Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity

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Belgium is a federal state with a complex political and institutional structure. Employment Directive 2000/78/EC touches upon the spheres of competence of the federal state, the (three) communities and the (three) regions. This explains why there are presently 11 legislative texts, each partially implementing the directive, with relevance to discrimination on the basis of sexual orientation. For private employment purposes, in particular the federal Act of 10 May 2007 aimed at combating particular forms of discrimination (general Anti-discrimination Act) should be mentioned. The Act, which prohibits discrimination on the basis, among other grounds, of sexual orientation, covers a broad range of activities, of which employment is only one.

The said federal Act of 10 May 2007 comes in the place of an Act on the same subject, adopted in 2003. There are also several community and regional laws in place that by and large contain the same principles and measures as the federal legislation.

There is no single answer to the question of whether the scope of the legislation in Belgium regarding discrimination on the ground of sexual orientation only covers employment or whether it also covers areas mentioned in the Racial Equality Directive (or whether it even extends beyond the latter scope). The answer again depends on the extent to which each separate piece of legislation, adopted by the various legislators within their specific sphere of competence, applies to other areas than employment. The analysis of the various laws shows, however, that there is definitely a broader scope than employment only.

On most legislative and government levels an equality body is yet to be designated (mostly by the relevant governments). Basically, only the federal level, the Walloon Region and the French Community have already done so up till now, having designated the Centre for Equal Opportunities and Opposition to Racism (CEOOR) as a body competent to deal with issues relating to discrimination on the ground of sexual orientation and the Institute for the Equality of Women and Men (IEWM) as far as sex and transgender issues are concerned. The CEOOR's and the IEWM's specific functions and competences include receiving complaints from persons who believe themselves to have suffered discrimination, and dealing with these complaints in the manner it sees fit, including by acting as a go-between or even mediating between the defendants and plaintiffs of discrimination or (depending upon the facts) by taking cases to both civil or criminal courts.

There are a number of associations that are active in the field of the defence of rights of gay and lesbian people. These organisations do not seem to take cases to court independently, but mostly provide (moral and informative) support to victims, and refer individuals to the CEOOR when legal steps are to be taken. The good relations between many of the main private associations and the CEOOR have much to do with this.

Freedom of movement

The implementation in the Belgian legal order of Directive 2004/38/EC (on freedom of movement and residence of family members of EU citizens) apparently is not an easy task. To begin with, there was no implementing legislation when the period for implementation had expired, i.e. on 30 April 2006. Meanwhile the implementing legislation has been adopted: the Act of 25 April 2007 amending the Aliens Act of 15 December 1980 is aimed at the implementation of a number of Directives, including Directive 2004/38/EC. However, the Act of 25 April 2007 has not yet entered into force.

The Aliens Act, as amended by the said Act of 25 April 2007, provides for a definition of 'family members' which includes spouses, partners with a registered partnership equivalent to marriage and partners with a registered partnership not equivalent to marriage, as well as their descendants and ascendants. Given that Belgium recognises same-sex marriages and same-sex registered relationships, it is obvious that LGBT partners of EU citizens are treated in the same way as heterosexual partners.

Asylum and subsidiary protection

In Belgium, persecution or ill-treatment on the ground of the sexual orientation of the person concerned is considered to be a valid reason for granting asylum or subsidiary protection.

Applications for refugee status and for subsidiary protection are brought before the Commissioner-general for the Refugees and the Stateless Persons. An appeal can be brought before a specialised administrative court, the Council for Aliens Disputes.

Family reunification

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification has been implemented by the Act of 15 September 2006 amending the Aliens Act of 15 December 1980.

The Aliens Act, as amended, provides for a list of 'family members' who can enjoy family reunification, which is similar to the one relating to freedom of movement and residence of family members of EU citizens. Just like LGBT partners of EU citizens, LGBT partners of non-EU citizens are treated in the same way as homosexual partners.

Family formation by partners who want to marry in Belgium is made possible through the granting of a special visa, which is valid for 90 days. Given the possibility of a same-sex marriage in Belgium, family formation applies to same-sex partners. Under the Belgian Code of Private International Law, it is necessary, but also sufficient, that one of the partners is of a country that allows same-sex marriages.

Freedom of assembly

Freedom of assembly is protected by the Belgian Constitution. Article 26 of the Constitution provides as follows:

'The Belgians have the right to gather peaceably and without arms, in accordance with the laws, which can regulate the exercise of this right but cannot subject it to prior authorisation.

This provision does not apply to meetings in open air, which remain entirely subject to police regulations.'

Demonstrations or parades, e.g. by LGBT persons, fall under the second paragraph of this provision.

There have been no bans on demonstrations by LGBT persons. There have been a few demonstrations against the rights or the demands of LGBT people, mainly by certain religious groups.

Criminal law and hate speech

All legislative levels include one or more criminal provisions regarding discrimination and/or hate speech on the basis of sexual orientation in their legislation. However, the specific conduct that is criminalised differs from legislative level to legislative level.

Discrimination on the basis of sexual orientation is a crime only in exceptional circumstances; most anti-discrimination acts have only criminalised discrimination by civil servants, not by ordinary citizens.

'Hate speech' on the basis of sexual orientation is made a crime under the federal legislation to the extent that it constitutes 'incitement to hatred, discrimination and violence'; similar provisions are provided in most regional legislation. A barrier for the application of the incitement provision in the context of homophobia, at least where it concerns written expressions, is the special protection regime that the Belgian Constitution offers to so-called "press crimes". Crimes of such a nature are to be brought before a jury, which means that in practice press crimes are never prosecuted, given the "risk" of an acquittal by the jury combined with the priority that is given to other types of crimes that have to be brought before the jury (i.e. severe criminal acts such as rape, murder, etc.).

The federal legislation provides for aggravating circumstances in case certain common crimes are committed with a 'discriminatory' motive. The provisions stipulate that the minimum penalties that the Criminal Code provides for in case someone is found guilty of these offences can be doubled in case of imprisonment or increased by 2 years in case of confinement, "when one of the motives for the crime or offence consisted in the hatred against, the contempt for, or the hostility against a person based on" one of the discrimination grounds, amongst which 'sexual orientation'.

Transgender issues

Discrimination of transgender people is in Belgian legislation mostly covered under the ground of 'sex' (rather than under the ground of 'sexual orientation').[1] With the exception of the federal legislation, however, this makes little difference as to the applicable principles and procedures. On the federal level, where discrimination on the ground of sex is the object of a separate piece of legislation (Act of 10 May 2007 aimed at combating discrimination between women and men, or Sex-discrimination Act), it does entail a number of discrepancies as compared with discrimination on the basis of sexual orientation. One such peculiarity results from the fact that an entirely different equality body is responsible for anti-discrimination on the basis of sex, namely the Institute for the equality of women and men.

The Act of 10 May 2007 concerning transsexualism provides transgender people with a legal basis for the change of their sex and for the change of their name. Furthermore, article 57 of the Civil Code since 2007 provides for the possibility to postpone the registration of the sex of a child with three months, if

[1] Several pieces of legislation (e.g. art. 16 § 5 of the Decree of 10 July 2008 establishing a framework for Flemish policies of equal opportunities and equal treatment (*infra*)) *explicitly* equate a less favourable treatment on the basis of transsexuality to a less favourable treatment on the basis of sex.

the sex should be unclear and on the condition that a medical justification is submitted.[2]

Criticism however remains with respect to the fact that the legislation in fact requires irreversible sterilisation in order for a sex change to be legally recognized and with respect to the complicated and unpredictable consequences that a sex change has on the legal rules of descent and filiation (*infra*).[3]

Good practices

The federal Anti-discrimination Act provides for lump sum damages payable when discrimination is legally established.

The Flemish Framework Decree explicitly offers protection against cross-sectional discrimination, discrimination on the basis of putative (or falsely attributed) characteristics and discrimination by association.

The CEOOR has concluded formal protocols with some NGO's active in the field of discrimination on the basis of sexual orientation, so that these NGO's can act as (independent) local complaint offices for the CEOOR.

A circular of the Minister of the Interior has inaugurated a practice of granting residence permits to unmarried partners of Belgian citizens or persons allowed to stay in Belgium, on the basis of cohabitation in the framework of a stable relationship. The circular explicitly states that the practice should apply to both heterosexual and homosexual couples.

The fact that Belgium has ratified same-sex marriage is a central element in the exercise of the freedom of movement and residence, the right to family reunification and the possibility of family formation.

There is a person in the office of the Commissioner-General for the Refugees and the Stateless Persons who is exclusively occupied with applications for asylum or subsidiary protection, based on sex (and transsexualism) or sexual orientation. This practice allows for the generation of a specific expertise in this area.

According to a circular of the Minister of Justice on the registration of homophobic crimes and offences, the registration has to take account of the

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[2] Inserted by art. 2 of the Act of 15 May 2007 (Moniteur, 12 July 2007).

[3] See on both issues: P. Borghs, "Recht op onvruchtbaarheid?", in X, Lief en leed: jaarboek seksuele gezondheid, Sensoa/Garant: Antwerpen, 2010; Institute for the Equality of Women and Men, *Leven als transgender in België. De sociale en juridische situatie van transgender personen in kaart gebracht,* Brussels, 2009, 162-163.

homophobic nature of such crimes. This enables a better view of the extent of such complaints and contributes to more reliable statistical information.

Aliens can obtain a special visa, valid for three months, in order to marry in Belgium a Belgian citizen or an alien who resides lawfully in the country. Combined with the fact that Belgium has given a legal status to same-sex marriage, this arrangement makes it possible for a same sex partner to obtain a special visa, to enter into marriage in Belgium.

A. Implementation of Employment Directive 2000/78/EC

A.1. Main features

A.1.1. General: Belgium and the implementation of Directive 2000/78/EC

Belgium is a federal state with a complex political and institutional structure. Aside from the federal level, it is composed of three 'communities' (Flemish Community, French Community and German-speaking Community) and three 'regions' (Flemish Region, Walloon Region and Brussels-Capital Region). All have their own legislative powers, exercised by separate parliaments; with the exception of the Flemish Community and Flemish Region, which 'share' a single parliament. The competences of the federal state and those of its components – the communities and regions – are mutually exclusive.[4] These competences however do not neatly coincide with the material and personal scope of Employment Directive 2000/78/EC.

As such, the directive touches upon the spheres of competence of the federal state, the communities and the regions. Employment in education for instance in principle belongs to the competence of the communities. Furthermore, vocational retraining, retraining and redeployment, and assistance to individuals largely fall within the jurisdiction of the Regions. The various levels are also responsible for determining the status of their own personnel. The largest segment of rights and obligations of employers and workers, social integration, social benefits and security, and access to employment however falls within the jurisdiction of the federal state. The federal level also holds the residual competences relating to domains not falling under the jurisdiction of the communities or regions.

Therefore our focus will be more on the federal law(s) than those of the other levels. In total, there are presently 11 legislative texts partially implementing Directive 2000/78/EC with relevance to discrimination on the basis of sexual orientation:

[4] Rather than there being a hierarchy between the federal state and its components, such as in Germany or in the United States.

- Act of 10 May 2007 aimed at combating particular forms of discrimination (federal level)[5]
- Decree of 8 May 2002 aimed at achieving proportionate participation in the labour market (Flemish Community & Flemish Region combined)[6]
- Decree of 10 July 2008 establishing a framework for Flemish policies of equal opportunities and equal treatment (Flemish Community & Flemish Region combined)[7]
- Decree of 2 December 2008 concerning particular forms of discrimination (French Community)[8]
- Decree of 6 November 2008 aimed at combating particular forms of discrimination (Walloon Region)[9]
- Ordinance of 26 June 2003 concerning the mixed administration of the labour market in the Brussels-Capital Region (Brussels-Capital Region)[10]
- Ordinance of 17 July 2003 pertaining to the Brussels housing code (Brussels-Capital Region)[11]
- Ordinance of 4 September 2008 for advancing diversity and combating discrimination in public office of the Brussels Region (Brussels-Capital Region)[12]
- Ordinance of 4 September 2008 aimed at combating discrimination and promoting equal treatment in employment (Brussels-Capital Region)[14]
- Decree of 22 March 2007 concerning the equal treatment of persons in vocational training (French Community Commission in Brussels)[15]
- Decree of 17 May 2004 ensuring equal treatment on the labour market (German-speaking Community)[16]

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5 Moniteur, 30 May 2007. This Act is hereafter called the (general) Anti-discrimination Act. The Act was amended by the Act of 30 December 2009 (art. 107-119), Moniteur, 31 December 2009.

6 Moniteur, 26 July 2002. Amended by the Decree of 9 March 2007 (Moniteur, 6 April 2007) and the Decree of 30 April 2009 (Moniteur, 26 May 2009).

7 Moniteur 13 January 2009.

8 Moniteur, 23 September 2008. The pre-existing Decree of 19 May 2004 concerning the application of the principle of equal treatment (Moniteur, 7 June 2004) has been repealed by (art. 62 of) this Decree.

9 Moniteur 19 December 2008. Amended by the Decree of 19 March 2009 (Moniteur, 10 April 2009). The pre-existing Decree of 27 May 2004 concerning the equal treatment in employment and vocational training (Moniteur, 23 June 2004) has been repealed by (art. 37 of) this Decree.

10 Moniteur, 29 July 2003.

11 Moniteur, 9 September 2003. Amended by the Ordinance of 19 March 2009 (Moniteur 7 April 2009).

12 Moniteur, 16 September 2008.

14 Moniteur, 16 September 2008.

15 Moniteur, 24 January 2007. The Commission Communautaire Française (Cocof), that is: the French Community Commission, exercises some community competences for the French Community in the bilingual area of Brussels-Capital. (On the Flemish side, the Flemish Community exercises these competences directly in Brussels.)

16 Moniteur, 13 August 2004.

A.1.2. Federal level: Anti-discrimination Act

A.1.2.1. General

The first federal Anti-discrimination Act in which discrimination on the basis of sexual orientation was prohibited (Act of 25 February 2003) entered into force in 2003. This Act had to be replaced however, which was done in 2007. There were several reasons for this, the most important ones being the following two. Firstly the Act was not sufficiently in conformity with EU-law; Belgium had already been held liable by the European Commission regarding the implementation of Directive 2000/78/EC. Secondly the Belgian Constitutional Court had nullified several provisions and elements from the 2003 Act on account of their unconstitutionality (the list of grounds of discrimination for one thing)[18], thereby however reducing the Act's intelligibility and applicability. In order to address these and other problems the Act as well as the remainder of the federal discrimination legislation was radically amended and/or replaced.

The current (general) Anti-discrimination Act (Act of 10 May 2007) covers discrimination on the basis not only of 'sexual orientation', but also on the basis of age, marital status, birth, language, fortune, religion or belief, political conviction, current and future state of health, disability, physical or genetic characteristics, social origin and trade union affiliation or membership.[19] Of the additional grounds, 'current and future state of health' is also potentially relevant to matters (indirectly) related to sexual orientation, most importantly because it allows for protection of people with HIV or aids: in practice the Belgian equality body (cf. infra) regularly finds discrimination of homosexuals to be intricately bound up with fears and prejudices regarding these (and other) sexually transmitted diseases.

Besides the general Anti-discrimination Act there are two additional pieces of federal anti-discrimination legislation, dealing with discrimination on specific grounds: one on sex-discrimination (Sex-discrimination Act of 10 May 2007) and another on racial discrimination (Anti-racism Act of 30 July 1981, the

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[18] Due to unjustified and discriminatory exclusions of certain criteria. See: D. De Prins, S. Sottiaux & J. Vrielink, *Handboek discriminatierecht*, Mechelen, Kluwer, 2005, n° 1129-1142. For the ruling, see: Constitutional Court, n° 157/2004, 6 October 2004.

[19] The last ground was added by the Act of 30 December 2009 (art. 107-119; Moniteur, 31 December 2009) due to the fact that the Constitutional Court had (again) ruled the selection to be (partially) unconstitutional. Specifically the Court ruled, in response to a request for annulment by several labour organisations, that the exclusion of the ground 'trade union affiliation' or 'membership of a trade union' was unjustified (Constitutional Court, n°. 64/2009, 2 April 2009, B.8.15-B.8.16. Compare: Constitutional Court, n° 123/2009, 16 July 2009). Additional unjustified exclusions might in the future be determined by the Court. See extensively: J. Vrielink & D. De Prins, "Die Wiederkehr des Gleichen. Het Grondwettelijk Hof en de (federale) discriminatiewetgeving", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 2009, 579-614.

contents of which have been replaced by an Act of 10 May 2007, covering: so-called[20] race, colour, descent, national or ethnic origin and nationality). The Sex-discrimination Act also covers discrimination of transgender people (cf. *infra*).

A.1.2.2. Scope

The material and personal scope of the federal legislation implementing Directives 2000/78/EC is much broader than that of the directive itself. The 'Act aimed at combating particular forms of discrimination' (general Anti-discrimination Act) prohibits discrimination in the following contexts and areas of public life:

- The provision of goods, facilities and services;
- Social security and social benefits;
- Employment in both the private and public sector;
- Membership of or involvement in an employers' organization or trade union;
- Official documents or (police) records;
- Access to and participation in economic, social, cultural or political activities accessible to the public.

Two explicit guidelines hold with regard to these areas however. Firstly, the areas are to respect the federal jurisdiction, so that e.g. the Act is not applicable to employment matters or goods and services falling under the authority and jurisdiction of the communities and the regions. Secondly, the private sphere is in principle excluded from the scope of the Act: the Act is applicable only to discriminations in the public domain.

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[20] Much of Belgian anti-discrimination legislation speaks of 'so-called race' rather than 'race'. This was initiated by the federal legislator in 2003 who argued that "use of the term 'race' could give the impression that the legislator thereby confirms the existence of distinct races while this concept is scientifically non-existent" (*Parliamentary Documents*, Senate 2001-2002, n° 2-12/15, 64). As such, the aim of the adjective 'so-called' is "to indicate that the distinction exists only in the mind of the racist and does not correspond with a reality" (*Parliamentary Documents*, Senate 2000-2001, n° 2-12/6, 1). See extensively: D. De Prins, S. Sottiaux & J. Vrielink, *Handboek discriminatierecht*, Mechelen, Kluwer, 2005, n°s 761-763. Compare also: recital n° 6 of Directive 2000/43/EC: "The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories".

A.1.2.3. Concept of discrimination

Direct and indirect discrimination

The Act distinguishes between direct and indirect 'distinctions' on the one hand, which may be justified and that denote a different or unequal treatment, and direct and indirect 'discriminations' on the other hand, being prohibited and unlawful by definition. Direct distinctions are defined as "the situation that occurs when one person is treated less favourably than another is, has been or would be treated in a comparable situation", on any of the grounds falling under the Act" (art. 4, 6° Anti-discrimination Act). Indirect distinctions are defined as "the situation that occurs when an apparently neutral provision, criterion or practice would put persons with a protected characteristic at a particular disadvantage compared with other persons".

The system for justifying distinctions or unequal treatment is 'closed' in the areas of the material scope dictated by the directive(s), that is: in employment for the ground 'sexual orientation'. Outside these areas the justification system for 'direct distinctions' is an 'open' one. That is: distinctions will not amount to discriminations to the extent that they are justified by means of an objective and reasonable justification.

Direct distinctions falling under scope of the directive(s)

Direct distinctions[21] on the basis of 'sexual orientation' in the general context of employment can be justified in three ways. Firstly, and in line with the directive[22], a direct distinction may be justified where a characteristic related to 'sexual orientation' constitutes a genuine and determining occupational requirement in light of the "nature of the relevant specific professional activity" (art. 8 § 2 Anti-discrimination Act). In order for this to occur, the requirement is to have a legitimate objective as well as to be proportionate in relation to this objective. The Act also provides for a specific 'genuine and determining occupational requirement' for "public and private organisations, the ethos of which is based on religion or belief" (art. 13 Anti-discrimination Act), but this exception is limited to the distinctions on the basis of religion or belief and does not extend to 'sexual orientation'. The relevant article does stipulate that "the Act does not prejudice the right of public or private organisations the ethos of which is based on religion or belief, to require individuals working for them to

[21] Logically consistent, the federal Acts distinguish between (direct and indirect) 'distinctions', which may be justified and merely concern an unequal treatment, and (direct and indirect) 'discriminations', being prohibited by definition.

