on this discrimination ground (nationality). The Cocof Vocational Training ET Decree²⁸³ does not provide for a justification system of direct discrimination based on nationality.

²⁸¹ Appeal Court (*Cour d'appel*) of Liège, 6 February 2006, *Jurisprudence Liège, Mons et Bruxelles*, 2006/15, p. 661664.

²⁸² Court of Cassation, Judgment of 18 December 2008.

²⁸³ Note that the Cocof ET Decree of 2010 provides that differences of treatment based on nationality may be justified in case of a genuine and determining occupational requirement (Article 10).

The Constitutional Court has already ruled in cases where the applicant claimed being discriminated against on the ground of nationality because of legislative provisions. A lot of these cases are linked to the freedom of movement within the EU and the conditions required to gain access to social, cultural and economic rights.²⁸⁴

There have also been a fair number of cases related to discrimination on the ground of nationality in the field of social security. In these cases, the Constitutional Court²⁸⁵ and national courts usually apply the criterion of 'strong consideration', on the basis of the case law of the European Court of Human Rights.²⁸⁶

Articles 10 and 11 of the Constitution protect non-nationals only for differences of treatment *between non-nationals*.²⁸⁷ Concerning differences of treatment between *nationals and non-nationals*, Article 191 guarantees that any foreigner who is on Belgian territory enjoys the protection related to goods and people, apart from the exceptions enshrined in the law. As a consequence, any difference of treatment between Belgians and non-nationals should be reasonably and objectively justified – i.e. justified as a measure necessary to achieve a legitimate aim and proportionate to that aim (in some cases, the illegality of the residence on the territory will be deemed to put non-nationals in a different situation). However, in this case, the scrutiny of the Court is by definition much more lenient.²⁸⁸

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

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

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

However, in March 2012, six NGOs – including the French-speaking and the Flemish human rights leagues – decided to apply to the Constitutional Court for annulment of the Belgian Act of 8 July 2011 on family reunification (Article 9). They argue that, by imposing on Belgian citizens who have not made use of their free movement rights the same conditions (in terms of income and housing) as non-EU citizens in order to get family reunification,

²⁸⁴ See among others the case ruled by the Constitutional Court concerning the language conditions that employees of nurseries financed by the Flemish Community have to comply with, Decision No. 97/2014 of 30 June 2014.

²⁸⁵ See among others the following cases: Constitutional Court, Decision No. 82/2016 of 2 June 2016, Decision No. 155/2014 of 23 October 2014 and Decision No. 12/2013 of 21 February 2013 available on the website of the Court: www.const-court.be/.

²⁸⁶ See Haumont, G. (2020), 'Sa langue vers l'autre – itinéraires de la jurisprudence de la Cour européenne des droits de l'homme dans le raisonnement du juge constitutionnel belge en matière de droits fondamentaux des étrangers', 2, *Revue belge de droit constitutionnel*, pp. 119-168; Bouckaert, S. (2012) 'Influence de la jurisprudence de la CEDH sur le droit et la jurisprudence belges', in CIECLR, *Différences de traitement en fonction de la nationalité ou du statut de séjour: justifiées ou non?*, p. 17.

²⁸⁷ See notably Belgian Constitutional Court, case No. 82/2012, 28 June 2012, B.2.

²⁸⁸ Lys, M. and Renauld, B. (2013) 'Le principe constitutionnel d'égalité et les étrangers: Du critère de la nationalité à celui du droit de séjour' (2013) 2 *Revue belge de droit constitutionnel* 201.

and thus by imposing stricter conditions on Belgian citizens than other EU citizens, the new legislation introduces discrimination between Belgian citizens and EU citizens (reverse discrimination). According to the six organisations, it is particularly Belgians of Turkish and Moroccan origin who will be most badly hit by the legislation, which is therefore considered to be discriminatory on the ground of ethnic origin. Individuals or couples asking for family reunification have brought 36 similar actions in annulment before the Constitutional Court. On 26 September 2013, the Constitutional Court handed down a decision on the merits in which it held that Article 40^{ter} of the Act of 15 December 1980, as modified by the new Belgian Act of 8 July 2011 on family reunification, does not infringe the right to equality and non-discrimination enshrined in Articles 10 and 11 of the Constitution. According to the Court, the principle of equality and non-discrimination between Belgian citizens and EU citizens may permit, by reason of the specific situation of both categories of persons, certain differences of treatment. The Court noted that the fact that the Belgian legislature transposes EU legislation with regard to EU citizens, by virtue of EU obligations, without simultaneously extending this legislation to a category of persons not subject to it (Belgian citizens who have not made use of their free movement rights), does not in itself infringe the principle of equality and non-discrimination. Furthermore, the Court considered that the differences in treatment between Belgian citizens who have not made use of their free movement rights and EU citizens, regarding the conditions imposed on family reunification in terms of age, income and housing, are based on an objective criterion, are justified by the legitimate aim of controlling migratory flows and do not constitute a disproportionate infringement upon the right to equality and non-discrimination. As a consequence, the Constitutional Court held that these grounds for annulment were not established and rejected the claim regarding these specific grounds.²⁸⁹

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

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

Nevertheless, the regulation on health and safety at work in Belgium makes it an obligation for the occupational physician to identify which solutions may be devised in order to promote access to employment for workers whose physical condition makes them unsuitable for certain jobs or for work on certain premises, and therefore the question of whether health and safety exceptions could be invoked by an employer to justify a difference in treatment on grounds of disability or health will depend exclusively on the attitude of the occupational physician, not on that of the employer.²⁹⁰ It is not possible in the context of this report to enter into the details of this regulatory framework.

Nevertheless, it is worth mentioning the exceptions relating to health and safety contained in the regional decrees on the admittance of guide dogs to public places (mentioned in section 2.6 above). The Ordinance of the Brussels Capital Region of 18 December 2008 and the Walloon Decree of 23 November 2006 (the provisions of which are now enshrined in the Walloon Code of Social Action and Health of 29 September 2011)²⁹¹ provide (in Article 4) that the admittance of guide dogs may be refused:

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

²⁸⁹ Constitutional Court, judgment no. 121/2013 of 26 September 2013. This decision of the Constitutional Court could be criticised in the light of the case law of the ECtHR according to which only very weighty reasons could justify a difference of treatment on the grounds of nationality (see *Gaygusuz* case law, 1996).

²⁹⁰ See especially *Arrêté royal du 28 mai 2003 relatif à la surveillance de la santé des travailleurs* (Royal Decree of 28 May 2003 on monitoring the health of workers), OJ (*Moniteur belge*), 16 June 2003.

²⁹¹ OJ (*Moniteur belge*), 21 December 2011 (*Arrêté du Gouvernement wallon portant codification de la législation en matière de santé et d'action sociale, confirmé par le Décret de la Région wallonne du 1er décembre 2011*).

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

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

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

In 2011, Unia made recommendations to the federal Ministers for Public Health and Equal Opportunities on the access of guide dogs to hospitals. Unia recommended that the 'Superior Health Council develop a uniform procedure regulating the access to hospitals and healthcare establishments. The general rule should be that persons accompanied by a guide dog should have free access to consultation places, hospital rooms, cafeteria ... It is essential to establish a list of places where guide dogs are not admitted. The procedure must also mention the hygiene precautions to be respected and the way in which the hospital staff can be sensitised to these questions'.²⁹² As a follow-up, the Superior Health Council adopted an opinion, in May 2014, on access to guide dogs to hospitals, where it reiterated that access to premises, or parts of premises, devoted to intensive care and invasive medical interventions should be prohibited, unless otherwise stated by the Hospital Hygiene Committee.²⁹³

The judgment of 21 November 2011 of the Antwerp Labour Court of Appeal constitutes a good illustration of exceptions in relation to disability and health/safety. The case concerns a woman with type-1 diabetes (insulin-dependent) who had been working as a storekeeper at the Port of Antwerp since 2004. In 2008, she decided to apply for the position of containers storekeeper, but the occupational doctor considered that she was medically unfit for any function at the Port of Antwerp. The doctor's position relied on internal guidelines, which automatically exclude employees or prospective employees with type-1 diabetes, irrespective of any individual examination and regardless of the position concerned. On this basis, the woman brought an action before the Antwerp Labour Court, which dismissed her action. Unia decided to appeal this judgment with the claimant. The Antwerp Labour Court of Appeal²⁹⁴ overruled both the individual decision of the occupational doctor regarding the claimant and the internal guidelines of the Port of Antwerp, which automatically exclude employees or prospective employees with type-1 diabetes from all functions performed at the Port of Antwerp. It held that the fitness to work of an employee, or a prospective employee, with type-1 diabetes, should be considered on a case-by-case basis in relation to the position concerned, so as to be in accordance with the Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination. It examined the discrimination under the ground of 'disability'.²⁹⁵ The Port of Antwerp brought the case before the Belgian Court of Cassation. In a ruling of 14 December 2015, the Court dismissed the argument of the Port of Antwerp and confirmed the decision of the Antwerp Labour Court of Appeal.²⁹⁶

²⁹² Recommendation available on the website of Unia.

²⁹³ This opinion is available in French and Dutch: www.health.belgium.be/en/node/20840.

²⁹⁴ Judgment of 21 November 2011 of the Labour Court of Appeal (*Arbeidshof*) of Antwerp.

²⁹⁵ www.unia.be/en.

²⁹⁶ Court of Cassation, 14 December 2015, www.unia.be/en. See also a similar decision handed down by the Labour Court of Liège (Tribunal du travail) on 19 August 2015 (summary available on Unia website: www.Unia.be/en). The court judged that the health problems of the applicants had played a role in the lay-off of the latter.

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

The Mons Court of Appeal ruled in a case related to discrimination on the ground of health in access to services. The applicant, who was wearing a headscarf to hide her baldness caused by chemotherapy, had been refused entry to a bowling alley. The refusal was based on the bowling alley's regulation that prohibits the wearing of any headgear for 'decency and hygiene' reasons. The court judged that the refusal was a consequence of a misinterpretation of the regulation and a communication problem between the employee of the bowling alley and the applicant. It decided that this refusal did not constitute discrimination. According to this judgment, since there was miscommunication/unusual practice, the applicant will be able to enter the bowling in the future, but no damages were awarded in the absence of recognised discrimination.²⁹⁷

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

4.6.1 Direct discrimination

a) Exceptions to the prohibition of direct discrimination on grounds of age

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

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

b) Justification of direct discrimination on the ground of age

In Belgium, national law provides, under certain conditions, for justifications for direct discrimination on the ground of age.

The wording of all the provisions referred to at the beginning of this section (4.6.1 a)) follow Article 6(1)(a) of Directive 2000/78/EC and appear to be in conformity with the approach adopted by the CJEU in *Mangold*²⁹⁸ and *Kucukdeveci*:²⁹⁹ '(...) direct distinctions on grounds of age shall not constitute discrimination if they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'. For instance, Article 12(1) of the General Anti-Discrimination Federal Act does not provide for age limits, but instead requires a case-by-case examination of any difference of treatment based on age, which may be justified as appropriate or necessary

²⁹⁷ Court of Appeal of Mons, 29 September 2015, www.unia.be/en. See *contra* Court of First Instance of Brussels (civil section), 25 January 2011, www.unia.be/en.

²⁹⁸ CJEU, judgment of 22 November 2005, *Mangold*, C-144/04, ECLI:EU:C:2005:709.

²⁹⁹ CJEU, judgment of 19 January 2010, *Kucukdeveci*, C-555/07, ECLI:EU:C:2010:21.

for the attainment of a legitimate objective. Despite the lack of case law interpreting this provision, Belgian law seems compatible with the *Mangold* and *Kucukdeveci* approach.

c) Permitted differences of treatment based on age

In Belgium, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78.

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

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

Unia's *Diversity Barometer: Employment*, published in September 2012, reveals the existence of age discrimination practices in the Belgian labour market during the first stage of the selection process, mainly affecting older people.³⁰⁰ The data published by Unia on its activities in 2016 reveal that, between 2015 and 2016, the highest increase in cases opened occurred in age discrimination cases in the field of employment: 104 cases were opened, which is an increase of 126 %. According to Unia, 'this type of discrimination remains underestimated, not taken seriously and, worse, almost socially accepted. Yet, considering the aging of the population and the lengthening of careers, this phenomenon should be tackled structurally'.³⁰¹ According to Unia, although the number of complaints increased in 2016, few cases involving alleged discrimination on the basis of age are brought in court and the majority of the disputes are regulated by way of negotiation and payment of compensation by the employer to the victim. In such cases, Unia is not entitled to file a suit. The high-profile case before the Ghent Labour Court, involving the conviction of a famous kitchen selling company in Flanders for having directly discriminated against a 59-year-old-applicant in a recruitment procedure could be a starting point for structural change in this respect (see above, section 3.2.1). In 2019, the number of opened cases in age discrimination cases in the field of employment was 67, which is a decrease of 14.1 % compared to 2018 (78 opened cases).³⁰²

d) Fixing of ages for admission to occupational pension schemes

In Belgium, national law allows occupational pension schemes to fix ages for admission to the scheme, taking up the possibility provided for by Article 6(2). As a result of the implementation in Belgium of the EU Pension Portability Directive 2014/50, the Belgian Government made changes to occupational pension schemes: as of 1 January 2019, companies could no longer restrict access to employees aged of at least 25 or with at least one year of seniority. Employees will immediately enter into their workplace pension scheme upon employment. In addition, in the event that the worker ceases to work for the company, he may request the transfer of the reserves acquired in respect of his occupational pension scheme.³⁰³

³⁰⁰ See Unia (2012) *Diversity Barometer: Employment* (available on the website of the Centre: www.unia.be/en/).

³⁰¹ First data of Unia on discrimination in the field of employment and education – 2016, available on <https://www.unia.be/fr/articles/les-premiers-chiffres-dunia-pour-2016-montrent-une-hausse-sensible-des-discriminations-presumees-dans-lemploi-et-lenseignement>.

³⁰² Unia (2020) *Annual statistics report 2019 (Contributing to a more equal society for all)*, p. 25, available on its website, www.unia.be/en/.

³⁰³ Belgian Federal Act of 27 June 2018 on the transposition of Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for increasing the mobility of workers between Member States by improving the acquisition and preservation of supplementary pension rights (*Loi du 27 juin 2018 relative à la transposition de la directive 2014/50/UE du Parlement européen et du Conseil du 16 avril 2014 relative aux prescriptions minimales visant à accroître la mobilité des travailleurs entre les Etats membres en améliorant l'acquisition et la préservation des droits à pension complémentaire*), OJ, 5 July 2018.

The legislation is extremely complex and has been modified on many occasions, but the basic rule is that, since 1 January 2009, men and women have been able to take their pension at 65 (see section 4.6.4.b below).³⁰⁴

4.6.2 Special conditions for younger or older workers

In Belgium, there are special conditions set by law for older and younger workers in order to promote their vocational integration.

The labour market is harder to access for younger and older workers. Employers tend to doubt the efficiency of older workers. The economic activity rate of people aged between 55 and 64 is particularly low in Belgium (in 2012, it was 39.5 %, compared to an EU-28 average of 48.8 %).³⁰⁵ Unia's *Diversity Barometer: Employment*, published in September 2012, as well as subsequent statistical reports, show that discriminatory practices in the Belgian labour market during the first stage of the selection process mainly affect older people (those over 45).³⁰⁶ On 27 June 2012, the National Labour Council agreed Collective Agreement No. 104 concerning the creation of a plan for the employment of older workers. This CLA was made mandatory by the Royal Decree of 28 October 2012. The measure is consistent with the objective set by Belgium in the implementation of the Europe 2020 strategy³⁰⁷ to achieve by 2020 a 50 % participation rate of workers aged 55 to 65. In 2019, this rate was 52.1 %.³⁰⁸ To address the issue further, all regions (employment policy being a competence of the regions) are putting in place schemes ensuring a smooth transition from full-time active employment to retirement. These schemes include financial incentives to remain active part-time; 'tutoring' initiatives, encouraging older workers to transmit their knowledge to younger workers (a task for which older workers may be trained); so-called 'landing jobs', the purpose of which is to encourage older workers to remain active in the voluntary sector as well as training younger workers (this latter formula was devised by the Flemish Region for workers above 45 years of age). A number of efforts, which include financial incentives, have been made in order to encourage the continued vocational training and retraining of older workers. These schemes and incentives are generally available to workers over 45 or 50 years of age. Other financial measures aim at encouraging older workers to return to work.

In 2019, an average of 9.3 % (an increase of 0.1% compared to 2018) of young people between 15 and 24 years old (12.9 % in Brussels, 11 % in Wallonia and 7.5 % in Flanders) were NEET (not in education, employment or training). Many actions plans have been adopted under the European Youth Guarantee and the Europe 2020 objectives, one of which is to reduce the share of young people who are NEET to a maximum of 8.2 %.³⁰⁹

³⁰⁴ Article 2 of the Royal Decree of 23 December 1996 executing Articles 15, 16 and 17 of the Act of 26 July 1996 on the modernisation of social security and assuring the viability of the legal pension schemes (*Arrêté royal portant exécution des articles 15, 16 et 17 de la loi du 26 juillet 1996 portant modernisation de la sécurité sociale et assurant la viabilité des régimes légaux des pensions*), as modified most recently by the Acts of 28 December 2011 and of 20 July 2012.

³⁰⁵ Article 4 of the Royal Decree of 23 December 1996 executing Articles 15, 16 and 17 of the Act of 26 July 1996 on the modernisation of social security and assuring the viability of the legal pension schemes (*Arrêté royal portant exécution des articles 15, 16 et 17 de la loi du 26 juillet 1996 portant modernisation de la sécurité sociale et assurant la viabilité des régimes légaux des pensions*), as modified most recently by the Act of 19 December 2014, OJ (*Moniteur belge*), 29 December 2014.

³⁰⁶ See Unia (2012) *Diversity Barometer: Employment* www.unia.be/en/ and the latest statistical report of 2018: www.unia.be/files/Documenten/Jaarrapport/Rapport_Chiffres_2018_FR.pdf.

³⁰⁷ <https://emploi.belgique.be/fr/themes/emploi-et-marche-du-travail/politique-de-lemploi/la-strategie-europeenne-pour-lemploi>.

³⁰⁸ National Reform Programme 2020, April 2020, p. 30, https://www.be2020.eu/uploaded/files/202005061414290.NRP_2020_Belgium_EN.pdf.

³⁰⁹ STATBEL (Belgian Office for Statistics), 'EU 2020 indicators from LFS (2000-2019)', <https://statbel.fgov.be/fr/themes/emploi-formation/formation-et-enseignement/neet#panel-14>. At the time of writing, no data was available for the year 2020.

4.6.3 Minimum and maximum age requirements

In Belgium, there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment and training.

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

One should also highlight in this respect the decision of the Brussels Labour Appeal Court (*Arbeidshof*) of 29 February 2008 in a case on the age limit fixed to be admitted to a training course to become a football referee in the first division. In this case, a football referee was taking a training course to become a referee in the first division, but when he was 38 years old, the Belgian Royal Football Union took the decision that, because of his age and his future career prospects, he could not continue the training. That decision was taken in accordance with a working plan endorsed by a trade union association, which fixed 36 years old as the limit to be admissible to that kind of training. In emergency proceedings, the President of the Brussels Labour Court ruled that the decision was not discriminatory. This decision was reversed on appeal when the Brussels Labour Appeal Court ruled that unjustified discrimination on the ground of age had occurred.³¹⁰ As a matter of fact, the decision was clearly based on the age of the referee (it mentioned the age of the future referee, his career prospects and the working plan of the trade union association) and the football union could not rely on the genuine and determining occupational requirement justification, because the court considered that the union had brought no argument that the referee's situation fell in the scope of that justification. As a consequence of this finding, the court ordered the suspension of the union's decision and ruled that the referee should be entitled to carry on his training.

In a case from 2014, the Brussels Labour Court ruled that an airline company discriminated against a pilot on the ground of his age by not admitting him to a traineeship because of his age (55 years old).³¹¹

As reported above (under section 4.1), in 2017, a proceeding for annulment was unsuccessfully brought before the Council of State against a refusal to appoint a candidate for a position at the Brussels Regional Agency for Public Cleanliness because of his age. According to the Council of State, the maximum age of 35 for applying to a position of public cleanliness worker can be considered as a genuine occupational requirement since the role requires the worker to be in excellent physical condition.³¹²

4.6.4 Retirement

a) State pension age

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

³¹⁰ Labour Appeal Court (*Arbeidshof*) of Brussels, 29 February 2008, *Barbry Geert v. VZW Koninklijke Belgische Voetbalbond*, no. 087518. This decision is available in Dutch at the following address: www.unia.be/fr/jurisprudence-alternatives/jurisprudence/cour-du-travail-de-bruxelles-29-fevrier-2008.

³¹¹ Judgment of the Labour Court of Brussels (*Tribunal du travail*) of 5 September 2014, www.unia.be/fr.

³¹² Judgment of the Council of State no. 239.217, of 26 September 2017, www.raadvst-consetat.be/?lang=fr.

If an individual wishes to work beyond the state pension age, the pension can be deferred.

An individual can collect a pension and still work (under certain conditions which go beyond the scope of this report).³¹³

Since 2009, the legal pensionable age - at which individuals become entitled to a state pension - is 65 years for both women and men.³¹⁴ The legal pensionable age will be raised to 66 in 2025 and to 67 in 2030.

Other age limits apply in specific sectors, such as underground mining (55 years) or surface mining (60 years). In addition, from 1 January 2013 to 1 January 2016, the early retirement age was progressively raised from 60 to 62, if the employee could prove a minimum number of years of employment (from 35 to 40 by 1 January 2015), with at least one third occupation for each year.³¹⁵ As a result of a reform adopted in 2015,³¹⁶ the age for early retirement has been increased to 63 years in 2019 if the employee can prove a minimum number of years of employment (from 41 to 42 by 1 January 2017).

b) Occupational pension schemes

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

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

An individual can collect a pension and still work.

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

An individual may be in receipt of a pension and still work, within certain limits. One of the changes brought about by the Federal Act of 23 December 2005 on the solidarity pact between generations is that these limits have been relaxed somewhat in order to encourage workers receiving a pension to maintain a certain level of economic activity. Since 2015, the limits of income of a professional activity concurrent with pension rights has been completely abolished in two cases: 1) the individual is at least 65 years old; 2) the career lasted for at least 45 years.³¹⁷ In all other situations, the income is limited according to the age of the pensioner and the existence of dependent children.

³¹³ See the website of the federal Ministry for Pensions (*Service public fédéral des pensions*) - in French: www.sfpd.fgov.be/fr.

³¹⁴ Article 2 of the Royal Decree of 23 December 1996 executing Articles 15, 16 and 17 of the Act of 26 July 1996 on the modernisation of social security and assuring the viability of the legal pension schemes (*Arrêté royal portant exécution des articles 15, 16 et 17 de la loi du 26 juillet 1996 portant modernisation de la sécurité sociale et assurant la viabilité des régimes légaux des pensions*), as modified most recently by the Acts of 28 December 2011 and of 20 July 2012.

³¹⁵ Article 4 of the Royal Decree of 23 December 1996 executing Articles 15, 16 and 17 of the Act of 26 July 1996 on the modernisation of social security and assuring the viability of the legal pension schemes, as modified most recently by the Act of 19 December 2014, OJ (*Moniteur belge*), 29 December 2014.

³¹⁶ Belgian Federal Act of 10 August 2015 aiming at increasing the minimum retirement age, setting up the access conditions to early retirement schemes (*Loi du 10 Août 2015. - visant à relever l'âge légal de la pension de retraite, les conditions d'accès à la pension de retraite anticipée et l'âge minimum de la pension de survie*), OJ (*Moniteur belge*), 21 August 2015.

³¹⁷ Royal Decree of 20 January 2015 modifying Article 64 of the Royal Decree of 21 December 1967 (*Arrêté royal du 20 janvier 2015 modifiant l'article 64 de l'Arrêté royal du 21 décembre 1967 portant règlement général du régime de pension de retraite et de survie des travailleurs salariés portant règlement général du régime de pension de retraite et de survie des travailleurs salariés*), OJ (*Moniteur belge*), 23 January 2015; Royal Decree of 18 January 2015 Modifying Article 107 of Royal Decree of 22 December 1967 (*Arrêté royal*

c) State-imposed mandatory retirement ages

In Belgium, there is no state-imposed mandatory retirement age in the private sector. Public servants, however, retire automatically at 65 years. On top of that, there are some exceptions to the mandatory retirement age of 65 laid down in the public sector. For instance, as regards judges, the mandatory retirement age is 70 for Court of Cassation and Council of State judges and 67 for other judges of the judiciary. In addition, at the federal level, a civil servant might carry on working beyond 65 years providing that s/he addresses a formal request to her/his chief officer who agrees to a one-year extension, which is renewable.³¹⁸

An important public debate surrounding the raising of the pension(able) age to 67 (see paragraph a, immediately above) was the recognition of a list of 'arduous occupations', such as nurses, police officers, construction workers, etc. who would benefit from an earlier retirement age due to the heavy toll that their job demands. This was one of the key elements to be decided by the 2014-2019 legislature. However, the Government and the social partners were unable to reach an agreement and the matter was pushed back for the next Government to decide. However, the new federal Government formed in 2020 has not planned to do anything on this issue during the current legislative period (2019-2024).

d) Retirement ages imposed by employers

In Belgium, national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally.

The 'normal' pension(able) age referred to above is not necessarily the age where retirement is required. In the private sector, workers may work beyond normal pension age, and their employer may not force them to retire. The employer may do so only by following the usual procedure of dismissal.³¹⁹ According to the Act of 3 July 1978 on employment contracts, contractual clauses providing that the mere fact of reaching normal pension(able) ages ends the contract are void (Article 36). However, Article 83(1) of the act provides that the employer may terminate the employment contract when the employee reaches the 'normal' pension(able) age with a reduced notice period of six months (three months if the employee has been in continuous employment for less than five years).³²⁰ This article also provides for a reduced notice period in the event of the resignation of the employee after the age of 60 years. Therefore, when an employee reaches the normal pension(able) age, the employer still has to put an end to the contractual relationship and to give formal notice and the notice period will be reduced in this case. If the worker continues to work after having reached the normal pension(able) age, the pension will be calculated on the basis of the most favourable years.

du 18 janvier 2015 modifiant l'article 107 de l' Arrêté royal du 22 décembre 1967 portant règlement général relatif à la pension de retraite et de survie des travailleurs indépendants, OJ (*Moniteur belge*), 23 January 2015. See the website of the federal Ministry for Pensions (Service public fédéral des pensions) - in French: www.sfpd.fgov.be/fr.

³¹⁸ See the Ministerial Decree of 11 September 2012 to implement Article 3 of the Royal Decree of 12 May 1927 on the age of retirement of officers, employees and service people of state administrations (*Arrêté ministériel du 11 septembre 2012 portant exécution de l'article 3 de l'arrêté royal du 12 mai 1927 relatif à l'âge de la mise à la retraite des fonctionnaires, employés et gens de service des administrations de l'Etat*). Details in French on the official website of the Federal Government: www.fedweb.belgium.be/fr/fin_de_carriere/travailler_apres_65_ans/#.UqNUmuCyuJl.

³¹⁹ An employer may dismiss a worker without giving a reason for termination, provided that he or she gives notice or pays the compensation prescribed by law. However, in the event of a contested termination of employment, it is for the employer to prove that the dismissal is not unfair.

³²⁰ The Constitutional Court confirmed the compliance of Article 83(1) of the Act of 3 July 1978 on employment contracts with the principle of equality and non-discrimination contained in Articles 10 and 11 of the Constitution and with Article 6(1) of Directive 2000/78/EC (see judgment no. 107/2010 of 30 September 2010 of the Constitutional Court, available on the website of the Court: www.const-court.be/).

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

e) Employment rights applicable to all workers irrespective of age

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

According to Article 36 of the Act of 3 July 1978 on employment contracts,³²¹ clauses providing that the fact of having reached the age of state or occupational pension terminate the contract, are void. However, an employee who is older than 65 who is dismissed is not entitled to a period of notice longer than 26 weeks. In other words, the period of notice might be shortened due to the pension(able) age of the employee (see paragraph d, above).

