European Monitoring Centre on Racism and Xenophobia
Observatoire Européen des Phénomènes Racistes et Xénophobes
Europäische Stelle zur Beobachtung von Rassismus und Fremdenfeindlichkeit

EUMC

Anti-discrimination Legislation in EU Member States

A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the Council Directives

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on behalf of the

European Monitoring Centre on Racism and Xenophobia (EUMC)

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The views expressed in the report do not necessarily reflect the opinions of the EUMC, the European Community and its Member States.

The information in the reports cover a period up to September 2001 and may not contain developments which have taken place since that date.

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PREFACE

The European Union (EU) is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to all Member States. The right to equality before the law and the protection of all persons from discrimination, together with the respect and promotion of the rights of minorities is essential to the proper functioning of democratic societies.

Strategies and activities to combat racism, xenophobia and anti-Semitism form an integral part of the European Union's work on equality, justice and social inclusion.

The Amsterdam Treaty which entered into force in May 1999, introduced a new article 13 into the EC Treaty. The European Commission proposed a package of measures to implement article 13 in November 1999 which led to the adoption in 2000 of a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and a Council Directive establishing a general framework for employment equality and a Council Decision establishing a Community action programme to combat discrimination.

The European Monitoring Centre on Racism and Xenophobia (EUMC) was established by the EU during 1997 as part of the EU's aim to combat racism, xenophobia and anti-Semitism more effectively at a European level. The EUMC has the task to provide the Community and its Member States with objective, reliable and comparable data at the European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action. It also undertakes studies and examines examples of good practice, formulates conclusions and opinions and publishes an Annual Report.

The EUMC as part of its work in the field of legislation commissioned a study to compare Member States' anti-discrimination legislation and the article 13 directives. Information from the study was used to produce a series of country reports. The reports aim:

- to provide an overview of existing anti-discrimination legislation on the grounds of race or ethnic origin, religion or belief in the Member States and draw a comparison with the anti-discrimination Directives;
- to support the implementation of the directives by the Member States by indicating to each Member State the developments in other Member States (with the view that by providing information on the variety of approaches adopted by Member States to deal with the same issues Member States could benefit from the experience of each other);
- to identify areas which may require further development;
- to support the European Commission in the framework of the Community Action Programme in particular under Strand 1 - Analysis and evaluation, and
- to support wider debate as the issue is of interest to a variety of sectors in society.

The EUMC takes the opportunity to thank Migration Policy Group for its work on this Study and hopes that this publication will be a useful contribution to overcoming discrimination.

Beate Winkler, Director EUMC

FRAMEWORK OF THE STUDY

Joint Project 1999-2000 "Research on national and European legislation combating racism"

In 1999, The European Monitoring Centre on Racism and Xenophobia (EUMC) undertook a joint project with Migration Policy Group on "Research on national and European legislation combating racism". The period covered in the project was from 1 May 1999 to 31 January 2000. The project carried out a comparative study on existing legislative provisions to combat discrimination on grounds of race or ethnicity and religion and belief and the proposal for a Directive concerning the elimination of racial and religious discrimination (known as Starting Line) and the proposal of the European Commission for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM (1999) 566 final, 1999/0253 (CNS).

EUMC Project 2001-2002 "Study on the comparison of the adopted Article 13 Council Directives with existing national legislation in the EU Member States"

By the end of 2000, with the adoption of Council Directives 2000/43/EC (Implementing the principle of equal treatment irrespective of racial or ethnic origin) and 2000/78/EC (Establishing a general framework for equal treatment in employment and occupation), there existed at the European Community level an actual framework for Member States on which to base, adapt or amend national legislation.

Terms of reference of the study

With the change in the legal situation at the European Community level, the EUMC decided to follow up the Joint Project of 1999 by commissioning a new study on legislation. The study would:

- produce a report on the comparison of the adopted Article 13 Council Directives with existing national legislation in the EU Member States. The grounds of discrimination to be examined in the Council Directives for the purposes of the comparative study and report would be limited to racial or ethnic origin and religion or belief; and

- update the country reports from the Joint project with Migration Policy Group (MPG): checking to see how the adopted Council Directives compare with existing legislation in all fifteen Member States; including information on any changes in legislation in the fifteen Member States that have occurred since the drafting of the Joint Project Reports.

Timeline of the study

The EUMC launched a call for tender process in May 2001 and selected Migration Policy Group to undertake the new study.

Information was collected up until September 2001. This enabled the draft reports from the study to be completed in time for submission to the meeting of the Legal Working Group to prepare the implementation of Directives 2000/43 and 2000/78 on non-discrimination into national law which was convened by the European Commission in November 2001. The Legal Working Group had an opportunity to examine the reports and make comments by 7 December 2001. Comments received by the EUMC were then examined and incorporated where relevant and as appropriate.

Format and scope

The format for the study is a list of questions, some optional for the purposes of the EUMC, related directly to the articles of the Council Directives. Optional questions where included in the reports provide information related to gender discrimination and the new Protocol 12 to the European Convention on Human Rights. Optional questions were not essential for the reports (and are therefore not included in every report) as they do not relate directly to the Council Directives, but may provide useful complementary information.

The information provided indicates provisions in the Constitutions, the Criminal law, Civil law and Administrative Law of the relevant EU Member State. Every care has been taken to ensure that the translations of titles of legislation from the original language are as accurate as possible, but they are for information purposes only and should not be regarded as the definitive or official translations by the European Union. The title of the piece of legislation in its original language has been included and should be referred to.

Final Caveat

The reports cover legal aspects as well as institutional mechanisms to promote equal treatment and combat discrimination as outlined by the Council Directives. In all reports there is a description of the legal and institutional situation and an indication of whether their compatibility with the Council Directives should be reviewed, some reports may indicate case law where it exists to complement the information on the legal provision, there is an element of evaluation in the reports, but the main emphasis has been to indicate what provisions exist without necessarily trying to evaluate them. As a result there may be some discrepancy between reality and the situation reflected by the law.

The final decision whether national legislation is compatible with the Council Directives rests with the European Court of Justice.

Introduction

Racial and ethnic discrimination, never totally eliminated in Europe, resurfaced when European societies became increasingly diverse as a result of continuous intra and extra European migration. Governments and civil society organisations responded by designing programmes to combat these forms of discrimination. In some countries these programmes included the adoption of comprehensive anti-discrimination legislation.

Policy responses at the level of the European Communities go back as far as the re-launch of the common market in the mid-eighties. This operation moved also social issues up on the European agenda, including equal treatment and anti-discrimination. In 1984, the European Parliament established the Parliamentary Committee of Inquiry into the Rise of Fascism and Racism, leading to the adoption of the Evrigenis Report in 1986. In the same year the European Parliament, the Council of Ministers and the European Commission adopted the Joint Declaration against Racism and Xenophobia. In 1991 a second report on the issue was published by the European Parliament (the Ford Report). From the early nineties non-governmental organisations started to call for European legislative measures and drafted their own legislative proposal, called the Starting Line, which received the support of the European Parliament, some governmental agencies and a great number of non-governmental organisations[1]. In 1994, the Consultative Commission on Racism and Xenophobia was established, which in its final report made a series of recommendations including the adoption of European legal measures against racism[2]. In the same year the final decision was taken by the Council of Ministers to designate 1997 as the European Year against Racism. The European Year offered tremendous opportunities to increase the support for a European strategy against racism, including for the adoption of legal measures against racism. At the same time the 1996/7 Intergovernmental Conference discussed proposals for Treaty changes, one of them being a proposal for the inclusion of an anti-discrimination clause in the EC-Treaty.

The actual inclusion of such a clause as Article 13 of the Treaty establishing the European Community (TEC) renews Europe's human rights commitments and strategically lays the foundation for policies that promote equality and value diversity. The European Commission started to draft anti-discrimination legislation as soon as the amended EC Treaty took effect (1 May 1999) and presented its first proposals in the same year. In one and half years two legislative measures and an action programme were adopted[3]. The Directive on racial and ethnic discrimination, the Racial Equality Directive[4], prohibits both

[1] Isabelle Chopin, The Starting Line: A harmonised approach to the fight against racism and to promote equal treatment. In: European Journal of Migration and Law I (1): 1999; Jan Niessen, The Amsterdam Treaty and NGO responses. In: European Journal of Migration and Law II (2): 2000; Isabelle Chopin, Possible harmonisation of anti-discrimination legislation in the European Union. European and non-governmental proposals. In: European Journal of Migration and Law II (3 and 4): 2000.

[2] Final report from the Consultative Commission on Racism and Xenophobia to the General Affairs Council, Brussels, May 1996 (6871/1/96 RAXEN 18).

[3] Council Directive implementing the principle of equal treatment between persons irrespective of racial and ethnic origin (OJ L 180, 19/07/2000.b); Council Directive establishing a general framework for employment equality (OJ L 303, 02/12/2000); Council Decision establishing a Community action programme to combat discrimination (OJ L 303 02/12/2000).

[4] This Directive was adopted first. For the negotiation process see, Adam Tyson, The negotiation of the European Community Directive on Racial Discrimination. In: European Journal of Migration and Law III (2): 2001.

direct and indirect discrimination, as well as harassment, victimisation and instruction to discrimination. The material scope includes access to employment and working conditions, all kinds of vocational training, membership in professional organisations, social protection including health, social advantages, education and access to goods and services which are available to the public, including housing. The Directive allows positive action. The Directive obliges Member States to ensure judicial and/or administrative procedures for the enforcement of the obligations under the Directive and allows non-governmental actors to start legal action in cases of discrimination. The burden of proof is more equally divided between a victim of racism and the perpetrator. The Framework Directive for employment equality forbids discrimination on grounds of religion and belief in employment.

While the Commission drafted the proposals for the two Directives and the Council negotiated on the texts, the Migration Policy Group started in co-operation with the European Monitoring Centre on Racism and Xenophobia (EUMC) a research project. The research compared the requirements under the Starting Line and the proposal for a Racial Equality Directive with existing legislation in the fifteen Member States. The intention of the research was to clearly describe what the individual Member States would need to do in order to comply with the developing European standards[5]. After the adoption of the two Directives the research was updated[6], again in close co-operation with the European Monitoring Centre, by a group of independent experts who were part of the Europe-wide project *Implementing European Anti-Discrimination Law*, a joint initiative of the Migration Policy Group, the European Roma Rights Center and Interights[7].

The incorporation of the Directives into the national laws of the Member States in 2003 will keep the combat against discrimination on the national and European agendas. The transposition process requires the active involvement of national and European governmental and non-governmental institutions. The fifteen country reports and the synthesis report may contribute to a well-informed debate on the required adaptations of the laws in the Member States.

Jan Niessen, Director, Migration Policy Group

Isabelle Chopin, Migration Policy Group

[5] The fifteen country reports were made available at EUMC's web-site: Isabelle Chopin and Jan Niessen (eds), Research on national and European legislation combating racism. Joint project of the Migration Policy Group and the European Monitoring Centre on Racism and Xenophobia; Project period 1 May 1999 -31 January 2000.
[6] For this purpose religion and belief – grounds of discrimination in the Framework Directive - were included in the comparison.
[7] The group also prepared country reports for eleven accession states published in March 2002.

INTRODUCTORY REMARKS[8]

The issue of the effectiveness of legislative measures for combating discrimination based on race and ethnic origin is of particular significance in Belgium. The existing legislative arsenal may, if one confines oneself to the texts, appear to be relatively satisfactory with regard to the international and European requirements in this sphere. In particular, the Law of 30 July 1981 on the prevention of certain acts inspired by racism or xenophobia has, on paper, a wide scope which should allow numerous concrete manifestations of racism and xenophobia to be combated. However, the implementation and effectiveness of this legislation has turned out to be deficient in several respects. Evidence of this is to be found notably in the reports on Belgium by the European Commission Against Racism and Intolerance[9] and the International Committee on the Elimination of Racial Discrimination[10].

Some of these gaps have already been filled by constitutional and legislative amendments. Starting with the constitutional sphere, a significant problem in terms of effectiveness resulted from the fact that, in pursuance of the old Article 150 of the Belgian Constitution, press offences fell exclusively within the competence of the Assize Courts (civilian jury). A long line of established precedents interpreted press offences as covering any written document - printed, reproduced or disseminated - containing the expression of an opinion regarded as criminally offensive. Yet, for years, press offences were, with only one exception, never prosecuted in the Assize Courts for reasons relating to the gravity of the proceedings and the negative effects of the publicity surrounding these trials. The reason for the *de facto* impunity from which the authors of racist tracts benefited thus rested in the competence of the assize jury with regard to press offences, combined with the broad jurisprudential interpretation of the concept of the press offence. A major reform was introduced in 1999, in order to ensure the effective punishment of infringements of the antiracism law committed through the press. Article 150 of the Constitution was amended so that press offences of a racist or revisionist nature no longer fall under the jurisdiction of the Assize Courts but of the Criminal Courts instead[11]. Following this, several legislative initiatives were taken with the aim of reinforcing the effectiveness of the law of 1981, notably the creation of the Centre for Equal Opportunities and Opposition to Racism, a stepping up of the applicable penalties and the addition of the withdrawal of the rights to stand for elections as a complementary punishment.

In its analysis of the Law of 30 July 1981[12], the Centre for Equal Opportunities and Opposition to Racism demonstrated three main problems with the application of the law: the initial filtering at the level of the police, the involvement of the public prosecutor's office

[8] This report was written by Emmanuelle Bribosia under the direction of Migration Policy Group for the EUMC project on comparing existing national legislation in EU Member States with the Article 13 Directives (Council Directives 2000/43/EC (Implementing the principle of equal treatment irrespective of racial or ethnic origin) and 2000/78/EC (Establishing a general framework for equal treatment in employment and occupation)). It includes information from a previous report by Ms Mieke van de Putte and Mr Ildephonse Murayi which was part of a joint project of the European Monitoring Centre on Racism and Xenophobia and Migration Policy Group entitled « Research on national and European legislation combating racism ».

[9] ECRI, *Second Report on Belgium*, 18 June 1999, CRI (2000) 2.

[10] CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination : Belgium. 23/04/97, CERD/C/304/Add.26.

[11] For more on this reform, see below, commentary on Article 7.1 of the Directive.

[12] See the Centre for Equal Opportunities and Opposition to Racism website: http://www.antiracisme.be.

and the large number of complaints ending in a withdrawal of proceedings, as well as the problem of the burden of proof[13]. While the first two problems require a change in mentality and a greater political will, the third could form the subject of a legislative amendment. The burden of proof is one of the aspects which should be regulated by the adoption of a general law on combating discrimination on the basis of different criteria, to supplement the existing criminal legislation with civil provisions, especially in relation to race and ethnic origin.