[22] See article 4.1 Directive 2000/78/EC.

act in good faith and with loyalty to the organisation's ethos", provided – that is – "that the provisions of the act are otherwise complied with".[23]

A second exception is that direct (or indirect) distinctions on the basis of sexual orientation can never lead to the finding of direct (or indirect) discrimination when said distinction constitutes a positive action (art. 10 Anti-discrimination Act).[24] A measure can only be seen as a positive action, however, if it satisfies the following requirements, taken from the jurisprudence of the Belgian Constitutional Court: an obvious or apparent inequality must (demonstrably) exist; the disappearance of this inequality must be designated as an aim that is to be promoted; positive action measures must be of a temporary nature and disappear if and when the intended aim has been reached and finally positive action measures may not unduly limit other people's rights (art. 10 § 2 Anti-discrimination Act). The Act further stipulates that the government will – by royal decree – determine the "situations in which and conditions under which a positive action measure can be taken" (art. 10 § 3 Anti-discrimination Act).[25]

The third and final exception concerns direct (or indirect) distinctions that have their basis in (other) legislation. Under art. 11 § 1 Anti-discrimination Act such distinctions are not considered to be prohibited by the said Act. This provision is somewhat contested. Critics have pointed out that it creates the impression of a legislator wanting to exempt himself from his own rules, which might even run counter to requirements of the Directive 2000/78/EC (and other European directives or law), even though paragraph 2 of article 11 provides that the first paragraph does not imply any judgment on the conformity of a direct (or indirect) distinction, having its basis in legislation, with the Constitution, EU law and (the relevant) international law. There appears to be a tension between this explicit exemption and the approach required by article 16a Directive 2000/78/EC, which states that "Member States shall take the necessary measures to ensure that (…) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished".[26]

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[23] Compare: article 4.2 Directive 2000/78/EC.

[24] Compare: article 7.1 Directive 2000/78/EC.

[25] For matters concerning employment and social security, the Act determines that these royal decrees are made: 1. concerning the public sector, after consultation of the relevant committees of the unions; 2. concerning the private sector, after consultation of the National Labour Council. If these organs or organisations do not react to a request within two months, their advice is considered to be positive.

[26] Note however that if laws and administrative provisions result in discrimination (on any ground) in the sense of (articles 10 and 11 of) the Belgian Constitution the Constitutional Court has the power to annul them or declare them non-applicable. The Council of State, the supreme administrative court, furthermore has the power to annul administrative acts that would be contrary to the Constitution.

Direct distinctions falling outside of the scope of the directive(s) and (all) indirect distinctions

The Anti-discrimination Act has a so-called 'open' system of justification for all direct distinctions on the basis of sexual orientation outside of the context of employment as well as for all indirect distinctions falling under any part of the scope of the Act (including employment).

The justification for said distinctions requires that they be "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary" (respectively art. 7 and art. 9 Anti-discrimination Act). In addition to this justification, the general exceptions of positive action and distinctions required by or with a basis in legislation hold for these types of distinctions as well (cf. supra).

Specific forms of discrimination: instruction to discriminate and harassment

Aside from direct and indirect discrimination the Anti-discrimination Act – in line with the Directive 2000/78/EC – introduces two additional forms of discrimination relevant for the ground sexual orientation and handles them on the same footing. This concerns firstly 'an instruction to discriminate' and secondly 'harassment'.

An instruction to discriminate is defined as follows: "any conduct that consists in giving anyone the instruction to discriminate a person, a group, a community or one of its members on the grounds of" the protected criteria, amongst which sexual orientation (art. 4, 13° Anti-discrimination Act).[27] Although neither the Act nor the directive explicitly require so, it is generally assumed – in light of the nature of the term 'instruction' – that in order for this provision to be applicable a hierarchical or other relationship must exist between the one giving the instruction and the one receiving it.[28]

Harassment on the other hand is considered a form of discrimination when "unwanted conduct related to any of the protected criteria takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment" (art. 4, 10° Anti-discrimination Act).[29]

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[27] Compare: art. 2.4 Directive 2000/78/EC.

[28] For the criminal provision of 'incitement to hatred, discrimination and violence' to apply, by contrast, such a hierarchical relationship is not required (cf. *infra*).

[29] Compare: art. 2.3 Directive 2000/78/EC.

A.1.2.4. Civil provisions

The Anti-Discrimination Act consists mainly of civil provisions, the most important ones of which will consecutively be discussed.

Firstly, the Act states that "any provisions contrary to" it "as well as provisions determining that one or more contracting parties renounce the rights guaranteed by" the Act "are null and void" (art. 15 Anti-discrimination Act).[30]

Secondly, the Act introduces a feature virtually unprecedented in Belgian law: lump sum damages payable when discrimination is legally established. Prior to this, adequate compensation and damages were the Achilles-heel of (civil) Belgian discrimination-law, especially in the context of employment.[31] In theory victims of discrimination had the right, in pursuance of article 1382 of the Civil Code, to full compensation for the damages they suffered. However, even if the burden of proof could be surmounted, the damages paid tended to be merely symbolic. In order to respect article 17 of Directive 2000/78/EC – requiring "effective, proportionate and dissuasive" sanctions – lump sum damages were introduced in 2007. These more specifically entail the following: in case of discrimination the victim can claim either a lump sum determined in the Act or damages in the amount of the actual harm that was done (art. 18 § 1 Anti-discrimination Act). In the latter case the victim is to provide proof of the magnitude of the harms suffered, while the lump sums are determined as follows. In the context of employment or social security it comes down to 6 months worth of gross income. Unless the employer is able to demonstrate that the less favourable treatment would also have occurred on other than discriminatory grounds; in that case the compensation is reduced to 3 months gross income (e.g. when the person who was discriminated against would (demonstrably) also not have been the person most suited for a job, even if he or she had not been excluded due to discriminatory considerations). In any other contexts of the Act's scope the lump sum is equal to 650 euro, liable to be raised to 1.300 if the person committing the discrimination is unable to demonstrate that the less favourable treatment would also have taken place on other than discriminatory grounds.[32]

These lump sums can be claimed in any legal proceedings based on the Act, but the Act also provides for a special cease and desist procedure in which the lump sums can be awarded. This procedure is dealt with according to the forms and

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30 Compare: art. 16 b Directive 2000/78/EC.

31 See: C. Bayart, *Discriminatie tegenover differentiatie. Arbeidsverhoudingen na de Discriminatiewet. Arbeidsrecht na de Europese Ras- en Kaderrichtlijn*, Brussels, Larcier, 2004, 359; D. De Prins, S. Sottiaux & J. Vrielink, *Handboek discriminatierecht*, Mechelen, Kluwer, 2005, 559-561.

32 The lump sum damages are also determined according to the latter model if the material damage ensuing from discrimination in employment of social security can be redressed via the application of the penalty of nullity (cf. *supra*).

regulations of summary proceedings, and as such is dealt with in a limited timeframe; its status however is that of a judgement on the merits. To enforce compliance with the outcome of the cease and desist procedure, courts can firstly impose a penalty on a daily basis or per infraction (art. 19 Anti-discrimination Act). Furthermore, non-compliance with the outcome of the procedure constitutes a crime in and of itself: a so-called 'contempt of court' offence, made punishable by prison sentences ranging from a month until a year and fines ranging from 50 euros until 1000 euros (art. 24 Anti-discrimination Act).

Again in line with Directive 2000/78/EC the Act provides for a distribution of the burden of proof among the parties in all civil proceedings on the basis of the Act.[33] Article 28 of the Act determines that "if a person who considers himself a victim of discrimination, the Centre [for Equal Opportunities and Opposition to Racism (cf. infra)] or one of the interest groups advances facts before the competent court that can lead to the presumption of discrimination on the basis of one of the protected criteria, it falls on the defendant to prove that discrimination did not occur". The Act details a number of (non-exhaustive) examples of facts that can lead to the presumption of either direct or indirect discrimination, and as such are liable to shift the burden of proof. Most of these examples are based on rulings by the European Court of Justice in cases involving direct and indirect discrimination on the basis of sex.[34]

More specifically, facts that can lead to the presumption of direct discrimination "include, but are not limited to": 1° "information that reveal a pattern of adverse treatment vis-à-vis individuals who are the bearer of a particular protected characteristic; e.g. several independent complaints at the Centre [for Equal Opportunities and Opposition to Racism] or one of the interest groups"; 2° "information demonstrating that the situation of the victim of a less favourable treatment is comparable to the situation of the reference person (art. 28 § 2 Anti-discrimination Act).

Likewise, facts that can lead to a presumption of indirect discrimination "include, but are not limited to": 1° "general statistics about the situation of the group to which the victim of the discrimination belongs or facts of general knowledge"; 2° "the use of an intrinsically suspect distinguishing criterion"; 3° "elementary statistical material demonstrating adverse treatment" (art. 28 § 3 Anti-discrimination Act).

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[33] Art. 10 Directive 2000/78/EC.

[34] In the *travaux préparatoires* of the Act mention is made specifically of the cases Brunnhofer (case C-381/99, 26 June 2001, r.o. 60); Danfoss (case C-109/88, 17 October 1989); Royal Copenhagen (case C-400/93) and Enderby (case C-127/92). See: *Parliamentary Documents*, House of Representatives 2006-2007, n° 51-2722/2, 2.

The Anti-discrimination Act also provides broad protection clauses for persons who have filed a complaint in relation to (alleged) infringements of the Act[35], and it extends this protection to individuals serving as witnesses regarding the complaint. Regarding these so-called victimisation clauses, the Act makes a distinction between complaints in relation to employment or social security on the one hand and complaints related to any other element of the scope of the Act.

In the area of employment the protection involves that employers (and or persons in a similar position)[36] may not take adverse measures vis-à-vis a person for whom or who himself has filed a complaint due to an infringement of the Act, unless it is for reasons foreign to the complaint (art. 17 § 1 Anti-discrimination Act). The Act specifies that 'adverse measures' are – among other things – the termination of the employment, the unilateral alteration of the terms of employment or adverse measures taken after the termination of the employment (art. 17 § 2 Anti-discrimination Act). A 'complaint' can furthermore be any of a number of things. It can concern formal legal proceedings instigated either by the individual or by the equality body (cf. infra) or an interest organisation, but it can also concern a complaint on the level of the organisation of the employer (either by the adversely treated individual, by the government services for labour inspection, or by the equality body or an interest group).[37]

In all other contexts the protection involves that if a complaint is filed by or on behalf of a person due to an infringement of the Act, those against whom the complaint is directed may not take adverse measures, unless it is for reasons foreign to the complaint (art. 16 § 1 Anti-discrimination Act). 'Complaints' in that case can again comprise formal legal proceedings instigated either by the individual or by the equality body or an interest organisation, but also complaints on the level of the organisation or institution against which the complaint is directed (either by the adversely treated individual or by the equality body or an interest group).[38] Identical protection holds for witnesses in relation to the complaint (art. 17 § 9 Anti-discrimination Act (employment) and art. 16 § 5 Anti-discrimination Act (other contexts)).

If in any context adverse measures are taken in a period of 12 months after a complaint has been lodged the burden of proof that these measures are foreign to the complaint falls on the person against whom a complaint has been filed. In

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35 Compare art. 11 Directive 2000/78/EC regarding victimisation.

36 Art. 17 § 10 Anti-discrimination Act.

37 Art. 17 § 3 Anti-discrimination Act. In the latter cases the complaint should consist in a dated, signed document sent by certified mail detailing the grievances vis-à-vis the perpetrator of the alleged discrimination.

38 Art. 16 § 2 Anti-discrimination Act. In the latter cases the complaint should fulfil the identical requirements as in the context of employment, that is: the complaint should consist in a dated, signed document sent by certified mail detailing the grievances vis-à-vis the perpetrator of the alleged discrimination.

case legal proceedings have been instigated this period is extended to 3 months following the day of the final judgement (art. 17 § 4 Anti-discrimination Act (employment)[39] and art. 16 § 3 Anti-discrimination Act (other contexts)). If the person who took the adverse measures is unable to demonstrate that the latter had nothing to do with the complaint, damages payable are respectively 6 months gross income in the context of employment (art. 17 § 6 Anti-discrimination Act) or – in other contexts – the lump sum damages provides for in article 18 § 2 of the Act (cf. supra). In both cases the victim can also opt for damages in the amount of the actual harm that was done, in which case the victim is to provide proof of the magnitude of the harms suffered.

A.1.2.5. Criminal provisions

The Anti-discrimination Act introduces three (types of) criminal provisions, which will be dealt with in more detail elsewhere in this report. This concerns 'incitement to hatred, discrimination and violence'; the introduction of aggravating circumstances in case certain crimes are committed out of hatred or contempt for persons on the basis of – among other things – their sexual orientation; and a prohibition of discriminatory conduct by civil and public servants.

In case of any criminal conviction on the basis of the Act the convicted person can – aside from his main penalty – also be deprived of his civil and political rights for a period of 5 to 10 years (art. 25 Anti-discrimination Act and article 33 Criminal Code).

A.1.2.6. Enforcement

Equality body and interest groups

Finally, the act provides for a number of enforcing public institutions and services as well as providing certain private organisations and NGO's with the opportunity to bring legal actions. The former firstly concerns the Centre for Equal Opportunities and Opposition to Racism (CEOOR). The CEOOR is – among other things[40] – the governmental equality body (see infra for more information on the CEOOR). The Act provides that the Centre may proceed in

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[39] A number of additional provisions hold in regard to adverse measures taken in the context of employment, assuring e.g. that – to the extent possible and desirable – a person can be reintegrated into his or her workplace under the same terms of employment as before and/or other situations in which persons can claim damages (see art. 17 §§ 5-8).

[40] It has other competences and tasks as well, e.g. in relation to education, immigration and asylum, and action against human trafficking.

law in all disputes to which the Act might give rise (art. 29 § 1 Anti-discrimination Act).[41]

Aside from the CEOOR a number of other associations, organisations and interest groups are authorised to bring legal actions on the basis of the Act (art. 30 Anti-discrimination Act).[42] This more specifically firstly concerns "every institution and all associations which on the date of the facts have disposed of legal personality for at least three years, and which have made it their purpose in their articles of association, to defend human rights and fight discrimination". Secondly, the same goes for all representative employers' organisations and trade unions, of both the public and private sector and of the self-employed; they too can instigate legal actions in relation to the Act.

The Act finally provides that "when the victim of a discrimination is an identified natural person or a legal body, the legal action of the Centre and the interest groups is admissible only if they can prove that they obtained the approval of the victim" (art. 31 Anti-discrimination Act). This is intended as a way to protect the personal decision of individual victims of discrimination: neither the Centre nor the interest groups can disregard or go against the wishes of an individual victim. If the discrimination is of a structural nature, however, the Centre and the interest groups can proceed autonomously.

Inspection

In matters of employment the Act provides for specialised officers who are to supervise observance of the Act. Article 32 § 1 states: "without prejudice to the powers of the officers of the criminal investigation department, officials appointed by the King shall supervise compliance with this act and the implementing decrees thereof". These officials are to exercise their "said supervision pursuant to the provisions of the Act of 16 November 1972 concerning the labour inspectorate". Additionally, regarding supervision of the Act in the context of supplemental pensions the Commission for the Banking, Financial and Insurance Sector[43] is competent as well, without prejudice to the aforementioned officials (art. 32 §§ 2 and 3 Anti-discrimination Act).

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41 With the exception of discrimination on the basis of language. The Act provides that the King is to appoint the body that is to deal with discriminations on the latter ground (art. 29 § 2 Anti-discrimination Act).

42 Compare: article 9.2 Directive 2000/78/EC.

43 As referred to in article 44 of the Act of 2 August 2002 concerning the supervision of the financial sector and financial services.

A.1.3. Flemish Community & Flemish Region combined

A.1.3.1. General

The Flemish Community and Region (combined) have two decrees in force. The first one being the Decree of 8 May 2002 aimed at achieving proportionate participation in the labour market in force (Decree Proportionate Participation),[44] which was amended on 9 March 2007[45] and on 30 April 2009.[46] The amendments were considered necessary since several elements in the decree were based upon the former federal legislation of 2003. Therefore, to the extent that the latter was held to be unconstitutional by the Constitutional Court, this would be the case for those elements in the decree as well. Furthermore, the amendments' aim was to achieve greater conformity with the European directives, as Flanders too had been reprimanded by the European Commission on this point.

The Decree provides protection against discrimination not only on the basis of 'sexual orientation' but also on the grounds of sex, so-called race, ethnicity, religion or conviction, disability, and age. As such it closely follows the various European directives in this regard (and does not – as opposed to most other Belgian legislation – include more grounds). However, the remainder of the approach taken by the Decree still deviates significantly from that of Directive 2000/78/EC (and other European directives), as it does not systematically employ the concepts characteristic of and required by European anti-discrimination law.

The second decree in force at the Flemish level is the Decree of 10 July 2008 establishing a framework for Flemish policies of equal opportunities and equal treatment (Framework Decree).[47] It covers a much broader scope than the Decree Proportionate Participation, while respecting the European requirements, and it is roughly modelled after the federal legislation (cf. *supra*). The Framework Decree also includes a much wider list of discrimination grounds (based on that of the federal legislation), namely: sex, so-called race, colour, descent, national or ethnic origin, nationality, age, sexual orientation, marital status, birth, language fortune, religion or belief, political conviction, state of health, disability, physical or genetic characteristics and social position.[49] It therefore provides the same benefits as the federal legislation

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44 Moniteur, 26 July 2002.
45 Moniteur, 6 April 2007.
46 Moniteur, 26 May 2009.
47 Moniteur 13 January 2009.
49 As such it differs slightly from the federal list: where the federal legislation speaks of 'current and future state of health' and 'social origin', the Decree mentions 'state of health' in general and 'social position' instead of social origin.

where discrimination on the basis of HIV or aids is concerned (cf. *supra*), since it covers 'state of health'.

Finally, the Decree Proportionate Participation as well as the Framework Decree are not limited to provisions regarding discrimination and/or hate speech and crimes. They also include sections on equal opportunity policies and target figures regarding diversity in matters of employment. As these elements are not directly related to issues of discrimination law sensu stricto (and are not covered by Directive 2000/78/EC), and since most of the concrete measures will have to be taken by the government, the said sections will remain undiscussed.

A.1.3.2. Scope

The Decree Proportionate Participation covers only matters of employment (in particular, but not exclusively, employment of the personnel of the Flemish authorities and the Flemish educational system), and thus does not extend beyond the scope of Directive 2000/78/EC. To begin with, the Decree states that "the Flemish employment policies are to be organised according to" the principle of "equal treatment", entailing "the absence of every form of direct or indirect discrimination or intimidation on the labour market" (art. 5 § 1 Decree Proportionate Participation). However, the remainder of the article detailing the scope of the Decree departs significantly from the terminology and concepts used in the European directives. Key concepts such as direct and indirect discrimination are largely abandoned in favour of specific descriptions of prohibited behaviour having no immediate connection with the approach required by Directive 2000/78/EC and/or the other European directives. The Decree prohibits 'references' to the discrimination grounds protected by the Decree, rather than actual direct and indirect discrimination, instructions to discriminate and intimidation (cf. *infra*).

Should this shortcoming prove problematic in practice, it is possible however for victims to invoke the Framework Decree which also covers the area of employment and which does closely follow the terminology and concepts of the European anti-discrimination directives.

As such, victims of discrimination (on the basis of sexual orientation) in matters belonging to the competence of the Flemish Community and the Flemish Region can either fall back on article 16 of the Framework Decree or on article

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As in the case of the federal legislation (cf. *supra*), the Constitutional Court has ruled this selection to be (partially) unconstitutional. The Court ruled that the exclusion of the ground 'trade union affiliation' or 'membership of a trade union' was unjustified (Constitutional Court, n° 123/2009, 16 July 2009. Compare: Constitutional Court, n° 64/2009, 2 April 2009). The Flemish legislation however has not yet amended its legislation on this point, as opposed to the federal legislator (cf. supra).

5 § 2 of the Decree Proportionate Participation. The latter prohibits the following thirteen types of conduct or measures:

- Referring to sex, a so-called race, ethnicity, religion or conviction, disability, age or sexual orientation in the conditions or criteria regarding employment-finding or to include elements in said conditions or criteria that lead to discrimination even without explicitly referring to sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation.
- Presenting - in information and publicity - employment-finding as more suitable for employees or employers of a certain sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation.
- Denying or restricting access to employment-finding for explicit or implicit reasons that are directly or indirectly related to sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation.
- Referring to the sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation of an employee in job offers, or to include elements in vacancies that, even without explicitly referring to these criteria, do mention or presuppose them.
- Referring to the sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation of an employee in the conditions, selection and selection criteria for vacancies and functions in any sector or industry, or to include elements in those conditions or criteria that lead to discrimination even without explicitly referring to said protected criteria of an employee.[50]
- Denying or impeding access to employment or to promotional opportunities for explicit and implicit reasons that are directly or indirectly based on sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation.
- Referring to sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation in the conditions or criteria concerning career counselling, vocational training and career guidance or to include elements in the conditions or criteria for these that lead to discrimination even without explicitly referring to sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation.
- Presenting - in information and publicity - career counselling, vocational training and career guidance as more suitable for candidates of a certain sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation
- Denying or impeding access to career counselling, vocational training and career guidance for explicit and implicit reasons that are directly or indirectly based on sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation.

