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# Country report

## Gender equality



Belgium

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# **Country report**

## **Gender equality**

How are EU rules transposed into national law?

### **Belgium**

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Reporting period 1 January 2018 – 31 December 2018

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## 1 Introduction

### 1.1 Basic structure of the national legal system

Under Belgium's federal structure, policy competences are divided between three entities: the Federal State, the regions (the Flemish, Walloon and Brussels Capital Regions) and the communities (Flemish, French and German speaking communities). This causes extreme confusion and significant gaps remain in the transposition of EU law. However, since 2008 each of the federate authorities has adopted new legislation, usually inspired by federal legislation. For example, labour relations such as access to employment, working conditions and pay issues fall within the jurisdiction of the federal authorities while vocational orientation and training fall within the exclusive jurisdiction of the federate authorities, i.e. the communities and regions. This is also true for other policy areas such as education (including school staff) or public housing (within the scope of Directive 2004/113/EC). Social security is still a federal matter, although the Sixth State Reform (2014) has allocated the competence in respect of family allowance to communities.

The Act of 10 May 2007 aimed at combating discrimination between women and men (the Gender Act)<sup>1</sup> is the legislative instrument that implements all EU directives concerning gender equality within the jurisdiction of the federal Parliament.

Articles 5 and 6 of the Act of 10 May 2007 apply, *inter alia*, to working conditions including pay, to occupational social security schemes, and to any persons concerned. It deals with certain aspects of access to employment (e.g. in the federal public services, or concerning the standard conditions of access to the professions), but other aspects fall within the jurisdiction of the federate authorities (e.g. in their own public services, or concerning the management of the labour market). Vocational training is almost entirely a community matter.

### 1.2 List of main legislation transposing and implementing the directives

At the federal level:

- Act of 10 May 2007 aimed at combating discrimination between women and men, usually known as the Gender Act;
- Working Conditions Act of 16 March 1971;
- Well-Being at Work Act of 4 August 1996;
- Act of 22 April 2012 aimed at combating the pay gap between men and women, as amended by the Act of 12 July 2013;
- Collective Agreement No. 25 of 15 October 1975 concerning equal pay for male and female workers.

At the federate level:

- Flemish Community and Region: *decreet* (legislative instrument) of 8 May 2002 concerning proportional participation in the labour market and *decreet* of 10 July 2008 on the framework for the Flemish policy of equal opportunities and equal treatment;
- French Community: *décret* of 12 December 2008 aimed at combating certain forms of discrimination;
- German-speaking Community: *Dekret* of 19 March 2012 aimed at combating certain forms of discrimination;
- Walloon Region: *décret* of 6 November 2008 aimed at combating certain forms of discrimination;

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<sup>1</sup> All legal instruments quoted are available in French and Dutch at [www.juridat.be](http://www.juridat.be).

- Brussels Capital Region: two *ordonnances/ordonnanties* of 4 September 2008, one concerning the fight against discrimination and concerning equal treatment in employment and the other aimed at promoting diversity and combating discrimination within the Regional civil service;
- French-speaking Community Commission (competent in matters devolved from the French Community in the Brussels Capital Region): *décret* of 22 March 2007 concerning equal treatment in vocational training and *décret* of 9 July 2010 aimed at combating certain forms of discrimination and implementing the principle of equal treatment.

### **1.3 Sources of law**

The main sources of gender equality law for practitioners in Belgium are Articles 10 and 11 of the Constitution and the national legislation (federal and federate instruments). The latter have been adopted mainly to implement European directives. In some cases, reference to EU directives or other international instruments will be used, generally to support an interpretation of the national law.



## **2 General legal framework**

### **2.1 Constitution**

#### 2.1.1 Constitutional ban on sex discrimination

The Belgian Constitution prohibits sex discrimination in Articles 10 and 11.

Although Article 10 (2) provides that 'Belgians are equal before the law' (a wording which has never varied since its original adoption in 1831), an Act of 21 February 2002 inserted an additional Paragraph 3: 'Equality between women and men is guaranteed'. The same act also inserted Article 11*bis*(1), which reads: 'Laws or [legislative acts of federate authorities] guarantee that women and men may equally exercise their rights and freedoms, and in particular promote their equal access to elective and public mandates.' The remainder of Article 11*bis* then provides that the federal and federate governments must be composed of persons of both sexes, and that the legislative instruments of the respective authorities must impose the same rule upon the composition of all public executive bodies at subordinate levels of administration (e.g. the board of mayor and aldermen of a local council).

#### 2.1.2 Other constitutional protection of equality between men and women

There is no other constitutional protection of equality between men and women.

### **2.2 Equal treatment legislation**

Belgium has a specific equal treatment law. Currently, at the federal level, it is the Gender Act of 10 May 2007 which prohibits sex discrimination, while two sister anti-discrimination acts adopted on the same date contain provisions to combat discrimination on the ground of other criteria: the Race Act, the scope of which coincides with that of Directive 2000/43/EC; and the Discrimination in General Act. The latter act deals with 12 criteria, including those mentioned in Directive 2000/78/EC, others mentioned in Article 21 of the Charter of Fundamental Rights of the European Union such as 'fortune', and some developed at the national level, such as 'health'. At the federate level, all legislative instruments mentioned above deal with sex among all those various criteria.

It must be mentioned here that, given that all federate pieces of legislation are inspired by their federal counterparts, in order to keep this report manageable, they will not be referred to hereafter unless it is unavoidable.

### 3 Implementation of central concepts

#### 3.1 General (legal) context

##### 3.1.1 Surveys on the definition, implementation and limits of central concepts of gender equality law

A report drafted in 2016 on the implementation of the Gender Act was published by the Institute for Equality of Women and Men in 2018.<sup>2</sup> The report was part of a comprehensive evaluation of the three discrimination laws adopted in 2007 as required by the laws themselves,<sup>3</sup> which also require an independent evaluation of the fight against discrimination led by a specific commission.<sup>4</sup>

The 2016 evaluation questioned the effect of the different acts on the actors and their behaviours: do the acts contribute to ensuring respect of the principle of non-discrimination and do they guarantee better protection against discrimination for individuals?

A common feature emerging from the two evaluation reports is that this set of laws represents a major step forward in the fight against discrimination through the adoption of protection mechanisms (such as '*l'action en cessation*' – legal application for an injunction). Equally, such laws are in themselves important in signalling that discrimination should be erased from our practices (pedagogical role). However, women in particular are still facing discrimination in various forms and although the number of complaints to and requests for information from the Institute for Equality of Women and Men is continuously increasing, those represent only the top of the iceberg.

Specific examples of difficulties highlighted in the evaluations will be further considered in this report under relevant headings. It should be noted though that both reports point to the absence of implementing royal decrees (i.e. exceptions to allow services or goods provided only to same-sex persons) and to the difficulties generated by this absence (legal uncertainty in particular). The difficulty in tackling multiple discrimination (or intersectionality) within the current legal framework is also a concern.

##### 3.1.2 Other issues

Nothing to report.

##### 3.1.3 General overview of national acts

- Act of 10 May 2007 aimed at combating discrimination between women and men, usually known as the Gender Act;
- Working Conditions Act of 16 March 1971 providing measures relating to maternity protection;
- Well-Being at Work Act of 4 August 1996;
- Act of 22 April 2012 aimed at combating the pay gap between men and women, as amended by the Act of 12 July 2013;

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<sup>2</sup> Institute for Equality of Women and Men (2018), Appraisal of the implementation and effectiveness of the gender law, (*Etat des lieux sur l'application et l'effectivité de la loi genre*), available at [https://igvm-iefh.belgium.be/fr/publications/etat\\_des\\_lieux\\_sur\\_lapplication\\_et\\_leffectivite\\_de\\_la\\_loi\\_genre](https://igvm-iefh.belgium.be/fr/publications/etat_des_lieux_sur_lapplication_et_leffectivite_de_la_loi_genre).

<sup>3</sup> Article 52 of the Discrimination Act provides that an evaluation of the implementation and effectiveness of the three antidiscrimination laws should be performed every five years.

<sup>4</sup> Evaluation Commission of the federal law aiming at fighting discrimination (2017), *First evaluation report, February 2017 (Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations, Premier rapport d'évaluation)*, report available at: [www.unia.be/files/Documenten/Aanbevelingen-advies/Commission dévaluation de la législation fédérale relative à la lutte contre les discriminations.pdf](http://www.unia.be/files/Documenten/Aanbevelingen-advies/Commission_dévaluation_de_la_législation_fédérale_relative_à_la_lutte_contre_les_discriminations.pdf).

- Collective Agreement No. 25 of 15 October 1975 concerning equal pay for male and female workers.

#### 3.1.4 Political and societal debate and pending legislative proposals

Nothing to report.

### **3.2 Sex/gender/transgender**

#### 3.2.1 Definition of 'gender' and 'sex'

The terms gender and sex are not defined in national legislation.

#### 3.2.2 Protection of transgender, intersex and non-binary persons

The Gender Act of 10 May 2007 protects transgender, intersex and non-binary persons from discrimination. Under Article 4(2) of the Gender Act, a horizontal provision, discrimination on the ground of gender reassignment, is to be regarded as gender discrimination.

Moreover, the Act of 22 May 2014 inserted a new paragraph (3) in Article 4 of the Gender Act to provide that discrimination on the ground of 'gender identity or gender expression' is also to be regarded as gender discrimination. However, the *Conseil d'État/Raad van State* (Council of State), in its capacity as legal adviser to the federal Government, had recommended that the proposed provision should define those new concepts, as the definitions are only to be found in the statement of purpose of the act,<sup>5</sup> which refers rather verbosely to non-binding instruments.<sup>6</sup>

#### 3.2.3 Specific requirements

There is no specific requirement to be fulfilled to benefit from non-discrimination protection.

### **3.3 Direct sex discrimination**

#### 3.3.1 Explicit prohibition

Direct sex discrimination is explicitly prohibited in the Gender Act of 10 May 2007 under Article 19. The definition provided in Article 5 uses the definition of direct discrimination found in Article 2(1)(a) of Directive 2006/54. However, such a definition is reproduced under the concept of 'direct distinction'. (See section 3.3.3 below on specific difficulties)

#### 3.3.2 Prohibition of pregnancy and maternity discrimination

Under Article 4(1) of the Gender Act of 10 May 2007, a 'direct distinction' on the ground of pregnancy, giving birth and maternity is to be regarded as a 'direct distinction' on the ground of sex, i.e. direct discrimination.

#### 3.3.3 Specific difficulties

According to the settled case law (be it constitutional, civil or administrative) in Belgium, any discrimination, direct or indirect, is potentially justifiable.

<sup>5</sup> *Documents parlementaires/Parlementaire stukken*, 2013-2014, no. 3483/001, available in French and Dutch at <http://www.dekamer.be/flwb/pdf/53/3483/53K3483001.pdf>.

<sup>6</sup> Mainly the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, available at <http://www.yogyakartaprinciples.org>.

This contradiction of the CJEU's position led to the following artificial solution, embodied in the three anti-discrimination Acts of 10 May 2007 (intended to implement Directive 2000/43/EC, Directive 2000/78/EC, and all the gender equality directives). A difference is made between 'distinction' and 'discrimination'. Direct discrimination is defined as a direct distinction that may not be justified when the object of such direct distinction falls within the scope of EU law. In fact, according to Directive 2006/54, maternity protection positive action and a genuine and determining occupational requirement are exceptions to the principle of gender equality, but the Gender Act presents them as justifications even in cases of direct 'distinction'. This notion of 'distinction' introduces confusion between the system of exceptions to gender equality and justification (Article 13 of the Gender Act).

In a general way, the concept of direct discrimination is applied correctly. However, some hesitation can be perceived in some cases. For example, one female employee in a small business had complained of pay discrimination by comparing herself with one male colleague. Thus, if there was gender discrimination, it was direct. However, the labour court of appeal immediately examined, and accepted, the justification offered by the employer, which was the difference in previous professional experience.<sup>7</sup> Technically, at least, this was admitting the justification of direct discrimination. The correct approach would have consisted of considering that the comparison was not possible, given the difference in previous professional experience.

Now that the Gender Act of 10 May 2007 uses the different concepts of 'distinction' and 'discrimination' there is even more space for such hesitation as it must first be established whether the disputed issue falls within or without the scope of EU law.

### **3.4 Indirect sex discrimination**

#### **3.4.1 Explicit prohibition**

Indirect sex discrimination is explicitly prohibited, under Article 19 of the Gender Act of 10 May 2007. The definition provided in Article 5 reproduces the definition found in Article 2(1)(b) of Directive 2006/54.

