Combating sexual orientation discrimination in employment:

legislation in fifteen EU member states

Report of the *European Group of Experts on Combating Sexual Orientation Discrimination* [1]

about the implementation up to April 2004 of *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*

4 Belgium

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The contents of the Group's report do not necessarily reflect the opinion or position of national authorities or of the European Commission. The report, submitted in November 2004, aims to represent the law as it was at the end of April 2004; only occasionally have later developments been taken into account.
The full text of the report (including English versions of all 20 chapters and French versions of most chapters, plus summaries of all chapters both in English and French) will be published on the website just mentioned; links to it will be given on www.emmeijers.nl/experts.

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4.1 General legal situation

4.1.1 Constitutional protection against discrimination

In the latest consolidated version of 17 February 1994, the Belgian Constitution guarantees against discrimination in Articles 10 and 11. These provisions guarantee equality before the law and enjoyment without discrimination of the rights and freedoms recognised to all. Although neither of these provisions mention sexual orientation explicitly, this ground is certainly covered, as these provisions do not contain a closed list of prohibited grounds[3]: the Belgian Constitutional Court, called Court of Arbitration (*Cour d'arbitrage*, *Arbitragehof*) has recognised this in a limited number of cases, albeit in an implicit manner[4].

The constitutional provisions on equality and non-discrimination will be invoked between private parties mostly against legislation which, although it normally should apply to their relationship, is alleged by either of the litigants as being in violation of the constitutional principles of equality and non-discrimination. A referral procedure to the Court of Arbitration will then apply. Articles 10 and 11 of the Constitution will however be of limited use in the context of employment relationships, where individual acts of discrimination are committed. Indeed, practice offers no examples of direct horizontal effect being recognised to Articles 10 and 11 of the Constitution to challenge a discriminatory act in the context of employment, i.e. direct reliance against a private party on these provisions when the alleged discrimination does not have its origin in the application of a discriminatory legislation which could be referred to the Court of Arbitration. This may be due to the vagueness with which Art. 10 and 11 of the Constitution are formulated. Moreover, these constitutional provisions appear on the face of their formulation to be directed solely against the public authorities, so that certain doubts still exist as to the obligations they may impose directly on private persons. However, there is a doctrinal tendency to affirm that notions of private law, such as 'good faith' (*'bonne foi'*) in the execution of the employment contract, or 'abuse of right' (*'abus de droit'*) in the exercise of one's private rights, should be influenced by the values embodied in the Constitution – the influence of the German notion of *mittelbare Drittwirkung* is, of course, visible in this doctrinal position[5].

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[3] According to Art. 10 of the Constitution, 'Il n'y a dans l'Etat aucune distinction d'ordres. Les Belges sont égaux devant la loi; seuls ils sont admissibles aux emplois civils et militaires, sauf les exceptions qui peuvent être établies par une loi pour des cas particuliers'. According to Article 11, 'La jouissance des droits et libertés reconnus aux Belges doit être assurée sans discrimination. A cette fin, la loi et le décret garantissent notamment les droits et libertés des minorités idéologiques et philosophiques'. On the constitutional notions of equality and non-discrimination, see Ergec, 1995, 64.

[4] See, e.g., *Cour d'Arbitrage*, 15 July 1999, Case n° 82/99 (action for annulment of a Decree of the Flemish Region of 15 July 1997 fixing the tariff of succession rights of cohabitants (*samenwonende, personnes vivant ensemble*)). These cases may be consulted from www.arbitrage.be.

[5] See Mast, Dujardin, 1987, 510-511; Rimanque, 1981, 41; Van Oevelen, 1982, 104. Some authors favour a more complete assimilation of the relationship between private persons to the relationship between public authorities and private persons, justifying a transposition, *mutatis mutandis*, of the constitutional rules on equality and non-discrimination to private relationships: see e.g. Rauws, Schyvens, 1982, 179. The debate has been recently summarised by Tison, 2002, 697.

4.1.2 General principles and concepts of equality

The notions of equality and non-discrimination under Articles 10 and 11 of the Constitution are interpreted in conformity with the classical understanding of the requirement of non-discrimination in international law, especially as formulated by the European Court of Human Rights[6]: the rules on equality and non-discrimination of the Constitution do not exclude a difference in treatment between certain categories of persons, provided that an objective and reasonable justification may be offered for the criterion of differentiation; the existence of such a justification must be assessed in relation to the aim and the effects of the contested measure and to the nature of the principles applying to the case; the principle of equality is violated where it is established that there exists no reasonable relationship of proportionality between the means used and the aim sought to be realised[7]. More recently, the Constitutional Court has enriched its understanding of the constitutional requirement of non-discrimination by deciding that the legislator may have to offer a reasonable and objective justification for not making a distinction between – i.e., offering the same treatment to – situations which are 'essentially different'[8]. This case-law interprets the Constitution as requiring the legislator not to commit indirect discrimination against certain categories. However, this prohibition of indirect discrimination remains relatively underdeveloped and of limited invocability. The requirement to treat distinct situations differently prohibits the adoption of across-the-board rules where this would place a particular disadvantage on certain categories. But the Court of Arbitration will not systematically engage in a disparate impact analysis, to strike down legislation which may disproportionately affect certain segments of the population.

The constitutional provisions on equality and non-discrimination also have been interpreted by the Court of Arbitration as imposing certain restrictions on the possibility to introduce forms of positive action under Belgian law. Positive action, when it leads to imposing differences in treatment between categories on the basis of a suspect characteristic[9], should be seen as a restriction imposed on the right to equal treatment – the right of each individual to be judged according to his or her abilities, needs, or merits, rather than on the basis of characteristics such as sex, national origin or religious affiliation. Such a form of positive action will be considered discriminatory unless four conditions are fulfilled, which the Court of Arbitration has identified in a judgement of 27 January 1994[10]: first, such 'positive discrimination' must constitute an answer to

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[6] ECtHR, 23 July 1968, *Belgian Linguistic Case* (Series A n° 6), § 10.
[7] *Cour d'Arbitrage*, 8 July 1997, Case n° 37/97; *Cour d'Arbitrage*, 13 October 1989, Case n° 23/89, *Sprl. Biorim, Moniteur belge,* 8 November 1989, B.1.3.
[8] *Cour d'Arbitrage*, 2 April 1992, Case n° 28/92, 5.B.4.
[9] Some forms of positive action, while designed to improve the representation of certain target groups in certain spheres of social life, will not take the form of measures introducing a difference in treatment between distinct categories, on the basis of a suspect characteristic: consider, e.g., the publication of job advertisements in periodicals directed towards a particular ethnic community, or encouraging minority applications, whilst subjecting the candidates from those communities to the same selection criteria and avoiding the setting of 'quotas' or any numerical goals to be achieved in the representation of those target groups.
[10] *Cour d'Arbitrage*, 27 January 1994, Case n° 9/94, recital B.6.2. The Council of State has aligned itself with this understanding of the constitutional limits imposed on the tool of positive action: see Opinion n° 28.197/1 on the Bill which would become the Law of 7 May 1999 on equal treatment between men and women in conditions of occupation, access to employment and promotion, access to a self-employed profession, and complementary regimes of social security.

situations of manifest inequality, i.e., it must be based on a clear demonstration that, in the absence of such action, a clear imbalance between the groups will remain; second, the legislator must have identified the need to remedy such an imbalance – in other terms, a private party may not take the initiative of introducing a scheme of positive discrimination, such an initiative must be based on a legislative mandate; third, the 'corrective measures' must be of a temporary nature: as a response to a situation of demonstrated manifest imbalance, these measures must be abandoned as soon as their objective – to remedy this imbalance – is attained; fourth, these corrective measures must not reach further than is required, i.e., they must be restricted to what is strictly necessary, so that the limitation of the right to equality will remain within well-defined boundaries: the cure must not appear worse than the evil to be combated.

4.1.3 Division of legislative powers relating to discrimination in employment

The situation in Belgium is particularly complex both because of the division of competences between the Federal State, the three Communities[11] and the three Regions[12], and because of the ambiguities which remain in the case-law of the two judicial bodies – the Council of State (*Conseil d'Etat*) and the Court of Arbitration – which, in the exercise of different competences, are to interpret the rules established in accordance with the Constitution on the division of competences between the different legislative powers which coexist in the State[13]. According to the Council of State[14], even where higher-ranking norms oblige all the organs and powers of the Belgian State, the constitutional rules dividing the competences within the State will have to be complied with, with respect to whichever further initiatives are required for the implementation of those norms: although all powers within the State are bound to respect these higher norms, each power may act only in its own field of competence to specify the implications of these norms in the fields which have been attributed to that power[15].

The question of which power within the State may take measures to combat discrimination in employment must therefore be distinguished from the question of which power must respect the norms of higher rank prohibiting any discrimination in employment. These norms are to be found either in the Constitution or in international treaties to which Belgium is a party. These

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[11] French-speaking Community (*Communauté française*), Flemish Community (*Vlaamse Gemeenschap*), German-speaking Community (*deutschsprachigen Gemeinschaft*).
[12] Wallonia (Région wallonne), Flanders (Vlaams Gewest), and Brussels-Capital (Région de Bruxelles-capitale).
[13] Regions and Communities adopt decrees, called ordinances (*ordonnances*), however, with respect to the Region of Brussels-capital. The Federal legislator (Senate and House of Representatives) adopts laws.
[14] See Conseil d'État (section de législation), Avis 28.197/1 du 16 février 1999, Documents parlementaires, Chambre des Représentants, session ord. 1998-1999, n° 2057/1 and 2058/1, pp. 34-36.
[15] The Council of State has subsequently confirmed this position. See for instance, when confronted with the Bill which would later become the Decree of 6 April 1995 on the integration of persons with disabilities (*Décret du 6 avril 1995 relatif à l'intégration des personnes handicapées*), the opinion delivered on 10 August 1994: *Conseil d'État* (*section de législation*), *avis* 23.478/2/V. See also, most recently, the opinion delivered on 11 February 2004 on a preliminary version of the Decree of the German-speaking Community on the guarantee of equal treatment in the labour market: *Conseil d'Etat (section de législation), avis 36.415/2*; and the opinion delivered on 25 March 2004 on a preliminary version of the Decree of the French-speaking Community on the implementation of the principle of equal treatment: *Conseil d'Etat (section de législation), avis 36.788/2.*

treaties include, at the universal level, the International Covenant on Economic, Social and Cultural Rights[16], the International Covenant on Civil and Political Rights[17], the ILO Convention (n° 111) concerning Discrimination in Respect of Employment and Occupation of 25 June 1958[18]; at the regional level, Article 1 par. 2 of the 1961 European Social Charter[19] and Article 14 of the European Convention on Human Rights[20] should also be taken into account. All these norms are relevant to the prohibition of any form of discrimination based on sexual orientation in employment and occupation. They are binding upon the different Belgian law-makers, just as these lawmakers are bound to respect Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[21]. However, which legislative power is competent to take affirmative measures to combat discrimination beyond this general negative prohibition will depend on the sort of measure which is envisaged.

In principle, the regulation of employment contracts and of general rules of civil or criminal law remains the competence of the Federal State. Therefore, it is at the federal level that discrimination in employment will normally be dealt with. This reading is not shared by all legal commentators. Some authors argue that each entity within the State should adopt measures prohibiting discrimination for the particular employment relationships which they organise – for example, regional public administrations or schools, which are organised by the Communities. It should be noted, however, that in neither of the two opinions delivered by the Council of State on the Bill which has now become the Law of 25 February 2003 on combating discrimination[22], did it question the competence of the federal legislator to adopt such a piece of legislation, despite the very broad scope of application of the Act[23]. Of course, the Regions and Communities may adopt other measures, in the areas where they have a recognised competence to intervene, provided their initiatives do not conflict with constitutional provisions or international treaties[24]; indeed, all the federal entities - the Flemish Community/Region, the Region of Brussels-Capital, the Walloon Region, the French-Speaking Community and the German-speaking Community – have taken such initiatives to ensure the implementation of Directive 2000/78/EC[25]; but the general rules are nevertheless laid down at the federal level.

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[16] Ratified on 21 April 1983. See Art. 2 para. 2 ECESC, in combination with Art. 6.
[17] Ratified on 21 April 1983. See Article 26 ICCPR.
[18] Ratified on 22 March 1977.
[19] Ratified on 16 October 1990.
[20] Ratified on 14 June 1955. It may be concluded from the recent case-law of the European Court of Human Rights that the non-discrimination clause of Article 14 ECHR may be invoked when the alleged discrimination would penalise a person for having exercised a freedom protected under the Convention – for example, freedom of religion (*Thlimmenos v. Greece* judgement of 6 April 2000) or the freedom to live in accordance with one's sexual orientation (*Fretté v. France* judgement of 26 February 2002).
[21] OJ L 303 of 2 December 2000.
[22] Act of 25 February 2003 on combating discrimination and amending the Act of 15 February 1993 setting up the Centre for Equal Opportunities and the Fight against Racism, *Moniteur belge,* 17 March 2003.
[23] See the two opinions of the Council of State: *Conseil d'État* (*sect. légis*.), *Avis* n° 30.462/2 du 16 November 2000, Doc., *Sénat*, *sess.* 2000-2001, 21 décembre 2000, n°2-12/5; and *Conseil d'État* (*sect. légis*.), *avis* n° 32.967/2, of 18 February 2002.
[24] In cases of conflict with a federal framework legislation, the Court of Arbitration will have to give judgement as to the division of competences in the constitutional system.
[25] See for the Flemish Region/Community, which exercise their competences jointly, the Decree of 8 May 2002 on proportionate participation in the employment market (*Decreet houdende evenredige participatie*

In its opinion of 16 November 2000 on the first version of the private Bill which would lead to the Law of 25 February 2003, the Council of State summarises its position thus: *'Si l'autorité fédérale ne peut interdire directement les discriminations dans les matières qui relèvent de la compétence des communautés et des régions, une telle interdiction peut, cependant, résulter de l'exercice par l'autorité fédérale de ses compétences en matière, notamment, de droit civil, de droit commercial ou de droit du travail'*[26]. In other terms, the federal legislator may not use the need to fight against discrimination as a pretext to exercise competences which are attributed exclusively to the Regions or Communities, but in exercising his general competence in the fields of criminal law, civil law, commercial law or employment law, it may affect situations in which the Regions or Communities have the power to adopt measures.

The Special Law of 8 August 1980 on institutional reforms[27] defines (while implementing the general clauses of the Constitution[28]), the allocation of competences between the Federal State and the Regions and the Communities. With respect to the implementation of the principle of equal treatment in the fields to which Directive 2000/78/EC applies, it will be noted that the Law of 8 August 1980 specifically reserves to the federal level the competence to legislate on employment law[29]; the Regions and Communities however, have certain competences in the domain of employment policy. The Regions have received competences relating to the placing of workers and the adoption of programmes for the professional integration of the unemployed[30]; the Communities have received competences relating to vocational training[31] – although, in accordance with the possibility provided by Article 138 of the Constitution, the French-speaking Community has transferred this competence to the Walloon Region and to the French Community Commission of the Region of Brussels-Capital (*commission communautaire française*)[32]. Therefore, although the Regions may not legislate in the areas covered by federal legislation relating for instance to the protection of the remuneration of

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op de arbeidsmarkt), *Moniteur belge,* 26 July 2002. For the Region of Brussels-Capital, see the *Ordonnance relative à la gestion mixte du marché de l'emploi dans la Région de Bruxelles-Capitale, of 26 June 2003 (Moniteur belge*, 29 July 2003). For the Walloon Region, the Decree on equal treatment in employment and professional training (*Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle)* has been adopted on 27 May 2004 (*Moniteur belge*, 23 June 2004). The French-speaking Community has adopted the Decree on the implementation of the principle of equal treatment (*Décret relatif à la mise en œuvre du principe de l'égalité de traitement*) on 19 May 2004 (*Moniteur belge*, 7 June 2004). The German-speaking Community has adopted a draft Decree (*Dekretentwurf bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt*), the official publication of which in the *Moniteur belge* is imminent.

[26] *Conseil d'État* (*sect. légis*.), *Avis* n° 30.462/2 du 16 November 2000, Doc., *Sénat*, sess. 2000-2001, *21 décembre 2000*, n°2-12/5, p. 4.

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

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

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

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

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

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

employees[33] or to certain forms of harassment – legislation which, adopted at the federal level, would apply to all workers of the country –, the Walloon Region may adopt measures to prohibit discrimination in the sphere of vocational guidance and vocational training – as this falls has been attributed to it by the French-speaking Community –; measures prohibiting discrimination in the area of vocational training may also be adopted by the French Community Commission in the Region of Brussels-Capital and by the Flemish Community. . Lastly, it will be noted, that the competences allocated to the Walloon Region in the area of employment by Article 6 § 1, IX of the Special Law of 8 August 1980 on institutional reforms are exercised by the German-speaking Community for the territory of the German-speaking Region, since 1 January 2000[34].

Apart from the specific arrangements governing the competences in the field of vocational training (Communities)[35] or placement of workers (Regions), certain employment relationships as such cannot be regulated at the Federal level, despite the general competence the Federal State has preserved on employment law generally. Indeed, the rules governing the status of personnel (including those employed in the educational systems) of the Regions or Communities are the exclusive competence of the Communities[36], and may not be regulated by the Federal legislator. [37]

4.1.4 Basic structure of employment law

Employment law is characterised in Belgium by a high degree of involvement of the social partners in the negotiation of collective agreements, and in the important role these play in the regulation of the employment relationship – although, historically, this role has been variable, with a relatively important decrease of these agreements between 1977 and 1987[38]. The position of collective agreements in the Belgian legal order is defined in the Law of 5 December 1968 on collective agreements and paritary committees [*Loi sur les conventions collectives de travail et les commissions paritaires*][39]. Article 51 of this Law defines the hierarchy of sources in the employment relationship between employers and workers, identifying fourteen levels of norms, from the highest ranking (imperative legal provisions) to custom (*usages*), and defining the relationship between legislative sources (imperative or purely suppletive),

[33] See the Law of 12 April 1965 concerning the protection of the remuneration of workers.
[34] This results from the Decrees of 6 and 10 May 1999 concerning the exercise, by the German-speaking Community, of the competences of the Walloon Region in the areas of employment and excavations.
[35] It will be noted that, during the parliamentary discussions which would lead to the adoption of the Antidiscrimination Law of 25 February 2003, an amendment was proposed to explicitly refer to vocational training and vocational guidance among the areas covered, *ratione materiae*, by the Federal Law (Amendment n° 48 by Ms Schauvliege, Doc. parl., Ch., doc. 50-1578/005, p. 10). This Amendment was rejected without an explanation. As a result, the current text of the Federal Law of 25 February 2003 should be interpreted as not covering these fields, which belong to the competences of the Communities. If the Amendment had been successful, the Federal legislator would probably be considered as having legislated beyond its powers.
[36] See Article 127 of the Constitution, and for confirmation that this provision of the Constitution implies that the Communities have an exclusive competence concerning the definition of the status of the personnel in the educational system, C.A. (*Cour d'arbitrage*), Case n°2/2000, 19 June 2000, point B.3.2.
[37] Article 87 of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.
[38] Ost, 1989, 113.
[39] *Moniteur belge*, 15 January 1969, erratum *Moniteur belge*, 4 March 1969.

collective agreements (either made compulsory or not[40], and adopted either at the national level – within the National Employment Council [*Conseil national du travail*] – or within sectoral committees), the individual employment contract, and the internal regulations adopted within an undertaking [*règlement du travail*], the extent of the obligation of the employer to adopt such regulations being defined in the Law of 8 April 1965 [*Loi sur les règlements de travail*][41].