[50] The Decree also declares this provision to hold for the self-employed to the extent that these fall under Flemish competence.

- Applying different requirements and conditions for obtaining or awarding all kinds of diploma's, certificates, testimonials or titles.
- Referring to the sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation of an employee in provisions and in the terms of employment and in the conditions, criteria or reasons for dismissal or to include elements in said conditions, terms, criteria or reasons that lead to discrimination even without explicitly referring to sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation.
- Determining or applying said conditions, criteria or reasons in a discriminatory fashion according to the sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation of an employee.
- Employing techniques and tests in career counselling, vocational training, career guidance and employment-finding that can give rise to direct or indirect discrimination.

The former, i.e. the Framework Decree, provides a broader protection against discrimination, not just in the employment sphere, but also with respect to health care, education, goods and services, social benefits and associations.

A.1.3.3. Concept of discrimination

Both the Decree Proportionate Participation and the Framework Decree define the various forms of discrimination closely in line with the European directives since the 2007 amendment. However, as mentioned above, the problem is that the Decree Proportionate Participation fails to systematically incorporate these concepts in and/or apply them to the scope (cf. *supra*), so that the various modes of discrimination are not in effect unequivocally prohibited in all matters pertaining to employment as defined in the scope. The latter is not the case for the Framework Decree, that not only provides definitions of concepts of discrimination that are in line with the European directives, but also employs them in its actual material scope.

Direct and indirect discrimination and justifications

The Decree Proportionate Participation defines direct discrimination as follows: "when one person is treated less favourably than another is, has been or would be treated in a comparable situation", on the basis of any of the grounds falling under the Decree, thus including sexual orientation (art. 2, 8° Decree Proportionate Participation). The Framework Decree uses this same basic definition, but specifies that the less favourable treatment can take place on more than one ground, and – moreover – that these grounds can be either factual or putative, and finally, that the treatment might concern someone the individual is associated with, rather than himself or herself. As such the Framework Decree aims to provide protection against respectively cross-sectional discrimination, discrimination on the basis of putative (or falsely attributed) characteristics and discrimination 'by association'. The Framework Directive

further specifies that any less favourable treatment that is justified according to the other provisions of the Decree, does not constitute direct discrimination (art. 16 § 1 Framework Decree).

Indirect discrimination occurs according to both decrees "when an apparently neutral provision, criterion or practice would put persons with a certain sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary" (art. 2, 9° Decree Proportionate Participation; art. 16 § 2 Framework Decree).

Besides the objective and reasonable justification in case of indirect discrimination, the following general exceptions and justifications for direct and indirect discrimination hold in both decrees. Firstly, as in the federal legislation and the directives,[51] a direct distinction may be justified if a characteristic related to 'sexual orientation' constitutes a genuine and determining occupational requirement in light of the "nature of the relevant specific professional activity" as long as the requirement has a legitimate objective as well as being proportionate in relation to this objective (art. 6 Decree Proportionate Participation; art. 25 Framework Decree).

The Decree Proportionate Participation did not explicitly implement the exception provided in Directive 2000/78/EC for organisations the ethos of which is based on religion or belief.[52] However, it does provide in general terms that it "does not impose restrictions on the protection and exercise of the fundamental rights and freedoms provided for in the Constitution and in international human rights conventions" (art. 5 § 6 Decree Proportionate Participation). The practical implications of this provision are not entirely clear, but the Flemish legislator – basing himself on the previous federal legislation[53] – intended it as a way to introduce a possibility of assessing and balancing the prohibition of discrimination against other rights and freedoms. The scope for exceptions in this regard seems limited, as any exception will also have to fulfil the strict requirements of the European directive(s) lest they be unlawful. The Framework Decree on the other hand does explicitly provide for an exception for organisations with the ethos based on religion or belief. It does so in article 25 specifying that such organisations can require an attitude of good faith and loyalty to their (religious) foundations.

A final exception is 'positive action'. Articles 5 § 3 and 26 of – respectively – the Decree Proportionate Participation and the Framework Decree determine

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[51] See article 4.1 Directive 2000/78/EC.

[52] See article 4.2. Directive 2000/78/EC. Apart from the federal legislator none of the other legislators chose to implement this provision.

[53] See former art. 3 Anti-discrimination Act of 2003. See: D. De Prins, S. Sottiaux & J. Vrielink, *Handboek discriminatierecht*, Mechelen, Kluwer, 2005, n° 1229-1232.

that the principle of equal treatment[54] "does not prevent that, in order to ensure full equality in the context of employment, specific measures are adopted or maintained to prevent or compensate for disadvantages linked to any" of the discrimination grounds.[55] Unlike the federal legislation the Decree does not require these positive actions to be expressly and a priori approved by the government. Of course, positive actions will have to meet the aforementioned criteria formulated by the Belgian Constitutional Court (cf. *supra*).

Specific forms of discrimination: instruction to discriminate, harassment and reasonable accommodations

With regard to other behaviour that the decrees equate with discrimination, not only the instruction to discriminate and intimidation/harassment are relevant for sexual orientation, in theory this can also be the case for the obligation to provide for reasonable accommodations, at least as far as the Decree Proportionate Participation is concerned.

Regarding the instruction to discriminate, both decrees simply provide that "an instruction to discriminate or incitement to discrimination on the basis of" the protected criteria is considered discrimination (art. 2, 10° Decree Proportionate Participation; art. 18 Framework Decree).[56] Intimidation or harassment is defined as "unwanted conduct related to a particular sex, so-called race, ethnicity, religion or conviction, disability, age or sexual orientation, and that has the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment" (art. 2, 11° Decree Proportionate Participation; art. 17 Framework Decree).[57]

As mentioned, the provision in the Decree Proportionate Participation concerning the obligation to provide for reasonable accommodations is potentially relevant for all discrimination grounds, including sexual orientation.[59] The provision reads as follows: "In order to guarantee compliance with the principle of equal treatment, reasonable accommodation shall be provided. This entails that intermediary organisations and employers shall take appropriate measures, where needed in a particular case, to enable access to, participation in, or advancement in employment, or to undergo training, unless such measures would impose a disproportionate burden. This burden may not be considered disproportionate when it is sufficiently compensated by existing measures" (art. 5 § 4 Decree Proportionate Participation).

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54 And that of 'proportionate participation'.
55 Compare: article 7 Directive 2000/78/EC.
56 Compare article 2.4 Directive 2000/78/EC.
57 Compare article 2.3 Directive 2000/78/EC.
59 While this provision is – in Directive 2000/78/EC (art. 5), as well as in the Framework Decree (and all other Belgian discrimination legislation) – applicable only to persons with disabilities.

Although – aside from disability – it might be easier to imagine claims on the basis of this provision in the sphere of religion or conviction (e.g. prayer-rooms in the workplace or serving halal or kosher foods in cantinas)[60], it is nonetheless conceivable for the provision to be invoked regarding sexual orientation. One might for instance attempt to use it in order to address particular manifestations of hetero-normality or -normativity[61] in the workplace (e.g. posters and the like), which might be insufficient to amount to 'intimidation' or 'harassment' but for which it might nevertheless be 'reasonable' to require accommodations.

A.1.3.4. Civil provisions

Most civil provisions in both Flemish decrees repeat those of the federal Anti-discrimination Act. Firstly, the decrees also declare "provisions of a contract and the provisions and internal codes of organisations and companies that conflict with the decree to be null and void", and the same goes for provisions determining that one or more contracting parties renounce the rights guaranteed by" the decrees (art. 13 Decree Proportionate Participation; art. 27 Framework Decree).[62]

Furthermore, the decrees provide in a distribution of the burden of proof among the parties in all civil proceedings on the basis of the decrees.[63] They more specifically determine that "if a person advances facts before the competent court that can lead to the presumption of direct or indirect discrimination, it falls on the defendant to prove that the principle of equal treatment was not violated" (art. 14 Decree Proportionate Participation; art. 36 Framework Decree).[64] The decrees also authorise courts to issue a cease and desist order vis-à-vis anyone who does not observe the prohibitions contained in them (art. 15 Decree Proportionate Participation; art. 37 Framework Decree).

The decrees also provides for protection against victimisation[65] for both plaintiffs and individuals serving as witnesses in relation to the complaint (art. 12 Decree Proportionate Participation; art. 38 Framework Decree). Concretely the protection under the Decree Proportionate Participation entails that "when a member of the personnel of the Flemish government or the educational system has filed a complaint or instigated legal proceedings on the basis of the Decree,

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60 We are not saying that these illustrations would by definition amount to reasonable accommodations; merely that it is conceivable that the provision will give rise to such claims. Whether courts will in fact award these is a different matter.

61 Hetero-normality or hetero-normativity refers to social structures and manifestations that encourage or even force people to identify as being straight, and discourage them from having an alternative sexual orientation or gender identity.

62 Compare: art. 16 b Directive 2000/78/EC.

63 Compare art. 10 Directive 2000/78/EC.

64 The provision is not applicable to criminal procedures, and does not replace other – more favourable – provisions regarding the burden of proof.

65 Compare art. 11 Directive 2000/78/EC.

the employment may not be terminated nor may the terms of employment unilaterally be altered, unless it is for reasons foreign to the complaint or the legal proceedings" (art. 12 § 1 Decree Proportionate Participation). If such adverse measures are taken in a period of 12 months after a complaint has been lodged the burden of proof that these measures are foreign to the complaint falls on the person against whom a complaint has been filed. In case legal proceedings have been instigated this period is extended to 3 months following the day of the final judgement (art. 12 § 2 Decree Proportionate Participation).[66] Witnesses enjoy the same protection (art. 12 § 6 Decree Proportionate Participation). Similar protection mechanisms, applying to all matters that are contained in the scope of the Framework Decree, are to be found in article 37 of the Framework Decree.[67]

As in the federal legislation, if the person who took the adverse measures is unable to demonstrate that these measures had nothing to do with the complaint, damages payable are either a lump sum consisting of 6 months gross income or damages in the amount of the actual harm that was done (art. 12 § 3 Decree Proportionate Participation; art. 37 § 5, 1° Framework Decree). In the latter case the victim is to provide proof of the magnitude of the harm suffered.

A.1.3.5. Administrative sanctions and criminal provisions

The Decree Proportionate Participation includes administrative sanctions ranging from 200 to 2000 euro for anyone who – in employment – practices discrimination on any of the criteria covered by the Decree (unless the facts are criminally prosecuted); these sanctions or fines are administered by specialised officers appointed by the Flemish government (art. 17 Decree Proportionate Participation).[68] Actual criminal prosecution is possible in case a person is guilty of direct discrimination in career counselling, vocational training, career guidance and employment-finding (art. 11 Decree Proportionate Participation). See infra in the section on criminal law for more details.

The Framework Decree also contains a criminal prohibition regarding (malicious) 'incitement to hatred, violence and direct discrimination' on the one hand and a prohibition of discrimination by civil and public servants (respectively art. 31 and 32 Framework Decree). Like the federal legislation this Decree also renders it a criminal offence not to comply with a cease and desist order based on the Decree (art. 33 Framework Decree).

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66 As in the federal legislation, a number of additional provisions hold in regard to adverse measures taken in the context of employment, assuring e.g. that – to the extent possible and desirable – a person can be reintegrated into his or her workplace under the same terms of employment as before and/or other situations in which persons can claim damages (see art. 12 §§ 3-5).

67 Except for the provision prolonging the period by 3 months in case of legal proceedings.

68 The Framework Decree does not provide for administrative sanctions.

A.1.3.6. Enforcement

Equality body and interest groups

Both Flemish decrees provide that the Flemish government is to designate a government organisation (or organisations) for the advancement of equal treatment and non-discrimination for all of the grounds covered by it, thus including sexual orientation. This organisation or these organisations will be authorised to provide support to victims of discrimination in dealing with their complaints, to formulate advice on public policy regarding equal treatment and to provide people with information on their rights of equal treatment.

Thus far no such organisation has been designated. The Flemish government is still negotiating with the other levels of government in order to create the possibility to authorise the CEOOR (cf. *infra*) for enforcing the anti-discrimination decrees. Should these negotiations fail in 2010, the Flemish government intends to establish one or more independent Flemish institutions to this end.

Persons who believe themselves to be victims of discrimination can also file a complaint with one of several regional Flemish complaints offices in a number of cities and towns. Subsequently the offices attempt to mediate or – if that fails – can support the plaintiffs in undertaking further legal steps.

Aside from the central government organisation still to be designated and the regional complaints offices, a number of private associations, organisations and interest groups are authorised to bring legal actions on the basis of the decrees (art. 16 Decree Proportionate Participation; art. 41 § 1 Framework Decree).[69] The requirements that hold in this regard are identical to the federal legislation (cf. *supra*). As such, they more specifically concern associations which on the date of the facts have disposed of legal personality for at least three years, and which have made it their purpose, in their articles of association, to defend human rights and fight discrimination. Representative employers' organisations and trade unions are also authorized to undertake legal action, in matters pertaining to employment.

Again just like the federal legislation, the decrees finally provide that when the victim of a discrimination is an identified natural person or a legal body, the legal action of the associations and organisations is admissible only if they can prove that they obtained the approval of the victim (art. 16 Decree Proportionate Participation; art. 41 § 3 Framework Decree).

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[69] Compare article 9.2 Directive 2000/78/EC.

Inspection

Finally, like the federal legislation, the Framework Decree provides for specialised officers who are to supervise its observance. Article 39 of the decree states: "without prejudice to the powers of the officers of the criminal investigation department, officials appointed by the Flemish government shall supervise compliance with this decree and the implementing decrees thereof". However, for the moment there are no specialised officers assigned to supervise compliance with the decree.

A.1.4. French Community

A.1.4.1. General

The French Community has its Decree of 12 December 2008 concerning particular forms of discrimination (Discrimination Decree)[71] in order to implement Directive 2000/78/EC (as well as Directive 2000/43/EC). This Decree replaced the pre-existing Decree of 19 May 2004 concerning the application of the principle of equal treatment (Decree Equal Treatment). [72]

The discrimination grounds currently covered by the Discrimination Decree are the same as the ones in the federal legislation: "sex, so-called race, colour, descent, national or ethnic origin, nationality, age, sexual orientation, marital status, birth, language fortune, religion or belief, political conviction, state of health, disability, physical or genetic characteristics and social origin"

A.1.4.2. Scope

Article 4 of the Discrimination Decree delineates its scope. It is applicable in all of the following contexts and for all persons in the public and private sector within the jurisdiction of the French Community:

- Civil servants
- The educational facilities of the French Community of all types and levels
- Health care
- Social benefits
- Private organisations that are subsidised by the French community
- Goods and services

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[71] Moniteur, 13 January 2009.
[72] Moniteur, 7 June 2004. This former decree was annulled by art. 62 of the new decree.

A.1.4.3. Concept of discrimination

As far as sexual orientation is concerned, the French Community's Decree prohibits direct and indirect discrimination, an 'instruction to discriminate' and of 'harassment'.

Direct and indirect discrimination and justifications

Like the Federal Act, the Discrimination Decree distinguishes between direct and indirect 'distinctions' on the one hand, which may be justified and denoting a different or unequal treatment, and direct and indirect 'discriminations', being prohibited and unlawful by definition. A direct distinction is defined as "the situation that occurs when one person is treated less favourably than another is, has been or would be treated in a comparable situation", on any of the grounds falling under the Act" (art. 3, 2° Discrimination Decree). An indirect distinction is defined as "the situation that occurs when an apparently neutral provision, criterion or practice would put persons with a protected characteristic at a particular disadvantage compared with other persons" (art. 3, 4° Discrimination Decree).

The system for justifying distinctions or unequal treatment is also the same as that in the federal legislation. As such it is 'closed' in the areas of the material scope dictated by the directive(s), that is: in employment for the ground 'sexual orientation'. Outside these areas the justification system for 'direct distinctions' is an 'open' one, allowing for objective and reasonable justification.

Again, the following general exceptions and justifications for both direct and indirect discrimination hold. Firstly, a distinction may be justified where characteristics related to 'sexual orientation' (or other grounds) constitute a genuine and determining occupational requirement in light of the "nature of the relevant specific professional activity" as long as the requirement has a legitimate objective as well as being proportionate in relation to this objective (art. 10 Discrimination Decree).[75]

Secondly, the Decree allows for 'positive action'. Article 6 provides that the French Community can adopt or maintain positive actions, being measures that prevent or compensate for disadvantages linked to any of the discrimination grounds and that are aimed at ensuring full equality.[77]

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[75] Compare article 4.1 Directive 2000/78/EC.
[77] Compare article 7 Directive 2000/78/EC.

Specific forms of discrimination: instruction to discriminate and harassment

The special forms of discrimination relevant for sexual orientation are the prohibition of 'an instruction to discriminate' (art. 3, 8° Discrimination Decree)[78] and that of harassment (art. 3, 7° Discrimination Decree).[80] The definitions are identical to those in the federal Anti-Discrimination Act (cf. *supra*).

A.1.4.4. Civil and criminal provisions

The Decree also provides for the exact same civil and criminal provisions as the federal legislation does (cf. *supra*). As such, on the civil level it declares contractual provisions that are contrary to the Decree null and void (art. 43 Discrimination Decree); it introduces lump sum damages (art. 46 Discrimination Decree) and a distribution of the burden of proof among the parties in civil proceedings (art. 42 Discrimination Decree); and it provides protection against victimisation for both plaintiffs and witnesses (art. 44-45 Discrimination Decree).

The criminal provisions relevant for sexual orientation consist in a prohibition of incitement to hatred, discrimination and violence (art. 52 Discrimination Decree) and a prohibition of discriminatory conduct by civil and public servants (art. 55 Discrimination Decree). As in the federal legislation, a criminal conviction on the basis of the Decree can also – apart from the main penalty – result in the person being deprived of his or her civil and political rights for a period of 5 to 10 years (art. 58 Discrimination Decree referring to article 33 Criminal Code).

A.1.4.5. Enforcement

Again, much like the federal Act, the French Community Discrimination Decree provides for a number of enforcing public institutions and services as well as providing certain private organisations and NGO's with the opportunity to bring legal actions. The former firstly concerns the Centre for Equal Opportunities and Opposition to Racism (CEOOR), on the issue of sexual orientation, and the Institute for the Equality of Women and Men, as far as sex and gender (and transgender and transsexualism) are concerned (art. 37 Discrimination Decree). Aside from these institutions the Decree also provides in a mediation service that is to be established (art. 60 Discrimination Decree).

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[78] Compare article 2.4 Directive 2000/78/EC.
[80] Compare: art. 2.3 Directive 2000/78/EC.

Furthermore the Decree offers the possibility for associations, organisations and interest groups to bring legal actions on the basis of the Act (art. 30 Discrimination Decree), under the same conditions as the federal Act (art. 39 Discrimination Decree).[82]

A.1.5. Walloon Region

A.1.6. General

The Walloon Region has the Decree of 6 November 2008 aimed at combating particular forms of discrimination (Discrimination Decree)[83] that has the explicit aim to implement Directive 2000/78/EC, Directive 2000/43/EC and the several sex discrimination directives.

The Decree covers the same discrimination grounds as the several federal acts combined (i.e.: sex, so-called race, colour, descent, national or ethnic origin, nationality, age, sexual orientation, marital status, birth, language fortune, religion or belief, political conviction, current and future state of health, disability, physical or genetic characteristics and social origin).

A.1.6.1. Scope

The Decree determines in article 5 that it is applicable in all of the contexts having to do with employment to the extent that the Walloon region is competent in this regard, i.e.:[84]

- Social protection, including health care;
- Social benefits;
- Professional orientation;
- Social mobilization and professional life;
- Employment finding;
- Attribution of support for promoting employment;
- Attribution of support and bonuses for employment as well as financial incentives to businesses, in the framework of economic policy, including the social economy;

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[82] Compare: article 9.2 Directive 2000/78/EC.

[83] Moniteur 19 December 2008. Amended by the Decree of 19 March 2009 (Moniteur, 10 April 2009). The pre-existing Decree of 27 May 2004 concerning the equal treatment in employment and vocational training (Moniteur, 23 June 2004) has been repealed by (art. 37 of) this Decree.

[84] The scope was thus amended by the Decree of 19 March 2009 (Moniteur, 10 April 2009). Originally the Decree had a more limited scope.

- Vocational training;
- Goods and services outside of the strictly private and family sphere (including housing);
- Access to, participation in or any other exercise of an economic, social, cultural or political activity open to the public;
- All employment positions in the services of the Walloon government; the public legal persons that are dependant on the Walloon Region; the provinces and municipalities, the associations of provinces, the associations of municipalities and the autonomous provincial and municipal enterprises; the public centres for social aid and the associations founded by the public centres for social aid.

A.1.6.2. Concept of discrimination

As far as sexual orientation is concerned, the Decree prohibits direct and indirect discrimination, as well as the 'instruction to discriminate' and 'harassment'.