#### **3.4.2 Statistical evidence**

Statistical material is mentioned in Article 33(3)(1) and (3) of the Gender Act of 10 May 2007 as an element that may be used by an alleged victim of discrimination to contend that there is a *prima facie* case. However, there is no known case in which a statistical demonstration of the difference in treatment was required. Usually, the whole litigation is focused on the existence of an objective justification as neither the defendant nor the court dispute the difference. Still, concerning part-time career breaks of which female employees are by far the main users, on one occasion the Constitutional Court has refused, in a very off-hand way, to acknowledge an obvious difference in treatment (by simply noting that the disputed provision applied to men as well as women), but this must be regarded as an exception.<sup>8</sup>

#### **3.4.3 Application of the objective justification test**

Actually, there are few known cases concerning indirect gender discrimination. However, as mentioned above, in all matters not covered by EU law, an objective justification is admissible even when the discrimination is direct. Thus, in a country where 'discrimination-spotting' has become a national obsession, the courts are usually quite expert at assessing objective justification, along lines very similar to the *Bilka* test. Still, concerning negative

<sup>7</sup> Labour Court of Appeal in Brussels, judgment of 4 January 2005, (2005) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 451 with J. Jacquain's case note.

<sup>8</sup> Constitutional Court, judgment no. 51/2008 of 13 March 2008. All judgments of the Constitutional Court are available in French, Dutch and German at [www.constitutional-court.be](http://www.constitutional-court.be).

gender effects of social policies, the CJEU's decision in Case C-229/89 *Commission v. Belgium*<sup>9</sup> set an example for lenience in such assessments, so that no indirect discrimination against women in the statutory unemployment insurance scheme has been challenged ever since. The gender pay gap should be an ideal battlefield for litigation against indirect discrimination, but after 40 years the case law concerning pay has remained extremely scanty.

#### 3.4.4 Specific difficulties

Indirect discrimination is very rarely acknowledged in Belgian case law. The judgment of the Labour Court of Mons of 23 November 2018 illustrates this point. In a case of a dismissal of a woman who had reduced her working time to take care of a child aged less than eight years old, the court decided that the compensation *in lieu* of notice should be calculated on the basis of the current remuneration and not on a full-time basis.<sup>10</sup> Furthermore, it refused to conclude that allocating reduced compensation (on a part-time basis instead of full-time) can constitute an indirect discrimination resulting from the fact that statistically more women use the scheme of reduced working time because the calculation is the same for women and men working part-time (see also below under 5.7.2).

The first evaluation report of the commission set-up to evaluate the anti-discrimination laws (see section 3.1.1 above) also notes the tendency of some judges and other institutional actors to require an intention to discriminate on the part of the author. The litigations relating to non-discrimination reveal a confusion between the burden of proving a discrimination act and the proof of the intention to commit such an act, although the latter aspect is not required.<sup>11</sup>

Finally, it should be added that, in the expert's view, the notion of 'distinction' in addition to the concept of discrimination is another potential source of confusion for practitioners.

### 3.5 Multiple discrimination and intersectional discrimination<sup>12</sup>

#### 3.5.1 Definition and explicit prohibition

The concept of multiple discrimination is not used, and consequently not defined, by any statute in Belgium. This means that every element of a situation of multiple discrimination must be challenged separately in the light of one or several statutes; however, this may be done through the same proceedings. For instance, in one case relating to the dismissal of a female employee, the labour court<sup>13</sup> found that the employer had demonstrated convincingly that he had not breached the rules on the protection of maternity (Act of 16 March 1971) or the prohibition on gender discrimination (Gender Act of 10 May 2007); however, the court found that the dismissal was grounded on 'health status' (General Discrimination Act of 10 May 2007).

<sup>9</sup> CJEU, decision in Case C-229/89 *Commission v. Belgium* [1991-I-2205].

<sup>10</sup> Labour Court of Mons, 23 November 2018, *J.T.T.*, 2019, p.23. The court refuses to apply *Meerts* case law, as the current case fall outside of the scope of parental leave and implementation of European law.

<sup>11</sup> Evaluation Commission of the federal law aiming at fighting discrimination, (2017), *First evaluation report, February 2017 (Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations, Premier rapport d'évaluation)*, report available at: [www.unia.be/files/Documenten/Aanbevelingen-advies/Commission\\_dévaluation\\_de\\_la\\_législation\\_fédérale\\_relative\\_à\\_la\\_lutte\\_contre\\_les\\_discriminations.pdf](http://www.unia.be/files/Documenten/Aanbevelingen-advies/Commission_dévaluation_de_la_législation_fédérale_relative_à_la_lutte_contre_les_discriminations.pdf).

<sup>12</sup> See for more information Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law* European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

<sup>13</sup> Labour Court of Ghent (division of Kortrijk), 25 October 2016, *Algemene Rol* No. 15/382/1, unreported.

### 3.5.2 Case law and judicial recognition

An informative case involved the European Commission, which decided in 2004 to dismiss a number of teachers who had been hired to train staff members in various languages. All of them received pay *in lieu* of a period of notice, except those who were less than two years short of the legal age of retirement who had to work during the period of notice. It so happened that the latter were all women. When one of them complained of discrimination on the ground of age and sex, the labour court of appeal in Brussels found that the European Commission had not succeeded in refuting the *prima facie* case.<sup>14</sup> However, the anti-discrimination legislation applicable to the facts of the case (age: Act of 25 February 2003; sex: Act of 7 May 1999) did not provide any fixed damage, so that the court allowed a lump sum of EUR 5 000 as reparation of the entire prejudice in tort law.

Recently, for the first time, a labour court judged that the refusal to hire a man as an office employee was both based on his age and sex. The court judged for the first time that 'the employer does not refute the presumption that the older worker was not hired because of both his age and sex'. The Gender Act and anti-discrimination acts of 10 May 2007 having different aims, the indemnities they provide are not rooted in the same causes and can therefore be compounded in cases of multiple discrimination.<sup>15</sup>

For the rest, one can think of several situations in which a better fitting phrase would have been 'multi-layered discrimination,' *i.e.* gender discrimination was hidden under an obvious difference in treatment that was not envisaged by Directives 2000/43/EC or 2000/78/EC, but could be challenged on the grounds of other instruments such as Articles 10 and 11 of the Constitution (the general principle of equality under the law) or Directive 97/81/EC (on the prohibition of discrimination against part-time workers).

In those cases (or rather 'situations', as for several of them a positive result was achieved without litigation), eliminating one type of discrimination meant getting rid of the other as well, so that whether or not to raise the gender discrimination claim was largely a question of strategy or a function of circumstances (e.g. whether there was a woman willing to complain about gender discrimination). For example, until 1 January 2000, part-time contractual employees in the public services were not entitled to seniority increments in their pay scales. Indirect discrimination against women was obvious and could have been challenged on the grounds of Article 119 EEC/141EC, now Article 157 TFEU (see the CJEU's decision in Case C-184/89 *Nimz*),<sup>16</sup> but the public services' trade unions could not find any prospective claimants, given the risk of victimisation. The issue was resolved as from 1 January 2000 when Belgium had to transpose Directive 97/81/EC, as the authorities and the unions agreed that the principle of non-discrimination against part-time workers must be applied to pay as well as to other working conditions. When, much later, a female employee claimed pay arrears for the period 1995-1999, the Labour Court of Appeal in Brussels found that there had indeed been indirect discrimination against women.<sup>17</sup>

## 3.6 Positive action

### 3.6.1 Definition and explicit prohibition

Positive action is allowed according to Article 16 of the Gender Act of 10 May 2007. It is regarded as a lawful justification for a 'direct distinction', meaning direct discrimination.

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<sup>14</sup> Labour Court of Appeal Brussels, Judgment of 13 November 2012, (2014) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 286; see Markey, L., 'Discriminations multiples', *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 279.

<sup>15</sup> Labour Court Liège (Dinant), 11 August 2017, *Chroniques de droit social/Sociaalrechtelijke Kronieken*, 2018, p. 242 with A. Maes's case note.

<sup>16</sup> CJEU, decision in Case C-184/89, *Nimz* [1991-I-297].

<sup>17</sup> Labour Court of Appeal Brussels, Judgment of 17 December 2010, (2012) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 29 with J. Jacquemain's case note.

There is no definition of positive action but the Gender Act of 10 May 2007 imposes a set of conditions (developed previously by the Constitutional Court in a matter unrelated to EU law) which fits the CJEU's case law: positive action should be a response to situations of *manifest inequality*; the removal of such situations should be identified as a target worth pursuing; the 'corrective measures' must be of a temporary nature; and finally, these corrective measures should not restrain the rights of others unduly.<sup>18</sup>

The implementation of the legal provision is conditional on an ancillary royal decree, which has not yet been formulated,<sup>19</sup> so that the lawfulness of positive action that had been undertaken under the previous gender equality legislation (which allowed positive action only for women) is uncertain. Moreover, while those previous examples of positive actions had been authorised and performed within the scope of Directive 76/207/EEC, Article 16 is a horizontal provision within the Gender Act of 10 May 2007 and should serve to implement Article 6 of Directive 2004/113/EC as well as Article 3 of Directive 2006/54/EC.

### 3.6.2 Conceptual distinctions between 'equal opportunities' and 'positive action' in national law

The differences between the two notions of 'equal treatment' and 'equal opportunities' are far from clear. As to the transposition, the whole set of legislation of 10 May 2007 is aimed at 'combating discrimination'. Unlike the previous acts aimed at implementing EC gender legislation (Act of 4 August 1978 and Act of 7 May 1999), the word 'equality' is hardly used at all, except in references to the directives. On the other hand, the Mainstreaming Act of 12 January 2007 mentions 'the promotion of equality between men and women'. The concept of 'equal opportunities' has been used in the past, and still is, as a synonym of 'equality', in particular in acts covering all discriminatory grounds.<sup>20</sup>

For gender equality, since the creation of the Institute for Equality of Women and Men (*Institut pour l'égalité des femmes et des hommes/ Instituut voor de Gelijkheid van Vrouwen en Mannen*) in 2002, the term that is mainly used is 'equality between women and men'.<sup>21</sup>

### 3.6.3 Specific difficulties

Obviously, the absence of the royal decree mentioned above, 11 years after the Gender Act of 10 May 2007 came into force, is the main difficulty, as for instance, advertising vacant positions with a preference for male or female candidates as positive action remains direct discrimination, liable to civil and penal sanctions.

### 3.6.4 Measures to improve the gender balance on company boards

The Act of 28 July 2011 inserted provisions relating to gender balance on company boards in the Act of 21 March 1991 concerning the (federal) economic public bodies, the Act of 19 April 2002 concerning the National Lottery, and the Company and Association Code (concerning companies quoted on the stock exchange). On the boards of directors, at least one third of members must be of the other sex. As long as this quota is not fulfilled, a person belonging to the minority sex must be appointed to any vacant position and any appointment which does not comply with this rule is void. Moreover, the amended

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<sup>18</sup> Conditions defined by the Constitutional Court (*Cour d'Arbitrage/ Grondwettelijk Hof*), 27 January 1994, Case no. 9/94.

<sup>19</sup> The relevant royal decree was adopted on 9 February 2019, after the cut-off date of this report. It is however only applicable to positive action relating to employment and to the private sector.

<sup>20</sup> For example, the Framework Decree for the Flemish equal opportunities and equal treatment policy (*Decreet houdende een kader voor het Vlaamse gelijkheidskansen en gelijkebehandelingsbeleid*) of 10 July 2008 implementing non-discrimination and gender equality European directives (2000/43/EC, 2000/78/EC, 2004/113/CE and 2006/54/EC).

<sup>21</sup> In contrast with the interfederal Centre for Equal Opportunities (now Unia) dealing with other discriminatory grounds.

Company and Association Code provides a specific sanction: as long as the composition of a board does not comply with the quota, any advantage (financial or otherwise) attached to the position of director is suspended for all the members of the board.

The provisions of the Act of 28 July 2011 are applicable to every concerned enterprise as from the following financial year. However, the new Article 518*bis* of the Company and Association Code provided for considerable delays in its application: for larger companies, the delay only expired in 2017, while smaller companies have two more years to comply.

### 3.6.5 Positive action measures to improve the gender balance in other areas

A Royal Decree of 2 June 2012 was adopted on the grounds of Article 16 of the Gender Act, with a very limited scope: imposing a principle of quotas (not more than two thirds of staff members of the same sex) for the upper ranks (university grade) of the federal civil service. Five years later, no report on the effectiveness of that measure has been made public. However, even more recently a Royal Decree of 13 May 2015 applied the same principle to the federal scientific establishments.

Until 2014, Article 34(5) of the Special Act of 6 January 1989 concerning the Constitutional Court only provided that judges must belong to different sexes. Consequently, the bench of the Court is presently composed of ten men and two women. The Special Act of 4 April 2014 amended the Special Act of 6 January 1989. Most of the amendments were aimed at improving procedural aspects, but one of them introduced a gender quota in the composition of the bench. There are 12 judges appointed for life at the Constitutional Court; six of them must have been either members of the Court of Cassation or the *Conseil d'État/Raad van State* (the highest administrative court), or professors of law at a university; the other six must have been Members of Parliament (federal or federate). The amendment (to Article 34(5) of the Special Act of 6 January 1989) provides that both sexes must be represented in each category, and that at least one third of the 12 judges must belong to each sex. That provision will come into force when the quota is achieved; meanwhile, a judge belonging to the less represented sex must be appointed whenever the previous two appointments did not enhance the representation of that sex.