However, Article 51 of the Law of 5 December 1968 would be misunderstood if it were not read in combination with other rules[42]. In particular, although this provision locates the law in its imperative clauses (*la loi dans ses dispositions impératives*) at the summit of the hierarchy of norms regulating the employment relationship, in fact it is well established – and may be deduced from Article 9(1) of the Law of 5 December 1968 itself – that rules contained in international treaties or regulations in force in Belgium have supremacy over any national rule, be it a collective agreement – even concluded at the highest level by the social partners, i.e., within the National Employment Council, and even made compulsory – or a legislative Act[43]. Still more significant is that, notwithstanding the hierarchy set forth in Article 51 of the Law of 5 December 1968, the principle is that priority should be given to the norm – whether general (law, collective agreement, *règlement du travail*) or individual (individual employment contract) – which is most favourable to the employee.

4.1.5 Provisions on sexual orientation discrimination in employment or occupation

Because of the difficulties entailed in applying Articles 10 and 11 of the Constitution in private relationships (see 4.1.1), we have to seek elsewhere the norms which will offer the employee protection from discrimination based on his or her sexual orientation. The most recent amendment to the Collective agreement n° 38 of 6 December 1983 relating to the recruitment and selection of workers (*convention collective du travail n° 38 concernant le recrutement et la sélection de travailleurs*)[44] has constituted the first explicit prohibition of discrimination based on sexual orientation in employment[45]. This was achieved by the insertion into Article 2bis in the Collective agreement of two new grounds of prohibited discrimination, sexual orientation and disability. This change, agreed upon by the most representative organisations of employers and workers on 14 July 1999, followed the ratification of the Treaty of Amsterdam of 2 October 1997 by the Belgian law of 10 August 1998[46]: the social partners

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[40] On the possibility for the Executive to adopt a Royal Decree (*Arrêté royal*) making compulsory a collective agreement, see Articles 28-34 of the Law of 5 December 1968.
[41] *Moniteur belge*, 5 May 1965.
[42] See esp. Jamoulle, 1994, chap. I.
[43] *Cour de cassation* (Court of cassation), 27 May 1971, *Journal des tribunaux,* 1971, p. 460, *Pasicrisie,* I, p. 886.
[44] Made obligatory by the Royal Decree (Arrêté royal) of 31 August 1999 (see Arrêté royal du 31 août 1999 rendant obligatoire la Convention collective du travail n° 38quater du 14 juillet 1999, conclue au sein du Conseil national du travail, modifiant la convention collective du travail n°38 du 6 décembre 1983, modifiée par les conventions collectives du travail n° 38bis du 29 octobre 1991 et 38ter du 17 juin 1998, *Moniteur belge*, 21 September 1999). The original text of 1983 was modified by the collective agreements n° 38bis of 29 October 1991, n° 38ter of 17 July 1998 and lastly n° 38quater of 14 July 1999.
[45] On previous attempts to legislate against sexual orientation discrimination, see Defoort*,* 1997-1998, 625-635.
[46] *Moniteur belge*, 10 April 1999.

believed Article 13 EC could be directly implemented in the Collective agreement n° 38 relating to the recruitment and selection of workers, without it being necessary to wait for the adoption of legislative instruments by the Council of Ministers of the European Union.

Article 2bis of Collective agreement n° 38 now reads:

> The employer may not treat the candidates in a discriminatory fashion.
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> During the procedure[47], the employer must treat all the candidates equally. The employer may not make distinctions on the basis of personal characteristics, when such characteristics are unrelated to the function [to be performed by the prospective employee] or the nature of the undertaking, unless this is either authorised or required by law. Thus, the employer may in principle make no distinction on the basis of age, sex, civil status, medical history, race, colour, ascendancy or national or ethnic origin, political or philosophical beliefs, membership of a trade union or of another organisation, *sexual orientation* or disability.

However, except for the greater familiarity the unions' representatives may have with the text of this collective agreement, this provision has essentially become redundant since the adoption of the Law of 25 February 2003 against discrimination and amending the Law of 15 February 1993 instituting a Centre for Equality of Chances and the Fight against Racism. This law essentially seeks to implement, at the level of the Federal State, Directives 2000/43/EC and 2000/78/EC. It follows a first legislative initiative adopted by the Flemish Community (*Vlaamse Gemeenschap*) to ensure the implementation of these directives, by the adoption of the Decree of 8 May 2002 on proportionate participation in the employment market (*Decreet houdende evenredige participatie op de arbeidsmarkt*), which has been referred to above[48]. These recent initiatives are described hereunder.

4.1.6 Important case law precedents on sexual orientation discrimination in employment or occupation

None.

4.1.7 Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation

After Belgium ratified the United Nations Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965[49], it adopted the Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia (*Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*), to implement this newly contracted international obligation. In its initial version, the 1981 Law made it a criminal offence to publicly incite to discrimination against a person or a group on the basis of 'race', colour, ascendancy or national or ethnic origin. It was modified by the Law of 12 April 1994 to extend its scope of application to the provision of goods and services

[47] The term of 'procedure' refers both to the 'recruitment' (referring to all the activities performed by an employer which relate to the announcement of a vacancy) and to the 'selection' (referring to all the activities performed by an employer which relate to hiring a candidate): see Art. 2 of Collective Agreement n° 38.
[48] See note 24.
[49] U.N.T.S., n° 195. See the Belgian Law of 7 August 1975, *Moniteur belge,* 11 December 1975.

and to employment relationships without, however, extending the list of prohibited grounds of discrimination[50].

Article 2bis of the 1981 Law, as inserted by the Law of 12 April 1994, read:

> Whomever, in the field of placement, vocational training, employment offer, recruitment, execution of the employment contract or dismissal, discriminates against a person on the basis of his/her race, colour, ascendancy, origin or nationality, will be punished by the sentences provided for in Article 2. (...)[51]

Thus, this legislation still protects only against certain forms of discrimination based on 'race', colour, ascendancy or national or ethnic origin[52]. It does not protect against discrimination based on other grounds.

The Law of 7 May 1999 prohibits discrimination on grounds of sex in employment and working conditions, conditions for access to employment or promotion, conditions for access to self-employment and conditions for access to insurance complementary to social security.[53] This legislation implements Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC, and the Council Directive 97/80/EC of 15 December 1997.

4.1.8 Provisions on sexual orientation discrimination in other fields than employment and occupation

Following the example of the 1982 *Vreemdelingencirculaire* adopted in the Netherlands but taking into account also the judgment of the European Court of Justice in the case of *Ann Florence Reed*[54], Belgium had chosen to facilitate family reunification for non-married partners, whether of opposite sex or same-sex partners. A circulaire adopted on 30 September 1997 by the Ministry of the Interior[55] authorises both Belgian nationals and aliens established in Belgium or authorised to reside in Belgium for periods of more than three months, to be joined in Belgium by the person with whom they have a "stable relationship" ("relation durable"). Although it benefits also heterosexual *de facto* couples, this extension of the right to family reunification – beyond that already provided for by the Law of 15 December 1980 on the status of aliens – was explicitly justified at the time by the need to put an end to the discrimination against homosexuals, a discrimination which was seen to have its source in a definition of the right to family reunification which is based on marriage, and thus, on an institution at that time unavailable to homosexuals. Interestingly, the reasons stated for the

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[50] In the revised version of the Law of 30 July 1981, the expression 'national origin' has been replaced by the expression 'nationality', a change which apparently was intended to be purely terminological. In 2003, the legislator returned to the original notion of 'national origin' (see note 44).

[51] Art. 2bis de la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie: 'Quiconque, en matière de placement, de formation professionnelle, d'offre d'emploi, de recrutement, d'exécution du contrat de travail ou de licenciement de travailleurs, commet une discrimination à l'égard d'une personne en raison de sa race, de sa couleur, de son ascendance, de son origine ou de sa nationalité, est puni des peines prévues à l'article 2 (...)'.

[52] The Law of 20 January 2003 reinforcing the legislation against racism (*Moniteur belge*, 12 February 2003) has brought about certain terminological changes in the Law of 30 July 1981: the notion of 'race' is replaced by 'pretended race' ('*prétendue race*'), and the misleading notion of 'nationality' has been abandoned, the original notion of 'national origin' being preferred.

[53] Loi sur l'égalité de traitement entre hommes et femmes en ce qui concerne les conditions de travail, l'accès à l'emploi et aux possibilités de promotion, l'accès à une profession indépendante et les régimes complémentaires de sécurité sociale (*Moniteur belge*, 19 June 1999).

[54] Case 59/85, *Ann Florence Reed* [1986] ECR 1283 (judgement of 17 April 1986).

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

adoption of the circulaire explicitly considered that an advantage recognised to married couples is considered to be discrimination based on sexual orientation, marriage in 1997 being unavailable to homosexuals. The reasoning was similar to that which sees a difference of treatment based on pregnancy as a form of discrimination based on sex, because only women – not men – may become pregnant[56] : as only homosexuals cannot marry, any legal provision favouring marriage is to be considered as discrimination based on sexual orientation, inspite of not being directly targeted at homosexuals[57].

It will also be noted (as explained in further detail below, 4.2.7.) that the Belgian Law of 25 February 2003, the main instrument implementing Directives 2000/43/EC and 2000/78/EC in the Belgian legal order, has a wide scope of application *ratione materiae*, going beyond employment and occupation to reach all spheres of economic and social life, including in particular access to goods and services.

4.2 The prohibition of discrimination required by the Directive

4.2.1 Instrument(s) used to implement the Directive

Due to the federal organisation of the Belgian State, six legislators (the Federal State, the Flemish Region/Community, the Walloon Region, the French Community, the Region of Brussels-Capital, the German-speaking Community) would have to act in order to fully implement Directive 2000/78/EC, each being a legislator within its own sphere of competence. On 23 June 2004, the date at which this report is closed, all six legislators had acted, although one of the decrees – that adopted by the German-speaking Community – is still awaiting official publication in the *Moniteur belge*.

First, the Flemish Community has adopted a Decree of 8 May 2002 on proportionate participation in the employment market (*Decreet houdende evenredige participatie op de arbeidsmarkt)*. This Decree seeks to implement directives 2000/43/EC and 2000/78/EC with respect to the competences of the Flemish Region and Community. Heavily influenced in that respect by Canadian and Dutch precedents[58], the *Decreet houdende evenredige participatie op de*

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[56] Case C-177/88, *Dekker* [1990] ECR I-3941, Recital 12 (judgement of 8 November 1990).

[57] Such reasoning would not generally be followed in the Belgian legal system. In particular, the Court of Arbitration has considered that the legislator could legitimately favour marriage above other forms of (stable) relationships, thereby demonstrating his attachment to the institution of marriage : see C.A., Case n° 128/98 of 9 December 1998, *Arr. C.A.* 1998, p. 1565, point B.15.3. ("En traitant différemment ces catégories de personnes en matière de droits de succession, le législateur décrétal est resté cohérent avec le souci, manifesté en droit civil, de protéger une forme de vie familiale qui, à son estime, offre de meilleures chances de stabilité. Les mesures fondées sur cette conception sont compatibles avec la Constitution, étant donné que, compte tenu du régime de l'impôt sur les revenus applicable selon qu'il y a ou non mariage, elles ne sont pas disproportionnées à l'objectif légitime poursuivi"). It should be added that, neither in that case nor in other cases presented to the Court of Arbitration, was the argument raised – or, for that matter, met – that favouring marriage would constitute a direct or indirect discrimination against homosexual couples, who have no access to that institution.

[58] The Flemish legislator was inspired by the Canadian 1995 *Employment Equity Act* as well as by the Dutch Law on the Promotion of Labour Participation of Ethnic Minorities (*Wet stimulering arbeidsdeelname minderheden* (*SAMEN*)) of 29 April 1998, which improves on the previously existing Law on the Promotion of proportional labour participation of Ethnic Minorities (*Wet bevordering evenredige arbeidsdeelname allochtonen*) of 1 July 1994. The initiative was also stimulate by the desire to achieve the objectives set

arbeidsmarkt seeks to improve the representation in the labour market of target groups (*kansengroepen*)[59]. These 'target groups' are defined in general terms as all groups within the active segment of the population which are underrepresented on the labour market (*'alle groepen van de bevolking op actieve leeftijd die niet op een evenredige wijze vertegenwoordigd zijn op de arbeidsmarkt'*). The executive regulation adopted on 30 January 2004 by the Flemish government, implementing the Decree of 8 May 2002[60], because it defines the principle of proportionate participation in the labour market (*evenredige participatie in de arbeidsmarkt*) in numerical terms, as 'participation of target groups in the labour market in proportion to the composition of the active population' (*'de deelname van kansengroepen aan de arbeidsmarkt in verhouding tot de samenstelling van de beroepsbevolking'*) (Art. 2(1)), offers a general definition of 'target groups' as 'all categories of persons whose level of employment, defined as the percentage of the active population of that category who effectively work, are under the average level of employment for the total Flemish population' (*'alle categorieën van personen waarbij de werkzaamheidsgraad, zijnde het procentueel aandeel van de personen uit de betrokken categorie op beroepsactieve leeftijd die effectief werken, lager ligt dan het gemiddelde bij de totale Vlaamse beroepsbevolking'*) (Art. 2(2), al. 1). However, the Regulation of 30 January 2004 then goes on to identify certain groups which, 'in particular' (*'inzonderheid'*, *'notamment'*), fall under that definition : these groups are persons of non-EU origin and background (*"allochtonen"*), persons with a disability, workers above 45 years of age, persons who have not completed their secondary education, or persons belonging to the under-represented sex in a specific profession (Art. 2(2), al. 2). Gay, lesbian and bisexuals are not mentioned. Although the Decree of 8 May 2002 protects from discrimination – including direct discrimination, indirect discrimination, harassment and instruction to discriminate – on the basis of sexual orientation, persons of a non-heterosexual orientation therefore are not considered to form a target group for the purpose of the affirmative measures imposed to the administrations of the Flemish Community/Region, to the sector of education, and to the intermediate agencies on the employment market, with respect to the listed target groups ; in particular, they will not have to prepare an annual report on the evolution of the representation of gay, lesbian and bisexuals in their workforce[61]. This obviously is to be explained by the difficulty – pointed out by the *Sociaal-Economische Raad van Vlaanderen* (*SERV*) in an opinion it delivered on 24 April 2003 on the Decree of 8 May 2002 on proportionate participation in the labour market[62] – to quantify such a

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forth in the conclusions of the Lisbon European Council, which vowed to upgrade the level of employment within the active population up to 65 % by 2004 and 70 % by 2010.

[59] In this report, the notion of *'kansengroepen'* is translated as 'targetgroeps', which corresponds more closely to the notion used by the Flemish legislator. The French translation in the *Moniteur belge* (*Belgisch Staatsblad*) uses the expression *'groupes à potentiel'* instead of *'groupes-cible'*.

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

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

[62] SERV, Advies in verband met het ontwerp van besluit van de Vlaamse regering tot uitvoering van het decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt, Brussel, 24 April 2003.

representation, as this would only be possible by the registration of the sexual orientation of employees[63]. The *Holebifederatie* however complained during the preparation of the Regulation implementing the Decree that the exclusion of homo- and bisexuals from the list of identified 'target groups' lowered the level of protection from discrimination enjoyed by homo- and bisexuals. It stated in a letter of 5 November 2003 to the Flemish Minister of Internal Affairs, Culture, Youth and Public Service [*Ambtenarenzaken*] that although holebis may be a group difficult to measure, this should not constitute an obstacle to an active non-discrimination policy[64].

It will be noted however that although a precise identification of target groups is required to implement one of the guiding principles of the Decree – the principle of proportionate participation in the labour market (*evenredige participatie in de arbeidsmarkt*), which implies that 'integration in the labour market stands in relationship to the composition of the active population and that the proportionate representation of target groups is guaranteed', such an identification appears not to be required for the implementation of the other guiding principle of the legislation, which is the principle of equal treatment (*gelijke behandeling*). This latter principle refers to the elimination of all forms of direct or indirect discrimination or harassment (*intimidatie*) on the labour market[65]. The prohibition of discrimination is not general, but extends to a long list of prohibited grounds of discrimination: sex, 'so-called race' ('*een zogenaamd ras*'), colour, ascendancy, national or ethnic origin, sexual orientation (referred to as '*seksuele geaardheid*'), civil status, birth, wealth, age, belief or conviction, present or future state of health, disability or physical characteristic.

It should be emphasised that this *Decreet houdende evenredige participatie op de arbeidsmarkt* has a limited scope of application, as it may only touch upon fields which fall under the competences of the Flemish Region or Community. It therefore does not impose obligations on all employers, but only on[66]: persons or organisations which act as intermediates on the labour market by giving information on employment opportunities, offer vocational guidance and vocational training[67], and generally mediate between supply and demand on the labour market (*intermediaire organisaties*)[68]; public authorities of the Flemish

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[63] The Independent Authority instituted in Belgium to supervise the legislation protecting private life vis-à-vis the processing of personal data delivered an opinion on the identification of members of 'target groups' to fulfil the objectives of the Flemish Decree on proportionate participation in the labour market of 8 May 2002 (*Commission de protection de la vie privée*, Opinion of 15 March 2004, n° 032004, available on www.privacy.fgov.be). However, as homosexuals or persons having a certain sexual orientation have not been identified as 'target groups', the Opinion has not specifically at the registration of certain persons, for instance in the composition of the workforce of an undertaking, according to that criterion.

[64] Indeed, in the opinion mentioned above, *SERV* did mention that the impossibility to register persons of a particular sexual orientation 'does not constitute an obstacle to an active non-discrimination policy' (*'staat niet in de weg [van] een actief beleid […] van non-discriminatie'*).

[65] See Art. 5 § 1 of the Decreet houdende evenredige participatie op de arbeidsmarkt.

[66] See Art. 3 of the Decreet houdende evenredige participatie op de arbeidsmarkt.

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

[68] In the course of the debates in the Flemish Parliament, an Amendment was put forward, which intended to extend the scope of application of the Decree to organisations of workers or employers, when such organisations make themselves guilty of discrimination when deciding on the membership of, or involvement in, these organisations (amendment n° 91, by Mr Van Goethem). By 10 votes to 3 in the Committee of Economy, Agriculture, Employment and Tourism, the amendment was considered redundant: either these organisations of workers or employers were acting as intermediates on the labour

Region/Community, including the field of education (which is a competence of the Communities in the Belgian federal organisation); other employers and employees with respect only to vocational training and integration of persons with disabilities in the labour market (vocational training and disability policy are a competence of the Communities in the Belgian federal organisation).