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

f) Compliance of national law with CJEU case law

In Belgium, national legislation is partially in line with the CJEU case law on age regarding mandatory retirement.

Apart from the public sector, where retirement is automatic and compulsory at the age of 65 years (with a few exceptions), there is no compulsory retirement age in the private sector. In the private sector, workers may work beyond the pension(able) age of 65 years, and their employer may not force them to retire; to do so the employer still has to terminate the contractual relationship by giving formal notice, even if the notice period will be reduced in this case. Therefore, except for the public sector, which is likely to constitute one of the items for discussion in the process of screening Belgian legislation and regulations for potential age-based discrimination, Belgian law is in line with the CJEU case law on age regarding compulsory retirement as regards the private sector. However, the reduced notice period provisions to terminating the contractual relationship in the private sector (mentioned in section 4.6.4.d) might possibly be out of line with the CJEU case law.

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Belgium, national law (indirectly) permits age or seniority to be taken into account in selecting workers for redundancy.³²² Indeed, the employer must make available a redundancy plan, indicating in particular the number of workers concerned, specifically divided by sex, age, and professional category, as well as the reasons for the decision. This means that the impact of the decision on older workers will be part of the collective discussion, which takes place with workers' representatives.

b) Age taken into account for redundancy compensation

³²¹ Federal Act of 3 July 1978 on employment contracts (*Loi du 3 juillet 1978 relative aux contrats de travail*), OJ (*Moniteur belge*), 22 August 1978.

³²² Redundancy procedures are regulated in Belgian law by Collective Agreement (*Convention collective du travail*) No. 10 of 8 May 1973 on collective layoffs; Collective Agreement No. 24 of 2 October 1975 on informing and consulting workers' representatives in collective layoffs; the Royal Decree (*Arrêté royal*) of 24 May 1976 on collective layoffs; the Act of 13 February 1998 containing provisions promoting employment, and the Royal Decree (*Arrêté royal*) of 30 March 1998 implementing Articles 63 and 66(2) of chap. VII, Collective Layoffs, of the Act of 13 February 1998. Moreover, account should be taken of Directive 98/59/EEC of 20 July 1998 when interpreting these provisions.

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

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

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

4.8 Any other exceptions

In Belgium, there are no other specific exceptions in the General Anti-Discrimination Federal Act and the Racial Equality Federal Act regarding the criteria covered in the directives. It is nevertheless worth highlighting that positive action measures are dealt with in these federal acts as a 'general motive of justification' (see below in section 5). The 'safeguard provision', as referred to in sections 8.2 and 11.1 below, is also mentioned under the chapters on 'general motives of justification'.

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

a) Scope for positive action measures

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

- Federal level

The General Anti-Discrimination Federal Act and the Racial Equality Federal Act provide that those differences in treatment based on a protected ground do not amount to discrimination when a measure of positive action is concerned (Article 10(1) of both acts). Such a measure has to respect four conditions, which are based on the case law of the Constitutional Court³²³ (Article 10(2) of both acts). First, any positive action should be a response to situations of *manifest inequality*, i.e. it must be based on a demonstration that a clear imbalance between the groups will remain in the absence of such action. Secondly, the removal of this inequality should be identified as a public goal. In this respect, the federal Government must authorise the adoption of positive action measures through a royal decree (Article 10(3) of both acts).³²⁴ In 2018, the federal Government eventually took the initiative to adopt a Royal Decree setting out the conditions for positive action as recognised in the three anti-discrimination laws of 10 May 2007. This ancillary Royal Decree was adopted on 11 February 2019.³²⁵ It came into force on 11 March 2019. It is only applicable to positive action relating to employment in the private sector. Its main purpose is therefore to provide private employers with a secure legal framework within which positive action may be undertaken. A positive action plan may be adopted either through a collective agreement or through an employer's 'deed of accession', conditional on complying with a format annexed to the Royal Decree.³²⁶ Thirdly, the 'corrective measures' must be of a temporary nature. As a response to a situation of proven manifest imbalance, these measures must be abandoned as soon as their objective – to remedy this imbalance – is reached. Fourthly, these corrective measures should not disproportionately restrict the rights of others.

- Regions and communities

Since the conditions defined by the Constitutional Court for the admissibility of positive action are derived from Articles 10 and 11 of the Constitution, rather than from rules specific to the federal level, the regions and communities must also comply with them. Similar to the federal acts, the conditions under which positive action is admitted are

³²³ Constitutional Court (*Cour d'Arbitrage*), 27 January 1994, Case no. 9/94, recital B.6.2. The Council of State has aligned itself with this understanding of the constitutional limits imposed on positive action: see Opinion no. 28.197/1 on the Bill subsequently became the Act of 7 May 1999 on equal treatment between men and women in conditions of occupation, access to employment and promotion, access to a self-employed profession, and social security.

³²⁴ In addition, where positive action measures are adopted in the field of work and employment, the social partners are consulted, via the competent bodies established respectively in the private and the public sectors (Article 10(4)).

³²⁵ Royal Decree of 11 February 2019 setting on the conditions of positive actions (*Arrêté royal du 11 février 2019 fixant les conditions de l'action positive*), OJ (*Moniteur belge*), 1 March 2019, p. 21169.

³²⁶ Article 5 of the royal decree reiterates that positive action should only be adopted in case of a *manifest inequality* (to be documented by any means by the company or the sector), should clearly describe the objectives, steps and expected outcome, may be pursued for a maximum of three years, should be submitted to a proportionality test and approved by the competent Minister (i.e. the Collective Relations Directorate of the Department of Employment). Employers may also devise positive action plans under forms other than a collective agreement or 'deed of accession'; in that case they should communicate such plans for information to the Minister for Employment. The Royal Decree fails to provide a definition of the term 'employers', thereby causing uncertainty as to its scope, at least for autonomous public economic bodies covered by the Act of 21 March 1991. It seems that they can use that latter route to implement a positive action plan. Implementation of the Royal Decree. will be assessed every two years by the Collective Relations Directorate jointly with the National Labour Council.

explicitly included in the Flemish Framework ET Decree (Article 26), the Walloon ET Decree (Articles 12 and 14), the French Community ET Decree (Article 6), the Brussels ET Ordinance (Article 14), the Brussels Local Civil Service ET Ordinance (Article 15) and the Brussels ET Employment Ordinance (Article 11), the Cocof ET Decree (Article 13) and the German Community ET Decree (Article 11). It is worth highlighting that the Brussels Local Civil Service ET Ordinance is not only dedicated to the fight against discrimination but also to the promotion of diversity in the public bodies of the Brussels Capital Region, in particular through the preparation of diversity action plans (Articles 6 to 11).

As in the General Anti-Discrimination Federal Act, Article 6 of the French Community ET Decree provides that a direct or indirect difference of treatment is not discriminatory when it takes the form of a positive action measure. Article 6(2) defines the conditions under which such positive action can be adopted. The former paragraph 3 provided that it is for the Government (of the French Community) to define the hypothesis and conditions to implement positive action measures in an executive regulation. In the absence of the adoption of such an executive regulation, on 13 November 2015, the Parliament of the French Community brought an amendment to the ET Decree by adding a fourth paragraph to Article 6. This paragraph provides that, in the absence of an executive regulation, a judge is competent to scrutinise the validity of positive action, except in the field of employment. Henceforth, even in the absence of an executive regulation, private and public actors can adopt positive action measures, which will be assessed case by case in court.

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

b) Quotas in employment for people with disabilities

In Belgium, national law provides for quotas for the employment of people with disabilities. Systems of quotas for recruiting workers who have been officially recognised or registered as disabled only exist in the public sector. The rate of manpower to be reached differs from one public body to another: 3 % within the federal public administration, 2.5 % in the Walloon Region, 2 % in the Brussels Capital Region, 5 % in the Cocof (Brussels) and 3 % in the Flemish Region.³²⁷ A common problem in this area is that of effective enforcement: reports show that quantitative objectives for the integration of persons with disabilities are usually not met (for example, in 2019, workers with disabilities made up only 1.22 % of the federal public service against 1.25 % in 2018 and 1.37 % in 2017).³²⁸ In its first report on Belgium in 2014, the Committee on the Rights of Persons with Disabilities stressed its concern about the low number of persons with disabilities in regular employment. 'The Committee also notes the Government's failure to reach targets for the employment of persons with disabilities within its own agencies, as well as the lack of a quota in the private sector'.³²⁹ In order to raise this number, the Support committee for the recruitment of

³²⁷ For a detailed presentation of this body of legislation, see the first report of Belgium before the UN Committee for the rights of persons with disabilities, available online at the following address: tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/BEL/1&Lang=en.

³²⁸ Support committee for the recruitment of people with disabilities in the federal public service, (2019) *Evaluation Report*, at <https://fedweb.belgium.be/fr/publications/carph-rapport-d%C3%A9valuation-2019>.

³²⁹ UNCRPD (2014) *Final Observations of the Committee for the Rights of Persons with Disabilities*, para. 38, at tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBEL%2fCO%2f1&Lang=en. The Committee has been preparing its second report on Belgium since 2019 (report not yet released on 31 December 2020). To find out more about the evaluation process, see

people with disabilities in the federal public service recommends the application of sanctions in the event of non-compliance with the employment obligation, such as forbidding the recruitment of new staff until the quota is reached.³³⁰

In 2019, the Belgian Disability Forum underlines the fact that no global and coordinated policy has been put in place to effectively address the low employment rate of people with disabilities.³³¹ In its 2019 memorandum drafted in view of the elections of 26 May 2019, Unia calls for the creation of an inter-ministerial conference on the employment of people with disabilities to introduce structural measures to deal with this problem.³³²

It is worth noting that some regional funds, which finance employment assistance measures, do not give subsidies to the public administrations when the quota requirement are not reached. This is an important issue since such a refusal to give subsidies may jeopardise the access to regular employment of people with disabilities, creating a vicious circle. In this context, Unia called on the regional funds to grant subsidies to support the hiring of people with disabilities even though the required quotas had not been reached.³³³

<https://www.unia.be/fr/criteres-de-discrimination/handicap/convention-onu-relative-aux-droits-des-personnes-handicapees/evaluation-par-le-comite-des-droits-des-personnes-handicapees-de-lonu-chronologie>.

³³⁰ Support committee for the recruitment of people with disabilities in the federal public service (2018) *Evaluation Report*, p. 11, at: <https://fedweb.belgium.be/fr/publications/carph-rapport-d%C3%A9valuation-2018>.

³³¹ Belgian Disability Forum (BDF), (2019) *Alternative Report for the Committee on the Rights of Persons with Disabilities*, February 2019, at: <https://phare.irisnet.be/droits/%C3%A9galit%C3%A9-des-chances/convention-des-nations-unies/>.

³³² Unia (2019) *S'engager pour les droits humains 61 propositions d'Unia pour les élections 2019* (Commit to human rights : 61 proposals for the 2019 elections).

³³³ See the parallel report of Unia on the UNCRPD. For the French version, www.unia.be/files/Z_ARCHIEF/rapport_parallele_crpdpdf, p. 42.

6 REMEDIES AND ENFORCEMENT

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

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

The procedures for enforcing the principle of equal treatment (judicial – civil and criminal – and, in most cases, alternative dispute resolution, such as mediation) in Belgium are set out below.

– Federal level

The General Anti-Discrimination Federal Act and the Racial Equality Federal Act provide for a civil and criminal procedural protection of victims of discrimination nearly identical for all the prohibited grounds. Only some criminal offences that are not in the General Anti-Discrimination Federal Act were maintained in the Racial Equality Federal Act (discrimination in the provision of goods or a service – Article 24 – or in access to employment, vocational training or in the course of a dismissal procedure – Article 25) and are therefore specific to discrimination based on race and ethnic origin. Victims of discrimination, under both acts, may

- seek a finding that discriminatory provisions in a contract are null and void (Article 15 and Article 13 respectively).
- seek reparation (damages) according to the usual principles of civil liability (Articles 18 and 16 respectively), although the victim may choose a payment of the lump sums defined in the act rather than damages calculated on the basis of the ‘effective’ damage (the lump sum consists of EUR 1 300, reduced to EUR 650 if the defendant provides evidence that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element; in the field of employment, this predefined sum amounts to six months’ salary, reduced to three months if the employer demonstrates that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element; see below in section 6.5). In its 2017 evaluation report, Unia showed that the very low lump sum discourages victims from lodging a complaint before courts, especially in the field of goods and services, including housing.³³⁴
- seek from the judge that he/she delivers an injunction imposing immediate cessation of the discriminatory practice, under the threat of financial penalties (Articles 19 and 20 and Articles 17 and 18 respectively).³³⁵ However, Unia pointed out that this does not accelerate the process, even though that is the procedure’s primary aim.³³⁶
- seek from the judge that he/she imposes the publication of the judgment finding discrimination, by the posting of the judicial decision on the premises where the discrimination occurred, or by the publication of the judicial decision in newspapers (Articles 20(3) and 18(3) respectively).

These actions are brought before courts of first instance (civil section) or labour courts where an employment relationship is concerned.

In addition, the acts provide for criminal liability in limited circumstances. First – although this goes beyond the scope of the Racial Equality or the Employment Equality Directives – incitement to commit discrimination, or incitement to hatred or violence against a group defined by certain characteristics, is a criminal offence, if it is done under public conditions

³³⁴ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 10 and 81 www.unia.be/en.

³³⁵ It is a criminal offence to refuse to comply with a judgment delivered under this provision (Article 24).

³³⁶ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 10 and 36 www.unia.be/en.

as defined by Article 444 of the Criminal Code (Articles 22 and 20 respectively). Secondly, civil servants who, in the exercise of their functions, commit discrimination may be criminally convicted (Article 23 in both acts).

For the sake of completeness, it should be added that where certain offences defined in the Criminal Code are committed with an 'abject motive', i.e. with discriminatory intent (hate crimes), this might be held as an aggravating circumstance (Articles 33-42 of the General Anti-Discrimination Federal Act).³³⁷ In this respect, on May 2012, the horrific murder of a young homosexual man was the first murder treated as a homophobic hate crime by the Belgian judicial authorities under anti-discrimination law.³³⁸ The four perpetrators were condemned to life sentences for premeditated murder, with homophobic hate crime as an aggravating circumstance. In reaction to an increase of homophobic violence reported by Unia, Article 405*quater* of the Criminal Code was amended in 2013, increasing the sanctions for crimes committed with an 'abject motive'.³³⁹ In another case, the Liège Criminal Court convicted the perpetrator of murder with premeditation, considering the homophobic intent as an aggravating circumstance.³⁴⁰ The murderer was sentenced to 25 years in prison. Several NGOs acted as a civil party at the trial, including Unia.³⁴¹

In a case where about 15 people – mainly undocumented migrants and homeless people – were victims of violent and degrading treatment by railway police officers, the perpetrators were brought by the public prosecutor before the Brussels Court of First Instance (criminal section). They were charged with the use of violence by a police officer without any legitimate reason with the 'abject motive', i.e. with discriminatory intent (hate crimes). On 26 February 2014, the court convicted 11 out of 14 defendants. The nature and the degree of the sentences varied depending on the role of the perpetrators in the violent acts, and whether they had previous criminal convictions; they ranged from: sentence of community service of 60 hours, prison sentence of 1 year to 40 months with probation that was combined, in some cases, with a fine between EUR 500 and 600. It is worth noting that the abject motive (discriminatory intent) was recognised against the four police officers in the cases in which Unia intervened.³⁴²

³³⁷ These offences which may thus lead to stronger convictions if driven by such an 'abject motive' are: sexual assaults (*attentats à la pudeur ou viols*: Articles 372 to 375 of the Criminal Code); homicide (Articles 393 to 405*bis* of the Criminal Code); refusal to assist a person in danger (Articles 422*bis* and 422*ter* of the Criminal Code); deprivation of liberty (Articles 434 to 438 of the Criminal Code); harassment (Article 442*bis* of the Criminal Code); attacks against the honour or the reputation of an individual (Articles 443-453 of the Criminal Code); putting a property on fire (Articles 510-514 of the Criminal Code); destruction or deterioration of goods or property (Articles 528-532 of the Criminal Code). Except for the offence of harassment, these situations are not normally met in the field of employment and occupation.

³³⁸ *Ihsane Jarfi* case. Although the hate crime was only treated as a homophobic crime in court, the fact that the victim was a Muslim gay man of North African origin and 32 years old was stressed in every media report. The father of the victim wrote a book 'Ihsane Jarfi, the corridor of mourning' (*Ihsane Jarfi, le couloir du deuil*), in which he condemns intolerance, whether it affects homosexuals, Muslims or any other minority. This is very significant in the Belgian context.

³³⁹ *Loi du 14 janvier 2013 modifiant l'article 405quater du Code pénal et l'article 2 de la loi du 4 octobre 1867 sur les circonstances atténuantes*, OJ (*Moniteur belge*), 31 January 2013.

³⁴⁰ During the night of 24-25 July 2012, in the Avroy park of Liège, a 61-year-old homosexual man was killed with a hammer. The perpetrator immediately confessed his crime. He explained to the police that he had come to this park frequented by many homosexuals with the intention of killing one of them. He wanted to take revenge on a homosexual who allegedly raped him when he was young.

³⁴¹ The decision of the Criminal Court of Liège is not available. However, additional information is available on the following website: www.unia.be/en.

³⁴² Judgment of the Court of First Instance of Brussels (criminal section) of 26 February 2014, available on the following website: www.unia.be/en.

– Regional level

With the adoption of the various ET decrees and ordinances since 2008, the systems of remedies put in place in the regions and communities copy to a large extent those of the federal anti-discrimination acts and are in line with the European requirements.³⁴³

All the procedures described above are binding. In most of the situations involving discriminatory acts, a conciliation procedure is also available, under the Act of 10 February 1994, which makes mediation possible for all offences punishable by imprisonment of a maximum of two years.³⁴⁴ Some regional anti-discrimination statutes also expressly provide for a conciliation procedure. Moreover, Unia in its assistance to victims, has developed non-binding procedures to reach an amicable settlement. In addition, the labour inspectorate is entitled to report cases of discrimination at work.

Finally, it is also worth highlighting that some Belgian municipalities have taken initiatives in order to protect victims of discrimination. For example, in 2013, the municipalities of Ghent approved a regulation relating to the activities of doormen. All the clubs, bars and restaurants of the city have to display the phone number '8989' on their front window. On this basis, victims or witnesses of any discrimination can send a direct text message reporting the alleged discrimination. The contact points (*meldpunten*) will study any complaint and contact the victims/witnesses within the week. The police services must also follow-up of complaints.³⁴⁵ The city of Ghent is also the first municipality in Belgium to include a non-discrimination clause in the terms of all its public procurements. According to this clause, the successful tenderer commits herself to ban any form of discrimination within her company and with regard to her subcontractors, and to take active measures to prevent discrimination, whether intentional or due to negligence. If, in the course of the execution of the public contract, the city of Ghent finds evidence of discrimination, it may impose additional measures on the successful tenderer. If necessary, the City may impose a fine or even end the contract. It can also report the breach to Unia and/or to the Directorate of Labour Law Inspection.³⁴⁶

b) Barriers and other deterrents faced by litigants seeking redress

If the victim wants to file a complaint him/herself, along with or without Unia or another organisation aimed at fighting discrimination, he/she will need to instruct a lawyer, at his/her own expenses. According to Article 508(1) and following of the Judicial Code, people with low incomes can benefit from legal aid, which is entirely or partially free. However, due to budget cuts and reduced public spending, getting legal aid is becoming increasingly difficult. Moreover, as Unia pointed out in its 2017 evaluation report, it is very difficult for applicants who do not fall within the conditions of legal aid to bring a claim before courts because of the numerous obstacles of such procedures (very high costs and the payment of a procedural indemnity in case of dismissal).³⁴⁷

There is no difficulty in bringing a claim after the employment relationship has ended under Belgian anti-discrimination law. If there is no criminal aspect, the claim must be brought in the year following the ending of the employment relationship.

³⁴³ The system of remedies put in place at regional level is described in detail in the flash reports of the European Equality Law Network.

³⁴⁴ This legislation has inserted Article 216ter in the Code of Criminal Procedure (*Code d'instruction criminelle*) to create a form of criminal mediation.

³⁴⁵ Unia (2014) *2013 Report*, available on the website of the Centre, www.unia.be/en.

³⁴⁶ Decision of the executive of the city of Ghent, 18 May 2017 (2017_CBS_05820). See City of Ghent (2017) 'Stad Gent Hanteert strikte anti-discriminatie aanpak bij overheidsopdrachten' (City of Ghent takes strict anti-discrimination approach in contracts), press release, 21 March 2017, available at: <https://persruimte.stad.gent/145680-stad-gent-zet-haarkoopkracht-in-voor-gelijke-kansen>.

³⁴⁷ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 10 and 58 www.unia.be/en.

There is no specific time limit prescribed by law to seek a judicial injunction imposing the cessation of a discriminatory practice, which therefore does not seem to be a deterrent to seeking redress. There is nevertheless a controversy as to the possibility of bringing an action in cases where the breach has already been accomplished and has exhausted its effects (e.g. the author of the discrimination has already rented the goods after refusing to rent them to the victim of discrimination). The first decisions in this matter seem to adopt a broad conception of the interest that must be demonstrated by the victim in order to take action, particularly when there is a danger that the violation will be repeated.³⁴⁸ In 2014, the Brussels Labour Court ruled on this issue. In this case, the claimant was asked by the administration of the Brussels Capital Region to choose between removing her headscarf and not doing the one-month job for which she had been hired as a student. Unia wrote to the administration condemning such a discriminatory practice. Subsequently, the administration informed the claimant that she could work for the rest of the month and could wear her headscarf, as 'exceptional derogation'. The applicant refused this 'gentlemen's agreement' and brought the case before the President of the Brussels Labour Court in emergency proceedings, asking the judge to order the administration to cease the discriminatory practice. In an admissibility decision adopted on 24 October 2012, the President held that the claimant had an actual and existing legal interest since there was no guarantee that she could enjoy the above-mentioned 'exceptional derogation' in the future, in any new application. However, the President of the Brussels Labour Court dismissed the applicant on the merits. The applicant lodged an appeal before the Labour Court of Brussels, which ruled that the action of the applicant was inadmissible. The court held that the injunction procedure aimed to stop an illegal act: the act at stake should have still existed. Indeed, the injunction procedure could not be used merely to hear from the judge that an act was illegal when the act in issue had already ceased. However, the court said that the judge could recognise the illegal character of a practice – though it had already ceased – if a risk of repetition existed which was not the case *in casu* because the claimant had refused the gentlemen's agreement and no longer worked for the administration of the Brussels Capital Region. Moreover, according to the court, since the claimant was not a student at the time of the hearing, she was not likely to apply for such a job again.

In its 2017 evaluation report, Unia recommends fixing a reasonable time limit, such as five years, for all labour law actions based on the Racial Equality Federal Act or the General Anti-Discrimination Federal Act.³⁴⁹ The Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts stresses the potential difficulties linked with the coexistence of different time limits in the field of anti-discrimination law depending on the type of action (civil, criminal, labour). However, the commission has said that it needs to consider this issue further before formulating recommendations.³⁵⁰

As regards offences committed with an 'abject motive', these can consist of offences (*délits*) or crimes, for which public prosecution becomes in principle impossible after 5 and 10 years respectively. However, the admission of extenuating circumstances may transform a crime into an offence (with a limitation of five years) or an offence into a misdemeanour (for which the limitation is one year). Finally, there are various causes of suspension and interruption of prescription. In this respect, the Federal Anti-Discrimination Acts provide in particular that the suspension occurs in the event of an action seeking the cessation of a discriminatory practice brought before civil courts.

c) Number of discrimination cases brought to justice

³⁴⁸ Wautelet, P. (2009) 'Les garanties de la non-discrimination: sanctions civiles et aspects de procédure dans les lois fédérales luttant contre la discrimination', (The non-discrimination safeguards: civil sanction and procedural aspects in the Federal Acts fighting against discrimination), in Wautelet, P. (ed.), *Le droit de la lutte contre la discrimination dans tous ses états*, C.U.P., Anthemis, Liège, 2009, p. 236.

³⁴⁹ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 9 and 84 www.unia.be/en.

³⁵⁰ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, pp. 77-80 and para. 247-262, www.unia.be/en.

In Belgium, statistics on the number of cases related to discrimination brought to justice are not available.

d) Registration of national court decisions on discrimination

In Belgium, court decisions on discrimination are not registered as such by national courts. There is no data on the number of discrimination cases brought to justice or dealt with by national courts.

It is noteworthy that, in application of the Common Circular (*circulaire commune*) for an efficient policy of monitoring and prosecution with respect to every ground of discrimination, adopted on 16 December 2013 (see section 9, below), the police services and the prosecution departments have to identify and register the cases related to discrimination and 'hate crime'. The contact prosecutor for discrimination has the obligation to manage the process of identification and registration. According to the circular, the registration of such cases and the follow-up are crucial to gathering data and statistics on the number of cases related to discrimination brought to justice and to get a better knowledge of that issue. In its 2017 evaluation report, Unia called on the prosecution departments to better implement the common circular in respect of several different issues.³⁵¹ In its 2018 report, Unia underlines that thanks to a better application of Circular COL13/2013, there has been a rise in the number of cases referred to the criminal court (*tribunal correctionnel*). In 2020, Unia considered that such statistics and data are still not systematically reported.³⁵²

In its 2014 report on Belgium, the European Commission against Racism and Intolerance (ECRI) asked the Belgian authorities to 'ensure that the new regulations for collecting data on racist and homo/transphobic incidents are applied in practice so that specific and reliable information on hate speech offences and the reaction of the criminal justice system is made available'.³⁵³ ECRI reiterated this recommendation in its 2020 report on Belgium.³⁵⁴

Finally, in 2019, Unia initiated a lawsuit in 18 cases related to discrimination or hate crimes.³⁵⁵

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

a) Engaging in proceedings on behalf of victims of discrimination (representing them)

In Belgium, certain associations or organisations and representative unions are entitled, under both federal and regional Anti-Discrimination legislations, to act on behalf of victims of discrimination under certain conditions.

– Federal level

In criminal procedures, it has long been realised in the field of anti-discrimination law that combined action by the public prosecutor (who has the authority to prosecute criminal offences) and by the individual victim (who may seek damages by lodging a civil action claiming reparation, but also file a complaint to the public prosecutor or the investigating judge), may not suffice. The Act of 30 July 1981 criminalising certain acts inspired by racism and xenophobia, therefore provided, rather exceptionally in Belgian procedural

³⁵¹ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 7 & 28 www.unia.be/en.

³⁵² Unia (2020) 'The underreporting and dismissal of discrimination offences', <https://www.unia.be/fr/publications-et-statistiques/publications/le-sous-rapportage-et-le-classement-sans-suite-des-delits-de-discrimination-2020>.

³⁵³ Report available on the website of the CoE, <http://www.coe.int/>.

³⁵⁴ ECRI (2020), *Sixth report on Belgium*, p. 17, <https://rm.coe.int/ecri-sixth-report-on-belgium-/16809ce9f0>.

³⁵⁵ Unia (2020) *Annual statistics report 2019 (Contributing to a more equal society for all)*, available on its website, www.unia.be. Figures for 2020 were not available when this report was written (15 March 2021).

law,³⁵⁶ that certain associations and representative unions, which statutorily pursue missions of combating racism and discrimination, could claim damages on behalf of the victim as a result of a violation of the provisions of this legislation (Article 32 of the current Racial Equality Federal Act). Later, Unia, which was set up by the Act of 15 February 1993 as an independent body, received similar powers under criminal statutory law.

In civil procedures, the General Anti-Discrimination Federal Act (Articles 29 and 30) and the Racial Equality Federal Act (Articles 31 and 32) provide for the legal standing of Unia, of certain organisations and of representative unions.