As for political bodies, in order to implement Article 11*bis* of the Constitution (see 2.1.1 above), electoral legislation (at federal, federate and local levels) provides that the parity of sexes must be assured in all lists of candidates. In addition, the first two candidates on every list must be of different sexes. Given that the whole electoral system is proportional, this measure is highly effective. In contrast, a gender balance within political executive bodies strongly depends on the culture of the parties which compose the majority, so that it remains possible for a federal or federate government to include one single woman in order to comply formally with Article 11*bis* of the Constitution.

## 3.7 Harassment and sexual harassment

### 3.7.1 Definition and explicit prohibition of harassment

The definitions of harassment on the ground of sex can be found in Article 5(9) of the Gender Act of 10 May 2007, and the prohibition of such behaviour as a form of gender discrimination in Article 19.

The definitions comply with EU law as they reproduce the definitions contained in Article 2(1)(c) and (d) of Directive 2006/54/EC.

The Welfare at Work Act of 4 August 1996 does not contain a definition of sex-related harassment but uses a general definition of harassment (Article 32*ter*): 'harassment at work: wrongful series of several behaviours, outside or within the undertaking or the organisation, taking place over a specific period of time, the goal or consequence of which



is that the personality, dignity or psychological integrity of a worker or another person to whom (this section) applies, is affected in the execution of his/her work, that his/her position is placed at risks or that a threatening, hostile, insulting, demeaning or hurtful environment is created (...).' So, in the Welfare at Work Act, several facts are necessary for the concept of harassment to apply, a requirement which appears neither in Directive 2006/54/EC nor in the Gender Act of 10 May 2007. Given that an employee who claims to be the victim of harassment as a form of gender discrimination must rely on the Welfare at Work Act to the exclusion of the Gender Act of 10 May 2007, obviously, the burden of *prima facie* demonstration of the harassment is made more onerous. Possibly, the harmful occurrence might come under the notion of 'violence at work' envisaged by the Welfare at Work Act (i.e. any situation of psychological or physical threat or aggression during the performance of work), which does not demand that there be several facts; still, this would be a roundabout way to meet the definition of Article 2(1)(c) of Directive 2006/54/EC.

The analysis above also applies to harassment as a form of discrimination under Directives 2000/43/EC and 2000/78/EC, given that the definition of harassment in the Welfare at Work Act mentions that it also covers occurrences of discrimination based on sex as well as the other criteria envisaged by the anti-discrimination legislation.

### 3.7.2 Scope of the prohibition of harassment

As mentioned above, the notion of sex-related harassment cuts across the Gender Act of 10 May 2007, the material scope of which is broader than those of Directives 2006/54/EC and 2004/113/EC. So, it is applicable to employment and access and supply of goods and services but also to statutory social security schemes, 'social advantages' as meant by Article 7(2) of Regulation 1612/68/EEC on the freedom of movement of workers, and 'access to and participation in any economic, social, cultural or political activity open to the public'.

It should be recalled that the federal Gender Act of 10 May 2007 is not the sole instrument of transposition of Directives 2006/54/EC and 2004/113/EC, the material scope of which includes various issues (e.g. vocational training and orientation, employment relations in the public services, subsidised accommodation) that fall totally or partially within the respective jurisdiction of the federate authorities (communities and regions). Consequently, the latter have adopted various pieces of legislation (*décrets/decreten/Dekreten* and *ordonnances/ordonnanties*) which are aimed at combating discrimination and at the same time transpose EU directives (Directives 2006/54/EC and 2004/113/EC, but also Directives 2000/43/EC and 2000/78/EC). They all include provisions similar to those of the federal act covering harassment, except that the federate texts envisage it as based on various criteria of discrimination, including sex.

### 3.7.3 Definition and explicit prohibition of sexual harassment

The definitions of sexual harassment can be found in Article 5(10), and the prohibition of such behaviour as gender discrimination in Article 19 of the Gender Act of 10 May 2007.

The definitions comply with EU law as they reproduce the definitions contained in Article 2(1)(d) of Directive 2006/54/EC.

Article 32<sup>ter</sup> of the Welfare at Work Act of 4 August 1996 on which an employee should base his/her claim, uses the same definition of sexual harassment as the Gender Act and is therefore in line with European law: 'Sexual harassment at work: any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, the purpose or effect of which is violating the dignity of a person or the creation of a threatening, hostile, insulting or injurious environment.'

### 3.7.4 Scope of the prohibition of sexual harassment

As mentioned above, the notion of sexual harassment cuts across the Gender Act of 10 May 2007, the material scope of which is broader than those of Directives 2006/54/EC and 2004/113/EC. So, it is applicable to employment and access and supply of goods and services but also to statutory social security schemes, 'social advantages' as meant by Article 7(2) of Regulation 1612/68/EEC on the freedom of movement of workers, and 'access to and participation in any economic, social, cultural or political activity open to the public'.

It should be recalled that the federal Gender Act of 10 May 2007 is not the sole instrument of transposition of Directives 2006/54/EC and 2004/113/EC, the material scope of which includes various issues (e.g. vocational training and orientation, employment relations in the public services, subsidised accommodation) that fall totally or partially within the respective jurisdiction of the federate authorities (communities and regions). Consequently, the latter have adopted various pieces of legislation (*décrets/decreten/Dekreten* and *ordonnances/ordonnanties*), which are aimed at combating discrimination and at the same time transpose EU directives (Directives 2006/54/EC and 2004/113/EC, but also Directives 2000/43/EC and 2000/78/EC). They all include provisions similar to those of the federal act that covers sexual harassment.

### 3.7.5 Understanding of (sexual) harassment as discrimination

Article 19 of the Gender Act of 10 May 2007 specifically states that such behaviour can constitute gender discrimination. The definition of harassment in the Welfare at Work Act mentions that it also covers occurrences of discrimination based on sex as well as the other criteria envisaged by the anti-discrimination legislation.

It should first be stressed that harassment (*harcèlement moral/pesterijen* in Belgian legal terminology) and sexual harassment are hardly ever perceived or analysed as forms of gender discrimination. This is a paradox as Belgium was a pioneer in the EU when its second Act on Gender Equality in Employment (Act of 7 May 1999) envisaged sexual harassment as gender discrimination, and as horizontal provisions (Article 5(9) and (10) providing the definitions and Article 19 laying down the prohibition) of the present Gender Act of 10 May 2007 correctly transposed Directives 2006/54/EC and 2004/113/EC in respect of harassment on the ground of sex and sexual harassment. However, since 2002, Belgium has also developed, within the Welfare at Work Act of 4 August 1996 (on health and safety), an extensive machinery aimed at preventing and suppressing harassment, sexual harassment and violence at work, regardless of whether it includes any dimension of discrimination. Moreover, in a particularly ill-advised attempt at legal simplification, Article 7 of the Gender Act provided that when an employee who falls within the scope of the Welfare at Work Act complains of harassment or sexual harassment, he/she must rely exclusively on the latter act.

Consequently, since 2007 there has been no case law in which harassment or sexual harassment at work was challenged as gender discrimination. However, Article 32<sup>ter</sup> of the Welfare at Work Act was later amended by the Act of 28 February 2014 and now states that harassment, sexual harassment and violence at work may be related (but not necessarily) with one of the criteria mentioned in the three anti-discrimination acts of 10 May 2007, and that it transposes Directives 2000/43/EC, 2000/78/EC and 2006/54/EC in that respect. The latter statement is questionable in that for the definition of harassment provided in Article 32<sup>ter</sup> to apply, there must have been a succession of several harmful facts, a requirement that does not appear in any of the directives that have allegedly been transposed.

### 3.7.6 Specific difficulties

As far as goods and services are concerned, Directive 2004/113/EC seems to have been implemented satisfactorily, although no deep thought was given to how sex-related and sexual harassment might occur within such a material scope.

As to employment matters, the situation is quite paradoxical. On the one hand, a good deal of effort went into developing a coherent and comprehensive legal system aimed at the prevention and compensation of harassment, sexual harassment and violence at work. On the other hand, providing that in situations where the victim is an employee he or she must rely on the Welfare at Work Act to the exclusion of the Gender Act of 10 May 2007 certainly makes for faulty compliance with Directive 2006/54/EC, for various reasons. First, even if the definition of harassment in the Welfare at Work Act complies with EU anti-discrimination law by stating that a situation of harassment may be conducive to any Article 19 TFEU discrimination, such an element is at best marginal in the treatment of the issue. Secondly and consequently, there is hardly any chance that the concept of harassment on the ground of sex as introduced by Directive 2002/73/EC will ever be understood, because the Welfare at Work Act pays much more attention to consequences than to causes. Thirdly, it seems absurd that a woman who is the victim of sexual harassment at work be forbidden to complain about gender discrimination. Fourthly, the definition of harassment is more demanding in the Welfare at Work Act than in EU law (see above). And finally, one important innovation of the Gender Act of 10 May 2007 as compared to the previous sex equality legislation is the possibility for the victim to claim fixed damages instead of trying to demonstrate the extent of the harm he or she has suffered; when the challenged situation happens within an employment relationship, the fixed damages are equal to six months' pay. Obviously, by forcing the victim to rely on the Welfare at Work Act, which does not provide for fixed damages, Belgium has made the transposition of Directive 2006/54 less effective than it could have been.

## 3.8 Instruction to discriminate

### 3.8.1 Explicit prohibition

Article 5(12) of the Gender Act of 10 May 2007 includes instruction to discriminate in the material scope of the act and Article 19 states that it is prohibited as discrimination. There is no significant related case law.

### 3.8.2 Specific difficulties

Nothing to report.

## 3.9 Other forms of discrimination

The Gender Act does not contain the notion of discrimination by association or assumed discrimination.

However, concerning discrimination by association, the Labour Court in Leuven found that there had been discrimination (against a male employee whose child was disabled) in circumstances very similar to those of Case C-303/06 *Coleman*, under the General Discrimination Act.<sup>22</sup> Given that the three anti-discrimination acts of 10 May 2007 use identical concepts, such case law could surely apply to gender discrimination as well. Concerning assumed discrimination, the case law known to the expert related to the Islamic *hijab* is entirely different from the suggested example: the victims of adverse

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<sup>22</sup> Labour Court Leuven, Judgment of 12 December 2013, (2014) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 344.

treatment invariably complain of discrimination on the ground of religious beliefs and/or ethnic origin, but never on the ground of gender.<sup>23</sup>

### **3.10 Evaluation of implementation**

The national law implements the EU law concepts in a satisfactory way. However, as already explained, difficulties may arise. First, the use of the concept of 'distinction' side by side with the concept of discrimination can create some difficulties for litigants (i.e. the possibility to justify direct discrimination). Secondly, while the Gender Act implements correctly the definitions of harassment and sexual harassment, the Welfare at Work Act of 4 August 1996 provides that several facts are necessary for the notion of harassment to apply. As workers have to rely on the latter act to the exclusion of the Gender Act of 10 May 2007, this can pose problems for the victim in terms of the burden of proof.

### **3.11 Remaining issues**

Nothing to report.

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<sup>23</sup> See for instance the CJEU's decisions in Case C-157/15 *Achbita* and the rather similar French Case C-188/15 *Bouagnaoui*.

## **4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)**

### **4.1 General (legal) context**

#### 4.1.1 Surveys on the gender pay gap and the difficulties of realising equal pay

Every year, the Institute for Equality of Women and Men (*Institut pour l'égalité des femmes et des hommes/ Instituut voor de Gelijkheid van Vrouwen en Mannen*) publishes a report on the gender pay gap.<sup>24</sup>

The latest report<sup>25</sup> dated 2017 notes a slight decrease in the gender pay gap in comparison with the previous year. Although the gender pay gap per working hour corresponds to 8 %, the annual gender pay gap represents 21 %, both to the detriment of female workers. The difference between these two indicators is explained by the impact of part-time work reflected in the annual gender pay gap indicator.

The difference in pay between women and men working full time is decreasing, but the pay gap between full-timers and part-timers is increasing revealing a double-sided labour market: one with good working conditions and one with part-time, less attractive jobs, offering few, if any, prospects. Looking at other aspects of pay, contributions of employers to complementary pension schemes demonstrate a gender gap of 37 %. Regarding other fringe benefits, the gender gap is tricky to assess but appears to be higher than the pay gap. For remuneration in stock options, a gender gap of around 40 % can be observed.

#### 4.1.2 Surveys on the difficulties of realising equal treatment at work

Nothing to report. Ad-hoc studies are carried out on specific aspects such as pay, maternity protection or protection of transgender people but not on equal treatment at work in general.

#### 4.1.3 Other issues

The implementation of equal pay received quite a lot of attention in Belgium in comparison with other types of discriminatory factors (i.e. part-time work). Social partners are playing an important role as illustrated by the adoption of collective agreements on equal pay in 1975 in view of implementing the EU Equal Pay Directive. For a few years, the focus has been on job evaluation and classification.<sup>26</sup> The revised Collective Agreement (CA) No. 25 itself provided (in Article 3) that companies and joint sector committees should assess whether their job evaluation systems and pay classification schemes are gender neutral and amend them when necessary.<sup>27</sup> Thus, potentially effective instruments do exist. However, the legal arsenal is only concentrated on one factor in the gender gap (job evaluation and classification) and not on the whole range.