Second, at the Federal level, a Law of 25 February 2003 has been adopted on the prohibition of discrimination[69]. While seeking to implement Directives 2000/43/EC and 2000/78/EC, in many respects this legislation goes beyond those Directives. *Ratione personae*, it defines broadly the categories protected against discrimination; *ratione materiae*, its extends the scope of application of the prohibition beyond the requirements of both Directives. The law protects from discrimination based not only on 'so-called race' (*'prétendue race'*), colour, ethnic or national origin, sexual orientation, age, religion or philosophical belief (*'conviction religieuse ou philosophique'*), and disability, but also based on sex[70], ascendancy, civil status, birth, wealth, current or future state of health, or a physical characteristic. Moreover, even with respect to categories other than those defined by 'race' or 'ethnic origin', the Law of 25 February 2003 purports to reach all spheres or social and economic life, instead of limiting itself to employment and occupation. Indeed, Article 2 § 4 of the Law of 25 February 2003 prohibits direct and indirect discrimination, *inter alia*, for all 'access to, participation in or other form of exercise of an economic, social, cultural or political activity accessible to the public' (*'l'accès, la participation et tout autre exercice d'une activité économique, sociale, culturelle ou politique accessible au public'*) – a formulation which is not only broad enough to cover, in combination with the other indents of this provision, the scope of application of Directive 2000/78/EC[71], but also goes beyond even the broader scope of the application of Directive 2000/43/EC[72]. It will be noted that the Law of 25

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market (intermediaire organisaties), and in that case they fall under Art. 3 of the Decree; or else, the Flemish Parliament would be acting beyond its competence, as the prohibition of discrimination in trade unions and employers' organisations is a federal competence.

[69] Loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme, *Moniteur belge*, 17 March 2003.

[70] However, the parliamentary debates led to limit the scope of application of the Law of 25 February 2003, with respect to discrimination based on sex, to the provisions of this Law which improve upon the protection already offered by the Law of 7 May 1999 (*Loi sur l'égalité de traitement entre hommes et femmes en ce qui concerne les conditions de travail, l'accès à l'emploi et aux possibilités de promotion, l'accès à une profession indépendante et les régimes complémentaires de sécurité sociale*, *Moniteur belge*, 19 June 1999): see Art. 5 of the Law of 25 February 2003. Essentially, it follows that only certain provisions of this latter legislation will apply with respect to sex-based discrimination: criminal provisions (the Law of 7 May 1999 is civil legislation) and the specific provisions which, amongst the civil provisions, relate to new methods by which discrimination may be proved (by reliance on statistical data and by 'testing').

[71] See Art. 3 of the Directive 2000/78/EC. Although the 'membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided by such organisations' (Art. 3(1), (d), of the Directive), are not explicitly covered by Article 2 § 4 of the Belgian Law of 25 February 2003, the very broad formulation which has just been referred to must be interpreted as covering this form of activity. The preparatory works of the Law leave no doubt on this question: see esp. the statement by Mme L. Onkelinx, vice-Prime Minister and Minister of Employment and Equality of Opportunities, before the Justice Committee of the Chamber of Representatives (*Documents parlementaires, Chambre des Représantants, session* 2001-2002, *Projet de loi tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme, Rapport fait au nom de la Commission de la justice par M. J. Arens et Mme K. Lalieux*, 26 July 2002, doc. 50 1578/008, p. 37).

[72] The broad scope of application *ratione materiae* of the Federal Law of 25 February 2003 implies that certain situations will be covered both by this legislation and other legislation, in particular by the Flemish Decree of 8 May 2002 and, when they will be adopted, the equivalent decrees from the other Regions or

February 2003 is now facing a constitutional challenge before the Court of Arbitration (*Cour d'Arbitrage*, *Arbitragehof*)[73]. The decision of the Court on the compatibility of the Law with the Constitution is expected for July 2004.

Thirdly, the Region of Brussels-Capital adopted an *'Ordonnance'* on 26 June 2003 (*Ordonnance relative à la gestion mixte du marché de l'emploi dans la Région de Bruxelles-Capitale*)[74]. This is much less detailed than the Flemish Decree of 8 May 2002, of which it constitutes the equivalent for the Region of Brussels-Capital. The *Ordonnance* of 26 June 2003 essentially defines which entities, and under which conditions, may act as intermediaries on the labour market. Whether public (*ORBEM*: *l'Office régional bruxellois de l'emploi*) or private (authorised private employment agencies), these intermediaries are obliged to respect a general requirement of non-discrimination. Indeed, Article 4(2) of the *Ordonnance*[75] lists as one of the obligations of these entities not to discriminate against job-seekers on the basis, inter alia, of sexual orientation or family or matrimonial status (what the Law of 25 February 2003 refers to as *'état civil'*). It should be emphasised however that the rest of the ordinance is silent about the prohibition of discrimination (although Article 4(4) states that the intermediaries on the labour market must abide by the applicable legislation concerning the protection of private life *vis-à-vis* the processing of personal data), which therefore is much less detailed on that issue than the Flemish Decree of 8 May 2002. In the remainder of this report, therefore, this ordinance will not be referred to systematically, as it has a limited scope of application and does not make any significant contribution to our understanding of the means Belgium has chosen to implement the vaguer or more ambiguous terms of the Directive.

Forthly, on 26 April 2004, the Council of the German-speaking Community (*Rat der Deutschsprachigen Gemeinschaft*) adopted the draft Decree proposed for the implementation, with respect to the competences of the Community, of Directive 2000/43/EC, Directive 2000/78/EC, and Directive 2002/73/EC[76]. This draft Decree (*Dekretentwurf bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt*) was originally adopted on 26 November 2003, and submitted to the Council of State which delivered its opinion on 1 February 2004. This opinion led to important changes being brought to the original proposal. The

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Communities. It is the understanding of the author that, in situations where the Flemish Decree of 8 May 2002 overlaps with the Federal Law of 25 February 2003, the individual alleging to be a victim of discrimination should be able to invoke the provision which offers the highest level of protection. As both instruments are relevant to the understanding of the implementation of Directive 2000/78/EC in the Belgian legal order, in what follows, the commentary will consider both instruments.

[73] Register n° 2780 and n° 2783 of the Court. The actions for annulment are lodged respectively by four parliamentarians of the extreme-right Vlaams Blok party and by Mr Matthias Storme.

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

[75] The French text of the provision reads: 'ne pas pratiquer à l'encontre des chercheurs d'emploi de discrimination fondée sur la race, la couleur, le sexe, l'orientation sexuelle, la langue, la religion, les opinions politiques, ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance, le statut matrimonial ou familial, l'appartenance à une organisation de travailleurs, ou tout autre forme de discrimination telle que l'âge ou le handicap. Par dérogation à l'alinéa précédent, des actions positives au besoin de certains chercheurs d'emploi appartenant à un groupe à risques sont toutefois autorisées par le Gouvernement'.

[76] Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002, amending Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269 of 5.10.2002, p. 15.

proposed Decree[77], the adoption and ensuing publication of which in the official journal are imminent at the time of writing, seeks to implement these directives with respect to the bodies or persons who fall under the powers of the German-speaking Community. Therefore, *ratione personae*, the Decree applies to the administration of that Community, to the personnel of the educational system of the Community, to the intermediaries (*zwischengeschalteten Dienstleister*) with respect to the services they offer, to employers with respect to the provision to persons with disabilities of the reasonable accommodation (*angemessenen Vorkehrungen*) prescribed by Article 13 of the Decree (Article 3). Article 4 of the Decree defines its scope of application *ratione materiae*. The Decree is to apply in particular to vocational guidance, professional counselling, vocational training and retraining (*Berufsorientierung, der Berufsberatung, beruflichen Aus- und Weiterbildung, Umschulung, Berufsbegleitung, Arbeitsvermittlung und des Zugangs zur Bildung*).

As it seeks to realise the principle of equal treatment in its limited scope of application, the proposed Decree imposes a general prohibition of discrimination, however it does not provide for positive action actions such as, for example, the preparation of diversity plans and annual reports which are prescribed by the Flemish Decree of 8 May 2002 and the implementation Executive Regulation adopted on 30 January 2004 by the Flemish government.

Fifthly, the French-speaking Community adopted the Decree on the implementation of the principle of equal treatment (*Décret relatif à la mise en œuvre du principe de l'égalité de traitement*) on 19 May 2004[78]. This text prohibits direct and indirect discrimination, including the instruction to discriminate, 1° against public servants of the administration of the French-speaking Community, 2° against the personnel of certain public interest organs depending of the Community, 3° at all levels of education in the French-speaking Community, and 4° with respect to the *Centre hospitalier universitaire de Liège*, which depends of the Community (article 3 § 1). It extends the prohibition of discrimination to the associations subsidised or otherwise recognised by the French-speaking Community (article 3 § 2). The decree specifies that it applies in the domains covered by the competences of the French-speaking Community, as defined in the Belgian Constitution and the Special Law of 9 August 1980 on institutional reforms.

Finally, on 27 May 2004, the Walloon Region has adopted a Decree on equal treatment in employment and professional training (*Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle)*[79]. This scope of application of this Decree is limited to the competences of the Walloon Region, including those attributed to it by the French-speaking Community in 1993[80] in

[77] The last document which could be consulted in the preparation of the report is doc. n°166, *Sitzungsperiode* 2003-2004, discussed within the *Rat der Deutschsprachigen Gemeinschaft* on 26 April 2004. **Addendum:** It became the Decree on guaranteeing equal treatment in the labour market, of 17 May 2004 (*Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt*). Entry into force: 13 August 2004.
[78] *Moniteur belge*, 7 June 2004.
[79] *Moniteur belge,* 23 June 2004.
[80] See Article 3, 4°, of the Decree of 19 July 1993 attributing the exercise of certain competences of the French-speaking Community to the Walloon Region and the French Community Commission (*Décret attribuant l'exercice de certaines compétences de la Communauté française à la Région wallonne et à la Commission communautaire française*), *Moniteur belge*, 10 September 1993.

the area of vocational training : under Articles 8 and 9 therefore, the prohibition of discrimination it contains applies to vocational guidance, socio-professional integration, the placement of workers, the allocation of aids for the promotion of employment, and vocational training, in both the public and the private sectors.

4.2.2 Concept of sexual orientation (art. 1 Directive)

Neither the Federal Law of 25 February 2003, nor the instruments adopted at regional or Community levels, describe the notion of sexual orientation (*'seksuele geaardheid'* in the Flemish Decree). However, although neither the Federal Law of 25 February 2003 nor the regional or Community instruments referred to above prohibit discrimination in a general manner (i.e., whichever the ground on which the discrimination is practised) although the Decree adopted on 19 May 2004 by the French-speaking Community constitutes an exception in this regard[81] –, any interpretation of those instruments should be based on a broad understanding of the notion of prohibited discrimination, as the intent of both legislators was to cover the largest spectrum of discriminatory practices as possible. Therefore, 'sexual orientation' should be read as covering both sexual preference or inclination and sexual activity (heterosexual, homosexual, bisexual), sexual identity (the 'coming out' about one's heterosexuality, homosexuality, or bisexuality), being in a same-sex or different-sex relationship, or even perceived sexual orientation.

4.2.3 Direct discrimination (art. 2(2)(a) Directive)

All the legislative instruments adopted to implement directives 2000/43/EC and 2000/78/EC prohibit direct discrimination. However, an important difference of approach exists between the Flemish *Decreet houdende evenredige participatie op de arbeidsmarkt,* the *Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt* proposed for the German-speaking Community, the Decree on the implementation of the principle of equal treatment (*Décret relatif à la mise en œuvre du principe de l'égalité de traitement*) of the French-speaking Community, the Decree on equal treatment in employment and professional training of the Walloon Region – on the one hand – and the Federal Law of 25 February 2003 on the other hand. The regional and Community instruments define direct discrimination in accordance with the Directives, as instances where 'one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any [prohibited] ground' (Article 2(2)(a) of the Directive)[82]. The Ordinance of the

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[81] Article 2 § 1, 1° of the Decree defines the principle of equal treatment as ' absence de toute discrimination directe ou indirecte fondée sur des motifs tels que la prétendue race, l'origine ethnique, la religion ou les convictions, le handicap, l'âge ou l'orientation sexuelle' (Décret du 19 mai 2004 *relatif à la mise en oeuvre du principe de l'égalité de traitement*, *Moniteur belge*, 7 June 2004). The expression 'tels que' indicates that the list of prohibited grounds of discrimination is not seen as exhaustive, but simply exemplative. This reading is confirmed in the travaux préparatoires of the Decree.

[82] See Article 2, 8°, of the Flemish Decree of 8 May 2002, this definition of direct discrimination: 'wanneer iemand ongunstiger wordt of is behandeld dan een ander in een vergelijkbare situatie op grond van (...) seksuele geaardheid (...)'. The Decree of the Walloon Region defines direct discrimination as 'tout traitement réservé à une personne se produisant de manière moins favorable qu'il ne l'est, ne l'a été ou ne le serait pour une autre personne placée dans une situation comparable' (article 4 al. 2), which is in accordance with the French text of Directive 2000/78/EC. See also Article 2 § 1, 2°, of the Decree on the implementation of the principle of equal treatment (*Décret relatif à la mise en œuvre du principe de l'égalité de traitement*) of the French-speaking Community.

Region of Brussels-Capital of 26 June 2003 (*Ordonnance relative à la gestion mixte du marché de l'emploi dans la Région de Bruxelles-Capitale*), prohibits discrimination in the areas and with respect to the persons it applies to, but offers no definition of discrimination. As to the Federal Law of 25 February 2003, it states in Art. 2(2) that

> *Il y a discrimination directe si une différence de traitement* qui manque de justification objective et raisonnable *est directement fondée sur (...) l'orientation sexuelle, l'état civil (...)*[83].

However, Article 2(5) of the Law of 25 February 2003 states that a differential treatment will only be justified in employment and occupation – i.e., within the scope of application of Directive 2000/78/EC – 'where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'. This wording reproduces that of Article 4(1) of Directive 2000/78/EC (occupational requirements). It ensures that, despite the difference in formulation between the Belgian Law and the Directive – the former admitting of an objective and reasonable justification being offered for a difference in treatment, the latter excluding in principle such a justification –, there is no contradiction between the two instruments[84].

4.2.4 Indirect discrimination (art. 2(2)(b) Directive)

The regional and Community instruments are also generally closer to the Directives they seek to implement than the Federal legislation. Thus, under the Flemish *Decreet houdende evenredige participatie op de arbeidsmarkt*, indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons belonging to certain protected categories at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary: Article 2(2)(b) of Directives 2000/43/EC and 2000/78/EC have been simply reproduced in Article 2 of the Decree, which defines the notion of indirect discrimination. Similarly, the Decree which is to be adopted for the German-speaking Community (*Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt*) contains a definition of 'indirect

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[83] My emphasis.

[84] On the reasons for the introduction for this clause, which the Minister presented as simply confirmative of the intent of the of the draft Bill, see *Documents parlementaires, Chambre des Représantants, session* 2001-2002, *Projet de loi tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme, Rapport fait au nom de la Commission de la justice par M. J. Arens et Mme K. Lalieux*, 26 July 2002, doc. 50 1578/008, pp. 40-41. On its terms at least, the precision offered by Article 2(5) of the Law of 25 February 2003 does not extend to membership of, and involvement in, trade unions or professional organisations (see n. 52 above): indeed, it only refers to access to employment, working conditions, and nomination in public functions, and not to the broader question of 'access to, participation in or other form of exercise of an economic, social, cultural or political activity accessible to the public'. But the obligation under which Belgian courts are to apply national law in conformity with the requirements of European Community Law (Case C-106/89, *Marleasing SA* [1990] European Court Reports I-4135 (recital 9); with respect to the interpretation of national rules which were adopted with the purpose of implementing a directive, see alerady Case 14/83, *S. von Colson and E. Kamann* [1984] European Court Reports 1891; and Case 79/83, *D. Harz* [1990] European Court Reports 1921) will probably compensate for this apparent contradiction, and exclude any justification of a less favourable treatment imposed on grounds of sexual orientation with respect to participation in trade unions or professional organisations.

discrimination' which replicates precisely that of the formulation in German of the Framework Directive, Article 2(2)(b) of which seems to be more protective than in its English formulation. Article 2 of the *Dekret* defines indirect discrimination to occur where an apparently neutral provision, criterion or practice 'could' (compare with the expression 'would' in the English version of the Framework Directive; the French version uses the expression *'est susceptible de'*), put a person having, i.e., a particular sexual orientation (*'einer bestimmten sexuellen Ausrichtung'*) at a particular disadvantage compared with other persons, unless the measure is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (*'…gegenüber anderen Personen in besonderer Weise benachteiligen können […]es sein denn diese Bestimmungen, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt, wobei die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sein müssen'*). Article 2 § 1, 3°, of the Decree on the implementation of the principle of equal treatment (*Décret relatif à la mise en œuvre du principe de l'égalité de traitement*) of the French-speaking Community also reproduces the wording of the Directive, thus containing the requirement of necessity. By way of contrast, Article 2(2) of the Federal Law of 25 February 2003 is more loosely worded: in particular, it omits an explicit reference to the principle of necessity, which identifies the relationship between the aim of the suspect provision, criterion or practice and the suspect measure which seeks to fulfil the aim[85]. The same remark can be made about the definition of 'indirect discrimination' offered in Article 4 al. 3 of the *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted by the Walloon Region. The omission in the Federal Law and in the Decree adopted by the Walloon Region may be of little practical consequence, as the notion of 'reasonable' justification implicitly refers to a requirement of proportionality and as the judge will seek to conform his or her interpretation of Article 2(2) of the Law of 25 February 2003 or Article 4 of the Walloon Decree to the definition of indirect discrimination contained in the directives this legislation sought to implement. It is regrettable, however, that this provision of the Federal Law[86] does not refer to the legitimacy of the aim pursued by the measure alleged to be constitutive of an indirect discrimination.

4.2.5 Prohibition and concept of harassment (art. 2(3) Directive)

Both the Federal Law of 25 February 2003 and the Decree proposed for the German-speaking Community identify harassment (*harcèlement*, *pesterijen*[87]*, Belästigung* in the original German-speaking version of the Decree proposed for

[85] According to Article 2(2) of the Law of 25 February 2003, indirect discrimination exists 'lorsqu'une disposition, un critère ou une pratique apparemment neutre a en tant que tel un résultat dommageable (schadelijke weerslag) pour des personnes auxquelles s'applique un des motifs de discrimination visés (...), à moins que cette disposition, ce critère ou cette pratique ne repose sur une justification objective et raisonnable'.

[86] The *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted by the Walloon Region does contain the requirement that the apparently neutral measure which imposes a particular disadvantage on the members of a protected category by justified by the realisation of a legitimate objective.