Several gaps or deficiencies in terms of effectiveness should be rectified with the imminent adoption of the draft bill on strengthening antiracism legislation and the *Mahoux* bill, as amended by the government, on combating discrimination and amending the Law of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism[14]. In addition, the government's Programme to Combat Racism and other Forms of Discrimination (*Plan de lutte contre le racisme et les autres formes de discriminations*) of March 2000 establishes a variety of complementary measures aimed at reinforcing the effectiveness of combating discrimination, especially that linked to race and ethnic origin. This includes, among other things, the adoption by the Board of Principal Crown Prosecutors (*Collège des procureurs généraux*) of a circular encouraging the public procurator's offices to prosecute infringements of the law against racism (including cases where these are perpetrated by parliamentarians). In the event of their failing to act, the right of positive injunction at the disposal of the Minster of Justice must be exercised. The points covered by this circular include encouraging the public prosecutor's offices to make use, in racism cases, of criminal mediation and other provisions instituted by the laws of 10 February 1994; inviting, in collaboration with the social partners, companies to subscribe to a *"Code of Good Conduct"* on the same model as the advertising code of ethics, by means of which they commit themselves not to assist initiatives or activities of a racist nature; and adapting the wording used in listing statements by the police services to identify and reflect discriminatory behaviour…

In general, an assessment of the effectiveness of the existing legislation can be made on the basis of the annual reports of the Centre for Equal Opportunities and Opposition to Racism.

[13] For more on the problems of applying the Law of 30 July 1981, see O. De Schutter, "Avis concernant certaines propositions visant à améliorer la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie", *Rapport annuel 1997 C.E.C.L.R.*, Brussels, 1997, 20 p.
[14] See below, commentary on Article 1 of the Directive.

Article 1[15]

Is there any legal framework at national level that puts into effect the principle of equal treatment, or that is designed to combat discrimination on the basis of racial or ethnic origin and/or on the basis of nationality and/or on the basis of religion or belief? If so, what is the nature of this framework?

European and international legal instruments

Belgium is bound by several general and specific legal instruments in the sphere of combating racism, xenophobia, anti-semitism and intolerance[16]. Of particular importance are Article 14 of the European Convention on Human Rights and Article 26 of the Covenant on Civil and Political Rights which establish, in different ways, the principle of equality before the law, as well as the prohibition of discrimination in the exercise and enjoyment of fundamental rights. These two articles have a direct effect on the Belgian legal system and thus may support an appeal before the national jurisdictions. In other respects, the necessary procedures for establishing the mechanism of petition before the Committee on the Elimination of Racial Discrimination (Article 14 of the International Convention on the Elimination of all Forms of Racial Discrimination) have been initiated and are still in progress. Finally, the first steps have been taken with a view to Belgium ratifying Protocol Nº 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 2000[17].

On the other hand, there are a number of European and international instruments relating to the fight against discrimination on the grounds of race or ethnic origin which have not yet been ratified by Belgium: the European Charter for Regional or Minority Languages (1992), the Framework Convention for the Protection of National Minorities (1995)[18], the UNESCO Convention Against Discrimination in Education (1960), the European Convention on the Legal Status of Migrant Workers and the Convention on the Participation of Foreigners in Public Life at Local Level (1992).

Constitutional law

The principle of the equality of Belgians before the law and that of non-discrimination are enshrined in the Constitution (Articles 10 and 11). In order to achieve this, the law and

[15] Discrimination on the grounds of race and ethnic origin are covered by the Council Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (henceforth, **Racial Equality Directive)**; discrimination on the grounds of religion and belief (but only in employment and occupation) are covered by the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (henceforth, **Employment Equality Directive**); until Article 5 the provisions of the two Directives correspond in content and numbering; as of Article 5, the contents of the articles corresponds, but the numbering differs; the reports follows the numbering of the Racial Equality Directive; the numbers of the corresponding articles on religion and belief in the Employment Equality Directive will be mentioned in a footnote.

[16] ECRI, general policy recommendation 1, "Combating racism, xenophobia, anti-semitism and intolerance", CRI (96) 43 rev., p. 7.

[17] See below, commentary on Protocol Nº 12.

[18] However, a governmental agreement was reached in 2001 regarding the signing and ratification of this instrument. So far is has only been signed - the ratification by the different assemblies concerned is yet to be achieved.

decree specifically guarantee the rights and freedoms of ideological and philosophical minorities[19].

Moreover, all aliens present on the territory of Belgium benefit from the protection accorded to persons and property, save for those exceptions provided for by law (Article 191 of the Constitution). Thus, from the point of view of public rights and freedoms, there is an assimilation of principle between Belgians and aliens. However, this assimilation is not absolute:

on the one hand, Article 191 of the Constitution refers to exceptions established by law. In this respect, it is nevertheless important to note the judgment from the Court of Arbitration of 14 July 1994, in which the Court clearly confirms that the intention of Article 191 is not to enable the legislature, when it establishes a difference in treatment, which disadvantages a foreigner, to cease to have regard for the principles of equality and non-discrimination established by the Constitution. According to the Court of Arbitration, Article 191 does not in any way result in the legislature, when it establishes a difference in treatment detrimental to aliens, being exempt from having to ensure that this difference is not discriminatory, regardless of the nature of the principles involved[20].

on the other hand, the Covenant on Civil and Political Rights, while prohibiting discrimination on the grounds of race or nationality, makes provision for two exceptions to this principle, which relate to political rights and access to the Belgian territory[21]. Thus the Belgian State maintains, with certain restrictions, the possibility of reserving political rights for Belgian nationals and of refusing access to the Belgian territory on the basis of nationality.

The exercise of political rights is, in principle, reserved for Belgians alone (Article 8, paragraph 2, of the Constitution) Nevertheless, on 11 December 1998, amendments were introduced to this article of the Constitution in order to allow the legislature to waive this principle by according the right to vote to citizens of the European Union, who do not have Belgian nationality, in accordance with Belgium's international and supranational obligations. European Union citizens were thus able to participate in the communal and provincial elections of October 2000. Article 8 of the Constitution also establishes that the right to vote can be extended by law to persons residing in Belgium who are not nationals of a Member State of the European Union, under the conditions and in accordance with the terms and conditions determined by this law[22].

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[19] This notion of ideological and philosophical minorities as stated in Article 11, appeared in 1970, at the time of the modification of theConstitution, in relation to the federalisation of the Belgian State, in order to preserve the rights and freedoms of the recognised existing minorities within the newly federated entities (the French Community, Flemish Community and German Community).

[20] CA, judgement of 14 July 1994, 61/94, *A.S.B.L. Mouvement contre le racisme, l'antisémitisme et la xénophobie et crts, M.B.*, 9 August 1994, point B.2. See also P. BOUCQUEY, "La Cour d'arbitrage et la protection des droits fondamentaux de l'étranger", *Annales de droit de Louvain*, 1996/3, pp. 289-330.

[21] See Articles 12, 13 and 25 of the ICCPR. For a commentary see. M. Mc EWEN, *Tackling Racism in Europe – An Examination of Anti- discrimination Law in Practice,* Oxford, Berg, 1995, pp. 56-60.

[22] A transitional provision stipulated that this law could not be adopted before 1 January 2001. However, the government accord of 7 July 1999 does not include involvement in this sense: since the route of facilitating naturalisation was preferred to that of granting the right to vote to nationals of third countries residing in Belgium (http://www.belgium.fgov.be/fr_index.htm).

In principle, only Belgians are eligible for employment in the public and military services, save for exceptions that may be established by law in specific cases[23].

The Belgian Constitution guarantees freedom of religion:
"Freedom of worship, public practice of the latter, as well as freedom to demonstrate one's opinions on all matters, are guaranteed, excepting the punishment of offences committed when using this freedom" (Article19).

In addition, Article 20 of the Constitution stipulates that
"No one shall be obliged to contribute in any way whatsoever to the acts and ceremonies of a religion, nor to observe the days of rest."

Finally, Article 21 of the Constitution provides that the State does not have the right either to intervene in the nomination or installation of ministers of any religion, nor to prevent these ministers from corresponding with their superiors, or from publishing their actions, except, in the latter case, taking into consideration normal responsibilities in matters of press and publication.

Criminal law

The Law of 30 July 1981 on the prevention of certain acts inspired by racism or xenophobia[24] punishes incitement to discrimination, violence or racial hatred on the one hand and, on the other, deeds and actions relating to discrimination perpetrated in the context of the provision of goods and services, discrimination perpetrated in the professional sphere and by public officials in the exercise of their duties, as well as membership of or support for a group or organisation which publicly, clearly and repeatedly, practises or advocates discrimination or segregation.
The Law of 23 March 1995 on punishing the denial, reduction, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War[25].

The Law of 30 July 1981 against racism does not punish discrimination as such, but only if it is inspired by certain motives: race[26], colour, descent, origin[27] or nationality[28].

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[23] Article 10 of the Constitution. See also commentary on Article 3.2 of the Directive.

[24] *M.B.*, 8 August 1981, 1 April 1994 (*M.B.* 14 May 1994) and 7 May 1999 (*M.B.* 25 June 1999). This law is available on the website of the Centre pour l'égalité des chances et la lutte contre le racisme (Centre for Equal Opportunities and Opposition to Racism): http://www.antiracisme.be.

[25] *M.B.*, 30 March 1995, err. 22 April 1995. See also: B. BLERO, "*La répression légale du révisionnisme*", *J.T.*, 1996, pp. 333-337, E. BREMS, "*Revisionismewet verenigbaar met vrije meningsuiting*", note on the Court of Arbitration, 12 July 1996, *T.V.R.*, 1996, n° 2, pp. 144-147.

[26] For more information, see also: ABICHT, L., BILLIET, J., HERMANS, P. and DE WITTE, H., "*Racisme. Drie bijdragen rond de oorsprong, typologie, achtergronden en beleving van racisme*" in *Cultuur en Migratie*, 1991, n° 1, 96 p.; DEJEMEPPE, B., "*De bestraffing van racistische gedragingen: stand van zaken anno 1996*", l.c., 319, n° 24; X, *De Belgische wetgeving*, XII.2, 03; RENSON, B., "*Racisme, wet en publieke opinie*", *T.V.R.*, 1985, n° 32, 5-7; VELAERS, J., "*Verdraagzaamheid ook t.a.v. de onverdraagzamen?-Enkele beschouwingen over de beteugeling van racistische en xenofobe uitingen in een democratische samenleving*", in *Recht en verdraagzaamheid in de multiculturele samenleving*, Antwerpen, Maklu, 1993, 310-312. It emerges from the account of the reasons concerning the amendment of the government that the Minister at the time (Vanderpoorten) understood the term 'race' to be "an ethnic group which differs from others due to a number of physical and hereditary characteristics representing variations within the species " (*Doc. parl.*, n° 54/3, Sess. sp., 1974)

Thus the following do not come within the scope of the law: religious or philosophical convictions, sexual practices, language[29], wealth, political or other convictions and sex.

Administrative law

The Public Servants Statute (*statut des agents de l'Etat*) stipulates that persons may not be appointed public servants unless they fulfil the general conditions of eligibility, that is "to be Belgian if the duties to be exercised include direct or indirect participation in the exercise of public authority and for duties, the aim of which is to safeguard the general interests of the State or, in other cases, to be Belgian or a citizen of the European Union"[30].

Civil law

Victims of acts of discrimination have the right, in pursuance of Article 1382 of the Civil Code, to full compensation for the injury they suffer. The action for compensation for the injury caused by an offence falls to those who have suffered this injury (Article 3 of the Code of Criminal Procedure).

Bills and draft laws under discussion

At the time of writing, there are a number of bills and draft laws pending for laws that relate directly to or are closely linked to combating racism on the grounds of race or ethnic origin[31]:

- a draft bill (*avant-projet de loi*) on strengthening anti-racism legislation was drawn up by the government. This draft bill contains amendments to be made to the Law of 30 July 1981 on the prevention of certain acts inspired by racism or xenophobia and amendments to be made to the Law of 15 February 1993 creating a *Centre pour l'égalité des chances et la lutte contre le racisme* (Centre for Equal Opportunities and Opposition to Racism, CEOOR). This draft bill has been subject to amendments to take account of advice from the Council of State on 12 March 2001. In its latest version of 1 June 2001, it must still be discussed in the Senate and the Chamber before being adopted.
- the Mahoux Bill (*proposition de loi*) on combating discrimination and amending the Law of 15 February 1993 creating a CEOOR was tabled at the Senate on 14 July

[27]This term related to anti-Semitism (*Doc. parl.*, Chambre, n° 214/9, Sess. sp., 1979, Discussion générale, p. 22).

[28] During the preparatory work on the Convention of 1966, it became apparent that national origin was not synonymous with nationality, in the legal sense of belonging to a State (see VELAERS, J., "*Verdraagzaamheid ook t.a.v. onverdraagzamen?-Enkele beschouwingen over de beteugeling van racistische en xenofobe uitingen in een democratische samenleving*", l.c., 314). Some authors point out that defining the concept of discrimination is not without its problems: Belgian law punishes incitement to discrimination based on nationality on the one hand, but on the other hand it deprives some people of fundamental rights and freedoms because of their nationality. Discrimination based on nationality is thus prohibited even though the authorities accept that a distinction is made on the basis of this criterion (VOORHOOF, D., "*Racismebestrijding en vrijheid van meningsuiting in België: wetgeving en jurisprudentie*" in *Vrijheid van meningsuiting, racisme en revisionisme*, SCHUIJT, G.A.I. and VOORHOOF, D., (ed.), Gand, Academia Press, 1995, 164-165).

[29] *Doc. parl.*, Chambre, Sess. sp., 1979, n° 214/9, p. 11.

[30] Article 16 of the royal decree of 2 October 1937 introducing the Public Servants Statute, amended by Article 5, A of the royal decree of 26 September 1994, and entered into force on 1 October 1994.

[31] See below. Some of these drafts and bills are available on the website of the Centre for Equal Opportunities and Opposition to Racism: http://www.antiracisme.be.

1999 (Sénat, doc. 2-12/1). It is a general bill on combating discrimination on various grounds, in particular, supposed race, colour, descent or national or ethnic origin, as well as religious or philosophical convictions[32]. This bill was submitted for the opinion of the Council of State[33]. The government made amendments to it in December 2000, in view particularly of compliance with the European Directive of 2000 relating to combating discrimination. These amendments respond in part to the objections raised by the Council of State. This bill thus amended[34] must still be discussed and adopted by the two legislative assemblies.

Article 2.1 and Article 2.2(a) and 2.2(b)

Is there a definition of direct and indirect discrimination in your national legal system? Is there a need to introduce definitions of direct and indirect discrimination, as defined in Article 2.2(a) and 2.2(b) of the Directive, into national legislation?

Are there comparable definitions in national law in relation to gender discrimination?

In the sphere of discrimination on the grounds of race or ethnic origin, the Law of 30 July 1981 on the prevention of certain acts inspired by racism or xenophobia establishes a definition of discrimination that is largely inspired by the UN Convention of 1966 relating to eliminating all forms of racial discrimination[35]. It should be noted that the criminal law against racism does not punish discrimination as such, but only if it is inspired by certain motives: race[36], colour, descent, origin[37] or nationality[38]. Thus the following do not come within the scope of the law: religious or philosophical convictions, sexual practices, language[39], wealth, political or other convictions and sex.

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[32] In the initial bill, religious or philosophical conviction was not included in the prohibited grounds for discrimination. It was only later (December 2000) that the government proposed amendments to the Mahoux bill in order to ensure that it complied with the European Directive establishing a general framework for equal treatment in employment and occupation. These amendments make provision for the inclusion of religious and philosophical discrimination in the list of grounds for discrimination.

[33] Opinion from the Council of State of 16 November 2000 on the bill on combating discrimination (…), Sénat, 2-12/5, 21 December 2000.

[34] A comparison of the bill on combating discrimination and the government amendments is available on the website of the Centre for Equal Opportunities and Opposition to Racism: http://www.antiracisme.be.