<sup>24</sup> Institute for Equality of Women and Men (2017), *L'écart salarial entre femmes et hommes en Belgique /De loon kloof tussen vrouwen en mannen in België*, latest edition 2017, available in French and Dutch at [https://igvm-iefh.belgium.be/fr/publications/lecart\\_salarial\\_entre\\_les\\_femmes\\_et\\_les\\_hommes\\_en\\_belgique\\_rapport\\_2017](https://igvm-iefh.belgium.be/fr/publications/lecart_salarial_entre_les_femmes_et_les_hommes_en_belgique_rapport_2017).

<sup>25</sup> For 2017, the data collected focused on the structure and distribution of salaries in the sectors of industry, trade, education, healthcare and culture.

<sup>26</sup> The federal Ministry of Employment developed the EVA (EValuation Analytique/Analytische EVAluatie) project, aimed at providing the social partners with technical tools for job evaluation and a training module. After it was created in 2003, the Institute for Equality of Women and Men drew up a 'gender-neutral checklist for job evaluation and classification'. *Checklist, gender neutrality in job evaluation and classification*, 2010, available in French, Dutch, German and English at [http://igvm-iefh.belgium.be/sites/default/files/downloads/39%20-%20Checklist\\_ENG.pdf](http://igvm-iefh.belgium.be/sites/default/files/downloads/39%20-%20Checklist_ENG.pdf), accessed on 11 September 2016. *Classification des fonctions sexuellement neutre – mode d'emploi*, 2006, available in French and Dutch at [https://igvm-iefh.belgium.be/fr/publications/sekseneutrale\\_funcctieclassificatie](https://igvm-iefh.belgium.be/fr/publications/sekseneutrale_funcctieclassificatie). A training programme and training manual were also prepared in 2000 and made available for a few years.

<sup>27</sup> Collective Agreement No. 25 of 15 October 1975, modified by Collective Agreement No. 25 bis of 19 December 2001 and finally, Collective Agreement No. 25 ter of 9 July 2008.

A number of sound mechanisms are in place, such as the works mediator (introduced by the Gender Pay Act 2012) and the Special Commission, which was instituted by CA No. 25 on equal pay for men and women. Under Article 6 of the CA, this commission can provide advice on equal pay disputes in answer to a labour court's request. Composed of representatives of employers' associations and trade unions, it would be well equipped to examine claims of work of equal value.

Unfortunately, no works mediators have been appointed since the act came into force (four years ago) and the Special Commission has been consulted only twice, with the last case being 30 years ago.

Finally, the lack of transparency on pay is culturally deeply rooted and does not facilitate comparison and therefore equal pay claims. For example, biennial reports must be submitted to work councils or, in the absence of such bodies, to union delegations providing gender segregated data concerning remuneration and allowances (e.g. holiday bonuses) paid by the employer; employer's contributions to professional social security insurances; and the total sum of other non-statutory allowances paid over and above remuneration to the workforce or part of it. That information must be broken down according to the following criteria: status (blue-collar, white-collar, executive); level of function, according to the classes of functions provided in the function classification scheme of the enterprise (if such a scheme exists); seniority; and level of education or training.<sup>28</sup> Nonetheless, the data mentioned in the reports are confidential.

#### 4.1.4 Political and societal debate and pending legislative proposals

Nothing to report.

## 4.2 Equal pay

### 4.2.1 Implementation in national law

Equal pay is guaranteed both by Collective Agreement No. 25 of the National Labour Council, of 15 October 1975, concerning equal pay for male and female workers (only applicable to the private sector) and by the Gender Act of 10 May 2007 (which includes the public sector).<sup>29</sup> Taken together, both instruments cover all aspects of the notion of pay within the scope of EU law, such as remuneration proper, be it *in specie* or *in natura*, tips, various bonuses, etc. and they include job classification schemes (Article 4 of Collective Agreement No. 25; Article 6 (2)(2) of the Gender Act). However, although Article 1 of the Collective Agreement mentions work of equal value, the Gender Act does not (obviously a mere omission in the drafting, as Article 2 states that the act is aimed at transposing all EU instruments concerning gender equality).

In Belgium, a national collective labour agreement commits social partners to keeping up efforts to achieve equality between women and men. This includes reviewing job classifications so as to make them gender neutral. Collective Labour Agreement No. 25 on equal pay for male and female employees, obliges all sectors and single enterprises to assess and, if necessary, correct their job evaluation and classification systems to ensure gender neutrality as a condition of equal pay. The Collective Labour Agreement, modified on 9 July 2008, provides that discrimination between men and women has to be excluded from all conditions of remuneration.

The Act of 22 April 2012 (amended by the Act of 12 July 2013) aimed at fighting the pay gap between men and women (the Gender Pay Gap Act), amended various pieces of

<sup>28</sup> Under Article 15(m) of the Organisation of the Economy Act of 20 September 1948, inserted in the Gender Pay Gap Act of 22 April 2012 and amended by the corrective Act of 12 July 2013.

<sup>29</sup> All Collective Agreements of the National Labour Council are available in French and Dutch at [www.cnt-nar.be](http://www.cnt-nar.be).

legislation in order to induce the social partners (in the private sector) to make fresh efforts in favour of equal pay. The implementation of the Act of 22 April 2012 required a number of ancillary royal decrees, which were promulgated on 25 April 2014.<sup>30</sup> According to the act, differences in pay and labour costs between men and women should be stated in companies' annual reports (*bilan social/sociale balans*).

The act provides that every two years, companies with more than 50 workers should carry out a comparative analysis of their wage structure, showing the rates for their female and male employees. If this shows that women earn less than men, the company will have to draw up an action plan. An employer may appoint a works mediator, following a proposal from the works council or the trade union delegation. If discrimination is suspected, women can turn to their firm's work mediator, who will investigate whether there is indeed a pay differential. If there is a differential, the works mediator will try to find a compromise with the employer.

The control of annual reports and comparative analysis is part of the tasks of company auditors within their role of annual accounts control. Despite instructions given by the Institute of Company Auditors (*Institut des réviseurs d'entreprises/ Instituut van de Bedrijfsrevisoren*),<sup>31</sup> currently, this obligation is not really effective as auditors are not systematically checking the accuracy of figures provided. Moreover, the report is only accessible internally to the works council, limiting its use in legal cases, for example. The labour inspectors also have a role in checking information provided by enterprises, but due to their limited human resources, it is barely carried out. Finally, all data mentioned in the reports are confidential.

The communication and control of revised job evaluation and classification systems by the federal service in charge of collective agreements is one positive outcome of the law (between 1 July 2013 and 30 November 2014, more than 150 collective agreements have been checked and subsequently some of them have been corrected or completely modified).<sup>32</sup>

Finally, the fact that no mediator has been appointed so far is a signal that although the law provides a number of mechanisms to ensure that equal pay in companies is real, it is not really effective.

#### 4.2.2 Definition in national law

Throughout the whole labour legislation, there is no single and exhaustive definition of 'pay'; however, according to the social partners' comment on Article 4 of Collective Agreement No. 25, the concept must be understood in the broadest sense. Moreover, Article 4 states that 'remuneration' includes pay, tips, advantages provided by the employer, holiday bonuses and benefits provided under occupational social security schemes. Article 6 (2)(2) of the Gender Act of 10 May 2007 is worded along similar lines (although occupational social security schemes are mentioned specifically under Article 6 (1)(4) as such schemes may concern self-employed workers as well). Thus, taken together, those provisions comply with Article 157 (2) TFEU.

There is no leading case law on the definition of pay.

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<sup>30</sup> Royal Decree of 25 April 2014 concerning the analytical report on the structure of the workforce's remunerations and Ministerial Decree of 25 April 2014 setting the format of the analytical report, both in *Moniteur belge/Belgisch Staatsblad*, 15 May 2014. Royal Decree of 25 April 2014 concerning the works mediator with regard to the fight against the pay gap between men and women, in *Moniteur belge/Belgisch Staatsblad*, 21 May 2014. All three texts available at <http://www.juridat.be>.

<sup>31</sup> *Institut des réviseurs d'entreprise*, Communication 2014/10, 29 October 2014.

<sup>32</sup> Deloese Safeya, *La loi sur l'écart salarial, effectivité et conformité au droit européen*, final essay for the L.L.M. at the Université libre de Bruxelles, June 2018, p.18.

#### 4.2.3 Explicit implementation of Article 4 of Recast Directive 2006/54

National legislation explicitly implements Article 4 of Recast Directive 2006/54.

Article 1 of Collective Agreement No. 25 and Article 19 of the Gender Act of 10 May 2007 both contain the prohibition of discrimination. Job classification is mentioned explicitly in Article 3 of the collective agreement and Article 6(2)(2) of the act.

#### 4.2.4 Related case law

There is no leading national case law relating to gender equality in pay.

However, an interesting case can be mentioned here. A furniture factory had classified its blue-collar workers in four categories. All female workers belonged to the third one. One of them took legal action, claiming that she was performing the same tasks as the men of the first category, who were entitled to a higher remuneration. After hearing a number of workers as witnesses, the labour court in Bruges concluded that the claim was valid and that the employer had been discriminating against women. As provided by Article 23(1) of the Gender Act of 10 May 2007, fixed damages equal to six months' pay were allowed to the claimant.<sup>33</sup> When the employer appealed, the Labour Court of Appeal in Ghent (division of Bruges) completely upheld the ruling.<sup>34</sup>

#### 4.2.5 Permissibility of pay differences

If the question is of a general nature, pay scales in the private sector, established by way of collective agreements, are usually based on seniority. Those which still used the criterion of age had to be corrected in compliance with the CJEU's case law (mainly Case C-297/10 and C-298/10, *Hennigs and Mai*).<sup>35</sup> In the public sector, seniority has always been the criterion.

#### 4.2.6 Requirement for comparators

There is no legal provision concerning a comparator, hypothetical or otherwise. The case law concerning equal pay is so scant that it does not reveal any particular difficulty in that respect.

#### 4.2.7 Existence of parameters for establishing the equal value of the work performed

There are no legal provisions defining any parameters concerning the nature of the work, training and working conditions. There are no case law laying down parameters for establishing the equal value of the work performed.

#### 4.2.8 Other relevant rules or policies

Nothing to report.

#### 4.2.9 Wage transparency

There is no law addressing wage transparency. However, in public services the pay structure is governed by objective criteria and by the general principle of equality before the law (Article 10 of the Constitution). Consequently, knowing the rank of a staff member

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<sup>33</sup> Labour Court Bruges, Judgment of 25 June 2013, *Algemene Rol* No. 07/127676/A, unreported. The fact that the expert only heard about this case with a four-years delay results from the haphazard way in which case law is made available (with the sole exceptions of decisions of the Constitutional Court, the *Conseil d'État/Raad van State* - higher administrative court - and, not exhaustively, the Court of Cassation).

<sup>34</sup> Labour Court of Appeal Ghent, Judgment of 5 December 2014, *Algemene Rol* No. 2013/AR/197, unreported.

<sup>35</sup> CJEU, Case C-297/10 and C-298/10, *Hennigs and Mai* [2011-I-7965].



(which, under staff regulations, is general information within a ministry or public body), his or her gross remuneration is transparent. In contrast, there is no transparency as to the remuneration of managers who are hired by public economic enterprises under employment contracts.<sup>36</sup>

Regarding case law, the only landmark case worth mentioning involved the European Trade Union Institute (of the European Trade Union Confederation), where a female researcher complained of pay discrimination in comparison with male colleagues. The Labour Court of Appeal in Brussels<sup>37</sup> found that the employer's pay system was opaque and simply referred to the CJEU's decision in Case 109/88 *Danfoss*<sup>38</sup> to conclude that there was gender discrimination.

#### 4.2.10 Implementation of the transparency measures set out by European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women

The principles of transparency are not implemented as such in Belgium.

#### 4.2.11 Other measures, tools or procedures

The Institute for the Equality of Women and Men issued a methodological instrument, the gender neutral checklist for job assessment and classification, which subsequently gained legal recognition.<sup>39</sup> The Act of 22 April 2012 aimed at combating the gender pay gap amended the collective agreements and Joint Sector Committees Act of 5 December 1968 to insert Article 50/1, under which, when a joint sector committee adopts a job classification system, the latter must be submitted to a department of the federal Ministry of Employment for an assessment of its gender neutrality. The checklist mentioned above is one element to be taken into consideration for that purpose.

### 4.3 Access to work, working conditions and dismissal

#### 4.3.1 Definition of the personal scope (Article 14 of Recast Directive 2006/54)

The personal scope of gender equality is not defined in the Gender Act of 10 May 2007 because of its very broad material scope (broader than all objects covered by EU directives). The Gender Act has no proper personal scope, it applies to anyone involved in any situation which falls within the material scope. The various pieces of federate legislation adopted the same approach.