[87] During the discussion held within the Chamber of Representatives, an amendment was suggested to retain the terminology of the Directives, and substitue the Dutch *'intimidatie'* for *'pesterijen'* (amendment n° 136 of Ms F. Moerman). The author of the amendment was convinced, however, by the argument that in another Belgian legislation dealing with harassment (Law of 11 June 2002 on moral and sexual harassment at work), the term of *'pesterijen*' was retained in the Flemish version.

the German-speaking Community) as a form of discrimination, and define the notion in strict conformity with the Directives[88] – although only the Decree proposed for the German-speaking Community explicitly assimilates harassment as a form of *direct* discrimination[89]. The Flemish *Decreet houdende evenredige participatie op de arbeidsmarkt* of 8 May 2002 also refers to harassment, however, after having offered a definition of harassment (*intimidatie*) which closely replicates the wording of the Directives[90], it then states that '[T]he principle of equal treatment implies the absence of any form of direct or indirect discrimination or of harassment in the employment market' (*'Het beginsel van gelijke behandeling houdt de afwezigheid van elke vorm van directe of indirecte discriminatie of intimidatie op de arbeidsmarkt in'*)[91].

In the *Decreet houdende evenredige participatie op de arbeidsmarkt*, therefore, the concept of harassment remains analytically separate from that of discrimination. This categorisation could be of more than purely conceptual importance. In particular, Article 5(2) of the Flemish Decree presents a long list of (13) forms of conduct which are prohibited, but the definitions of these prohibitions systematically refer to conduct which may lead to discrimination, thereby seemingly excluding 'harassment' from the forms of conduct which the Decree formally prohibits. Article 9 of the Decree, which concerns the institution of an authority which should promote proportionate participation (*evenredige participatie*) and equal treatment (*gelijke behandeling*), the two guiding principles of the Decree, mentions that such an authority will have the competence, in particular, to assist victims of discrimination in filing their complaints: should this be read as excluding assistance to victims of harassment, which the Decree distinguishes from discrimination per se? More worrisome perhaps, Article 11 of the Decree provides that those who commit discrimination may be sentenced to a prison sentence and/or to the payment of a fee: would it not be in contradiction with the principle of strict interpretation of criminal provisions to extend this clause to acts of harassment? For these reasons, and because of the difficulties of interpretation it could create in the future, the choice to present harassment as a violation of the principle of equal treatment but as distinct from either direct or indirect discrimination may be contested.

The usefulness of including harassment amongst the forms of discrimination prohibited under the legislative instruments implementing Directives 2000/43/EC and 2000/78/EC has been questioned by the legislative section of the Council of State, in the second opinion it gave on the draft Bill, when it was pending before the Chamber of Representatives[92]. The Council of State noted that Article 442bis of the Penal Code, introduced by the Law of 30 October 1998, already criminalises harassment in general[93]. It also remarked that, under Article 11 of the Law of 25 February 2003, when harassment (as defined under

[88] See Article 2(6) of the Law.
[89] See Article 5(2) of the Dekretentwurf bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt.
[90] See Article 2, 11°, of the Decree.
[91] Article 5(1), 2°, of the Decree.
[92] See *Conseil d'État* (*sect. légis*.), *Avis n°32.967/2 du 4 février 2002*, *Doc*. *Ch*., *sess*. 2001-2002, 18 février 2002, doc. 50 1578/002, p. 7.
[93] Article 442bis of the Penal Code refers to 'Quiconque aura harcelé une personne alors qu'il savait ou aurait dû savoir qu'il affecterait gravement par ce comportement la tranquillité de la personne visée'.

Article 442bis of the Penal Code) is committed with a discriminatory purpose – i.e., when it appears to be a 'hate crime', motivated by hostility towards a person because of a particular characteristic suspected as being held by the victim – the penalties may be doubled[94]. At last, at a time when the Bill which was to become the Law of 25 February 2003 was still under discussion in Parliament, a Law of 11 June 2002 on the protection against violence and moral or sexual harassment at work inserted a new Chapter Vbis (*'Dispositions spécifiques concernant la violence et le harcèlement moral ou sexuel au travail'*) in a Law of 4 August 1996 (*'Loi du 4 août 1996 relative au bien-être des travailleurs lors de l'exécution de leur travail'*), again with a similar object[95]. Therefore, although in conformity with the Directives it sought to implement, the inclusion of the notion of harassment in the definition of discrimination in the Federal Law of 25 February 2003 is the source of a certain redundancy. Of course, the inclusion of the prohibition of harassment in the Law of 25 February 2003 would ensure that a civil action may be lodged against the harasser, with the possibility of a shift of the burden of proof under Article 19(3) of the Law. However, Art. 32undecies of the Law of 4 August 1996, inserted in that Law by the Law of 11 June 2002, provides in similar terms for such a reversal of the burden of proof[96]. In fact, the coexistence of the notion of harassment in the Federal Law of 25 February 2003 and in the Law of 4 August 1996 as amended by the Law of 11 June 2002 could create legal uncertainty, as it is obvious that harassment in the workplace would fall under both – more precisely, either – legislation. When confronted with an action by a victim alleging that harassment as occurred, which legislation should the judge apply? This choice may produce very concrete consequences. For instance, under Art. 32duodecies(7) of the Law of 4 August 1996 as amended in 2002, witnesses of the harassment are protected from forms of reprisals by the employer; there is no such protection under the Law of 25 February 2003. On the other hand, under the Law of 25 February 2003, the victim of any form of discrimination – including, presumably, harassment – may request that the judge deliver an injunction prohibiting the continuation of the discrimination (*action en cessation*), where such a possibility does not exist under the Law of 4 August 1996. But there is no clear criterion to choose between the two pieces of applicable legislation. It is unclear, for instance, which is the *lex specialis*, and which is the *lex generalis* : whilst the notion of harassment as inserted in the Law of 4 August 1996 concerns

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

[95] *Loi du 11 juin 2002 relative à la protection contre la violence et le harcèlement moral ou sexuel au travail*, *Moniteur belge*, 22 June 2002. The ground of sexual orientation is not mentioned explicitly, however article 32ter(3) of the Law of 4 August 1996 (as modified by the Law of 11 June 2002, inserting a new chapter Vbis in that Law), defines 'sexual harassment' as *'toute forme de comportement verbal, non-verbal ou corporel de nature sexuelle, dont celui qui s'en rend coupable, sait ou devrait savoir, qu'il affecte la dignité de femmes et d'hommes sur les lieux de travail'*: the reference to any form of sexual harassment affecting the dignity of men or women is broad enough to cover harassment *vis-à-vis* persons of the same sex or against homosexuals. See also, giving detailed instructions on the implementation by employers of the legislation of 11 June 2002, the 11 July 2002 *Circulaire relative à la protection des travailleurs contre la violence et le harcèlement moral ou sexuel au travail* (*Moniteur belge*, 18 July 2002).

[96] Under Art. 32undecies of the Law of 4 August 1996 (as modified by the Law of 11 June 2002, inserting a new chapter Vbis in that Law): 'Where a person having a legal interest establish before the competent court facts from which it may be presumed that there has been violence or moral or sexual harassment in employment, it shall be for the respondent to prove that there has been no such violence or moral or sexual harassment committed' (*'Lorsqu'une personne qui justifie d'un intérêt établit devant la juridiction compétente des faits qui permettent de présumer l'existence de violence ou de harcèlement moral ou sexuel au travail, la charge de la preuve qu'il n'y a pas eu de violence ou de harcèlement moral ou sexuel au travail incombe à la partie défenderesse'*).

specifically the employment relationship, which is a narrower scope of application *ratione materiae* than the Law of 25 February 2003, the notion of harassment contained in the latter legislation is on the other hand narrower, as it concerns only harassment *on grounds of one of the suspect characteristics* it identifies.

Neither the *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted by the Walloon Region on 27 May 2004, nor the *Décret relatif à la mise en œuvre du principe de l'égalité de traitement* adopted on 19 May 2004 by the French-speaking Community refer to harassment. This omission is deliberate. It is based on the idea that the prohibitions of harassment which already exist at federal level[97] should be considered sufficient, and that any further action would be redundant. Moreover, the Council of State has clearly stated its opinion that the adoption at the federal level of the Law of 4 August 1996 on the well-being of the workers in the execution of the contract of employment constituted an exercise by the federal legislator of its general competences in regulating the employment relationship, and that in principle the Regions and Communities could not legislate on the same subject-matter without exceeding their own competences[98].

4.2.6 Instruction to discriminate (art. 2(4) Directive)

At the level of the Regions and Communities, Article 2, 10°, of the Flemish Decree of 8 May 2002, Article 2(2) of the *Décret relatif à la mise en œuvre du principe de l'égalité de traitement* adopted by the French-speaking Community , Article 7 of the *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted by the Walloon Region, and Article 5(1) of the Decree adopted by the German-speaking Community (*'Die Anweisung zur direkten oder indirekten Diskriminierung ist einer direkten Diskriminierung gleichzustellen'*) provide that the instruction to discriminate should be considered an act of discrimination. Article 2(7) of the Federal Law of 25 February 2003 also replicates the wording of Article 2(4) of Directive 2000/78/EC, stating that an instruction to discriminate shall be considered to be a form of prohibited discrimination[99]. However, with respect to discrimination committed by the public servant in the exercise of his/her functions under Article 6(2) of the Law of 25 February 2003, the compliance with an order received from his/her hierarchical superior is exclusive of the criminal liability of the individual public servant who committed the discrimination: if discrimination is indeed established, only these superiors will be fined or imprisoned under the

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[97] Or for the protection of the personnel of the French-speaking Community : see esp. *the Arrêté du gouvernement de la Communauté française du 26 juillet 2000 organisant la protection des membres du personnel des services du Gouvernement de la Communauté française et de certains organismes d'intérêt public contre le harcèlement sexuel ou moral sur les lieux de travail*.

[98] See the Opinion of the section of legislation of the Council of State n° 24.143/1 of 16 March 1995, on the draft text which was later to become the Law of 4 August 1996; and, more recently, the Opinion n° 36.415/2 delivered on 11 February 2004 on a draft decree of the German-speaking Community on the guarantee of equal treatment in the employment market (*Dekretentwurf bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt*).

[99] With respect at least to the criminal offences provided for by these legislations, this solution appears to be imposed anyway by a general provision of the Penal Code – Article 67, al. 2 – according to which those who give instructions to commit a criminal offence shall be considered accomplices and, thus, criminally liable. This provision is applicable to the criminal offences defined in the Law of 25 February 2003: see Article 16 of the Law. See also, i.a., Article 15 of the *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted by the Walloon Region.

terms provided by the law. The Decrees adopted at the regional or Community levels do not comprise such a limitation.

4.2.7 Material scope of applicability of the prohibition (art. 3 Directive)

What is remarkable about the Law of 25 February 2003 is that, as it seeks to implement both Directive 2000/43/EC and Directive 2000/78/EC despite the much larger material scope of applicability of the former instrument, it resulted in extending the protection against discrimination based on a number of grounds it refers to – not only sex, 'race', colour, ascendancy, national or ethnic origin, but also sexual orientation, civil status, birth, fortune, age, religion or belief, actual or future state of health, handicap of physical characteristic – beyond the domains of employment and occupation. Indeed, the prohibition of direct and indirect discrimination extends to[100]:

a) the provision or offering to the public of goods and services;

b) access to employment or to self-employment, and working conditions, in both the private and the public sector – this includes not only conditions of remuneration, promotion and dismissal, but also membership of, and involvement in, trade unions and professional organisations (see above, note 53, in par. 4.2.1.);

c) the nomination or promotion in the public service, or the assignment of a public servant to a particular service;

d) any mention in official documents;

e) distribution, publication or public exposition of a text or sign under any other form;

f) access, participation in, and any exercise of an economic, social, cultural or political activity open to the public.

The material scope of the prohibition of discrimination formulated in the Flemish Decree of 8 May 2002 on proportionate participation in the employment market is narrower. This latter instrument, indeed, is focussed on the labour market – as its very title indicates -; moreover, although this leads to restricting, rather, its 'personal scope of applicability' (4.2.7 hereunder), it is framed to extend only to situations which fall under the competences of the Flemish Region or Community. Although Article 5(2) of the Decree contains a long list of prohibited forms of discrimination, the enumeration is, on the whole, a relatively restrictive one: the prohibition extends to access to employment (including self-

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[100] The enumeration given in the text, closely follows Article 2(4) of the Law of 25 February 2003, without reproducing it exactly. Article 2(4) reads:
'Toute discrimination directe ou indirecte est interdite, lorsqu'elle porte sur:
- la fourniture ou la mise à la disposition du public de biens et de services;
- les conditions d'accès au travail salarié, non salarié ou indépendant, y compris les critères de sélection et les conditions de recrutement, quelle que soit la branche d'activité et à tous les niveaux de la hiérarchie professionnelle, y compris en matière de promotion, les conditions d'emploi et de travail, y compris les conditions de licenciement et de rémunération, tant dans le secteur privé que public;
- la nomination ou la promotion d'un fonctionnaire ou l'affectation d'un fonctionnaire à un service;
- la mention dans une pièce officielle ou dans un procès-verbal;
- la diffusion, la publication ou l'exposition en public d'un texte, d'un avis, d'un signe ou de tout autre support comportant une discrimination;
- l'accès, la participation et tout autre exercice d'une activité économique, sociale, culturelle ou politique accessible au public'.

employment) and vocation guidance and training. With respect to the prohibited grounds listed by the Decree[101], it is prohibited

- to refer to these grounds in the description of conditions or criteria in employment intermediation, or to other criteria which could lead to discrimination on the basis of the prohibited grounds (Art. 5 § 2, 1°);
- to present certain employment opportunities as better suited to persons presenting one of the prohibited characteristics (2°);
- to impede access to placement services on the basis of justifications which, explicitly or implicitly, relate to one of the prohibited grounds of discrimination (3°);
- to mention one of the prohibited grounds in job announcements, or to allude to either of these grounds (4°);
- to use one of the prohibited grounds as an access or selection criterion for any function, in whichever sector of industry – this includes access to self-employed activities –, or to resort to conditions which could lead to discrimination on any of these grounds (5°);
- to deny or discourage access to employment on the basis of either of the prohibited grounds or on the basis of reasons which implicitly refer to such grounds (6°);
- to refer to either of the prohibited grounds in the description of conditions or criteria for access to vocational guidance, vocational training or career guidance (7°);
- in information or publicity about vocational guidance, vocational training or career guidance, to refer to these as better suited to persons defined by reference to such prohibited grounds (8°);
- to deny access to vocational guidance, vocational training or career guidance, on the basis of a prohibited ground or of reasons which implicitly refer to such ground (9°);
- to impose conditions for the award and delivery of titles, diplomas, etc., which are defined differently according to one's race, colour, etc. (10°);
- to refer to either of the prohibited grounds in the definition of working conditions or conditions of dismissal, or to refer to conditions and criteria which, although not referring explicitly to these grounds, may lead to discrimination on the basis of such grounds (11°);
- to define or to apply criteria or conditions in employment and dismissal which are based on any of the prohibited grounds (12°);
- to use techniques or tests which, in vocational guidance, vocational training, career guidance or employment intermediation, may lead to direct or indirect discrimination (13°).

[101] The prohibition of discrimination is formulated as to: sex, 'pretended race' ('*een zogenaamd ras*'), colour, ascendancy, national or ethnic origin, sexual orientation (referred to as '*seksuele geaardheid*'), civil status, birth, fortune, age, belief or conviction, present or future state of health ('*huidige or toekomstige gezondheidstoestand*'), disability or physical characteristic ('*een handicap of een fysieke eigenschap*').

It has also been mentioned (above, 4.2.1.) that the Region of Brussels-Capital adopted an *Ordonnance* on 26 June 2003 specifically seeking to ensure that public and private intermediates on the employment market will not commit discrimination on any of the mentioned grounds, including sexual orientation and matrimonial or familial situation. This *Ordonnance* has a material scope of application limited to what it calls 'employment activities' (*'activités d'emploi'*). This covers:

- the activity consisting in helping offer and demand on the employment market to meet (the intermediates in the strict sense);
- the activity of employment of interim agencies, employing persons who will be put at the disposal of other 'users' on a temporary basis;
- lastly, other services facilitating access to employment.[102]

The Decree on the implementation of the principle of equal treatment (*Décret relatif à la mise en œuvre du principe de l'égalité de traitement*) adopted by the French-speaking Community on 19 May 2004[103] prohibits direct and indirect discrimination, including the instruction to discriminate, 1° against public servants of the administration of the French-speaking Community, 2° against personnel of certain public interest organs depending on the Community, 3° at all levels of education in the French-speaking Community, and 4° with respect to the *Centre hospitalier universitaire de Liège*, which depends on the Community (article 3 § 1). It extends the prohibition of discrimination to the associations subsidised or otherwise recognised by the French-speaking Community (article 3 § 2).

The *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted by the Walloon Region has a scope of application limited to the competences of the Region in the domains of employment policies and retraining : under its Articles 8 and 9, therefore, the prohibition of discrimination applies to vocational guidance, socio-professional integration, the placement of workers, the allocation of aids for the promotion of employment, and vocational training, in both the public and the private sectors[104].

The Decree adopted by the German-speaking Community (*Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt*) extends its scope of application, *ratione personae*, to the administration of that Community, to personnel of the educational system of the Community, to intermediaries (*zwischengeschalteten Dienstleister*) with respect to the services they offer, to employers with respect to the provision to persons with disabilities of the reasonable accommodation (*angemessenen Vorkehrungen*) prescribed by

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[102] Art. 2(1), al. 3, of the Ordonnance: 'tous les autres services ayant trait à la recherche d'emploi, sans pour autant viser nécessairement à rapprocher l'offre et la demande sur le marché de l'emploi, à l'exception de la simple publication d'offres et de demandes d'emploi'.
[103] *Moniteur belge*, 7 June 2004.
[104] Under Art. 8 of the Decree adopted by the Walloon Region : *'Dans le respect de la compétence en matière d'emploi exercée par la Région, le présent décret s'applique à toute personne, tant dans le secteur public que dans le secteur privé, en ce qui concerne l'orientation professionnelle, l'insertion socioprofessionnelle, le placement des travailleurs et l'octroi d'aides à la promotion de l'emploi'. Under Art. 9 :* '*Dans le respect de la compétence en matière de recyclage et de reconversion professionnels exercée par la Région, le présent décret s'applique à toute personne, tant dans le secteur public que dans le secteur privé, en ce qui concerne l'insertion socioprofessionnelle et la formation professionnelle, y compris la validation des compétences*'.

Article 13 of the Decree (Article 3). Article 4 of the Decree defines its scope of application *ratione materiae*. The Decree is to apply in particular to vocational guidance, professional counselling, vocational training and retraining (*Berufsorientierung, der Berufsberatung, beruflichen Aus- und Weiterbildung, Umschulung, Berufsbegleitung, Arbeitsvermittlung und des Zugangs zur Bildung*).