[35] See Article 1 of the Law of 30 July 1981.

[36] For more information, see: ABICHT, L., BILLIET, J., HERMANS, P. and DE WITTE, H., "Racisme. Drie bijdragen rond de oorsprong, typologie, achtergronden en beleving van racisme" in Cultuur en Migratie, 1991, n° 1, 96 p.; DEJEMEPPE, B., "De bestraffing van racistische gedragingen: stand van zaken anno 1996", l.c., 319, n° 24; X, De Belgische wetgeving, XII.2, 03; RENSON, B., "Racisme, wet en publieke opinie", T.V.R., 1985, n° 32, 5-7; VELAERS, J., "Verdraagzaamheid ook t.a.v. de onverdraagzamen?-Enkele beschouwingen over de beteugeling van racistische en xenofobe uitingen in een democratische samenleving", in Recht en verdraagzaamheid in de multiculturele samenleving, Antwerpen, Maklu, 1993, 310-312.

[37] This term related to anti-semitism (*Doc. parl.*, Chambre, n° 214/9, Sess. sp., 1979, Discussion générale, p. 22).

[38] During the preparatory work on the Convention of 1966, it became apparent that national origin was not synonymous with nationality, in the legal sense of belonging to a State (see VELAERS, J., "*Verdraagzaamheid ook t.a.v. onverdraagzamen?-Enkele beschouwingen over de beteugeling van racistische en xenofobe uitingen in een democratische samenleving*", l.c., 314).

[39] *Doc. parl.*, Chambre, Sess. sp., 1979, n° 214/9, p. 11.

Definitions of direct and indirect discrimination were introduced into the Mahoux Bill on combating discrimination, in order to comply with the European Directives 2000/43/EC and 2000/78/EC relating to equal treatment, as well as with the definitions of the Law of 7 May 1999 on the equal treatment of men and women in the field of work and employment[40].

Until 7 May 1999 no definition of indirect discrimination existed in Belgian law. Article 118 of the Law on economic reorientation of 4 August 1978 stipulated that the principle of equal treatment of men and women implies the absence of any discrimination based on sex, whether direct or indirect, by reference in particular to marital or family status. However, it did not define the actual concept of indirect discrimination. Nevertheless, the Law of 7 May 1999 on the equal treatment of men and women regarding employment conditions, access to employment and opportunities for promotion, access to self-employment and the complementary social security implemented in Belgian law Council Directive 96/97/CE of 20 December 1996, amending Directive 86/378/CEE on the implementation of the principle of equal treatment of men and women in the professional social security structures, and Council Directive 97/80/CE of 15 December 1997 on the burden of proof in cases of discrimination on the grounds of sex (see below Law of 7 May 1999 on the equal treatment of men and women). This Law introduces a definition of indirect discrimination in the field of equality between men and women[41].

Article 2.3

Is unlawful harassment an identifiable concept in national law? Is there a definition of harassment in the national law that corresponds to that in the Directive? Is it necessary to introduce such a definition into national legislation?

Are there comparable definitions in national law in relation to gender discrimination?

The Law of 30 October 1998 inserted an Article 442bis into the Penal Code with the aim of making harassment a criminal offence[42]. However, it is stipulated that such offences can only be prosecuted if a complaint is lodged by the persons who consider themselves wronged. Harassment as a criminal offence in this case includes harassment on the grounds of race, ethnic origin or sex, which can therefore be criminally punished in Belgian law without a specific offence having to be committed.

The Law of 7 May 1999 on the equal treatment of men and women puts sexual harassment in the workplace in the same category as sex discrimination (Article 5).

In order to comply fully with the Directives on the implementation of the principle of equal treatment, the Belgian legislature will have to adopt a provision of the same type which would be applicable to all other forms of discrimination and which would therefore not be restricted solely to the equality of men and women in relation to employment conditions.

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[40] See Articles 2 paragraph 2 and 2 paragraph 3 of the bill (government amendments to the bill on combating discrimination and amending the Law of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism introduced by Mr Mahoux et al., Sénat, doc., 2-12/1).

[41] See Article 4 paragraph 2.

[42] *M.B.*, 17 December 1998.

The Mahoux Bill on combating discrimination makes provision for the insertion in Article 2, paragraph 4, of a definition inspired directly by the Directives. Thus "*harassment shall be deemed to be discrimination, when an unwanted conduct related to racial or ethnic origin takes place which is related to any of the grounds which are listed in paragraph 2* (sex, supposed race, colour, descent, national or ethnic or origin, sexual orientation, civil status, birth, age, religious or philosophical convictions, current or future state of health, disability or physical characteristic), *with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment*".

In addition, in the draft bill on strengthening antiracism legislation, as established on 1 June 2001, provision is made for the addition of the offence of harassment (Article 442bis of the Penal Code) to the list of prohibitions for which Article 5ter of the draft bill establishes racist intention in aggravating circumstances. Harassment inspired by racism will therefore be specifically targeted by criminal law and will be able to be punished more severely[43].

Article 2.4

Is it unlawful under national law to give instruction to discriminate on the grounds of racial or ethnic origin or religion and belief? Is it deemed to be discrimination? Is there a need to introduce a similar principle in national law?

Are there comparable definitions in national law in relation to gender discrimination?

To instruct someone to practise discrimination on the grounds of race or ethnic origin is illegal in Belgian law, this fulfils the condition of it being public. The Law of 30 July 1981 criminally punishes incitement, in certain areas public conditions[44], to discrimination, hatred of violence against a person (or a group), on the grounds of race, colour, national or ethnic origin[45]. It therefore appears that incitement to racial discrimination is illegal in Belgian law, and this would apply as strongly to the instruction to practise discrimination that would in theory constitute "incitement" to discriminate. Thus, if one individual in a hierarchical relationship with another gives him or her an order (instructs him or her) to practise discrimination on grounds of race, this constitutes an incitement to perpetrate such discrimination and the individual may therefore be convicted on the basis of Article 1 of the Law of 30 July 1981.

Moreover, in the sphere of public office, the 1981 Law stipulates that if any public servant or public official, any bearer or agent of public authority or public power, who discriminates against a person (or a group) on the grounds of race, proves he or she acted on the orders of his or her superiors, the penalties are only applied to the superior who gave the order[46].

Remaining with the scope of the criminal law of 1981, a person instructed to perpetrate any form of discrimination prohibited by this Law could be punished criminally as the co-perpetrator of the offence[47].

[43] See below, commentary on Article 15.
[44] See public conditions listed in Article 444 of the Penal Code.
[45] Article 1, paragraph 1.
[46] Article 4 of the Law of 30 July 1981.
[47] See Article 66 of the Penal Code.

Article 3.1[48]

Does the definition of 'racial and ethnic discrimination' and 'discrimination on the grounds of religion and belief' apply to all the fields of application listed in Article 3, both in the private and the public sectors?

To which other fields of application does the definition apply? (Compare with the fields of application listed in Protocol Nº 12)

Is gender discrimination covered in the same fields?

The Law of 30 July 1981 on the prevention of certain acts inspired by racism or xenophobia is a criminal law which applies to direct discrimination in the political, economic, social and cultural spheres and in any other sphere of social life. In this respect, it not only renders illegal direct discrimination on the grounds of race or ethnic origin, but also discrimination on the grounds of colour, descent, origin or nationality. It punishes speech and intentions, as well as deeds and actions. In the first case, this just means declarations or actions in public which incite discrimination or which publicly demonstrate a will to discriminate. In the second case, the deeds and actions relate, on the one hand, to discrimination in the context of the provision of goods and services, discrimination perpetrated in the professional sphere and discrimination by a public servant in the exercise of his or her duties, and, on the other hand, membership or support of a group or organisation which publicly, clearly and repeatedly, practises or advocates discrimination or segregation.

The scope as set out in Article 3 of the Racial Equality Directive 2000/43/EC is fully covered, in criminal matters by the scope of the Law of 30 July 1981[49]. The scope of the Law does not include religious convictions, so the scope of the Employment Equality Directive is not currently covered. The Mahoux bill does include religious and philosophical convictions in the grounds for discrimination which it prohibits and one of the aims of the bill is to remedy this gap[50].

Both the public and private sectors are directly targeted, since the law punishes "anyone" who commits one of the offences listed and since provision is made for harsher penalties, in theory, if the discrimination is perpetrated by a public servant (cf. Article 4 of the Law of 30 July 1981).

The scope of the Law of 30 July 1981 is actually wider than that of the Directive. It also classifies the following as offences: incitement or publicity given to the intention to resort to racial discrimination, hatred or violence against a person, a group, a community or their members (Article 1)[51]; and membership of a group or organisation which clearly and

[48] Article 3.1 of the Employment Equality Directive does not include the fields e) social protection, including social security and health care f) social advantages g) education h) access to goods and services, including housing, so the Directive's prohibition of religious discrimination does not apply to these fields

[49] See the comparative table in the appendix. The Employment Equality Directive 2000/78/EC is not covered, since the law does not cover religious discrimination.

[50] See below.

[51] It should also be noted that Article 2, paragraph 4, of the Directives establishes that "An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination [direct or indirect on the grounds of race or ethnic origin]". Nevertheless, the scope of Belgian law is broader, since it condemns incitement without there necessarily having to have been an actual instruction. In this regard, ENAR

repeatedly practises discrimination or segregation or advocates this in the circumstances set out in Article 444 of the Penal Code, or supports such a group or organisation (Article 3).

The bills and draft laws under discussion should also have the effect of extending the scope of prohibited racial, ethnic or religious discrimination.

Thus, the draft bill on strengthening antiracism legislation should produce two additions to the scope of the Law of 30 July 1981: first, the punishment of acts of discrimination or segregation at work against a group, and against a sole individual (amendment of Article 2bis); secondly, racist intention is established in aggravating circumstances in the perpetration of certain offences. This also allows racist insult or abuse, which was not previously punishable, to be made an offence in pursuance of the Law of 1981, where it was demonstrated that it was perpetrated with the intention of inciting another to racial hatred.

The aim of the Mahoux Bill on combating discrimination is to prohibit any direct or indirect discrimination on the grounds of supposed race, colour, descent, national or ethnic origin, religious or philosophical conviction[52]. The bill covers:

- the provision of goods and services
- the advertising and treatment of applications for vacancies
- the commencement and termination of a contract of employment
- employment conditions and the pursuit of a professional career
- the appointment of a public servant or the posting of a public servant to a service
- references in official documents or reports
- the dissemination, publication or public display of a text, an opinion, a symbol or any other support comprising discrimination
- any other normal exercise of an economic, social, cultural or political activity (Article 2, paragraph 1)

The last three fields of application represent an extension of the scope of the prohibition of discrimination on the grounds of race or ethnic origin in comparison with the fields of application defined in Article 3 of Directive 2000/43/EC and certainly those of Directive 2000/78/EC, because this Directive does not cover the fields e) - h) listed in Directive 2000/43/EC[53].

The scope of Protocol Nº 12 (Article 1) appears to be partially covered by Article 4 of the Law of 30 July 1981 which establishes as an offence discrimination perpetrated by a public servant or public official, any bearer or agent of public authority or public power where this discrimination is perpetrated in the exercise of the duties of the persons listed above against

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points out that the proposal for Directive 2000/43/EC does not include incitement and pressure to discrimination, hatred or violence for reasons of race or ethnic origin (ENAR position paper on the Council proposal for a Directive on the implementation of the principle of equal treatment between persons irrespective of race or ethnic origin, 9 March 2000, Point 2.2).

[52] It should be noted that these last two grounds were added to the Mahoux bill by governmental amendments which were established in December 2000 and intended to ensure that the bill complied with Community law. In the explanatory memorandum the government notes that "religious or philosophical convictions means only those which appear in the preparatory work on the Directive. This does not relate to convictions which have no connection with questions about whether or not there is a god, such as political convictions.

[53] See comparative table in the appendix.

a person or a group on the grounds of race, colour, descent, origin or nationality[54]. This also applies to the arbitrary refusal of the exercise of a right or freedom to which an individual is entitled[55]. Article 2 of the Law of 30 July 1981 may also cover some of the instances referred to by the Protocol in that it condemns acts of discrimination on the grounds of race or ethnic or national origin in the provision of or offer to provide goods or services or the enjoyment of them.

With regard to discrimination that originates in a law, decree or statute, Articles 10 and 11 of the Constitution apply in that they guarantee equality and non-discrimination. The Court of Arbitration has the power to make decisions on appeals, to annul rules of law or on preliminary questions addressed by the judges regarding the compliance of laws, decrees and statutes with Articles 10 and 11 of the Constitution. In this respect, it should be noted that the Court of Arbitration also accepts appeals that combine the invoking of Articles 10 and 11 of the Constitution with a provision from an international treaty that directly affects the Belgian legal system (for example, Article 14 of the ECHR or Article 26 of the ICCPR).

Sex discrimination is currently covered by a specific law regarding employment conditions, access to employment and opportunities for promotion, access to self-employment and the complementary social security structures in pursuance of the Law of 7 May 1999. This Law prohibits both direct and indirect discrimination, as well as sexual harassment in the workplace, which is presumed to be discrimination on the grounds of sex. For the other spheres there is no specific legislation.

In this respect, the effect of the Mahoux Bill on combating discrimination would be to expressly extend the prohibition of sex discrimination to include new areas such as the provision of goods and services (…); the appointment of a public servant or the posting of a public servant to a service; references in official documents or reports; the dissemination, publication or public display of a text, an opinion, a symbol or any other support comprising discrimination; and any other normal exercise of an economic, social, cultural or political activity (Article 2, paragraph 1). Article 3quater of the bill establishes the premise that it does not undermine the Law of 7 May 1999 on the equality of men and women.

The general principle of equal treatment established in Article 10 of the Constitution can certainly also be applied, in accordance with the framework defined by the jurisprudence of the Court of Arbitration. The interesting point about it being enshrined in the provisions, compliance with which is ensured by the Court of Arbitration, is that this allows the application of a law that would be contrary to this principle to be invalidated and rejected. Even though the principle of the equality of Belgians before the law includes the equality of men and women, an amendment to the Constitution in the form of the insertion of a new paragraph into Article 10 is currently under discussion, in order to provide a direct link between the equality of men and women with equality as defined in the Constitution. In the current version it is formulated as follows: “the equality of men and women is guaranteed”[56].

[54] This covers the cases in points iii and iv of the explanatory memorandum to the Protocol.
[55] This covers the cases in points i and ii of the explanatory memorandum to the Protocol.
[56] Chamber of Representatives, 9 March 2001, “Révision du titre II de la Constitution en vue d'y insérer un article nouveau relatif au droit des femmes et des hommes à l'égalité”, Doc. 50 1140/001

In relation to the exercise of a professional activity, access to employment, dismissal and all other employment conditions, as well as all forms of vocational training (Article 3, paragraph 1, a, b and c of the Directives:

- *Principle:*

In 1994, an Article 2bis was added to the Law against racism in order to extend its scope to include the professional sphere. On the other hand, discrimination perpetrated against groups is not so far deemed by the law to be a punishable act[57]. The draft bill on strengthening antiracism legislation aims specifically to remedy this gap by introducing an amendment to Article 2bis of the Law of 30 July 1981. The amendment would render illegal acts of discrimination or segregation at work that are perpetrated against a group. This would be aimed particularly at collective dismissals specifically targeting aliens working for a company or the establishment in the workplace of separate changing rooms or a separate refectory for aliens. The issue of whether the discrimination is perpetrated by an individual on his or her own initiative or on behalf of another (usually the employer) is of no significance in this situation.