#### 4.3.2 Definition of the material scope (Article 14(1) of Recast Directive 2006/54)

Article 19 of the Gender Act of 10 May 2007 provides the scope of its material scope and lays down the general prohibition of discrimination. As for the content of Article 14(1) of the Recast Directive:

- (a) was transposed by Article 6 (2)(1) of the Gender Act, which provides a non-exhaustive list of aspects of the notion of 'access to employment.' One useful element worth mentioning concerns access to partnership in firms of self-employed

<sup>36</sup> However, in a judgment of 2 May 2016 (Dumortier, No. 234.069 at [www.raadvst-consetat.be](http://www.raadvst-consetat.be), the Raad van State found that the protection of privacy and of the company's economic interests could not serve as a blanket justification for denying making the managers' wages transparent at V.R.T., the Flemish public radio and television organisation. This judgment concurs with the CJEU's decision in joint Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk*, [2003 – I - 4989].

<sup>37</sup> Labour Court of Appeal Brussels, Judgment of 19 October 2014, *Chroniques de droit social/Sociaalrechtelijke Kronieken*, 2005, p. 16 with J. Jacquain's case note.

<sup>38</sup> CJEU, decision in Case 109/88 *Danfoss* [1989-3199].

<sup>39</sup> Available in French and Dutch at [www.igvm-iefh.belgium.be](http://www.igvm-iefh.belgium.be).

- professionals (as it had been observed that in certain law firms, for instance, women were admitted as members, but not as partners);
- (b) was transposed by Article 6(2)(2) and (3) of the Gender Act, concerning working conditions and the termination of employment respectively, again with non-exhaustive lists of aspects;
- (d) was transposed by Article 6(1)(7) of the Gender Act, in a wording reproduced from the directive;
- (c) concerns matters (vocational training, etc.) which fall under the respective jurisdictions of the federate authorities. Consequently, the transposition is to be found in the various instruments mentioned above; usually, the same method as in the Gender Act (non-exhaustive lists of aspects) was applied.

#### 4.3.3 Implementation of the exception on occupational activities (Article 14(2) of Recast Directive 2006/54)

Article 13(1) and (2) of the Gender Act provide that sex may be a genuine and determining occupational requirement, again in a wording reproduced from Article 14(2) of the Recast Directive. However, under Article 14(3), an exhaustive list of such situations must be provided in an ancillary royal decree; 11 years after the act came into force, such a royal decree has not yet been promulgated. Thus, *faute de mieux*, the Royal Decree of 8 February 1979 is regarded as still being in force, although it was adopted as ancillary to the first piece of legislation concerning the equal treatment of male and female workers (Heading V of the Economic Reorientation Act of 4 August 1978), long since repealed. That royal decree contains a short exhaustive list of jobs: singers, dancers, actors, fashion and photographic models, plus positions in foreign countries that do not apply the principle of gender equality in employment.<sup>40</sup>

The 1979 royal decree has never been evaluated, even if that is required by the European legislation and in particular by Directive 76/207/EEC.<sup>41</sup>

There is also the Royal Decree of 29 August 1985 which provided that prison warders had to be of the same sex as prisoners (given that prisons are sex-segregated); however, it was amended by a Royal Decree of 10 December 2000 and now provides that a maximum of 60 % of warders must be of the same sex as prisoners in any given prison.

#### 4.3.4 Protection against the non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity

There are no known cases of forced resignation. Failure to renew a fixed-term contract after an employee took maternity leave, while such renewal is habitual practice in the enterprise or institution concerned, is now analysed as direct discrimination by the courts, provided that the employee can produce *prima facie* elements of proof.<sup>42</sup>

However, it appears that this legal protection does not prevent discriminatory practices in reality. By default, where discrimination is found, the fixed damages are equal to six months' pay. The level of the sanction is obviously too low to be dissuasive, when European legislation specifies that sanctions must be effective, proportionate and dissuasive. The standard compensation of six months for discrimination does not seem to be an appropriate sanction to change discriminatory practices.

<sup>40</sup> For instance, a company wishes to send a representative to a state of the Arabic peninsula where women are excluded from any such job. Please note that the royal decree dates back to 1979.

<sup>41</sup> Council Directive of 9 February 1976 on the implementation the principle of equal treatment for men and women in access to employment, vocational training and promotion and working conditions.

<sup>42</sup> See Labour Court of Nivelles, Judgment of 14 September 2006, *Chroniques de droit social*, 2008, p.31.

#### 4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (Article 28(1) of Recast Directive 2006/54)

Article 17 of the Gender Act of 10 May 2007 provides that provisions concerning the protection of pregnancy and maternity may not be analysed as discrimination, but are considered as a condition to the achievement of equal treatment between men and women. This formulation is meant as an incitement to seek a dynamic combination of protection and non-discrimination.

#### 4.3.6 Particular difficulties

Nothing to report.

#### 4.3.7 Positive action measures (Article 3 of Recast Directive 2006/54)

Article 16 of the Gender Act of 10 May 2007 allows the adoption of positive actions (as mentioned at section 3.6.1 above).

### **4.4 Evaluation of implementation**

There remain uncertainties for potential claimants about their chances of getting satisfaction before the courts. This is the case in respect of equal pay for work of equal value, for example. In a case relating to a married couple employed as concierges in an enterprise, but performing extra work, the husband as a handyman and the wife as a cleaner, the Labour Court of Liège on 9 February 2011 accepted the difference in pay.<sup>43</sup> Another court judged that a difference in education was a justification for unequal pay, without checking whether such a criterion was relevant to the job in question.<sup>44</sup>

### **4.5 Remaining issues**

Nothing to report.

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<sup>43</sup> Labour Court Liège, Judgment of 9 February 2011, *Chroniques de droit social/Sociaalrechtelijke Kronieken*, 2011, p 380 with C. Lardin's case note.

<sup>44</sup> Judgment of 4 January 2005, *Chroniques de droit social/Sociaalrechtelijke Kronieken*, 2005, P. 451 with J. Jacqmain's case note.

## **5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54 and 2010/18)<sup>45</sup>**

### **5.1 General (legal) context**

#### 5.1.1 Surveys and reports on the practical difficulties linked to work-life balance

In 2008, the Institute for the Equality of Women and Men commissioned a study on discrimination on the ground of pregnancy in order to assess the complaints it received in a broader context and to estimate the extent of the phenomenon in Belgium.

In 2017, the institute decided to update the study.<sup>46</sup> The conclusions were worrying: three out of four women workers have faced at least one form of discrimination, prejudice, unequal treatment and unpleasant treatment because of their pregnancy or maternity; 22 % of pregnant workers faced direct discrimination and 69 % suffered indirect discrimination. These figures corroborate the conclusions that can be drawn from the complaints the institute receives. In 2016, the vast majority of reports of employment discrimination to the institute came from women (69 %) and 38 % of reports relating to employment concerned discrimination linked to pregnancy and maternity. Women may be discriminated against at all stages of the employment process: from recruitment and selection to the non-extension of their fixed-term contract and dismissal, as well as in their conditions of employment. Few women dare to enforce their rights, often having themselves integrated gender stereotypes and accepted the idea that pregnancy and motherhood are obstacles to their careers.

Another survey, from the Family League (*Ligue des familles*), found that eight out of ten parents have difficulty reconciling work and family life and one in four workers say they are on the verge of exhaustion. The most frequently expressed demand by parents is a collective reduction in working time. The Family League also proposes 'conciliation leave,' which could be taken in hours rather than in days.<sup>47</sup>

#### 5.1.2 Other issues

The leave system in Belgium is extremely complex (parental leave, time credit and career break). The various types of leave all have different conditions of access, duration and rules of assimilation (to periods worked), formulas or amounts of allowance. This is historically explained by the fact that new measures have been added to old ones without harmonising the regulations with different objectives (redistribution of work or reconciliation of work and private life). Today these schemes are covered by different social security schemes.

#### 5.1.3 Overview of national acts on work-life balance issues

- Working Conditions Act of 16 March 1971.
- Consolidated Act of 14 July 1994 concerning healthcare and sickness insurance.
- Employment Contracts Act of 3 July 1978.

<sup>45</sup> See Masselot, A. (2018) *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A. (2015) *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway* European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

<sup>46</sup> Institute for the Equality of Women and Men (2017) *Pregnancy at Work - Experiences of candidates, employees and self-employed women in Belgium (Grossesse au travail. Experience de candidates, d'employées et de travailleuses indépendantes en Belgique)*.

<sup>47</sup> Family League (Ligue des familles), (2018) *Comment adapter le monde du travail à la vie des parents?*, October 2018, available in French at <https://www.laligue.be/Files/media/495000/495841/fre/2018-10-25-enquete-travail-et-parentalite.pdf>.

#### 5.1.4 Political and societal debate and pending legislative proposals

The system of time credit has recently been reviewed unfavourably for unmotivated leaves, meaning leave taken without specifying the reason of the leave. This led to a drop in the number of beneficiaries. Conversely, parental leave is increasing significantly. The preferred formula is reducing working time by a fifth. It is in this type of formula that the distribution between men and women is most balanced (for example, in the case of time credit, 57 % of women and 43 % of men reduce their working hours by a fifth. These figures are explained by the high number of men who choose a time credit at the end of their career (60 % of men). Women remain the largest group of applicants for this type of measure and the figures for career breaks (stable between 2008 and 2017) show a proportion of 72 % of women.

The recommendation of the Institute for the Equality of Women and Men No. 2018-R/001 on the protection against discrimination against workers of both sexes with family responsibilities endorses the integration of a new protected criterion against discrimination relating to family responsibilities.

Finally, there are no less than 10 proposals relating to parental leave now pending in the House of Representatives (in effect, the federal Parliament), tabled by members belonging to various political parties. There is no indication that any of them will be processed in time before the general election in 2019. All are available on the House's website.<sup>48</sup>

Six of these proposals aim at amending the current birth leave for paid workers: Nos. 54-0991 and 54-2166 (making the 10-days leave compulsory); Nos. 54-1678 and 54-1833 (extending the leave to 15 days, compulsory); 54-0027 (extending the leave to 20 days, three of them compulsory); No. 54-2075 adopts an entirely different angle and proposes to allow the mother to transfer the facultative part of the maternity leave to her spouse/partner. The other four proposals are aimed at creating a birth leave for self-employed persons: No. 54-0191 of five days, Nos. 54-2037, 54-2128 and 54-3067 of 10 days; given that for that category of workers, the maternity leave itself is optional, the proposed birth leave is optional too in all proposals.

## 5.2 Pregnancy and maternity protection

### 5.2.1 Definition in national law

There is no legal definition of a 'pregnant' worker, but protection of a pregnant worker against pregnancy-related health risks and against dismissal is conditional on the worker informing her employer of her pregnancy (Article 41*bis* and Article 40 of the Working Conditions Act of 16 March 1971, respectively). This is consistent with Article 2(a) of Directive 92/85/EEC.

There is no definition of a worker who has recently given birth or who is breastfeeding.

### 5.2.2 Obligation to inform employer

Article 40 of the Working and Conditions Act of 16 March 1971 does not impose any form on the information that must be given to the employer, nor does it even instruct the person concerned to provide such information herself. However, in the event of a dispute, it will be up to the worker to prove that the employer was informed. Thus, the visible nature of the pregnancy is sufficient to provide the employer with information.

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<sup>48</sup> <http://www.lachambre.be> (French) or [www.dekamer.be](http://www.dekamer.be) (Dutch).

### 5.2.3 Case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding

Nothing to report.

### 5.2.4 Implementation of protective measures (Articles 4-6 of Directive 92/85)

Article 42 of the Working Conditions Act of 16 March implements protective measures mentioned in articles 4 to 6 of the directive. The employer must take the necessary steps, such as temporarily adjusting working conditions, moving the worker to another job or, if there is no other solution, granting the worker temporary leave. So, if the employee must be withdrawn from her usual tasks, and the employer cannot assign her to any other activities, a 'protection of maternity' leave is provided. When protection against health risks during pregnancy or breastfeeding entail that a worker is transferred temporarily to another position, she has a right to be reinstated in her normal position when the protection is no longer required.

### 5.2.5 Case law on issues addressed in Articles 4 and 5 of Directive 92/85

Nothing to report.

### 5.2.6 Prohibition of night work

Article 43 of the Working and Conditions Act of 16 March 1971 protects female workers against performing night work during a period of eight weeks before the expected date of delivery and four weeks following the end of the maternity leave.

Upon production of a medical certificate, the pregnant worker may also refuse night work during other periods of her pregnancy. The employer is then required to give the worker day work or, if this is not possible, to suspend the employment contract execution.

### 5.2.7 Case law on the prohibition of night work

Nothing to report.

### 5.2.8 Prohibition of dismissal

National law, in Article 40 of the Working and Conditions Act, prohibits dismissal of a woman from the time she has informed her employer of her pregnancy until one month after the end of maternity leave.