– **Regional level**

The Flemish Decree of 8 May 2002 (Article 16), the German Community ET Decree (Article 13), the Cocof Vocational Training ET Decree (Article 14) and the Cocof ET Decree (Article 28) have solutions similar to that of the Anti-Discrimination Federal Acts of 10 May 2007. This is also true of the Flemish Framework Decree (Article 41), the Walloon ET Decree (Article 31), the French Community ET Decree (Article 39),³⁵⁷ the Brussels ET Ordinance (Article 16), the Brussels Local Civil Service ET Ordinance and the Brussels ET Employment Ordinance.

At both federal and regional level, associations willing to claim damages on behalf or in support of claimants, for a violation of the anti-discrimination legislation, must have had a legal personality for at least three years³⁵⁸ and a legal interest in the protection of human rights or in combating discrimination. This uniform system is provided by Article 32(1) of the Racial Equality Federal Act, Article 30 of the General Anti-Discrimination Federal Act, Article 16 of the Flemish Decree of 2002, Article 13 of the German Community ET Decree, Article 14 of the Cocof Vocational Training ET Decree (2007) and Article 28 of the Cocof ET Decree (2010), Article 41 of the Flemish Framework Decree, Article 31 of the Walloon ET Decree, Article 39 of the French Community ET Decree, Article 16 of the Brussels ET Ordinance, Article 27 of the Brussels ET Employment Ordinance and Article 29 of the Brussels Local Civil Service ET Ordinance (which specifically designates Unia as the equality body with legal standing to defend victims in court). However, it is worth noting that under the German Community ET Decree and the Cocof ET Decree, associations, which have a legal personality at the moment of the discriminatory act (but have not necessarily had it for three years), may engage in proceedings on behalf or in support of complainants. Furthermore, under the Cocof Vocational Training ET Decree, associations willing to engage in proceedings on behalf or in support of complainants must have had a legal personality for at least five years.

Both at the federal and the regional levels, where the victim of the alleged discrimination is an identifiable (natural or legal) person, actions of the entities entitled to act on behalf or in support of them will only be admissible if they prove that the victim has agreed to their action being filed. This principle is provided for by the General Anti-Discrimination Federal Act (Article 31), the Racial Equality Federal Act, (Article 33), the Decree of the

³⁵⁶ The principle is that the so-called 'collective interest' asserted by an association which seeks to base its right to file a legal action on the basis of the mission defined in its internal statutes, will not suffice, if the rights of the association (to the protection of its property, its honour or reputation) are not violated as such. According to the Court of Cassation, if another solution were to prevail, citizens forming an association could impose on the authorities an obligation to prosecute, even in cases where the public prosecutor would find it not opportune to do so (Cour de Cassation, 24 November 1982, *Pasicrisie*, 1983, I, p. 361). The Court of Cassation confirmed its position on a number of later cases (e.g., Cour de Cassation, 19 September 1996, *Revue critique de jurisprudence belge*, 1997, p. 105). However, the Act of 31 July 1981 provides for exceptions to this rule, allowing unions and associations under certain conditions to pursue damages on behalf of the victim in the collective interest.

³⁵⁷ French Community ET Decree, Article 38 provides that the IECO and the Institute for the Equality of Women and Men are competent to file a suit on the basis of the decree.

³⁵⁸ In the procedure it had launched against Belgium, the European Commission took the view that the requirement of being established for a minimum of five years was too burdensome. The choice to lower the requirement to three years' existence is a response to this concern.

Flemish Framework ET Decree (Article 40), the Walloon ET Decree (Article 32), The French Community ET Decree (Article 40), the German Community ET Decree (Article 14), the Cocof Vocational Training ET Decree (Article 14), the Cocof ET Decree (Article 28), the Brussels ET Ordinance (Article 16), the Brussels ET Employment Ordinance (Article 34) and the Brussels Local Civil Service ET Ordinance (Article 29).

The extension of legal interest in a case where a person has been a victim of discrimination to Unia, representative unions and associations has an important consequence. Such entities acting as private prosecutors may overcome both the inertia of the public prosecutor (in criminal proceedings) and the unwillingness of the victim to file a complaint by which, if he/she seeks damages, the victim obliges the investigating judge to commence an investigation. However, these entities may only launch proceedings on the basis of the federal or regional anti-discrimination laws with the agreement of the individual victim, and they have absolutely no legal duty to act on behalf or in support of the victim in the event of any violation of these laws.

Like the victim of discrimination, Unia, representative unions and associations may ask the court for an injunction in order to stop the discriminatory behaviour. They may engage in criminal proceedings to obtain the conviction of the person responsible for discrimination when he/she has committed an offence under an anti-discrimination act. They also may engage in civil proceedings to obtain damages for the victim (in this case they can choose between full compensation for the damage or lump-sum compensation fixed by law). Therefore, these entities may seek and obtain the same remedies as the victim of discrimination, and benefit from the same protection.

b) Engaging in proceedings in support of victims of discrimination (joining existing proceedings)

In Belgium, certain associations or organisations and representative unions are entitled, under both federal and regional anti-discrimination legislation, to act in support of victims of discrimination, under exactly the same conditions (as described in section 6.2.a, above).

c) *Actio popularis*

In Belgium, national law allows associations, organisations and trade unions to act, under certain circumstances, in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

As described above (sections 6.2.a and 6.2.b), the federal and regional anti-discrimination legislation provides for the legal standing of associations to a certain extent. Although the concept of *actio popularis* involving a 'representative claimant' acting in court in the name of a collective interest, is unknown in Belgian law, if there is no identified victim, Unia, associations, organisations or trade unions may act on their own behalf to challenge a breach of the anti-discrimination legislation.

In the case of Unia, this *actio popularis* power gained European visibility and recognition in the *Feryn* case before the CJEU.³⁵⁹ This case concerned the question whether a public statement by Feryn's director that his company would not recruit persons of Moroccan origin because the company's customers did not want them in their homes could be seen as applying a discriminatory recruitment policy. Unia's predecessor took the case to court on its own behalf, given the lack of an identifiable victim. Ireland and the United Kingdom questioned the legal standing of the equality body in the absence of an identifiable victim. Therefore the CJEU in its seminal judgment analysed this issue and established that the Racial Equality Directive does not preclude national legislation granting the equality body

³⁵⁹ CJEU, judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, C-54/07, ECLI:EU:C:2008:397.

the right to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant.³⁶⁰ The CJEU went on to rule that such public statements constitute direct discrimination and are enough to shift the burden of proof and sanctions must be effective, proportionate and dissuasive, even where there is no identifiable victim.³⁶¹

In the *Adecco* case (see 3.2.1), the Brussels Appeal Court confirmed the decision of the court of first instance (civil section) on the grounds of admissibility and rejected the argument by Adecco that the French NGO SOS Racism – one of the applicants – would lack legal standing because its interest would be restricted to discrimination happening in France. Interpreting Article 32(1) of the Racial Equality Federal Act (providing that associations willing to claim damages on behalf or in support of complainants, in case of violation of the anti-discrimination legislations, must have a legal personality for at least three years and a legal interest in the protection of human rights or in combating discrimination) in the light of European law, the court held that there was no territorial requirement and that an association could bring a non-discrimination claim irrespective of the location of its head office.³⁶² Although there were thousands of jobseekers discriminated against on the grounds of their race and ethnic origin in this case, Adecco and SOS Racism were not acting on behalf or in support of named claimants in this case.

d) Class action

In Belgium, national law does not allow associations, organisations and trade unions to act in the interest of more than one individual victim for claims arising from the same event (class action).³⁶³ Like the concept of *actio popularis*, the concept of class action, understood as a mechanism implying that a 'representative claimant' will sue in the name of a class and obtain a judgment binding on all the members of that class, is unknown in Belgian law. Unia, representative unions and associations may engage in civil or criminal proceedings in cases of a violation of anti-discrimination legislation, but only on behalf or in support of one identified victim of discrimination, or in the public interest on their own behalf, without a specific victim to support or represent (see above, section 6.2.c).

The Antwerp Labour Appeal Court, in a 25 June 2008 ruling, made an interesting statement on the range of the injunction procedure (*action en cessation*) aimed at putting an end to discriminatory behaviour. It considered that Unia could request the ending of a discriminatory practice against a defined group of people who may, in the future, be discriminated against. This involves the recognition of a kind of collective injunction procedure. The scope of the collective injunction procedure is, however, limited to the person (or the entity) who discriminates or who is responsible for the discrimination and to the practice or the measure that the judge considered in breach of the equal treatment principle.³⁶⁴

It is worth noting that, in its evaluation report of 2017, Unia recommends the creation of a collective redress mechanism in anti-discrimination law, such as the class action existing in the field of consumer protection.³⁶⁵

³⁶⁰ CJEU, judgment of 10 July 2008, *Feryn* C-54/07, ECLI:EU:C:2008:397, section 27.

³⁶¹ CJEU, *Feryn*, Case C-54/07, ECLI:EU:C:2008:397.

³⁶² Appeal Court of Brussels, 10 February 2015, www.unia.be/en.

³⁶³ The only exception relates to consumer law. Since September 1, 2014, a collective redress action may be brought against a company that causes harm to consumers (Federal Act of 28 March 2014 which provides for the insertion of a Title 2 in the Book XVII ('Special Court proceedings') of the Code of Commercial law. This new part of the Code is entitled 'collective redress action').

³⁶⁴ Labour Appeal Court (*Arbeidshof*) of Antwerp, 25 June 2008, no. 54470, Centre for Equal Opportunities and Opposition to Racism v. B& G.

³⁶⁵ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 7 and 58 www.unia.be/en.

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

In Belgium, national law, at both Federal and Regional levels, provide for a shift of the burden of proof from the complainant to the respondent in civil procedures.

– Federal level

Both Federal Anti-Discrimination Acts provide for shifting the burden of proof in all the jurisdictional procedures, except the criminal ones (Article 27 of the Racial Equality Federal Act and Article 29 of the General Anti-Discrimination Federal Act). A victim seeking damages in reparation of the alleged discrimination, on the basis of Article 1382 of the Civil Code, can produce evidence – such as ‘statistical data’ or recurrence tests, for instance – which could lead the judge to presume that discrimination has occurred, thus obliging the defendant to demonstrate that, contrary to that presumption, there has been no discrimination.

In its decisions issued in 2009 on several actions of annulment against the 2007 Federal Anti-Discrimination Acts, the Constitutional Court gave a misleading view on the shift of the burden of proof mechanism.³⁶⁶ The Court referred to the judge’s power of assessment to allow the reversal of the burden of proof as if the judge had a discretionary power to allow such a reversal or not.

It is worth noting that in its 2017 evaluation report, Unia observed that in many cases it is almost impossible for the applicant to bring the proof of the discrimination despite the principle of the shift of the burden of proof. Moreover, judges do not always accurately apply this principle. The burden of proof is therefore often too heavy for the applicant.³⁶⁷ The Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts suggests the drafting of a good practice guide in order to better identify which facts should count as having sufficient weight to trigger the switch of the burden of proof. Such a guide should include an analysis of the case law of the CJEU and the ECtHR, but also good practice found in other Member States.³⁶⁸

– Regional level

The regional anti-discrimination statutes that have been adopted since 2008 all include a provision dealing with the shifting of the burden of proof directly inspired by the federal acts and are therefore in line with the EU requirements.

Earlier instruments are less detailed in this respect. Article 14 of the Flemish Decree of 8 May 2002 provides for the reversal of the burden of proof in the context of civil actions brought on the basis of the decree – the mechanism will not apply in criminal procedures³⁶⁹ – although the decree remains vague as to which facts should count as being of sufficient weight to prompt the switch of the burden of proof. There will be, therefore, a great deal of room for judicial interpretation. The judge will have to consider what weight should be afforded to the facts presented by the victim, and whether these facts lead to a presumption that discrimination may have occurred. Both decrees of the Cocof provide for a very similar system (Article 13(2)-(3) of the Cocof Vocational Training ET Decree and Article 25 of the Cocof ET Decree).

³⁶⁶ Constitutional Court (*Cour constitutionnelle*), 12 February 2009, 11 March 2009 and 2 April 2009, decision no. 17/2009, para. B.93.4; decision no. 39/2009, para. B.53; decision no. 40/2009, para. B.98, available on the website of the Court: www.const-court.be.

³⁶⁷ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 10, 22 and 58 www.unia.be/en.

³⁶⁸ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 86-89, para. 300 www.unia.be/en.

³⁶⁹ See Directive 2000/78/EC, Article 10(3).

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

In Belgium, there are legal measures of protection against victimisation.

– Federal level

The General Anti-Discrimination Federal Act and the Racial Equality Federal Act extend the protection from reprisals to victims filing a complaint and to any witness in the procedure (persons having otherwise assisted in the preparation or the filing of the complaint are not included, however, in the protection from reprisals). Article 17 of the General Anti-Discrimination Federal Act provides for protection of an employee who has filed a complaint against discrimination or on whose behalf a complaint has been filed, in the field of employment. This protection is extended to witnesses (Article 17(9)). Article 16 of the General Anti-Discrimination Federal Act provides a similar protection from victimisation in fields other than employment; in this context, too, the protection extends to witnesses (Article 16(5)). Where an employment relationship is concerned, the victim of reprisals by way of a dismissal, can, either themselves or through the organisation of which the victim is a member (and who represents that victim) ask for their reintegration, at the same level and under the same conditions as those prior to the dismissal. This is the case until a judicial decision has been made establishing that there has been discrimination. Articles 14 (outside the employment field) and 15 (in the field of employment) of the Racial Equality Federal Act contain identical protections against reprisals. All those regimes of protection imply a reversal of the burden of proof. However, they are only applicable to victims and witnesses of act of discrimination, which is more restrictive than the directives.

In a 28 December 2010 ruling, the Ghent Labour Appeal Court confirmed a strict interpretation of the protection of witnesses against reprisal. The appeal court decided that the protection of a witness against reprisal (as enshrined in Article 15(9) of the Racial Equality Federal Act) only applies to a person who acknowledges the facts of the case in a signed and dated document as part of the trade union investigation of the presumed discrimination or to a person who appears as a witness in the proceeding before the labour inspector.³⁷⁰ This interpretation could be applicable to the three Federal Anti-Discrimination Acts of 2007.

In its 2017 report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts suggests extending the protection against reprisals to any person intervening as a counsel, defender or in support of the alleged victim of discrimination.³⁷¹

Recently, the Court of Justice of the European Union (CJEU) ruled on this matter in its judgment *Hakelbracht* of 20 June 2019.³⁷² Indeed, the Labour Court of Antwerp asked the Court of Justice for a preliminary ruling regarding the compatibility with Article 24 of Directive 2006/54 of the restrictive protection of witnesses (only to persons who report the facts in a signed and dated document) under the Gender Equality Federal Act (GEFA). The CJEU stated that Article 24 of Directive 2006/54 must be interpreted as meaning that it precludes legislation, such as the Belgian Gender Equality Federal Act, under which an employee who has supported a person who believed themselves to be discriminated against on the ground of sex 'is protected from retaliatory measures taken by the employer solely if that employee has intervened as a witness in the context of the investigation of that complaint and that the employee's witness statement satisfies formal requirements laid down by that legislation.'

³⁷⁰ *Rechtskundig Weekblad*, 2011-12, no. 29, 17 March 2012, p. 1304-1305.

³⁷¹ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, pp. 11 and 86 and para. 286, www.unia.be/en.

³⁷² CJEU, judgment of 20 June 2019, *Hakelbracht* C-404/18, ECLI:EU:C:2019:523.

The decision of the CJEU regarding the protection of witnesses was eagerly expected as the current Belgian legislation has been reported by independent experts as not complying with EU Law because it provides for a too formalistic approach to the protection of witnesses (in that it only extends protection to persons who report the facts in a signed and dated document).

The issue related to the interpretation of the protection of witnesses of discrimination is in fact broader than the field of discrimination relating to sex and gender. The other two anti-discrimination acts of 10 May 2007 (GAFA and REFA), which implement Directives 2000/43/EC and 2000/78/EC respectively, both contain the same provision relating to the protection against retaliation to persons who act as witnesses of discrimination. Obviously all three federal acts will have to be amended and already have to be interpreted accordingly.

– **Regional level**

The Flemish Framework Decree provides for quite extensive protection against reprisals because it applies to the whole material scope of the decree and not only to the area of employment. Moreover, it concerns not only the victims but also witnesses and legal representatives of the victims (Articles 37 and 38).

The Walloon ET Decree also provides for an extensive protection against reprisals. It applies to victims and witnesses but also to 'persons acting as counsel, defendant or support for the person concerned' (Article 18(5)).

All the other regional ET statutes provide for protection against victimisation, in their respective material scope, following the model of the Federal Anti-Discrimination Acts. Except for the Cocof decrees, which are in line with the directives,³⁷³ they lay down rules on protection from victimisation that are only applicable to victims and witnesses to the act of discrimination, which is more restrictive than the directives.

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

a) Applicable sanctions in cases of discrimination – in law and in practice

– **Federal level**

Under the General Anti-Discrimination Federal Act and under the Racial Equality Federal Act, the victim of discrimination may seek damages according to the usual principles of civil liability (Articles 18 and 16 respectively) or opt for a payment of the lump sums defined in the law. Damages are payable each time a discriminatory practice is proven to have occurred (in line with the general rule in non-contractual civil liability enshrined in Article 1382 of the Civil Code). The choice of the victim to seek the payment of damages either on the basis of the 'effective' damage, or on the basis of the lump sums defined in the law, aims to ensure the effectiveness of the sanctions provided for instances of discrimination. These different sanctions may apply whether the discrimination occurs in private or public employment, or in a field outside employment covered by ET legislation. The victim can also request that:

- the court rules that the discriminatory provisions enshrined in a contract are null and void (Article 15 of the General Anti-Discrimination Federal Act and Article 13 of the Racial Equality Federal Act);

³⁷³ Article 26(8) of the Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment of July 2010 and Article 15/1 of the Decree on equal treatment between persons in vocational training of 2007 (the protection applies also to any person intervening as a witness, counsel, defender or support of the alleged victim of discrimination).

- the court delivers an injunction ordering the immediate cessation of the discriminatory practice, under the threat of financial penalties (*astreintes*) (Articles 19 and 20 of the General Anti-Discrimination Federal Act and Articles 17 and 18 of the Racial Equality Federal Act);³⁷⁴
- the court imposes the publication of the judgment finding discrimination, by the posting of the judicial decision on the premises where the discrimination occurred, or by the publication of the judicial decision in newspapers (Article 20(3) of the General Anti-Discrimination Federal Act and Articles 18(3) of the Racial Equality Federal Act).

The decisions handed down by the Commercial Court and the Ghent Court of Appeal in the case *Centre for Equal Opportunities and Opposition to Racism v. B.V.B.A. Kuoni Travel Belgium*³⁷⁵ provide a good example of the applicable sanctions in Belgian law. The case concerns a deaf man used to self-sufficient travelling who called upon the services of a travel agency to book a package tour in Jordan. Believing that his security would not be correctly assured because of his difficulties in communicating with the local population, the travel agency refused to offer its services, unless an independent guide accompanied the deaf man at his own expense. After several mediation attempts, Unia brought an action before the Ghent Commercial Court (*Tribunal de commerce*), alleging that simple adjustments should have been made by the travel agency. The Ghent Commercial Court ruled in favour of Unia and convicted the travel agency of failing to provide reasonable accommodation to the victim, and therefore refusing to allow him to participate in the package tour of Jordan. The travel agency was sentenced to pay a lump sum of EUR 650 and financial penalties (*astreintes*) of EUR 1 000 for every possible new offence noticed and per diem if the offence continued. Furthermore, the travel agency had to advertise the judgment in its Ghent branch and on its website, and to publish it at its own expense in the media. In a decision of 20 January 2011, the Ghent Court of Appeal confirmed the judgment of the Ghent Commercial Court but decided to sentence the travel agency to pay a lump sum of EUR 1 300 (and not just EUR 650 as had been decided in the first instance).

The previously mentioned *Feryn* case is another good example (see section 6.2.c, above). After the decision of the CJEU of 10 July 2008 (Case C-54/07), the Labour Appeal Court (*Cour du travail*) of Brussels delivered its judgment on 28 August 2009.³⁷⁶ The court ruled that Mr. Feryn, by publicly declaring that his firm was not recruiting any employees of Moroccan origin, was directly discriminating on the ground of ethnic origin. It ordered the cessation of the discriminatory practice and the publication of this judicial injunction in several newspapers.

In addition, some discriminatory acts (racial discrimination in the provision of goods or services and in employment) are also punishable as crimes. These offences, which fall under the scope of Directive 2000/43/EC, may lead to imprisonment (one month to a year), fines (EUR 250 to 5 000), or to both sanctions combined, and even to the loss of their civil and political rights for a certain time, meaning that during this time the offender cannot be a civil servant, nor be elected, nor sit in representative bodies (Article 25 of the General Anti-Discrimination Act and Article 27 of the Racial Equality Federal Act). Moreover, the victim has the option of claiming compensation for the damage caused by the offence. Actually, these criminal offences have been very rarely prosecuted and have led to very few convictions because of the difficulties in finding the person who is criminally liable (burden of proof issue).

– Regional level

³⁷⁴ These financial penalties, the amount of which is fixed by a judge, are intended to force the perpetrator of the discrimination to comply with a court decision. They are an additional sanction that does not replace the payment of damages.

³⁷⁵ Judgment No. 7302 of 29 September 2010 of the Commercial Court (*rechtbank van koophandel*) of Ghent and Decision of 20 January 2011 of the Court of Appeal of Ghent.

³⁷⁶ Judgment of 28 August 2009 of the Labour Appeal Court (*Cour du travail*) of Brussels after the preliminary ruling of the Court of Justice of the European Union of 10 July 2008 (Case C-54/07).

The ET statutory law adopted by the regions and communities is directly inspired by the system of sanctions provided for in the Federal Anti-Discrimination Acts.

b) Compensation – maximum and average amounts

In Belgium, there is no maximum amount for compensation as such, but the victim is entitled to choose the lump sums defined in the law rather than asking for damages calculated on the basis of the 'effective' loss (EUR 1 300, reduced to EUR 650 when the defendant provides evidence that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element, or, in the field of employment, six months' salary, reduced to three months' salary if the employer shows that the disputed measure would have been adopted anyway, even in the absence of the discriminatory element).

There is no information available as to the average amount of compensation awarded to victims of discrimination.

In a 2019 case, the Constitutional Court rightly decided that there is no distinction to be made between the awarding of lump sum damages, depending on whether the discrimination is direct or indirect. The difference between those two notions resides only in the nature of the discrimination and the possible justification. There should be no difference in the awarding of lump sum damages. The Constitutional Court recalls the established case law of the CJEU that the intent to discriminate is not a constituent element of discrimination. This implies that there is no difference between either perpetrators or victims of direct and indirect discrimination, and therefore there should be no difference between the damages.³⁷⁷

As all pieces of anti-discrimination legislation (federal and federate level) provide for the same lump sum system, this decision also confirms the constitutionality of all the relevant anti-discrimination laws.

c) Assessment of the sanctions

The 2007 Federal Anti-Discrimination Acts significantly improved the system of sanctions available to victims of discrimination, bringing Belgium nearer to a situation where discrimination leads to 'effective, proportionate and dissuasive' sanctions. The fact that victims can choose fixed rate damages was presented by the federal legislature as a way to improve the effectiveness of remedies.

However, in its 2017 report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts, raises several questions as to the dissuasive impact of the sanctions. Even though the commission intends to give further consideration to the matter in order to truly assess the effective, proportionate and dissuasive character of the sanctions, it is already suggesting increasing the lump sums in cases of discrimination outside the field of labour relations and to provide for their indexation.³⁷⁸

The ET statutory laws adopted by the regions and communities in 2008 are directly inspired by the system of sanctions provided for in the Federal Anti-Discrimination Acts. Those sanctions must therefore also be held as being effective, proportionate and dissuasive. The situation is less clear regarding the older regional decrees. The Flemish Decree of 8 May 2002 on proportionate participation in the labour market also contains a criminal clause (Article 11 – the author of a discriminatory act may be sentenced to a prison term from one month to one year or/and to a fine). It also provides that the court might order the cessation of the discriminatory practice (Article 15). The duty of reporting under the

³⁷⁷ Constitutional Court (*Cour constitutionnelle*), Judgment 110/2019 of 10 July 2019, No. 110/2019.

³⁷⁸ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, pp. 95-100 and para. 341, www.unia.be/en.

Flemish Decree on proportionate participation in the labour market is part of the general duties to report of the entities to which the decree is addressed. The 2007 Ccof Vocational Training ET Decree provides only for disciplinary sanctions against civil servants or for the suspension of the official approval of the public body whose practice was held discriminatory by a court (Article 16). It is doubtful whether this decree fulfils the European requirements regarding sanctions.

It should also be added that there are no specific sanctions to tackle the issue of structural discrimination, such as desegregation plans. Although financial penalties (*astreintes*) can compel defendants to put an end to instances of structural discrimination that have been taken to court, this societal issue should be addressed in a more comprehensive manner.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

In Belgium, Unia (also known as the Centre)³⁷⁹ is the equality body designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive.

From its creation in 1993³⁸⁰ until 2014, the body was called the 'Centre for Equal Opportunities and Opposition to Racism and Discrimination' (CECLR) and was a federal body, only competent in respect of both Federal Anti-Discrimination Acts. It was not institutionally linked to the regions and communities and was therefore not competent in respect of regional statutory ET law. In order to empower the Centre for Equal Opportunities to play a role at regional level, the federal state, the regions and the communities signed a Cooperation Agreement on 12 June 2013. The Centre for Equal Opportunities and Opposition to Racism and Discrimination became an *inter-federal* centre competent to promote equal opportunities and fight any kind of distinction, exclusion or restriction based on the prohibited grounds contained in various anti-discrimination instruments adopted at both regional and federal levels.

The Inter-federal Centre for Equal Opportunities (renamed Unia in 2016) has been fully operational since March 2014.³⁸¹ Henceforth, in cases of potential infringement of any of the federal or regional anti-discrimination legislation, citizens are able to contact either the main office of the Centre in Brussels or contact points in Flanders or Wallonia.³⁸² Since the entry into force of the Cooperation Agreement of 2013, these contact points fall directly under the responsibility of Unia. As a consequence, whether a potential discrimination case is submitted to the main office or to a local contact point, Unia is the centralised equality body competent to assist victims and file legal actions with respect to federal as well as regional ET law (Cooperation Agreement of 12 June 2013, Article 6). In 2015, two years after the entry into force of the Cooperation Agreement of 12 June 2013, 4 554 people had contacted the Centre to report discrimination cases and 904 of them had come through the contact points. As has been pointed out by the Centre itself, the goal of the Cooperation Agreement has been achieved in this respect.³⁸³

Another cooperation agreement was planned in order to turn the Institute for Equality of Women and Men into an inter-federal institute, but the process could not be achieved for political reasons and was eventually abandoned, as there was no reference to this cooperation agreement or to a future inter-federal centre for equality of women and men in either the 2014 Federal Governmental Agreement³⁸⁴ or in the new one.³⁸⁵

³⁷⁹ It is the abbreviation chosen by the Centre itself (see, on its website: www.unia.be/en/).

³⁸⁰ The Centre for Equal Opportunities and Opposition to Racism was created by a Federal Act of 15 February 1993 (OJ (*Moniteur belge*), 19 February 1993).

³⁸¹ Since 15 March 2014 (date of the entry into force of the Cooperation Agreement of 12 June 2013), all the details regarding the missions, organisation and functioning of the Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination are enshrined in the Cooperation Agreement (and no longer in the Federal Act of 15 February 1993).

³⁸² There are currently 13 contact points in Flanders. In Wallonia, a collaboration currently exists with 10 'Wallonia Spaces' ('Espaces Wallonie'). There are four Unia contact points covering four sub-regions. A list of the contact points is available at the following address: www.unia.be/en/contacting-unia/our-local-contact-points.

³⁸³ Unia (2016) *Annual report for 2015 (Discrimination – Diversité)*, available on its website, www.unia.be/en, p. 27.

³⁸⁴ Interview with Patrick Charlier, co-director of Unia, 28 March 2017.

³⁸⁵ Federal Governmental Agreement, 30 September 2020, in French: https://www.sfpd.fgov.be/files/1989/accorddegouvernement2020_decroo1.pdf.