Direct and indirect discrimination and justifications

Like the Federal Act and the French Community Decree, the Discrimination Decree of the Walloon Region distinguishes between direct and indirect 'distinctions' on the one hand, which may be justified and denoting a different or unequal treatment, and direct and indirect 'discriminations', being prohibited and unlawful by definition (art. 4, 6-7° and 8-9° Discrimination Decree).

The system for justifying distinctions or unequal treatment is also the same as that in the federal legislation. As such it is 'closed' in the areas of the material scope dictated by the directive(s), that is: in employment for the ground 'sexual orientation'. Outside these areas the justification system for 'direct distinctions' is an 'open' one, allowing for objective and reasonable justification.

Again, the following general exceptions and justifications for both direct and indirect discrimination hold: a distinction may be justified where characteristics related to 'sexual orientation' (or another ground) constitute a genuine and determining occupational requirement (art. 8 Discrimination Decree)[85] or when a distinction constitutes a positive action measure (art. 12 Discrimination Decree).[86] The Decree also implements the possibility for religious organisations to require an attitude of good faith and loyalty to their (religious) foundations (art. 11/1 Discrimination Decree).

[85] Compare article 4.1 Directive 2000/78/EC.
[86] Compare article 7 Directive 2000/78/EC.

Specific forms of discrimination: instruction to discriminate and harassment

The special forms of discrimination relevant for sexual orientation in which the Decree provides are the prohibition of 'an instruction to discriminate' (art. 4, 14° Discrimination Decree)[87] and that of harassment (art. 4, 10° Discrimination Decree),[88] with definitions being identical to those in the federal Anti-Discrimination Act (cf. *supra*).

A.1.6.3. Civil and criminal provisions

The Walloon Region copied its civil provisions from the federal Anti-Discrimination Act and thus provides for the protection mechanisms required by Directive 2000/78/EC. As such, at the civil level, it declares contractual provisions that are contrary to the Decree null and void (art. 17 Discrimination Decree); it introduces lump sum damages (art. 19 Discrimination Decree) and a distribution of the burden of proof among the parties in civil proceedings (art. 28 Discrimination Decree); and it provides protection against victimisation for both plaintiffs and witnesses (art. 18 and 18/1 Discrimination Decree).

The criminal provisions relevant for sexual orientation consist in the prohibition of incitement to hatred, discrimination and violence (art. 23 Discrimination Decree) and a prohibition of discriminatory conduct by civil and public servants (art. 24 Discrimination Decree). As in the federal legislation, a criminal conviction on the basis of the Decree can also – apart from the main penalty – result in the person being deprived of his civil and political rights for a period of 5 to 10 years (art. 26 Discrimination Decree referring to article 33 Criminal Code).

A.1.6.4. Enforcement

Equality body and interest groups

Like the French Community decree and the federal legislation, the Walloon Region Discrimination Decree designates the CEOOR (on the issue of sexual orientation) and the Institute for the Equality of Women and Men (as far as sex and gender (and transgender and transsexualism) are concerned) as the main equality bodies (art. 30 Discrimination Decree) responsible for enforcing the Decree.

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87 Compare article 2.4 Directive 2000/78/EC.
88 Compare: art. 2.3 Directive 2000/78/EC.
95 Compare: article 9.2 Directive 2000/78/EC.

The Decree also offers the possibility for associations, organisations and interest groups to bring legal actions on the basis of the Act, under the same conditions as the federal Act (art. 31 Discrimination Decree).[95]

Furthermore, the Decree provides that the Walloon government is to develop a biennial action plan in relation to the Decree, after consultation of the Economic and Social Council of the Walloon Region (art. 33 § 1 Discrimination Decree). Said Council is also entrusted with the task of making proposals or giving advice, on its own initiative or at the request of the Walloon government, in relation to actions liable to improve equal treatment in employment and vocational training (art. 33 § 3 Discrimination Decree).

Furthermore, the Decree assigns to the Walloon Institute for Evaluation, Prospection and Statistics the task of gathering and disseminating statistical data, studies and information on equal treatment in employment and vocational training, annually evaluating government policy on this issue, and representing the Walloon government in the competent national and international bodies with regard to equal treatment in employment and vocational training (art. 33 § 2 Discrimination Decree).

Finally, the Advisory Commission on the integrated system of socio-professional mobilisation is responsible for the annual organisation of a 'round table discussion' on the issue of equal treatment (art. 33 § 4 Discrimination Decree).

Inspection

Control and supervision on the observance of the provisions of the Decree and its implementing decrees is performed by the services designated by the Walloon government, in accordance with a more general decree regarding supervision and control of the observance of legislation concerning employment policies (art. 34 Discrimination Decree).

A.1.7. Brussels-Capital Region

A.1.7.1. General

The Brussels-Capital Region opted for the solution in which a separate ordinance was enacted for every major domain residing under its competence. As such there are 4 ordinances in place, each partially implementing the European non-discrimination directives (cf. *supra*): [97]

[97] Besides these ordinances there are a number of texts in place having to do with promoting

- Ordinance of 26 June 2003 concerning the mixed administration of the labour market in the Brussels-Capital Region (Ordinance Mixed Administration)[98]
- Ordinance of 17 July 2003 pertaining to the Brussels housing code (Housing Ordinance)[99]
- Ordinance of 4 September 2008 for advancing diversity and combating discrimination in public office of the Brussels Region (Public Service Ordinance)[100]
- Ordinance of 4 September 2008 aimed at combating discrimination and promoting equal treatment in employment (Employment Ordinance)[101]

• Ordinance Mixed Administration

The earliest of these texts, the Ordinance of 26 June 2003 concerning the mixed administration[102] of the labour market in the Brussels-Capital Region (Ordinance Mixed Administration) is not a 'proper' piece of anti-discrimination legislation as such. It merely contains a number of general provisions concerning discrimination and equal treatment. It was also insufficient to implement the obligations constituted by Directive 2000/78/EC or any of the other recent European directives for that matter.

Article 4 of the ordinance provides that all relevant organisations within the Brussels-Capital Region's jurisdiction[103] are obliged – in the exercise of their employment activities – to "refrain from discriminatory practices on the basis of race, colour, sex, sexual orientation, language, religion, political or any other conviction, national or social origin, being part of a national minority, fortune, birth, marital status or family situation, membership of a union, or any other form of discrimination such as that on the basis of age or disability" (art. 4.2 Ordinance Mixed Administration). An interesting point is that there is a prohibition of discrimination in recruitment in the form of the 'discriminatory gathering of personal data of persons in search of employment' (art. 4.4 Ordinance Mixed Administration).

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diversity and ensuring equality, e.g.: Ordinance of 4 September 2008 pertaining to realizing a diversity policy in the Brussels civil service (Moniteur, 19 September 2008); Ordinance of 4 September 2008 for advancing social responsible enterprising in businesses in Brussels (Moniteur, 30 September 2009). Since these texts however do not – strictly speaking – constitute non-discrimination legislation, they will not be discussed here.

98 Moniteur, 29 July 2003.

99 Moniteur, 9 September 2003. Amended by the Ordinance of 19 March 2009 (Moniteur 7 April 2009).

100 Moniteur, 16 September 2008.

101 Moniteur, 16 September 2008.

102 The term "mixed administration" refers to the fact that both public and private employment services are covered.

103 As enumerated in art. 3 § 2 of the ordinance.

However, positive actions can be authorised by the Brussels government "for the benefit of specific persons in search of employment belonging to high-risk groups" (art. 4.2 Ordinance Mixed Administration).[104] The Ordinance does not define what is to be understood by the concept of 'high-risk groups'; contextually however the most obvious thing would be to interpret it in the light of the grounds of discrimination explicitly mentioned in the same section (as such including sexual orientation).

The Ordinance also provides for a 'concertation platform on employment' with powers of enforcement and supervision, and created within the Economic and Social Council of the Brussels Capital-Region (art. 15 § 1 Ordinance Mixed Administration). This 'platform' is – among other things – competent to supervise the prohibition of every form of discrimination on the labour market.

A.1.7.2. Other ordinances

Three other ordinances have been enacted in the last few years at the level of the Brussels-Capital Region in order to ensure a more encompassing – albeit still incomplete – implementation of the European obligations. For the present purposes it would take up too much space to cover all of these ordinances separately, especially since they are highly similar in the principles and measures they introduce.[105] As such they will be treated together.

Scope

All three ordinances of the Brussels-Capital Region roughly provide protection for all the discrimination grounds that the federal legislation includes. They cover some of the main fields for which the Brussels-Capital Region is competent, i.e.:

- Housing (Housing Ordinance)
- Private employment (Employment Ordinance)
- Civil and public service (Public Service Ordinance)

Concept of discrimination

All three ordinances distinguish between direct and indirect 'distinctions' on the one hand, which may be justified and denoting a different or unequal treatment, and direct and indirect 'discriminations', being prohibited and unlawful by definition. A closed system is in place in the areas of the material scope dictated by the directive(s); outside of those areas the justification system for 'direct

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[104] Compare art. 7 Directive 2000/78/EC.
[105] To the extent that this is not the case this will be mentioned in footnote.
[108] Compare article 2.4 Directive 2000/78/EC.

distinctions' is an 'open' one, allowing for objective and reasonable justification. The (other) exceptions and justifications for both direct and indirect discrimination are the genuine and determining occupational requirement (in matters of employment) and positive action (generally).

The special forms of discrimination relevant for sexual orientation which the ordinances prohibit are 'instruction to discriminate'[108] and harassment,[109] with definitions being identical to those in the federal Anti-Discrimination Act (cf. *supra*).

Civil provisions and criminal provisions

The Brussels-Capital Region copied the civil provisions from the federal Anti-Discrimination Act in its most recent ordinances. As such, on the civil level, the ordinances declare contractual provisions that are contrary to principles of non-discrimination null and void; they also introduce lump sum damages and a distribution of the burden of proof among the parties in civil proceedings; and they provide protection against victimisation for both plaintiffs and witnesses.

The criminal provisions relevant for sexual orientation consist in the prohibition of incitement to hatred, discrimination and violence in the Housing Ordinance (art. 190 § 1 Housing Ordinance), as well as the prohibition of discriminatory conduct by civil and public servants (art. 18 Public Service Ordinance; art. 191 Housing Ordinance) and in private employment (art. 19 Employment Ordinance). As in the federal legislation, a criminal conviction of a civil servant on the basis of the Public Service Ordinance can also – apart from the main penalty – result in that person being deprived of his or her civil and political rights for a period of 5 to 10 years (art. 20 Public Service Ordinance).

Enforcement

All of the Brussels ordinances provide that a government organisation (or organisations) is (are) to be designated for the advancement of equal treatment. This organisation (or these organisations) will be authorised to provide support to victims of discrimination in dealing with their complaints, to formulate advice on public policy regarding equal treatment and to provide people with information on their rights of equal treatment. Thus far – as in the case of Flanders – no such organisation has been designated.

The ordinances also offer the possibility for associations, organisations and interest groups to bring legal actions on the basis of the ordinances, under the same conditions as the federal Act.[110]

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[109] Compare: art. 2.3 Directive 2000/78/EC.
[110] Compare: article 9.2 Directive 2000/78/EC.

Finally, the Public Service Ordinance specifies that the Brussels-Capital Region Government can appoint one or more persons or institutions as specialised conciliation agencies, in order to intervene in alleged cases of discrimination on the basis of that ordinance (art. 26 Public Service Ordinance). The Employment Ordinance mentions specialised civil servants who are to supervise its observance (art. 16 Employment Ordinance).

A.1.8. French Community Commission in Brussels

A.1.8.1. General

For the French Community Commission, which exercises some community competences in the bilingual area of Brussels-Capital, there is the Decree of 22 March 2007 concerning the equal treatment of persons in vocational training aims (Decree Equal Treatment), which (explicitly) aims to implement the following European directives: 2006/54/EC, 2000/43/EC, 97/80/EC, 2000/78/EC and 76/207/EEC.

Notably, it is the only piece of legislation to have an open-ended list of grounds of discrimination, covering "sex, so-called race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, possessions, age, religion or belief, current or future state of health, disability, physical characteristics or any other ground of discrimination".[111] Besides the aforementioned relevance of 'state of health' (cf. supra), the fact that the list is open-ended – and that therefore discrimination on any ground can be tackled – is also potentially relevant for discriminations indirectly related to sexual orientation as well. For instance, it may allow for action against (direct) discrimination on the basis of specific 'life-styles', so that this kind of discrimination does not have to be tackled indirectly.

A.1.8.2. Scope

The Decree is applicable to any person who is involved with career guidance, vocational training, professional formation and training, as well as to anyone who distributes information or publicity within the following agencies:

[111] Although, as mentioned (cf. *supra*), due to rulings of the Constitutional Court, the lists of discrimination grounds that the other Belgian legislation contains, can also no longer be considered as unequivocally 'closed' either. See: Constitutional Court, n° 64/2009, 2 April 2009; Constitutional Court, n° 123/2009, 16 July 2009.

- The Brussels Francophone Institute for Vocational Training
- The centres for vocational training recognised by the aforementioned institute
- The institutes of socio-professional mobilisation recognised pursuant to the relevant legislation.
- The centres for ongoing education of the self-employed and the small and medium-sized companies recognised in the Brussels-Capital Region pursuant to the relevant legislation
  (article 10 Decree Equal Treatment).

Again, besides these broad descriptions of its scope, the Decree also entails an enumeration of specific types of (discriminatory) conduct that are prohibited, analogous and comparable to those listed in the above mentioned Flemish Decree Proportionate Participation (see art. 11 Decree Equal Treatment).

A.1.8.3. Concept of discrimination

Direct and indirect discrimination and justifications

The Decree defines direct discrimination as the situation "when one person is treated less favourably than another is, has been or would be treated in a comparable situation on the basis of sex, so-called race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, possessions, age, religion or belief, current or future state of health, disability, physical characteristics or any other ground of discrimination" (art. 3 § 2 Decree Equal Treatment).

Indirect discrimination occurs "when an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons on the basis of their sex, so-called race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, possessions, age, religion or belief, current or future state of health, disability, physical characteristics or any other ground of discrimination, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary" (art. 3 § 3 Decree Equal Treatment).

The Decree allows for 'positive action': "without prejudice to the principle of equal treatment specific measures may be adopted or maintained: if they are aimed at redressing inequalities that adversely affect full equality between individuals in the area of vocational training; if they are necessary and appropriate, in the framework of a precise objective, to re-establish an equality of opportunities" (art. 9 Decree Equal Treatment).[112]

[112] Compare article 7 Directive 2000/78/EC.

However, the Decree fails to address the possibility of a genuine and determining occupational requirement.[113] Therefore – strictly speaking – any 'less favourable' treatment on the basis of sexual orientation (or any other ground), falling under the scope of the Decree constitutes a direct discrimination and is as such unlawful.

Specific forms of discrimination: instruction to discriminate and harassment

The Decree considers any instruction to commit a direct or indirect discrimination itself as a (direct) discrimination (art. 4 Decree Equal Treatment).[114] The same goes for harassment, that is "any objectionable conduct related to sex, so-called race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, possessions, age, religion or belief, current or future state of health, disability, physical characteristics or any other ground of discrimination that takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment" (art. 5 Decree Equal Treatment).[115]

A.1.8.4. Civil provisions

The Decree provides for a distribution of the burden of proof among the parties in all civil proceedings[116]: "if a person advances facts before the competent court that can lead to the presumption of direct or indirect discrimination, it falls on the defendant to prove that the principle of equal treatment was not violated" (art. 13 Decree Equal Treatment).[117] Article 15 also authorises courts to issue a cease and desist order vis-à-vis anyone who maintains a discriminatory situation.

Other (civil) elements required by Directive 2000/78/EC have not been implemented (e.g. victimisation; nullity of discriminatory provisions).[118]

A.1.8.5. Criminal provisions

In the area of criminal responsibility any direct or indirect discrimination in employment, committed by an employee in any of the agencies enumerated in article 10 (cf. *supra*) can give rise to criminal prosecution (art. 16 § 1 Decree

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[113] See art. 4.1 Directive 2000/78/EC. Compare the other legislations *supra* and *infra*.
[114] Compare article 2.4 Directive 2000/78/EC.
[115] Compare article 2.3 Directive 2000/78/EC.
[116] Art. 10 Directive 2000/78/EC.
[117] The provision does not apply to criminal procedures, and does not replace other – more favourable – provisions regarding the burden of proof.
[118] See respectively: art. 11 and 16 b Directive 2000/78/EC.

Equal Treatment). Moreover, if it turns out that an agency did in fact discriminate, its recognition may be revoked (art. 16 § 2 Decree Equal Treatment).

A.1.8.6. Enforcement: equality body and interest groups

The executive body (government) of the French Community Commission will, according to the Decree, assign to one or more organisations the task of promoting equal treatment. These organisations can provide support to victims of discrimination in dealing with their complaints, give opinions and recommendations and perform research on all issues related to discrimination, and exchange information on all relevant levels with equivalent organisations (art. 12 Decree Equal Treatment).

No organisation has been designated yet. Just as several other community and regional governments, the executive body of the French Community Commission is still negotiating with other levels of government in order to create the possibility to make the CEOOR and the IEWM (cf. *infra*) competent for enforcing its anti-discrimination decree(s).

Private associations and interest groups are authorised to bring legal actions on the basis of the Decree as well (art. 14 § 1 Decree Equal Treatment).[119] This concerns associations which on the date of the facts have disposed of the legal personality for at least five years[120], and which have made it their purpose in their articles of association, to defend human rights and fight discrimination. The same again goes for all representative employers' organisations and trade unions. The interest groups are required to prove that they obtained the approval of the victim of discrimination if this victim is an identified natural person or a legal body.

A.1.9. German-speaking Community

A.1.9.1. General

The German-speaking Community's Decree of 17 May 2004 ensuring equal treatment on the labour market (Decree Equal Treatment) is aimed at implementing not only Directive 2000/78/EC, but also directives 2000/43/EC

[119] Compare article 9.2 Directive 2000/78/EC.

[120] This differs from the other legislation, in which this requirement is limited to three years. The difference is explained by the fact that the federal legislation was criticised by the European Commission for using the five year-requirement and in response the federal legislator lowered the term to three years as did most other legislators. The French Community Commission in Brussels however has not yet changed this requirement accordingly.

and 2002/73/EC. It covers the following range of grounds: sex, so-called race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, disability and physical characteristics. Just like the federal legislation and other pieces of Belgian legislation the Decree Equal Treatment as such also offers the possibility of taking action against discriminations on the basis of health, related to (prejudice or stereotyping) regarding sexual orientation (cf. *supra*).

There is a problem with the current list of discrimination grounds however in that it is an exact copy of the one which was annulled by the Constitutional Court in the Federal Act of 2003 (cf. *supra*). For these and other reasons the Decree will (have to) be revised in the near future.

A.1.9.2. Scope

The personal scope of the Decree Equal Treatment consists firstly of the services of the German-speaking Community as well as the personnel of these services and educational personnel, and secondly of the services provided by so-called intermediary organisations (art. 3 Decree Equal Treatment).

The material scope of the Decree is described as follows: "provisions and conduct in the area of career counselling and guidance, vocational training and completion, retraining, career guidance, employment-finding and access to education" (art. 4 Decree Equal Treatment).

Besides these broad descriptions of its scope, the Decree also entails an enumeration of specific types of (discriminatory) conduct that are prohibited in specific areas, highly analogous and comparable to those listed in the Flemish Decree Proportionate Participation. Due to limitations of space, we will not get into these provisions here (articles 6 to 11 Decree Equal Treatment).

A.1.9.3. Concept of discrimination

The Decree prohibits direct and indirect discriminations, as well as 'harassment' and an 'instruction to discriminate'.

Direct and indirect discrimination and justifications

The Decree defines direct discrimination as the situation "when one person is treated less favourably than another is, has been or would be treated in a comparable situation", on the basis of any of the grounds falling under the Decree (art. 2 § 1, 6° Decree Equal Treatment).

Indirect discrimination occurs "when an apparently neutral provision, criterion or practice would put persons with a certain sex, so-called race, colour, descent,

national or ethnic origin, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, disability and physical characteristics at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary" (art. 2 § 1, 7° Decree Equal Treatment).

The Decree allows for 'positive action', providing that "notwithstanding the principle of equal treatment it is possible, with a view to ensuring full equality in employment, to adopt or maintain specific measures to prevent or compensate for disadvantages linked to the discrimination grounds" (art. 12 Decree Equal Treatment).[121]

However, the Decree fails to provide any other exception or possible justification for any less favourable treatment directly related to the discrimination grounds. More specifically it does not explicitly offer any possibility of a genuine and determining occupational requirement.[122] As such it would seem – for the present topic – that any 'less favourable' treatment whatsoever, on the basis of sexual orientation, falling under the scope of the Decree, constitutes a direct discrimination and is as such unlawful.