Although some relationships or situations are, arguably, covered by more than one instrument, which may create problems of co-ordination we should pay careful attention to other situations which remain insufficiently covered by the existing instruments combating discrimination. In particular, it would seem that the adoption by the Region of Brussels-Capital of the Ordonnance of 26 June 2003 does not ensures that the principle of equal treatment as defined in Directives 2000/43/EC and 2000/78/EC is fully implemented. The scope of application of the prohibition of discrimination in the Ordonnance is restricted to the 'employment activities' (*'les activités d'emploi'*), defined as[105] :

> a) *tout acte d'intermédiation visant à rapprocher l'offre et la demande sur le marché de l'emploi, sans que l'intermédiaire ne devienne partie aux relations de travail susceptibles d'en découler;*
>
> b) *les services consistant à employer des travailleurs dans le but de les mettre à la disposition d'un tiers utilisateur, personne physique ou morale, qui fixe leurs tâches et en supervise l'exécution, dans le cadre du travail temporaire, du travail intérimaire et de la mise à la disposition des travailleurs auprès d'utilisateurs, en application de la loi du 24 juillet 1987 sur le travail temporaire, le travail intérimaire et la mise de travailleurs à la disposition d'utilisateurs;*
>
> c) *tous les autres services ayant trait à la recherche d'emploi, sans pour autant viser nécessairement à rapprocher l'offre et la demande sur le marché de l'emploi, à l'exception de la simple publication d'offres et de demandes d'emploi.*

Under the Belgian constitutional scheme however, the Regions have received the competence in the field of employment policy (including placement and professional integration)[106], and they alone are competent to regulate the employment relationship between the Region and the personnel of the regional administrations[107]. Moreover, since 1993, the French-speaking Community has attributed to the French Community Commission (*commission communautaire française*) the power to exercise its competences in the field of vocational training for the Region of Brussels.[108] Therefore, quite apart from the unsatisfactory protection from discrimination offered by the Ordinance of 26 June 2003 whenever it is applicable, this restricted scope of application may be problematic when compared to the scope of application of Directive 2000/78/EC, as defined in Article 2(1) of the Directive. Indeed, the *commission*

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[105] Article 2, 1, of the Ordonnance.
[106] Article 6 § 1, IX of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.
[107] See Article 87 of the *Loi spéciale de réformes institutionnelles* of 8 August 1980, cited above.
[108] See Article 3, 4°, of the Decree of 19 July 1993 attributing the exercise of certain competences of the French-speaking Community to the Walloon Region and the French Community Commission (*Décret attribuant l'exercice de certaines compétences de la Communauté française à la Région wallonne et à la Commission communautaire française*), *Moniteur belge*, 10 September 1993.

communautaire française has not acted, as it should have, to implement the principle of equal treatment in the field of vocational training. The Region of Brussels-Capital has not implemented Directive 2000/78/EC – nor, for that matter, Directive 2000/43/EC – with respect to its own personnel. At the date of writing, therefore, the implementation of the Directives adopted on the basis of Article 13 EC still remain incomplete in Belgium.

4.2.8 Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition

As mentioned above[109], the personal scope applicability of the Flemish Decree of 8 May 2002 on proportionate participation in the employment market is narrowly defined, espousing the limits of the competencies of the Regions and Communities in Belgium. This is also the case of the other instruments adopted at the levels of the Regions or Communities. As to the Federal Law of 25 February 2003, the answer is complex, because each prohibition imposed by the Law is addressed to a different set of persons. In its four first chapters, the Law contains general provisions (chap. I and II), criminal provisions (chap. III) and civil provisions (IV). Chapters III and IV, which are the operative parts of the Law, have four different kinds of addressees. The incitement to discriminate or the publicity a person gives to his or her intention to discriminate – provided the conditions of Article 444 of the Penal Code are satisfied[110] – is prohibited whether the offence is committed by a private natural or legal person[111], or by a public officer[112]. But other forms of discrimination will only constitute a criminal offence if they are committed by a public officer in the exercise of his or her official functions[113]. However, the identification of the discriminatory motive as an aggravating motive (*'motif abject'*) when certain criminal offences are committed - offences which the Penal Code defines independently[114] -, of course, will lead to the aggravation of the penalty incurred whomever is convicted for such an offence. At last, the civil provisions of the Law of 25 February 2003, contained in its Chapter IV, apply to everyone (both natural and legal persons, and including co-workers, clients, etc.), both in the private and the public sector.

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[109] See note 47 and the corresponding text.
[110] This provision identifies the conditions under which an offence may be said to have taken place in public (rather than within a closed circle of private participants).
[111] In Belgium, the Law of 4 May 1999 on the criminal liability of legal persons has made possible the assimilation of the legal person to the natural person, for the application of the Penal Code: see esp. Art. 5 of the Penal Code. The principle is that the legal person is criminally liable for all criminal offences which are intrinsically linked to the realisation of its social purpose or to the defence of its interests, as well as for the criminal offences of which it is demonstrated that they have been committed for the legal person (*pour son compte*) (Article 5, al. 1, of the Penal Code). However, this assimilation does not extend to the States or any of its parts: although criminal provisions of the Law of 25 February 2003 could be violated by a company or a non-profit organisation, they could not be violated, e.g., by a municipality having advertised a job offer containing a discriminatory criterion.
[112] On this prohibition, see Article 6(1) of the Law of 25 February 2003.
[113] Article 6(2) of the Law of 25 February 2003.
[114] See note 108.

4.3 What forms of conduct in the field of employment are prohibited as sexual orientation discrimination ?

4.3.1 Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour

None of the legislative pieces which seek to implement Directive 2000/78/EC (and also Directive 2000/43/EC) in the Belgian legal order define the concept of sexual orientation on the basis of which discrimination, whether direct or indirect, is prohibited. For the reasons stated above however, a broad understanding of the notion is probably most in line with the intent of the legislators which have acted towards ensuring this transposition: whether the individual is discriminated against because of his/her inclinations towards persons of the same sex, because of the same-sex partners he/she has in sexual relationships, because he/she is open as to his/her sexual orientation, or even because of the assumptions about his/her sexual orientation[115], discrimination should be considered to be based on sexual orientation[116] and, therefore, prohibited under the Federal Law of 25 February 2003 and the regional or Community decrees which implement Directive 2000/78/EC. Such a reading may be seen to be required in European Union law itself, insofar as, in implementing secondary Community legislation, the Member States are obliged to respect the fundamental rights which are part of the general principles of European Community Law[117].

Nothing in the Law of 25 February 2003 suggests that the only forms of discrimination which are prohibited are those based on *effective* sexual orientation, defined either as preference/inclination or as sexual activity. Rather, the focus is on the discriminatory act, not on the identity of the victim: whether or not the victim of discrimination indeed has the sexual orientation he or she is assumed to have by the author of the discrimination, such a victim should be protected from discrimination[118]. Not only is such a reading of the Law of 25 February 2003 defensible; it also presents the advantage of avoiding that the victim of a discrimination based on sexual orientation shall be obliged to renounce his or her right to preserve the confidentiality of his or her sexual orientation, to be able to invoke this legal protection.

4.3.2 Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation

See above, 4.3.1.

4.3.3 Discrimination between same-sex partners and different-sex partners

A difference in treatment between opposite-sex couples and same-sex couples, *as such*, should be considered as a direct discrimination based on sexual orientation[119]. Any advantage recognised to heterosexual couples should

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[115] On these different understandings of the 'sexual orientation' of a person, see Garneri, 1999.
[116] On this, see De Schutter, 2001, 121, note 55.
[117] See chap. 2 on the situation of European Law in this regard.
[118] Consider for example a case where a heterosexual man, A, would be fired by his employer, but managed to tape a conversation in which his employer explicitly mentions that the undertaking should get rid of 'queers such as A'.
[119] See ECtHR, 26 June 2003, *Karner v. Austria*.

therefore be extended to homosexual couples. This would be the interpretation given by the Constitutional Court of Articles 10 and 11 of the Constitution.

It is uncertain whether Framework Directive 2000/78/EC obliges the Member States to extend benefits accorded to married partners to non-married partners where marriage is unavailable to the latter because of their sexual orientation and therefore might constitute discrimination on that ground[120]. Such a question would not be raised in these terms in the Belgian legal order anyway, for two reasons. First, the recognition of same-sex marriage in Belgian law[121] – making marriage available to those with a homosexual sexual orientation – implies that benefits reserved to married couples are not denied on ground of sexual orientation: therefore, such benefits constitute neither direct nor indirect discrimination on this ground.

Second, the Flemish *Decreet houdende evenredige participatie op de arbeidsmarkt* of 8 May 2002, the *Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt* adopted by the German-speaking Community, the *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted on 27 May 2004 by the Walloon Region – at the level of the Regions and Communities –, and the Antidiscrimination Law of 25 February 2003 at the Federal level identify civil status (*'état civil'*, *'burgerlijke stand'*, *'Zivilstand'*) as a prohibited ground of discrimination, alongside sexual orientation. The Ordinance of 26 June 2003 adopted by the Region of Brussels-Capital contains a similar prohibition, although it refers to *'le statut matrimonial ou familial'* rather than 'civil status' (Article 4). The *Décret relatif à la mise en oeuvre du principe de l'égalité de traitement* adopted on 19 May 2004 by the French-speaking Community does not provide for such a prohibition, however, for the reason stated in the previous paragraph, this does not imply that homosexuals could be indirectly discriminated against by certain advantages being recognised to married couples, as they have access to marriage since 2003.

4.3.4 Discrimination on grounds of a person's association with gay/lesbian/bisexual/heterosexual individuals, events or organisations

The protection of freedom of association, both under Article 11 of the European Convention of Human Rights and under Article 27 of the Belgian Constitution, should protect the individual from the negative consequences which another private person would want to attach to his/her association with lesbians, gays or bisexuals. Some examples may be found in Belgian case law where Article 11 ECHR has been recognised has having direct horizontal effect, i.e., where it has been considered to be a norm invocable within the relationships between private parties[122]. Beyond the general protection these provisions offer to

[120] See Recital 22 of the Preamble of the Directive. In the text of the Framework Directive proposed in March 2000, it was explicitly mentioned that 'This Directive is without prejudice to national laws on marital status and does not therefore oblige Member States to extend the benefits accorded to married partners to non-married partners'.

[121] Law of 13 February 2003 opening marriage to persons of the same sex (Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil), *Moniteur belge*, 28 February 2003.

[122] See esp. with respect to transfers from one sporting association to another: *Tribunal de première instance, chambre civile Neufchâteau* (*juridiction des référés*), 25 June 1997, *Revue régionale de droit*,

persons who are discriminated against following the exercise of their right of freedom of association, it is uncertain whether either the Federal Law of 25 February 2003 or the regional or Community instruments implementing the Framework Directive 2000/78/EC will be interpreted as protecting the individual from discrimination based on such forms of association. The wording of these instruments does not make such an interpretation very plausible, unless this form of discrimination may be presented as discrimination based on the (presumed, or a supposition of) sexual orientation of the person on whom a disadvantage is imposed (see 4.3.1.).

4.3.5 Discrimination against groups, organisations, events or information of/for/on lesbians, gays or bisexuals

Groups or organisations promoting homosexuality would be protected from any form of discrimination based on the view that they express – on the viewpoint they express – by the general protections afforded to freedom of expression and freedom of association under the Belgian Constitution and the European Convention on Human Rights, in combination, if necessary, with the protection from discrimination included in these instruments. Such a detour however may not be required in all cases. It may be deduced from Article 2(7) of the Federal Law of 25 February 2003 that this legislation prohibits direct and indirect discrimination not only of an individual on one of the grounds mentioned, but also of groups or communities as such : Article 2(7), indeed, which assimilates to a form of discrimination the instruction to discriminate, alludes to such forms of discrimination (mentioning *'une discrimination à l'encontre d'une personne, d'un groupe, d'une communauté ou de leurs membres'*).

The instruments adopted by the Regions and Communities do not necessarily extend their protection from discrimination beyond individuals, to groups, organisations, or 'communities'. For instance, the *Décret relatif à la mise en oeuvre du principe de l'égalité de traitement* adopted on 19 May 2004 by the French-speaking Community adopts a narrower definition of discrimination, as limited to a form of treatment affecting a 'person'[123]. Because of its particular objective, which is to identify the conditions of recognition of intermediaries in the employment market in the Region of Brussels-Capital, the *Ordonnance* of 26 June 2003 adopted by that Region similarly does not offer a protection to groups as such. The same limitations seem to affect the *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted by the Walloon Region and Flemish *Decreet houdende evenredige participatie op de arbeidsmarkt* of 8 May 2002.

4.3.6 Discrimination on grounds of a person's refusal to answer, or answering inaccurately, a question about sexual orientation

Sexual orientation is protected as an element of the right of the individual to preserve the confidentiality of certain information – i.e., as an element of the right to respect for private life, in the most classical understanding of the

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1997, p. 326; Justice de Paix Torhout, 28 June 1994, *Journal des juges de paix*, 1997, p. 254; *Tribunal de première instance, chambre civile Turnhout*, 29 June 1993, *Rechtskundig Weekblad*, 1993-1994, p. 783; *Tribunal de première instance, chambre civile Liège* (*juridiction des référés*), 22 June 1995, *Journal de droit des jeunes*, 1995, p. 421.

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

concept as a right to secrecy. Therefore, unless there is an objective and reasonable justification for seeking from the individual information concerning his or her sexual orientation, the individual has, in principle, a right not to answer to such a question. The Belgian courts have recognised that Article 8 ECHR may be invoked in private relationships, for instance by an employee vis-à-vis his employer[124].

More specific protections may be invoked, however, by the individual. The Law of 8 December 1992 on the protection of privacy *vis-à-vis* the processing of personal data[125] protects data relating to the sexual life of the individual among sensitive data, deserving specific protection under personal data protection law. According to Article 11 of Collective Agreement n°38 relating to the recruitment and selection of workers – which has been referred to above (see 4.1.5.) – , 'questions which relate to private life will only be justified if they are relevant according to the nature of the function [postulated] and its conditions of performance' (*'des questions sur la vie privée ne se justifient que si elles sont pertinentes en raison de la nature et des conditions d'exercice de la fonction'*). The obligation to respect the private life of the candidate is imposed not only to the employer (not to seek information which is unrelated to the job performance), but also on all those who are involved in the hiring procedure (e.g., psychologists or physicians who intervene on behalf of the employer). According to Article 13 of the same instrument, which defines the duties of the candidate in the recruitment procedure, the candidate must in full good faith provide all the requested information of a professional nature, relating either to his/her educational background or professional experience, insofar as the requested information is indeed relevant ('*lorsque [ces informations] ont un rapport avec la nature et les conditions d'exercice de la fonction'*). It is hard to picture a situation where, due to the nature of the function, the sexual orientation of an individual would constitute relevant information in the context of employment. The only situation where this could occur is where an employer seeks to implement a plan providing for a form of affirmative action in favour of certain target groups, among which persons with a certain sexual orientation are covered. The guarantees which should apply in such a situation have been enumerated by the *Commission pour la protection de la vie privée*, the independent authority set up in Belgium to monitor the 1992 Law protecting the right to private life vis-à-vis the processing of personal data. In an opinion it was requested to deliver on identification of the members of 'target groups' in the system set up by the Flemish Decree of 8 May 2002 (to which, it will be

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[124] See, e.g., Appeal Ct Liège (*Chambre des mises en accusation Liège*), 22 September 1998, *Pasicrisie,* 1989, II, p. 47. The most recent confirmation may be found in a decision of the Court of Cassation concerning video surveillance in the workplace: *Cour de cassation* (2ième ch.), 27 February 2001, *C.N., E. c. Leli's World*, R.G. n° P990706N, *J.L. Moniteur belge*, 2002, n°1, p. 18. See De Hert and Gutwirth, 2001, 21; and De Hert, and Noops, 2001.

[125] Loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel (*Moniteur belge*, 18 March 1993). Initially adopted to implement the Council of Europe Convention on the protection of the individual with respect to the automatic processing of personal data of 28 January 1981 (ETS, n° 108), the 1992 Law has been revised in 1998 to ensure compliance with Directive 95/46/EC of the Parliament and 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 of 23 November 1995, p. 31): Loi du 11 décembre 1998 transposant la directive 95/46/CE du 24 octobre 1995 du Parlement européen et du Conseil relative à la protection des personnes physiques à l'égard du traitement de données à caractère personnel et à la libre circulation de ces données (*Moniteur belge*, 3 February 1999).

recalled, persons with a homosexual orientation do not belong[126]). This authority considered that the aim pursued (to measure the evolution of the representation within the workforce of members of 'target groups' in favour of whom plans were devised) was legitimate, and that treatment of certain sensitive data therefore could be considered acceptable under the relevant privacy legislation, provided that the worker concerned is given the required information and individually and explicitly gives his/her consent to the processing of such personal data[127].

However, the employer may have legitimate reasons to seek information about the civil status of the employee or candidate employee: whether or not the employee is married or has children, e.g., may be determinative for the level of remuneration or lead to the employer conferring certain social advantages linked to the employment contract. In this respect, it will be difficult to avoid inferences being made by the employer, true or false, on the basis of the answers to those questions. The protection from sexual orientation-based discrimination by the exercise of the right not to answer questions irrelevant to the nature of the job may therefore be more illusory than real.

4.3.7 Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent

In principle, an employer is prohibited under the Belgian Privacy Law of 8 December 1992 from having access to and processing the criminal record of employees or candidate employees. The only exception concerns certain professions for which the absence of any criminal record is a condition of exercise (civil servants, military, private security services, practising lawyer (*avocat*),...)[128]. A notable and recent example was a circular adopted on 1 July 2002 by the Ministry of the Interior, which provided that special certificates of good character (*certificat de bonnes moeurs*) would be issued when required for access to an activity connected with education, psychological, medical and social counselling, youth care, child protection, entertainment and supervision of minors: the circular provided that such certificates would list all the convictions and confinement orders for convictions lists in art. 354 to 360, 368, 369, 372 to 386c, 398 to 410, 422b and 422b of the Penal Code, when such offences have been committed against minors.

However, the kind of discrimination at issue is not likely to take place in Belgium, because there exists no criminal offence which could be committed by homosexuals and has no heterosexual equivalent.

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[126] See here above, 4.2.1., the general presentation of the Decree of 8 May 2002 and especially of the implementation regulation adopted on 30 January 2004 by the Flemish government (*Besluit* [*van 30 Januari 2004*] *van de Vlaamse regering tot uitvoering van het decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling*, *Belgisch Staatsblad*, 4 March 2004, p. 12050 (Regulation [of 30 January 2004] of the Flemish Government concerning the execution of the decree of 8 May 2002 on proportionate participation in the employment market concerning professional orientation, vocational training, career counselling and the action of intermediaries on the labour market)).

[127] *Commission de protection de la vie privée*, Opinion of 15 March 2004, n° 032004, available on www.privacy.fgov.be.

[128] See Article 8 of the Law of 8 December 1992, mentioned above, and the Avis d'initiative relatif au traitement de données à caractère personnel réalisé par les sociétés privées d'intérim, n°8/2002, of the Commission pour la protection de la vie privée.