It must be stressed that the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts, in its 2017 report, made recommendations on the institutional structure of the Belgian equality bodies:

12. (§148) The Commission recommends to inter-federalise the Institute for the Equality of Women and Men by the means of a Cooperation Agreement between the Federal State, the Regions and Communities.

13. (§§ 152-153) The Commission recommends creating a one-stop shop system, virtual if necessary, to help citizens easily identify the competent body for handling their case. (...) The Commission also recommends setting up a concerted action structure between the different existing bodies promoting equal opportunities. This structure could adopt special measures to combat multiple discrimination situations, falling under the competence of more than one body.

14. (§155) The Commission recommends that the authorities continue their work in order to create without further delay a National Human Rights Institution, in compliance with the "Paris Principles".³⁸⁶

In 2014, Unia launched a collaborative human rights network and, in 2015, a protocol of collaboration was signed between all federal and regional independent public bodies, accessible to the citizens, that are active in the field of human rights in order to foster cooperation and exchange good practice (i.e., Federal Ombudsmen, Walloon Ombudsman, Ombudsman of the German-speaking Community, General Delegate to the Rights of the Child, Commission for the Protection of Privacy, High Council of Justice, Institute for the Equality of Women and Men, Standing Police Monitoring Committee or Committee P, etc.). This human rights network gathers on a monthly basis with a rotating chair and has served as a starting point for the national mechanism of human rights.

However, Belgium was under political pressure to accelerate the process of creating a 'national mechanism of human rights', in conformity with the United Nations 'Paris Principles'. Eventually, thanks to the political crisis at the end of 2018 and the departure of the N-VA from the former federal Government, the process was fruitfully relaunched at the beginning of 2019. To bring the project to a successful conclusion before the end of the parliamentary term in April 2019, a pragmatic approach has been adopted to prioritise an institute for the protection and promotion of human rights at the federal level, while expecting that it should become inter-federal in a second stage, to cover the areas of competence of the regional entities.³⁸⁷

This is the first institution transversally competent in respect of human rights, unlike the several different specialised bodies (e.g. Unia: competent for discrimination; Myria: migrants' rights; IEFH: gender equality, etc.), whose respective jurisdictions will remain untouched. In order to achieve overall coverage of fundamental rights, it was decided to define the competence of the new institute in a 'complementary' or 'residual' way. Thus, this new federal institute is competent to ensure the respect of all fundamental rights, in the federal fields not covered by an existing specialised body. The institute should work in close cooperation with the specialised public bodies active in the field of human rights and take part in the human rights network. At this stage it is not entirely clear what role the institute is going to play in the field of discrimination as it will have to define its action in complementarity with the mandate of Unia and the Institute for the Equality of Women and Men. The institute will have a consultative role and will be able to intervene in front of the judiciary and the Constitutional Court.

³⁸⁶ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, www.unia.be/en.

³⁸⁷ Belgian Federal Act of 12 May 2019 creating a Federal Institute for the Protection and Promotion of Fundamental Rights (*Loi du 12 mai 2019 portant création d'un Institut fédéral pour la protection et la promotion des droits humains*), OJ (*Moniteur belge*), 21 June 2019.

In its recommendations of December 2019, the UN Committee for Human Rights welcomed the adoption of this law. However, the UN Committee noted that 'there are several sectoral institutions for human rights in the State party, with various mandates, including ... Unia.' The Committee is unclear as to 'how such institutions will ensure coordination with the new federal institute, which is essential for the effective implementation of its mandate in all areas of human rights in the State party, including its ability to receive complaints (art. 2)'. The Committee recommended that Belgium 'speed up the establishment of the Federal Institute for the Protection and Promotion of Human Rights'. It also urged Belgium to 'encourage the federal authorities and the federated entities to negotiate cooperation agreements so as to increase collaboration in order to ensure effective protection, in accordance with the State party's obligations under the Covenant'.³⁸⁸ In its recommendations of March 2020, the UN Committee on Economic, Social and Cultural Rights recommended that Belgium should extend the mandate of the national human rights institution, in accordance with the Paris Principles, in order to cover not only the federal State but also the regions. The Committee also urged Belgium 'to consider the possibility of providing this institution with the capacity to receive and consider complaints and petitions relating to individual situations, in particular with regard to economic, social and cultural rights'.³⁸⁹

The members of the institute's board of directors were appointed in the summer of 2020. The President (Olivier de Schutter) and Vice-President (Eva Brems) are both very well-known and respected law professors who are part of European and international human rights networks.³⁹⁰ The new Government formed in 2020 announced that the institute will start working during this legislature (2019-2024) and that it will become an inter-federal body equipped with a complaint procedure.³⁹¹ The new Federal Institute for the Protection and Promotion of Human Rights was set up at the end of 2020. For the time being, there is a good collaboration between the new federal institute and the other federal and regional independent public bodies, accessible to the citizens, that are active in the field of human rights, and with Unia in particular.³⁹²

Some points of concern remain:

- for now, the institute is not be able to receive individual complaints, which greatly diminishes its ability to take action;
- for now, the body has been created as a federal institute, however, in Belgium there are different levels of power, and a federal institute does not cover the scope of competences of the regions and communities – ideally, it should take the form of an inter-federal institute, like Unia, so as to be competent for ensuring the respect of fundamental rights in the entire country in any field of application.

b) Political, economic and social context of the designated body

There have been several debates concerning Unia, most of which were launched by Flemish politicians from the N-VA, a leading right-wing political party in Flanders. For example, the Belgian former Federal Secretary of State for Equal Opportunities, Zuhair Demir (N-VA, appointed on 24 February 2017) harshly criticised Unia in a Flemish newspaper (*Het*

³⁸⁸ UN Human Rights Committee, *Concluding observations on the sixth periodic report of Belgium*, CCPR/C/BEL/CO/6, 6 December 2019, paras. 9-10.

³⁸⁹ UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Belgium*, E/C.12/BEL/CO/5, 26 March 2020, paras. 7-8.

³⁹⁰ RTBF (2020) 'Olivier De Schutter devient président du nouvel Institut des droits de l'Homme', 3 September 2020, https://www.rtbf.be/info/belgique/detail_olivier-de-schutter-devient-president-du-nouvel-institut-des-droits-de-l-homme?id=10575879. Please note that Martien Schotsman was appointed as the Director of the Federal Institute for the Protection and Promotion of Human Rights in February 2021 (after the cut-off date of this report).

³⁹¹ Federal Governmental Agreement, 30 September 2020, in French: https://www.sfpd.fgov.be/files/1989/accorddegouvernement2020_decroo1.pdf.

³⁹² Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

Nieuwsblad) just after her appointment.³⁹³ She questioned whether Unia still pursued its goals. She stated that Unia is poorly viewed by citizens because of its tone, which is too moralising. She furthermore stressed that Unia looked ridiculous by opening positions only for women. Furthermore, according to the former Secretary of State, the majority of issues that Unia works on are raised by French-speaking people.

In November 2017, the former Flemish Minister for Equal Opportunities, Liesbeth Homans (N-VA) asked for an independent study on Unia's functioning and neutrality.³⁹⁴ She pledged in front of the Flemish Parliament to obtain an audit. She claimed Unia was partial and was more likely to accept complaints from Moroccans or Muslims than from a blonde, Flemish woman. She demanded direct access to Unia's database, which centralises the complaints. Unia refused, however, since it is under the control of the Parliament and not of the Government (much less of one minister).³⁹⁵ At the same time, some Flemish politicians called for the separation of Unia into two bodies, one in charge of Flemish cases and the other in charge of French cases. M. Storme, a member of the board of directors, supported this opinion.³⁹⁶

The public perception of Unia is quite different in Brussels and Wallonia compared with Flanders. From the French-speaking side, Unia is generally viewed as a centre for expertise and a valuable tool for people suffering discrimination, whereas in the Flemish part of the country, the perception is more partisan and certain parts of the population question its independence and impartiality.³⁹⁷ However, direct assaults on Unia remain exceptional.

At the political level, after months of negotiation following the elections that took place in May 2019, a coalition agreement was reached in Flanders on 30 September 2019, which includes its withdrawal from Unia. Bart de Wever, the chairman of the Nieuw Vlaamse Alliantie (N-VA) announced that the Flemish Government will set up its own equality body.³⁹⁸ This measure can be explained by the fact that the N-VA had regular conflicts with Unia during the previous parliamentary term and might also be linked to the fact that the N-VA, which had gained many votes from Vlaams Belang (VB), a far-right, populist nationalistic political party, with repeated xenophobic tendencies, lost ground to the VB in the last elections.³⁹⁹

Unia fears that the creation of a Flemish equality body will lead to a lack of clarity and confuse citizens about the role and competence of the various institutions with a responsibility to fight against discrimination. Moreover, the Flemish Government is currently responsible for 10 % of the financial resources of Unia and this loss of income could have serious consequences for the running of Unia. Nevertheless, the cooperation agreement that binds Unia and the Flemish Government remains valid until March 2023. Unia's budget is protected, at least temporarily, as the yearly amount allocated is enshrined in the Cooperation Agreement of 2013, including indexation. If there were a political will

³⁹³ La Libre (2017) 'Zuhail Demir charge Unia, "obsédé par les discussions sur le Père Fouettard"' www.lalibre.be/actu/politique-belge/zuhail-demir-charge-unia-obsede-par-les-discussions-sur-le-pere-fouettard-58b1275dcd70e898180d11c1.

³⁹⁴ Sudinfo (2017) 'Unia: la majorité flamande veut une étude indépendante, après une nouvelle polémique avec Homans' 17 November 2017, www.sudinfo.be/1990792/article/2017-11-17/Unia-la-majorite-flamande-veut-une-etude-independante-apres-une-nouvelle-polemie.

³⁹⁵ Interview with Patrick Charlier, co-director of Unia, 24 January 2018.

³⁹⁶ Le Vif (2017) 'La N-VA veut un Unia flamand: "Le problème, ce sont les francophones"', 27 February 2017, www.levif.be/actualite/belgique/la-n-va-veut-un-unia-flamand-le-probleme-ce-sont-les-francophones/article-normal-620687.html.

³⁹⁷ Le Vif (2019) 'La Wallonie, la FWB et Bruxelles continueront de travailler étroitement avec Unia', 1 October 2019, https://www.levif.be/actualite/belgique/la-wallonie-la-fwb-et-bruxelles-continueront-de-travailler-etroitement-avec-unia/article-news-1197571.html?cookie_check=1584697076.

³⁹⁸ Unia (2017) 'Unia réagit à la décision de la Flandre d'arrêter leur coopération', 30 September 2019, <https://www.unia.be/fr/articles/unia-reagit-a-la-decision-de-la-flandre-darreter-leur-cooperation>.

³⁹⁹ HLN (2019), 'Vlaams Belang haalde nieuwe kiezers vooral bij N-VA', 4 June 2019 <https://www.hln.be/nieuws/binnenland/vlaams-belang-haalde-nieuwe-kiezers-vooral-bij-n-va~aa676d40/>. This news article (on the federal elections of 26 May 2019) cites a study by iVox which shows that voters move between Vlaams Belang and N-VA, including during the elections of 2014.

to cut Unia's budget, it would have to be agreed upon by all regional and federal Governments. To date, there has been no serious threat of budget cuts. However, it must be noted that there have been parliamentary questions on the cost, considered exorbitant, of the *Achbita* case before the CJEU.

Since the political declaration of the Flemish Government was released in September 2019, no official progress has been made and the question of which model of equality body should be adopted by the Flemish Region does not seem to be settled yet. It is worth stressing that Unia is in regular contact with the Flemish Minister for Equal Opportunities, Bart Somers (Dutch-speaking Liberal Party), who has been invited to visit Unia, to meet with members of its staff and to have discussions with Equinet and ENNHRI (European Network of National Human Rights Institutions). In the event that the withdrawal takes place, Unia is in discussion with the minister on two issues:

- to ensure that the new Flemish body takes over part of the Unia staff in order to promote continuity and not to have to dismiss any employee;
- to foster collaboration between the new Flemish equal opportunities body and Unia (e.g. sharing a toll-free number or the same offices between the local services of Unia and those of the Flemish body).⁴⁰⁰

c) Institutional architecture

In Belgium, the designated body does not form part of a body with multiple mandates.

It is true that Unia assumes a specific mandate under Article 33(2) of the CRPD, which provides that an independent body must promote, protect and follow up on the application of the Convention (Article 3(1)(b) of the Cooperation Agreement of 12 June 2013). For this purpose, a multidisciplinary department of seven full-time equivalent employees was especially set up to carry out the new missions of the Centre. The department designs a three-year strategic plan and a one-year action plan. There is a support committee of 23 people (11 Dutch-speaking, 11 French-speaking and 1 German-speaking) belonging to associations of people with disabilities, the academia and social partners, which is in charge of the representation and participation of civil society within the context of the missions carried out by the department. It is responsible for approving the three-year strategic plan and the one-year action plan prepared by the service.

However, the main focus of Unia is still equality and non-discrimination, as the mandate under Article 33 is integral part of it, even if the scope of the CRPD is broader as it enshrines the whole range of human rights for persons with a disability. According to the authors of this report, there is no risk of dilution or less visibility of the equality mandate.

d) Status of the designated body– general independence

i) Status of the body

Unia has the status of an 'independent public service' (*service public autonome*). Since 2018, it has been recognised as a National Human Rights Institution, accredited with B status by the GANHRI Sub-Committee on Accreditation, in partial compliance with the UN Paris Principles. Its B status is explained by the absence of a general human rights mandate.

Unia is managed by a board of directors composed of 20 members: 10 members appointed by the House of Representatives and 10 members (plus a member of the German-speaking Community for matters concerning the German-speaking Community), appointed by the Parliaments of the regions and communities. Members of the inter-federal board are

⁴⁰⁰ Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

appointed on the basis of their competence, experience, independence and moral authority. They are academics, social partners and part of the judiciary and civil society. The inter-federal board must be a pluralist body (Article 8(2) of the Cooperation Agreement of 12 June 2013). The board members are appointed for six years, but their mandate is renewable twice. The lack of independence, criticised by several international bodies,⁴⁰¹ which resulted from the appointment of the board of the Centre by the Government has been solved by the adoption of the Cooperation Agreement. In February 2015, the first inter-federal board was appointed by the Parliaments.⁴⁰² The Presidents are Fahim De Leener and Bernadette Renault. The board elected them on 10 September 2015. The appointment of two co-directors (Patrick Charlier and Els Keytsman) of the new Inter-federal Centre (joint management on a double parity: gender – male/female - and linguistic – Dutch/French speaking) took place in early December 2015. Their six-year mandate is renewable twice.

In 2015, the board of directors approved the rules of procedures in order to implement Article 10(3) of the Cooperation Agreement of 12 June 2013.⁴⁰³

The renewal of the board of directors started at the end of 2020.⁴⁰⁴ Each Parliament appointed 'its' members, apart from the Flemish Parliament due to an institutional blockage. According to the d'Hondt proportional distribution method, the Flemish Parliament planned to appoint two members of the N-VA (Nationalist Flemish Party), one member of the CD&V (Christian Flemish Party) and one member of Vlaams Belang (far-right, populist nationalistic Flemish party). Unia refused to allow a member of a far-right party, which had already introduced bills to abolish Unia altogether, to sit on its board of directors. Given that the withdrawal of the Flemish region from Unia and the setting up of a Flemish equality body were under discussion, the Flemish Parliament regarded this new appointment as unnecessary. In the end, it was decided that the former members of the board of directors, who were appointed by the Flemish Parliament, will continue to sit to ensure the continuity of the public service.⁴⁰⁵

In 2020, Unia had 96 full-time equivalent employees,⁴⁰⁶ which is a slight decrease in comparison with the 106 full-time equivalent employees in 2019. This decrease is linked to the financial plan put in place to restore a balanced budget which was achieved at the end of 2020. However, to face an increased workload, Unia is looking for other sources of funding to be able to hire a further five or six full-time equivalent staff and is confident that it will manage to do so.⁴⁰⁷

Unia is required to submit an annual report to the federal and regional Parliaments on the fulfilment of its responsibilities, the use of its resources and its functioning. This annual report is designed to justify the use of its resources and its functioning. Unia is also compelled to send a copy of this annual report for informative purposes to each federal or regional Government (Article 7 of the Cooperation Agreement of 12 June 2013).

The budget awarded to Unia has evolved over the last years. It is worth noting that, since 2013, the budget is included in the Cooperation Agreement of 12 June 2013, which allows for greater stability regarding the funding:

⁴⁰¹ UN Committee on the Rights of Persons with Disabilities (2015), *Concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session* (15 September – 3 October 2014), section 48: www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx. Moreover, in the 2014 Concluding observations, the Committee on the Elimination of Racial Discrimination is concerned 'that the board of the new Centre is appointed by the Executive, which may compromise its independence' (CERD/C/BEL/CO/16-19, 14 March 2014, para. 7).

⁴⁰² The list of the members is available at the following address (in French): www.unia.be/fr/propos-dUnia/membres-du-conseil-dadministration-dUnia.

⁴⁰³ OJ (*Moniteur Belge*), 22 July 2015, p. 46958 Entry into force 1 August 2015.

⁴⁰⁴ This renewal was achieved in early 2021.

⁴⁰⁵ Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

⁴⁰⁶ At the time of writing, there were no figures available concerning the year 2020.

⁴⁰⁷ Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

- 2009: EUR 4 480 000;
- 2010: EUR 7 140 000 (this increase in the budget is a late adaptation of the extension of the missions of the Centre, which took place in 2003 - 12 persons were added to the staff which increased from 74 to 86 people);
- 2011: EUR 7 260 000;
- 2012: EUR 7 189 000;
- 2013: EUR 7 596 000;
- 2014: EUR 7 705 200;
- 2015: EUR 7 840 000;
- 2016: EUR 7 915 000;
- 2017: EUR 8 080 000;
- 2018: EUR 8 222 000;
- 2019: EUR 8 479 000.⁴⁰⁸

ii) Independence of the body

The independence of Unia is explicitly referred to in the Cooperation Agreement approved on 12 June 2013 (Article 2(1) and Article 3(3): 'the Centre accomplishes its mission independently, in conformity with the Paris Principles').⁴⁰⁹

Generally, the Centre is able to function independently and calmly, but (media-driven) political pressure and interference cannot always be excluded.⁴¹⁰ In 2014, the appointment of Matthias Storme to the board of directors was very controversial because Storme, a lawyer and law professor, is a well-known fierce opponent of the ET legislation and the equality body in charge of their implementation. He has launched actions for annulment against almost all the provisions of the Federal Anti-Discrimination Acts of 10 May 2007 (the Racial Equality Federal Act, the General Anti-Discrimination Federal Act and the Gender Equality Federal Act), which were rejected by the Constitutional Court on 12 February 2009. In addition, in 2004, he publicly stated that the conviction for racism of the Vlaams Blok almost morally obliged him to vote for the extreme-right and that the anti-discrimination law was a 'blunder and an attack against democracy'. Still taking a libertarian tone, he also stated that 'to discriminate is a fundamental freedom'.⁴¹¹ In 2017, he supported the schism of the Centre. However, according to Patrick Charlier, the co-director of Unia, the board of directors has been able to fulfil its mandate and to work in a satisfactory manner.⁴¹²

e) Grounds covered by the designated body

Unia is competent for all the protected grounds listed in the federal and regional anti-discrimination legislation, apart from language and sex/gender⁴¹³ (i.e. alleged race, colour, descent national or ethnic origin, nationality, age, sexual orientation, civil status, birth, property ('fortune', in French), religious or philosophical belief, state of health, disability, physical or genetic features, political opinion, trade union opinion, and social origin) (Article 3(1)(a) of the Cooperation Agreement of 12 June 2013).

⁴⁰⁸ At the time of writing, there were no available figures concerning the year 2020.

⁴⁰⁹ As previously mentioned in this report, since 15 March 2014 (date of the entry into force of the Cooperation Agreement of 12 June 2013), all the details regarding the missions, organisation and functioning of the Inter-federal Centre for Equal Opportunities and Opposition to Racism and Discrimination are enshrined in the Cooperation Agreement (and no longer in the Federal Act of 15 February 1993).

⁴¹⁰ See also the developments above under 7.b.

⁴¹¹ Le Soir (2014) 'Le N-VA Matthias Storme nommé administrateur du Centre interfédéral pour l'Égalité des Chances', *Le Soir*, 25 October 2014, available on the website of this newspaper: www.lesoir.be.

⁴¹² Le Soir (2014) 'La N-VA a nommé Matthias Storme au poste d'administrateur de l'institution. Ses partenaires n'y voient rien à redire', *Le Soir*, 27 October 2014, available on the website of this newspaper: www.lesoir.be.

⁴¹³ Pregnancy, birth, maternity leave, gender assignment, gender expression and gender identity are assimilated to sex/gender.

Unia continues to fight against every form of discrimination based on the protected grounds which it is competent for, but it has also listed a set of priorities in its former three-year strategic plan (2016-2018): national or ethnic origins, religious or philosophical beliefs, and disabilities. This choice is justified in the second strategic axis of the plan, linked to the two UN conventions covering these grounds (CERD, UNCRPD).⁴¹⁴ These grounds are also the most often invoked in the complaints that Unia receives. Unia decided not to construct its 2019-2021 strategic plan on the basis of particular grounds, but to base it on the need to develop prevention, promotion and knowledge and to work together with other organisations to reach out to citizens and public authorities.⁴¹⁵

Apart from complaints concerning disabilities, which are treated by a specific department, there is a cross-cutting approach towards complaints. The individual reports department is made of 29 full-time equivalent employees working at Unia and 5 full-time equivalent employees at the decentralised contact points across the country. After a first selection, the complaints are divided according to their material scope (employment, goods and services, housing, education, internet, others), rather than according to the discrimination grounds.

The Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts underlined the difficulty raised by the existence of a plurality of bodies promoting equality. In its report of February 2017, it recommended the creation of a one-stop shop for the filing of complaints and the establishment of a structure of coordination for the different bodies.⁴¹⁶ It remains to be seen how this coordination is going to develop in the event that a new Flemish equality body is set up. This is most important in tackling multiple or intersectional discrimination (gender plus another ground).

f) Competences of the designated body- and their independent exercise

Articles 4, 5 and 6 of the Cooperation Agreement creating the Inter-federal Centre, define the tasks of the Centre and the means it may use in order to fulfil them. These provisions state that the Centre's objective to promote equal opportunities is fulfilled through producing studies and reports, making recommendations, helping any person seeking advice on his or her rights and obligations, taking legal action, collecting and analysing statistics and case law relating to the application of the federal and regional anti-discrimination legislation, and obtaining information in order to make enquiries of the relevant authority in cases where the Centre has reasons to believe that discrimination may have been committed, pursuant to those pieces of legislation.

i) Independent assistance to victims

As explained on its website, Unia receives discrimination reports on a daily basis, either directly or through the local contact points. The attention that the Centre devotes to these reports from the first contact is essential for proper monitoring. A large number of requests for intervention are rapidly answered by providing information or referral to other authorities or organisations. Other questions require more work: racist or homophobic attacks, conflicts between employers and employees, discrimination in the housing sector, racist remarks and incitement to hatred on the internet, etc. In such situations, Unia actively intervenes and provides practical support to the victims.

The statistics in the annual report demonstrate the effectiveness of the treatment of the

⁴¹⁴ Unia (2016) *Plan stratégique 2016-18, Une société inclusive avec une place pour chacun*, 2016, p. 18, available in French at the following address: www.unia.be/fr/publications-et-statistiques/publications/plan-strategique-2016-2018une-societe-inclusive-avec-une-place-pour-chacun.

⁴¹⁵ Unia (2018) *Strategic Plan (2019-2021)*, available at www.unia.be/files/Documenten/Publicaties_docs/Plan_Strate%CC%81gique_2019-2021.pdf.

⁴¹⁶ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, pp. 10 and 56-57, para. 152-153, www.unia.be/en.

cases. It must however be noted that the coexistence of multiple bodies for the promotion of equality can create confusion for the victims of discrimination – especially the powers shared between Unia and the Institute for the Equality of Women and Men – in cases of multiple discrimination based both on gender and on a protected ground covered by Unia. More broadly, this multitude of relevant bodies can damage the visibility of Unia and its ability to raise its visibility to the public.⁴¹⁷

Since the reorganisation of the Centre into an inter-federal body, there are 29 + 5 full-time-equivalent employees in charge of dealing with individual complaints. This seems sufficient to treat the cases within a reasonable time. The cooperation between Unia's head office and the local contact points is also successful. Unia's budget is sufficient to support the strategic litigation cases that the board decides to pursue. However, it must be noted that there have been parliamentary questions on the cost, considered exorbitant, of the *Achbita* case before the CJEU. Moreover, in 2018, Unia has encountered for the first time some financial difficulties and a slight budget deficit, due to the significant increase in the volume of work, and the increase of staff linked to the different commitments of Unia. From 2013 to 2018, the amount of reports and of cases opened has practically doubled. The number of full-time workers has increased from 85 in 2015 to 106 in 2019 and dropped to 96 in 2020.⁴¹⁸ Thanks to a financial plan, Unia managed to achieve a balanced budget in 2020.⁴¹⁹

ii) Independent surveys and reports

In Belgium, the designated body does have the competence to conduct independent surveys and publish independent reports.

Unia exercises this function in fully independent manner. This independence is guaranteed through close cooperation on a regular basis with: 1) associations in the field of discrimination; 2) Belgian and European universities and institutions such as the King Baudouin Foundation. In this context, it organises training sessions, seminars and programmes for the exchange of information and practical experience.

Unia publishes an annual report based on its daily practice and Belgian case law.⁴²⁰ It also publishes general surveys related to discrimination issues including socioeconomic monitoring reports, which aim to get a clear view of the situation on the labour market depending on the ethnic origin and/or migration background of workers. The first socioeconomic monitoring report was written in 2013, a second one in 2015, a third one in 2017 and the most recent one in 2019 was published in 2020. The latter showed that ethnic origin and migration background are still the grounds generating many inequalities on the labour market. The employment rate for people of Belgian origin was still the highest in 2016: from 73 % in 2014, it reached 73.7 % in 2016. In 2016, the employment rate of people of Middle East origin was the lowest and it is the only group for which the rate dropped (from 37.3 % in 2014 to 33.6 % in 2016).⁴²¹ The main conclusion of the report is that the data collected show only a slight improvement in the number of people of foreign origin working in 2016 (3.6 % more than in 2008) and that at this rate, it will take decades before the participation of people of foreign origin in the labour market in Belgium reaches that of people of Belgian origin. Unia co-director, Patrick Charlier, emphasises that 'Even with the same diploma, people of foreign origin have less success on the labour market'.⁴²²

⁴¹⁷ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, para. 151, www.unia.be/en.

⁴¹⁸ At the time of writing the report, there were no figures available for the year 2020.

⁴¹⁹ Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

⁴²⁰ For the most recent annual report available, see Unia (2020) *Annual report for 2019 (Contributing to a more equal society for all)*, available on its website, www.unia.be/en.

⁴²¹ Unia (2020), *Socio-Economic Monitoring - Labour Market and Origin 2019*, Federal Public Service on Employment, Labour and Social Dialogue, Brussels, March 2020, p. 45, www.unia.be/en.

⁴²² Unia (2020), 'Le taux d'emploi des personnes d'origine étrangère s'améliore mais reste à la traîne', (The employment rate of people of foreign origin is improving, but is still trailing behind),

There is structural discrimination against jobseekers of foreign origin in the Belgian labour market which leads to the fact that more people of foreign origin have low-paid and precarious jobs. Therefore, Unia strongly recommends that the different authorities develop an integrated policy with a long-term perspective.⁴²³

Unia has also produced several diversity barometers in different fields: on employment (2012), housing (2014), and education (2018). These barometers map out different aspects of Belgian society, such as the degree of discrimination, the degree of tolerance and the degree to which target groups characterised by their origin, age, disability, or other characteristics contribute to Belgian society. The independence of these barometers is guaranteed through the close collaboration with universities.