Specific forms of discrimination: instruction to discriminate and harassment

Of the additional forms of discrimination, again only the instruction to discriminate and harassment are relevant for sexual orientation. The Decree states that "the instruction to direct or indirect discrimination is to be regarded as direct discrimination" (art. 5 § 1 Decree Equal Treatment).[123] Although this wording seemingly excludes an instruction to 'harassment' to constitute an instruction to discriminate, this is in fact not the case since 'harassment' too is equated to 'direct discrimination' (see hereunder) and as such is in fact included in the preceding definition.

More specifically harassment itself is addressed in the following terms: "any unwanted conduct related to any of the grounds of discrimination that has the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment is equated with direct discrimination" (art. 5 § 2 Decree Equal Treatment).[124]

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[121] Compare article 7 Directive 2000/78/EC.
[122] See 4.1 Directive 2000/78/EC. Compare the other legislations *supra*.
[123] Compare article 2.4 Directive 2000/78/EC.
[124] Compare article 2.3 Directive 2000/78/EC.

A.1.9.4. Civil provisions

The Decree Equal Treatment has failed to implement several of the civil provisions required by Directive 2000/78/EC. For instance, it does not provide for the nullity of provisions in regulations and contracts that conflict with its principles[125], nor does it offer protection against victimisation.[126]

The Decree does provide for a distribution of the burden of proof among the parties in civil proceedings.[127] Article 18 of the Decree provides that if a person "advances facts before a court that can lead to the presumption of direct or indirect discrimination, it falls on the defendant to prove that the principle of equal treatment was not violated".[128] Article 19 also authorises any court to issue a cease and desist order vis-à-vis anyone who has been found not to observe the prohibition of discrimination as set down in the Decree.

A.1.9.5. Criminal provisions

The Decree comprises two criminal prohibitions in one single article, both having to do with hate speech and both punishable with identical sanctions.

Article 17 renders it punishable to either publicly incite to discrimination or publicly announce one's intention to discriminate under the scope of the Decree (cf. *infra* for more on these penalizations).

A.1.9.6. Enforcement

Equality body and interest groups

The Decree states that the government will designate an organisation or organisations for the advancement of equal treatment of all persons. This organisation or these organisations will be authorised to provide support to victims of discrimination in dealing with their complaints, and to formulate opinions and recommendations and to perform research on all issues related to discrimination (art. 15 Decree Equal Treatment).

No organisation has been designated yet. Like some of the other community and regional governments, the government of the German-speaking Community is still negotiating with the other levels of government in order to create the

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[125] See: art. 16 b Directive 2000/78/EC.
[126] See: art. 11 Directive 2000/78/EC.
[127] Art. 10 Directive 2000/78/EC.
[128] The provision is not applicable in criminal procedures and does not replace other – more favourable – provisions regarding the burden of proof.

possibility to make the CEOOR and the IEWM (cf. *infra*) competent for enforcing its anti-discrimination decree(s).

Again, certain private associations and interest groups are authorised to bring legal actions on the basis of the Decree as well (art. 20 Decree Equal Treatment).[129] This concerns associations which on the date of the facts have disposed of the legal personality for at least five years[130], and which have made it their purpose in their articles of association, to defend human rights and fight discrimination. The same again goes for all representative employers' organisations and trade unions.

And also in this case the interest groups and the equality body (yet to be designated) are required to prove that they obtained the approval of the victim of discrimination, if this victim is an identified natural person or a legal body. If not, then the legal action will be inadmissible (art. 20 Decree Equal Treatment).

Inspection

The Decree assigns powers of enforcement, investigation and supervision to civil servants of the Department of Employment and Education of the General Directorate Economics and Employment of the Ministry of the Walloon Region (art. 16 Decree Equal Treatment).

A.1.10. Overview

On the basis of what has been described above, the following overview of some of the features of all relevant legislative acts can be given:

Legislative level	Direct and indirect discrimination - Justifications	Specific forms of discrimination (relevant for LGBT-persons)	Civil provisions	Sanctions	Enforcement
Federal	*Direct* distinction in areas covered by Directive 2000/78/EC: "closed" system of	- Instruction to discriminate - Harassment	- Nullity of provisions - Damages: lump sum or actual damage - Cease and	Criminal sanctions	- Equality body: CEOOR - (IEWM for sex) - Associations etc.

[129] Compare article 9.2 Directive 2000/78/EC.

[130] As mentioned previously, the federal legislation was criticised by the European Commission for using this requirement and in response the federal legislator lowered the term to three years (cf. *supra*).

	justifications; *direct* distinction in areas not covered by directive 2000/78/EC, and any *indirect* distinction: "open" system of justifications		desist procedure - Burden of proof - Protection of victims		
Flemish Community & Flemish Region	*Direct* distinction in areas covered by Directive 2000/78/EC: "closed" system of justifications; *indirect* distinction: "open" system of justifications	- Instruction to discriminate - Harassment - Reasonable accommodations (Decree Proportionate Participation)	- Nullity of provisions - Damages: lump sum or actual damage (Framework Decree) - Cease and desist procedure - Burden of proof - Protection of victims	- Administrative (Decree Proportionate Participation) sanctions - Criminal sanctions	- Equality body: not yet designated - Local complaints offices - Associations etc.
French Community	*Direct* distinction in areas covered by Directive 2000/78/EC: "closed" system of justifications; *indirect* distinction: "open" system of justifications	- Instruction to discriminate - Harassment	- Nullity of provisions - Damages: lump sum or actual damage - Cease and desist procedure - Burden of proof - Protection of victims	Criminal sanctions	- Equality body: CEOOR - (IEWM for sex) - Mediation offices - Associations etc.
Walloon Region	*Direct* distinction in areas covered by Directive 2000/78/EC: "closed"	- Instruction to discriminate - Harassment	- Nullity of provisions - Damages: lump sum or actual damage	Criminal sanctions	- Equality body: CEOOR - (IEWM for sex) - Associations

	system of justifications; *indirect* distinction: "open" system of justifications		- Cease and desist procedure - Burden of proof - Protection of victims		etc.
Brussels-Capital Region	*Direct* distinction in areas covered by Directive 2000/78/EC: "closed" system of justifications; *indirect* distinction: "open" system of justifications	- Instruction to discriminate - Harassment	- Nullity of provisions - Damages: lump sum or actual damage - Cease and desist procedure - Burden of proof - Protection of victims	Criminal Sanctions	- Equality body: not yet designated - Associations etc.
French Community Commission (Brussels)	*Direct* and *indirect* distinction in areas covered by Directive 2000/78/EC: "open" system of justifications	- Instruction to discriminate - Harassment	- Cease and desist procedure - Burden of proof	Criminal sanctions	- Equality body: not yet designated - Associations etc.
German-speaking Community	*Direct* distinction in areas covered by Directive 2000/78/EC: "closed" system of justifications; *indirect* distinction: "open" system of justifications	- Instruction to discriminate - Harassment	- Burden of proof	Criminal sanctions (for hate speech only)	- Equality body: not yet designated - Associations etc.

A.2. Implementation regarding other areas

There is no single answer to the question of whether the scope of the legislation in Belgium regarding discrimination on the ground of sexual orientation only covers employment or whether it also covers areas mentioned in the Racial Equality Directive (or whether it even extends beyond the latter scope).

The precise scope of the legislation currently in force at the various levels is dealt with in detail in the preceding section. Summing up however, one can schematically present the scope of the various acts and decrees as follows.

Legislative level	Covers scope 2000/78/EC?[131]	Covers scope 2000/43/EC? [132]	Additional areas and contexts?
Federal	Yes	Yes	Yes (covers wide range of contexts and areas of public life)
Flemish Community & Flemish Region	Yes	No (Decree Proportionate Participation) Yes (Framework Decree)	No (Decree Proportionate Participation) Yes (Framework Decree): identical scope as that of the federal legislation
French Community	Yes	Yes	Yes (covers all activities by officials and associations under the jurisdiction of French Community)
Walloon Region	Yes	Yes (to the extent that the Region is competent)	Yes
Brussels-Capital Region	Yes	No (goods and services, except for housing, are not included)	Yes
French Community Commission (Brussels)	Yes	Partially (applies to a number of relevant agencies only)	No

[131] Each time to the extent that this scope falls within the competence of the relevant entity.
[132] Each time to the extent that this scope falls within the competence of the relevant entity.

German-speaking Community	Yes	No	No

A.3. Equality Body

A.3.1. General

As mentioned in the section describing the legislation (cf. *supra*), on most legislative and government levels an equality body is yet to be designated (mostly by the relevant governments). Basically, only the federal level, the French Community and the Walloon Region have already done so up till now, having designated the Centre for Equal Opportunities and Opposition to Racism (CEOOR) as far as sexual orientation is concerned.

Most of the other levels however are currently in the process of negotiating and preparing a so-called 'cooperation agreement' that will allow them to transfer the authority for dealing with complaints on the basis of their decrees and ordinances to the CEOOR as well.

A.3.2. Centre for Equal Opportunities and Opposition to Racism

The CEOOR is – among other things[133] – a governmental equality body, responsible for enforcing the major part of the federal discrimination legislation. Organically it is linked to the office of the Prime Minister; substantively the Minister of Equal Opportunities bears responsibility for it. The Centre enjoys legal personality in its own right and exercises its activities independently, that is under the supervision of a board of management, the members of which are appointed by royal decree on the basis of their expertise. It was created by the Act of 15 February 1993.[134] At the outset, it was charged with promoting equal opportunities and combating racial discrimination. In 2003 the scope of the Centre's activities has been extended so as to include discrimination on the basis of sexual orientation and a considerable number of other grounds.

More specifically, besides racial discriminations and discrimination on the basis of sexual orientation, the Centre in 2003 became competent to treat

[133] It has other competences and tasks as well, e.g. in relation to education, immigration and asylum, and the fight against human trafficking.

[134] Moniteur 19 February 1993. Amended by the Acts of 13 April 1995, 20 January 2003, 25 February 2003, 10 August 2005 and 10 May 2007.

discrimination on the following grounds: marital status, birth, fortune, age, religion or belief, current and future state of health, disability or physical characteristics.[135] With the introduction of the new federal legislation in 2007 this list was further expanded. The Centre is currently competent to deal with discrimination complaints on the following grounds: so-called race, colour, descent, national or ethnic origin, nationality, age, sexual orientation, marital status, birth, fortune, religion or belief, political conviction, current and future state of health, disability, physical or genetic characteristics, social origin.[136]

The CEOOR has a staff of a little over 100 people. The department responsible for dealing with issues and complaints of discrimination on the basis of sexual orientation used to be known as the Department of Non-Racial Discrimination and was responsible for discriminations on all of the aforementioned grounds, with the exception of so-called race, colour, descent, national or ethnic origin and nationality, for which there was a separate Department of Racism. Since October 2009 these departments were united to constitute one single Department of Discrimination.

The CEOOR's specific functions and competences include receiving complaints from persons who believe themselves to have suffered discrimination, and dealing with these complaints in the manner it sees fit: the CEOOR is authorised – among other things – to provide information; to examine and investigate situations of (alleged) discrimination; to act as a go-between or even mediate between the defendants and plaintiffs of discrimination; or (depending upon the facts) to take cases to both civil or criminal courts (cf. supra). Furthermore, the Centre is also authorised to initiate inquiries or studies into discrimination[137]; to publish reports and to address recommendations to the public authorities and to private individuals and institutions on issues connected with discrimination. It also provides training and formation to magistrates, lawyers and police, on issues of homophobia and (ways to deal with and tackle) discrimination on the basis of sexual orientation.

Filing a complaint or directing a question at the CEOOR can be done in several ways. It is possible to do so in person either at its main seat or at one of the several local complaints offices throughout Belgium. Complaints can also be

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[135] For sex discrimination and discrimination of transgender people a separate institute was founded in 2002: the Institute for the Equality of Women and Men (cf. *infra*).

[136] For sex discrimination the Institute remains competent. Yet another institution is to be designated to deal with discriminations on the basis of 'language', a ground for which the new 2007 Act also provides protection.

[137] See, regarding homophobia, for example the study commissioned by the CEOOR 'Agressie tegen holebi's in Brussel Stad' ('Aggression against LGB people in Brussels'), surveying the problem of aggression, public intimidation and street harassment of LGBT people in Brussels centre. The CEOOR also commissioned a study on discrimination of LGB people in employment, since it received relatively few complaints and wanted to investigate what the reasons for this were.

sent in by e-mail or regular mail, fax or telephone or by means of an electronic complaint form to be found on the Centre's website.[138]

Aside from victims of discrimination, other natural and legal persons can also appeal to the CEOOR for support and guidance, such as government institutions or private businesses with questions about the legislation, or associations and interest groups working on specific groups or issues. The CEOOR for example maintains close relations with a number of main NGO's active in the field of discrimination on the basis of sexual orientation, some of which even act as (independent) local complaint offices for the Centre, on the basis of formal protocols.

A.4. Civil society organisations

A.4.1. General

As mentioned in the section describing the legislation (cf. *supra*), all legislative levels have authorised (private) associations, organisations and interest groups to bring legal actions on the basis of their legislation. Thereby they have implemented article 9.2 of Directive 2000/78/EC, and they all apply roughly comparable criteria for the designation of the authorised organisations. Generally speaking the following types of organisations are authorised:

- all organisations the purpose of which (expressed in their articles of association) is to defend human rights and fight discrimination, and that have (on the date of the fact) had legal personality for either three years (or five years, in the case of the German-speaking Community and the French Community Commission in Brussels).
- all unions or otherwise representative labour organisations.

A.4.2. Specific organisations and practice

Specifically then, regarding sexual orientation, firstly all trade unions and representative organisations for employees and employers have the possibility to engage on behalf or in support of complainants. The same goes for a number of gay-rights and human rights organisations. On the Dutch speaking side this would concern e.g.: Çavaria[139] (umbrella organisation for LGBT groups in

[138] See: www.diversite.be or www.diversiteit.be.

[139] Known, until 25 June 2009, as the 'Holebi-federatie'. 'Holebi' is the (Belgian) Dutch abbreviation for the combined designation of 'homosexual', 'lesbian', 'bisexual' (taking the first two letters from each).

Flanders and Brussels), Wel Jong Niet Hetero [Young Not Straight] (LGBT organisation especially for young people), the several Roze Huizen [Pink Houses] (meeting-places and umbrella organisations for gay groups), Sensoa (the Flemish expert organisation on sexual health and HIV) and the Liga voor Mensenrechten [Flemish League for Human Rights] (the main Flemish human rights NGO). On the French speaking side it would include organisations like: the Fédération des Associations Gayes et Lesbiennes [Federation of Gay and Lesbian Organisations], Arc-en-Ciel Wallonie, Tels Quels and Alliàge (LGBT organisations).

Up to now these and other associations have not often taken cases to court independently; mostly they provide (moral and informative) support to victims, and refer individuals to the CEOOR when legal steps are to be taken. The good relations between many of the main private associations and the CEOOR (cf. *supra*) have much to do with this: the private organisations are as such working as a means to reduce barriers for victims wanting to file complaints, rather than 'competing' over complaints with the equality body.

B. Freedom of movement

The implementation in the Belgian legal order of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, apparently is not an easy task. To begin with, there was no implementing legislation when the period for implementation had expired, i.e. on 30 April 2006. Meanwhile the implementing legislation has been adopted: the Act of 25 April 2007 amending the Aliens Act of 15 December 1980 is aimed at the implementation of a number of Directives, including Directive 2004/38/EC. This modifying act has entered into force on 1 June 2008.

B.1. Right to move and to reside freely within the territory of Belgium

For a good understanding of the applicable regime relating to freedom of movement for citizens of the EU, one should make a distinction between the short stay and the long stay.

B.1.1. Short stay

A short stay is a period of stay in Belgium of maximum three months. Each EU citizen in possession of a valid identity document has the right to a short stay (art. 40, § 3 of the Aliens Act, as replaced by the Act of 25 April 2007).

Family members of an EU citizen have the right to accompany or to join the EU citizen. Family members who are not themselves EU citizens, in principle need a visa valid for Belgium. In case they have a residence card on the basis of Directive 2004/38/EC, the visa requirement is not applicable (art. 40bis, § 3 of the Aliens Act, as inserted by the Act of 25 April 2007).

B.1.2. Long stay

A long stay is a period of stay in Belgium of more than three months. An EU citizen in possession of a valid identity document has the right to a long stay if

he or she meets certain conditions. In particular, EU citizens must belong to one of the following categories:

a. be a worker or a self-employed person in Belgium, or enter Belgium with the purpose of looking for work, as long as there is a reasonable chance to be appointed;
b. have sufficient resources for themselves (and their family members) not to become a burden on the Belgian social assistance system during their period of residence, and have a health insurance that covers medical expenses in Belgium;
c. be registered at an organized, acknowledged or subsidized educational institution, for the principal purpose of following a course of study, including vocational training, and have a health insurance that covers medical expenses in Belgium, and give assurance that they have sufficient resources for themselves (and their family members) not to become a burden on the Belgian social assistance system.

(art. 40, § 4, of the Aliens Act, as replaced by the Act of 25 April 2007).

Family members of an EU citizen belonging to the categories a or b can accompany or join the said citizen under the same conditions as for a short stay. This means that family members who are not themselves EU citizens in principle need a visa, but are exempted from this requirement if they have a residence card on the basis of Directive 2004/38/EC. Not all family members of an EU citizen belonging to the category c (students) can accompany or join that citizen: the right to free movement and residence is in their case limited to spouses and partners and to the children dependent on the EU citizen (art. 40bis, § 4 of the Aliens Act, as inserted by the Act of 25 April 2007).

B.2. Definition of family members

As indicated, the above arrangements apply to EU citizens and the members of their family. Article 40bis, § 2 of the Aliens Act, as inserted by the Act of 25 April 2007, gives the following definition of family members of an EU citizen[141]:

– the spouse or the alien with whom a registered partnership has been contracted, considered to be equivalent to marriage[142], who accompanies or joins the EU citizen;

[141] Compare art. 2, 2), Directive 2004/38/EC.
[142] According to the *travaux préparatoires* of the Act of 25 April 2007, the registered partnerships covered by point a are in particular those that exist in Scandinavian countries (*Parliamentary Documents*, House of Representatives 2006-2007, n° 51-2845/1, p. 39). The King is to determine which partnerships, registered abroad, are considered equivalent to marriage (art. 40bis, § 2 Aliens Act, as inserted by the Act of 25 April 2007).

d. the partner who accompanies or joins the EU citizen, with whom the EU citizen has contracted a registered partnership in accordance with a law, provided that it concerns a durable and stable relationship that is lasting already for at least one year, that both partners are older than 21 years and that they have no durable relationship with another person;
e. the direct relatives in the descending line of the EU citizen and those of the spouse or partner, as defined in points a and b, who are under the age of 21 or are dependants, who accompany or join them;
f. the dependent direct relatives in the ascending line of the EU citizen and those of the spouse or partner, as defined in points a and b, who accompany or join them.

It should be noted that category b is one that is not imposed by the Directive. The legislator has seized the opportunity to give a legislative basis to a practice which was inaugurated by a circular of the Minister of the Interior of 1997. Under that circular, a residence permit would be granted to unmarried partners who live together in a stable relationship.[143] These persons will, after the entry into force of the Act of 25 April 2007, enjoy the same protection as spouses and registered partners with a partnership equivalent to marriage.[144] In this respect, the legislator has extended to family members of EU citizens (freedom of movement and residence) the same treatment that, about a year earlier, he has extended to family members of non-EU citizens (family reunification, see infra).

The Aliens Act, as amended, does not mention same-sex marriages or same-sex relationships. However, since Belgium accepts same-sex marriages and same-sex registered partnerships, it is obvious that the above mentioned provisions apply both to (married or unmarried) heterosexual and homosexual couples and their descendants and ascendants. This has been explicitly acknowledged, with respect to registered partnerships (under Belgian law or the law of another state), in the explanatory memorandum of the bill that has led to the Act of 25 April 2007.[145] The above mentioned circular of 1997 also made it clear that the practice with respect to residence permits on the basis of a stable relationship would apply to heterosexual as well as homosexual relationships.

LGBT partners of EU citizens thus enjoy absolutely the same rights as heterosexual partners.

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[143] Circular of 30 September 1997 regarding the granting of a residence permit on the basis of cohabitation in the framework of a durable relationship.
[144] *Parliamentary Documents*, House of Representatives 2006-2007, n° 51-2845/1, p. 40.
[145] Ibid., p. 41.

C. Asylum and subsidiary protection

In Belgium, applications for asylum and subsidiary protection on the basis of sexual orientation are in principle treated in the same way as any other application for asylum and subsidiary protection. The general legal basis thereto is the "Aliens Act"[146], in which the entry and residence to the territory of the Belgian state by people from outside Belgium (aliens) is regulated.