4.3.8 Harassment

The Law of 11 June 2002 on the protection against violence and moral or sexual harassment at work[129] has already been mentioned (see above, 4.2.5.). This law, it will be recalled, inserts a chapter Vbis in the Law of 4 August 1996 on the well being of workers during the execution of the employment contract. On 11 July 2002, a Royal Decree (*Arrêté royal*) was adopted, detailing the obligations imposed in the Law and defining the internal procedure for the treatment of complaints[130]. These regulations protect the employee from harassment in the workplace, against harassment by any person who is in contact with the worker – not only the employer, thus, but also, for example, clients and service providers ('*toute personne qui entre en contact avec les travailleurs lors de l'exécution de leur travail, [non seulement l'employeur mais également] les clients, les fournisseurs, les prestataires de services, les élèves et les étudiants et les bénéficiaires d'allocations*'[131]). The definition of sexual harassment is close to the definition of Article 2(3) of Directive 2000/78/EC or that of Directive 2002/73/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[132]. There appears to be no reason in principle for excluding that this definition of sexual harassment may apply to sexual harassment against a person of the same sex[133]. Under Article 2(6) of the Federal Law of 25 February 2003, moreover – which, as has been mentioned, overlaps with the preceding protection –, harassment based either on sex or on sexual orientation should be considered a form of discrimination based on these grounds (see above, 4.2.5.).

4.4 Exceptions to the prohibition of discrimination

4.4.1 Objectively justified indirect disadvantages (art. 2(2)(b)(i) Directive)

The conditions under which an apparently neutral provision, criterion or practice, although putting persons of a particular sexual orientation at a particular disadvantage, could be justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, have been specified above (see 4.2.4.).

4.4.2 Measures necessary for public security, for the protection of rights of others, etc. (art. 2(5) Directive)

Article 3 of the Law of 25 February 2003 mentions that the prohibition of discrimination as laid down in that legislation does not infringe on fundamental rights and freedoms stipulated in the Constitution or international treaties (*'La*

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[129] *Loi du 11 juin 2002 relative à la protection contre la violence et le harcèlement moral ou sexuel au travail* (*Moniteur belge*, 22 June 2002).
[130] See Van Wassenhove and Brasseur, 2002, 801; Cordier, 2002, 448; Jacqmain, 2002, 6.
[131] Art. 2, 3° of the Royal Decree.
[132] OJ L 268 of 5 October 2002, p. 15.
[133] Such an interpretation may arguably defended on the basis of the Recommendation of the Commission of 27 November 1991 on the protection of the dignity of women and men in employment, and the accompanying Code of practice on sexual harassment (OJ C 27, of 4 February 1992, p. 4)(extending the notion of sexual harassment to harassment against homosexuals or 'young men').

présente loi ne porte pas atteinte à la protection et à l'exercice des libertés et des droits fondamentaux qui sont mentionnés dans la Constitution et les conventions internationales relatives aux droits de l'homme')[134]. In accordance with the reading of national law in conformity with the Directive[135] – under the *Marleasing* principle mentioned above –, this provision of the Law of 25 February 2003 should be read under the condition of necessity: only the restrictions to be protected from discrimination which are strictly necessary (and, therefore, which remain within the bounds of proportionality) for the protection of those fundamental rights mentioned in that provision will be acceptable. Even then, however, the compatibility of Article 3 of the Law of 25 February 2003 with the Directive is questionable: Article 2(5) of the Directive requires that exceptions to the principle of equal treatment are explicitly laid down in national law, which seems to exclude such a blanket justification such as that seemingly provided by Article 3 of the Law of 25 February 2003.

The instruments adopted by the Regions and Communities to further the implementation of Directive 2000/78/EC do not contain an equivalent clause. Although, as a matter of course, any application of these instruments must remain in conformity with fundamental rights protected under the Constitution and the international treaties to which Belgium is a party, no explicit exception to that effect is mentioned in these instruments.

4.4.3 Social security and similar payments (art. 3(3) Directive)

Payments made by state schemes are excluded by Article 3(3) from the scope of application of Directive 2000/78/EC. It should be noted however, that such schemes – inasmuch as they are defined by legislation or by administrative regulations – are to respect the principles of equality and non-discrimination of Articles 10 and 11 of the Constitution. The Court of Arbitration (with respect to legislative norms) and the Council of State (with respect to administrative regulations) are competent to annul these acts, if they are found not to respect these principles.

4.4.4 Occupational requirements (art. 4(1) Directive)

Under the Law of 25 February 2003, there will be 'direct discrimination' only where a difference in treatment on a suspect ground is without any objective and reasonable justification. This creates the impression that the definition of direct discrimination is open-ended and therefore could be in violation of the Directive's requirement with respect to the outlawing of any difference in treatment based on a suspect ground. However, to avoid this situation - and thus to keep in line with the requirements of the Directive -, in the field of 'employment relationships' (see par. 4.2.7)[136] Article 2(5) of the Law of 25

[134] Whether or not the Belgian Law provided explicitly such a clause, this would be a requirement of EU Law, as the national measures adopted to implement the directive must comply with the requirements of fundamental rights recognized in the EU legal order.
[135] Article 2(5) of Directive 2000/78/EC admits of measures laid down by national law which are necessary, in a democratic society, 'for the protection of the rights and freedoms of others'.
[136] This corresponds to the definition of Art. 2(4), al. 2 and 3 of the Law : 'les conditions d'accès au travail salarié, non salarié ou indépendant, y compris les critères de sélection et les conditions de recrutement, quelle que soit la branche d'activité et à tous les niveaux de la hiérarchie professionnelle, y compris en matière de promotion, les conditions d'emploi et de travail, y compris les conditions de licenciement et de

February 2003[137] states that the only 'reasonable and objective justification' which will be accepted will be that corresponding to the notion of occupational requirements as defined in Article 4(1) of the Directive.

Article 2(5) is a general formulation, the wording of which is closely inspired by Article 4(1) of the Directive, and the result of which is to exclude any form of differential treatment based on one of the grounds classified by the Belgian Law as suspect in work and employment (however this does not include vocational training and guidance e.g.), unless this difference in treatment corresponds to a genuine occupational requirement. This concerns sexual orientation as well as the other grounds enumerated by the Law of 25 February 2003.

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

While it stipulates that the prohibition to refer to certain characteristics may be removed in certain cases, Article 6 of the Flemish *Decreet houdende evenredige participatie op de arbeidsmarkt* of 8 May 2002 entrusts the Flemish government with the task to identify which positions in particular are concerned by this 'genuine occupational requirements' exception, after consulting the Flemish Socio-Economic Council. However, although one provision of the Regulation of 30 January 2004 of the Flemish Government concerning the execution of the decree of 8 May 2002 on proportionate participation in the employment market does identify in which provisions sex may constitute such a genuine occupational requirement – and thus the reference to sex be justified –, no such list is proposed in the executive regulation with respect to other grounds. Therefore, as Article 6 of the Flemish Decree of 8 May 2002 clearly seems to limit the invocability of this exception to the situations which the Executive will have identified, it would seem that, in the domains covered by the Flemish decree, the 'genuine occupational requirements' exception will have no role to play.

4.4.5 Loyalty to the organisation's ethos based on religion or belief (art. 4(2) Directive)

During the parliamentary discussions preceding the adoption of the Law of 25 February 2003, there were attempts to include in the legislation under

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rémunération, tant dans le secteur privé que public; la nomination ou la promotion d'un fonctionnaire ou l'affectation d'un fonctionnaire à un service'.

[137] Article 2(5) states: 'Dans le domaine des relations de travail (...), une différence de traitement repose sur une justification objective et raisonnable lorsque, en raison de la nature d'une activité professionnelle ou des conditions de son exercice, la caractéristique en cause constitue une exigence professionnelle essentielle et déterminante, pour autant que l'objectif soit légitime et que l'exigence soit proportionnée'.

discussion either a provision closely following the wording of Article 4(2) of the Directive[138], or even more broadly, excluding the applicability of the Law to organisations or activities which are based on religious or philosophical grounds[139]. These amendments were rejected. Although churches will not be prohibited to organise themselves by taking into account religion or belief of those involved[140], they will be restricted by the strict formulation of Article 2(5) of the Law of 25 February 2003 which, directly inspired from Article 4(1) of the Framework Directive, only tolerates differences in treatment directly based on religion or belief, in the context of employment and occupation, where this corresponds to a genuine occupational requirement.

4.4.6 Positive action (art. 7(1) Directive)

Article 4 of the Federal Law of 25 February 2003 provides that this Law does not prohibit the adoption or maintenance of measures which, to ensure full equality in practice, seek to prevent or compensate the disadvantages linked to a protected ground. However, such measures will have to conform to the relatively strict conditions imposed by the case-law of the Belgian Constitutional Court – the Court of Arbitration, the position of which on this point has been recalled previously (see 4.1.2.). As to the Flemish Decree of 8 May 2002, one of its guiding principles – the proportionate representation of target groups in employment – may be said to constitute a form of positive action, in the broad sense of this expression which is used in Directive 2000/78/EC. The *Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt* adopted by the German-speaking Community, in contrast with the Flemish Decree of 8 May 2002, does not provide for such affirmative measures as annual reports on the representation of different target groups of plans for the promotion of diversity. Nevertheless, Article 16 of the Decree does provide for the possibility of positive action measures (*'positiven Maßnahmen'*), which are defined in conformity with the definition offered by the Framework Directive. Similarly, Article 7 of the *Décret relatif à la mise en oeuvre du principe de l'égalité de traitement* adopted on 19 May 2004 by the French-speaking Community mentions that the principle of equal treatment forbids the maintenance or adoption of measures with the objective of preventing or compensating for disadvantages linked to one of the grounds protected from discrimination. Article 10 of the *Décret relatif à l'égalité de traitement en matière d'emploi et de*

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[138] See, e.g., Amendment n°53 presented within the Justice Committee of the Chamber of Representatives by Ms J. Schauvliege (*Documents parlementaires, Chambre des Représantants, session* 2001-2002, *Projet de loi tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme, Rapport fait au nom de la Commission de la justice par M. J. Arens et Mme K. Lalieux*, 26 July 2002, doc. 50 1578/008, pp. 45-47). The proposed amendment was rejected by 9 votes against it. There were 4 abstentions.

[139] See, e.g., Amendment n°78 presented within the Justice Committee of the Chamber of Representatives by Mr. Bart Laeremans (*Documents parlementaires, Chambre des Représantants, session* 2001-2002, *Projet de loi tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme, Rapport fait au nom de la Commission de la justice par M. J. Arens et Mme K. Lalieux*, 26 July 2002, doc. 50 1578/008, pp. 49-50). The proposed amendment stipulated that *'La présente loi n'est pas applicable à l'organisation interne des religions et des organisations philosophiques reconnues par le Roi ni à toutes les activités qui procèdent dune vision religieuse ou philosophique'*. It was rejected by 9 votes to 2, with 2 abstentions.

[140] In the field of education, see the Law of 29 May 1959 (*Loi modifiant certaines dispositions de la législation sur l'enseignement*), and in the recent case-law, *Conseil d'Etat*. (4th chamber), 20 December 1985, *Van Peteghem*, n°25.995, *Rechtskundig weekblad,* 1986-1987, colonne 246, with the observations of Lambrechts, 1986-1987; case also commented in De Schutter and Van Drooghenbroeck, 2000, 287.

formation professionnelle adopted by the Walloon Region on 27 May 2004 adopts a bolder formulation, as it states that the Walloon Government 'maintains and adopts' positive action provisions, 'in order to fulfil the principle of equal treatment' (*'le Gouvernement wallon maintient ou adopte, aux fins de garantir le principe d'égalité de traitement, des mesures spécifiques destinées à prévenir ou à compenser des désavantages liés un des motifs (…)'*). Of course, the formulation remains too vague to identify in this provision an obligation imposed on the Walloon executive to take action in this regard; nevertheless the formulation is worth emphasising, as it presents the adoption of positive action as a consequence of the requirement of equal treatment, rather than as an exception to that principle.

4.4.7 Exceptions beyond the Directive

The ambiguities in the definition of direct discrimination in the Federal Law of 25 February 2002 (4.2.3.) and in the treatment of the question the loyalty organisations based on religion or belief may require from their employees (4.4.5.) have already been mentioned. On both these points, the comments above have insisted that, if the implementation in Belgium of Directive 2000/78/EC is to be compatible with the requirements of the Directive, the exceptions contained in the Belgian Federal Law must be read, in as far as possible, in conformity with the prescriptions of the Directive. This is a task for judicial interpretation.

4.5 Remedies and enforcement

4.5.1 Basic structure of enforcement of employment law

In Belgium, the public interest is represented by the '*ministère public*'. In criminal matters, the *ministère public* is in charge of the prosecution. In civil matters, it intervenes when the public order so requires, or when the law specifies that his intervention is required. Before the courts competent in employment matters (*tribunaux du travail*, *Cour du travail*[141]), the public interest is represented by the *auditorat du travail*[142]. Its active role[143] is made possible through the important powers recognised to it by Article 138 al. 3 of the *Code judiciaire*: this provision, in particular, states that the *auditorat du travail* may request and obtain from the administration or public services all administrative information which is required to effectively fulfil its missions[144]. Where a penal sanction is attached to the violation of a rule in employment law[145], the auditorat will be in charge of the prosecution, representing the public interest by introducing the *action publique* against the defendant[146].

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[141] The competences of the Employment Tribunal (*tribunal du travail*) are defined at Articles 578 to 583 of the *Code judiciaire*.
[142] *Auditorat du travail* before the first instance courts in employment matters; *auditorat général* before the appeals courts.
[143] On which, see especially Kreit, in Gosseries, 1998, 647.
[144] These are investigative missions, which may be assimilated to the function exercised by the juge d'instruction in criminal cases.
[145] On the competence of the *tribunal du travail* in this respect, see Article 583 of the *Code judiciaire*.
[146] See Article 155 of the *Code judiciaire*.

Another important institution for the enforcement of employment law is the Employment Inspectorate (*inspection du travail*). The missions and competences of this body are defined in the Law of 16 November 1972.

4.5.2 Specific and/or general enforcement bodies

The Federal Law of 25 February 2003 *tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme*, seeking its inspiration from the Law of 30 July 1981 on Racism and Xenophobia, gives to the Centre for Equal Opportunities and the Fight against Racism the power to file suit on the basis of the provisions of the legislation, and thus to contribute to the preservation of legality in the name of the public interest (Art. 23, 24[147] and 31 Law of 25 February 2003). The same power is also recognised to certain organisations which have the legal personality since at least five years and the social purpose of which is the promotion of human rights and combating discrimination, and to workers' and employers' organisations which are recognised as representative under the relevant Belgian legislation (Art. 31 of the Law). Where the alleged violation has an identifiable victim (who can be a natural or legal person)[148], the power of the Centre to file suit remains however conditional upon the consent of the victim (Art. 31, *in fine*, of the Law). This mechanism appears to be in conformity with Art. 9(2) of the Framework Directive 2000/78/EC.

Drawing upon the Law of 16 November 1972 on the Employment Inspectorate which has been mentioned above, the Law of 25 February 2003 provides that the Executive will designate a body of civil servants as inspectors to monitor the compliance with the Law[149]. At the time of this writing, we have no indications yet as to how this body will function and to which extent it will represent an important enforcement mechanism for the legal prescriptions of the new Anti-Discrimination Law.

The *Decreet houdende evenredige participatie op de arbeidsmarkt* of 8 May 2002 provides for the same possibilities. The Centre for Equal Opportunities and the Fight against Racism will be competent to contribute to the enforcement of the Decree of 8 May 2002 under the same mechanisms as those available at the Federal level[150]. The Flemish Decree also provides that certain public servants will be designated to monitor compliance with the provisions of the Decree. These officers will receive extensive powers, including the right to enter

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[147] These provisions modify Articles 2 and 3 of the Law of 15 February 1993 instituting the Centre for Equal Opportunities and Fight against Racism. These modifications seek 1°) to enlarge the competences of the Centre, beyond combating discrimination based on race, color, ascendancy, ethnic or national origin, to discrimination based on the other grounds listed now in the Law of 25 February 2003; and 2°) to recognize to the Centre a right to file actions based on this latter legislation.

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

[149] Article 17 of the Law of 25 February 2003.

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

any premises – except private houses – which may be reasonably considered to be under the scope of application of the Decree, between 5 A.M. and 9 P.M.; outside these hours, such inspections may take place upon judicial authorisation, where there are reasons to suspect that the Decree has been violated; they may conduct inquiries to ensure that the Decree and its implementing regulations are fully complied with.

The *Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt* adopted by the German-speaking Community provides that the organisations having an interest, according to their founding statutes, in filing suits against violations of the Decree, may do so; representative organisations of workers and employers have the same power (Article 20). Similarly to both the Federal Antidiscrimination Law of 25 February 2003 and the Flemish Decree of 8 May 2002, these organisations are however required to act with the consent of the victim of the alleged discrimination, where such a victim exists, whether it is a legal or a natural person. The Centre for Equal Opportunities and the Fight against Racism (*Centre pour l'égalité des chances et la lutte contre le racisme* / *Centrum voor Gelijkheid van Kansen en Racismebestrijding* / *Zentrum für die Chancengleichheit und die Bekämpfung des Rassismus*) is not given any role in the surveillance of the Decree. However, Article 15 of the proposed instrument provides that the Executive of the German-speaking Community may entrust one or more organs with the promotion of the principle of equal treatment, including assistance to the victims of discrimination under the Decree and the preparation of reports and recommendations. To assign this mission to the existing Centre for Equal Opportunities and the Fight against Racism would require a protocol to be concluded between the German-speaking Community and the Federal State – of which the *Centre*, indeed, is an Agency, and from which it receives its funding[151].

The *Décret relatif à la mise en oeuvre du principe de l'égalité de traitement* adopted on 19 May 2004 by the French-speaking Community does not set up any specific enforcement body to monitor the effectiveness of its implementation. In fact, this Decree is silent about enforcement : in particular, neither Article 13(2) of Directive 2000/43/EC, nor – more importantly in the context of the present report – Article 9(2) of Directive 2000/78/EC or Article 7(2) of Directive 2000/78/EC seem to be complied with in the absence of any provision regarding the possibility for certain qualified organisations to engage in, on behalf or in support of the complainant, judicial or administrative procedures which ensure the enforcement of the guarantee of equal treatment offered by the Decree.

For the same reasons, although Article 11 of the *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted by the Walloon Region on 27 May 2004 provides for a form of supervision of the Decree by the *Institut wallon de l'évaluation, de la prospective et de la statistique* (*IWEPS*) – the *IWEPS* must essentially report on the application of the Decree and make recommendations on the basis of its evaluations –, and although the Decree contains clauses providing for a conciliation procedure (Article 12) and specifies that the Walloon Government will designate which

[151] Indeed, this is the solution which the Flemish Community has opted for, as mentioned here above, this paragraph.

services will be entrusted with the surveillance of the Decree and its implementing regulations (Article 13), these provisions appear insufficient in comparison to what is required by Article 9(2) of Directive 2000/78/EC or Article 7(2) of Directive 2000/78/EC.