Unia's regular budget funds are supplemented by funds from different ministers in order to carry out surveys in optimal conditions. The last diversity barometer, measuring discrimination and inequalities in the education system, was the result of long-term scientific research carried out by several research centres of Belgian universities. In order to carry out this study and the subsequent report, Unia received funding from the three community ministers of basic education and the Minister for Equal Opportunities of the French-speaking Community. Unia coordinated the research, and through a combination of the results of the study and the expertise of Unia, formulated political recommendations.

By combining its regular funding and other public resources, Unia has sufficient resources in order to carry out its mission to conduct independent surveys and publish independent reports.

iii) Recommendations

In Belgium, the designated body does have the competence to issue independent recommendations on discrimination issues.

Although under the supervision of the federal and regional Parliaments (formerly the Prime Minister), Unia fulfils its mandate in an independent manner.

Unia formulates recommendations for all levels of government. These recommendations focus on improving the legislation and developing action plans or seeking a better understanding by the political leaders of specific new phenomena. In addition, the federal, regional and community authorities increasingly rely on the expertise of Unia.⁴²⁴ Since 2014 and the entry into force of the Cooperation Agreement, there is a new department for public policies at Unia, with representatives of the federal Government and each region and community to ensure the link between federal and regional policies.⁴²⁵

By relying on surveys and statistics that are the result of independent and informed research, Unia can effectively measure discrimination phenomena and recommend specific courses of action to public authorities, in order to deal with them accordingly.

iv) Other competences

As explained above, Unia has a specific mandate under Article 33(2) of the CRPD, which provides that an independent body must protect and follow up on the application of the Convention.

<https://www.unia.be/fr/articles/le-taux-demploi-des-personnes-dorigine-etrangere-sameliore-mais-reste-a-la-traine>.

⁴²³ Unia (2020), *Socio-Economic Monitoring - Labour Market and Origin 2019*, Federal Public Service on Employment, Labour and Social Dialogue, Brussels, March 2020, p. 296, www.unia.be/en.

⁴²⁴ For a more detailed presentation of those activities of the Centre, see its website, www.unia.be/en/.

⁴²⁵ Interview with Patrick Charlier, co-director of Unia, 28 March 2017.

Moreover, Unia organises campaigns in order to raise awareness and inform the public. It provides customised training and tools for fighting for equal opportunities and against discrimination and formulates targeted advice and recommendations for organisations and Government authorities.

It also set up online training on anti-discrimination laws where it answers questions about diversity in the workplace. In this respect, the 'eDiv' initiative is worth mentioning: it is a free online training tool on anti-discrimination law, aimed at fostering diversity in companies by providing employers with practical situations and solutions.⁴²⁶ In its most recent annual report, published in 2020, Unia underlines the success of this tool: since its creation, more than 20 000 users have registered (4 561 in 2018⁴²⁷ and 5 284 in 2019).⁴²⁸

In December 2017, Unia won the Agoria e-Gov prize in the innovation category, rewarding specifically the disability module in the eDiv.⁴²⁹ Unia has also been lauded for another awareness campaign: in November 2017, at The Extraordinary Film Festival in Namur, Unia has won the prize for best communication movie for its disabilities campaign, '*J'ai un handicap et j'ai des droits*'.⁴³⁰ In 2019, Unia won the Belgian Diversity Award for its fight against racism and discrimination.⁴³¹

g) Legal standing of the designated body

In Belgium, Unia has legal standing to bring discrimination complaints on behalf (or not) of an identified victim.

The General Anti-Discrimination Federal Act and most of the regional statutory laws give Unia the power to file suits, and thus to contribute to the defence of legal principles in the name of the public interest. Where the alleged violation has an identifiable victim (who can be a natural or legal person), the power of Unia to file a suit is conditional upon the consent of the victim and is used for an intervention supporting the victim's case. The main reason for this legal avenue (rather than representing the victim) is that sometimes the action of the victim and the action of Unia may differ. Therefore, Unia wishes to remain able to define its strategy of action without undermining or being undermined by the victim's strategy before the court.⁴³² A leading example of Unia's use of such legal standing can be observed in the seminal *Achbita* judgment of the CJEU (see section 4.2, above).⁴³³ The case was taken to court by Ms Achbita, supported by her trade union, who alleged that she was a victim of discrimination. Unia's predecessor, the Centre for Equal Opportunities and Opposition to Racism appears as a claimant in the case as it joined the case intervening on the side of Ms Achbita.

If there is no identified victim, Unia may act on its own behalf to denounce a breach of the anti-discrimination legislation. This kind of *actio popularis* power granted to Unia gained European visibility and recognition in the *Feryn* case before the CJEU (see section 6.2, above).⁴³⁴

⁴²⁶ For more details on this initiative, see the website www.ediv.be/.

⁴²⁷ Unia (2019) *Annual Report for 2018 (Reconnect with human rights)*, p. 81, see its website, www.Unia.be/en.

⁴²⁸ Unia (2020), *Annual Report for 2019 (Contributing to a more equal society for all)*, p. 91, see its website, www.Unia.be/en.

⁴²⁹ For more details, see the Unia website: and www.unia.be/fr/articles/Unia-remporte-le-prix-de-linnovation-aux-e-gov-awards-2017.

⁴³⁰ For more details, see the Unia website: www.unia.be/fr/sensibilisation-et-prevention/campagnes/jai-des-droits.

⁴³¹ Unia (2020), *Annual Report for 2019 (Contributing to a more equal society for all)*, p. 81, see its website, www.Unia.be/en.

⁴³² Input to the article from Emmanuelle Bribosia and Isabelle Rorive, country experts for Belgium in the European network of legal experts in gender equality and non-discrimination.

⁴³³ CJEU, judgment of 14 March 2017, *Achbita*, C-157/15, ECLI: EU:C:2017:203.

⁴³⁴ CJEU, judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, C-54/07, ECLI:EU:C:2008:397.

Unia may also intervene as *amicus curiae* in cases concerning discrimination, when such intervention is possible according to judicial procedure law. However, Unia has no power to launch *ex officio* investigations. This mechanism appears to be in conformity with Article 9(2) of the Racial Equality Directive.

In a typical case of an individual person asking Unia to intervene in an instance of discrimination, Unia first appraises the facts. If the allegation does not appear ill founded, Unia seeks to obtain an amicable settlement with the alleged discriminator. Because the discriminator may fear the bad publicity of a lawsuit for alleged discrimination, they may be tempted to accept this process, even in situations where it may be difficult to prove that discrimination occurred. Where such an amicable settlement seems unsatisfactory, because of blatant discrimination or non-cooperation with the defendant, Unia may suggest that the victim file a suit. If the victim agrees, Unia is competent to bring the case to court. Other organisations, which aim to fight discrimination and protect human rights, as well as trade unions, have the same competence (see section 6.2, above).

Unia has been particularly efficient in providing advice and legal assistance to victims of discrimination. It is especially renowned for its practice of assisting the victim in having the alleged perpetrator of the discrimination to agree to some form of amicable settlement. Unia has developed significant expertise in this discreet way to proceed. In addition, local anti-discrimination 'contact points' have been established in several towns and cities in Flanders (13) and in Wallonia (4) in addition to the collaboration with the 10 'Wallonia Spaces' (*Espaces Wallonie*). This ensures that day-to-day discriminatory practices can be fought against in close consultation with local and provincial authorities, and with local integration centres, associations, neighbourhood committees, etc. Since the conclusion of the Cooperation Agreement of 12 June 2013, these anti-discrimination 'contact points' fall directly under the responsibility of Unia:

'The Centre provides access to its services, including to persons with disabilities, and organises, in addition to the central contact point, in collaboration with the Regions, provinces and municipalities, contact points at the local level, where a report may be filed. These contact points must be sufficiently distributed geographically in order to ensure easy access to citizens' (Article 6 of the Cooperation Agreement).

The legal standing of the Centre is expressly defined in several parts to the Cooperation Agreement, namely in the federal state,⁴³⁵ the Walloon Region,⁴³⁶ the French Community⁴³⁷ and the Flemish⁴³⁸ Community in the framework of the missions of Unia (Article 3 of the Cooperation Agreement) and of the different anti-discrimination norms (Article 6(3) of the Cooperation Agreement). The other entities broadly authorise human rights organisations to file lawsuits within the scope of the legislative provisions but do not expressly give legal standing to the Centre, except for the Brussels Local Civil Service ET Ordinance (Article 29).⁴³⁹ However, according to Unia, there is no doubt in practice that the Centre can directly take legal action on the basis of the other decrees and ordinances listed in the Cooperation Agreement as well.⁴⁴⁰

In 2019, Unia initiated a lawsuit in 18 cases related to discrimination or hate crimes. They are all cases where no amicable settlement could be found and which 'needed more legal certainty or which were particularly serious'.

⁴³⁵ General Anti-Discrimination Federal Act, Articles 16, 17, 18.

⁴³⁶ Walloon ET Decree, Articles 30 & 31.

⁴³⁷ French Community ET Decree, Articles 37, § 2 & 38.

⁴³⁸ Flemish Framework ET Decree, Article 40 and Executive Regulation (Flemish Community) of 16 May 2014, OJ (*Moniteur Belge*), 27 June 2014.

⁴³⁹ Brussels ET Ordinance, Article 25; German Community ET Decree, Article 13; Cocof Vocational Training ET Decree, Article 14(1); Cocof ET Decree, Article 28(1).

⁴⁴⁰ Interview with Patrick Charlier, co-director of Unia, 14 April 2015.

h) Quasi-judicial competences

In Belgium, Unia is not a quasi-judicial institution.

i) Registration by the body of complaints and decisions

In Belgium, Unia registers the number of complaints of discrimination made and decisions (by ground, field, type of discrimination, etc.). These data are available to the public.

Such data are part of the annual report published on its website, which lists the number of complaints received by ground and field, the number of complaints regarding which a file was opened and the number of cases in which the Centre launched a lawsuit.

In 2010, Unia received 3 608 complaints, 4 162 in 2011, 4 226 in 2012, 3 713 in 2013 and 4 627 in 2014. In 2015, Unia received 4 554 complaints, it opened a file in 1 596 cases and launched a lawsuit in 14 cases. In 2016, Unia received 5 619 complaints, it opened a file in 1 907 cases and launched a lawsuit in 18 cases. In 2017, Unia received 6 602 individual complaints (an increase of 17.5 % compared to 2016), it opened a file in 2 017 cases and launched a lawsuit in 13 cases. In 2018, Unia received 7 498 individual complaints, it opened a file in 2 192 cases and launched a lawsuit in 33 cases.

In 2019,⁴⁴¹ Unia received 8 478 individual complaints (an increase of 13.2 % compared to 2018) and opened 2 343 files (an increase of 6.9 % compared to 2018). This increase is likely to be related to a combination of factors, including greater media exposure, an increased accessibility at the local level, and targeted actions. The sectors for which it opened the most files are employment (28 %) and goods and services (27.4 %). It is interesting to note that there has been a sharp rise in cases in the employment field (an increase of 28.8 %). Specifically, in 2019, Unia opened 657 files related to discrimination in employment, 641 files related to the access to goods and services, 346 related to discrimination issues on the internet or in the media, 308 files concerning education, 125 files related to life in society, 81 cases concerning the police and the justice system, 27 concerning social protection and finally 127 related to other areas. Regarding the discrimination grounds, in 2019, about 951 opened files concerned racial discrimination, 143 concerned discrimination based on age, 133 were based on sexual orientation, 614 were based on disability, 307 were based on religious beliefs, 168 related to the wealth status and there were 156 on the state of health. Moreover, Unia launched 18 judicial actions.⁴⁴² The detailed data for 2020 is not yet available. According to Unia's co-director, Patrick Charlier, there has been another increase in the number of individual complaints, which amount to more than 9 000 (compared to 8 478 in 2019). Of importance when the 2020 data is published in June 2021 will be the impact of the COVID-19 pandemic. Unia has introduced a specific registration category since the beginning of the pandemic in order to identify COVID-19 related complaints.⁴⁴³

According to Els Keytsman, Unia's co-director, these numbers do not indicate that there is more discrimination in Belgian society but that there is growing awareness of discrimination and that people are reporting it more.

The low number of court cases compared to the figures of files opened reflects the policy of Unia to reach constructive, out-of-court settlements and to seek alternative measures, designed to help victim and perpetrator alike, even once legal action has been initiated. In addition, Unia tends only to go to court when strategic litigation is at stake: 'if the case is highly relevant from a social point of view (to establish a legal precedent (...) or clarify a

⁴⁴¹ Please note that data for 2020 was not yet available at the time of drafting of this report.

⁴⁴² Unia (2020) *Annual statistics report 2019 (Contributing to a more equal society for all)*, available on its website, www.unia.be, pp. 7-60.

⁴⁴³ Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

point of law) or if the facts of the case are particularly serious (such as flagrant hate crimes)'.⁴⁴⁴

j) Roma and Travellers

When the new structure was put in place in 2014, one full-time employee, in the public policies department of Unia, was specifically in charge of Roma discrimination issues.⁴⁴⁵ Currently, Roma issues are covered by three different staff members, each responsible for one region (Flanders, Wallonia and Brussels). They dedicate only a part of their working time to Roma issues.⁴⁴⁶

In 2015, Unia organised several roundtables between journalists and members of the Roma community, in order to raise awareness of the negative stereotypes that are conveyed in the media.⁴⁴⁷ Since 2013, 268 cases of potential discrimination against Roma have been opened. The numbers decreased between 2013 and 2018 – 52 in 2013 and 2014 against 25 in 2018 – but they doubled in 2019 with 53 cases.⁴⁴⁸ Moreover, Unia was associated with the work conducted by the Roma task force, which adopted a 'National Strategy for Roma Integration', issued in March 2012. It defines issues and objectives for Roma integration by 2020, and provides for coordination between the federal state, the regions and the communities within the Roma task force, so that every authority can take measures according to their responsibilities. The Roma task force meets at least twice a year and is the national contact point for the European Commission.

Since May 2016, Unia has participated in the pilot committee of the Belgian National Roma Platform, set up by the Belgian national contact point for Roma. However, in 2020, the work of the pilot committee seems to have been come to a standstill.⁴⁴⁹

⁴⁴⁴ Unia (2018) *Annual report for 2017 (Refusing Inertia)*.

⁴⁴⁵ Interview with Patrick Charlier, co-director of Unia, 28 March 2017.

⁴⁴⁶ Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

⁴⁴⁷ For more information, see: <https://www.unia.be/fr/articles/se-rencontrer-pour-se-comprendre>.

⁴⁴⁸ See Unia (2020) *Annual statistics report 2019 (Contributing to a more equal society for all)*, p. 50, available on its website, www.unia.be.

⁴⁴⁹ Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

8 IMPLEMENTATION ISSUES

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

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The Federal Anti-Discrimination Acts were widely publicised in 2007, in particular through brochures presenting the main provisions of the law and identifying a list of organisations and administrations involved in their implementation. Seminars on the content of the law in the context of employment took place in 2007 as part of a European project dedicated to the dissemination of information about legal protection against discrimination. The Federal Anti-Discrimination Acts were also translated into sign language.⁴⁵⁰ Furthermore, the Centre organised several training afternoons in the major cities of the country for the benefit of local organisations and professionals (integration centres, municipalities, lawyers, associations, etc.). In addition, the federal Minister for Equal Opportunities funded the creation, in 2007-2008 and 2008-2009, of an inter-university Chair on 'Law and discrimination', involving academics from three universities for the French-speaking part of the project. Each year, 30 hours of training on anti-discrimination law has been delivered by scholars from those universities. Attendance was free and it was part of the continuing training of lawyers and judges.

In early 2016, Unia launched its new website which is much more user-friendly and published a leaflet called 'For equality, against discrimination. How can we help?' in order to clarify its role and missions to the public.⁴⁵¹ The eDiv initiative (reported in section 7.f, above), is also worth mentioning. Unia has also been lauded for another awareness campaign on disabilities: 'I have a disability and I have rights' ('*J'ai un handicap et j'ai des droits*').⁴⁵²

Currently, Unia has three newsletters through which it disseminates information: one on Unia's activities in general, another focuses on disability and a third one focuses on the legal action that Unia undertakes.

In its 2017 report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts suggests strengthening the training for judges, police services and labour inspectorates, in collaboration with Unia. The commission has also stressed the need for training adapted to the different groups of the public concerned by the anti-discrimination legislation, in particular employers.⁴⁵³ In 2019, Unia launched a newsletter addressed to civil servants and judges gathering comments on recent judgments, the exchange of good practice, and announcements of study days. Unia also organises specific training sessions for police services and produces a quarterly newsletter specifically dedicated to the police.⁴⁵⁴

At the very end of 2018, an awareness campaign against racism, called *#stopracisme*, with the slogan '*le racisme, ça sert à quoi?*' (Racism, what gives?), was launched, in collaboration with Unia. This was done on the initiative of the equal opportunities department and with the support of the federal Government, despite the absence of the

⁴⁵⁰ For more details on those initiatives, see Unia (2018) *Annual Report for 2017 (Discrimination - Diversity)*, p. 122 and seq., available on the website of the Centre, www.unia.be/en.

⁴⁵¹ The folder is available at the following address: https://www.unia.be/files/Documents/Brochures/UNIA_folder_EN_220116.pdf.

⁴⁵² For more details, see the Unia website: www.unia.be/fr/sensibilisation-et-prevention/campagnes/jai-des-droits.

⁴⁵³ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, pp. 95-100 and para. 208, www.unia.be/en.

⁴⁵⁴ Unia (2020), *Annual Report for 2019 (Contributing to a more equal society for all)*, p. 91, see its website, www.Unia.be/en. Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

federal action plan that the Government was supposed to adopt following the 2001 Durban Conference.

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

Overall, Unia engages with most of the relevant stakeholders in order to fulfil its mandate and mission to promote equality and fight against discrimination. The support committee set up in the field of disability discrimination could serve as a model for structuring the relationships with the civil society organisations active in the fight against discrimination on other grounds. In 2020, another support committee in the field of racial discrimination was set up. It brings together people and civil society NGOs, academics and social partners.⁴⁵⁵

On 22 March of each year, an 'Anti-Discrimination Day' is organised, which provides further opportunities to disseminate this information, and in which a range of social and human rights non-governmental organisations, as well as the social partners, engage on the issue of combating discrimination and promoting diversity.

Furthermore, on 18 March 2008, the federal Government decided to initiate a national debate on multiculturalism and diversity named the 'Assizes on Inter-culturalism'. Its aim was to discuss with the main actors how to promote a society of diversity and integration, without discrimination, where all cultural specificities are respected, as well as where a set of common values could be shared. The work eventually led to a final report, which was submitted to the federal Vice-Prime Minister, Minister of Employment and Equal Opportunities in charge of Immigration and Asylum, Mrs Joëlle Milquet, on 8 November 2010. This final report contains 67 recommendations grouped by themes: education; employment; governance; goods and services (health and housing); community work, culture and media. The report was heavily criticised and most of these recommendations were not given any follow-up.⁴⁵⁶

In May 2018, a coalition of over 30 associations active in the fight against racism and discrimination (NAPAR coalition) proposed 11 key actions to be included in the yet-to-be-adopted federal action plan against racism. In June 2020, the coalition published a memorandum with more than 50 proposals for the future inter-federal action plan against racism.⁴⁵⁷

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice and workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

Social partners have been actively involved in dissemination activities.

First, Unia has regularly organised events with both employers and workers organisations and has also set up training sessions in cooperation with these organisations.

Secondly, as mentioned above, in 1999 the social partners concluded Collective Agreement No. 38 in the National Council for Labour (Conseil National du Travail), the main provisions of which have now been transposed and made compulsory through a royal decree (*arrêté royal*). In the interprofessional agreement 2007-2008, 'diversity and non-discrimination' was one of the four policy issues especially under focus.⁴⁵⁸ In line with this commitment,

⁴⁵⁵ Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

⁴⁵⁶ Ringelheim, J. (2015) 'Du Dialogue aux Assises: heurts et malheurs de l'interculturalité en Belgique', in Bribosia, E. & Rorive, I. (eds), *L'accommodement de la diversité religieuse. Regards croisés: Canada, Europe, Belgique*, P.I.E. Peter Lang, 2015, pp. 67-68.

⁴⁵⁷ <https://www.naparbelgium.org/revendications>.

⁴⁵⁸ Note that there is nothing in this respect in the interprofessional agreement 2009-2010.

a new collective agreement was signed on 10 December 2008 and was made compulsory by the Royal Decree of 11 January 2009 (Collective Agreement No. 95 relating to equality of treatment at all stages of the employment relationship). Moreover, as mentioned above, in the interprofessional agreement 2011-2012, adopted on 18 January 2011, the gradual harmonisation of the social status of labourers (*ouvriers*) and employees (*employés*) was one of the four policy issues under focus. Thereby, an act was adopted, on 12 April 2011, as a first step to gradually equalising the social status of labourers and employees regarding the notice period.⁴⁵⁹ A second act was adopted on 23 December 2013 (in force on 1 January 2014), so as to provide for a single notice period system for both labourers and employees and removing the 'waiting day' (*jour de carence*) system so that labourers as well as employees are entitled to a guaranteed remuneration from the first day of illness.⁴⁶⁰

Recently, Unia has renewed its memoranda of understanding with the trade unions, ten employers' federations and the various LGBTQI+ organisations. In 2020, a support committee in the field of racial discrimination was set up, which brings together people and civil society NGOs, academics and social partners.⁴⁶¹

In the Flemish Community/Region, the dialogue between social partners has taken place through the establishment of a 'diversity' committee in the Flemish Economic and Social Council, in which the most representative workers and employers unions are represented. Diversity is also promoted actively by the workers unions, which have benefited from specialised consultants in diversity whose task is to promote diversity and offer solutions to any resistance facing policies aimed at improving diversity within the workforce.

In the Flemish Region/Community, it is particularly remarkable that the Flemish Government concluded a number of agreements with businesses at the sectorial level, which encourage diversity, promote specific measures for the integration of migrant workers, and provide for codes of conduct in favour of diversity and against discrimination at the level of companies. In addition, a range of initiatives has been taken in order to actively promote the employment of members of (traditionally underrepresented) 'target groups', in particular persons of non-native origin (*allochtones*) and persons with disabilities. Thus, for instance, the '*Jobkanaal*' project, launched by the Flemish business network VOKA, or the 'diversity' focal point of the UNIZO (Association of Small and Medium-sized Enterprises), contribute to diversity in employment.

The other regions and communities have also adopted measures, some of which have actively involved social partners.

d) Addressing the situation of Roma and Travellers

The Belgian Inter-Ministerial Conference on Social Integration created a Roma task force on 21 March 2011, in order to develop an integrated action plan to draw up proposals to improve Roma integration in Belgium. Work conducted by the task force led to a 'National Strategy for Roma Integration', issued in March 2012. It defines issues and objectives for Roma integration by 2020, and provides for more coordination between the federal state, the regions and the communities through the Roma task force, so that every authority can freely take measures according to its responsibilities. The task force meets at least twice a year and is the national contact point for the European Commission. Unia calls for an

⁴⁵⁹ Act of 12 April 2011 amending the Act of 1 February 2011 on the extension of anti-crisis measures and the execution of the inter-professional agreement, and executing the compromise of the Government related to the project of inter-professional agreement (*Loi modifiant la loi du 1er février 2011 portant la prolongation de mesures de crise et l'exécution de l'accord interprofessionnel, et exécutant le compromis du Gouvernement relatif au projet d'accord interprofessionnel*), *Moniteur belge*, 28 April 2011.

⁴⁶⁰ *Loi du 26 décembre 2013 concernant l'introduction d'un statut unique entre ouvriers et employés en ce qui concerne les délais de préavis et le jour de carence ainsi que de mesures d'accompagnement*, OJ (*Moniteur belge*), 31 December 2013.

⁴⁶¹ Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

evaluation of this strategy in its 2019 memorandum drafted in view of the federal, regional and European elections of 26 May 2019.⁴⁶² In its March 2020 report, the UN Committee on Economic, Social and Cultural Rights recommended that Belgium 'ensure effective implementation of the national strategy for the integration of Roma people, through the adoption of an inter-federal action plan including specific measures for Roma women and children and receiving a specific and adequate budget'.⁴⁶³

In 2014 and 2015, Unia organised several roundtables between journalists and members of the Roma community, in order to raise awareness of the negative stereotypes that are conveyed in the media.⁴⁶⁴ Nevertheless, the Commissioner for Human Rights stressed, in its last report on Belgium, that 'the authorities should also take measures to combat stereotypes and prejudices against Roma in society more actively, notably by raising awareness of the history of Roma in Europe'.⁴⁶⁵

In 2016, a Belgian National Roma Platform was launched, with the support of the European Commission, to encourage active dialogue between the relevant parties, including the Belgian Roma communities.⁴⁶⁶ In 2017, it released its recommendations to the Belgian public authorities.⁴⁶⁷ In 2018-19, the platform has been particularly concerned with the organisation of working meetings to ensure proper communication between all the parties concerned.⁴⁶⁸

In 2020, the European Union Agency for Fundamental Rights (FRA), in collaboration with Unia and the Belgian National Roma Platform, organised a webinar⁴⁶⁹ to present the key findings of its 2020 study on Roma and Travellers in Belgium.⁴⁷⁰ During this conference, FRA and the participants tried to define, on the basis of the results of this study, policy recommendations for a future national strategy for Roma inclusion.

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16(a))

Article 11(1) of both the General Anti-Discrimination Federal Act and the Racial Equality Federal Act, act as 'safeguard provisions' stating that they will not, per se, apply to differences in treatment imposed by another legislation, or by virtue of another legislation.

Article 11(2) of both Acts specifies that Article 11(1) 'does not prejudice the conformity of direct or indirect distinctions imposed by or under a law with the Constitution, the EU law and international law in force in Belgium'. As a result of this clause, national jurisdictions

⁴⁶² Unia (2019) *S'engager pour les droits humains 61 propositions d'Unia pour les élections 2019* (Commit to human rights: 61 proposals for the 2019 elections) https://www.unia.be/files/Documenten/Publicaties_docs/Memorandum_pour_les_%C3%A9lections_2019.pdf, p. 9-10.

⁴⁶³ UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Belgium*, E/C.12/BEL/CO/5, 26 March 2020, paras. 20-21.

⁴⁶⁴ For more information, see <https://www.unia.be/fr/articles/se-rencontrer-pour-se-comprendre>.

⁴⁶⁵ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, paragraph 140, rm.coe.int/16806db735.

⁴⁶⁶ More information available in French at the following link: www.mi-is.be/fr/themes/pauvrete/integration-des-roms/la-plateforme-nationale-belge-pour-les-roms.

⁴⁶⁷ The recommendations are available in French online: www.mi-is.be/fr/themes/pauvrete/integration-des-roms/la-plateforme-nationale-belge-pour-les-roms-2/annee-dactivite-0.

⁴⁶⁸ ECRI (2020), *Sixth Report on Belgium*, para. 85, <https://rm.coe.int/ecri-sixth-report-on-belgium-/16809ce9f0>

⁴⁶⁹ The webinar is available here : <https://www.mi-is.be/fr/agenda/rencontre-numerique-roms-et-gens-du-voyage-presentation-des-principaux-resultats-de-lenquete>.

⁴⁷⁰ European Union Agency For Fundamental Rights (FRA) (2020), 'Roma and Travelers in Belgium - Key results from the Roma and Travelers survey 2019', https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-roma-and-travellers-survey-country-sheet-belgium_fr.pdf.

will not refuse to apply existing legislation because it would be in violation of anti-discrimination legislation, but they should refer any potentially discriminatory legislation to the Constitutional Court so that this jurisdiction may find a law to be invalid if it is in violation of the equality and non-discrimination clauses of Articles 10 and 11 of the Constitution. As a result, where discrimination (potentially violating the Racial Equality Directive or the Employment Equality Directive) has its source in legal provisions or in implementing regulations, they are not nullified simply through the adoption of the anti-discrimination law – they will have to be found to be invalid, on an *ad hoc* basis, by the courts.

Since 2008, all the regional ET laws include a provision similar to the federal one. They are therefore in line with the directives, with the exception of the problem referred to above of the 'safeguard provision', which follows the same model as the federal one.