It should be noted, however, that there is a person in the office of the Commissioner-General for the Refugees and the Stateless Persons (see infra) who is exclusively occupied with applications for asylum or subsidiary protection, based on sex (and transsexualism) or sexual orientation. This practice allows for the generation of a specific expertise in this area.

C.1. Asylum on the basis of sexual orientation

In general terms, an asylum seeker has to indicate a real and imminent threat to his life or personal safety. The application is evaluated according to the Convention of Geneva of 1951, -which contains a definition of a refugee (article 48/3 of the Act). It must be clear that the grounds of application do not need to be political in nature, hence other reasons for persecution are also taken into account.

The case law shows a few cases where the homosexual orientation of an applicant, as a ground for his or her persecution in the country of origin, was considered to be a ground upon which a request for asylum could be based. Competent bodies are generally open to such claims, but sometimes deny them nonetheless when and if the evidence (that can be narrative) is considered implausible.

It is sufficient to indicate a real threat of persecution, it is not needed that the applicant is in fact being persecuted. Also, people who reside in Belgium, and do not have refugee status, can invoke this fear of persecution if the situation in their home country has changed to a degree that there is a clear and real risk of persecution upon re-entry in their country of origin.

The practice reportedly used in some countries during the asylum procedure known as 'phallometry' or 'phallometric testing' does not occur in Belgium.

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[146] Act of 15 December 1980 concerning access to the territory, residence, settlement and removal of aliens, as amended.

C.2. Subsidiary protection on the basis of sexual orientation

When someone does not qualify for the status of refugee, he or she can invoke subsidiary protection. This is the case where there are serious reasons to presume that the applicant would face a serious risk to severe harm, upon return to his or her country of origin, and where he or she cannot, or because of the risk does not wish to, put him or herself under the protection of his or her country of origin (article 48/4 of the Act).[147]

Subsidiary protection on the basis of sexual orientation hence becomes possible in mainly two situations:

- If the applicant is sentenced to the death penalty by a criminal court in his or her country of origin, because of the fact that he or she is an LGBT person or has displayed same-sex intercourse or other forms of personal physical interaction with a same-sex partner that indicate an LGBT sexual orientation.
- If the applicant faces inhuman or degrading treatment in his or her country of origin, based on his or her sexual orientation. This inhuman or degrading treatment is interpreted in the sense of article 3 of the European Convention on Human Rights.

C.3. Family members of asylum seekers

Provisions for family members of asylum seekers can be found in article 88 of the Royal Decree of 8 October 1981 concerning access to the territory, residence, settlement and removal of aliens. In this article, it is stated that two types of partners are considered in the context of asylum and subsidiary protection (when the applicant is in the application process):

- The spouse of the asylum seeker,
- The partner, considered equal to a spouse under Belgian law. The partnership is considered equal to marriage in Belgium if it is legally registered in Germany, Denmark, Finland, Iceland, Norway, Sweden or the United Kingdom.

The fact that Belgium accepts same-sex marriage is obviously highly relevant, as this has repercussions on who can be considered family member of an asylum seeker. The same logic applies to registered partnerships. It should be

[147] See generally: Ph. Gérard & F. Parrein, "Seksuele geaardheid: een begrip in het Europese en Belgische vreemdelingenrecht", *T.Vreemd.* 2009, 291-306.

pointed out that no lesser form of "stable relationship" as provided in article 2/h of EC Directive 2004/83, is taken into account with regard to an asylum seeker.

The limitation to same-sex married partners and partners in a registered partnership is applicable to persons who are in the process of applying for asylum in Belgium. It should be noted that this limitation does not apply to those who already have been granted the status of refugee in Belgium. Once a person is granted that status, he or she has an unlimited right to residence/stay in Belgium, and then the usual legislation on family reunification applies. In that context, a stable relationship can actually be considered as similar to that of one with a family member (*infra*).

C.4. Procedure for asylum and subsidiary protection

C.4.1. Administrative procedure

The procedure consists of four stages: the convocation, the interview, the assessment of the application, and the decision. The procedure is administered by the central asylum agency, the Commissioner-General for the Refugees and the Stateless Persons.

In the convocation stage, the applicant is summoned for an interview. This is done either directly by the Aliens Registration Office, an office of the Ministry of the Interior, or by a letter by recorded delivery. The basis for the interview is a questionnaire filled out by the applicant at the Aliens Registration Office (which, hence, constitutes the first step in applying for asylum or subsidiary protection). The Commissioner-General is obliged to conduct an interview, but may request the applicant to provide further information.

At the interview stage, all possible evidence showing that the applicant meets the requirements for refugee status needs to be put forth. This needs to be complete, and if other evidence would be introduced further down the process, it is requested that this is already indicated at the interview stage. This will play, inter alia, an important role in possible subsequent appeal procedures.

In the assessment of the application, the Commissioner-General takes into account: (a) the credibility and veracity of the narration of the applicant, and (b) the test of the aforementioned criteria relating to the status of refugee and subsidiary protection. The examination more concretely comprises:

- an insight in the country of origin (is there a threat for prosecution or damage/injury based on sexual orientation?)

- examination of the proof that has been brought forward by the applicant (is this threat real and imminent in the applicant's case – not just a general fear but an identifiable personal threat?)
- examination of the truthfulness of the narration of the applicant (in relation to the examination of the situation in the country of origin)
- examination of possible contradictions
- the contents of the questionnaire filled out by the applicant.

The decision of the Commissioner-General can be either one of the following:

- The application of an EU-resident is not taken into consideration. This is the case for two types of applications:

  - the application is made by an EU-citizen. In that case, a more speedy procedure is initiated. It is however unlikely that an EU-citizen will file an application for asylum or subsidiary protection based on his or her sexual orientation;
  - the Commissioner-General is of the opinion that there is no well founded fear for prosecution or serious ground to assume that there is a substantial risk on injury or damage. Such decision is usually taken within five working days. In this case, it can be that the person is not personally facing a direct threat, for example in the case where in a country being gay or gay interaction is criminalized, but is systematically not prosecuted (the law is there, but the effects are not).

- The application is found to be impervious, deceptive or untruthful. This would be the case if the applicant's country of origin does not systematically prosecute LGBT people, if other motives appear to support the application than the ones brought forward on the basis of sexual orientation, or if the story in which he or she invokes the refugee status contains contradictions or incredible elements to an extent that renders it impossible to objectively assess the application.
- The Commissioner-General grants the applicant the status of refugee. This means that the applicant does face a direct and imminent threat of prosecution or injury or damage, based on his sexual orientation. This decision is based on, on the one hand an appraisal of the situation with regards to sexual orientation in the applicant's country of origin, and, on the other hand, the personal story of the applicant. As seen above, the applicant has to establish the imminent, direct, and personal character of the threat he or she faces.
- The Commissioner General refutes the status as refugee as well as the subsidiary protection status. If this is the case, the applicant will receive an order to leave the territory from the Aliens Office.

C.4.2. Appeal

An appeal is possible against all the decisions of the Commissioner-General. The plea is brought before the Council for Aliens Disputes, an administrative court established in 2006.[148] With respect to appeals against decisions of the Commissioner-General, the Council acts as an appeal body with full jurisdiction, which can reform the said decisions. It should be noted that the Council is also competent to hear appeals against administrative decisions in matters not involving asylum seekers, in particular decisions taken by the Minister of the Interior or his delegate; in those cases the Council's jurisdiction is limited to reviewing the legality of the act challenged before it (see article 39/2 of the Act).

Against the decision of the Council for Aliens Disputes, a cassation appeal can be brought before the Council of State, the supreme administrative court.

[148] Before the establishment of the Council for Aliens Disputes, such appeals were brought before the Permanent Appeals Commission for Refugees, also an administrative court.

D. Family reunification

In general terms, the issue of family reunification in the broad sense can be looked at from two different angles: family reunification in the narrow sense and family formation. In the first case, existing family ties are consolidated or existing family members are physically reunited on the Belgian territory. In the second case, which is of specific importance and possible benefit for LGBT people, two persons can come to Belgium either to get married here or to enter into a living together contract. Given that same-sex marriage is legal in Belgium, the latter situation will open possibilities for LGBT people who wish to consolidate their relationship.

D.1. Family reunification in the narrow sense

The term 'family reunification' is used here in the sense of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification: it concerns the entry into and residence in Belgium by family members of a non-EU citizen residing lawfully in Belgium (art. 2, (d) of the Directive).

D.1.1. Various situations of family reunification

When one discusses the issue of family reunification, one has to make a distinction depending on the person (resident) with whom the applicant has family ties. That person can be: a) a person with Belgian or EU citizenship, b) a person with other than EU citizenship, c) an asylum seeker, or d) a person who is employed in Belgium and with whose country of origin Belgium has a bilateral treaty. The different situations are governed by different rules. Situation a), insofar as it applies to family reunification with EU citizens, has been discussed above, in the light of the freedom of movement and residence of family members of EU citizens.

We will limit ourselves here to family reunification by family members of a non-EU citizen (situation b). This is the sort of family reunification falling within the scope of Directive 2003/86/EC.

The implementation of Council Directive 2003/86/EC has been done by the Act of 15 September 2006 amending the Aliens Act of 15 December 1980. The relevant rules are now to be found in arts. 10 (family of a non-EU citizen with an unlimited right of residence) and 10bis (family of a non-EU citizen with a limited right of residence) of the Aliens Act.

D.1.2. Family members who can enjoy family reunification

Article 10, first paragraph, 4° to 7° of the Aliens Act enumerates the family members who, under certain conditions, can enjoy the right to family reunification[149]:

a. the foreign spouse or the alien with whom a registered partnership has been contracted, considered to be equivalent to marriage[150];
b. the alien with whom the non-EU citizen has contracted an official registered partnership, provided that it concerns a durable and stable relationship that is lasting already for at least one year, that both partners are older than 21 years and that they have no durable relationship with another person;
c. the children (minors as well as adults who, because of a handicap, are unable to provide for their own needs);
d. the parents (of a refugee).

It should be noted that category b is one that is not imposed by the Directive. Article 4, 3. of the Directive merely makes it possible for the member states to authorise the entry and residence "of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership (...)". The legislator has made partial use of this possibility. As he would later also do with respect to the rights of family members of EU citizens (see supra), he has seized the opportunity, in this context too, to give a legislative basis to the practice which was inaugurated by the abovementioned circular of the Minister of the Interior of 1997.[151] As a result, partners with a 'merely' registered partnership now enjoy the same protection as spouses and registered partners with a partnership equivalent to marriage.[152] Partners without any form of registered partnership can depend only on the provisions of article 3, 2b of Directive 2004/38: as such the member state, i.c. Belgium, is only held to "facilitate entry and residence" for those categories of partners.

Article 10 Aliens Act does not mention same-sex marriages or same-sex relationships. However, just like with partners of EU citizens, it is obvious that the provisions on family reunification with non-EU citizens apply both to (married or unmarried) heterosexual and homosexual couples and their descendants and ascendants. This has been explicitly acknowledged, with respect to registered partnerships (under Belgian law or the law of another

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[149] The enumeration of Article 10 is also referred to in the various provisions of Article 10bis.
[150] The King is to determine which partnerships, registered abroad, are considered equivalent to marriage.
[151] Circular of 30 September 1997 regarding the granting of a residence permit on the basis of cohabitation in the framework of a durable relationship.
[152] *Parliamentary Documents*, House of Representatives 2005-2006, n° 51-2478/1, p. 43.

state), in the explanatory memorandum of the bill that has led to the Act of 15 September 2006.[153]

LGBT partners of non-EU citizens thus enjoy absolutely the same rights as heterosexual partners.

D.2. Family formation

According to an administrative practice, aliens can obtain a special visa, valid for three months, in order to marry in Belgium a Belgian citizen or an alien who resides lawfully in the country.[154]

In this context, the fact that Belgium has given a legal status to same-sex marriage is of the utmost importance. Indeed, the same sex partner is thus able to obtain a special visa, to enter into marriage in Belgium.

The following people can enter into a same-sex marriage in Belgium:

- Two people with Belgian nationality.
- One person with Belgian nationality and one with any other nationality.
- One person who has obtained residence status in Belgium with another person of any origin.
- Two persons of other than Belgian nationality, without resident status. Here, the basic conditions for marriage of the national legislation of the partners' countries of origin are used as a criterion. For same-sex marriages, however, the Belgian legislator has made the exception that it is sufficient that the country of origin of only one of the future spouses allows same-sex marriage, in order for the couple to be able to get married in Belgium (this exception is provided for in the Belgian Code on Private International Law).155 Consequently, a person of any origin, whether or not same-sex marriage is allowed in his or her country of origin, can always enter into a same-sex marriage, not only with a Belgian person, but also with any other person from a country that allows same-sex marriages.

Once the two same-sex persons are married, the spouse who came to Belgium can obtain a residence status in Belgium, based on family reunification.

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[153] Ibid., p. 44.

[154] See circular of the Minister of the Interior of 11 July 2001 concerning the documents to be submitted in order to obtain a visa with the view of contracting marriage in Belgium or to obtain a visa 'family reunification' on the basis of a marriage contracted abroad.

[155] Said provision was based on an older circular letter by the Minister of Justice (of 23 January 2004, Moniteur 27 January 2004, 4829). See also: Ph. Gérard & F. Parrein, "Seksuele geaardheid: een begrip in het Europese en Belgische vreemdelingenrecht", *T.Vreemd.* 2009, 302 (footnote 103).

D.3. Procedure

D.3.1. Administrative procedure

Decisions relating to family reunification are taken by the minister of the Interior or his delegate. In practice, decisions are taken by the Aliens Office of the Ministry of the Interior.

D.3.2. Appeal

As is the case with asylum, an appeals procedure is open to the people who are denied the right to family reunification in Belgium and to the people who have unsuccessfully applied for a visa to marry in Belgium. They can appeal against the administrative decision to the above mentioned Council for Aliens Disputes.

As has been indicated above, this kind of appeal, directed against a decision taken by another authority than the Commissioner-General for the Refugees and the Stateless Persons, is in the nature of a plea for annulment. The Council can only review the legality of the act, but cannot reform it. In the case of an annulment, it is up to the competent authority to take a new decision.

A cassation appeal against the decision of the Council for Aliens Disputes can be brought before the Council of State.

E. Freedom of assembly

Freedom of assembly is protected by the Belgian Constitution. Article 26 of the Constitution provides as follows:

> 'The Belgians have the right to gather peaceably and without arms, in accordance with the laws, which can regulate the exercise of this right but cannot subject it to prior authorisation.
>
> This provision does not apply to meetings in open air, which remain entirely subject to police regulations.'

In the Belgian legal system, there is no specific legal provision that guarantees the freedom of assembly of LGBT people. They fall within the general protection provided by article 26 of the Constitution.

Article 26 of the Constitution makes the distinction between an assembly in an enclosed space and an assembly in open air. Assemblies held in an enclosed space, for example in a theatre or a bar, cannot be subjected to prior authorisation. Nevertheless, they can be regulated, e.g. in view of the safety of the participants. Moreover, the freedom of assembly is only protected if the assembly is peaceable and unarmed, and as long as everyone behaves in accordance with the law that may regulate the event. If one of these conditions is not fulfilled, the assembly can be subjected to restrictive measures, and can even be forbidden, if there are serious indications that the public order will be disrupted.

Assemblies in open air, by contrast, are entirely subjected to police regulations. These are, inter alia, parades, manifestations, and demonstrations in the streets. In these cases, all possible measures can be taken to guarantee public order and safety. A prior authorisation can thus be required. However, local authorities can refuse such authorisation only on the ground that the assembly would put the public order and safety in danger, not merely because of the purpose of the assembly. An LGBT parade could thus be prohibited if it would endanger the public order and safety. If a local authority would refuse an assembly on the ground that it is an LGBT parade, this would constitute a violation of the freedom of assembly as protected by the Belgian Constitution.

There are no cases known in Belgium where an LGBT assembly was refused or banned. Nor are there cases known where LGBT assemblies were grossly disrupted. Since 1996, the Belgian Lesbian Gay Pride parade takes place each year in Brussels. The entire city centre is made available for this annual event.

There are, however, examples of demonstrations against tolerance of LGBT people. In 2005, there were two demonstrations against the bill providing for the possibility of adoption by LGBT persons. During the 2007 Belgian Lesbian

Gay Pride parade, a Christian organisation boarded up the church where a service would be held at the beginning of the Pride parade. These examples were provided to us by the Belgian LGB Federation, but there are no statistics available on the number of demonstration in favour of or against tolerance of LGBT people.

F. Criminal law

F.1. General

Apart from the Brussels-Capital Region and the French Community, all other levels include one or more criminal provisions regarding discrimination and/or hate speech on the basis of sexual orientation in their legislation (cf. *supra*). The answer to the question what specific conduct is criminalised differs greatly from legislative level to legislative level. However, this leads to less disparities than would seem to be the case at first glance, since – regarding criminal legislation – the so-called 'residual competence' falls to the federal legislator. Simply put, this is taken to imply that the federal criminal provisions are generally applicable in areas and matters pertaining to the competence of the other legislative levels as well.[156]

In this context mention should also be made of the fact that the Minister of Justice issued a circular letter in 2006 on the registration of all homophobic crimes and offences.[157] It prescribes a uniform way for the registration of such crimes, which expressly takes account of their homophobic nature, thereby enabling a better view of the extent of such complaints and contributing to more reliable statistical information.

F.2. Discrimination

F.2.1. Federal level

The only criminal provision covering actual discriminatory conduct in the federal Anti-discrimination Act, and therefore being generally applicable, consists in a prohibition of discriminatory conduct for civil and public servants.

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[156] The Council of State, the advisory organ on legislation, has stated that the federal legislator, on the basis of his residual competence, can issue criminal provision that will be applied in matters falling under the competence of the communities and the regions, at least until these entities provide in specific measures themselves on the basis of their own legislative competence (Council of State, opinion n° 40.689-40.691, point 17). It is not yet entirely clear what this doctrine implies in case a community or regional legislator should (want to) opt not to criminalise certain conduct, which the federal legislator did criminalise. It is expected that the Constitutional Court will – in time – pronounce itself on this matter. For the current purposes we shall take the Council of State's doctrine as a starting point, and assume that the other legislators cannot somehow 'repeal' the federal legislation, so that it would become inapplicable in areas belonging to their competence.

[157] Circular n° 14/2006 of the College of procurators-general of the courts of appeal, 26 June 2006. In force since 1 November 2006.

The Act does not render discrimination on the basis of sexual orientation[158] a criminal offence for ordinary citizens. It does however – by means of article 23 – provide that "every public officer and civil servant, every bearer or agent of public authority or power" who discriminates against a person or group on the basis of one of the protected criteria shall be punished with imprisonment of two months until two years.

If the accused proves that he was "acting on orders of those in command, in matters falling under their competence and in which he owed them obedience as a subordinate", the punishment is applied only to the superior officers who issued the command.[159]

F.2.2. Other levels

In matters pertaining to the competence of the Flemish Community and the Flemish Region, persons can additionally be sanctioned if they are found guilty of direct discrimination in career counselling, vocational training, career guidance and employment-finding (art. 11 Decree Proportionate Participation). Penalties entail imprisonment ranging from a month to a year and/or fines of 50 to 1000 euro. The Framework Decree, on the other hand, provides only for criminal sanctions for civil servants (art. 32 Framework Decree), in a manner identical to that of the federal legislator (*supra*).

A provision similar to the latter one is also part of several other regional legislative texts, more specifically of the French Community decree (art. 55), the Walloon Region decree (art. 24) and two of the Brussels Capital Region ordinances (art. 191 Housing Decree; art. 18 Public Service Decree). As such, only the German-speaking Community and the French Community Commission in Brussels did not introduce a similar provision. The latter however does offer a general criminal prohibition of discrimination falling within its scope (*infra*). The Brussels-Capital Region Employment Ordinance does not offer a similar provision either, since it is applicable only to private employment. It does provide for criminal sanctions (50 to 1000 euros and/or imprisonment of a month to a year) for anyone who intentionally discriminates in matters of employment (art. 19 § 1 Employment Ordinance).

Similarly, in matters falling under the scope of the Walloon Region anyone can – in addition to the federal provisions – be punished "by imprisonment of 8

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[158] Belgian federal law does do so, however, regarding race and ethnicity.