The protection of employment consists of a prohibition of any dismissal grounded on 'the physical condition resulting from the pregnancy or delivery'. The burden of proof that the dismissal was not connected to pregnancy rests on the employer. In case of unlawful dismissal, fixed damages equal to six months' pay (a standard in Belgian labour law) are due, and if the employer gave notice, the notice period is null and void so that payment *in lieu* is due as well.

### 5.2.9 Redundancy and payment during maternity leave

If an employee is made redundant during her maternity leave this will have no impact on the payment of her maternity leave as it is paid by the social security system and not by the employer.

#### 5.2.10 Employer's obligation to substantiate a dismissal

As mentioned above, in case of dismissal during the period of protection, the employer will have to prove that the dismissal is not connected to the worker's 'physical condition resulting from the pregnancy or delivery'. The employer has no obligation to communicate the reasons in writing to the worker. However, under Article 3 of Collective Agreement No. 109, the reasons have to be communicated by the employer if requested by the worker.<sup>49</sup>

#### 5.2.11 Case law on the protection against dismissal

Nothing to report.

### **5.3 Maternity leave**

#### 5.3.1 Length

Under Article 39 of the Working Conditions Act, maternity leave normally has a duration of 15 weeks:

- five weeks of optional antenatal leave, which the worker is also free to transfer in part or in total to the end of the compulsory postnatal leave, or not use at all;
- one week compulsory antenatal leave, immediately before birth;
- nine weeks compulsory postnatal leave.

In the case of a multiple pregnancy, two weeks are added to the optional antenatal leave, and two weeks to the compulsory postnatal leave.

#### 5.3.2 Obligatory maternity leave

As explained above, Article 39 of the Working Conditions Act provides for an obligatory leave of 10 weeks. The obligatory maternity leave is composed of two compulsory periods: one week antenatal leave immediately before delivery and nine weeks postnatal leave.

#### 5.3.3 Legal protection of employment rights (Articles 5, 6 and 7 of Directive 92/85)

Under Article 42 of the Working Conditions Act, when protection against health risks during pregnancy or breastfeeding entails that a worker is transferred temporarily to another position, she has a right to be reinstated in her normal position at the end of her maternity leave.

#### 5.3.4 Legal protection of rights ensuing from the employment contract

For workers under employment contracts (and untenured staff members in public services), no remuneration is due during maternity leave. Instead, statutory social security benefits are made available under the maternity insurance scheme, organised by Articles 111 to 117 of the Consolidated Act of 14 July 1994 concerning healthcare and sickness insurance and Articles 219 to 223<sup>quater</sup> of the ancillary Royal Decree of 3 July 1996. These provisions concern the conditions for entitlement and the amount of benefits available during various periods related to the protection of maternity.

As for tenured staff members in the public service, staff regulations provide that during the various periods of absence related to the protection of maternity, a staff member is considered as being in active service with full pay and all related advantages.

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<sup>49</sup> Collective Agreement No. 109, 12 February 2014, regarding the obligation to motivate dismissal (*Convention collective de travail n° 109, conclue au sein du Conseil national du Travail, concernant la motivation du licenciement*).

### 5.3.5 Level of pay or allowance

Under the provisions mentioned above, the amounts of social security benefits are the following:

- first 30 days of maternity leave: 82 % of the gross remuneration without a ceiling, which is equal to 100 % of the net remuneration, i.e. what a worker would receive from her employer during the first 30 days of sick leave;
- the remainder of maternity leave: 75 % of the gross remuneration with a ceiling, i.e. the maximum amount of the benefit is EUR 106.90 per day as from 1 January 2018. In comparison, benefits due in case of sick leave amount to 60 % of the gross remuneration with the same ceiling, i.e. a maximum of EUR 83.84 per day;
- suspension of occupation due to health risks: 78 % of gross remuneration with a ceiling, i.e. a maximum of EUR 109.33 per day.

### 5.3.6 Additional statutory maternity benefits

Additional benefits are possible under collective agreements concluded at the level of individual employers. For instance, the French-speaking Free University of Brussels will pay full remuneration to an untenured staff member and then recover the social security benefits to which she is entitled.

### 5.3.7 Conditions for eligibility (Article 11(4) of Directive 92/85)

Under Article 128 of the Consolidated Act of 14 July 1994 (since 1 January 2015, Article 116/1) and Article 203 of the Royal Decree of 3 July 1996, a woman must have been subject to the Consolidated Act during at least 120 working days in the last 6 months preceding her application to be entitled to maternity benefits. This requirement gave rise to Case C-65/14 *Rosselle*, in which, because of a change in the nature of the working relationship (from a tenured staff member in one school to a temporary staff member in another one), a teacher was denied maternity benefits although she had been in uninterrupted employment for much longer than one year. Consequently, the Royal Decree of 2 July 1996 was amended<sup>50</sup> in the following way: the condition of having been subject to the scheme for at least 120 working days within a period of six months immediately prior to the application for benefits is now waived when the applicant is a tenured staff member of public service who took unpaid leave in order to be engaged as a paid worker by another employer. However, it is still possible (in different situations) that, because a worker does not meet the condition of 120 working days, she receives neither benefits, nor remuneration (as it is not due, see above) during maternity leave, although a part thereof (10 weeks) is compulsory.

### 5.3.8 Right to return to the same or an equivalent job (Article 15 of Directive 2006/54)

For the private sector, there is no explicit provision relating to either the protection of rights or the return from maternity leave as mentioned in Article 15. The practical consequences of the absence of such a provision may be observed in certain collective agreements: for instance, if the amount of a Christmas bonus was made proportional to periods of effective work, a notion which excludes periods of absence related to the protection of maternity. In the public sector, there is no such adverse effect because, under staff regulations, those periods of absence are considered as active service, a favourable solution which was extended to workers under employment contracts in order to avoid discrimination between the two categories of personnel. Regarding the absence of an explicit provision on reinstatement in the job at the end of maternity leave, the only remedy available in the private sector is to challenge the transfer as constructive dismissal

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<sup>50</sup> Royal Decree of 28 October 2016, *Moniteur belge/Belgisch Staatsblad*, 25 November 2016.



grounded on maternity or as gender discrimination and apply for an order to put an end to it, but this method has not been tested in court.<sup>51</sup>

### 5.3.9 Legal right to share maternity leave

There is no national law that provides a right to share maternity leave. However, it should be mentioned that in cases where, after giving birth, a worker (a) dies or (b) must remain in hospital when the child can be taken home, the part of the maternity leave which has not been used before the birth is transferred in total (in case (a)) or in as much as the mother cannot use it (in case (b)) to her male or female spouse, registered partner or stable common law partner. In case (a), maternity benefits are paid to this person. In case (b), maternity benefits continue to be paid to the mother while benefits equal to 60 % of the gross remuneration with a ceiling (i.e. the same rate as during sick leave) are paid to the transferee.<sup>52</sup>

#### 5.3.10 Case law

Nothing to report.

## 5.4 Adoption leave

### 5.4.1 Existence of adoption leave in national law

Under Article 30<sup>ter</sup> of the Employment Contracts Act of 3 July 1978, any worker who adopts a child under the age of eight is entitled (thus, each parent is entitled in the case of an adoption by a couple) to adoption leave of six weeks if the child is under three years old and four weeks if the child has reached the age of three and is less than eight years old. The Act of 6 September 2018 considerably improved these provisions, as from 1 January 2019:

- the basic duration of the leave is now six weeks for any adopting employee, whatever the child's age provided he/she is a minor (under 18);
- to this basic duration of six or (six+six in the case of an adopting couple) weeks is added a supplement of one week as from 1 January 2019, itself increasing by one week every two years to reach a total of five weeks as from 1 January 2027; this supplement is to be shared between the two members of the couple, when applicable;
- another supplement of two weeks for every parent is added in case of simultaneous adoptions of more than one child.

The length of the leave is doubled for adoption of a disabled child.

During the adoption leave, no remuneration is paid by employers after the first three days, but the healthcare and sickness insurance scheme<sup>53</sup> provides a benefit equal to 82 % of normal remuneration under a ceiling of EUR 101.79 per day as from 1 January 2018.

In the public sector, under staff regulations, leave of six weeks is provided if the child is under 10.<sup>54</sup> During adoption leave, a tenured staff member is considered as being in active service and is entitled to normal remuneration. Some authorities (e.g., for the federal civil

<sup>51</sup> Except by the clerk of an investigating magistrate who was reassigned when she took maternity leave. However, the *Raad van State* in its judgment (*Coppens*) of 16 February No. 218.060 dismissed her claim for annulment on purely technical grounds.

<sup>52</sup> Article 39 of the Working Conditions Act of 16 March 1971, Article 114 of the Consolidated Act of 14 July 1994 and Article 221 of the Royal Decree of 3 July 1996.

<sup>53</sup> Article 223<sup>ter</sup> of the Royal Decree of 3 July 1996

<sup>54</sup> Before the adoption of the Act of 6 September 2018, the public sector regulation was more generous. The current regulations will probably have to be adapted to provide the same conditions for public service contractual workers.

service, Royal Decree of 19 November 1998 concerning leave and other forms of leave of absence) have extended this scheme to workers under employment contracts, provided they do not make use of Article 30<sup>ter</sup> at the same time.

#### 5.4.2 Protection against dismissal (Article 16 of Directive 2006/54)

Under Article 30<sup>ter</sup> (4) of the Employment Contracts Act, a worker who makes use of adoption leave may not be dismissed during a period beginning two months before the leave takes effect and ending one month after it expired, unless on grounds unrelated to the leave, for which the employer bears the full burden of proof. If the dismissal is found to be unlawful, fixed damages, equal to three months of gross pay, are due.

However, there is no provision concerning the preservation of rights after the end of adoption leave; thus, what was reported above concerning maternity leave (see above under 5.3.8) is applicable in this respect as well. Again, such an issue does not arise in the public services.

#### 5.4.3 Case law

Nothing to report

### 5.5 Parental leave

#### 5.5.1 Implementation of Directive 2010/18

The Financial Stabilisation Act of 22 January 1985 (Articles 99 to 107) provides the statutory basis for all career break/time credit schemes. Thus, in the private sector (and for all staff members employed by local councils), parental leave was introduced, as a special career-break scheme, by the Royal Decree (RD) of 29 October 1997. Similar provisions then had to be inserted into the numerous sets of regulations applicable to the different authorities: for instance, in the federal administration, when the new RD of 19 November 1998 reorganised the various forms of leave and leave of absences, provisions concerning parental leave were included (Article 35). Curiously, in the private sector, the social partners had pre-empted the RD of 29 October 1997 when on 29 April 1997 they concluded Collective Agreement (CA) No. 64 within the National Labour Council; this CA (later made generally binding by the RD of 29 October 1997) also provided the same parental leave as the RD, but gave no entitlement to a social security benefit. In the public sector, most authorities already provided a primitive parental leave (resulting from the gender-neutral transformation of an ancient 'breastfeeding leave'), which was allowed to exist alongside the 'new' parental leave mentioned above (e.g. Article 34 of RD of 19 November 1998).

Consequently, the implementation of Directive 2010/18/EU only required amendments to the extant regulations (essentially to lengthen the leave from three to four months and to give effect to Clause 6 of the Framework Agreement: see below). This was done, in the private sector by the RD of 31 May 2012 amending the RD of 29 October 1997, and by CA No. 64<sup>bis</sup> of 24 February 2015 amending CA No. 64. In the public sector, the RD of 20 July 2012 amended various sets of regulations as to the entitlement to social security benefits; each of the various authorities then had to adjust its own regulations as to the right to parental leave. As for the 'old' provisions in the public sector, they were left unamended and thus can no longer be regarded as valid instruments for implementing the directive.

#### 5.5.2 Applicability to public and private sectors (Clause 1 of Directive 2010/18)

In the private sector, parental leave is available for all workers irrespective of the nature and duration (full-time/part-time; indeterminate/fixed-term) of the employment relationship. Employment provided through temporary work agencies is also included.

In the public sector, every set of regulations mentioned in section 5.5.1 above provides a right to parental leave for any staff member, irrespective of rank (i.e. including high-level managers). However, because of the multiplicity of regulations, it may occur that this or that institution or category of personnel is not included in the scope of any of them: for instance, it was discovered quite recently that the situation of 'Bozar' (the Palace of Fine Arts in Brussels, a federal public body) is unclear concerning parental leave. As to the judiciary (judges or public prosecutors), the Judicial Code contains no provision in that respect.

### 5.5.3 Scope of the transposing legislation

The scope of the national transposing legislation includes contracts of employment or employment relationships related to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary work agency.

### 5.5.4 Length of parental leave

The duration of full-time parental leave is four months, both in the private and the public sectors, after the extant regulations were amended in compliance with Directive 2010/18/EU (see above). However, it should be noted that, while the deadline set in Article 3(2) of the Directive was 8 March 2012, both the RD of 31 May 2012 and the RD of 20 July 2012 came into force on the day of their publication (1 June and 1 August respectively), without any retrospective effect.