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

The General Anti-Discrimination Federal Act and the Racial Equality Federal Act comply with Article 16(b) of Directive 2000/78/EC and Article 14(b) of Directive 2000/43/EC. Indeed, Article 15 of the General Anti-Discrimination Federal Act and Article 13 of the Racial Equality Federal Act mention that contractual clauses, and also any 'provisions' contrary to the prohibition of discrimination, shall be considered null and void.⁴⁷¹

Since 2008, all the regional ET laws have included a provision similar to the federal one.

⁴⁷¹ On 2 April 2009, the Constitutional Court cancelled the words 'in advance' (*par avance*) in Article 15 of the General Anti-Discrimination Federal Act (decision no. 64/2009, para. B.13.2 and B.13.3).

9 COORDINATION AT NATIONAL LEVEL

At the federal level, from 2017, anti-discrimination policy was in the hands of the Secretary of State, Zuhair Demir (N-VA - Nationalist Flemish Party). She was replaced by Kris Peeters (Flemish Christian Party) at the end of 2018 when she resigned together with all the other N-VA federal ministers and then by Nathalie Muylle (CD&V, Christian Flemish Party) for the duration of a short-term interim Government. Since 1 October 2020, Sarah Schlitz (French-speaking Green Party) is the new Secretary of State for Gender Equality, Equal Opportunities and Diversity.

Her counterparts are:

- In the Walloon Region, Mrs Christie Morreale (French-speaking Socialist Party), Vice-President of the Walloon Government, Minister for Employment, Vocational Education, Health, Social Action, Equal Opportunities and Women's Rights.
- In the Flemish Region/Community, Mr Bart Somers (Dutch-speaking Liberal Party), Minister for Internal and Administrative Affairs, Integration and Equal Opportunities.
- In the French Community, Mr Frédéric Daerden (French-speaking Socialist Party), Vice-President and the Minister for Budget, Civil Service, Equal Opportunities and of responsibility (*tutelle*) for Education in Brussels.
- In the Brussels Capital Region, Mrs Nawal Ben Hamou (French-speaking Socialist Party), Secretary of State for Housing and Equal Opportunities.
- In the German-speaking Community, Mr Antonios Antoniadis (Socialist Party), Minister of Family, Health and Social Affairs.

At an early stage of the implementation of the EU anti-discrimination directives, the absence of strong coordination between the different levels of the state was certainly the most serious obstacle to the full compliance of Belgium with its obligations under EU law. There has been significant improvement in this respect as the regions and communities have shown a willingness to harmonise their statutory law with federal legislation. Moreover, the federal state, the regions and the communities approved a Cooperation Agreement, on 12 June 2013, to turn the Centre for Equal Opportunities and Opposition to Racism into an inter-federal centre. The independent Inter-federal Centre for Equal Opportunities (renamed Unia in 2016), which has been operational since March 2014, is competent with regard to the various pieces of ET legislation adopted at both regional and federal levels. However, as explained above (section 7), the federal Government remained silent on the other project of turning the Institute for the Equality of Women and Men into an inter-federal institute. On 25 April 2019, the Belgian Federal Chamber of Representatives adopted a legislative act that allows for the creation of a Federal Institute for the Protection and the Promotion of Human Rights. This new body, set up in 2020, is the first body universally responsible for human rights unlike the several different specialised bodies (e.g. Unia: discrimination; Myria: migrants' rights; IEFH: gender equality etc.), whose respective jurisdictions remain untouched. Such a mechanism, which should become inter-federal, would allow full implementation of the United Nations Paris Principles on the status and functioning of national institutions for the protection and promotion of human rights (see section 7, above).⁴⁷²

Under the former Federal Government, there were two initiatives aimed at fostering greater coherence in equal opportunities policies. First, an Equal Opportunities Unit was created in the federal administration. This 'Diversity Steering Committee' was set up in December 2014. It is made of internal and external experts in the field of diversity and meets four times a year. Its role is:

- to develop a vision of a federal management of diversity;

⁴⁷² Since 2018, Unia has been recognised as a National Human Rights Institution, accredited with B status under the UN Paris Principles. Its B status is explained by the absence of a general human rights mandate.

- to coordinate the 'plan-program' and prioritise the projects;
- to manage and attribute the central budgets;
- to give advice and report at the political level.⁴⁷³

In her general policy orientation note of December 2020, the Federal Secretary of State for Equal Opportunities, Sarah Schlitz, announced that she will relaunch the work of the Diversity Steering Committee to enable it to pursue its work on fostering inclusion and diversity within the public service and to act as a key advisory body supporting diversity policies.⁴⁷⁴

Second, the assessment of the anti-discrimination federal legislation in order to have a better coordination of these laws and to enhance effectiveness was finally achieved.⁴⁷⁵ The expert commission for the assessment of the 2007 Anti-Discrimination Acts was set up in 2016 and is composed of twelve members: two representatives of the judiciary, two lawyers, four members proposed by the National Labour Council and four members proposed by the Ministry for Equal Opportunities. Its president is Françoise Tulkens, the former vice-president of the European Court of Human Rights and the vice-president is Marc Bossuyt, the former president of the Belgian Constitutional Court. The commission carried out its work during the second part of 2016 and beginning of 2017. It heard 10 experts in the field of non-discrimination, including P. Charlier (the co-director of Unia), M. Pasteel and L. Stevens, (the co-directors of the Institute for Equality of Women and Men), E. Bribosia, I. Rorive (members of the European network of legal experts in gender equality and non-discrimination) and J. Jacquain (now a former member of the European network of legal experts in gender equality and non-discrimination). In February 2017, the commission submitted its first high-level report to the federal Secretary of State in charge of Equal Opportunities and to the federal Parliament.⁴⁷⁶ This report (146 pages) makes a number of recommendations including:

- taking into account multiple discrimination in the legal framework and providing for appropriate sanctions;
- expressly mentioning discrimination by association in statutory law;
- adopting regulation to better define situations of genuine and determining occupational requirement;
- putting in place a one-stop shop for victims of discrimination;
- giving the competence to the labour inspectors to carry out situation testing, including 'mystery calls';
- more training in anti-discrimination law for the judiciary, the police, the labour inspectorate as well as some training to employers;
- a better protection against victimisation;
- developing positive action through the adoption of regulations;
- transposing Article 15 of Directive 2006/54/EC on the rights of an employee after maternity leave.

To date, the evaluation process has not yet resulted in any adjustments to the federal anti-discrimination legislation. In its latest annual report, Unia highlighted that this task should be addressed during the current parliamentary term.⁴⁷⁷ Recently, the UN Committee on

⁴⁷³ For further information, see www.fedweb.belgium.be/fr/a_propos_de_l_organisation/administration_federale/mission_vision_valeurs/Equilite_des_chances_et_diversite/Les_acteurs/groupe-de-pilotage.

⁴⁷⁴ Schlitz, Sarah (2020) 'General policy note', Gender Equality, Equal Opportunities and Diversity, House of Representatives, 6 November 2020, DOC 55 1580/022 p. 24.

⁴⁷⁵ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, www.unia.be/en.

⁴⁷⁶ The full report is available (in French) at the following address: www.unia.be/files/Documenten/Aanbevelingen-advies/Commission_dévaluation_de_la_législation_fédérale_relative_à_la_lutte_contre_les_discriminations.pdf.

⁴⁷⁷ Unia (2020), *Annual Report for 2019 (Contributing to a more equal society for all)*, p. 16, see its website, www.Unia.be/en.

Economic, Social and Cultural Rights also requested that Belgium implement the recommendations issued by the Commission.⁴⁷⁸

In addition, in its *Annual Report for 2014*, Unia highlighted as best practice the cross-cutting approaches of equal opportunities and anti-discrimination policies developed in Flanders, since 2005 and more recently in the Wallonia-Brussels Federation.⁴⁷⁹

Furthermore, Common Circular (*circulaire commune*) 13/2013 for an efficient policy of monitoring and prosecution with respect to every ground of discrimination, approved by the Association of General Prosecutors, the former Minister of Justice, and the former Vice-Prime Minister, Minister of the Interior and in charge of Equal Opportunities was presented to police officers and judicial authorities, on 16 December 2013. The circular aims to strengthen the cooperation between the justice departments and the police departments, so as to ensure better recording and prosecution of all forms of discrimination and hate crimes, including homophobic discrimination and cyberhate. In criminal matters, this circular compels the prosecution departments and the police services to register all criminal cases implying a discriminatory intent on the basis of the following grounds: gender, disability, racism/xenophobia, and homophobia. The aim is to provide for better statistics and greater effectiveness. Moreover, this circular provides for the appointment of a 'coordinating prosecutor' (*magistrat coordinateur*) who is in charge of its implementation. This prosecutor is the contact person for Unia. Other prosecutors and labour auditors are in charge of discrimination issues in their respective departments (prosecution departments and labour departments) as well as public servants in police services. The circular defines their missions.

In its first 2017 report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts issued recommendations on the correct application of the circular, recommending in particular that: '(i) contact prosecutors and officers are appointed in all the constituent bodies of the public prosecutor's office and the police force; (ii) these contact persons are given regular training; (iii) contact officers draw up standard questionnaires and checklists for the police; (iv) contact prosecutors monitor processing times and the standard of investigations; (v) efforts should continue within the judiciary and the police to raise awareness, increase the willingness of victims to report offences and provide quality support for victims; (vi) attention is paid to the importance of drawing up reports of a high standard and properly recording all the facts'.⁴⁸⁰ These recommendations were repeated by ECRI, in its last report on Belgium.⁴⁸¹

These recommendations have been partially implemented. For example, specific training courses bringing together contact prosecutors, contact police officers and members of Unia were organised in judicial districts. This led various initiatives to be singled out as good practice. In particular, a contact police officer in Charleroi has drawn up a standard form including Unia's contact details for collecting complaints about discriminatory acts.⁴⁸² In addition, in view of the high rate of dismissal of criminal complaints of discriminatory cases or hate crimes without investigation (*classement sans suite*) and the unwillingness of some victims to take legal action, two studies were commissioned by Unia, the Institute for Equality between Women and Men and the King Baudouin Foundation with the support of the College of Public Prosecutors. These studies seek to better understand the position of

⁴⁷⁸ UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Belgium*, E/C.12/BEL/CO/5, 26 March 2020, paras. 18-19.

⁴⁷⁹ Unia (2015) *Annual report for 2014 (Discrimination – Diversité)*, p. 13, available on its website, www.unia.be/en.

⁴⁸⁰ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, p. 9 and para. 419, www.Unia.be/en.

⁴⁸¹ ECRI (2020), *Sixth Report on Belgium*, para. 61, <https://rm.coe.int/ecri-sixth-report-on-belgium-/16809ce9f0>.

⁴⁸² Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

the victim, on the one hand, and the position of the public prosecutor's office on the other.⁴⁸³ They were published in November 2020.

Despite the repeated calls of Unia (i.e. in the 2014 and 2019 memorandums drafted by Unia in view of the federal, regional and European elections of May 2014 and May 2019), ECRI⁴⁸⁴ and the UN Council for Human Rights for an inter-federal action plan against racism,⁴⁸⁵ no plan has yet been adopted.⁴⁸⁶ In May 2018, a collective of more than 30 associations active in the fight against racism and discrimination (NAPAR coalition) recalled in the House of Representatives that Belgium is not fulfilling its commitments regarding the action plan. They proposed several key steps that were met with enthusiasm by the opposition parties, but no follow-up was put in place.⁴⁸⁷ The then-Secretary of State for Equal Opportunities, Zuhal Demir, caused quite a media storm when she announced her desire to transform the action plan against racism into a 'living together' plan, which would also focus on anti-autochthonous (anti-white) racism, since she believed that autochthonous people are 'a minority' in some cities. At the end of 2018, the Government resigned, which put the action plan *de facto* on the agenda of the current legislature. An awareness campaign has been launched by Unia (see section 8.1.a, above). In the Brussels Capital Region, a regional action plan against racism and discrimination was adopted in March 2019.⁴⁸⁸ The plan contains 23 actions for 2019 and 2020, in order to combat racism in the city; the actions are mainly focused on sensitivity and training. The plan was put into practice by the service 'equal.brussels' (SPRB). In June 2020, the NAPAR coalition published a memorandum with more than 50 proposals to develop the future inter-federal action plan against racism.⁴⁸⁹ In September 2020, an inter-ministerial conference on the fight against racism (launched by the then Prime-Minister Sophie Wilmès at the beginning of 2020 but paused during the first wave of the COVID-19 pandemic), finally took place. It started the process of drafting the inter-federal action plan against racism. The new Secretary of State for Equal Opportunities, Sarah Schlitz, also stated that the drafting of the inter-federal plan should be done in 2021 at the latest, 20 years after the Durban Conference against racism.⁴⁹⁰

In 2018, a new inter-federal action plan against discrimination and violence against LGBTI people was published.⁴⁹¹ This plan updates the 2013 action plan that focused on homophobic and transphobic violence,⁴⁹² in order to include violence and discrimination on the basis of sexual orientation, gender identity, gender expression or intersexuality.

⁴⁸³ Unia (2020) 'Le sous-rapportage et le classement sans suite des délits de discrimination' (Underreporting and dismissal of discrimination cases), November 2020, <https://www.unia.be/fr/publications-et-statistiques/publications/le-sous-rapportage-et-le-classement-sans-suite-des-delits-de-discrimination-2020>.

⁴⁸⁴ ECRI (2014) *Fifth Report on Belgium*, para. 57: www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Belgium/BEL-CbC-V-2014-001-ENG.pdf.

⁴⁸⁵ Such a commitment had already been made at the federal level after the Durban world conference against racism in 2001.

⁴⁸⁶ In 2016, a preliminary study on the feasibility of such an inter-federal action plan against racism, racial discrimination, xenophobia and intolerance was submitted to the Secretary of State in charge of equal opportunities (Dr. Saïla Ouald Chaïb, under the scientific supervision of Prof. Eva Brems (University of Ghent), 'Racisme in België. 15 jaar na de Durban verklaring: tijd voor een interfederaal actie plan tegen racisme' (Racism in Belgium 15 years after the Durban Declaration: time for an inter-federal action plan against racism), 2 September 2016).

⁴⁸⁷ fr.metrotime.be/2018/05/22/actualite/la-belgique-a-la-traine-dans-lelaboration-dun-plan-national-contre-le-racisme/.

⁴⁸⁸ https://equal.brussels/wp-content/uploads/2020/03/Plan-daction-bruxellois-contre-le-racisme_FR_def.pdf.

⁴⁸⁹ <https://www.naparbelgium.org/revendications>.

⁴⁹⁰ Sarah Schlitz, General policy note. Gender Equality, Equal Opportunities and Diversity, House of Representatives, 6 November 2020, DOC 55 1580/022 p. 20.

⁴⁹¹ Belgian Government (2018) Inter-federal plan to fight against discrimination and violence towards people based on their sexual orientation, gender identity, gender expression or intersex condition, May 2018, available on the website of the federal Government, fedweb.belgium.be/sites/default/files/Plan_d_action_LGBTI_2018-2019_FR.pdf.

⁴⁹² Belgian Government (2013) *Inter-federal plan to fight against homophobic and transphobic violence*, 31 January 2013, available on the website of the Institute for Equality between Women and Men iqvm-iefh.belgium.be/fr/avis_et_recommandations/plan_daction_inter-federal_de_lutte_contre_les_discriminations_homophobes_et.

According to the plan, special attention is given to intersectionality, namely to LGBTI with disabilities or from an ethnic minority. The plan mobilises the responsibilities of the different regional Ministers for Equality, as well as federal Ministers of Justice, Internal Affairs, Foreign Affairs, Social Affairs, Employment and Asylum and Migration. In total, the plan contains 22 overall objectives and 115 specific measures. Among the most notable measures are the criminalisation of discrimination on grounds of sexual orientation, gender identity, gender expression or intersexuality; structural instead of project-based funding of NGOs; flagging of countries unsafe to visit for LGBTI people; defence of LGBTI rights in international situations; periodic review of the prohibition to donate blood for homosexual or bisexual men;⁴⁹³ special care for LGBTI asylum seekers; sensitivity and awareness-raising campaigns around intersex people; better medical care for LGBTI people, in particular follow-up of psychological help for LGBTI victims of harassment and/or violence. The different NGOs in the field of LGBTI rights welcomed the ambitious action plan, but were sceptical given the limited timeframe of the plan's implementation, which would have to be before the 2019 European, federal and regional elections.⁴⁹⁴ The message of the plan was also somewhat undermined as barely three months after its presentation, the then Secretary of State for Asylum and Migration, Theo Francken (N-VA) - one of the signatories of the plan - posted a message on Facebook saying: 'Men who wear make-up, men who wear lingerie and handbags, men who have babies... Is it me or is the world going crazy? Long live the normal man who doesn't need all this nonsense to feel good about himself'. He deleted the message after condemnation from both within and outside his political party, but he did not apologise. Before the 2019 elections, Unia called on the various governments to develop a new inter-federal action plan.⁴⁹⁵ In its *Sixth Report on Belgium*, ECRI recommends 'that the authorities ensure that following the 2018-19 Inter-federal Action Plan to Combat Discrimination and Violence against LGBTI persons and based on an assessment thereof, provision should be made in the next plan for a proper consultation of the stakeholders, particularly civil society. The next inter-federal plan should also have an impact beyond the various federal and federated levels, focusing in particular on the local level'.⁴⁹⁶ In 2020, Sarah Schlitz announced, in her general policy note, that she would adopt a new inter-federal SOGIESC (Sexual Orientation, Gender Identity and Expression and Sex Characteristics) plan. She stressed that this plan is going to be prepared in collaboration with civil society and will adopt an intersectional approach.⁴⁹⁷ In the meantime, the Brussels Capital Region published an action plan for 2020-2022 based on the 2018 inter-federal action plan against discrimination and violence against LGBTI people.⁴⁹⁸

⁴⁹³ Currently, blood donation for men who have sexual intercourse with men involves a deferral period of 12 months from the last sexual intercourse. However, a decision of the Constitutional Court of 26 September 2019 (see 3.2.5 above) cancelled this condition with regard to donations of fresh frozen plasma.

⁴⁹⁴ www.beout.be/2018/05/11/nieuw-actieplan-tegen-holebifobie-en-transfobie-belooft-veel-maar-heeft-weinig-tijd-voor-uitvoering/.

⁴⁹⁵ Memorandum drafted by Unia in view of the federal, regional and European elections of 26 May 2019: Unia (2019) *S'engager pour les droits humains 61 propositions d'Unia pour les élections 2019* (Commit to human rights : 61 proposals for the 2019 elections), https://www.unia.be/files/Documenten/Publicaties_docs/Memorandum_pour_les_%C3%A9lections_2019.pdf.

⁴⁹⁶ ECRI (2020), *Sixth report on Belgium*, para. 38, <https://rm.coe.int/ecri-sixth-report-on-belgium-/16809ce9f0>.

⁴⁹⁷ Schlitz, Sarah (2020) 'General policy note', Gender Equality, Equal Opportunities and Diversity, House of Representatives, 6 November 2020, DOC 55 1580/022 p. 23.

⁴⁹⁸ Action plan for inclusion and the fight against discrimination of LGBTIQI+ people, https://www.brussels.be/sites/default/files/bxl/PA_LGBTQI_VFR_Print.pdf.

10 CURRENT BEST PRACTICES

- On 25 April 2019, the Belgian Federal Chamber of Representatives adopted a legislative act that allows for the creation of a Federal Institute for the Protection and the Promotion of Human Rights.⁴⁹⁹ This is the first institute universally competent in respect of Human Rights, unlike the several different specialised bodies (e.g. Unia: discrimination; Myria: migrants' rights; IEFH: gender equality, ...), whose respective jurisdictions remain untouched. In order to achieve an overall coverage of fundamental rights, it was decided to define the competence of the new body in a 'complementary' or 'residual' way. Thus, this new federal institute is competent to ensure the respect of all fundamental rights, in the federal fields not covered by an existing specialised body. The institute is intended to work in close cooperation with the specialised public bodies active in the field of human rights and takes part in the human rights network. At this stage it is not entirely clear what role the institute is going to play in the field of discrimination as it has to define its action in complementarity with the mandate of Unia and the institute for the Equality of Women and Men. The institute has a consultative role and is able to intervene in front of the judiciary and the Constitutional Court. The members of the institute's board of directors were appointed in the summer of 2020. The President (Olivier de Schutter) and Vice-President (Eva Brems) are both very well-known and respected law professors who are part of European and international human rights networks.⁵⁰⁰ The new Government formed in 2020 announced that the institute will start working during this legislature (2019-2024) and that it will become an inter-federal body equipped with a complaint procedure.⁵⁰¹ The new Federal Institute for the Protection and Promotion of Human Rights was eventually set up at the end of 2020. For the time being, there is good collaboration between the new federal institute and the other federal and regional independent public bodies, accessible to the citizens, that are active in the field of human rights, and with Unia in particular (see chapter 7, above).⁵⁰²
- The publication by Unia, in 2020, of the fourth socio-economic monitoring report. This is a general survey related to discrimination issues including socioeconomic monitoring reports, which aim to get a clear view of the situation on the labour market depending on the ethnic origin and/or migration background of workers (see above, chapter 7).
- In 2020, Unia was involved, in partnership with the Equal Opportunities Unit (SPF Justice), in a Belgian project co-funded by the European Commission's REC programme (Rights, Equality and Citizenship) on 'Improving equality data collection in Belgium' (IEDCB). This project aims to create an inventory of existing equality data in Belgium in relation to three discriminatory grounds:
 - o the so-called 'racial' criteria: alleged race, skin colour, nationality, descent and national or ethnic origin;
 - o religious or philosophical belief;
 - o sexual orientation, gender identity (transgender) and intersex.⁵⁰³

⁴⁹⁹ Belgian Federal Act of 12 May 2019 creating a Federal Institute for the Protection and Promotion of Fundamental Rights (*Loi du 12 mai 2019 portant création d'un Institut fédéral pour la protection et la promotion des droits humains*), OJ (*Moniteur belge*), 21 June 2019.

⁵⁰⁰ RTBF (2020) 'Olivier De Schutter devient président du nouvel Institut des droits de l'Homme', 3 September 2020, https://www.rtb.be/info/belgique/detail_olivier-de-schutter-devient-president-du-nouvel-institut-des-droits-de-l-homme?id=10575879. Please note that Martien Schotsman has just been appointed as the Director of the Federal Institute for the protection and promotion of human rights in February 2021 (after the cut-off date of this report).

⁵⁰¹ Federal Governmental Agreement, 30 September 2020, in French: https://www.sfpd.fgov.be/files/1989/accorddegouvernement2020_decroo1.pdf.

⁵⁰² Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

⁵⁰³ <https://www.unia.be/fr/articles/un-nouveau-projet-pour-ameliorer-la-collecte-et-le-traitement-des-donnees-relatives-a-legalite-en-b>.

- Unia's publication, in September 2020, of a specific report related to the impact of the pandemic on human rights entitled 'Covid-19. A challenge to human rights'. The COVID-19 crisis is seen as a warning signal regarding the respect of core fundamental rights, which has an impact on the fight for equality and against discrimination.⁵⁰⁴
- Several initiatives for an efficient policy of monitoring and prosecution with respect to every ground of discrimination have been adopted in 2019-2020, following ECRI's recommendations on the implementation of the Common Circular 13/2013. For example, specific training courses bringing together contact prosecutors, contact police officers and members of Unia were organised in a judicial district. This led to various initiatives being singled out as good practice (see above, chapter 9).
- Several initiatives of the City of Ghent in the field of the fight against discrimination and violence against LGBTI persons are worth highlighting.
 - o In order to devise an ambitious policy at local level for LGBTI persons, it has drawn on a broad coalition of stakeholders (civil society, universities, etc.) and has brought together a range of measures in this area under the umbrella of a high-profile rainbow action plan.⁵⁰⁵
 - o The municipal police in the City of Ghent set up a special contact point for violence motivated by hatred targeting LGBTI persons. It includes an electronic mailbox that can be accessed via a button on the Ghent police website. In addition, a telephone hotline has been set up for emergency cases. There is also a structured consultation procedure between the prosecutor's office, the police, Unia and the LGBTI organisation Cavarria.⁵⁰⁶
- In December 2020, Unia signed a collaboration agreement⁵⁰⁷ with partners in Dutch-speaking education to strengthen their collaboration in order to improve diversity in education. The agreement provides for the exchange of information, recommendations, campaigns, research on diversity in education, etc. Meetings should also be held at least once a year. Unia is looking to better understand and tackle the various barriers to inclusive education and non-discrimination.
- In June 2020, the Senate adopted a proposal to amend the Constitution by adding a new Article 22ter, which states that 'Every person with disabilities has the right to full inclusion in society, including the right to reasonable accommodation'.⁵⁰⁸ The text received the unanimous support of the Senate, apart from the N-VA and Vlaams Belang members, who abstained. The proposal has still to pass through the House of Representatives in 2021.⁵⁰⁹
- There are no good practices to report in relation to the fight against discrimination caused by artificial intelligence.

⁵⁰⁴ Unia (2020) *COVID-19: A challenge to human rights*,

https://www.unia.be/files/Documenten/Publicaties_docs/2020_Rapport_Covid_-_FR.pdf.

⁵⁰⁵ ECRI (2020), *Sixth report on Belgium*, para. 37, <https://rm.coe.int/ecri-sixth-report-on-belgium-/16809ce9f0>.

⁵⁰⁶ ECRI (2020), *Sixth report on Belgium*, para. 58.

⁵⁰⁷ <https://www.unia.be/fr/articles/unia-signe-un-accord-avec-les-partenaires-de-lenseignement-neerlandophone>.

⁵⁰⁸ <https://phare.irisnet.be/2020/07/08/un-pas-vers-la-reconnaissance-du-handicap-dans-la-constitution-belge/>; <https://www.gamp.be/new/wp-content/uploads/2020/07/proposition-commune-PS-SPA-CDV-7-169-1-SN1202k7-169-1DP1.pdf>.

⁵⁰⁹ RTBF (2021) 'Constitution soon to recognise the rights of disabled people' https://www.rtbf.be/info/belgique/detail_la-reconnaissance-des-droits-des-personnes-handicapees-bientot-dans-la-constitution?id=10671861.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

- The definition of direct discrimination by the Flemish Decree of 10 July 2008 (Article 16(1)) and by the Decree of the German Community of 19 March 2012 (Article 5(4)), as it is currently worded, could be formally read as allowing for derogations to direct discrimination, which is prohibited under the provisions of the directives (see section 2.2.a, above).
- In 2009, the Constitutional Court stated that Article 4(10) of both the General Anti-Discrimination Federal Act and the Racial Equality Federal Act, which defines the notion of harassment, does not specify that this behaviour could be punished if it has the consequence of creating an intimidating, hostile, degrading, humiliating or offensive environment, without any intention of the offender to create such an environment.⁵¹⁰ On this basis, it seems that the Court requires an intention to be proven more generally, i.e. in civil matters as well. This interpretation may raise an issue of lack of compliance with EU and national law since both define harassment as an unwanted conduct related to a protected criterion. If a behaviour which has the effect of creating a bad environment amounts to a prohibited harassment, no specific intention is required under EU and national law. Consequently, the interpretation of the Constitutional Court should be strictly applied to criminal matters – and not to civil matters – to be in compliance with EU law and national law.
- In addition, in its first 2017 report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts stresses that the definition of harassment in the Act of 4 August 1996 on the welfare of workers is not in line with EU law, as it requires ‘several acts’ (i.e. a pattern of repetitive behaviour) whereas the equality directives do not require such a condition. The expert commission recommends the amendment of the Act of 4 August 1996 so as to bring it in line with EU law⁵¹¹ (see section 2.4, above).
- In order to fully implement the directives, it is necessary to include, in the material scope of the regional decrees, ‘membership of, and involvement in, an organisation of workers or employers or any organisation whose members carry on a particular profession’ that is financed by the relevant community or region. Only the French Community (French Community ET Decree of 12 December 2008, Article 4(5)), the Cocof (Cocof ET Decree of 9 July 2010, Article 5(9)) and the Brussels Capital Region (Brussels ET Ordinance, Article 4(5)) have done it. Regarding the Walloon Region and the Flemish-speaking Community, one could consider that this is implicitly included in the phrase, ‘the access, participation or whatever exercise of an economic, social, cultural or political activity open to the public’ which is used in both ET decrees. The statutory ET law of the Brussels Capital Region and of the German-speaking Community should be completed in this respect (see section 3.2.4, above).
- In Belgium, there is a potential breach of the framework directive with respect to the compulsory retirement age in the public sector (retirement is automatic and compulsory at the age of 65 years, with a few exceptions). In addition, the reduced notice period provisions to end the contractual relationship in the private sector might possibly be out of line with the CJEU case law (see section 4.6.4.d and 4.6.4.f, above).
- In its 2009 rulings concerning several actions in annulments against the Federal Anti-Discrimination Acts, the Constitutional Court stressed that the facts leading to the

⁵¹⁰ Constitutional Court (*Cour constitutionnelle*), Decision of 12 February 2009, no. 17/2009, para. B.53.4; Decision of 11 March 2009, no. 39/2009, para. B.25.4; Decision of 2 April 2009, no. 40/2009, para. B.33.4.