- *Problems in enforcing this measure:*

Article 2bis of the Law against racism punishes discrimination in the world of work in the broad sense. However, its enforcement remains problematic[58]. CEOOR's 2000 annual report establishes that, although academic studies have demonstrated that discrimination on the grounds of ethnic descent is common in the employment market in Belgium, Article 2bis of the Law against racism has not yet led to a conviction. The main problem is in how the proof of the existence of discrimination is produced[59].

In order to raise awareness of the existence of this article in the spheres concerned and to ensure that discrimination in the sphere of employment can be prosecuted, CEOOR has concluded protocols with unions on dealing with discrimination suffered by their members. Several towns have enshrined clauses in their staff regulations which oblige members of staff to refrain from any form of discrimination on the grounds of race, skin colour, descent, origin or nationality. Some police forces require their new recruits to sign a declaration of intent along the same lines. Moreover, the armed forces are in the process of developing a code of conduct. Other actions have also been taken, particularly in collaboration with the social partners, in order to make combating discrimination in the sphere of employment really effective[60].

Mahoux Bill

Pursuant to Article 2, paragraph 1, of the Mahoux Bill, "…any direct or indirect discrimination [on the grounds of supposed race, colour, descent or national or ethnic

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[57] STOKX, R., "De vernieuwingen aan de antiracismewet: meer dan een laagje vernis?", Panopticon, 1994, 508.

[58] See in particular the study, "*Les discriminations ethniques à l'embauche*", research carried out by three Belgian teams on behalf of the International Labour Office (*Bureau international du Travail*), Brussels, 1997, 285p.

[59] See below, commentary on Article 8.

[60] See below, commentary on Article 11.

origin… religious or philosophical conviction…] is prohibited where it affects (…) the advertising and treatment of applications for vacancies; the commencement and termination of a contract of employment; employment conditions and the pursuit of a professional career; the appointment of a public servant or the posting of a public servant to a service (…). This law will have a significant impact on combating discrimination in employment in the civil sphere[61], since the bill makes provision for significant civil action measures in cases of discrimination on these grounds[62].

In relation to membership of and involvement in an organisation of workers or employers (Article 3, paragraph 1 d) of the Directives):

Belgian law guarantees all persons the right to join and to be involved in an organisation of workers or employers or in any other organisation whose members carry on a particular profession, including the benefits provided by such organisations (Article 11 ECHR). Union freedom is thus guaranteed for all persons without any form of discrimination. In the terms of Article 23 of the Constitution, union organisations also enjoy the "right to information, consultation and collective negotiation". Furthermore, membership of and involvement in an organisation of workers or employers could be considered as services, the refusal of which, if it is on the grounds of race or ethnic origin, would be made a criminal offence by the Law of 30 July 1981 against racism (Article 2). Finally, in reference to the Mahoux bill, membership of or involvement in an organisation of workers or employers would be included in its scope, in relation both services and to "any other normal exercise of an economic or social activity".

In relation to social protection, social advantages, education, the provision of goods, equipment and services, including housing (Article 3, paragraph 1 e, f, g and h of Directive 2000/43/EC):

- *Principle*

In accordance with the law, legal action can be brought against "anyone providing or offering to provide a service, goods or the enjoyment of such goods who perpetrates discrimination against a person on the grounds of his or her race, colour, descent, origin or nationality" (Article 2 of the Law against racism). The same applies if this discrimination is perpetrated against a group, a community or their members. It is important to note that the requirement imposed by the previous version of the Law against racism - that the actions had to have taken place in a place accessible to the public - was removed. Moreover, the legislature decided to punish more harshly discrimination which arises in the context of property rental. This is why the words "goods or the enjoyment of such goods" were added.

- *Jurisprudence*

[61] This bill will not introduce amendments in the criminal sphere insofar as Article 7bis stipulates that "criminal sanctions for discrimination on the grounds of supposed race, colour, descent or national or ethnic origin are those determined by the Law of 30 July 1981 on the prevention of certain acts inspired by racism or xenophobia".
[62] See below, commentary on Article 7.1.

There are several cases where the court ruled that Article 2 of the Law against racism had been infringed[63]:

Thus a conviction was imposed on a proprietor who refused to serve a drink to a person for reasons which had nothing to do with the clothing or behaviour of the individual but were based solely on the individual's national origin (Moroccan)[64].

The judge also saw a violation of this law in *the behaviour of a refuse collector who refused to collect refuse from persons of foreign origin*[65].

An estate agent was convicted for putting up a notice which stated that the property was only available for rent by persons *"of Belgian origin"*[66].

The same applied to the manager of a night club who made the presentation of a Belgian identity card a condition of admission to his establishment[67];

More recently, on 25 April 2000[68], the Anvers Court of Appeal upheld the conviction pronounced by the Criminal Court of Anvers on 26 June 1998, on the refusal to allow admission to a nightclub to persons of foreign origin. Although the Court carefully considered the nightclub management's concern to ensure the security of their clients, it nevertheless viewed that this did not authorise the management to refuse entry to certain individuals, who were clearly covered by the framework of the concept invoked in the case. Moreover, it is not necessary for the actions to form the subject of a regular practice in order for them to be punishable. A once-off act of racism is sufficient to come under the law.

On the other hand, acquittals were pronounced in a number of cases[69]:

In another case concerning the refusal of admission to a discotheque, the plaintiff won the case in the first instance. However, this judgment was overturned by the Anvers Court of Appeal after an additional inquiry into the number of immigrant clients regularly present, the presence of workers of foreign origin in the establishment and the existence of a black list on which the name of the plaintiff appeared[70].

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[63] For an outline of this jurisprudence, see the website of the Centre pour l'égalité des chances (Centre for Equal Opportunities) http://www.antiracisme.be/fr/jurisprudence/jp_intro.htm.

[64] Liège, 11 March 1988, *T.V.R.*, 1988, 39; *R.D.E.*, 1988, 62; *R.R.D.*, 1988, 303. The accused were acquitted in the first instance: Trib. corr. Namur, 31 July 1987, *Lettre de la Ligue*, 1988, n° 2.

[65] Trib. corr. Dendermonde, 12 February 1996. This judgement was upheld on appeal, but the convicted party was granted a reduction in sentence for half the amount of the fine imposed (Gand, 19 November 1996, not publised.).

[66] Trib. corr. Anvers, 21 June 1996, not published.

[67] Trib. corr. Dendermonde, 21 October 1986, *T.V.R.*, 1986, n° 40, 19; *R.D.E.*, 1986, 111. This decision was upheld on appeal (Gand, 3 November 1988, not published.)

[68] See the website of the Centre for Equal Opportunities (*Centre pour l'égalité des chances*) http://www.antiracisme.be/fr/jurisprudence/jp_intro.htm.

[69] For an outline of this jurisprudence, see the website of the Centre pour l'égalité des chances (Centre for Equal Opportunities) http://www.antiracisme.be/fr/jurisprudence/jp_intro.htm.

[70] Trib. corr. Hasselt, 26 June 1996, not published and Anvers, 18 April 1997, not published.

In the case of two judgments made by Hasselt Criminal Court on 10 May 2000[71], in relation to the refusal to admit persons of foreign origin to nightclubs, the Court approved the argument that it could only be an issue of discrimination if an objective reason for the refusal could not be put forward. Thus, the judge considered that the use of selection criteria by a doorman might lead to mistakes or errors but that this does not provide proof of a violation of antiracism law. The court *"found to be justified the fact that, as a doorman, the individual summoned had implemented preventative measures with the aim of maintaining order in a night club and guaranteeing the safety of the clientele. Such objective reasons allow the court to accept this as justification for a refusal"*. Thus, in all cases where the proof failed to be provided, there was an acquittal.

An acquittal was also given in a case where young people were refused entry to a hotel-restaurant. The Court considered *that permitting the doormen to refuse entry to aliens, on the grounds that there was a fear of trouble (especially regarding the female clientele), was based on the concern of the accused to dissuade a clientele, who were at risk, if they entered the establishment, did not, properly speaking, contravene Article 2 of the Law against racism.*

- *Non-discrimination declarations*

Since the law on its own was judged insufficient to put a stop to a certain type of behaviour, non-discrimination declarations were concluded in several sectors with the aim of aiding greater awareness and a change in mentality. This was the case in the housing sector in Gand as well as in the Flemish education sector (joint declaration on a policy of non-discrimination in education). It is also worth mentioning the campaign mounted by MRAX with the support of CEOOR in order to prove the existence of discrimination in the Horeca (hospitality) sector and, in particular, in night clubs towards individuals of foreign origin in Brussels[72]. This campaign was followed by another one of the same type called "dance discrimination" which was led by CEOOR in 1999 in Limbourg[73]. The use of practical tests or "situational tests" appears to be able to facilitate the legal proof of the existence of discrimination in this area[74].

Mahoux Bill

Pursuant to Article 2, paragraph 1, of the Bill, "…any direct or indirect discrimination [on the grounds of supposed race, colour, descent, national or ethnic origin or religious or philosophical conviction] is prohibited where it affects:

- the provision of goods and services
- any other normal exercise of an economic, social, cultural or political activity

[71] See the website of the Centre pour l'égalité des chances (Centre for Equal Opportunities) http://www.antiracisme.be/fr/jurisprudence/jp_intro.htm.

[72] M.R.A.X. press release, 21 March 2001. This campaign was entitled "the management reserves the right to refuse admission".

[73] Centre for Equal Opportunities and Opposition to Racism (*Centre pour l'égalité des chances et la lutte contre le racisme*), "*Citoyens à part entière*", rapport annuel 1999.

[74] See below, commentary on Article 8.

This law will have a significant impact on combating discrimination on the grounds of race or ethnic origin in these fields in the civil sphere, since the bill makes provision for significant civil action measures in cases of discrimination on a number of grounds [75].

Membership of a group or organisation which clearly and repeatedly practises discrimination or segregation or advocates this in the circumstances set out in Article 444 of the Penal Code, or assists such a group or organisation (Article 3)

Principle:

Article 3 of the Law against racism punishes anyone who joins a group or organisation which clearly and repeatedly practises or publicly advocates discrimination or segregation or assists such a group or organisation. From the preparatory work on the Law, it emerges that the aim of the legislature was to make punishable membership of or collaboration with a group or organisation, which has been established to repeatedly and indisputably commit one of the offences listed in Article 1, 2 and 2bis of the Law[76].

The group or organisation in question must practise or advocate discrimination or segregation clearly, repeatedly and publicly. The number of members or the fact that the group enjoys (or does not enjoy) legal status is of little significance: it is sufficient that has operated for a certain period of time and that it is of a durable structure and character. Thus, a football supporters' club may constitute a group, but the supporters who gather casually at a football match and chant racist slogans together do not constitute a group in the eyes of the law[77]. The individual is punishable from the moment he or she joins or assists a group of this type. Legal opinion considers that an individual assists a group if he or she finances it or agrees, for example, give a lecture. This means that even a speaker who went to give a presentation on the objections to racial discrimination could be punishable according to the letter of the law. It is not necessary for the person in question to be an active member of the organisation: it is sufficient if they are aware of the organisation's aims[78].

- *Jurisprudence*

Members of the organisation, "Forces Nouvelles" ("New Forces"), among others, were convicted on the basis of Article 3 for having organised a 'ratonnade' (racist attack). The court considered that the accused were guilty of a violation of Article 3, because they had taken part that night in activities of the organisation in question[79].

Membership of an organisation which clearly and repeatedly advocates the arbitrary sending back of non-European immigrants to their country of origin and which stirs up feelings of

[75] See below, commentary on Article 7.1.

[76] *Actes du Parl.*, Sénat, 24 July 1981, 2280.

[77] This is different from Article 1, second paragraph, 2° and 4°, Article 2, second paragraph, and Article 4, second paragraph, of the Law against racism where 'group' siginifies more than one person sharing the same characteristics (BOUTMANS, E., "*De toepassingsmogelijkheden van de herziene racismewet*", n° 37).

[78] DEJEMEPPE, B., "De bestraffing van racistische gedragingen: stand van zaken anno 1996", Panopticon, 1996, 333.

[79] Trib. corr. Bruxelles, 8 March 1988, *T.V.R.*, 1988, n° 49, 28 and as discussed in the *Rapport annuel du CECLR*, 1994, II, 57.

hatred and contempt among the Belgian population against these persons may, for example, constitute a violation of Article 3 of the Law of 30 July 1981[80].

The Centre for Equal Opportunities also instituted proceedings, on the basis of collaboration with a group which clearly and repeatedly advocates discrimination in terms of the antiracism law. As a civil claimant before the Brussels Criminal Court, the Centre directly cited three non-profit-making associations for aiding a group which clearly and repeatedly advocates discrimination – namely, the Vlaams Blok. After the drafting of the direct citation, the Centre contacted the Flemish Human Rights League and suggested they should work together on the approach and should commence the direct citation jointly. This case was commenced on 27 October 2000 and the counsel's speech began in February 2001[81]. However, in a judgment of 29 June 2001, the Brussels Criminal Court declared itself incompetent, considering that this was a political offence for which only the Court of Assizes is competent, in pursuance of Article 150 of the Constitution. CEOOR decided to appeal against this decision.

In relation to the exercise of duties by any public body:

- *Principle*

Any public servant or public official, any bearer or agent of public authority or public power who, in the exercise of his or her duties, perpetrates discrimination against a person (or a group) on the grounds of race, or who arbitrarily refuses the exercise of a right or freedom to which this individual is entitled is punishable in pursuance of Article 4 of the Law against racism. The penalty, which is applicable in such cases, is more severe than that provided for against a private individual. Article 5bis of the Law of 30 July 1981, inserted by the Law of 7 May 1999, makes provision that, in cases of violation of Articles 1, 2, 2bis, 3 and 4, the convicted person may be deprived of certain civil and political rights, in accordance with Article 33 of the Penal Code. Among these rights, the exercise of which may be prohibited for a period of five to six years, is the right to hold offices, employment or public offices and the right of eligibility (…). The public servant who perpetrates the discrimination may escape sentence and the sentence be transferred to his or her superior, if he or she can prove that there is a hierarchical relationship, that he or she has executed an order which comes into the sphere of competence of his or her superiors and that he or she acted on the orders of his or her superiors. If public servants are accused of having ordered, authorised or facilitated arbitrary actions and they claim that their signature was obtained by deception, they are obliged, if necessary by stopping the action, to expose the guilty party. If not, they are prosecuted personally.

- *Jurisprudence*

After a car accident between a Belgian and an alien, the latter requested that the police intervene to make a report of the facts, since the parties were not succeeding in coming to an amicable arrangement. The police refused to make the report and the alien was eventually involved in violence at the police station during which he was seriously injured. The court pronounced a conviction for illegal resort to violence – assault and battery which led to an

[80] Brussels, 4 September 1987, *Pas*., I, 1988, 216; *T.V.R*., 1987, n° 45, 42.

[81] *Centre pour l'égalité des chances* (Centre for Equal Opportunities), "*Un combat pour les droits*", annual report 2000, p. 27.

inability to work – by officials in the exercise of their duties, as well as a conviction for the arbitrary deprivation of a right – in this case the right to make a statement after a car accident – by officials in the exercise of their duties, and that this was for reasons linked to race, colour, descent, origin or nationality.