[159] Unless the said superior officers allege that their signature has been obtained by surprise or ruse, in which case they are obliged to bring the discriminatory situation to an end and report the guilty party. If not, they themselves will be prosecuted. Furthermore, if one of the discriminatory acts is committed by means of a fraudulent signature of a public officer, the perpetrators of this fraud and those who maliciously or fraudulently made use of it, are punished with imprisonment of 10 to 15 years.

days to a year and a fine of 100 to 1000 euros, or one of those penalties alone" if he or she "voluntarily or consciously commits discriminatory acts in the sense of (the Decree Equal Treatment)" (art. 13 Discrimination Decree). If the offence is repeated the maximum penalties can be doubled (art. 14 Decree Equal Treatment). And finally, under the scope covered by the Decree of the French Community Commission in Brussels, direct or indirect discrimination in employment committed by employees of agencies covered by the Decree can give rise to criminal prosecution (art. 16 § 1 Discrimination Decree).

F.3. Hate speech

F.3.1. Federal level

The only provision specifically covering 'hate speech' on the basis of sexual orientation in the federal legislation is the prohibition of 'incitement to hatred, discrimination and violence'.[161] Article 22, 1° and 2° of the Anti-discrimination Act (2007) makes it a crime, punishable "by imprisonment of one month to one year and with a fine of 50 euros to 1000 euros", to publicly incite to discrimination, hatred or violence against a person on the basis of one of the protected criteria. Article 22, 3° and 4° prohibits incitement to discrimination, hatred, violence or segregation against a group, a community or its members on the same grounds.

The Constitutional Court has ruled in 2004 – regarding the former Anti-discrimination Act of 2003 – that 'incitement' presupposes actively 'urging', 'stimulating' or 'instigating' third parties to undertake certain actions or to adopt a particular conduct (of hatred, more specifically).[162] Moreover, the Constitutional Court required the presence of 'special intent' for the application of the incitement clause to be constitutional.[163] As such, apart from the requirement that the content of words and expressions must incite or provoke hatred, discrimination, violence or segregation, it must also be demonstrated that such was the defendant's conscious intention.

A barrier for the application of the incitement provision in the context of homophobia, at least where it concerns written expressions, is the special protection regime that the Belgian Constitution offers to so-called "press

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[161] Hate speech might of course also be dealt with by means of other, general criminal provisions, such as slander, defamation and insults.

[162] Constitutional Court, n° 157/2004, 6 October 2004, B.51. See also: Constitutional Court n° 17/2009, 12 February 2009, B.67.2-B.67.3; Constitutional Court n° 40/2009, 11 March 2009, B.57-B.58.

[163] Constitutional Court, n° 157/2004, 6 October 2004, B.51. See also: Constitutional Court n° 17/2009, 12 February 2009, B.67.2-B.67.3; Constitutional Court n° 40/2009, 11 March 2009, B.57-B.58.

crimes". In Belgium written and published materials[164] are subject to a special protection regime according to which they can in general only be tried by a jury (art. 150 Constitution). Jury trials are in the first place reserved for the most serious crimes (murder, rape, terrorism, etc.). Several other crimes are also referred to a jury, not so much because of their seriousness, but rather because of their (politically subversive) nature: e.g. political crimes and press crimes.[165] In practice this means that press crimes are hardly ever prosecuted, given the "risk" of an acquittal by the jury. In 1999 the federal Parliament introduced an exception to the constitutional principle of the jury trial for press crimes, and allowed that press crimes "motivated by racism or xenophobia" be brought before professional judges. However, for press crimes on other grounds, such as sexual orientation, there is no comparable exception. This makes it improbable that a prosecution will be brought against authors of written 'homophobic' incitement.

F.3.2. Other levels

At the community and regional levels almost all legislators (with the exception of the French Community Commission in Brussels, and the Brussels-Capital Region in its Public Service Ordinance and Employment Ordinance) have all enacted provisions regarding hate speech as well. Most entail – as far as sexual orientation is concerned – a prohibition of incitement to hatred, discrimination and violence (cf. *supra*). The German-speaking Community's Decree Equal Treatment also prohibits publicly announcing one's intention to discriminate.

It is unclear whether these additional criminalisations of 'incitement' add anything to the federal incrimination, since it should be noted that in areas belonging to the competence of the communities and the regions, the (federal) prohibition of incitement is applicable, at the very least until these communities and regions enact(ed) their own provisions in this regard.

The German-speaking Community's criminalisation of publicly announcing one's intention to discriminate, however, is likely to be considered unconstitutional, since an almost identical provision in the federal Anti-Discrimination Act of 2003 (on which the one in the Decree of the German-speaking Community was based) has been annulled by the Constitutional Court.

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[164] Some case law extends this protection to other media, such as the internet and television on the basis of an evolutive interpretation of the Constitution. This development, however, has not been accepted by the Court of Cassation.

[165] Due to their subversive nature and the fact that they tend to be based on ideas that are critical of the state or generally 'the powers that be', the drafters of the Belgian Constitution deemed it inappropriate for these defendants to be tried by a judge appointed by 'the system'.

F.4. Aggravating circumstances

Only the federal legislation can and does provide in aggravating circumstances in case certain crimes are committed with a 'discriminatory' motive. The relevant provisions concern a large number of common crimes, including rape, assault, manslaughter, murder, criminal negligence, stalking, arson, defamation and slander, desecration of graves, vandalism, etc.

The provisions stipulate that the minimum penalties that the Criminal Code provides for in case someone is found guilty of these offences can be doubled in case of imprisonment or increased by 2 years in case of confinement, "when one of the motives for the crime or offence consisted in the hatred against, the contempt for, or the hostility against a person based on" one of the discrimination grounds, amongst which 'sexual orientation'.

The explicit reference to "one of the motives" provides that it is not necessary to demonstrate that (discriminatory) hatred, contempt or hostility was in fact the only motive for the crime. As such, a robbery committed (also) for financial gain, but for which the perpetrator did consciously and maliciously select people on the basis of their sexual orientation can give rise to the application of these aggravating circumstances.

G. Transgender issues

G.1. Discrimination of transgender people: "sex", not "sexual orientation"

Discrimination of transgender people is in Belgian legislation mostly covered under the ground of 'sex' (rather than under the ground of 'sexual orientation').[166] With the exception of the federal legislation, this makes little difference as to the applicable principles and procedures, so that the reader can be referred to the relevant sections. On the federal level however, where discrimination on the ground of sex is the object of a separate piece of legislation (Act of 10 May 2007 aimed at combating discrimination between women and men, or Sex-discrimination Act), it does entail a number of discrepancies as compared with discrimination on the basis of sexual orientation.

The first difference is that the Sex-discrimination Act has a closed system for direct distinctions, not only in employment, but in goods and services as well. Any direct distinction, in goods and services, on the basis of sex (including discrimination of transgender people) will therefore be a direct discrimination, unless the goods and services are "exclusively or essentially intended for people of a certain sex"; only such goods and services are exempt from the prohibition of making any form of direct distinction in that area (art. 9 Sex-discrimination Act). A second and connected difference, is that these exceptions for services that are exclusively or essentially intended for people of a certain sex, as well as all exceptions of genuine and determining occupational requirements are to be expressly provided for in royal decrees (art. 9 and 13 Sex-discrimination Act). Thirdly, an entirely different equality body is responsible for anti-discrimination on the basis of sex, namely the Institute for the equality of women and men (IEWM).[167] The IEWM is a federal institution. Like the CEOOR it has a broad

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[166] In some texts there is an explicit provision according to which discrimination based on the change of a person's sex is considered to be discrimination on the basis of sex (see e.g. article 4, § 2 Sex-discrimination Act of 10 May 2007), while in others this is apparent from the *travaux préparatoires*.

[167] Act of 16 December 2002 setting up the Institute for the equality of women and men. The reasons for creating a separate equality body responsible for discrimination on the basis of sex were political (and philosophical), having to do with the different status and nature of (discrimination on the basis of) 'sex'. See critically: P. Popelier & J. Vrielink, "Alle mensen zijn gelijk, maar sommige mensen zijn meer gelijk dan anderen. Over mannen, vrouwen, paritaire democratie en geslachtsdiscriminatie", *T.B.P.* 2003, 682-696; S. Van Drooghenbroeck, "La loi du 25 février 2003 tendant à lutter contre la discrimination: les défis d'une 'horizontalisation' des droits de l'homme", *A.P.T.* 2003, p 217, n° 18. See pro: J. Jacqmain, "Et omnia discriminatio. La loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993'', *J.D.J.* 2003, n° 227, p. 20.

mandate, rendering it responsible for "ensuring and promoting equal opportunities for women and men and to combat any form of discrimination and inequality based on gender". To this aim the IEWM is authorised, among other things, to handle complaints on the basis of the (federal) discrimination legislation and to undertake legal or other action if and when it sees fit to do so.

Aside from the federal level, the Walloon Region and the French Community have also empowered the IEWM to handle complaints on the basis of their respective legislation. Negotiations with the other levels of government are ongoing (cf. *supra*).

G.2. Applicability of relevant sex-related legislation

All the other acts discussed in the remainder of this report apply in the same way to transgender people as to LGB people.

As said above, asylum and subsidiary protection on the basis of sexual orientation are in principle treated the same way as any other application for asylum and subsidiary protection. The same can be said for asylum and subsidiary protection on the basis of transsexualism.

Transsexualism is not an obstacle to remain married to a person of the other sex than the original one (or of the same sex), or to marry a person of the other sex than the new one (or the same sex) (see *infra*). Therefore, the rules of the Aliens Act of 1980 applicable to other married couples also apply to couples where one partner is a transsexual.

Concerning criminal law and hate speech, we can also refer to the provisions set out above. With respect to the federal level it should be mentioned that the relevant principles and punishments are formally provided in the Sex-discrimination Act, but they are the same as the ones that apply to discrimination on the basis of sexual orientation and that are provided in the general Anti-discrimination Act.

G.3. Specific legislation on transsexualism

The Act of 10 May 2007 concerning transsexualism, amending the Civil Code and a number of other acts, provides transgender people with a legal basis for the change of their sex and for the change of their name.[168]

G.3.1. Change of sex in official documents

G.3.1.1. Requirements

Before the Act of 10 May 2007 came into force, there was no statutory regulation of the (official) change of a person's sex. The Belgian courts tried to fill this legal gap. However, there was no consensus on the ground on which an official change of sex could be permitted, and some courts even kept refusing the possibility to officially change one's sex. With the Act on transsexualism, the legislature has put an end to this uncertainty. The legal basis is now to be found in articles 62bis-62ter of the Civil Code, as inserted by the Act.

Under these provisions, the requirements for a change of sex are:

- a constant and irreversible inner conviction to belong to the other sex;
- a physical adaptation to the other sex;
- a statement from a psychiatrist and a surgeon, in the capacity of treating doctors, certifying that

  - the person concerned has a constant and irreversible inner conviction to belong to the other sex
  - the person concerned has undergone a physical adaptation to the other sex
  - the person concerned is no longer capable to beget children in accordance with his/her former sex.

First of all, the person concerned has to have the constant and irreversible inner conviction that he/she belongs to the other sex than the one stated in his/her birth certificate. The legal text only requires a 'constant' conviction without providing a specific time period. The courts will have to assess if the conviction is constant by taking into account the specific circumstances of the case. To do so, the courts will probably fall back on the former case law and assess whether the request for a change of sex is based upon a random decision or a whim. The

[168] For a more extensive analysis of the Act of 10 May 2007, see K. Uytterhoeven, G. De Cuypere, P. Senaeve and T. Wuyts (2007) *De wet aangaande de rechtspositie van transseksuelen*, Leuven: K.U.Leuven, Instituut voor Familierecht en Jeugdrecht.

question whether the conviction is 'irreversible' can be assessed by the medical treatments the person has undergone. If this medical treatment has irreversible consequences, one may assume that the person's conviction is also irreversible.

A mere conviction is not enough, the person concerned must also be physically adapted to the other sex, as far as medically possible and safe. During the parliamentary discussion of the bill, the Minister of Justice made it clear that a sex reassignment surgery would be necessary. Only when such a surgery would put the person's health at risk, this requirement could be disregarded.

Finally, the law requires that a psychiatrist and a surgeon, in the capacity of treating doctors, certify that the person concerned has a constant and irreversible inner conviction to belong to the other sex, that the person concerned has undergone a physical adaptation to the other sex, and that an irreversible infertility of the person concerned. Whether and when the sex change operation may be performed has been left unspecified in the legislation and it concerns an autonomous decision by individual hospitals. The infertility condition however, contrary to the requirement of a sex reassignment surgery, is an absolute condition. If an operation that leads to irreversible infertility is not possible for medical reasons, the person concerned can not officially change his/her sex. No exceptions are allowed. This requirement, however, still raises a number of questions. For example, can a man-to-woman transsexual freeze sperm before his sex reassignment surgery, so that it can be used for reproduction after the official sex change? Questions like these still await answers. On the other hand, contrary to the former case law, the transsexual is not required to be childless.

The legislator does not require a certain age. Underage transsexuals can officially change their sex if they fulfil the requirements. They do have to be assisted by their mother, father or legal representative.

The possibility to change his/her sex – as an amendment to the birth certificate – exists not only for Belgian citizens. Also aliens who are enrolled in the 'registres de la population' ('population registers') can change their sex under the same conditions as Belgians. People enrolled in the 'registres des étrangers' ('aliens registers') can only officially change their sex if they fulfil the requirements stated by the country of which they are a national. This is stated in the new article 35bis of the Code of Private International Law, which has been inserted by the Act concerning transsexualism (cf. *supra*). If provisions in their country of origin do not allow a change of sex, these provisions will not apply and the Belgian procedure will become applicable (art. 35ter Code of Private International Law). If a person meets all the requirements, he/she can go to the municipality to obtain an act acknowledging his/her new sex.

G.3.1.2. Appeal procedure

An officer of the municipality can refuse to draw up a new act acknowledging a person's new sex if he considers the aforementioned requirements to not have been met (art. 62bis § 6 Civil Code).[169] In that case he has to inform the person concerned 'immediately' of his (motivated) refusal. The person concerned, and only he or she, can challenge this refusal before the court of first instance (art. 62 §7 Civil Code and art. 1385duodecies §1, 1st para., Judicial Code). He/she has 60 days from the day he/she was informed (art. 1385duodecies § 1, 2nd para., Judicial Code).

On the other hand, the decision of the officer to draw up the act can also be challenged. The public prosecutor and 'every person concerned' can appeal against the decision of the officer (art. 1385duodecies § 1, 1st para., Judicial Code). Persons concerned can be, inter alia, the husband/wife, the parents or the children of the transsexual. They have 60 days from the day the act is drawn up to file an appeal with the court of first instance.

The jurisdiction of the court of first instance is not limited to merely reviewing the legality of the decision of the officer. The court can and must exercise its full jurisdiction. This means that the court must decide whether the person concerned can officially change his/her sex, taking into account all the facts, also those dating from after the decision taking by the officer, e.g. further medical treatment of the transsexual. The officer will have to act according to the judgment of the court.

G.3.2. Change of name

The Act of 10 May 2007 establishes a right to change one's first name, as an amendment to one's birth-certificate. The Act of 15 May 1987 concerning names and first names already provides for a procedure to change the first name. This is a separate procedure, unrelated to the procedure to officially change one's sex. Everybody can submit a request to the Minister of Justice. The applicant has to mention the reason why he/she would want to change his/her first name, but even the fact that his/her name is not his/her taste, is accepted as a valid reason. The only condition that has to be fulfilled is that the new name may not cause confusion or cause harm to the applicant or to a third party. This procedure is open to everyone, so also to transsexuals. The change of first name, however, is seen as a favour by the Minister of Justice who is in no way obliged to allow the change of first name.

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[169] This act containing a person's new sex is also entered into the records of birth (art. 62bis Civil Code). This entry into the records of birth takes place, at the earliest, 90 days after the drawing up of the act pertaining to a sex change (that is: 30 days after the expiration of a 60 day objection term).

The Act on transsexualism adds a new article to the Act on names and first names, specifically intended for transsexuals and intersexuals. The article provides for a specific ground for obtaining the change of a first name. It can be relied upon by any person who fulfils the following conditions:

- the person concerned has the constant and irreversible inner conviction to belong to the other sex than stated in his/her birth certificate;
- the person concerned has taken on the corresponding sexual role;
- the person concerned has a statement from a psychiatrist and an endocrinologist, certifying that

  - the person concerned has a constant and irreversible inner conviction to belong to the other sex
  - the person concerned is undergoing or has undergone hormonal treatment to induce the physical sexual characteristics of the sex the person concerned is convinced to belong
  - the change of first name is an essential part in the role reversal.

In accordance with the change of sex, the person concerned must have a constant and irreversible inner conviction to belong to the other sex. He/she is, however, not required to have undergone sex reassignment surgery. He/she must only have undergone or be undergoing hormonal treatment. The legislator does not even specify in which phase of treatment the person concerned should be, so if one is only in the first, still reversible, phase of treatment, this requirement is nevertheless fulfilled. The fact that only hormonal treatment is required, also explains why a statement by an endocrinologist (and not of a surgeon) suffices.

If these requirements are fulfilled, the person concerned can submit a special request of first name change. Contrary to the general procedure, where a first name change is seen as a favour, the first name change for a transsexual is seen as a right. The Minister of Justice has the obligation to allow the first name change. The transsexual is free in his/her choice of a new name, the choice is not limited to sex-neutral names. The Minister can only refuse the request if the new name will cause confusion or cause harm to the applicant or to a third party.

If these requirements are not fulfilled, the person concerned can still submit a request according the general procedure. The choice of first name is also in this case not limited to sex-neutral names. But as said, under these circumstances, the first name change is a favour. The Minister of Justice has to examine the situation, but is under no obligation to allow the change of first name.

As a general rule, provided by the Code of Private International Law, the first name change is a matter governed by the law of the state of which the person concerned is a citizen. Aliens can therefore not rely on Belgian law to have their name changed. When discussing the bill on transsexualism, the legislature was

of the opinion that he could not make an exception for foreign transsexuals, as this would create discrimination among aliens.[170] The paradoxical result is that an alien can obtain in Belgium an official recognition of his/her change of sex, but not a change of his/her first name.

G.3.3. Legal effects concerning family law

Art. 62bis § 4 Civil Code, introduced by the Act of 10 May 2007, states that an official change of sex only generates legal effects ex nunc, which means from the day of the change and only for the future. We will focus on the legal effects of an official sex change in family law.

G.3.3.1. Marriage

Since the Act of 13 February 2003, which allows same-sex marriage, an official change of sex does not affect an existing marriage. Prior to the implementation of this act, an existing marriage of a transsexual had to be dissolved or annulled before the transsexual was able to officially change his/her sex. With the enactment of the new act, an existing marriage is no longer an obstacle.

Furthermore, a marriage will not automatically be dissolved after an official sex change. The new Act of 27 April 2007 concerning divorce also does not consider an official sex change as a ground for a divorce. Of course, a divorce is possible on the ground of an irreparable breakdown of the marriage and it is not excluded that the sex change will be used to prove this breakdown. Lastly, an official sex change is also not a sufficient ground for the annulment of a marriage.

Once all the conditions are fulfilled, the official sex change becomes a right. Therefore, an official sex change cannot, on its own, constitute a 'serious fault' in the sense of article 301 § 2 Civil Code, allowing the other spouse to avoid the payment of alimony.

G.3.3.2. Filiation

Article 62bis § 8.1 Civil Code explicitly states that the existing filiations and the resulting rights, competences and obligations will not be modified by an official sex change. This means for example that a filiation on father's side remains a filiation on father's side, although the transsexual has officially become a woman. The law thus creates a legal discrepancy between the sex of a transsexual in the existing filiations and his/her new legal sex. As an official sex

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[170] *Parliamentary Documents*, Senate 2006-07, n° 3-1794/5, p. 11.

change also does not modify the rights, competences and obligations resulting from an existing filiation, the parental authority of a transsexual remains unaffected.

The filiations arising after an official sex change are regulated by article 62bis § 8 Civil Code. This article states that the legal provisions concerning the determination of filiations on father's side do not apply to persons of the male sex. This raises an interpretation problem: what constitutes a person of the male sex in this context? Is this a man-to-woman transsexual or a woman-to-man transsexual? The most logical interpretation of article 62bis §8 Civil Code would be to hold that it applies to a woman-to-man transsexual. This would mean that a child can never be affiliated to two persons having the same genetic sex under the 'normal' regulations concerning filiations. This was already the rule for homosexual couples. There can only be an affiliation under the normal regulations in a situation where there is, at least, the possibility of a biological bond.

G.3.4. Postponement of sex registration

As of 15 May 2007,[171] article 57 of the Civil Code provides for the possibility to postpone the registration of the sex of a child – in the birth certificate – with three months, if the sex should be unclear and on the condition that a medical justification is submitted.

[171] Inserted by art. 2 of the Act of 15 May 2007 (Moniteur, 12 July 2007).

H. Good practices

H.1. Implementation of Employment Directive 2000/78/EC

The federal Anti-discrimination Act as well as some regional legislation provide for lump sum damages payable when discrimination is legally established. This avoids for victims the need to prove the actual amount of damages they have suffered, and should result in more than symbolic damages.