⁵¹¹ Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2017), *Premier rapport d'évaluation 2017*, p. 9 and para. 86, www.Unia.be/en.

reversal of the burden of proof cannot be of general character but must be attributed specifically to the author of the distinction. Consequently, the Court stated that it is not enough to establish through statistics that a neutral criterion disadvantages persons characterised by a protected ground of discrimination. According to the Court, it must also be shown that the defending party was aware of that situation.⁵¹² In the opinion of the authors of this report, that statement of the Court is in breach of EU law and in contradiction to the intention of the Belgian legislature (see section 6.3, above).

- There is a problem regarding victimisation because Belgian law only protects victims, their representatives and witnesses against victimisation while the EU directives cover 'all persons' involved. Only the Cocof ET Decree and the Flemish Framework ET Decree are in line with the directives regarding protection against reprisals (see section 6.4, above).
- The 'safeguard provision' (Article 11 of both the General Anti-Discrimination Federal Act and the Racial Equality Federal Act) implies that any statutory law (or regulation implementing a legislative provision), which might be considered discriminatory under the EU directives, will not be voided by the adoption of the anti-discrimination legislative framework. It may be necessary, therefore, to launch a full-scale screening of the existing legislation and regulations in order to ensure that any discriminatory provisions are identified and removed, since a purely case-by-case approach left in the hands of courts might be insufficient.

11.2 Other issues of concern

1) Political context

In its 2014 report on Belgium, ECRI noted that

'since its fourth report on Belgium a number of leaders of and militants from extremist parties have continued making statements in public against the other linguistic Community in the name of extreme nationalism combined with intolerant and xenophobic arguments against foreigners and minority groups. ECRI considers that this exploitation of the climate of political tension that exists between the linguistic Communities is particularly deplorable as it not only encourages inter-Community prejudice and stereotyping but can fuel hatred also against ethnic minorities and migrants.'⁵¹³

This statement has resonated in recent years during which politicians of the Dutch-Speaking Nationalist Flemish Party (N-VA) have made several statements with racist connotations.⁵¹⁴ This is troubling because the N-VA is the biggest party in Flanders (and thus Belgium). There is also the far-right party Vlaams Belang, which systematically makes

⁵¹² Constitutional Court (*Cour constitutionnelle*), Decision of 12 February 2009, no. 17/2009, para. B.93.3; Decision of 11 March 2009, no. 39/2009, para. B.52; Decision of 2 April 2009, no. 40/2009, para. B.97.

⁵¹³ ECRI (2014) *Fifth Report on Belgium*, para 51.

⁵¹⁴ See for instance: *Het Nieuwsblad* (2018), 'Weer twee N-VA'ers in opspraak door racisme' (*Again two members of the N-VA denounced for racism*), 12 September 2018; Interview with Liesbeth Homans and Mieke Van Hecke, conducted by *De Standaard*, 6 October 2018, in which Liesbeth Homans (prominent N-VA member and Flemish Minister) affirmed: 'Not every Muslim is a terrorist, but every terrorist is a Muslim'; or when then-Minister for Home Affairs Jan Jambon said 'a significant part of the Muslim Community danced after the terrorist attacks' (of 22 March 2016 in Brussels): <https://www.demorgen.be/nieuws/jan-jambon-ik-heb-geen-uitspraak-over-dansende-moslims-gedaan~b3f627a4/>. See also the links between the N-VA and the youth group Schild & Vrienden (Shield and Friends) made public in the documentary *Pano* broadcast on Flemish television in September 2018. The documentary revealed their racist, sexist, anti-Muslim, anti-Semitic, anti-gay agenda: <https://www.vrt.be/vrtnws/nl/2018/09/05/pano-wie-is-schild-vrienden-echt/>. See also how the Minister-President of Flanders, Jan Jambon (N-VA), endorses the misleading allegations that a refugee family can afford a house with just the family allowances they receive (on 30 December 2019): https://www.rtbf.be/info/article/detail_racisme-ordinaire-a-la-n-va-philippe-walkowiak?id=10397546.

overtly racist (in particular Islamophobic) statements. This party has become the second biggest party in Flanders after the elections of 26 May 2019. Nearly one out of two Flemish voters voted for a nationalist and/or far right party. However, there is a *cordon sanitaire* against the Vlaams Belang, which means that the other political parties in the country commit not to form a government coalition with the Vlaams Belang at all levels of power. However, the cordon has been under pressure since the last elections.

In 2017, many debates concerning Unia occurred and were mostly launched by Flemish politicians from the N-VA or from the Vlaams Belang. In 2018 these incessant attacks had died down slightly, but in September 2019, the newly formed Flemish Government and Bart de Wever, the chairman of the N-VA, announced that the Flemish Government will drop out of Unia and set up its own equality body. Unia fears that the creation of a Flemish equality body will lead to a lack of clarity and confuse citizens about the role and the competence of the various institutions responsible for the fight against discrimination. Moreover, the Flemish Government is currently responsible for 10 % of the financial resources of Unia and this loss of income could have significant consequences for the running of the Centre.⁵¹⁵ Since the political declaration of the Flemish Government was made in September 2019, no official progress has been made and the question of which model of equality body should be adopted by the Flemish Region does not seem to be settled yet. It is worth stressing that Unia is in regular contact with the Flemish Minister for Equal Opportunities, Bart Somers (Dutch-speaking Liberal Party), who has been invited to visit Unia, to meet with members of its staff and to hold discussions with Equinet and ENNHRI (European Network of National Human Rights Institutions).⁵¹⁶ In 2020, the renewal of the board of directors of Unia was also tricky due to an institutional blockage with the Flemish Parliament. In the end, it was decided that the former members of the board of directors, who were appointed by the Flemish Parliament, would continue to sit to ensure the continuity of the public service. This might weaken the authority of Unia in the Flemish part of the country (see chapter 7, above).⁵¹⁷

2) COVID-19 Pandemic

It is too early on to carry out an accurate analysis of the impact of the pandemic, and the measures taken to deal with it, with respect to the principle of equality and non-discrimination. Unia's specific report, published in September 2020, *Covid-19: A challenge to human rights*, provides a first account based on information gathered between February and August 2020 (i.e. during the first 200 days of the pandemic in Belgium).⁵¹⁸ In this report, Unia views the COVID crisis as a warning signal regarding the respect of core fundamental rights, which has an impact on the fight for equality and against discrimination.

The study points to the need to pay particular attention to the disproportionate impact of the pandemic on vulnerable groups. During these 200 days, there was a 32 % increase in the number of 'discrimination reports' to Unia (*signalements*) compared to 2019, of which 29.4 % are related to COVID-19. The pandemic has undoubtedly had a spill-over effect in terms of discriminatory reports. Young people, the elderly, people with disabilities, people living in institutions, people with health issues, isolated people or those who do not correspond to the 'traditional' family model were more affected by the emergency measures, which 'seemed to be based on a social and relational model far from reflecting the diversity of (the Belgian) society. It was as if the emergency (...) had caused a return

⁵¹⁵ <https://www.unia.be/fr/articles/unia-reagit-a-la-decision-de-la-flandre-darreter-leur-cooperation>.

⁵¹⁶ Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

⁵¹⁷ Interview with Patrick Charlier, co-director of Unia, 3 March 2021.

⁵¹⁸ Unia (2020), *Covid-19: A challenge to human rights*, available (in French):

https://www.unia.be/files/Documenten/Publicaties_docs/2020_Rapport_Covid_-_FR.pdf.

to a certain normativity to which everyone was implicitly expected to conform'.⁵¹⁹ Unia is expected to provide a more detailed analysis in its next annual report, due in June 2021.⁵²⁰

In a report released in November 2020, Amnesty International Belgium underlines the major human rights violations (right to health, right to life and prohibition of discrimination) suffered by elderly people living in care and nursing homes during the first lockdown in Belgium, which have had disastrous consequences.⁵²¹

3) Inertia and/or lack of political will

There is also a worrying inertia at the political level regarding several issues central to the fight against discrimination:

- Belgium has not yet ratified Protocol No. 12 to the European Convention on Human Rights. There was no commitment to a forthcoming ratification in the 2014 Federal Governmental Agreement.
- Despite the repeated calls of Unia (i.e. in the 2014 and 2019 memorandum drafted by Unia in view of the federal, regional and European elections of 2014 and 2019) and of the UN Council for Human Rights for an inter-federal action plan against racism, no plan has yet been adopted. On a more positive note, in June 2020, the NAPAR coalition published a memorandum with more than 50 proposals to develop the future inter-federal action plan against racism. In September 2020, an interministerial conference on the fight against racism eventually took place and started the process of drafting the inter-federal action plan against racism. The new Secretary of State for Equal Opportunities, Sarah Schlitz, also stated that she was working to have an inter-federal plan for 2021, 20 years after the Durban Declaration.⁵²² According to Unia's co-director, Patrick Charlier, this deadline could be met as the consultation and drafting process have speeded up in recent months.
- As highlighted by the Commissioner for Human Rights of the Council of Europe following his visit in Belgium in September 2015 (and reported above in section 3.2.8 and 3.2.10),⁵²³ the situation of Roma and Travellers in Belgium is still worrying regarding housing and education. Despite the adoption of some measures by the regional authorities, it seems that there is a lack of political will to improve the precarious situation of these vulnerable groups. The situation in respect of Travellers is particularly worrying. As pointed out in the 2014 and 2020 ECRI reports on Belgium, there was still a shortage of properly equipped transit sites for Travellers, in particular in the Walloon Region and in the Brussels Capital Region. This was also emphasised by the Committee on the Elimination of Racial Discrimination in its *Concluding observations on the sixteenth to nineteenth periodic reports of Belgium*,⁵²⁴ by the Commissioner for Human Rights of the Council of Europe, after the last visit in Belgium, in September 2015⁵²⁵ and by the European Union Agency

⁵¹⁹ Unia (2020), *Covid-19: A challenge to human rights*, available (in French):

https://www.unia.be/files/Documenten/Publicaties_docs/2020_Rapport_Covid_-_FR.pdf, pp. 26-27.

⁵²⁰ Interview Patrick Charlier 3 March 2021.

⁵²¹ Amnesty international (2020) 'Les maisons de repos dans l'angle mort. Les droits des personnes âgées pendant la pandémie de Covid 19 en Belgique', November 2020, https://www.amnesty.be/IMG/pdf/20201116_rapport_belgique_mr_mrs.pdf.

⁵²² Schlitz, Sarah (2020) 'General policy note', Gender Equality, Equal Opportunities and Diversity, House of Representatives, 6 November 2020, DOC 55 1580/022 p. 20.

⁵²³ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, rm.coe.int/16806db735.

⁵²⁴ CERD/C/BEL/CO/16-19, 14 March 2014, paras. 18-19.

⁵²⁵ Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, rm.coe.int/16806db735.

for Fundamental Rights (FRA) in its 2020 survey⁵²⁶ (see above, section 3.2.8). In its *Sixth report on Belgium*, published in March 2020, ECRI recommends 'that the authorities adopt an integrated approach to the issue of Travellers' access to housing, and in particular: authorise the federated authorities to take substitute action if and when local authorities fail to make available a sufficient number of transit and/or residential sites; take the necessary steps to enable caravan dwellers to acquire a reference address; and recognise caravans as a legal type of housing throughout the country'.⁵²⁷

- In its 2017 evaluation report, Unia pointed out that the fight against discrimination is not a priority for the relevant judicial, administrative and disciplinary authorities and that the anti-discrimination legislation is not well applied.⁵²⁸ There have been no significant developments since then. In one of its two priority recommendations, ECRI recommends 'that the authorities appoint new experts to the Committee to Evaluate Federal Anti-Discrimination Legislation as soon as possible, so that the committee can resume its activities; that the committee is given adequate resources to carry out its duties in an appropriate manner; and that civil society organisations be consulted as representatives of victims of discrimination. Finally, ECRI reiterates its recommendation that the evaluation of anti-discrimination legislation at the federal level be combined with an evaluation of the relevant legislation at the federated entities' level so as to identify possible gaps'.⁵²⁹

4) Issue of effectiveness

- A fair amount of cases decided in court and the 2017 report of the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts show that there is still a noticeable lack of knowledge of the anti-discrimination law – especially of the notion of indirect discrimination – by the professionals in charge of its implementation.
- As underlined by the three Unia diversity barometers on employment, housing and education, there are still many discriminatory practices in these fields. Just as the OECD and the European Commission have done, the fourth socio-economic monitoring report, published in 2019, underlines the alarming situation of inequalities on the Belgian labour market. This was also stressed by the Committee on the Elimination of Racial Discrimination, which stated:

'despite numerous measures taken by the State party at the Federal, Regional and Community levels, migrants and persons of foreign origin continue to face obstacles to the full enjoyment of economic, social and cultural rights. In particular, the Committee is concerned at reports that persons of foreign origin, especially those from non-European Union countries, face structural discrimination in the field of employment, where 'ethnic stratification' seems to exist. The Committee is further concerned at difficulties faced by such persons in accessing housing (Article 5).'⁵³⁰

- In its *Sixth Report on Belgium*, from March 2020, ECRI recommends that

⁵²⁶ European Union Agency For Fundamental Rights (FRA) (2020), *Roma and Travellers in Belgium - Key results from the Roma and Travellers survey 2019*, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-roma-and-travellers-survey-country-sheet-belgium_fr.pdf.

⁵²⁷ ECRI (2020), *Sixth report on Belgium*, para. 91, <https://rm.coe.int/ecri-sixth-report-on-belgium-/16809ce9f0>.

⁵²⁸ Unia (2017), *Evaluation of the Anti-Discrimination Federal Acts*, February 2017, pp. 10 and 58 www.unia.be/en.

⁵²⁹ ECRI (2020), *Sixth report on Belgium*, para. 97.

⁵³⁰ Committee on the Elimination of Racial Discrimination (2014), *Concluding observations on the sixteenth to nineteenth periodic reports of Belgium*, CERD/C/BEL/CO/16-19, 14 March 2014, para. 15.

'the authorities increase co-operation with employers to improve immigrants' employment opportunities. It draws their attention to its General Policy Recommendation No. 14 on combating racism and racial discrimination in employment, which includes valuable examples of positive measures to facilitate migrants' access to employment, and mechanisms for the recognition of qualifications'.⁵³¹

The federal state, the communities and the regions should take appropriate measures to tackle such issues.

- Concerning the rights of people with disabilities, at least two points stressed by the UN Committee on the Rights of Persons with Disabilities, which echo the above-mentioned observations, are noteworthy. First, the Committee expresses its concern about the

'poor accessibility for persons with disabilities, the absence of a national plan with clear targets and the fact that accessibility is not a priority. It notes that government action has focused primarily on accessibility for persons with physical disabilities and that few measures have been taken to promote accessibility for persons with hearing, visual, intellectual or psychosocial disabilities'.⁵³²

Secondly, the Committee notes 'the low number of persons with disabilities in regular employment' and 'the Government's failure to reach targets for the employment of persons with disabilities within its own agencies, as well as the lack of a quota in the private sector'.⁵³³ In its 2020 recommendations, the UN Committee on Economic, Social and Cultural Rights reiterated those concerns.⁵³⁴

- The Decree of 7 December 2017⁵³⁵ adopted by the Government of the French Community concerning the reception, assisting and maintenance of children with specific needs in basic and secondary education raises some concerns. This decree provides, *inter alia*, arrangements for the consultation on and implementation of reasonable accommodation for disabled students. It also creates a conciliation procedure and an appeal to an ad hoc committee in which Unia will sit 'on a voluntary and advisory basis'. However, there are some concerns about the interpretation of the right to reasonable accommodation, which is much too limited in view of legal texts and case law. In particular, the decree conditions the right to reasonable accommodation on the fact that the pupil's situation 'does not make it necessary to send him or her to specialized education according to the provisions of the decree of 3 March 2004 organising special education' (Article 4(1)). Under anti-discrimination legislation and the UN CRPD, the refusal of reasonable accommodation constitutes discrimination. In other words, the provision is a right as far as that is reasonable, not a 'possibility'. This right must be open to all students with disabilities within the meaning of the UN convention and international jurisprudence. This additional condition therefore does not comply with the law. In addition, this decree closes the door of ordinary schools to students with specific needs that 'call into question the learning objectives defined by the inter-jurisdictional reference frameworks' (Article

⁵³¹ ECRI (2020), *Sixth report on Belgium*, para. 75.

⁵³² Committee on the Rights of Persons with Disabilities (2015), *Concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session* (15 September – 3 October 2014), para. 21 – 22.

⁵³³ Committee on the Rights of Persons with Disabilities (2015), *Concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session* (15 September – 3 October 2014), para. 38 – 39.

⁵³⁴ UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Belgium*, E/C.12/BEL/CO/5, 26 March 2020, §§24-25.

⁵³⁵ Decree of 7 December 2017 concerning the reception, the assisting and the maintenance of children with specific needs in the basic and secondary education (*Décret relatif à l'accueil, à l'accompagnement et au maintien dans l'enseignement ordinaire fondamental et secondaire des élèves présentant des besoins spécifiques*), OJ (*Moniteur belge*), 1 February 2018, www.gallilex.cfwb.be/document/pdf/44807_000.pdf.

4(4)). This provision goes against an inclusive education system, which should allow for flexible study programmes, learning methods and forms of assessment adapted to all students (see CRPD, General Comment No. 4 (2016) on the right to inclusive education, Articles 14 and 26).

- In 2018 and in 2020, the European Committee of Social Rights (ECSR) condemned Belgium because of the Belgian state's failure to guarantee the right to inclusive education for children with intellectual disabilities within the Flemish Community⁵³⁶ and the French Community (Wallonia-Brussels Federation).⁵³⁷ In both cases, Unia filed an amicus brief. In both cases, the ECSR found a violation of Articles 15 (right of persons with disabilities to independence, social integration and participation in the life of the community) and 17 (right of children and young persons to social, legal and economic protection) of the Revised European Social Charter. Conversely, the Committee decided that there was no violation of Article E in conjunction with Articles 15 and 17. According to the Committee, Articles 15 and 17 encompass discrimination on the ground of disability. The allegations of discrimination on the basis of socio-economic origin ('low-income families would not be able to mobilise adequate resources to enable the pupil to be directed to mainstream education') are not upheld by the Committee due to the lack of 'specific evidence' to support them.⁵³⁸

5) Religious symbols

The numerous judicial rulings involving the highest courts in Belgium (such as the Constitutional Court, the Court of Cassation and the Council of State) show that the issue of religious symbols (and the wearing of the Islamic veil in particular) is still a very controversial one in Belgium (see sections 3.2.8 and 4.2, above).

The highly debated question of wearing headscarves at school is highlighted as an issue of concern in the 2020 ECRI *Sixth report on Belgium*: 'In a federal state like Belgium, the regulations provide for a highly complex apportionment of powers between the Flemish-, French- and German-speaking communities ... ECRI recommends that the Belgian authorities take all possible measures to ensure that decisions taken by schools regarding the wearing of religious symbols or clothing at school and in higher education establishments respect the principle of lawfulness and are free of any form of discrimination. Particularly when faced with adult students, the principle of neutral education should be compatible with their freedom to express their religious beliefs'.⁵³⁹

6) Resurgence of individual racist incidents, as well as debates laying bare structural discrimination based on alleged race and ethnic origin

Another issue of concern is the resurgence of both individual racist incidents, as well as debates laying bare structural discrimination based on alleged race and ethnic origin.

In June 2020, following the death of George Floyd in the United States, several demonstrations in support of the Black Lives Matter movement against racism and police

⁵³⁶ ECSR, *Mental Disability Advocacy Centre (MDAC) v. Belgium*, No. 109/2014, decision on the merits, 29 March 2018, [https://hudoc.esc.coe.int/eng#%7B%22fulltext%22:%5B%22Mental%20Disability%20Advocacy%20Centre%20\(MDAC\)%20v.%20Belgium%22%5D,%22sort%22:%5B%22ESCPublicationDate%20Descending%22,%22ESCDcIdentifier%22:%5B%22reschs-2018-3-en%22%5D%7D](https://hudoc.esc.coe.int/eng#%7B%22fulltext%22:%5B%22Mental%20Disability%20Advocacy%20Centre%20(MDAC)%20v.%20Belgium%22%5D,%22sort%22:%5B%22ESCPublicationDate%20Descending%22,%22ESCDcIdentifier%22:%5B%22reschs-2018-3-en%22%5D%7D).

⁵³⁷ ECSR, *International Federation of Human Rights Leagues (FIDH) and Inclusion Europe v. Belgium*, No. 141/2017, decision on the merits, 9 September 2020, <https://hudoc.esc.coe.int/eng#%7B%22sort%22:%5B%22ESCPublicationDate%20Descending%22,%22tabview%22:%5B%22document%22,%22ESCDcIdentifier%22:%5B%22cc-141-2017-dmerits-en%22%5D%7D>.

⁵³⁸ ECSR, *International Federation of Human Rights Leagues (FIDH) and Inclusion Europe v. Belgium*, No. 141/2017, decision on the merits, 9 September 2020, paras. 195-197 and 210.

⁵³⁹ ECRI (2020), *Sixth report on Belgium*, para. 21, <https://rm.coe.int/ecri-sixth-report-on-belgium-16809ce9f0>.

violence were held in several major Belgian cities.⁵⁴⁰ These demonstrations also denounced the deaths of people from visible minorities following police interventions in Belgium such as Semira Adamu (1998), Mawda (2018), Mehdi (2019) and Adil (2020).⁵⁴¹

These incidents are not helped by the fact that Belgium still struggles with the acknowledgement of its colonial past: there is persistent opposition to those who would like to see statues and street names of King Leopold II removed; the renovation of the Africa Museum (which formerly glorified colonisation) was not done with the input of the African community; and history classes on Belgian colonialism are often devoid of criticism. During the summer of 2020 and inspired by Black Lives Matter, a movement to decolonise public space emerged: several statues and street name plates bearing the effigy of King Leopold II were defaced (BLM tags, red paint, etc.). In reaction to this, some Belgian cities decided to remove these statues (as in Ghent⁵⁴²), while others added an explanatory plate on the colonisation period (as in the Africa Museum).⁵⁴³

Contrary to other European countries and for a long time, Belgium did not feel as though it needed to make reparations for the colonial period. However, in July 2020, a special parliamentary committee on Belgium's colonial past has been set up, which is a unique initiative worldwide.⁵⁴⁴ It is composed of MPs and experts who have one year to 'make recommendations on how to deal with the past in the independent state of Congo and the Belgian colonial past in Congo, Rwanda and Burundi through shared memories'.⁵⁴⁵

The year 2020 saw an increase in ethnic profiling in the context of controls to ensure compliance with public health measures related to the COVID-19 pandemic. Numerous reports linked with excessive, targeted and discriminatory police interventions were reported to Unia and Police Watch (Human Rights League). For example, in the summer of 2020, the police banned young people from visible minorities from the popular beach of Blankenberge. The statements from the Blankenberge police spokesman caused outrage in the media.⁵⁴⁶ In June 2020, seven organisations (including the Human Rights League, the MRAX (Movement against racism, anti-semitism and xenophobia) and Amnesty) launched a campaign to fight ethnic profiling ('Not Normal – Stop Ethnic Profiling').⁵⁴⁷ In July 2020, a report on police racial profiling, which Unia funded, was published. This report was based on research carried out at the National Institute for Criminalistics and Criminology.⁵⁴⁸

All these incidents and debates are corroborated by the fact that Unia received 951 racist reports in 2019, in contrast to 866 in 2018, and 782 in 2017. About 25 % of those cases concerned racism in situations related to the provision and/or supply of goods and services, while in almost 80 cases it was a question of a racist society as a whole (racist slurs while working or going out).

⁵⁴⁰ https://www.rtbef.be/info/societe/detail_mort-de-george-floyd-des-milliers-de-citoyens-manifestent-contre-le-racisme-dans-toute-la-belgique?id=10517214.

⁵⁴¹ <https://www.lesoir.be/305576/article/2020-06-07/black-lives-matter-pres-de-10000-personnes-se-sont-rassemblees-devant-le-palais>.

⁵⁴² <https://www.vrt.be/vrtnws/nl/2020/06/18/gent-haalt-controversieel-standbeeld-leopold-ii-weg/>.

⁵⁴³ https://www.francetvinfo.fr/monde/usa/mort-de-george-floyd/un-buste-de-l-ex-roi-leopold-ii-figure-du-passe-colonial-belge-a-nouveau-degrade_4065329.html.

⁵⁴⁴ Belgian Federal Chamber of Representatives (2020), 'Commission spéciale chargée d'examiner l'état indépendant du Congo (1885-1908) et le passé colonial de la Belgique au Congo (1908-1960), au Rwanda et au Burundi (1919-1962), ses conséquences et les suites qu'il convient d'y réserver', doc n°33-1462/001, 17 July 2020, https://www.lachambre.be/kvvcr/pdf_sections/pri/congo/55K1462001.pdf.

⁵⁴⁵ https://www.rtbef.be/info/belgique/detail_debats-sur-la-memoire-du-colonialisme-la-commission-speciale-aura-une-mission-etendue?id=10540236.

⁵⁴⁶ <https://www.brusselstimes.com/news/belgium-all-news/125900/belgian-police-will-refuse-access-to-beach-to-people-of-certain-profile/>.

⁵⁴⁷ <https://stopethnicprofiling.be/fr/recommandations/>.

⁵⁴⁸ Van Praet, S. (2020) 'Identifier et affronter des problèmes et abus dans la sélectivité policière', July 2020, https://www.unia.be/files/Documenten/Publicaties_docs/Rapport_s%C3%A9lectivit%C3%A9_polici%C3%A8re_2020.pdf.

The main conclusion of the third socio-economic monitoring report, published in 2020, relates to structural racial discrimination. Ethnic origin and migration background remain the major grounds leading to inequalities in the labour market.⁵⁴⁹ In consequence, Unia strongly recommends that the competent public authorities develop an integrated policy with a long-term perspective.⁵⁵⁰

⁵⁴⁹ Unia (2020), *Socio-Economic Monitoring - Labour Market and Origin 2019*, Federal Public Service on Employment, Labour and Social Dialogue, Brussels, March 2020, p. 45, www.unia.be/en.

⁵⁵⁰ Unia (2020), *Socio-Economic Monitoring - Labour Market and Origin 2019*, p. 296.

12 LATEST DEVELOPMENTS IN 2020

12.1 Legislative amendments

In February 2020, the Federal Act of 10 May 2007 pertaining to fight discrimination between women and men was amended in order to include new protected grounds.⁵⁵¹ This act now refers to sex/gender and those related grounds: pregnancy, childbirth, breastfeeding, motherhood, adoption, medically assisted procreation, gender reassignment, gender identity and gender expression, sexual characteristics, paternity and co-maternity.