### 5.5.5 Age limits

The child's maximum age is 12, or 21 if she/he is disabled. There is no difference between natural and adopted children. An employee is entitled to parental leave for every one of her/his children.

### 5.5.6 Individual nature of the right to parental leave

The right to parental leave is individual for each of the parents, and no part of the leave is transferable from one parent to the other.

### 5.5.7 Transferability of the right to parental leave

The right to parental leave is individual for each of the parents, and no part of the leave is transferable from one parent to the other.

### 5.5.8 Form of parental leave

Parental leave may be used under the following forms: full-time (four months), half-time (eight months) or one fifth (20 months). Once the leave has begun, the employee may shift from one form to another (thus, for instance: two months full-time and four months half-time). The leave may also be broken down into periods of one month (full-time), two months (half-time) or five months (one fifth), or a multiple of each of those lengths. The employee is entirely free to choose between those various options.

The Act of 2 September 2018 adopts a measure allowing parental leave to be taken per half day (reduction of 1/10) and to be broken down into weeks (previously only in months).<sup>55</sup>

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<sup>55</sup> Act of 2 September 2018 amending the Recovery Act of 22.01.1985, M.B./B.S. 26 September 2018.

#### 5.5.9 Work and/or length of service requirements (Clause 3(b) of Directive 2010/10)

In the private sector, to be entitled to a leave an employee must have been occupied under an employment contract with the same employer during 12 months in the 15-month period preceding the notice. There is no such requirement in the public sector.

A succession of fixed-term contracts with the same employer (in so far as it has not resulted in a contract with indeterminate duration) is taken into account for the calculation of the required period of occupation.

#### 5.5.10 Notice period

In the private sector (RD of 29 October 1997), a written notice, given at least two and at most three months before the date when the leave must begin, is required; the same applies when the employee wishes to change the form of the leave, or to take a new period after breaking down the leave. There are no similar requirements in the public sector.

#### 5.5.11 Postponement of parental leave (Clause 3(c) of Directive 2010/18)

In the private sector, within one month after receiving notice, the employer may invoke reasons related to business needs to postpone the leave by six months. Such reasons must be 'justifiable', which seems to mean that the employer must be able to demonstrate that they are genuine. This possibility of a postponement is available to all employers, regardless of the size of the business. There is no such provision in the public sector.

#### 5.5.12 Special arrangements for small firms (Clause 3(d) of Directive 2010/18)

There are no special arrangements for small firms.

#### 5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3(3) of Directive 2018/10)

The only special rule concerning a disabled child has been mentioned above: parental leave is available until she/he reaches the age of 21 instead of 12.

#### 5.5.14 Measures addressing the specific needs of adoptive parents (Clause 4 of Directive 2010/18)

No.

#### 5.5.15 Provisions protecting workers against less favourable treatment or dismissal (Clause 5(4) of Directive 2010/18)

Under Article 101 of the Financial Stabilisation Act of 22 January 1985, an employee who has made use of parental leave may only be dismissed on serious grounds or on grounds which (in case of litigation) the labour court accepts as sufficient, *i.e.* unrelated to the leave; the employer bears the burden of proof. Protection against dismissal is applicable as from the date when the employer receives notice until three months after the end of the leave (or of the last fraction of the leave). Fixed damages equal to six months' gross remuneration are due in case of unlawful dismissal. Those provisions are applicable to employees under employment contracts in the private and public sectors. They are not applicable to tenured staff members in the public sector, but given the rules under which such an appointment may be terminated, dismissal related to parental leave is impossible.

#### 5.5.16 Right to return to the same or an equivalent job (Clause 5(1) of Directive 2010/18)

There is no explicit right to return to the same or an equivalent job.

Probably because of the short duration of the leave, there are no statutory provisions concerning either a return to the same job or acquired rights in the private sector. Although the expert is not aware of any case law concerning acquired rights, it is quite possible that provisions in certain collective agreements, such as entitlement to a Christmas bonus, do not take absences due to parental leave into account for the calculation of the required period of occupation, but the huge number of CAs prevents any attempt to verify that hypothesis. As to the right to return to the same job, the only case worth mentioning concerns an employee who left the company because the employer was only willing to provide her with an inferior position after four years' time credits under the general scheme. The court decided that the employee had left a position which was not suitable, so that she was entitled to unemployment benefits.<sup>56</sup>

The situation is clearer in the public sector, where tenured staff members who make use of parental leave are considered as being in active service and thus retain their positions and acquired rights. The same favourable treatment is usually extended to staff members under employment contracts (e.g. in the federal administration, parental leave as governed by Article 35 of the RD of 19 November 1998 was made applicable to contractual staff members by the Royal Decree of 4 June 1999).

#### 5.5.17 Maintenance of rights acquired or in the process of being acquired by the worker (Clause 5(2) of Directive 2010/18)

The entitlement to all social security benefits, including healthcare and retirement pensions, is unaffected by parental leave, although no contributions are paid. The same applies to the pension scheme for tenured staff members in the public sector as they are considered as being in active service.

#### 5.5.18 Status of the employment contract or relationship during parental leave

Under Articles 100 and 102 of the Financial Stabilisation Act of 22 January 1985, execution of the employment contract is fully or partially suspended during parental leave. As mentioned above, a staff member in the public sector is considered as being in active service during the leave.

#### 5.5.19 Continuity of entitlement to social security benefits

The entitlements to all social security benefits, including healthcare and retirement pensions, are unaffected by parental leave, although no contributions are paid. The same applies to the pension scheme for tenured staff members in the public sector.

#### 5.5.20 Remuneration

No remuneration is paid by the employer during parental leave, either in the private or public sectors.

#### 5.5.21 Social security allowance

Social security benefits are granted during parental leave. For historical reasons, they are provided by the unemployment insurance scheme.<sup>57</sup> For both sectors, the gross monthly amounts are (since 1 September 2018) EUR 834.90 for full-time leave (EUR 1 152.16 for a single parent); for half-time leave, under 50 years old, EUR 417.44 (EUR 576.07 for a single parent), over 50 years old, EUR 562.71; for one-fifth leave, under 50 years old, EUR 141.62 (EUR 190.44 for a single parent) over 50, EUR 212.42.

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<sup>56</sup> Labour Court of Appeal in Brussels, judgment of 3 September 2013, (2014) *Journal des tribunaux du travail*, p. 94.

<sup>57</sup> Regulated by the Royal Decree of 25 November 1991.

#### 5.5.22 More favourable provisions (Clause 8 of Directive 2010/18)

Obviously, fixing the maximum age at 21 if the child is disabled was a generous step. As to entitlement to parental leave in the case of the birth (or adoption) of twins, and the CJEU's decision in Case C-149/10 *Khatzi*, the regulations applicable to both private and public sectors are interpreted as giving a right to parental leave in respect of each of the children.<sup>58</sup> Finally, under Article 149 of the Social Penal Code, denying an employee the right to career breaks / time credits, and thus to parental leave as well, is an offence liable to a fine of EUR 350 up to EUR 3 500. However, there is no known case in which such a sanction was imposed.

#### 5.5.23 Case law

As to parental leave, the landmark cases were those which led to the CJEU's decisions in Case C-116/08 *Meerts* [2009-I-10063] and C-588/12 *Rogiers*, according to which if an employee who had taken half-time parental leave was dismissed unlawfully, calculation of fixed damages (*Meerts*) and of indemnity in lieu of a period (*Rogiers*) had to be based on the full-time remuneration. However, those cases were disputed on the sole ground of the first Framework Agreement on parental leave (Directive 96/34/EC), although the eventuality of indirect discrimination against women (main users of parental leave) was obvious. Moreover, Article 105 of the Act of 22 January 1985 was amended in 2009 to comply with C-116/08 *Meerts*, but strictly as far as parental leave is concerned.

### 5.6 Paternity leave

#### 5.6.1 Existence of paternity leave in national law

Under Article 30 (2) of the Employment Contracts Act of 3 July 1978, there is a right to paternity leave, although since 2011 the term 'paternity' is hardly appropriate as the leave is accessible to the male or female spouse, the registered partner or the common law partner (provided that a stable relationship of at least three years can be proved) of the woman who has given birth. The length of the leave is 10 working days, which may be used as the worker pleases within four months after the birth. This is not subject to any condition, except that the worker must notify the employer in writing of his/her making use of the leave. Normal remuneration is paid during the first three days; under Article 223*bis* of the Royal Decree of 3 July 1996, the same social security benefits as at the beginning of the maternity leave are available for the following seven days.

Identical provisions apply in the public sector, except that normal remuneration is paid during the whole leave.

#### 5.6.2 Protection against unfavourable treatment and/or dismissal (Article 16 of Directive 2006/54)

Under Article 30 (4) of the Employment Contracts Act, a worker who makes use of the leave may not be dismissed as from the moment when he/she has notified the employer up to the end of three months following the notification (a slight incoherence as the leave may be used over a period of four months), except on grounds unrelated with the leave, for which the employer bears the full burden of proof. If the dismissal is found to be unlawful, fixed damages, equal to three months' gross remuneration, are due.

Again, there is no provision concerning the preservation of rights after the end of paternity leave.

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<sup>58</sup> See J. Jacmain's case note on *Khatzi*, (2012), *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 274.

### 5.6.3 Case law

There is no case law regarding birth leave.

## 5.7 Time off/care leave

### 5.7.1 Existence of care leave in national law (Clause 7 of Directive 2010/18)

Time off on grounds of *force majeure* may be provided in isolation from the parental leave scheme. In the private sector, Collective Agreement No. 45 concluded within the National Labour Council on 18 December 1989 entitles any employee to up to 10 days' leave per year, under serious circumstances which are not necessarily related to childcare. The leave is unpaid and gives no right to social security benefits, but entitlement to social security cover is maintained. Given that there are employees who do not fall within the scope of CA No. 45 (essentially, contractual staff members in the public sector), Article 30*bis* of the Employment Contracts Act of 3 July 1978 and its ancillary RD of 11 October 1991 also provided the same leave under the same conditions.

In the public sector, regulations applicable to tenured staff members usually provide the right to *force majeure* leave, in case of an illness or an accident affecting a close relative (e.g. the spouse as well as a child). The leave is usually a maximum of four days per year, during which the staff member is considered to be in active service and entitled to remuneration (e.g. in the RD of 19 November 1998, Article 20).

The only recent provisions which may be regarded as implementing Clause 7 of the revised Framework Agreement on parental leave concern the case of a sick or injured child who must be rushed to hospital. The special career break/time credits scheme aimed at caring for a seriously ill relative (RD of 10 August 1998 and, in the public sector, various sets of regulations) includes several restrictions: the employee must give seven days' notice, the employer may object to the leave (in small businesses) or postpone it on organisational grounds (in any business), and the minimum duration of the leave must be one month. In order to make that leave usable under the emergency circumstances mentioned above, a Royal Decree of 10 October 2012 amended the RD of 10 August 1998 so that the leave may take effect immediately and the employer may neither object to it nor postpone it and the minimum duration of the leave is one week with an optional second week. The RD of 10 October 2012 contained no reference to Directive 2010/18, but when a Royal Decree of 12 July 2013 amended the various regulations applicable in the public sector to the same effect, a reference to the directive was included in its recital.

### 5.7.2 Case law

Concerning the 'special schemes' grafted on to the general career break or time credit schemes, the disputes submitted to the labour court are usually focused on the application of the protection and motives of a dismissal, but not on the eventuality of discrimination.

The judgment of the Labour Court of Mons of 23 November 2018 illustrates this point. In a case of a dismissal of a woman who had reduced her working time to take care of a child aged less than eight years old, the court decided that the compensation *in lieu* of notice should be calculated on the basis of the current remuneration and not on a full-time basis.<sup>59</sup> Furthermore, it refused to conclude that allocating reduced compensation (on a part-time basis instead of full-time) can constitute an indirect discrimination resulting from the fact that statistically more women use the scheme of reduced working time because the calculation is the same for women and men working part-time.

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<sup>59</sup> Labour Court of Mons, 23 November 2018, *J.T.T.*, 2019, p.23.

As a major exception, the Labour Court of Appeal in Ghent has a consistent case law according to which possible indirect discrimination against women must always be examined in cases concerning career breaks and time credits, even beyond the special schemes.<sup>60</sup>

Finally, concerning half-time leave to care for a terminally ill member of family, the Constitutional Court found<sup>61</sup> that refusing to calculate indemnity in lieu of notice period on the ground of full-time remuneration was incompatible with the general principle of equality under the law (Articles 10 and 11 of the Constitution), but the Court only mentioned the very short duration of the disputed leave (up to two months) and refrained from admitting that its judgment was in fact extending *Meerts* beyond parental leave.

## **5.8 Leave in relation to surrogacy**

So far, surrogacy has no legal existence.