The Centre for Equal Opportunities and Opposition to Racism (CEOOR) has concluded formal protocols with some NGO's active in the field of discrimination on the basis of sexual orientation, so that these NGO's can act as (independent) local complaint offices for the Centre. The local Flemish complaints offices likewise bring anti-discrimination policies closer to the citizens and stress mediation and extra-legal approaches in coming to solutions.

The Flemish Framework Decree explicitly offers protection against cross-sectional discrimination, discrimination on the basis of putative (or falsely attributed) characteristics and discrimination by association.

H.2. Freedom of movement and family reunification

A circular of the Minister of the Interior, dating already from 1997, has inaugurated a practice of granting residence permits to unmarried partners of Belgian citizens or persons allowed to stay in Belgium, on the basis of cohabitation in the framework of a stable relationship. The circular explicitly states that the practice should apply to both heterosexual and homosexual couples.

The fact that Belgium has ratified same-sex marriage is a central element in the exercise of the freedom of movement and residence, the right to family reunification and the possibility of family formation.

H.3. Asylum and subsidiary protection

There is a person in the office of the Commissioner-General for the Refugees and the Stateless Persons who is exclusively occupied with applications for asylum or subsidiary protection, based on sex (and transsexualism) or sexual orientation. This practice allows for the generation of a specific expertise in this area.

H.4. Criminal law

The Minister of Justice has issued a circular letter on the registration of all homophobic crimes and offences. It prescribes a uniform way for the registration of such crimes, which expressly takes account of their homophobic nature. This enables a better view of the extent of such complaints and contributes to more reliable statistical information.

H.5. Family reunification

According to an administrative practice, aliens can obtain a special visa, valid for three months, in order to marry in Belgium a Belgian citizen or an alien who resides lawfully in the country. In this context, the fact that Belgium has given a legal status to same-sex marriage is of the utmost importance. Indeed, a same sex partner can thus obtain a special visa, to enter into marriage in Belgium.

I. Miscellaneous: institutional homophobia

In Belgium there are no institutionally homophobic laws or policies in place which are similar or comparable to those that surfaced in Lithuania. There are e.g. no general bans on materials that agitate for homosexual relations nor are there general bans in place on the promotion of homosexual relations in public places.

Annex 1 – Case law

Chapter A, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC

There are only two cases on discrimination on the grounds of sexual orientation.

Chapter A, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 1

Case title	
Decision date	31 December 2003 (first instance); 30 November 2005 (appeal).
Reference details (type and title of court/body; in original language and English [official translation, if available])	Voorzitter van de Rechtbank van Eerste Aanleg te Gent [President Court of First Instance Ghent] (first instance), Hof van Beroep te Gent [Court of Appeal Ghent] (on appeal) – civil court
Key facts of the case (max. 500 chars)	A homosexual couple was – at the request of the owners' contact person (i.e. the owners' mother) – refused

	by a housing agency acting as an intermediary. This fact was established in the presence of a bailiff. In first instance and in appeal both the agency and the owners were acquitted.
Main reasoning/argumentation (max. 500 chars)	Both in first instance and on appeal the acquittal was mainly due to the fact that the judges ruled that the wrong persons had been sued. Instead of the agency and the owners, the judges found that the contact person should have been prosecuted (in first instance a wrong interpretation of the rules regarding the burden of proof was a factor too).
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Direct discrimination; instruction to discriminate; burden of proof; situation test
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Acquittal.

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 2

Case title	
Decision date	19 April 2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	Président du Tribunal de première instance de Nivelles [President Court of First Instance Nivelles] – civil court
Key facts of the case (max. 500 chars)	A homosexual couple was refused by a housing agency, because the owners did not want to rent their house to homosexuals. The agency had left a message on the victims' answering machine saying that the owner "preferred to rent to a traditional couple"; a bailiff ascertained the message.
Main reasoning/argumentation (max. 500 chars)	The message on the answering machine led to a shift in the burden of proof. Since the owner was unable to demonstrate convincingly that he had *not* expressed his preference for a 'traditional couple' the judge

	considered the discrimination to be proven.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Direct discrimination; burden of proof.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Cessation of discrimination with a penalty for repetition of 100 euros per infraction. Damages in the following amounts: 596.56 euros (owners); 233.02 euros (agency).

Chapter B, Freedom of movement, case law relevant to Directive 2004/38/EC

No cases available.

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 3

Case title	X against the Commissioner-General for the Refugees and the Stateless Persons, n° 99.324
Decision date	1st October 2001
Reference details (type and title of court/body; in original language and English [official translation, if available])	Conseil d'Etat (Council of State) - supreme administrative court
Key facts of the case (max. 500 chars)	The applicant applied for the status of refugee on the ground that she had been persecuted in her country (name not made public) because of her sexual orientation. The application was rejected by the delegate of the Minister of Interior and, on appeal, by the Commissioner-General for the Refugees and the Stateless Persons, because of lack of credibility of her story.
Main reasoning/argumentation (max. 500 chars)	The Council of State is of the opinion that the incoherencies in the applicant's story seem to be of a minor nature. Since she has submitted documents, including a certificate by a responsible person of Amnesty International, indicating that she played a leading role in the defence of the rights of gays and lesbians, and since homosexuality is a crime in her country, there are reasons to believe that her story is true.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Persecution based on sexual orientation; reality of the threats; proof.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Suspension, under a procedure of extreme urgency, of the decision refusing the stay of the applicant in Belgium.

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 4

Case title	X against the Commissioner-General for the Refugees and the Stateless Persons, n° 162.527
Decision date	19 September 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Conseil d'Etat (Council of State) - supreme administrative court
Key facts of the case (max. 500 chars)	The applicant applied for the status of refugee on the ground that his workplace in Cameroon had been attacked by family members and neighbours, after they had found out that he was homosexual and was a member of an association of gay people. The application was rejected by the delegate of the Minister of Interior and, on appeal, by the Commissioner-General for the Refugees and the Stateless Persons, because of insufficient proof of a persecution.
Main reasoning/argumentation (max. 500 chars)	During the appeal proceedings, the applicant insisted that he was not only threatened by his family, but that he was also not protected by the police, as it refused to register the complaint he wanted to make. The Council of State refers to the elements in the file which suggest that the applicant was the victim of direct discrimination by the authorities. It also refers to a report by an NGO describing the degrading treatment of homosexuals by members of the police and security forces in Cameroon. It notes that homosexuality, although it may be tolerated to a certain extent, is still a crime. Finally, it refers to the fact that the authorities did not protect the applicant against persecution by private persons, based on his sexual orientation. The decision of the Commissioner-General is therefore not sufficiently motivated.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Persecution based on sexual orientation; conduct of the authorities (active and passive).

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Annulment of the decision refusing the stay of the applicant in Belgium.

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 5

Case title	X against the Commissioner-General for the Refugees and the Stateless Persons
Decision date	4 December 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Vaste Beroepscommissie voor vluchtelingen [Permanent Appeals Commission for Refugees] - specialised administrative court, replaced in 2007 by the Council for Aliens Disputes
Key facts of the case (max. 500 chars)	The application for asylum is founded on sexual orientation and a fear of prosecution in Iran. The applicant has had a relationship with a same-sex partner for over 9 years now. The applicant saw his partner being arrested and consequently fled the country. The applicant's request is rejected by the Commissioner-General for the Refugees and the Stateless Persons on the basis of absence of lawful interest in the status of refugee, contradictions in the applicant's narration, and lack of proof of the applicant's narration.
Main reasoning/argumentation (max. 500 chars)	The Permanent Appeals Commission takes the view that the applicant fails to indicate the "real" and "personal" character of the threat of persecution. The applicant fails to prove that he falls under the current gay-related issues in Iran, in particular because of his sustained secret relationship of more than 9 years, of which 2 years occurred during his military service. This relationship was strictly secret, and therefore the imminent threat of persecution is not proven.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Persecution based on sexual orientation; reality and personal character of the threats.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeal is rejected.

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 6

Case title	X against the Commissioner-General for the Refugees and the Stateless Persons
Decision date	30 July 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Raad voor Vreemdelingenbetwistingen [Council for Aliens Disputes] - specialised administrative court
Key facts of the case (max. 500 chars)	The applicant applied for asylum, originally based on the fact that he was persecuted and tortured in Pakistan because of his membership of the Pakistan Muslim League. His application was rejected by the Commissioner-General for the Refugees and the Stateless Persons because of lack of a "lawful" interest in the status of refugee. It was held that the applicant tried to deceive the Belgian public authorities by not telling the truth at the interrogations by the asylum instances. In the appeals procedure the applicant for the first time makes mention of his sexual orientation as being a (main) ground for his application.
Main reasoning/argumentation (max. 500 chars)	The Council for Aliens Disputes holds that the new ground is not reasonable, given the opportunities for the applicant to put this information forth at a much earlier stage. Especially in combination with the previous narrative (which was founded on fake proof), the Council holds that invoking the new ground is not admissible at this stage.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Persecution allegedly based on sexual orientation; inadmissibility of argument raised for the first time on appeal.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Appeal declared inadmissible.

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 7

Case title	X against the Commissioner-General for the Refugees and the Stateless Persons
Decision date	21 August 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Raad voor Vreemdelingenbetwistingen [Council for Aliens Disputes] - specialised administrative court
Key facts of the case (max. 500 chars)	The applicant was caught in gay interaction with his boyfriend by his father, a political figure in Bangladesh. A year later the father threatened to report the incident to the police. The applicant indicated to have planned a marriage with his boyfriend in Belgium. His request for asylum was rejected by the Commissioner-General for the Refugees and the Stateless Persons, who was of the opinion that the story was not credible.
Main reasoning/argumentation (max. 500 chars)	On appeal, the applicant could convince the Council that he faced a direct threat. The inconsistencies and elements that led the Commissioner-General to believe that the story was incredible were closely attended to. The fact that the father felt ashamed and dishonoured by his gay son and, as a political figure, did not want to make this public, could explain his inactivity during one year. The Council also took into account the applicant's plan to marry his boyfriend in Belgium. Given the illegal character of gay relationships in Bangladesh, this marriage would put the applicant in a position that is principally in conflict with Bengalese public order.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Persecution based on sexual orientation; "real and personal threat"; same-sex marriage.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The applicant was awarded the status of refugee.

Chapter C, Asylum and subsidiary protection, case law relevant to art 2/h of Council Directive 2004/83/EC

No cases available.

Chapter D, Family reunification, case law relevant to art 4/3 of the Council Directive 2003/86/EC

No cases available.

Chapter E, Freedom of assembly

No cases available.

Chapter F, Hate speech, case 8

Case title	
Decision date	4 June 2008
Reference details (type and title of court/body; in original language and English [official translation, if available])	Raadkamer Nijvel [Indictment Division Nivelles] – criminal court
Key facts of the case (max. 500 chars)	Complaint against a bishop (current archbishop) because he (allegedly) said in an interview with a magazine that homosexuals are 'abnormal'.
Main reasoning/argumentation (max. 500 chars)	The Indictment Division dismissed the charges against the defendant because it ruled that the bishop's words – while being of the nature to offend the homosexual community – did not incite to hatred or discrimination (as required by the relevant legislation).
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Offense versus incitement.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Charges dismissed.

Chapter F, Hate speech, case 9

Case title	
Decision date	11 January 2010
Reference details (type and title of court/body; in original language and English [official translation, if available])	Tribunal de première instance d'Arlon [Court of First Instance Arlon] – criminal court
Key facts of the case (max. 500 chars)	'Intersectional' racist and homophobic insults against a homosexual couple in the street. The defendant had said (amongst other things) "sale PD, va te faire enculer par ton noir" (transl.: "Dirty fag, go ass-fuck your black/nigger").
Main reasoning/argumentation (max. 500 chars)	Little concrete reasoning other than that the facts were considered proven, since they were confirmed by two witnesses.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Insults, incitement, street harassment/intimidation.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Conviction. Fine of 1.375,00 euros and moral damages for 500,00 euros.

Chapter F, Hate crimes

Chapter F, Hate crimes, case 10

Case title	
Decision date	16 March 2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	Jeugdrechtbank Leuven [Juvenile Court Leuven] – criminal court
Key facts of the case (max. 500 chars)	Public assault and insults by three minors of two homosexual men, for homophobic reasons.
Main reasoning/argumentation (max. 500 chars)	No relevant reasoning other than declaring that there are sufficient elements to find the defendants guilty.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Criminal act of a homophobic nature.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Conviction of the perpetrators. Order to pay 1541.84 euros for moral damages.

Chapter F, Hate crimes, case 11[172]

Case title	
Decision date	2007 (exact date currently unknown)
Reference details (type and title of court/body; in original language and English [official translation, if available])	Tribunal de première instance de Nivelles [Court of First Instance Nivelles] – criminal court
Key facts of the case (max. 500 chars)	A person is assaulted and insulted by his neighbour, also his former employer. Insults are of a homophobic nature. Prior to this the victim had (allegedly) already been fired after the defendant (at that time his employer) had learned of his homosexual orientation.
Main reasoning/argumentation (max. 500 chars)	The defendant is convicted for assault and insults, with aggravating circumstances. Motivation unknown.

[172] Information on the case received from the Centre for Equal Opportunities and Opposition to Racism. The decision is not reported.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Criminal act of a homophobic nature. Application of aggravating circumstances (as introduced by the federal Anti-discrimination Act of 2007).
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Conviction of the perpetrator.

Chapter F, Hate crimes, case 12

Case title	
Decision date	2 September 2008
Reference details (type and title of court/body; in original language and English [official translation, if available])	Correctionele Rechtbank Turnhout [Tribunal of first instance, Turnhout] – criminal court
Key facts of the case (max. 500 chars)	4 persons solicited homosexuals (on at least two occasions) via contact-ads to meet them. Subsequently however they assaulted and robbed the homosexual individuals.
Main reasoning/argumentation (max. 500 chars)	Theft and assault were established, but the tribunal considered that there was insufficient proof that the conduct was motivated by homophobia.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	(Lack of) proof of special intent.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Conviction for theft with violence (and infringements of the drugs legislation).

Chapter F, Hate crimes, case 13

Case title	
Decision date	22 October 2008
Reference details (type and title of court/body; in original language and English [official translation, if available])	Correctionele Rechtbank Brussel [Tribunal of first Instance, Brussels] – criminal court
Key facts of the case (max. 500 chars)	Severe homophobic violence in a café.
Main reasoning/argumentation (max. 500 chars)	The Tribunal judged, based on context and things the defendant had said, that the facts were motivated by hatred against, contempt for and hostility against the victim, based on his sexual orientation.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Violence, proof of special intent.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	8 months imprisonment, deferred. A symbolic euro for moral damages awarded to the CEOOR, that acted in the case.

Chapter G, Applicability of legislation to transgender issues

There is only one published case applying general legislation to transgender issues.

Chapter G, Applicability of legislation to transgender issues, case 14

Case title	X against State (Minister of Interior), n° 165.110
Decision date	24 November 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Raad van State (Council of State) - supreme administrative court
Key facts of the case (max. 500 chars)	The applicant, a transsexual of Ecuador, has been staying in Belgium since 1995. She has been repatriated four times, but has always returned to Belgium. In 2003, a first application for asylum has been rejected. After several requests for authorisation to stay in Belgium, she declared herself a refugee for the second time in 2006. The Minister of the Interior, however, refuses to take this request into consideration.
Main reasoning/argumentation (max. 500 chars)	The Council considers that the new application also contained a request to obtain subsidiary protection. The Minister seems to have failed to examine the application from this point of view. Having regard to the documented instances of violent aggression against transvestites and transsexuals in Ecuador, the execution of the challenged decision would cause 'harm serious and difficult to restore'.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Persecution based on transsexualism; asylum or subsidiary protection.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Suspension, under a procedure of extreme urgency, of the decision refusing the stay of the applicant in Belgium.

Chapter G, Name change and/or sex change of transgender people

There is extensive case law regarding name and sex changes in Belgium (going back to the 1970's). Two major views were represented in that case law: one view followed the reasoning adopted in case 1, the other the reasoning adopted in case 2. The two cases are only an illustration of the conflict that existed in the Belgian case law before the adoption of the legislation on transsexualism in 2007. As yet, there is no case law regarding that new legislation.

Chapter G, Name change and/or sex change of transgender people, case 15

Case title	V.S.P.J.C.
Decision date	27 June 2003
Reference details (type and title of court/body; in original language and English [official translation, if available])	Rechtbank van Eerste Aanleg te Antwerpen [Court of First Instance Antwerp] – civil court
Key facts of the case (max. 500 chars)	The applicant is officially of the male gender, but belongs in reality to the female gender. A psychiatrist confirms the diagnosis of gender dysphoria, man-to-woman transsexuality. The applicant has also undergone sex reassignment surgery. The applicant is married and wants to remain married. He now wants to officially change his sex.
Main reasoning/argumentation (max. 500 chars)	At birth, the assessment of the sex is based on the external characteristics visible at birth, while science also recognises genetic, hormonal and psychological assessment of sex. It is possible that the official sex does not correspond to the sex experienced in reality. The court therefore accepts that a sex change can be legally acknowledged. (Note: the decision is prior to the 2007 Act on transsexualism.)

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Official recognition of sex change, even without statutory authorisation.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Order to change the birth certificate: 'of the female sex' must be changed in 'of the male sex', and 'daughter' must be changed in 'son'.

Chapter G, Name change and/or sex change of transgender people, case 16

Case title	
Decision date	10 October 2001
Reference details (type and title of court/body; in original language and English [official translation, if available])	Tribunal de première instance de Mons [Court of First Instance of Mons] – civil court
Key facts of the case (max. 500 chars)	The applicant is officially of the female gender, but she feels as if she belongs to the male gender. She has undergone a significant breast reduction. Due to medical reasons, however, she cannot undergo other surgeries or hormonal treatment. The applicant nevertheless wants to officially have her sex changed in her birth certificate.
Main reasoning/argumentation (max. 500 chars)	The court states that a complete sex change cannot be noted in the birth register, since a complete sex change is medically impossible. The court refers to the fact that in general the gender of a person is the combination of nine elements and that even after a sex reassignment surgery the transsexual will not have all the biological elements of the opposing sex. However, art. 8 ECHR obliges the national authorities to take all necessary measures so that a transsexual can receive identity documents in accordance with his/her appearance . (Note: the decision is prior to the 2007 Act on transsexualism.)
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	No possibility to obtain an official recognition of sex change; authorisation to obtain documents indicating new sex and new name.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The court allows the modification of the identity papers, including the mention of a masculinised first name. It rejects the request to modify the birth certificate.

Chapter I, Case law relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation

No cases available.

Annex 2 – Statistics

Chapter A, Implementation of Employment Directive 2000/78/EC in relation to sexual orientation

See attachment to Annex 2 – Chapter B.

Chapter B, Freedom of movement of LGBT partners

No statistics available.

Chapter C, Asylum and subsidiary protection, protection due to persecution on the grounds of sexual orientation[173]

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT individuals benefiting from asylum/ subsidiary protection due to persecution on the ground of sexual orientation							33 (all status of refugee)	60 (all status of refugee)

[173] Data communicated by the office of the Commissioner-General for the Refugees and the Stateless Persons. No statistics available for the years before 2006. For the purpose of this table, "sexual orientation" includes "transsexualism" (no separate data available for transsexuals).
The numbers refer to the applications dealt with by the Commissioner-General. They do not take into account the effects of appeals to the Council for Aliens Disputes (the Council itself has no statistical data relevant for this table).

Number of LGBT individuals who were denied the right to asylum or to subsidiary protection despite having invoked the fear of persecution on grounds of sexual orientation							83	128

Chapter C, Asylum and subsidiary protection, protection of LGBT partners

No statistics available.

Chapter D, LGBT partners benefiting family reunification

No statistics available.

Chapter E, LGBT people enjoyment of freedom of assembly

No statistics available.

Chapter F, Homophobic hate speech

See attachment to Annex 2 – Chapter G, Homophobic hate speech.

Chapter F, Homophobic motivation of crimes as aggravating factor

See attachment to Annex 2 – Chapter G, Homophobic motivation.

Chapter G, Transgender issues

	2000	2001	2002	2003	2004	2005	2006	2007
Number of name changes effected due to change of gender[174]	Not available		40	20	37	37	19	26
Number of persons who changed their gender/sex in your country under the applicable legislation	Statistics can be requested at the Ministry of Internal affairs. They, however, charge €522,32 to gather this information.							
Number of complaints regarding discrimination based on transsexualism filed at the IEWM[175]	Not applicable					3	4	14

[174] These numbers are released by the Department of Name and First Name Change of the Ministry of Justice.

[175] The Institute for Equality of Women and Men (IEWM) was set up by an Act of 16 December 2002. It is operational since 2004 and has started to register complaints in 2005.

Chapter I, Statistics relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation

No statistics available.