12.2 Case law

Relevant discrimination ground(s): disability

Name of the court: Labour Court of Charleroi

Date of decision: 10 January 2020

Name of the parties: /

Reference number: /

Link:

https://www.unia.be/files/Documenten/Rechtspraak/Tribunal_du_travail_de_Charleroi_10_janvier_2020.pdf (in French)

Brief summary: A teacher with multiple sclerosis requested some accommodations related to her working schedule and the nature of her working tasks. The employer refused to grant her any of them. The court ruled that this refusal was discriminatory because the employer did not justify the extent to which the required accommodations of the applicant's schedule and working tasks were not reasonable and constituted a disproportionate burden. The court also found that there was a risk of 'recidivism' and sentenced the employer to pay six months' salary compensation to the employee. The court did not order the employer to provide the relevant accommodations because at the time of the judgment, these had been put in place following a judicial mediation.

Relevant discrimination ground(s): age

Name of the court: Constitutional Court

Date of decision: 9 July 2020

Name of the parties: /

Reference number: 103/2020

Link: <https://www.const-court.be/public/f/2020/2020-103f.pdf> (in French)

Brief summary: The Constitutional Court ruled that Article 2 of the Federal Act of 27 February 1987 on allowances for people with disabilities was in breach of the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution). This provision does not allow entitlement to the allowances for people with disabilities (income replacement allowance and integration allowance) to be granted to adults who have not reached the age of 21. According to the Constitutional Court, this is an unjustified distinction between adults with disabilities, depending on whether or not they have reached the age of 21.

Relevant discrimination ground(s): disability and sex

Name of the court: Antwerp Labour Court

Date of decision: 29 September 2020

Name of the parties: /

Reference number: A.R. 19/3232/A

⁵⁵¹ Federal Act of 4 February 2020 amending the Act of 10 May 2007 pertaining to fighting discrimination between women and men with regard to the prohibition of discrimination on the grounds of paternity or comaternity (*Loi du 4 février 2020 modifiant, en ce qui concerne l'interdiction de discrimination relative à la paternité ou à la comaternité, la loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes*), O.J. 28 February 2020.

Link: https://www.unia.be/files/Documenten/2020_09_29_Arbrb_Antwerpen.pdf (in Dutch)

Brief summary: On 29 September 2020, the Antwerp Labour Court found that the facts at issue revealed discrimination based on disability and sex.⁵⁵² The case concerned a pregnant woman with a hearing impairment (deafness) who applied for a job in a pharmaceutical company as a bioengineer. During the interview, the applicant stipulated that she could only start working after her maternity leave, as she was close to the end of her pregnancy. The company offered the applicant a temporary administrative position to see whether collaboration was possible regarding her hearing impairment. She declined the offer because of her academic qualifications. The application procedure was interrupted and after a silence of a few months, the applicant was informed that her application had been rejected. The court found that there was double direct discrimination based on disability in breach of the General Anti-Discrimination Federal Act. First, a discrimination occurred during the recruitment process as an additional condition was added because of her disability (accepting a temporary assignment below her level so that the company could 'get used' to her disability). Secondly, the decision not to recruit the applicant was discriminatory, since she was a suitable candidate for the position and would have been recruited without her disability. The court also found a third form of direct discrimination based on pregnancy (assimilated to the ground of sex), in breach of the Gender Equality Federal Act. In this respect, the court pointed to the fact that the company acknowledged that having to wait until the end of the maternity leave had worked to the candidate's disadvantage. The victim was able to claim the compensation provided for by the two federal acts in question. According to the court, if more than one form of discrimination is found, the damages must be cumulated. Both acts provide for a lump-sum indemnity of six months' gross salary. As the claimant was discriminated against three times, the company was ordered to pay damages amounting to 18 months' gross salary. It should be stressed that Unia and the Institute for Equality between Women and Men collaborated in this case of multiple discrimination. The company decided to appeal against this judgment.

Relevant discrimination ground(s): racial or ethnic origin

Name of the court: Court of Appeal of Brussels

Date of decision: 5 May 2020

Name of the parties: /

Reference number: /

Link: https://www.unia.be/files/Documenten/Rechtspraak/2020_05_05_Bruxelles.pdf (in French)

Brief summary: The criminal chamber of the Court of First Instance of the Walloon Brabant convicted the store manager of a large retail outlet (Intermarché) for the dismissal of a black employee because some customers 'didn't want to be served by a black person'.⁵⁵³ The court ruled that the dismissal was discriminatory on the ground of the colour of the skin. According to the court, anti-discrimination law applies to the company but also to its employees who decided on the dismissal. On 5 May 2020, the Court of Appeal of Brussels confirmed this decision and sentenced the defendants to pay EUR 7 500 in damages to the victim. The court also sentenced the manager to a two-months suspended prison sentence and a fine of EUR 1 200 (the whole of which is suspended for three years). Intermarché was also punished by a fine of EUR 3 000 (the whole of which is suspended for three years).

Relevant discrimination ground(s): racial or ethnic origin

Name of the court: Court of Appeal of Brussels

Date of decision: 28 September 2020

Name of the parties: /

⁵⁵² Judgment of 29 September 2020, Labour Court of Antwerp, A.R. 19/3232/A, in Dutch: https://www.unia.be/files/Documenten/Rechtspraak/2020_09_29_Arbrb_Antwerpen.pdf.

⁵⁵³ Court of First Instance of the Walloon Brabant, 3 October 2017, https://www.unia.be/files/Documenten/Rechtspraak/Tribunal_de_premiere_instance_du_brabant_wallon_3_octobre_2017.pdf.

Reference number: /

Link: <https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/hof-van-beroep-brussel-28-september-2020> (in French)

Brief summary: A Belgian candidate tenant of 'African origin' contacted a real estate agency to rent a particular flat. He sent all the required documents but was informed that the owner chose another candidate. As he was not convinced that the flat had been rented out, he asked a friend with no foreign origin (and, in particular, no 'Black person's accent') to contact the agency. His friend was informed that the property was still available. Both telephone conversations were recorded and produced in court. On this basis, the Court of First Instance of Nivelles ruled that direct discrimination occurred and awarded damages.⁵⁵⁴ The real estate agency also had to display the judgment on its premises and in the bulletin of the Professional Institute of Estate Agents (IPI). The Brussels Court of Appeal confirmed the judgment of the First Instance Tribunal of Nivelles. It ruled that the use of situation testing was a 'perfectly admissible mode of proving discrimination'. This was the first judicial application of the situation testing tool that Unia developed on its website in November 2016.⁵⁵⁵

Relevant discrimination ground(s): religion or belief

Name of the court: Constitutional Court

Date of decision: 4 June 2020

Name of the parties: /

Reference number: 81/2020

Link: <https://www.const-court.be/public/f/2020/2020-081f.pdf> (in French)

Brief summary: According to the internal regulation of a school of higher education approved by Brussels City Council, students are banned from wearing signs, jewellery or clothing that reflect a political, philosophical or religious opinion or affiliation, and they are also banned from wearing any headgear. This regulation is based on Article 3 of the Decree of the French Community adopted on 31 March 1994 defining the neutrality of the education in the French Community.

Muslim female students who are more than 18 years old (like the very large majority of students in this kind of school of higher education) and are wearing a headscarf filed a lawsuit in emergency proceedings before the President of the First Instance Court of Brussels on the basis of Article 50 of the Decree of the French Community adopted on 12 December 2008 on the fight against certain forms of discrimination (FRED). They alleged that the ban was discriminatory and they asked the court to put an end to this discriminatory practice. According to the claimants, the ban was in breach of freedom of religion (Article 19 of the Constitution, Article 9 of the European Convention on Human Rights), the right to education (Article 2 of the First Additional Protocol to the European Convention on Human Rights), neutrality of public education (Article 24 of the Constitution) and the right to human dignity (Article 23 of the Constitution). The First Instance Court of Brussels referred a preliminary ruling to the Constitutional Court to decide whether such a ban, aimed at ensuring a totally neutral educational environment, was constitutional when adult students wearing headscarves were concerned.

On 4 June 2020, the Constitutional Court ruled that the ban is not contrary to the obligation to respect neutrality in public education and does not violate the freedom of religion guaranteed by the Constitution and by the European Convention on Human Rights. The Court did not find it necessary to examine the matter further under Article 23 of the Constitution (right to human dignity). The Court found legitimate the objective to ensure a totally neutral educational environment in order to protect students who do not wish to make their beliefs visible from the social pressure that might be exerted on them by those

⁵⁵⁴ Court of First Instance Tribunal of Nivelles, judgment no 18/17/C of 3 September 2019, https://www.unia.be/files/Documenten/Rechtspraak/Tribunal_premi%C3%A8re_instance_Nivelles_3_septembre_2019.pdf.

⁵⁵⁵ <https://www.unia.be/fr/articles/discriminations-au-logement-unia-lance-son-outil-de-testing-pour-les-candidats-locataires>.

who wish to make their beliefs visible. According to the Constitutional Court, Article 3 of the Decree of the French Community adopted on 31 March 1994 defining the neutrality of education in the French Community is not unconstitutional.

The Court decided that neutrality is a variable concept and may justify a total ban of the wearing of political, philosophical or religious symbols, if it is explicitly provided for in the internal regulation of a school of higher education. The Court also found that such a ban is not discriminatory. In addition, the Court ruled that a general ban is not mandatory to ensure neutrality. Higher education institutions may therefore also allow the wearing of signs of conviction and opt for a policy of inclusive neutrality. Unia, the equality body, took part in the case in support of the claimants. Unia regrets that the Constitutional Court did not take into account the fact that the students concerned are aged over 18. Unia also regrets that the Court did not take into account the case law of the European Court of Human Rights according to which there is no right not to be exposed to the beliefs of others.

Relevant discrimination ground(s): religion or belief

Name of the court: Labour Court of Brussels

Date of decision: 29 April 2020

Name of the parties: /

Reference number: /

Link: https://www.unia.be/files/2020_04_29_Trib._Trav._Bruxelles.pdf (in French)

Brief summary: A Public Centre for Social Welfare (*Centre Public d'Action Sociale - CPAS*) offered a woman on a social integration income a cleaning job in a nursing home. After she accepted the job, the CPAS told her that she could not wear a headscarf because of the CPAS work regulations. She refused to work without her headscarf and lost her social integration income. According to the court, the CPAS failed in its mission of social integration through employment. The court ruled that the applicant was indirectly discriminated against on the basis of her religious beliefs. The court also stated that the biases of the public service's users regarding the headscarf could not justify limiting the fundamental rights of the claimant.

Relevant discrimination ground(s): religion or belief

Name of the court: Labour Court of Brussels

Date of decision: 17 July 2020

Name of the parties: /

Reference number: /

Link: https://www.unia.be/files/Documenten/Rechtspraak/2020_07_17_Trib._Trav._Bruxelles.pdf (in French)

Brief summary: A young woman, wearing a headscarf, wanted to do an internship in a social housing company in the private sector. The company rejected her application because of its policy of neutrality. The applicant alleges direct and/or indirect discrimination on the grounds of religion and gender. The court referred the matter to the CJEU for a preliminary ruling in order to obtain information on the scope of the *Achbita*⁵⁵⁶ ruling (paragraphs 41-46 of the judgment).⁵⁵⁷

Relevant discrimination ground(s): religion or belief

Name of the court: Labour Appeal Court of Ghent

Date of decision: 12 October 2020

Name of the parties: /

Reference number: 2019/AG/55

Link: https://www.unia.be/files/Documenten/Rechtspraak/2020_10_12_Arbh._Gent.pdf (in Dutch)

⁵⁵⁶ CJEU, judgment of 14 March 2017, *Achbita*, C-157/15, ECLI: EU:C:2017:203.

⁵⁵⁷ Case C-344/20, Request for a preliminary ruling, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=232307&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=8581615>.

Brief summary: This case concerned a Muslim woman, Mrs Achbita, who worked as a permanent contract receptionist at G4S Security Services and decided, in April 2006, three years after her hiring, to wear the Islamic headscarf during the working hours. She had not held any duty to wear a specific uniform so far. However, a few days after she decided to wear the headscarf at work, she was informed that it would not be tolerated because it was contrary to the neutrality policy of the company. At that time, the neutrality policy was unwritten. During the conflict with Mrs Achbita which ended in dismissal, the work regulations of the company were also amended in order to forbid workers from wearing any visible symbol expressing their political, philosophical or religious beliefs. Refusing to remove her headscarf within the premises of the company, Mrs Achbita was laid off.

According to the Antwerp Labour Court,⁵⁵⁸ which decided the case on 23 December 2011, the employer could prohibit the wearing of any religious signs by all employees in order to preserve the neutral image of the company, even though the company did not have any clear regulation on neutrality in the workplace at the time of hiring. The applicant then brought the case before the Belgian Court of Cassation,⁵⁵⁹ which decided to submit the case to the CJEU for a preliminary ruling. The question referred to the CJEU only concerned the issue of direct discrimination. The CJEU rendered its judgment in *Achbita* on 14 March 2017.⁵⁶⁰ The Court considered that the general ban on wearing religious symbols did not constitute direct discrimination since it was applicable to all employees regardless of their religion. It nevertheless stressed that it could constitute indirect discrimination if it was demonstrated that people with a particular religion were more disadvantaged by this measure. In a ruling of 9 October 2017, the Belgian Court of Cassation⁵⁶¹ overturned the decision of the Antwerp Labour Court, except with regard to the consideration that there was no direct discrimination in the case at hand, following the interpretation of the CJEU in this respect. The case was then referred to the Ghent Labour Appeal Court⁵⁶² as the Court of Cassation is not competent to decide the case on the facts. Unia, the equality body, was still a party to the proceedings, acting in support of Mrs. Achbita.

The Ghent Labour Appeal Court had to determine whether a dismissal motivated by the wearing of a headscarf, in application of a neutrality policy of the company, was likely to constitute indirect discrimination based on religion or belief. The Ghent Labour Appeal Court ruled that the policy of general neutrality did not disadvantage Muslim women more than others. All G4S workers are required to refrain from revealing their religious, political or philosophical beliefs. In any case, the separation between state and church does not allow the court to distinguish these beliefs according to their importance. In the end, the Ghent Labour Appeal Court decided that there was no indirect discrimination because it was not demonstrated that people with a particular religion were more disadvantaged by this policy of neutrality in the company. Since no indirect distinction could be established in the absence of a particular disadvantage for a protected group, there would not even be a need for justification. Nevertheless, the court carried out the justification test (referred to as the *Bilka* test), which consists in determining whether or not an indirect distinction is justified in the pursuit of a legitimate aim, to achieve the same result. According to the Labour Appeal Court, the policy of neutrality is a legitimate aim and the measure is appropriate, necessary and proportionate. The court also held that the employer did not have to consider alternatives such as the wearing of a neutral headscarf or the transfer to another position where the employee would not be in contact with clients.

⁵⁵⁸ Labour Court of Appeal (*Arbeidshof*) of Antwerp, 23 December 2011, Judgment no. A.R. 2010/AA/453 and no. A.R. 2010/AA/467.

⁵⁵⁹ Court of Cassation, 9 March 2015, S.12.0062.N.

⁵⁶⁰ CJEU, judgment of 14 March 2017, *Achbita*, C-157/15, ECLI: EU:C:2017:203.

⁵⁶¹ Court of Cassation, 9 October 2017, S 12.062.N1.

⁵⁶² Judgment No. 2019/AG/55 of 12 October 2020 of the Labour Court of Appeal (*Arbeidshof*) of Ghent, https://www.unia.be/files/Documenten/Rechtspraak/2020_10_12_Arbh_Gent.pdf.

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: Belgium
Date: 31 December 2020

Title of the law: Act criminalising certain acts inspired by racism or xenophobia

Abbreviation: Racial Equality Federal Act

Date of adoption: 30 July 1981

Latest relevant amendment: amended by the Acts of 12 April 1994, of 7 May 1999, of 20 January 2003, of 10 May 2007 and of 2 May 2019

Entry into force: 9 June 2007 (entry into force of the Federal Act of 10 May 2007 amending the Act of 30 July 1981)

Web link: <http://www.ejustice.just.fgov.be/loi/loi.htm>

Grounds covered: Alleged race, colour, descent, ethnic or national origin and nationality
Civil, administrative and criminal law

Material scope: Access to and provision of goods and services (including private housing, unless another piece of legislation was adopted at the level of the region or the community); labour relations; social advantages; social protection; membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations; economic, social, cultural or political activities normally accessible to the public

Principal content: Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment; civil remedies, and criminal provisions

Title of the law: Act pertaining to fight against certain forms of discrimination

Abbreviation: General Antidiscrimination Federal Act

Date of adoption: 10 May 2007

Latest relevant amendment: N/A

Entry into force: 9 June 2007

Web link: <http://www.ejustice.just.fgov.be/loi/loi.htm>

Grounds covered: Age, sexual orientation, civil status, birth, property ('fortune', in French), religious or philosophical belief, actual or future state of health, disability, political opinion, trade union opinion, language, physical or genetic features and social origin
Civil administrative and criminal law

Material scope: Access to and provision of goods and services including private housing; labour relations; social advantages; social protection; membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations; economic, social, cultural or political activities normally accessible to the public

Principal content: Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment; civil remedies, and criminal provisions

Title of the law: Decree on proportionate participation in the employment market (Flemish Community/Region)

Abbreviation: /

Date of adoption: 8 May 2002

Latest relevant amendment: 10 December 2010

Entry into force: 1 October 2002

Web link: <http://www.ejustice.just.fgov.be/loi/loi.htm>

Grounds covered: All grounds of Article 19 TFEU: Sex, alleged race, ethnic origin, religion or belief, disability, age and sexual orientation

Civil, administrative and criminal law

Material scope: Access to employment, vocational training, promotion, working conditions, but only applicable to a) labour market intermediaries; b) the public authorities of the Flemish Region/Community, including the field of education; c) the other employers with

respect only to vocational training and integration of persons with disabilities in the labour market

Principal content: Prohibition of direct and indirect discrimination, instruction to discriminate and harassment

Title of the Law: Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region)

Abbreviation: The Flemish Framework ET Decree

Date of adoption: 10 July 2008

Latest relevant amendments: 18 May 2018

Entry into force: 3 October 2008

Web link: <http://www.ejustice.just.fgov.be/loi/loi.htm>

Grounds covered by the article: all grounds of Article 19 TFEU plus colour, national or ethnic descent or origin, civil status, birth, property ('fortune', in French), state of health, physical or genetic features, political opinion, language, social position, nationality, trade union opinion, gender, gender identity and gender expression, transgender, pregnancy, childbirth, motherhood

Civil, administrative and criminal law

Material scope: employment policy, healthcare, education, goods and services available to the public (i.e. housing, energy, cultural services), social advantages, and economic, social, cultural and political activities outside the private sphere

Principal content: Prohibition of direct and indirect discrimination, instruction to discriminate, harassment and sexual harassment and the failure to provide reasonable accommodation for persons with disabilities; civil remedies, and criminal provisions

Title of the law: Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (Walloon Region)

Abbreviation: The Walloon ET Decree

Date of adoption: 6 November 2008

Latest relevant amendment: 2 May 2019

Entry into force: 30 December 2008

Web link: <http://www.ejustice.just.fgov.be/loi/loi.htm>

Grounds covered: All grounds listed in Article 19 TFEU plus nationality, colour, descent, national origin, social origin or condition, civil status, family status, birth, property ('fortune', in French), political opinion, trade union opinion, language, state of health, physical or genetic features, pregnancy, childbirth, motherhood, breastfeeding, gender reassignment, gender identity and gender expression

Civil, administrative and criminal law

Material scope: Economy; employment and vocational training in the public and the private sectors; social protection, including health care; social advantages; access to and supply of goods and services available to the public and outside private and family sphere, including housing; access, participation or any exercise of an economic, cultural or political activity open to the public and statutory relationships in departments of the Walloon Government, public authorities depending on the Walloon Region, decentralised bodies (such as provinces, municipalities, etc.), public Centres for social assistance

Principal content: Prohibition of direct and indirect discrimination, instruction to discriminate, harassment and sexual harassment and the failure to provide reasonable accommodation for persons with disabilities; civil remedies, and criminal provisions

Title of the law: Ordinance aiming to combat discrimination and promote equal treatment (Region of Brussels-Capital)

Abbreviation: Brussels ET Ordinance

Date of adoption: 5 October 2017

Latest relevant amendment: N/ A

Entry into force: 29 October 2017

Web link:

<http://www.ejustice.just.fgov.be/eli/ordonnance/2017/10/05/2017031347/justel>

Grounds covered: All grounds listed in Article 19 TFEU plus political opinion, trade union opinion, civil status, birth, property ('fortune', in French), language, state of health, physical or genetic features, pregnancy, childbirth, motherhood, gender reassignment, gender identity and gender expression, nationality, colour, descent, national origin, social origin or condition

Civil, administrative and criminal law

Material scope: Social protection and advantages, access to goods and services,⁵⁶³ access to economic, social and cultural activities, affiliation to trade unions or employers' representative organisations, official documentation

Principal content: Prohibition of direct and indirect discrimination, harassment and sexual harassment and instruction to discriminate; civil remedies, and criminal provisions

Title of the law: Ordinance related to the fight against discrimination and equal treatment in the employment field (Region of Brussels-Capital)

Abbreviation: Brussels ET employment Ordinance

Date of adoption: 4 September 2008

Latest relevant amendment: N/A

Entry into force: 26 September 2008

Web link: <http://www.ejustice.just.fgov.be/loi/loi.htm>

Grounds covered: All grounds listed in Article 19 TFEU plus political opinion, trade union opinion, civil status, birth, property ('fortune', in French), language, actual or future state of health, physical or genetic features, pregnancy, childbirth, motherhood, gender reassignment, nationality, colour, descent, national or social origin

Civil, administrative and criminal law

Material scope: Employment field which covers, at that regional level, the placement of workers policies and the policies dedicated to unemployed persons

Principal content: Prohibition of direct and indirect discrimination, harassment and sexual harassment and instruction to discriminate; civil remedies, and criminal provisions

Principal content: Prohibition of direct and indirect discrimination, harassment and sexual harassment and instruction to discriminate; civil remedies, and criminal provisions

Title of the law: Framework Ordinance to ensure a diversity policy and to combat discriminations in the local Brussels civil service

Abbreviation: The Brussels Local Civil Service ET Ordinance

Date of adoption: 25 April 2019

Latest relevant amendment: N/A

Entry into force: 24 May 2019

Web link: <http://www.ejustice.just.fgov.be/loi/loi.htm>

Grounds covered: All grounds listed in Article 19 TFEU plus political opinion, trade union opinion, civil status, birth, property ('fortune', in French), language, state of health, physical or genetic features, pregnancy, childbirth, motherhood, gender reassignment, gender identity and gender expression, nationality, colour, descent, national or social origin

Civil, administrative and criminal law

Material scope: Employment field in the civil service of the Region of Brussels-Capital: access conditions, criteria selection, promotion, work conditions, including dismissals and pay

Principal content: Prohibition of direct and indirect discrimination, harassment and sexual harassment and instruction to discriminate; civil remedies, and criminal provisions

Title of the Law: Decree on equal treatment between persons in vocational training (Commission communautaire française [Cocof])

⁵⁶³ Except for housing which falls under the Brussels Housing Code, 17 July 2003, lastly modified on 21 December 2018, *OJ (Moniteur belge)*, 31 January 2019.

Abbreviation: Cocof Vocational Training ET Decree
Date of adoption: 22 March 2007
Latest relevant amendments: 5 July 2012
Entry into force: 24 January 2008
Web link: <http://www.ejustice.just.fgov.be/loi/loi.htm>
Grounds covered: All grounds (open list of suspect criteria)
Administrative and disciplinary
Material scope: Vocational training, including vocational guidance, learning, advanced vocational training and retraining
Principal content: Prohibition of direct and indirect discrimination, including instruction to discriminate and harassment

Title of the Law: Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (Commission communautaire française [Cocof])

Abbreviation: The Cocof ET Decree
Date of adoption: 9 July 2010
Latest relevant amendments: N/A
Entry into force: 3 September 2010
Web link: <http://www.ejustice.just.fgov.be/loi/loi.htm>
Grounds covered: All grounds listed in Article 19 TFEU plus civil status, birth, property ('fortune', in French), political or trade union opinion, language, actual or future state of health, physical or genetic features, pregnancy, motherhood, childbirth, gender reassignment, nationality, colour, descent, and national or social origin
Civil, administrative and criminal law
Material scope: School transport and school building management; municipal, provincial, inter-municipal and private facilities with regard to physical education, sports and outdoor life; tourism; social advancement; health policy; assistance for people; access to and supply of goods and services; access, participation and any other exercise of economic, social, cultural or political activities publicly available; labour relations within public institutions of the *Cocof*
Principal content: Prohibition of direct and indirect discrimination, instruction to discriminate, harassment and sexual harassment and the failure to provide reasonable accommodation for persons with disabilities; civil remedies, and criminal provisions

Title of the Law: Decree on the fight against certain forms of discrimination (French Community)

Abbreviation: The French Community ET Decree
Date of adoption: 12 December 2008
Latest relevant amendments: N/A
Entry into force: 23 January 2009
Web link: <http://www.ejustice.just.fgov.be/loi/loi.htm>
Grounds covered: All grounds listed in Article 19 TFEU plus nationality, colour, descent, national or social origin, pregnancy, childbirth, motherhood, gender reassignment, gender identity and gender expression, civil status, birth, property ('fortune', in French), political or trade union opinion, language, actual or future state of health, physical or genetic features
Civil, administrative and criminal law
Material scope: selection, promotion, working conditions, including dismissals and pay, in the public service of the French Community, education and vocational training, health policy, social advantages, membership of and involvement in any professional organisation funded by the French Community, access to goods and services available to the public, and access to and participation in, or any exercise of, an economic, social, cultural or political activity open to the public
Principal content: Prohibition of direct and indirect discrimination, instruction to discriminate, harassment and sexual harassment and the failure to provide reasonable accommodation for persons with disabilities; civil remedies, and criminal provisions

Title of the Law: Decree aimed at fighting certain forms of discrimination (German-speaking Community).

Abbreviation: The German Community ET Decree

Date of adoption: 19 March 2012

Latest relevant amendments: 22 February 2016

Entry into force: 15 June 2012

Web link: <http://www.ejustice.just.fgov.be/loi/loi.htm>

Grounds covered: All grounds listed in Article 19 TFEU plus nationality, colour, descent, national or social origin, pregnancy, childbirth, motherhood, parenthood, transgender, civil status, birth, property ('fortune', in French), political or trade union opinion, language, actual or future state of health, physical or genetic features

Civil, administrative and criminal law

Material scope: labour relations regarding public bodies created or funded by the German-speaking Community, education institutions and the civil service and governmental institutions; education; employment; social advantages; cultural matters; person-related matters; access to, and supply of, goods and services available to the public

Principal content: Prohibition of direct and indirect discrimination, instruction to discriminate, harassment and sexual harassment and the failure to provide reasonable accommodation for persons with disabilities; civil remedies, and criminal provisions

ANNEX 2: INTERNATIONAL INSTRUMENTS

Country: Belgium

Date: 31 December 2020

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	04.11.1950	14.06.1955	No	N/A	Yes
Protocol 12, ECHR	04.11.2000	Not ratified	N/A	N/A	N/A
Revised European Social Charter	03.05.1996	02.03.2004	No	Ratified Protocol on collective complaints on 23.6.2003	Yes
International Covenant on Civil and Political Rights	10.12.1968	21.04.1983	No	Ratified Optional Protocol on 17.5.1994	Yes
Framework Convention for the Protection of National Minorities	03.07.2001	Not ratified	N/A	N/A	N/A
International Covenant on Economic, Social and Cultural Rights	12.12.1968	21.04.1983	No	N/A	Yes
Convention on the Elimination of All Forms of Racial Discrimination	17.08.1967	07.08.1975	No	N/A	Yes
ILO Convention No. 111 on Discrimination	25.06.1958	22.03.1977	No		Yes
Convention on the Rights of the Child	16.01.1990	16.12.1991	No	N/A	Yes

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Rights of Persons with Disabilities	30.03.2007	02.07.2009	No	Ratified Optional Protocol on 2.7.2009	Yes

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