The Military Court of Brussels pronounced two judgments in cases of acts committed by Belgian paratroopers during a UN mission in Somalia. Two servicemen were prosecuted for having held a Somali child over a brazier. The Military Court considered that there were insufficient elements in the file to be able to conclude that this act was caused or influenced by racism or xenophobia and that, taking account of the presumption of innocence, the benefit of the doubt had to be granted to the accused, even though it shouldbe noted that their conduct was certainly inadequate in the context of a military peace-keeping mission.[82].

The case of a child being made to eat pork in the knowledge that this was forbidden for the child constituted an infringement of the Law against racism[83].

- *MahouxBill*

In pursuance of Article 2, paragraph 1, of the bill, as amended by the government: any direct or indirect discrimination [on the grounds of supposed race, colour, descent, national or ethnic origin or religious or philosophical conviction] is prohibited where it affects (…) references in official documents or reports. This law will have a significant impact on combating discrimination on these grounds in the civil sphere, since the bill makes provision for measures for civil action in cases of discrimination on various grounds [84].

Article 3.2

To what extent, if any, does national legislation go beyond the Directive in prohibiting discrimination on the ground of nationality?

The Constitutional principles of equality and non-discrimination apply to all persons established or residing in Belgium. In addition, any foreigner on the territory of Belgium enjoys the protection accorded to persons and property, save for the exceptions established by law (Article 191 of the Constitution)[85].

Public employment: In principle only Belgians are eligible for employment in the public or military services, save for exceptions which may be established by law for individual cases[86]. The Public Servants Statute stipulates that persons may not be appointed public servants unless they fulfil the general conditions of eligibility, that is "to be Belgian if the duties to be exercised include direct or indirect participation in the exercise of public

82 Brussels Court Martial, 17 December 1997, *J.T.*, 1998, 286.
83 Brussels Court Martial, 7 May 1998, not published.
84 See below, commentary on Article 7.1.
85 See above, commentary on Article 1.
86 Article 10 of the Constitution.

authority and duties the aim of which is to safeguard the general interests of the State or, in other cases, to be Belgian or a citizen of the European Union"[87].

In the case of access to public office, it should be pointed out, with the CEOOR, that the administration and public interest bodies are still insufficiently open to foreign nationals, in accordance with the jurisprudence of the European Court of Justice, as well as to Belgian citizens descended from immigrants. Clearly, the obstacle of nationality is not the only one which must be overcome, since there are still very few Belgian nationals of foreign origin (particularly Moroccan and Turkish) being appointed to public office, although the issue is not one of competence.[88].

Employment of foreign workers: the employment of foreign workers is governed by the Law of 30 April 1999[89]. It stipulates that an employer, who wishes to take on a foreign worker, must first obtain authorisation for employment from the competent authority (work permit). The employer may only use the services of this worker within the limits determined by this authorisation. Authorisation for employment is not granted if the foreign national entered Belgium with the aim of being employed before the employer had obtained the authorisation for employment. The King may waive this condition in cases he determines. It should be noted that this Law of 30 April 1999 has been subject to criticisms by legal authorities, especially since it allows the possibility to persist of people residing legally in Belgium without being able to work legally, which appears to be contrary to fundamental economic and social rights[90]. There is currently a debate in progress about the possibility of facilitating the obtaining of work permits for certain categories of workers, following proposals put forward by the European Commission relating to reopening legal channels for economic immigration.

Save for exceptions, any foreigner from outside the European Union exercising a profit-making and self-employed occupation must hold a *"carte professionelle"* (professional permit)[91].

The *carte professionelle* may only be issued to aliens permitted to reside or settle in Belgium. While the foreigner's right to reside or settle depends on an authorisation or a permit, the request for a *carte professionnelle* must be submitted at the same time as the request for the authorisation or permit. The withdrawal of the residence authorisation or permit to settle terminates of itself the validity of the *carte professionnelle.*

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87 Art.16 of the Royal Decree of 2 October 1937 on the Public Servants Statute, as modified by Article 5, A of the Royal Decree of 26 September 1994, entry into force 1 October 1994.

88 Centre pour l'égalité des chances et la lutte contre le racisme (Centre for Equal Opportunities and Opposition to Racism), "Un combat pour les droits", annual report 2000, p. 48.

89 For a legal ana lysis of this legislation, see S. SAROLEA, "Modification de la législation sur l'occupation des travailleurs de nationalité étrangère", *Revue du droit des étrangers*, n° 103, 1999, p. 212-225.

90 S. SAROLEA, "Modification de la législation sur l'occupation des travailleurs de nationalité étrangère", *Revue du droit des étrangers*, n° 103, 1999, p. 214.

91 Art. 1 of the Law of 19 February 1965 on the exercise by aliens of self-employed occupations as amended by the Law adopted on the 2d February 2001 (*M.B.*, 8 march 2001). The amendment of the Law of 19 February 1965 on the exercise by aliens of self-employed occupations gives the King greater authority to exempt certain categories of aliens from the *carte professionnelle*, by means of a Royal Decree debated by the Council of Ministers. The government's intention would exempt from the *carte professionnelle*, apart from established aliens, aliens with permanent leave to stay (*Centre pour l'égalité des chances et la lutte contre le racisme, "Un combat pour les droits"*, annual report 2000, p. 53).

Apart from this, aliens residing legally in Belgium, who fulfil the conditions of employment legislation enjoy all the constitutional guarantees relating to the right to work.

In the sphere of social protection, although less discrimination has been established as a rule on the basis of nationality through the contributory social security schemes (compulsory healthcare and injury insurance, unemployment benefit, retirement pensions and *pensions de survie*, benefits for industrial accidents and occupational illnesses and diseases, family benefits and annual holiday allowances), such discrimination still persists in the non-contributory social security schemes (disability benefit, guaranteed income for the elderly, guaranteed family allowances and the general social assistance benefit known as "Minimex" (*Minimum de Moyens d'Existence*)[92].

Finally, mention must be made of the changes which were introduced into the Belgian *Code de la Nationalité* (Nationality Code), with the aim of facilitating the acquisition of Belgian nationality. Thus, the aim of the Law of 1 March 2000 was to relax and simplify the conditions to be fulfilled in order to obtain Belgian nationality. The main changes are the removal of the obligation to provide proof of sufficient will to integrate, the relaxation of the conditions for the granting of nationality by the declaration procedure and by naturalisation, the acceleration of dealing with application procedures and the possibility of providing a document other than a birth certificate as document in proof[93].

Article 4

Do exemptions relating to genuine and determining occupational requirements exist at national level? Is it necessary to restrict any exemptions to those defined in Article 4?

In Belgian law, in accordance with the jurisprudence from the European Court of Justice, nationality is deemed to be a "genuine and determining occupational requirement" in the sphere of public employment where the duties involve the exercise of public authority or are intended to safeguard the general interests of the State[94].

In line with other prohibited grounds for discrimination, the jurisprudence of the Council of State allows that, in certain circumstances, there may be differences in treatment which are linked to sex or to religious conviction without this constituting discrimination. Thus, for example, it is acceptable for the selection of a teacher for a female gymnastics class to be

[92] Centre pour l'égalité des chances et la lutte contre le racisme (Centre for Equal Opportunities and Opposition to Racism), "Un combat pour les droits", annual report 2000, pp. 49-50. The Centre, which regrets the persistence of such differences in treatment, submitted to the Minister for Social Integration a proposed amendement to the Law of 7 August 1974 on the "Minimex", with the aim of making the right to *Minimex* open to aliens who are not currently eligible for it because of their nationality but who are on the *registre de la population* (population register) or the *registre des étranger* (register of aliens) with unlimited leave to stay.

[93] For a presentation of this new law, see B. LOUIS, "L'important assouplissement de l'acquisition de la nationalité introduit par la loi du 1er mars 2000 engendre, dans l'urgence, 'une révolution par défaut'", Administration Publique trimestrielle, to be published, B. RENAULD, "La loi du 1er mars 2000 modifiant certaines dispositions relatives à la nationalité belge. De réformes en réformes …", R.B.D.C., 2000/1, pp. 43-53, Centre for Equal Opportunities and Opposition to Racism, Devenir belge. Nouvelle loi 2000, leaflet, May 2000 and A.S.B.L. Trait d'Union, Comment réussir une demande de naturalisation, la nouvelle loi du 1re mars 2000 relative à la nationalité belge, vol. 12, April 2000.

[94] See above, commentary on Article 3.2.

based first and foremost on the desire to recruit a female rather than a male candidate[95]. The distinction is based on sex, but is justified due to the nature or conditions of the professional occupation - the characteristic in question (in this case sex) constitutes a genuine occupational requirement. Similarly, a candidate's religious conviction may constitute a selection criterion in the appointment of a teacher of religion[96].

The Mahoux Bill[97] on combating discrimination implements the Directives by drawing its inspiration almost word for word from Article 4, regarding exemptions linked to genuine and determining occupational requirements (Article 3). However, the necessity for the objective to be legitimate and the requirement proportionate is not expressly included. These conditions must be taken into account by the Council of Ministers, when it adopts the Royal Decree determining the cases in which a characteristic related to one of these grounds for discrimination constitutes a determining condition, in accordance with the nature or conditions of the occupation. In this respect, it might be useful to refer to the explanatory memorandum to the Directives which provides some examples of genuine occupational requirements[98].

Article 5[99]

Are there any specific measures that aim to ensure or promote full equality or to compensate for disadvantages linked with racial or ethnic origin and religion or belief? Is the government considering adopting such measures?

Are there are comparable measures in relation to gender discrimination?

In the Mahoux bill on combating discrimination, Article 3bis implements the Directives by stipulating that the provisions of the anti-discrimination law "in no way prevents the adoption of measures with the aim of promoting equal opportunities and in view of which specific benefits are introduced or maintained in order to prevent or compensate for difficulties in relation to persons for whom one of the grounds for discrimination listed in Article 2 might apply".

Although there is still no law-making basis for this, positive action programmes on behalf of persons of foreign origin already exist in Belgium in several spheres, including the following notable examples:

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95 Council of State, n°20.514, 22 July 1980.

96 Council of State, n°16.993, 29 April 1975.

97 Shortly before publication, the last version of the Mahoux bill was adopted by the Senate in December 2001 (18 December 2001, 2-12/16) no longer contains the notion of genuine occupational requirements. The Senate chose to change the definition of direct and indirect discrimination into " a difference in treatment lacking objective and reasonable justification", thus leaving it to the judge to appreciate. (amendment NR 116)

98 For example, as far as the difference in treatment based on race or ethnic origin is concerned, "if a person of a specific race or ethnic origin must be selected for a performance, for reasons of authenticity, or if social services are to be provided to persons of a specific ethnic group and these services can be more effectively provided by a person from the same group" (Explanatory memorandum to Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, p. 8).

99 Article 7 in the Employment Equality Directive.

Positive actions on behalf of persons of foreign origin in the public services

Decision No. 27 of the Interministerial Conference on Immigration Policy (*Conférence interministérielle à la Politique de l'Immigration*) of 29 April 1998 contains a commitment to adopt positive measures on behalf of persons of foreign origin in the public services. On the basis of this text, the Federal Minister of Employment and the Federal Minister of Public Administration have committed themselves to developing a system of regulations for the adoption of positive measures on behalf of persons of foreign origin in the public services. An equal opportunities programme, along the lines of the Royal Decree of 27 February 1990 relating to measures favouring equal opportunities for men and women in public office must be established in all the public services.

Positive actions in employment in Flanders and Brussels[100]

On 8 June 1998, the Flemish government and the social partners concluded a commitment through VESOC (Vlaams Economisch Sociaal Overlegcomité – Flemish Economic and Social Co-ordination Committee) to develop positive actions in enterprise. The aim is to achieve "proportional and complete participation of migrants at all levels and for all professions, in both the private and public sectors"[101].

Positive actions in education in the French and Flemish communities of Belgium[102]

In the sphere of education the French community adopted a decree of 30 June 1998 on ensuring equal opportunities for social emancipation for all pupils, particularly through the use of positive discrimination. Primary and secondary schools comprising a certain proportion of pupils from deprived areas, determined on the basis of objective socio-economic criteria, are defined as forming a target group (Article 4). This group is entitled to benefit from additional resources to achieve certain pre-defined goals (Article 5). A Positive Discrimination Committee was established in pursuance of this decree to ensure its correct application (Article 6).

In the Flemish community, in the sphere of education, the authorities who represent the different educational networks and the Minister of Education for the Flemish Community signed a "Community Declaration on a Non-discrimination Policy in Education" on 15 July 1993. This declaration commits the education authorities to ensure that the schools over which they have jurisdiction adopt non-discrimination programmes. The aim of these programmes is to disperse the children belonging to a target group among all the schools

[100] See H. VERHOEVEN & A. MARTENS, De vreemde eend in de bijt, arbeidsmarkt en diversiteit. Een kwantitatief onderzoek naar de positie van allochtonen op de arbeidsmarkt in Vlaanderen en Brussel, Leuven, Dossier Steunpunt WAV, 2000 ; H. VERHOEVEN, E. VAN ROY, M. LAMBERTS & A. MARTENS, Werk maken van werk voor allochtonen. Eindrapport, Leuven, Departement Sociologie, Hoger Instituut voor de Arbeid; A. Martens, "Discriminations et actions positives dans l'emploi en Flandre et à Bruxelles. Quelques résultats de recherches empiriques", in MARTINIELLO M. AND REA A. (Eds), Discriminations ethniques et actions positives, Brussels, Académia/Bruylant, 2001, to be published.

[101] VESOC, De tewerkstelling van migranten. Engagementen van de Vlaamse regering en de Vlaamse sociale partners, Brussels, 1998.

[102] See M. VERLOT, "La discrimination positive en matière d'enseignement. Une comparaison culturelle entre les politiques de la Communauté française et de la Communauté flamande de Belgique", in MARTINIELLO M. AND REA A. (Eds), Discriminations ethniques et actions positives, Brussels, Académia/Bruylant, 2001, to be published.

from one area or one *commune*. The implementation of these agreements, monitored by a community committee with responsibility, among other things, for dealing with complaints relating to this implementation, aims to "desegregate" schools said to be "high-density" – where over fifty per cent of the pupils come from the target group. This group is made up of children whose maternal grandmothers were not born in Belgian and were neither Belgian nor Dutch by birth and whose mothers did not continue their education beyond the age of 18. Thus this programme makes provision for positive actions on behalf of immigrant children and children descended from immigrants.

Positive actions in male/female equality

The Law of 24 May 1994 on the promotion of an equal distribution of men and women on candidate lists for elections[103] stipulates that the number of candidates of the same sex on one list must not exceed a quota of two thirds of the total constituted by sum of the seats available for election and the maximum authorised number of candidates. Although the law is couched in neutral terms, the aim of this law is to protect women. Lists which do not comply with the intention of the law are rejected[104].

Article 6[105]

Are there any measures that protect the principle of equal treatment at national level that go beyond the minimum requirements of the Directive?

As has been demonstrated above, in the section on Article 3, paragraph 1, of Directive 2000/43/EC regarding the material scope of the Directive, all the fields of application are covered by the provisions of the Law of 30 July 1981, the scope of which is even broader than that of the Directive in several respects. The bills currently under discussion should also have the effect of extending the scope of prohibited racial and ethnic discrimination beyond the European stipulations[106]. The Mahoux bill will also have the effect of extending protection against discrimination connected to religious and philosophical convictions beyond the requirements of Directive 2000/78/EC.