4.5.3 Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)

The Law of 25 February 2003 comprises both civil and criminal provisions, following a first chapter on the definitions. Chapter III of the Law contains the criminal provisions. These will be relied on in three situations: a) where a person openly incites to hatred or discrimination, or to violence, on the basis of one of the suspect grounds enumerated by the Law, in the conditions of publicity defined by Article 444 of the Penal Code (see Art. 6(1) of the Law of 25 February 2003); b) where a public servant commits an act of discrimination, unless he/she was acting following the orders of a hierarchical superior (who then will be criminally liable) (Art. 6(2) of the Law of 25 February 2003)[152]; c) where certain offences defined in the Penal Code are committed with an 'abject motive', i.e., with a discriminatory intent (hate crimes) (Articles 7 to 14 of the Penal Code)[153]. For most of these situations – and always in situations a) and b) –, a conciliation procedure is available, under a Law of 10 February 1994 which makes mediation possible for all offences punishable by an imprisonment of at a maximum of two years[154].

Most forms of discrimination which the law prohibits will lead to a civil action lodged by the victim on the basis of Chapter IV of the Law of 25 February 2003. The Law provides for the invalidity of any contractual clauses which go against its provisions, making this law imperative (Art. 18); it gives the judge the power to deliver an injunction prohibiting the continuation of the discriminatory practice, when the aggrieved parties lodge an *action en cessation* alleging discrimination (Art. 19); it also gives the judge the power to order the cessation of that practice, under the threat of a fine (*astreinte*) (Art. 20).

The Centre for Equal Opportunities and the Fight against Racism may file a suit under the Law of 25 February 2003 (Art. 31(1) of the Law). In other terms, it may act as a private prosecutor, by lodging a complaint and requesting damages even when the victim is not identified or is the 'collectively' (for instance, where a person publicly incites to discriminate, or where it appears that an employment agency systematically commits discrimination e.g.). However, where there is an identified individual victim (either a natural or a legal person), the Centre may only file a suit with the agreement of the victim (Art. 31(3) of the Law). In the typical case of an individual person asking to the Centre to intervene in an instance of discrimination, the Centre will appraise the

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[152] See hereunder, 4.5.5.

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

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

facts given, and in most cases where the allegation is not ill founded it will seek to obtain a friendly settlement with the alleged discriminator. Because the discriminator may fear the bad publicity a suit against him for alleged discrimination would result in, he may be tempted to accept this, even in situations where it may be difficult to prove that discrimination has occurred. Where such a friendly settlement seems unsatisfactory, because the discrimination is flagrant or because the defendant does not co-operate, the Centre may propose to the victim to file a suit. If the victim consents to this, the Centre will go ahead, as the Law authorises the Centre to do. Not only the Centre for Equal Opportunities and the Fight against Racism has this competence, but also other organisations whose social aims are the fight against discrimination or the protection of human rights, and trade unions (see par. 4.5.7).

The instruments adopted by the Regions and Communities are less developed in terms of which procedures they provide for in terms of effectively upholding the right not to be discriminated against. This is at least partly to be attributed to the uncertainties which remain about their competences to adopt such measures. Although the Regions and Communities may, when adopting Decrees[155], adopt ancillary penal clauses to ensure that these Decrees are effectively sanctioned, they have in principle no competence in the criminal law, which remains a federal domain – only the Federal legislator, for instance, may amend the Penal Code. And although controversies exist on this point, it is doubtful that the Regions and Communities may, when adopting Decrees in domains falling within their competence, include provisions about the competences of courts and tribunals or the modalities under which they will exercise these competences[156]. This uncertainty – or this incapacity – has constituted a serious obstacle for the full implementation of Directives 2000/43/EC and 2000/78/EC in the Belgian legal order. In particular, it may explain the failure of the Walloon Region and the French-speaking Community to comply with Article 9(2) of Directive 2000/78/EC and Article 7(2) of Directive 2000/78/EC. Another difficulty is due, more broadly, to the different understandings which still coexist concerning the level at which the different aspects of these Directives should be implemented in the Belgian legal order. For instance, to justify the fact that when adopting the *Décret relatif à la mise en oeuvre du principe de l'égalité de traitement* on 19 May 2004, the French-speaking Community has adopted neither civil nor penal sanctions, to ensure that any violations of the principle of equal treatment will be sanctioned effectively, the authors of the text mention that such civil or penal sanctions, to the extent they are required by Directives 2000/43/EC and 2000/78/EC, are provided for in the Federal Law of 25 February 2003, which would be sufficient. The Decree of the French-speaking Community in fact contains only one provision according to which discrimination committed by an agent of the

[155] *'Ordonnances'* for the Region of Brussels-Capital.
[156] For instance, Article 18 of the Flemish *Decreet houdende evenredige participatie op de arbeidsmarkt* of 8 May 2002 intended to modify the Judicial Code (Code judiciaire), specifically Article 581 of that Code listing the situations in which the employment tribunal (*tribunal du travail*) may deliver injunctions on the basis of proceedings requesting the cessation of a practice considered *prima facie* illegal (*action en cessation*). A compromise had to be reached after the Federal Government envisaged to refer this to the Court of Arbitration (Cour d'arbitrage), considering that the Flemish Community may not on its own motion modify this text.

Community will lead to disciplinary sanctions (see Article 9). However, this reasoning is based on the presumption that the Federal Law of 25 February 2003 applies to situations which in principle fall under the competences of the Communities in the Belgian Federal system – for instance, to the relationship between the Community and its personnel in the field of education. This presumption is at least debatable, and probably incorrect.

4.5.4 Civil, penal and/or administrative sanctions (art. 17 Directive)

Focussing exclusively on the sanctions for discriminatory acts – leaving aside thus the other aspects of the Law of 25 February 2003 –, we can summarise the situation thus[157] :

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

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

For the reasons mentioned above (4.5.4.), the instruments adopted by the Regions and Communities are much less detailed on the question of sanctions.

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

The *Décret relatif à la mise en oeuvre du principe de l'égalité de traitement* adopted on 19 May 2004 by the French-speaking Community provides no sanctions, except disciplinary proceedings against the agents of the Community which have committed discrimination. The *Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt* adopted by the German-speaking Community provides for penal sanctions, but only when a person publicises his/her intention to discriminate, within the conditions provided by Article 444 of the Penal Code (Article 17 of the Decree). The *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted by the Walloon Region on 27 May 2004 provides that a person voluntarily or knowingly committing discrimination may be convicted to a prison term of eight days to a year and to a fine running from 100 to 1,000 euros, or to one of the given penal sanctions (Article 14). It also provides that in civil proceedings alleging a discrimination, the competent judge may grant an injunction to ensure that the discrimination ceases (*action en cessation*) (Article 15); the Decree refers to the procedure described in the Federal Law of 25 February 2003. The Flemish Decree of 8 May 2002 on proportionate participation in the labour market also contains a penal clause (Article 11 – the author of a discrimination may be sentenced to a prison term from one month to one year or/and to a fine; in contrast to what is provided by the Walloon Decree, the imposition of a criminal sanction is not limited to instances of intentional discrimination, but rather it covers, like in the Federal Law of 25 February 2003, all forms of prohibited discrimination, even indirect and therefore possibly unintentional). Also it provides that the competent jurisdiction may impose an order that the discrimination ceases (Article 15).

4.5.5 Natural and legal persons to whom sanctions may be applied

In principle, both civil and criminal sanctions may apply either to natural persons or to legal persons. The conditions of the criminal liability of legal persons are defined in Belgian law by the Law of 4 May 1999. However, it will be recalled that the Federal Law of 25 February 2003 – which contains both criminal and civil provisions – only criminalises discrimination *when it is committed by a public servant in that capacity* (Art. 6(2) of the Law). Private individuals only face the threat of civil actions, unless they openly incite discrimination or publicly vindicate their intention to discriminate (Art. 6(1) of the Law) – but this should be described, rather than as discrimination as such (differential treatment or indirect discrimination), as incitement to hatred or discrimination.

The natural and legal persons to whom the instruments adopted by the Regions and Communities impose obligations are defined by the limited scope of application of those instruments, which are adopted strictly within the limited sphere of competences of these entities. See 4.2.1, above.

4.5.6 Awareness among law enforcers of sexual orientation issues

To the knowledge of the author, no initiatives have been taken to improve this awareness, which is low. Much will depend on the efforts by the Centre for Equal Opportunities and the Fight against Racism to promote the Law of 25 February 2003, and the dissemination of information about the protection it affords.

4.5.7 Standing for interest groups (art. 9(2) Directive)

In the field of anti-discrimination law, it was realised that the combined action of the *ministère public*, with a competence to launch prosecutions where criminal offences are committed, and of the individual victim, who may not only seek damages by lodging a civil action claiming reparation, but also file a complaint in the hands of a *juge d'instruction* (charged with the impartial investigation of the suspected criminal offence), may not suffice. The Law of 30 July 1981 on racism and xenophobia (the origins of which are described at 4.1.7) therefore provided – what is rather exceptional in Belgian procedural law[158] – that certain associations, whose social purpose is the defence of human rights and the fight against racism and discrimination, could claim having been caused a damage because of a violation of the provisions of this legislation. Such an extension of the cognisable legal interest has an important consequence: both the inertia of the *ministère public* and the unwillingness of the victim to file a complaint by which, if he/she seeks damages, the victim obliges the juge d'instruction to commence an investigation, may be overcome, by such an association instituted as a private attorney general. Later, when the Centre for Equal Opportunities and the Fight against Racism was set up by the Law of 15 February 1993 as an agency which, although organically placed under the supervision of the Prime Minister's Services, nevertheless is functionally independent, received a similar competence in the context of the Law of 30 July 1981. The Centre pour l'égalité des chances et la lutte contre le racisme has now received competence with respect to sexual orientation, as well as all the other prohibited grounds of discrimination (see art. 31 of the Law of 25 February 2003, which therefore complies with Art. 9(2) of Directive 2000/78/EC)[159].

In addition, article 31 (n. 2°, 3° and 4°) of the Law of 25 February 2003 also provides that every entity of public utility and every association which enjoys

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[158] Indeed, the principle is that the so-called 'collective interest' asserted by an association which seeks to base its right to file a legal action on the basis of the social purpose defined in its internal statutes, will not suffice, if the rights of the association (to the protection of its property, its honour or reputation, i.e.) are not violated as such. According to the Court of cassation, if another solution were to prevail, citizens forming an association could impose on the authorities an obligation to prosecute, even in cases where the ministère public would find it not opportune to do so ('*le fait d'être constitué en établissement d'utilité publique ayant pour objectif la défense des valeurs morales, ne suffit pas à rendre la demanderesse recevable à exercer cette action civile et qu'en décider autrement permettrait toutes les intrusions dans le domaine de la répression par l'intentement d'actions civiles, en réalité factices, ayant pour effet, sinon pour but de faire sortir le ministère public de l'abstention ou (...) de lui forcer la main*' (*Cour de cassation*, 24 November 1982, *Pasicrisie*, 1983, I, p. 361, *conclusion de l'avocat géneral Velu*)). This position has been confirmed since on a number of occasions by the Court of cassation. See, most recently, *Cour de cassation*, 19 September 1996, *Revue critique de jurisprudence belge,* 1997, 105, note De Schutter, 1997).

[159] Art. 31 of the Law of 25 February 2003: '*Le Centre pour l'égalité des chances et la lutte contre le racisme peut ester en justice dans les litiges auxquels l'application de la présente loi donnerait lieu. Peuvent également ester en justice dans les litiges auxquels l'application de la présente loi donnerait lieu, lorsqu'un préjudice est porté aux fins statutaires qu'ils se sont donnés pour mission de poursuivre: 1° tout établissement d'utilité publique et toute association, jouissant de la personnalité juridique depuis au moins cinq ans à la date des faits, et se proposant par ses statuts de défendre les droits de l'homme ou de combattre la discrimination; 2° les organisations présentatives des travailleurs et des employeurs, telles qu'elles sont définies à l'article 3 de la loi du 5 décembre 1968 sur les conventions collectives de travail et les commissions paritaires; 3° les organisations représentatives au sens de la loi du 19 décembre 1974 organisant les relations entre les autorités publiques et les syndicats des agents relevant de ces autorités; 4° les organisations représentatives des travailleurs indépendants. Toutefois, lorsque la victime de l'infraction ou de la discrimination est une personne physique ou une personne morale, l'action des groupements visés aux premier et second alinéas ne sera recevable que s'ils prouvent qu'ils ont reçu l'accord de la victime*'.

legal personality of at least five years and states as its objective the defence of human rights or the fight against discrimination, as well as representative organisations of workers and employers, may file suit on the basis of this Law, although these organisations also may only do so with the agreement of the victim, if there is an identifiable victim.

The Flemish Decree of 8 May 2002 (see Article 16) and the Decree adopted by the German-speaking Community (see Article 20) have solutions similar to that of the Federal Law of 25 February 2003. The organisations which pursue the objective of protecting human rights and combating discrimination may engage in judicial actions to complain about the discriminations prohibited under these instruments, although they may only do so with the consent of the victim if the discrimination has affected a legal or natural person in particular. By way of contrast, it does not seem that the *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted by the Walloon Region on 27 May 2004, nor the *Décret relatif à la mise en oeuvre du principe de l'égalité de traitement* adopted on 19 May 2004 by the French-speaking Community, accord with Article 9(2) of Directive 2000/78/EC. Indeed, these latter instruments do not provide for any possibility by such organisations having a legally recognised interest in combating discrimination to engage in procedures in support of the victim.

4.5.8 Burden of proof of discrimination (art. 10 Directive)

Although 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 procedures[160] – the Decree remains vague as to which facts should count as weighing sufficiently to impose this switch of the burden of proof from the alleged victim to the defendant[161]. There will be, therefore, a large room for judicial interpretation: the judge will have to consider what weight should be afforded to the facts presented by the victim, and whether these facts create a presumption that discrimination may have occurred. The same remark can be made concerning the *Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt* adopted by the German-speaking Community. Article 18 of this Decree provides for the possibility of certain facts being presented to the judge leading to shifting the burden of proof of discrimination (*'Wenn diese Person vor dieser Gerichtsbarkeit Tatsachen vorbringt, die eine Diskriminierung vermuten lassen, obliegt die Beweislast der Beachtung des Gleichbehandlungsgrundsatzes der beklagten Partei'*). This possibility is excluded with respect to criminal procedures. Like in the Flemish Decree of 8 May 2002, the facts which may lead to such a consequence are not specified.

On this question, the provisions of the Federal Law of 25 February 2003 are more detailed. In the Chapter of the Law which contains the civil provisions (chap. IV – these procedural provisions are therefore not applicable in criminal procedures[162]), Article 19(3) states: *'Lorsque la victime de la discrimination ou*

[160] See Art. 10(3) of Directive 2000/78/EC.
[161] This provision simply states: 'Wanneer [the alleged victim of the discrimination] feiten aanvoert die het bestaan van een directe of indirecte discriminatie kunnen doen vermoeden, valt de bewijslast dat er geen schending van het beginsel van gelijke behandeling is, ten laste van de verweerder'.
[162] See Art. 10(3) of Directive 2000/78/EC.

un des groupements visés à l'article 31 invoque devant la juridiction compétente des faits, tels que des données statistiques ou des tests de situation, qui permettent de présumer l'existence d'une discrimination directe ou indirecte, la charge de la preuve de l'absence de discrimination incombe à la partie défendresse'. Where discrimination has occurred, the victim will seek damages in reparation, on the basis of art. 1382 *Code Civil*. However the fault which gives rise to the civil liability of the defendant will be easier to prove thanks to the shift of the burden of proof of Art. 19(3) of the Law of 25 February 2003, mentioned here above. This law in other terms enriches the protection of the victim, and will make it easier for the victim to rely on the rules of civil liability. Art. 19 mentions 'statistical data' and 'situation tests' as two examples of facts which, when put forward before a judge, could lead the judge to presume that discrimination has occurred, thus obliging the defendant to demonstrate that, contrary to that presumption, there has been no discrimination[163]. The conditions under which 'situation tests' must be performed and may be considered valid will be defined by a further executive regulation (Royal Decree). Although a number of consultations have taken place on the content of this executive regulation, both within the Ministry of Labour and Employment and within the Ministry of Justice, no draft text is available yet. These consultations seem to have highlighted the difficulty there is in pursuing simultaneously two partially incompatible objectives : first, the 'situation tests' should be strictly codified, and their methodology ascertained, to ensure that they will not lead to abuse by alleged victims of discrimination, but also to encourage the judge before which the results of such tests are presented to accept that this will result in the reversal of the burden of proof; second however, such 'situation tests' must not be too burdensome to perform, and they should remain a relatively accessible means by which a presumption of discrimination may be established.

The *Décret relatif à la mise en œuvre du principe de l'égalité de traitement* adopted by the French-speaking Community does not contain specific rules governing the proof of discrimination – a situation which is, in regard of Directive 2000/78/EC, problematic, although it is to be explained by the understanding of the French-speaking Community that all it could do in its sphere of competence was to impose obligations on the public servants of the Community, backed by the threat of disciplinary sanctions, whilst any civil or criminal sanctions of discrimination were already contained in the Federal Law of 25 February 2003. The *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted by the Walloon Region contains (in Article 17) a rule on the burden of proof, drafted in accordance with Article 10(1) of the Directive 2000/78/EC.

[163] Article 19(3) of the Law of 25 February 2003 reads; 'Lorsque la victime (...) invoque devant la juridiction compétente des faits, tels que des données statistiques ou des tests de situation, qui permettent de présumer l'existence d'une discrimination directe ou indirecte, la charge de la preuve de l'absence de discrimination incombe à la partie défenderesse'. Statistical data and situation tests are therefore merely exemplative of the kinds of facts which could be brought forward to reverse the burden of proof in discrimination cases presented in civil proceedings. The legal and methodological difficulties raised by these modes of proof se are discussed in De Schutter, 2003.

4.5.9 Burden of proof of sexual orientation

The question of the burden of proof of sexual orientation should not be distinguished from the question of the shift of the burden of proof in civil actions lodged under the Law of 25 February 2003. Before the discrimination can be presumed – thus obliging the defendant to refute the allegation that he/she has committed a discrimination – it may be necessary, depending on the circumstances, for the complainant to put forward his/her sexual orientation: for instance, where there is no apparent reason for the refusal to hire or the dismissal the person who is openly gay, a suspicion may be raised that the act of the employer is discrimination on the ground of sexual orientation.