Moreover, in the context of combating racism and xenophobia, the Law of 10 April 1995[107] requires political parties to include a commitment to respect the rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms. An agreement was recently negotiated in the Chamber of Representatives and the Senate[108] to authorise a bilingual Chamber of the Council of State and to withdraw a

[103] *M.B.*, 1 July 1994, p. 17681.
[104] For a commentary on this law, see M. UYTTENDAELE and J. SOHIER, "*Les quotas féminins en droit électoral ou les paradoxes de l'égalité*", *Journal des tribunaux*, 1995, pp. 249-256.
[105] Article 8 in the Employment Equality Directive.
[106] See *above*, commentary on Article 3.1.
[107] Law of 10 April 1995 inserting an Article 15bis into the Law of 4 July 1989 on the limitation and control of electoral expenses for Federal Parliament elections as well as on financing and the transparency of accountability of political parties and amending the consolidated Laws of 12 January1973 on the Council of State. For the opinion of the legislative section of the Council of State on the subject of this law, see: Doc. parl., Chambre, 1992-93, n° 1113/3.
[108] Law of 17 Feburary1999 inserting an Article 15ter into the Law of 4 July 1989 on the limitation and control of electoral expenses of political parties and an Article 16bis into the consolidated laws on the Council

political party's allowance *"If the party by its own actions or by the actions of its members, its lists, its candidates or its elected representatives demonstrates clearly and through several concordant indications its hostility to the rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms"*. An agreement was reached by the Council of Ministers in March 2001 on the Royal Decree required to allow the application of the Law of 12 February 1999 inserting an Article 15ter into the Law of 4 July 1989 on the limitation and control of electoral expenses for Federal Parliament elections, as well as on the financing and open accountability of political parties, and an Article 16bis into the laws on the Council of State, consolidated 12 January 1973 (*MB*, 17 March 1999). However, this Royal Decree is not yet formally in force.

Article 7.1[109]

Are legal procedures available for the enforcement of the obligations under the Directive for those who consider themselves wronged?

Current situation

Right to civil damages: victims of acts of discrimination have the right, in pursuance of Article 1382 of the Civil Code, to full compensation for the damages they suffer. Action for compensation for damages caused by an offence is brought by those who have suffered the damages (Article 3 of the Code of Criminal Procedure).

Legal aid: in order to provide assistance to persons with insufficient income, the Bar Council established a consultation and defence office, in accordance with terms and conditions it determines itself[110]. The State pays the trainee barrister appointed by the consultation and defence office for the provision of the service for which the appointment was made.

Conciliation and mediation: CEOOR is authorised to attempt mediation between the perpetrator and the victim of discrimination. A team of experts provides information, collects complaints, analyses incidents of discrimination, advises of existing services, implements mediation and considers, with the applicant, the possible legal recourses on the basis of the Law of 30 July 1981 on the prevention of certain acts inspired by racism or xenophobia. The public prosecutor may invite the perpetrator of the discrimination to compensate for the damage caused by the offence and provide him or her with evidence. If necessary, the public prosecutor also summons the victim and organises mediation on the

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of State (12 January1973). Doc. parl., Chambre, 1997-1998, n° 1084/23, C.R.A., Chambre, 10 December 1998, 290-292 in Doc. parl., Sénat, 1998-1999, n° 1197/6. See also: E. BRIBOSIA and M. JURAMIE, "*Restrictions légales aux libertés et droits des partis liberticides*", *Revue du droit des étrangers*, 1999, n° 103, pp. 191-212, S. DEPR2, "*Le financement public des partis politiques hostiles aux droits et libertés de l'homme*", *R.B.D.C.*, 1999, pp. 287-302. See also Court of Arbitration, judgement no. 10/2001, 7 February 2001 which rejects the appeal entered against the Law of 12 February 1999 "inserting an Article 15ter into the Law of 4 July 1989 on the limitation and control of electoral expenses for Federal Parliament elections as well as on the financing and the open accountability of political parties and an Article 16bis into the laws on the Council of State, consolidated 12 January 1973".

[109] Article 9.1 in the Employment Equality Directive.

[110] Article 455 Judicial Code.

compensation as well as on the terms and conditions[111]. Criminal mediation may represent a solution in cases of racism. It allows the issue to be dealt with more quickly, the two parties to be urged to work together and expresses the importance which society – in the person of a magistrate – attaches to a solution to the conflict being found.

Information: the Ministry of Justice already publishes a number of leaflets to assist the victims (for example, a leaflet entitled "Vous êtes victime d'un délit" – "You are the victim of a crime"). But in order that awareness can be raised among the victims of racist crimes of the extent of their rights and duties, the Centre considers it essential, given the specific nature of these crimes, to produce a more detailed information leaflet[112].

Press offences: with regard to violations of the antiracism law committed through the press, a major reform took place in 1999, in order to ensure effective punishment. Article 150 of the Constitution was amended so that racist or revisionist press offences no longer fall within the competence of the Court of Assizes but of the Criminal Courts instead[113]. In this respect, it is worth drawing attention to the judgment of the Brussels Court of Appeal of 27 June 2000[114], whereby the judgement from the Criminal Court of 22 December 1999 was upheld. The judgment sentenced Wim E. Fut, following the dissemination of racist e-mails to Internet electronic discussion lists, to a six months' suspended prison sentence and a fine of 100,000 Belgian francs. The double significance of this judgment should be noted. Firstly, it was the first time that the dissemination of racist messages via the internet formed the subject of a penalty and secondly, it was the first case of press offences being tried in the criminal courts since the revision of Article 150 of the Constitution.

Amendments resulting from the Mahoux Bill on combating racism

The Mahoux bill is particularly innovative in procedural terms. Thus, Articles 10, 11, 12 and 13 establish the rules of procedure and specific competence for civil actions to which the application of the law could give rise, in order to ensure that the rights of victims are effectively respected. All these provisions should reinforce the effectiveness of the respect for rights guaranteed by the anti-discrimination law.

- Article 10, paragraph 1, establishes a procedure for preventing an act which constitutes a violation of the anti-discrimination law. This is based on the model which exists in relation to commercial practice. The president of the court may, if this contributes to the cessation of the prohibited act or its effects, require the posting of the decision outside and inside the offender's establishments or premises and order the publication and dissemination of the judgment in the newspapers or by any other means (Article 10, paragraph 2).

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111 Article 216 ter Code of Criminal Procedure.

112 See below, commentary on Article 10.

113 For more on this reform, see: A. SCHAUS, "Le délit de presse raciste", in Les droits de l'homme au seuil du troisième millénaire, mélanges en hommage à Pierre Lambert, Brussel, Bruylant, 2000, p. 735; A. SCHAUS, "Les délits de presse à caractère raciste", in Pas de liberté pour les ennemis de la liberté, Brussels, Bruylant, 2000, p. 331; E. BRIBOSIA and M. JURAMIE, "Restrictions légales aux libertés et droits des partis liberticides", Revue du droit des étrangers, 1999, n° 103, pp. 191-212.

114 See the website of the Centre for Equal Opportunities and Opposition to Racism http://www.antiracisme.be/fr/jurisprudence/jp_intro.htm.

- Article 10 paragraphs 3 and 4 establishes a redistribution of the burden of proof which is more favourable to the victim and makes provision for the possibility of a situational test of the situation as a means of proof[115].
- Article 11 allows the judge to impose an coercive fine to compel the perpetrator of the discrimination to respect the judgment which has been issued[116]
- On the model of what is provided for by the Law of 30 July 1981 on combating racism and xenophobia, Article 12 establishes a right of action for a number of non-profit-making associations, organisations representing workers and employers and the Centre for Equal Opportunities and Opposition to Racism[117].
- Article 13 establishes a fast-track procedure for civil actions brought on the basis of the proposed law. Since the respect of fundamental rights is at stake, the authors of the bill consider that these disputes merit exceptional treatment, distinct from purely private conflicts.

Article 7.2[118]

Is it possible for national associations or other legal entities to engage in legal proceedings for the enforcement of rights under the Directive?

As in the case of other criminal laws, the public prosecutor's offices have the power to prosecute violations of the antiracism law and the victims of these crimes may constitute themselves as civil claimants. One of the characteristics of the Law of 30 July 1981 against racism is that it is not they alone who may refer an appeal to the criminal judge to enforce the law. Since the Law of 15 February 1993, CEOOR may take legal action to ensure the enforcement of the law against racism by the criminal judge[119]. In addition, any registered charity and any non-profit-making association, which has existed as a legal entity for at least five years at the time of the acts in question and which includes in its statutes the protection of human rights or combating discrimination, may take legal action in any dispute to which the antiracism law might be applied, if their statutory objectives are compromised (Article 5, first paragraph, of the Law against racism). It is important that the organisation has obtained and maintained legal status. Following the last amendment to the law, organisations representing workers and employers, professional organisations and organisations representing the self-employed may now also take legal action in any disputes to which Article 2bis of the law against racism may be applied. Nevertheless, if the discrimination was perpetrated against individually identified natural persons, action by one of these legal persons is only admissible if it can be proved that this has been agreed to by the individuals. On the other hand, in cases of discrimination perpetrated against a group, a community or its

[115] See below, commentary on Article 8.

[116] It should be noted that this possibility already existed in pursuance of Articles 1385bis of the Judicial Code of which the general formulation authorises any judge, when requested by one party, to combine his or her decision with a coercive fine in the event that the convicted party does not comply. Only convictions involving the payment of a sum of money and decisions relating to the execution of contracts of work/community service are immune to the possibility of such coercion (Decision by the Council of State, 21 December 2000, on the bill on combating discrimination and admending the Law of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism, Sénat, 2-12/5, p. 9).

[117] See below, commentary on Article 7.2.

[118] Article 9.2 in the Employment Equality Directive.

[119] Law of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism, *MB*, 19 February 1993, 3764. Entry into force: day of publication.

members, the consent of the victims is not required for the legal action to be admissible. The condition requiring the consent of the victim (natural person) for legal action to be taken has proved to be problematic, in certain cases, where it is no longer possible or extremely difficult to find the victim. This is particularly true in cases where the victim is deceased or where actions were perpetrated abroad by members of the Belgian military against "locals" in contravention of the Law of 30 July 1981. In order to remedy this difficulty, MRAX proposed an amendment to Article 5 of the Law of 30 July 1981 in order to specify that "the consent of the victim shall not be required in *force majeure* cases[120].

The Mahoux Bill on combating discrimination, as amended by the government, also makes provision in Article 12 for a right to legal action for the Centre for Equal Opportunities and Opposition to Racism in disputes to which the law might be applied. This also applies for any registered charity and any non-profit-making association in the event of its statutory objectives being compromised (Article 12, paragraph 1) and for the majority of organisations representing workers and employers (Article 12, paragraphs 2, 3 and 4).

Article 7.3[121]

What time limits apply to the bringing of an action?

Regarding time limits, in principle it is standard law which is applied in criminal (time limit of five years for indictable offences (*délits*) and ten years for serious indictable offences (*crimes*)) and civil matters.

Nevertheless, note should be taken of Article 13 of the Mahoux bill which makes provision for the establishment of a fast-track procedure in civil matters for the implementation of this law.

Article 8[122]

Does the principle of the reversal or easing of the burden of proof in cases of racial and religious discrimination exist in national law?

Are there comparable provisions in national law in relation to gender discrimination?

The Belgian antiracism law is a criminal law. Racist offences are tried by the criminal court. The choice of criminal law automatically involves the application of the presumption of innocence (Article 6 (2) ECHR). On the other hand, in civil law, and even more so in labour law, the burden of proof usually rests with the employer[123]. Since it is the person who

[120] M.R.A.X. position paper on the draft bill on strengthening antiracism legislation and the bill on combating racism and amending the Law of 15 February 1993 creating the Centre for Equal Opportunities and Opposition to Racism, May 2001, point 5.

[121] Article 9.3 in the Employment Equality Directive.

[122] Article 10 in the Employment Equality Directive.

[123] CUYPERS, D., "*L'article 2bis de la loi contre le racisme*", in *Rapport annuel CECLR*, 1997, 212). Explanatory memorandum on the proposal introduced by the Commission (COM(96)340), Article 4.

considers him/herself wronged who must provide the proof, it is difficult to prove that discrimination has taken place due to one of the reasons established by the law, if there is no written evidence. In the field of employment, it is often very difficult to establish the intent to discriminate on the part of the employer who refuses a job to a particular candidate for such a job or who dismisses a member of his or her staff, since neither recruitment nor dismissal must be justified, not to mention the fact that very few employees are prepared to testify against their employer[124].

The Law of 7 May 1999 on the equal treatment of men and women implemented Council Directive 97/80/CE of 15 December 1997, on the burden of proof in cases of discrimination on the grounds of sex, into national law. This law makes provision for a "reversal" of the burden of proof, provided that the person who alleges he or she is the victim of discrimination establishes facts that allow the existence of direct or indirect discrimination to be presumed. However, this provision does not apply to criminal procedures (Article 19).

Provision is made for a comparable system in the Mahoux Bill on combating discrimination (Article 10, paragraph 3). The situation which will result from the adoption of the law would thus appear to comply with the requirements of Article 8 of Directive 2000/43/EC and Article 10 of Directive 2000/78/EC. Moreover, Article 10, paragraph 4, stipulates that the proof of discrimination on the grounds of supposed race, colour, descent, national or ethnic origin, religious or philosophical conviction may be provided by a bailiff's report through a test de situation. Certain terms and conditions are already established in the bill regarding recourse to a situational test[125], although others would be determined subsequently by Royal Decree deliberated by the Council of Ministers.

However, it should be pointed out that the possibility of resorting to situational tests as a method of proof already existed both for penal and civil cases, although in practice it is relatively rarely used. The reason given by the government to justify this amendment is that *"its aim is to create the possibility of authorising reports of discrimination through situational tests, conducted by a bailiff. This possibility is restricted to cases of discrimination in civil matters"*.

Article 9[126]

Is the Directive's definition of victimisation to be found in national law?

Are there comparable definitions in national law in relation to gender discrimination?

Commission proposal for a Directive C.E., n° 96/C 332/10, 20 September 1996, Pb. C, n° 332, 7 November 1996, 11).

[124] Cass., 10 January 1978, *Arr.Cass.*, 1978, 547; Cass., n° 4615, 26 February 1986.

[125] Thus Article 10, paragraph 4, stipulates that "to this end, the plaintiff or an organisation in the sense of Article 12 of this law may submit a request signed by him or herself or by his or her lawyer, to the bailiff who has power in that region. The request sets out all the useful information as well as the places where the reports may be carried out and which reveal discrimination. Place in the sense of this article means 1. a public place; 2. a place which is not public but which is accessible to a certain number of persons who have the right to frequent it.

[126] Article 11 in the Employment Equality Directive.

In Belgium, Article 23 of the Law of 7 May 1999 on the equal treatment of men and women, regarding conditions of employment, stipulates that the employer who takes on an employee, who has lodged a justifiable complaint or who is instituting legal proceedings or for whom legal proceedings have been instituted regarding the proper compliance with the provisions of this law, may not terminate the working relationship or unilaterally change the conditions of employment, except for reasons which are not connected to this complaint or this legal action. The burden of proof for these reasons rests with the employer if the employee is dismissed, or if his or her conditions of employment are changed unilaterally in the twelve months which follow the lodging of a complaint.