4.5.10 Victimisation (art. 11 Directive)

Except on one relatively minor issue[164], Article 21 of the Law of 25 February 2003 and Article 12 of the Flemish Decree of 8 May 2002 are phrased in identical terms. It will therefore suffice to describe the regime laid down in the former provision. Article 21 of the Law of 25 February 2003 first states the principle that, when a complaint of discrimination or a legal action have been filed by the employee, he/she may not be dismissed unless for reasons unrelated to that complaint or that procedure. During 12 months after a complaint has been filed, or, when a legal suit has been introduced, during three months after a final decision has been adopted and the litigation thus terminated, there is a presumption that the dismissal or the unilateral modification of the employment conditions by the employer are a form of reprisal against the employee: indeed, the burden is on the employer to prove that the dismissal or the modification of the employment conditions are unrelated to the complaint made by the employee, or to the legal procedure he/she initiated. Should the employer fail to prove this, the employee or the union of which he/she is a member may request the reintegration of the employee into his previous position, or the restoration of the conditions under which he/she was previously employed. A refusal of the employer to reintegrate into the workforce the employee whose dismissal appears to have been motivated by a desire to sanction the complaint or the legal action filed by the victim, may be very costly to the employer, who may be obliged to compensate the employee either according to the prejudice effectively caused, or by paying the equivalent of six months' remuneration.

In my opinion Article 9 of Directive 2000/43/EC should be read as imposing on Member States to also ensure that employees or other persons connected to a complaint or to legal proceedings are protected from reprisal: for instance, not only the employee against whom the discrimination has been committed, but also witnesses, or members of the union which has assisted in the complaint, should be protected. Whether or not this reading also will be imposed in the context of Directive 2000/78/EC, Article 11 of which is drawn in narrower terms (referring to 'employees' instead of 'persons' having to be protected from reprisals), is uncertain. However, the wording of Article 21 of the Law of 25

[164] Comp. Article 21(5) of the Law of 25 February 2003 with Article 12(5) of the Decree of 8 May 2002. The Federal Law is more protective, to the extent that it provides that the worker may be reintegrated in his/her previous function of receive a compensation worth 6 months' salary where the competent jurisdiction has found that discrimination has occurred.

February 2003 seems too narrow to include also such a protection beyond the individual complainant. If the broader reading of the Directives is confirmed, the Belgian implementing legislation should be improved in this regard. This remark also applies to Article 12 of the Flemish Decree of 8 May 2002 although it would appear from the formulation of this provision that it cannot be excluded that, by judicial interpretation, the protection could be extended beyond the plaintiff, for instance to witnesses[165].

Neither the *Décret relatif à la mise en œuvre du principe de l'égalité de traitement* adopted by the French-speaking Community, nor the *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted by the Walloon Region, contain any provisions on reprisals. In the view of the author of this report, this is in violation with Article 11 of Directive 2000/78/EC and with Article 9 of Directive 2000/43/EC. The Decree adopted by the German-speaking Community presents the same deficiency. It should be added however that the initial version of the *Dekretentwurf bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt* (version of 26 November 2003) did contain a provision protecting the worker from reprisals (either in the form of a dismissal constituting a disguised sanction or in the form of a unilateral modification of the conditions of employment) (see Article 23 of the draft proposal : *Schutz vor einer Entlassung*). That provision was removed from the proposed Decree, in the version submitted to the discussion of the *Rat der Deutschsprachigen Gemeinschaft* on 26 April 2004, following an observation by the Council of State, made in the opinion it delivered on 11 February 2004 on the initial proposal for a Decree that legislating on this question – conditions of dismissal – may go beyond the powers of the German-speaking Community[166]. This provides a clear illustration of the difficulties the Regions and Communities may face when implementing Directives, where the limits attached to their competences are unclear, and where they risk legislating beyond their attributed powers in fulfilment of their obligations under EC Law.

4.6 Reform of existing discriminatory laws and provisions

4.6.1 Abolition of discriminatory laws (art. 16(a) Directive)

No specific action has been taken in Belgium to ensure that, according to the requirements of Article 16 of Directive 2000/78/EC, 'any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished', and 'any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers'

[165] Indeed, Article 12(1) of the Flemish Decree states that *'Wanneer een lid van het Vlaams overheids- en onderwijspersoneel, overeenkomstig de vigerende procedures, een met redenen omklede klacht heeft ingediend of een rechtsvordering instelt tot naleving van het decreet, mag de arbeidsverhouding niet beëindigd worden, noch de arbeidsvoorwaarden eenzijdig gewijzigd worden, behalve om redenen die vreemd zijn aan die klacht of aan die rechtsvordering. werknemer de omvang van de geleden schade kunnen bewijzen'* . It could be argued that reprisals against witnesses or other colleagues could not be presented as bearing no relationship to the complaint on which the suit is based, even where the reprisals are not against the victim/plaintiff him or herself.

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

and employers' organisations are, or may be, declared null and void or are amended'.

More precisely, the abolition of any existing discriminatory laws would result from such laws, when applied in particular situations, being referred to the Court of Arbitration (*Cour d'Arbitrage*), which may find that these laws violate Articles 10 or 11 of the Belgian Constitution. This possibility is provided by Article 142 of the Constitution, which offers a general definition of the powers of the Court of Arbitration, and by the Law of 6 January 1989 on the Court of Arbitration[167]. It is not specifically a result of the implementation in Belgium of Directive 2000/78/EC; it is based, rather, on the classical function of the Court of Arbitration, to which any law[168] may be referred when the jurisdiction before which it is invoked[169] suspects that it may be in violation of the equality clauses of the Constitution[170]. Such a referral leads the Court of Arbitration to examine whether such an alleged discrimination exists. If the Court arrives at the conclusion that Articles 10 or 11 of the Constitution have been violated, the law found to be discriminatory may not be applied in the case which led to the referral[171]; neither will it be applied in later cases, by other jurisdictions. Moreover, although in principle an action for the annulment of laws may only be lodged within six months of their official publication[172], after a law has been found to create an instance of discrimination in the context of a referral procedure, a new period of six months commences during which the annulment of the discriminatory legislation may be sought[173]. In other terms, despite the passage of time – and the requirement of legal stability which led the legislator to limit to six months the period during which an action for annulment may be brought against laws, decrees or ordinances after their publication –, no law is immune from being annulled when found to be discriminatory.

The question whether this is sufficient under Article 16 of the Framework Directive will depend, among other factors, on the interpretation given to Articles 10 and 11 of the Constitution, and whether this interpretation provides protection from both direct and indirect discrimination, as defined in the Directive. This report has already described that, under these provisions of the Constitution, both these forms of discrimination are prohibited, in terms broadly similar, however not identical, to those of the Directive. The Court of Arbitration considers that Articles 10 and 11 of the Constitution protect from any form of discrimination, with respect to all the rights and freedoms recognised to those

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[167] *Loi spéciale du 6 janvier 1989 sur la Cour d'arbitrage*, *Moniteur belge*, 7 January 1989. This Law has been modified on a number of occasions, the most recent substantial modification was by the Law of 9 March 2003 (*Loi spéciale modifiant la Loi spéciale du 6 janvier 1989 sur la Cour d'arbitrage*, *Moniteur belge*, 11 April 2004).

[168] This expression here is used in a generic sense, and covers all norms of legislative status: this comprises the Acts adopted at the Federal level, the Decrees adopted by the Regions and Communities, and the Ordinances adopted by the Region of Brussels-Capital. Altogether, there are six 'legislators' in the Belgian federal system, as the Flemish Community and the Flemish Region have fused.

[169] This comprises both the courts and tribunals of the judiciary, and the Council of State, the supreme administrative court.

[170] See Article 26 § 2 of the Law of 6 January 1989, cited above, on the conditions under which such a referral may be decided.

[171] Article 28 of the Law of 6 January 1989, cited above.

[172] Article 3 § 1 of the Law of 6 January 1989, cited above.

[173] Article 4, al. 2, of the Law of 6 January 1989, cited above. Since the entry into force of the Law of 9 March 2003 amending the Law of 6 January 1989, an action for annulment in this context is open not only to the Executives, but also to any natural or legal person having the required interest.

under the jurisdiction of Belgium, whether or not these rights or freedoms would be directly applicable as such, taken in isolation from the non-discrimination requirement[174]. Any legislative provision creating direct or indirect discrimination in access to employment or working conditions, for instance, could potentially be referred to the Court of Arbitration, and possibly annulled on the basis of the provisions cited.

4.6.2 Abolition of discriminatory administrative provisions (art. 16(a) Directive)

The administrative regulations (*arrêtés et règlements*) may be annulled by the Council of State (*Conseil d'Etat*), the sole administrative court in Belgium[175], in the conditions defined by the *Lois coordonnées sur le Conseil d'Etat* of 12 January 1973[176]. In particular, Article 14 of this Law provides that the *section d'administration* of the Council of State adopts judgements (*arrêts*) where actions for annulment have been lodged against, *inter alia*, 'the acts and regulations [adopted by] the diverse administrative bodies' (*'les actes et règlements des diverses autorités administratives'*), which covers essentially all the obligatory acts adopted by the administration (at all levels, whether this concerns federal, regional or Community authorities) or public persons[177]. Any administrative act creating discrimination could be annulled by the Conseil d'Etat (*section d'administration*) through this procedure. However, such actions must be lodged within 60 days of the publication of the challenged act. After this period has expired, they are immune from being challenged by an action for annulment, but they may be disapplied – set aside – by the jurisdictions before which they are invoked, if they are considered to violate any hierarchically superior norm (either legislative, constitutional or international): indeed, Article 159 of the Constitution provides that the courts will apply administrative regulations only to the extent that they are compatible with these above norms (*'Les cours et tribunaux n'appliqueront les arrêtés et règlements généraux, provinciaux et locaux, qu'autant qu'ils seront conformes aux lois'*).

4.6.3 Measures to ensure amendment or nullity of discriminatory provisions included in contracts, collective agreements, internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations (art. 16(b) Directive)

Individual contracts. Article 18 of the Law of 25 February 2003 provides that clauses contained in individual contracts – including employment contracts – will be considered void if they contradict the provisions of the Law, which are considered to be imperative (*'Sont nulles les clauses d'un contrat contraires aux dispositions de la présente loi, et celles qui prévoient qu'un ou plusieurs contractants renoncent par avance aux droits garantis par la présente loi'*). Therefore the judge before which such clauses (inserted in violation of the Law

[174] C.A., Case n° 106/2003 of 22 July 2003, esp. B.4.2.
[175] Article 160 of the Constitution.
[176] A substantial revision of this Law is currently being prepared. However, no text is publicly available yet, and it is therefore not possible to take these proposed changes into account in this report.
[177] C.E., 22 January 1960, Josse, n° 7559, Descamps, n° 7560 c. *Institut des réviseurs d'entreprises*, Rec., p. 59.

of 25 February 2003 into individual contracts) are invoked, should simply disregard them. This would appear to apply also to such clauses inserted in individual contracts before the entry into force of the Law of 25 February 2003.

A similar provision may be found in the Flemish Decree of 8 May 2002 on proportionate participation in the employment market (Article 13). The other instruments adopted by the Regions and Communities for the implementation of Directives 2000/43/EC and 2000/78/EC are silent on this issue. This may be in violation with Article 16(b), of Directive 2000/78/EC.

Collective agreements. With respect to collective agreements (*conventions collectives du travail*) the compulsory character of which have been extended by the adoption of a Royal Decree (*Arrêté royal*)[178], the annulment of that Decree may be sought before the Council of State. Although this formally does not lead to the annulment of the collective agreement as such – indeed, the Council of State is explicitly denied the possibility to annul a collective agreement concluded within a commission paritaire[179] –, it will be noted that the clauses of the collective agreement which are in violation of imperative clauses of laws or executive decrees or conflict with international undertakings of Belgium, will be considered null and void[180]. Therefore if the Council of State finds that a collective agreement could not have been extended by Royal Decree, because it contains clauses which are in violation of imperative legal provisions or international treaties or regulations, this will necessarily lead to the inapplicability of the conflicting clauses of the collective agreement by the judge before which the agreement is invoked. Moreover, whether or not the Council of State has been requested to annul the Royal Decree extending the compulsory character of the agreement, Article 9 of the Act of 5 December 1968 will oblige the judge before which a collective agreement is invoked which contains a discriminatory clause to disregard that clause, as the collective agreement remains subordinated to the laws, including the Law of 25 February 2003 and other legislative measures adopted to implement Directive 2000/78/EC. It will also be noted that, under Article 10 of the Act of 5 December 1968, the provisions of a collective agreement concluded within a commission paritaire, will be considered void if they are in violation of an agreement concluded within the *Conseil national du travail* : therefore, any collective agreement concluded in violation of Collective agreement n° 38 of 6 December 1983 relating to the recruitment and selection of workers (*convention collective du travail n° 38 concernant le recrutement et la sélection de travailleurs*)[181] – which, as mentioned earlier in this report, from 1999 has constituted the first explicit

[178] This possibility is provided by Articles 28 to 34 of the Act of 5 December 1968 on collective agreements and paritary commissions (*Loi du 5 décembre 1968 sur les conventions collectives de travail et les commissions paritaires*) (*Moniteur belge*, 15 January 1969, *erratum, Moniteur belge*, 4 March 1969). In the absence of such an endorsement by the Executive of collective agreements concluded within commissions where employers and workers are equally represented (commissions paritaires), the collective agreement will only be binding on the organisations having signed the convention, the employers who are members of those organisations and their workers; with respect to collective agreements concluded within commissions paritaires, all the organisations represented must have concluded the agreement.
[179] Art. 26, al. 3 of the Act of 5 December 1968, inserted by Article 107 of the Law of 20 July 1991, *Moniteur belge*, *1* August 1991.
[180] Article 9 of the Act of 5 December 1968 provides that 'Sont nulles les dispositions d'une convention : 1° contraires aux dispositions impératives des lois et arrêtés, des traités et règlements internationaux obligatoires en Belgique (…)'.
[181] Cited above, para. 4.1.5.

prohibition of discrimination based on sexual orientation in employment – will have to be disregarded.

Internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations. To the knowledge of the author, no systematic action has been taken to ensure that any remaining discriminatory provisions will be removed.

4.6.4 Discriminatory laws and provisions still in force

None.

4.7 Concluding remarks

The situation in Belgium is made particularly complex by the co-existence of six instruments which seek to implement the Directives 2000/43/EC and 2000/78/EC, especially in a context where the division of tasks between the Federal level, the Regions and the Communities, is not always clearly defined, and still debated about in doctrine and in the case-law both of the Court of Arbitration (*Cour d'arbitrage*, *Arbitragehof*) and the Council of State (*Conseil d'Etat*, *Raad van State*). It is also remarkable that the need to implement these Directives has led to the adoption of legislation which are, in fact, much broader in ambition, both as to grounds of discrimination which are prohibited, and as to the material situations in which the protection from discrimination may be invoked. The remaining shortcomings are:

- In the absence both of an initiative from the Commission communautaire française, to which the French-speaking Community has transferred its competences since 1993 in the sphere of vocational training, and of an initiative of the Region of Brussels-Capital to ensure implementation of Directive 2000/78/EC (and Directive 2000/43/EC) with respect to its own personnel, the implementation process is still incomplete in Belgium
- The hesitance of the Regions and Communities concerning their competence to adopt procedural rules, relating for instance to sanctions (penal or civil), to the *locus standi* of organisations, or to the powers of the court before which a complaint is filed alleging a discrimination, results in a situation where the implementation of Council Directive 2000/78/EC remains unsatisfactory on a number of issues, with respect to the domains falling under the competences of the Regions and Communities in the Belgian Federal system of allocation of competences.
- The coexistence of the notion of harassment in the Federal Law of 25 February 2003 and in the Law of 4 August 1996 as amended by the Law of 11 June 2002 could create legal uncertainty, as harassment in the workplace would fall under either legislation, with different consequences concerning inter alia the protection from reprisals of witnesses of the harassment (no such protection is provided under the Law of 25 February 2003) or the power of the judge to deliver an injunction prohibiting the continuation of the discrimination (*action en cessation*) (such a possibility does not exist under the Law of 4 August 1996).

- Neither the *Décret relatif à la mise en oeuvre du principe de l'égalité de traitement* adopted on 19 May 2004 by the French-speaking Community nor the the *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted by the Walloon Region on 27 May 2004 seem to accord with the requirement set forth in Article 9(2) of Directive 2000/78/EC or Article 7(2) of Directive 2000/78/EC, in the absence of any provision on the possibility for certain qualified organisations to engage, on behalf or in support of the complainant, judicial or administrative procedures provided for the enforcement of the guarantee of equal treatment offered by these Decrees.
- Neither the *Décret relatif à la mise en œuvre du principe de l'égalité de traitement* adopted by the French-speaking Community, nor the *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted by the Walloon Region, nor the Decree adopted by the German-speaking Community contain any provisions on reprisals. In the view of the author of this report, although this is to be explained by the opinion of the Council of State that Regions and Communities may not legislate on a topic which belongs to the regulation of the employment contract, this is in violation with Article 11 of Directive 2000/78/EC and with Article 9 of Directive 2000/43/EC.
- As the employer may have legitimate reasons to seek information about the civil status of the employee or candidate employee, it will be difficult to avoid inferences being made by the employer, true or false, on the basis of the answers to those questions, as to the sexual orientation of the employee. The protection from sexual orientation-based discrimination by the exercise of the right not to answer questions irrelevant to the nature of the job is fragilised in this respect (see 4.3.6).
- Article 3 of the Law of 25 February 2003 mentions that the prohibition of discrimination as laid down in that legislation does not infringe on fundamental rights and freedoms stipulated in the Constitution or international treaties. The Law could have specified that only such restrictions to the prohibition of discrimination which are strictly necessary (and, therefore, which remain within the bounds of proportionality) for the protection of those fundamental rights mentioned in that provision will be acceptable; moreover, Article 2(5) of the Directive requires that exceptions to the principle of equal treatment are explicitly laid down in national law, which seems to exclude such a blanket justification such as that seemingly provided by Article 3 of the Law of 25 February 2003 (see 4.4.2).[182]
- If Article 11 of Directive 2000/78/EC is to be read as imposing on Member States the duty to ensure that not only the employee against whom the discrimination has been committed should be protected from reprisal, but also other employees connected to a complaint or to legal proceedings, the wording of Article 21 of the Law of 25 February 2003 would appear as too

[182] The same remark can be made about Article 6 of the *Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt* to be adopted by the German-speaking Community, which provides generally that the prohibition of discrimination laid down in the decree is without prejudice to measures which are necessary for 'public security' reasons, including 'public health', without specifying in which circumstances such an exception will apply.

narrow to include also such a protection; although it cannot be excluded that the same problem may be raised in the face of Article 21 of the Flemish Decree of 8 May 2002, this can be saved by judicial interpretation without it being imperative to modify the wording of the Decree (see 4.5.10).

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

- The definition of indirect discrimination in Article 2(2) of the Federal Law of 25 February 2003 omits an explicit reference to the principle of necessity, which identifies the relationship between the aim of the allegedly discriminatory provision, criterion or practice and the allegedly discriminatory measure which seeks to fulfil the aim ; and it does not refer to the legitimacy of the aim pursued by the measure alleged to be constitutive of indirect discrimination (see 4.2.4).

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