The Mahoux Bill on combating discrimination, as amended by the government, inserted an Article 11bis in order to comply with Article 9 of Directive 2000/43/EC and Article 11 of Directive 2000/78/EC and to protect the employee against possible negative consequences in reaction to a complaint or legal action relating to ensuring respect for the principle of equal treatment (retaliatory measures). This provision establishes a detailed procedure that is modelled on that established regarding the equal treatment of men and women.

Article 10[127]

Which steps are necessary to ensure sufficient public awareness of existing laws? What arrangements currently exist to ensure that anti-discrimination legislation has been or will be brought to the attention of the public?

Does the government need to act to ensure that by means of information and training, and where necessary by effective sanctions, all officials and other representatives of the public authorities at every level abstain from any racially or religiously discriminatory speech or behaviour in the exercise of their functions?

CEOOR plays an important role in providing training and raising awareness about combating racial discrimination. The functions, which the Centre is legally required to fulfil include "to ensure, within the context of its functions, the provision of support and guidance for institutions, organisations and those providing legal aid, as well as to provide any useful information or documentation in the context of its function"[128]. Thus, the Centre has run several awareness-raising campaigns, including, notably, poster campaigns and the development of teaching tools aimed at the education sector. Several training courses have also been devised, most of which are aimed at the public services: police officers, officials from the General Commission for Refugees and Stateless Person (*Commissariat général aux réfugiés et apatrides*), prison officers, *commune* officials and from CPAS (Public Centre for Social Assistance), FORem, ORBEm, VDAB (regional training and employment services), teachers and military personnel etc. The Programme to Combat Racism and other Forms of Discrimination (*Plan de lutte contre le racisme et les autres formes de discriminations*) adopted by the Council of Ministers at its session of 17 March 2000, makes provision for developing the awareness-raising and training programmes for police officers and magistrates on combating racism.

[127] Article 12 in the Employment Equality Directive, which has the following phrase in addition to Article 10 "for example at the workplace".

[128] Article 3, paragraph 2, points 6 and 7 of the Law of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism, *M.B.*, 19 February 1993.

Among several examples, there were the campaigns to raise awareness of antiracism legislation through the European Passport Against Racism (*passeport Européen contre le racisme*) (end of 1993). Then, starting in 1994, a poster was produced on which the text of the law on the prevention of certain acts motivated by racism or xenophobia was reproduced in full. It was distributed to magistrates, police forces, the *gendarmerie*, *burgomasters*, CPAS presidents, Federal and Community Ministers, as well as to their ministerial departments, parliamentarians and European parliamentarians.

Training

Following the Interministerial Conference on Immigration Policy of 29 April 1998, the Centre, in collaboration with the Ministry of Justice, put in place a training course entitled *"Aliens and the magistrature: the prevention of racism and xenophobia"* ("*Etrangers et magistrature: la répression du racisme et de la xénophobie*"). These training sessions are decentralised and cover all 27 public prosecutor's offices in Belgium. Those invited to take part include examining magistrates, youth magistrates, public prosecutors, legal trainees and mediation workers. In addition to a thorough analysis of the functioning and improvements to be made to the Law of 30 July 1981, the participants learn about the various criminal procedure mechanisms which are liable to give rise to discrimination against persons of foreign nationality or origin.

Several circumstances linked to the current situation, to the political priorities within the Centre, as well as to external requests, have led the Centre's Training Service to concern itself mainly with campaigns aimed at the Police. Because of the size of the task (there are almost 36,000 police officers and *gendarmes*) and the growing level of demands on the limited available human resources, the Centre will move in the future more towards training the trainers, the only initiative which might, in the end, allow the vast need for training to be met.

In its Activity Report 2000 the CEOOR Francophone Training Service highlights the diversification of the types of campaigns run, both in terms of content and of participants. Training spaces are being opened and developed for the police, the armed forces, education, the General Commission for Refugees and Stateless Persons and the those working within the judicial system (judges, public prosecutors, legal trainees and prison staff etc.) through the intermediary of the Ministry of Justice[129]. It should also be noted that the Centre has received an increase in demand for training on multicultural issues from private companies and bodies, including Euromut (federation of mutual insurance companies), the Red Cross and a federation of rest homes. The Activity Report 2000 of the Flemish-speaking Training Service outlines its new responsibility for training courses in managing diversity aimed particularly at the training service of the Belgian Army and for a basic training course at the Ecole de Police (police training college) in Anvers. The second half of 2000 was reserved for the preparation and training of trainers in managing diversity, in connection with the Flemish Community programme – in the context of the VESOC agreements – to encourage

[129] Centre pour l'égalité des chances et la lutte contre le racisme (Centre for Equal Opportunities and Opposition to Racism), "*Un combat pour les droits*", annual report 2000, pp. 79-84

and support a policy of cultural diversity within organisations and companies in the commercial and non-commercial sectors[130].

Mass media

Belgium has already taken the measures necessary to ensure that trainers and persons working in the mass media are aware of their responsibility, in the field of education, for combating racial discrimination and that they behave accordingly. In Flanders, Article 20, paragraph 2, of the Flemish Council Decree of 4 May 1994 on cable networks, their installation and use, as well as the broadcasting and production of television programmes, stipulates that the broadcasting organisations' programmes must not incite hatred for reasons linked to race, sex, religion or nationality[131]. In the French Community, equivalent provisions appear in Article 7, paragraph 1, of the French Community Decree on the status of Radio-Télévision belge francophone (*Belgian Francophone Radio and Television* - RTBF).

In a recent judgement, the Council of State applied Article 7 of this Decree. It had to examine the decision by RTBF to withdraw the right to broadcast on radio and television from the FNB (*Front Nouveau de Belgique* – Belgian New Front). It considered that, taking into account Article 7, paragraph 1 of the Decree of 1997 on the status of RTBF – prohibiting racial discrimination – and Article 3, paragraph 1, of the Cultural Covenant (*Pacte culturel*): "RTBF is not prohibited from broadcasting innocuous messages from persons known not to respect the values listed in Article 7 of the Decree, but it is no longer obliged to agree to broadcast such messages". It considered that "as RTBF was authorised to decide not to provide a broadcasting platform for a party which would not respect the principles and rules of democracy or would not comply with them, the distinction, which was declared to be discriminatory, does have basis in law[132].

Article 11[133]

Are there any measures to promote the social dialogue on the issues of the Directive at national level?

Dialogue with the social partners with the aim of promoting equal treatment on the grounds of race or ethnic origin already exists in Belgium, mainly on the initiative of the Centre for Equal Opportunities and Opposition to Racism.

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[130] Centre pour l'égalité des chances et la lutte contre le racisme (Centre for Equal Opportunities and Opposition to Racism), "*Un combat pour les droits*", annual report 2000, pp. 84-89.

[131] (*MB*, 4 June 1994; err. *MB*, 22 October 1994). Work is currently in progress on finalising a code of ethics for professional journalists. In the Netherlands, half a dozen principles and a check-list for reporting about immigrants has already been developed (see DOPPERT, M. and TOP, B., *Werkgroep Migranten en Media van de Nederlandse Vereniging van Journalisten, Aanbevelingen voor berichtgeving over migranten*, Amsterdam, 1993, 18-23)] See also VOORHOOF, D., "*Vrijheid van meningsuiting, media, racisme en revisionisme: de marges van het recht*", l.c., 38-39.

[132] C.E., 9 June 1999, Bastien c/ RTBF, n°80.787. For a commentary, see E. BRIBOSIA and M. JURAMIE, "*Restrictions légales aux libertés et droits des partis liberticides*", *Revue du droit des étrangers*, 1999, n° 103, pp. 191-212.

[133] Article 13 in the Employment Equality Directive.

As mentioned above, Article 2bis of the Law against racism penalises discrimination in the world of work in the broad sense. However, its application remains problematic in the work and employment sector. In order to raise awareness of the existence of this article in the relevant spheres and thereby to ensure that discrimination in employment forms the subject of prosecutions, CEOOR and the three major union organisations have concluded protocols on the treatment of discrimination suffered by their members[134].

On 17 July 1998 the Collective Agreement 38ter was concluded. In a chapter entitled "equal treatment" it stipulates that employers engaging in recruitment shall not discriminate between candidates on the basis of their age, sex, civil status, medical background, race, skin colour, national or ethnic origin, political or philosophical convictions or membership of a union or other organisation. A Royal Decree taken on 8 October 1998 confirmed the general restrictive nature of this Convention (M.B. 27 October1998).

In addition, non-discrimination codes have been concluded in some sectors, such as HORECA (hospitality) and the sphere of temporary work[135]. In the case of the latter, attention should be drawn to the Collective Agreement of 7 May 1996 concluded within the Joint Committee for Temporary Work (*Commission paritaire pour le travail intérimaire*) on the code of good practice relating to the prevention of racial discrimination[136]. In the event of a breach of this code of good practice, and without prejudice to the procedures usually applicable in cases of violation of a collective agreement, any injured person may lodge a complaint, either in accordance with the procedure established to this effect by the working regulation or through the *Commission de bons offices* (Commission of Good Office), the competence of which is set out by the collective agreement of 8 July 1993 (Article 3).

The Vlaams Economisch Verbond (VEV: Federation of Flemish Companies), in collaboration with the Union Wallonne des Entreprises and the Association des Entreprises in Brussels (Walloon Enterprise Union and the Enterprise Association), produced a manifesto for companies against the exclusion of migrants. The aim was to convince as many companies as possible to sign this manifesto and to ensure its implementation.

The Programme to Combat Racism and Other Forms of Discrimination adopted by the Council of Ministers during its session of 17 March 2000, includes the objective, in collaboration with the social partners, to invite companies to subscribe to a "Code of Good Conduct" on the model of the advertising code of ethics and by which they commit themselves not to give their co-operation to initiatives or activities of a racist nature.

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[134] Centre pour l'égalité des chances et la lutte contre le racisme, "Analyse de la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie", 1999, p. 12.

[135] In the case of this last sphere it is important to note that a complaint concerning the employment agency, ADECCO, was lodged with the public prosecutor of Brussels at the beginning of 2001 by CEOOR and the *Ligue des droits de l'Homme* (Human Rights League), on the basis of Article 2bis of the Law of 30 July 1981. The subject of the complaint was the practice of using ethnic criteria, including the "BBB" (*Bleu-Blanc-Belge* (Blue-White-Belgian) – a code defining persons of Belgian origin) in the files kept by the agency on each of the applicants for temporary work for whom they guarantee placements. This practice, which was revealed by an individual working for Adecco, was confirmed by a search of the premises of the employment agency effected on 22 February 2001 (*Ligue des droits de l'homme, "Adecco complice de discriminations à l'embauche*", press release, 23 February 2001, http://www.liguedh.org/actualites/010223adecco.html).

[136] Collective Agreement made compulsory by Article 1 of the Royal Decree of 9 September 1996, *M.B.,* 6 November 1996.

Article 12[137]

Are there any measures to promote the dialogue with non-governmental organisations at national level?

Dialogue with NGOs exists and is co-ordinated by the action of CEOOR which is charged with developing co-operation and dialogue with all the public and private players involved in combating discrimination. The government intends, in partnership with non-profit-making associations and civil society, through the Programme to Combat Racism and Other Forms of Discrimination of 17 March 2000, to make use of the experience of the Centre in order to ensure a permanent dialogue between the member of the public who are affected by discrimination and the public authorities whose responsibility it is to combat discrimination.

Article 13[138]

Is there a specialised body to promote equal treatment, irrespective of race or ethnic origin at national level? If so, what are its powers and duties? Is such a body effective?

If not, would the government need to act in order to give this body such specific powers? What would be the procedure?

Current situation: the role and the remit of the Centre for Equal Opportunities and Opposition to Racism

The current situation in Belgium complies fully with the provisions in Article 13 of the Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The Centre for Equal Opportunities and Opposition to Racism, created by the Law of 15 February 1993, is an independent body charged with promoting equal opportunities and combating all forms of discrimination on the grounds of race, colour, descent, origin or nationality. It is linked to the departmental offices of the Prime Minister, but enjoys legal status in its own right and exercises its activities fully independently. The functions of the Centre include receiving complaints from persons who have suffered discrimination on the grounds of race (…), initiating inquiries or studies into discrimination, publishing reports and putting forward recommendations to the public authorities and to private individuals and institutions on issues connected to discrimination. It is available to individuals, who are victims of or witnesses to racist acts or discrimination. A team of experts provides information, collects complaints, analyses incidents of discrimination, advises of existing services, implements mediation and considers, with the applicant the possible legal recourses on the basis of the Law of 30 July 1981 on the prevention of certain acts inspired by racism or xenophobia. The Centre is entitled to bring legal actions in any dispute to which may be applied the Law of 30 July 1981 on racism, or that of 13 April 1995 containing provisions aimed at preventing trafficking of human beings and child pornography. As of 1993, the Centre has responsibility for numerous victims of racism and has decentralised its reception services by opening local services for combating

[137] Article 14 in the Employment Equality Directive.
[138] There is **no** article in the Employment Equality Directive corresponding to Article 13 of the Racial Equality Directive on specialised bodies.

racism in all the large and medium-sized urban centres in the three regions of the country. There are currently twelve services.

Proposals under discussion: extending the competence of the Centre for Equal Opportunities and Opposition to Racism

Following a proposal by the Prime Minister and the Deputy Prime Minister with responsibility for equal opportunities policy, the Council of Ministers, in its session of 17 March 2000, adopted the Programme to Combat Racism and Other Forms of Discrimination. This programme makes provision for the adoption of a general law, as distinct to the specific antiracism legislation, pertaining to combating discrimination based on grounds other than those relating to race or ethnic origin , i.e. sex, sexual orientation, birth, civil status, illness, disability and age[139], as well as extending the competence of CEOOR in mediation and its potential right to institute legal proceedings in any discrimination case which might be resolved by this means. The role of the Centre will continue to be in keeping with the policy it fulfils in terms of racial discrimination:

- reception of victims of discrimination;
- investigation of complaints, informing complainants about their rights and directing them to the relevant services;
- implementation of mediation or conciliation For the benefit of the authority, private body or individual in question;
- in the event of failure, support for the complaint in legal actions and, potentially, constituting itself as a civil claimant in conjunction with the victim of discrimination.

In addition to dealing with complaints, the Centre will play a co-ordinating role aimed at encouraging positive policies towards groups exposed to discrimination. In the political sphere, this co-ordination will be organised by the creation of an Interministerial Conference on Anti-discrimination Policy, under the presidency of the Minister with responsibility for equal opportunities and combating discrimination, for which the Centre will guarantee the preparation and follow-up of decisions. This co-ordination role will also have a place in the administrative sphere through an intensification of co-operation with the relevant services. Finally, regarding co-operation with non-profit-making associations and civil society, the Centre's experience will be put to good use to ensure a permanent dialogue between the members of the public who are affected by discrimination and the public authorities responsible for combating it.

Within the framework of this Programme to Combat Racism and Other Forms of Discrimination, the government has drafted a draft bill on strengthening antiracism legislation, one chapter of which deals with the amendments made to the Law of 15 February 1993 creating a CEOOR with the aim of extending its scope. Following the decision of the Council of State no. 31132/2 of 12 March 2001, which was particularly critical regarding certain extensions of the scope established in the draft bill, amendments were made and a new version of this draft bill was adopted by the Council of Ministers on 1

[139] As regards this Programme to Combat Racism and Other Forms of Discrimination the religious or philosophical conviction was not included in the prohibited grounds for discrimination. It was only later (December 2000) that the government proposed amendments to the Mahoux bill in order to ensure that it complied with the European Directive establishing a general framework for equal treatment in employment and occupation. These amendments make provision for the inclusion of religious and philosophical discrimination in the list of grounds for discrimination.

June 2001. In this, the stipulation is made that in the future the Centre will be entitled to collect and publish statistical data and jurisprudence decisions (ensuring that the anonymity of the parties involved is maintained) which might be useful in the evaluation of the Law of 30 July 1981 and the Law on combating discrimination. It will also be able to request the relevant administration, if it can draw on facts which allow for the presumption of the existence of discriminatory treatment by a public servant, to make enquiries and to report back with the results of the analysis of the facts concerned. The disciplinary authorities will thus have to inform the Centre in a way which justifies their subsequent actions[140]. Finally, it is stipulated that the Minister of Justice must provide the Centre annually with legal statistics relating to the enforcement of the Law of 30 July 1981 and the future Law on combating discrimination, as well as the legal decisions taken in enforcing these laws, ensuring that the anonymity of the parties involved is maintained [141].

Article 14[142]

Is action needed to ensure that national law guaranteeing equal treatment between individuals, irrespective of racial or ethnic origin and religion or belief, takes priority over other laws, regulations or administrative provisions?

Do national legislative or administrative procedures provide for declaring null and void those provisions in agreements, contracts or rules that relate to professional activity, workers and employers that are contrary to the principle of equal treatment?

If laws, regulations or administrative provisions result in discrimination on the grounds of race or ethnic origin, the Court of Arbitration has the power to annul them or declare them to be non-applicable, if they conflict with Articles 10 and 11 of the Constitution, which guarantee equality and non-discrimination. The Council of State has the power to annul administrative or regulatory acts, which would be contrary to the Constitution or the laws. In addition, in pursuance of Article 159 of the Constitution, it is stipulated that the courts shall only apply general, provincial and local judgements if they comply with the laws.

Furthermore, certain legislative changes are necessary in order for Belgian law to comply with the concept of equal treatment as it is established by the Council Directive of 29 June 2000 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The Mahoux Bill on combating discrimination, as amended by the government, establishes civil provisions allowing discrimination on various grounds to be combated more effectively, particularly racial discrimination in relationships between individuals, especially in the fields of employment and housing[143]. Article 9 of the bill expressly makes provision for clauses of a contract, which is contrary to the provisions of anti-discrimination law, to be declared null and void and the same applies to clauses which

[140] Article 9 of the draft bill suggesting an amendment of Article 3 of the Law of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism by adding two new paragraphs, 9 and 10.
[141] Article 10 if the draft bill suggesting the insertion of a new paragraph into Article 4 of the Law of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism.
[142] Article 16 in the Employment Equality Directive.
[143] See above, commentary on Article 7.1.

stipulate that one or more of the contracting parties renounce in advance the rights guaranteed by anti-discrimination law[144].

Article 15[145]

Is there a need for further effective and proportionate sanctions, penalties and remedies? Do equivalent provisions already exist on the national level in other areas?

Criminal sanctions

In the criminal sphere, it has already been seen that the Belgian Law of 30 July 1981 establishes prison sentences of between one month and a year or a fine of 50 to 1,000 Belgian francs (with a surcharge of ten per cent). In the case of offences committed by public servants, the minimum and maximum prison sentences are doubled (two months to two years). Regarding racist crimes committed through the press, the amendment of Article 150 of the Constitution made in 1999 represents a clear improvement which is likely to reinforce the effectiveness of the punishment of racist offences committed by means of printed media (distribution of pamphlets, books etc)[146].

To make the sanctions applicable in violations of the legal provisions for combating racism more effective and dissuasive, the government programme on combating racism of 17 March 2000 formulates various suggestions that were incorporated into the draft bill on strengthening antiracism legislation. Thus, Article 5ter establishes racist intention in aggravating circumstances when the following offences are committed: indecent assault, rape, intentional homicide and assault and battery, failure to give assistance to a person in danger, abduction and illegal confinement of persons, harassment, abuse, violation of graves and cemeteries, arson, destruction of property, abuse - contravention. Until now, where certain crimes were committed from exclusively racist motives, the perpetrator was only prosecuted for the offence in question, without the racist intent being taken into account. In fact, sometimes, in order that the law against racism may be applied, for example, to assault and battery inflicted for xenophobic reasons, it must be demonstrated that the perpetrator of the assault and battery had the intention of inciting the spectators or persons present to hatred or discrimination, which is sometimes difficult.

Civil sanctions

By virtue of standard law, victims of acts of discrimination have the right to full compensation for the damages they suffer in pursuance of Article 1382 of the Civil Code.

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[144] In this respect, it is surprising that a more general formulation was not retained like that in Article 18 of the Law of 7 May 1999 on the equal treatment of men and women, which stipulates, in a broader sense, that "with the exception of legal provisions, provisions contrary to the principle of equal treatment as defined in [the Law of 7 May 1999] are null and void". If Article 9 remains formulated as it is currently, the judge will, as far as possible, have to interpret it in compliance with Article 14 of Directive 2000/43/EC and Article 16 of Directive 2000/78/EC which not only requires the nullity of provisions contrary to the principle of equal treatment which apear in contracts but also of those which appear in collective agreements and internal company regulations, as well as in regulations governing profit-making and non-profit-making associations, self-employed occupations and workers' and employers' organisations.

[145] Article 17 of the Employment Equality Directive.

[146] See above, commentary on Article 7.1.

The Mahoux Bill on combating discrimination aims to reinforce and make more effective civil actions in relation to discrimination. Thus, Articles 10, 11, 12 and 13 set out the specific rules of procedure and competence for civil actions to which the law may be applied, in order to ensure the rights of the victims are effectively respected[147].

Complementary measures

A number of complementary measures aimed at making combating discrimination more effective – some of which are also the subject of draft laws and bills currently pending – are also proposed by the Programme to Combat Racism and Other Forms of Discrimination:

- Adoption by the Board of Principal Crown Prosecutors (*Collège des procureurs généraux*) of a circular encouraging the public procurator's offices to prosecute infringements of the law against racism, (including cases where these are perpetrated by parliamentarians); in the event of their failing to act, the right of positive injunction at the disposal of the Minster of Justice must be exercised.
- Encourage the public prosecutor's offices to make use, in racism cases, of criminal mediation and other provisions instituted by the laws of 10 February 1994.
- In the context of the public service, to allow the Centre, if it is in possession of information concerning discrimination perpetrated by a public servant, to compel the administration to keep it informed about the matter with a view, if the facts are confirmed, to considering setting a disciplinary procedure in motion; to oblige the administration to inform the Centre of the follow-up to this process[148].
- In collaboration with the social partners, invite companies to subscribe to a *"Code of Good Conduct"* on the same model as the advertising code of ethics, and by means of which they commit themselves not to assist initiatives or activities of a racist nature; to negotiate protocols with the Post Office and other private distribution companies in order to prevent the dissemination of racist propaganda.
- Evaluate whether the antiracism legislation allows the dissemination of racist and revisionist messages on the Internet to be effectively punished.
- Adapt the wording used in listing statements by the police services to identify and reflect discriminatory behaviour.
- Finalise a statistical tool at the Centre in order to evaluate continuously the application conditions of the anti-discrimination legislation.[149].
- Reinforce the provision of Article 5bis of the Law of 30 July 1981 which entitles the judge to pronounce forfeiture or revocation of permanent deputies, *burgomasters*, deputy mayors and public servants who make remarks which are incompatible with the office they exercise (especially remarks of a racist or revisionist nature).

Financial sanctions with regard to political parties[150]

[147] See above, commentary on Articles 7.1 and 8.
[148] This is found in the draft bill on strengthening anti-racism legislation, Article 9 (see above, commentary on Article 13).
[149] This is found in the draft bill on strengthening anti-racism legislation, Articles 9 and 10 (see above, commentary on Article 13).
[150] See above, commentary on Article 6.

Article 16[151]

What action (if any) has already been taken in order to comply with the Directive?

Before the Directives were adopted, on the proposal of the Prime Minister and the Deputy Prime Minister with responsibility for equal opportunities, the Council of Ministers had already, during its session of 17 March 2000, adopted a Programme to Combat Racism and Other Forms of Discrimination, the majority of chapters of which have already been mentioned.

The aim of this programme was to allow Belgium to conduct a voluntary and effective antiracism policy:

- the adoption of a general law, as distinct from the specific antiracism legislation, pertaining to combating discrimination based on grounds other than those relating to racism, i.e. sex, sexual orientation, birth, civil status, illness, disability and age[152];
- the amendment of the law on the prevention of incitement to racial hatred in order to improve its effectiveness;
- the equipping of an independent public institution with the power to look after the interests of victims of discrimination and mandated to provide the public authorities with a continuous evaluation of the implemented policies and to achieve this by extending the competence of the CEOOR.

In order to implement this Programme in accordance with Belgium's European obligations, legislative initiatives have been taken:

- a draft bill on strengthening antiracism legislation has been developed by the government.
- the Mahoux Bill on combating discrimination and amending the Law of 15 February1993 creating a CEOOR was tabled at the Senate on 14 July 1999 (Sénat, doc. 2-12/1)[153].

Protocol Nº 12

Has your government signed Protocol N°12?
Does your government intend to ratify Protocol N°12?
What are the obstacles to the ratification of Protocol N°12 by your country? Are these obstacles political or legal? In the case of obstacles in national legislation, what are these?

The Belgian government signed Protocol Nº 12 on 4 November 2000. It intends to ratify the Protocol, but processes are currently underway at the relevant ministries in order to establish whether, potentially, any reservations or declarations must be formulated at the time of

[151] Article 18 in the Employment Equality Directive.
[152] As regards this Programme to Combat Racism and Other Forms of Discrimination the religious or philosophical conviction was not included in the prohibited grounds for discrimination. It was only later (December 2000) that the government proposed amendments to the Mahoux bill in order to ensure that it complied with the European Directive establishing a general framework for equal treatment in employment and occupation. These amendments make provision for the inclusion of religious and philosophical discrimination in the list of grounds for discrimination.
[153] See above, commentary on Article 1.

ratification. In this respect, it should be noted that the Centre for Equal Opportunities and Opposition to Racism, consulted by the Minister of Justice, has advised that Belgium should ratify the Protocol without reservations and considers that it is a matter of principle to adopt it since it is a document that relates to the fundamental rights of individuals.

Appendix

Article 3 Directive of 29 June 2000	Law of 30 July 1981 + *draft bill on strengthening anti-discrimination legislation (1 June 2001)*	*Bill on combating discrimination (Mahoux bill), as amended by the government*
conditions for access to employment, to self-employment and to occupation (…) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience employment and working conditions, including dismissals and pay	Article 2bis: Whoever, in placing people in employment, providing professional training, offering jobs, recruitment, the performance of contracts of employment, or the dismissal of employees, commits discrimination against a person on the grounds of race, colour, descent, origin, or nationality shall be punished by the penalties set out in Article 2 *draft amendment Article 2bis : "the same penalties are applied if the discrimination perpetrated against a group, a community or their members is based on supposed race, colour, descent or national or ethnic origin of these members of certain of them"*	*Article 2, paragraph 1: Any direct or indirect discrimination is prohibited which pertains to (…)* *the advertising and treatment of applications for vacancies* *the commencement and termination of a contract of employment* *employment conditions and the pursuit of a professional career* *the appointment of a public servant or the posting of a public servant to a service (…)*
membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations	Article 2: Whoever, in supplying or offering to supply services, goods or the enjoyment of them, commits discrimination against a person (or a group) on the grounds of race, colour, descent, origin or nationality shall be punished by a prison sentence of one month to one year and by a fine of fifty francs to one thousand francs, or by one of these penalties alone + Principle of union freedom without discrimination (Articles 11 and 14 of the ECHR and Articles 10 and 27 of the Constitution)	*Article 2, paragraph 1: Any direct or indirect discrimination is prohibited which pertains to (…)* *any other normal exercise of an economic, social, cultural or political activity.*
social protection, including social security and healthcare social advantages education access to and supply of goods and services which are available to the public, including housing	Article 2: Whoever, in supplying or offering to supply services, goods or the enjoyment of them, commits discrimination against a person (or a group) on the grounds of race, colour, descent, origin or nationality shall be punished by a prison sentence of one month to one year and by a fine of fifty francs to one thousand francs, or by one of these penalties alone Article 4: Any public servant or public official, any bearer or agent of public authority or public power, who in the exercise of his or her duties commits discrimination against a person (or a group) on the grounds of race, colour, descent, origin or nationality or who arbitrarily denies any person the exercise of a right or liberty that he or she may claim, shall be punished by a prison sentence of two months to two years	*Article 2, paragraph 1: Any direct or indirect discrimination is prohibited which pertains to (…)* *the provision of goods and services (…)* *any other normal exercise of an economic, social, cultural or political activity.*
Other fields of application not stipulated in the Directive Except Article 2, paragraph 4: "Any instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1 [direct or indirect discrimination based on racial or ethnic origin]"	Article 1: The following shall be punished by a prison sentence of one month to one year and by a fine of fifty francs to one thousand francs, or by one of these penalties alone: Whoever incites discrimination, hatred, or violence against a person on the grounds of race, colour, descent, origin or nationality in the circumstances given in Article 444 of the Penal Code; Whoever incites discrimination, segregation, hatred or violence against a group, community or the members of it on the	*Article 2, paragraph 1: Any direct or indirect discrimination is prohibited which pertains to (…)* *the dissemination, publication or display in public of a text, an opinion, a symbol or any other support comprising discrimination*

	grounds of the race, colour, descent, origin, or nationality of its members, or some of them, in the circumstances given in Article 444 of the Penal Code; Whoever announces publicly the intention to perpetrate discrimination, hatred or violence, against a person on the grounds of race, colour, descent, origin or nationality in the circumstances given in Article 444 of the Penal Code; Whoever announces publicly the intention to perpetrate discrimination, hatred, violence, or segregation against a group, community or the members of it on the grounds of the race, colour, descent, origin or nationality of its members, or some of them, in the circumstances given in Article 444 of the Penal Code.	
Other fields of application not stipulated in the Directive	Article 3: "Whoever belongs to a group or organisation that clearly and repeatedly practises or advocates discrimination or segregation in the circumstances given in Article 444 of the Penal Code, or who gives assistance to any such group or organisation, shall be punished by a prison sentence of one month to one year and by a fine of fifty francs to one thousand francs, or by one of these penalties alone	
Other fields of application not stipulated in the Directive		*Article 2, paragraph 1: Any direct or indirect discrimination is prohibited which pertains to (…)* *references in official documents or reports*
Other fields of application not stipulated in the Directive	*New Article 5ter: racist intention is established in aggravating circumstances on the perpetration of certain offences. The indictable and serious indictable offences concerned are: indecent assault, rape, intentional homicide and assault and battery, failure to give assistance to a person in danger, abduction and illegal confinement of persons, harassment, abuse, violation of graves and cemeteries, arson, destruction of property, abuse - contravention.*	