## **5.9 Flexible working time arrangements**

### **5.9.1 Right to reduce or extend working time**

There is no legal right to permanent part-time work.<sup>62</sup>

In the public sector where full-time appointments are the general rule (except in education), staff regulations provide a wide and rather incoherent range of possibilities of a voluntary reduction of the working time. In all cases, the reduction has a limited duration; in most cases, no motive must be given in the application. The main reason for such a plethora is that, usually, the time during which no work is performed does not give right to any pay, thus allowing budgetary savings. The most widely used scheme is the 'voluntary 4-day week'. Under the Act of 19 July 2012, staff members have a right to such a reduced work schedule without any need to provide a motive. The weekly day of leave does not give a right to pay, but to a monthly fixed bonus currently amounting to EUR 112. The scheme is available during a maximum of 60 months over the whole career to a staff member under the age of 50 (over that age, the limit does not apply), but it is possible to use the scheme beyond the maximum without receiving the bonus. Applications must be for a minimum of three months and a maximum of 24; the work schedule is fixed by the manager of the institution according to the requirements of the service. Staff members in higher positions may only access the scheme if they give up the bonus.

In the private sector, historically the most resolute attempt to facilitate the reconciliation of work and private life was the career-breaks scheme, introduced by the Financial Stabilisation Act of 22 January 1985. This scheme was promptly extended to the public sector. As from 2001, in the private sector the wording 'career breaks' was replaced by 'time credits'.

As from 1 January 2015, the recently reformed 'time-credits scheme' is structured under three headings: a) unmotivated leave; b) motivated leave; c) end-of-career leave. The following details apply to heading b), which is the only relevant one for the purposes of this report.

The right to 'time credits' is governed by Collective Agreement (hereafter CA) No. 103, concluded on 27 June 2012 within the National Labour Council. As the CA does not provide for the payment of remuneration during the periods of absence, statutory social security

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<sup>60</sup> Labour Court of Appeal in Ghent, Judgment of 14 January 2013, *Sociaalrechtelijke Kronicken*, 2014, p.292.

<sup>61</sup> Constitutional Court, Judgment No. 164/2013 of 5 December 2013, *Chroniques de droit social*, 2014, p.317 with J.Jacqmain's case note.

<sup>62</sup> In that respect, some attention should be paid to Case C-221/13 *Mascellani*, in which the Court of Justice stated that Directive 97/81/EC does not guarantee a right to part-time work.



benefits are granted by the Royal Decree of 12 December 2001, considerably amended by the Royal Decree of 30 December 2014.

CA No.103 is applicable to all employers in the private sector, regardless of their size, and to all employees. However, CAs concluded within a joint sector committee or within an individual enterprise may deprive certain categories of employees, completely or partly, from the right to time credits. Employees in executive management positions are quoted as a possible example.

Basically, access to the right to time credits is conditional on 24 months' seniority with the employer at the time of application.

The admissible 'care' motives are: caring for a child under the age of eight; caring for a disabled child under the age of 21; caring for a seriously ill family member up to the second degree of kinship; caring for a terminally ill family member.

Motivated time credit leave is available up to a maximum of 48 months during the whole career. The leave may be full-time, half-time or one-fifth, but the chosen fraction has no relevance to the calculation of the time credits (i.e. one month with one-fifth leave is equal to one month with full-time leave).

For historical reasons, social security benefits are granted by the unemployment insurance scheme.<sup>63</sup> At 1 June 2017, the gross monthly benefit in case of full-time leave amounts to EUR 818.56, and EUR 1 129.61 for a single parent. If the leave is half-time, those amounts are divided by two. If the leave is one-fifth, the amount is EUR 138.84, or EUR 186.71 for a single parent.

As mentioned above, the time-credits scheme is not applicable to the public sector (with some exceptions which concern certain public bodies where the private sector legislation is applicable), which remains subject to the former career-breaks scheme. Under the Royal Decree of 7 May 1999 and the regulations adopted by the various authorities for their own staff members, that scheme provides a right to up to five years' full-time leave during the whole career, plus a right to up to five years' part-time leave (half-time or one-fifth). The leave is unpaid and a social security benefit is provided by the statutory unemployment insurance scheme, at very modest rates (the basic monthly gross benefit at 1 June 2017 is EUR 418.86 in case of full-time leave). Access to career break leave does not require any motive, unless a staff member wishes to make use of one of the 'special variants' which are attached to the general scheme. One of those special variants provides a right to a maximum of 24 months' leave to care for a seriously ill child under the age of 16. The current rate of corresponding monthly benefits is EUR 818.56 gross for full-time leave, *i.e.* the same as in the private sector. Moreover, the federal Government has decided to reform the public sector career-breaks scheme radically so that it becomes identical to the reformed time-credits scheme of the private sector described above.

## 5.9.2 Right to adjust working time patterns

There is no legal right to adjust working time patterns on request, except for the provisions which were adopted to implement Clause 6(1) of the revised Framework Agreement on parental leave. Clause 6(1) of the revised Framework Agreement was simply reproduced from Article 7/1 of the RD of 29 October 1997, inserted by the RD of 31 May 2012. The maximum period of time during which working hours and patterns may be 'adapted' (not 'reduced') is six months. The application for an adaptation, stating the employee's need for reconciliation of work and private life, must be submitted in writing at least three months before the end of the leave. The employer must give a written answer at least one

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<sup>63</sup> Regulated by the Royal Decree of 25 November 1991.

week before the end of the leave, explaining how the enterprise's and the employee's respective needs were taken into account.

In the public sector, the RD of 20 July 2012 inserted a similar provision (as Article 35*bis*) in the RD of 19 November 1998, which only applies to staff members of the federal administration. As for personnel employed by other authorities, the implementation of Clause 6(1) does not seem to have been achieved yet.

### 5.9.3 Right to work from home or remotely

There is no legal right to work from home, on request. As regulated by Heading VI of the Employment Contracts Act of 3 July 1978, the traditional forms of working from home imply the consent of the employer as do the provisions that were adopted to implement the Framework Agreement of 16 July 2002 concerning telework: in the private sector, Collective Agreement No. 85, concluded on 9 November 2005 within the National Labour Council; in the public sector, diverse regulations, e.g. the Royal Decree of 22 November 2006 in the federal public services.

### 5.9.4 Other legal rights to flexible working arrangements

The possibility to 'bank' hours is severely constricted by the provisions which had to be adopted in order to implement the Working Time Directive 93/104/EEC, now 2003/88/EC. In the private sector, under the Working Conditions Act of 16 March 1971, overtime must be compensated by rest periods within a maximum of 12 months; in the public sector, under the Working Time (Administrative Services) Act of 14 December 2000, within a maximum of four months.

### 5.9.5 Case law

There is no case law relating to flexible working arrangements. The only case law relates to career breaks and concern the issue of calculation of financial compensation following a dismissal.

## 5.10 Evaluation of implementation

In relation to maternity, some improvements are still needed to reinforce the effectiveness of the protection of women. In particular, the law, whether the Gender Act of 10 May 2007 or the law on the protection of maternity, should explicitly provide that a woman is entitled, upon her return from maternity leave, to her job or to a post with terms and conditions that are no less favourable to her and benefit from any improvements in working conditions to which she would have been entitled during her absence (full implementation of Article 15 of Directive 2006/54).

Regarding care leave, as mentioned above, conditions, entitlements and duration should be harmonised. They currently vary according to the ground under which the various forms of leave are taken (parental leave, care leave, adoption leave, flexible working time arrangements etc.) which is a source of confusion and creates difficulties for workers who do not always have access to the best information. For example, the new possibility to reduce working time by 1/10 and on a weekly basis for parental leave should be extended to all forms of leave.

## 5.11 Remaining issues

Discrimination grounded on maternity is very common in Belgium. In 2017, the Institute for Equality of Women and Men developed an information campaign on the issue of

maternity at work,<sup>64</sup> which met with great success. As a result, about 150 individual complaints, most of them concerning dismissal, were filed with the institute, which is sorely stretched to handle them, given its very limited human and material resources.

Discrimination linked more generally to parenting and family responsibilities is also happening and there is a need to reinforce protection. In that regard, some voices are pleading for the inclusion of such discrimination grounds in the Gender Act of 10 May 2007 to reinforce protection.<sup>65</sup>

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<sup>64</sup> See Institute for Equality of Women and Men (2017), *Grossesse au travail or Zwanger aan het werk*, at <https://iegh.be/fr/publications/zwanger-op-het-werk-de-ervaringen-van-werkneemsters-in-belgi>.

<sup>65</sup> Institute for Equality between Women and Men (2018), *Appraisal of the implementation and effectiveness of the gender law (État des lieux sur l'application et l'effectivité de la loi genre)*, Brussels.

## **6 Occupational social security schemes (Chapter 2 of Directive 2006/54)**

### **6.1 General (legal) context**

#### 6.1.1 Surveys and reports on the practical difficulties linked to occupational and/or statutory social security issues

Nothing to report.

#### 6.1.2 Other issues related to gender equality and social security

Recently, there was a case concerning the refusal of an insurance firm to cover costs related to gender reassignment for a worker engaged in a firm where an occupational hospital care insurance scheme was available to employees. The individual insurance policy which the insurance company proposed to the recruited employee included a clause under which the employee had to waive any claim for reimbursement of hospital costs related to her gender dysphoria, analysed as a chronic disease which had been diagnosed previous to the conclusion of the contract; if the employee did not accept that clause, access to the insurance would be denied. The employee objected, given that thanks to the reassignment operation, she was cured from the disease, which consequently was not chronic, although it could still entail hospital costs, e.g. for the replacement of a mammary prosthesis. Under Article 4(2) of the Gender Act of 10 May 2007, any adverse treatment grounded on gender reassignment is regarded as discrimination on the ground of sex, while discrimination in an occupational social security scheme is prohibited under Articles 6(1)(4) and 12(1). In succession, the Labour Court in Brussels and the Labour Court of Appeal in Brussels found that there was discrimination on the ground of gender reassignment and ordered the insurance company to give the employee access to the insurance scheme.

#### 6.1.3 Political and societal debate and pending legislative proposals

Nothing to report.

### **6.2 Direct and indirect discrimination**

The horizontal prohibition of discrimination is laid down in Article 19 of the Gender Act. Articles 6(3) and 12 together deal with occupational social security schemes in a wording that is extremely close to Article 9 of the directive.

### **6.3 Personal scope**

The personal scope is neither broader nor more restricted than Article 6 of Directive 2006/54. The Gender Act of 10 May 2007 has no specifically defined personal scope, but applies to any person concerned by any object included in the material scope. However, in respect of occupational social security schemes, certain provisions necessarily specify whether they apply to paid or to self-employed workers.

### **6.4 Material scope**

The material scope is neither broader nor more restricted, as Article 12 of the Gender Act of 10 May 2007 refers to Article 6(1)(4), which simply mentions 'occupational social security schemes.' In Belgium, the whole statutory social security system is obligatory, and as a result an occupational scheme may only complement the corresponding statutory scheme (as stated in Article 45 of the Social Security (Paid Workers) Act of 27 June 1969). Therefore, an occupational scheme may be aimed at meeting any of the items mentioned in Article 7 of the directive.

## 6.5 Exclusions

There are no exclusions from the material scope, simply because none of the items mentioned in Article 8(1) of the directive can possibly fall within the notion of an 'occupational scheme' as it is understood in Belgium (such as private insurance, falling under the scope of Directive 2004/113),<sup>66</sup> which means that there is no necessity for such exclusions.

## 6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54

There was some case law concerning discrimination against women as well as against men, which was related to the maximum or minimum age of entitlement to occupational benefits, at a time when the age of retirement was different in the statutory social security scheme (as allowed by Article 7(1)(a) of Directive 79/7/EEC), although the CJEU's decision in Case C-262/88 *Barber* had made it clear that such a reference to the statutory scheme was not a justification in an occupational one and, indeed, the CJEU ruled against Belgium in Case C-173/91 *Commission v. Belgium*, concerning an occupational complement to unemployment benefits.<sup>67</sup> The relevance of that case law progressively lessened as the faulty provisions in occupational schemes were belatedly corrected; however, situations that arose in the distant past may still be disputed now. For instance, quite recently the Court of Cassation found that as the Gender Act of 10 May 2007 is of public order (*d'ordre public*), a retired female worker could rely on Article 12 of the act to reclaim occupational disability benefits that had been denied to her when she had reached the age of 60 (before the act came into force), while they would have been given to a man up to the age of 65.<sup>68</sup>

## 6.7 Actuarial factors

Article 12 of the Gender Act of 10 May 2007 reproduced Article 9 of the Recast Directive, including the possible uses of sex as an actuarial factor that are permitted in Article 9(1)(h) and (j) (i) and (ii). Indeed, sex (i.e. gender-segregated mortality tables) is the most readily quoted example of an actuarial factor in occupational pension schemes. Probably for that reason, there is no known related case law.

## 6.8 Difficulties

It should be noted that an occupational social security scheme may only complement the corresponding statutory social security scheme. In Belgium, therefore, the issue is not just about pension rights but is about all branches of social security for paid workers. Currently, surveys of the gender pay gap do not include the gap in occupational social security schemes because of a lack of statistics.<sup>69</sup> However, it seems obvious that fewer women than men are benefiting from such additional advantages in view of horizontal segregation (concentration of women in less prosperous sectors, offering therefore fewer collective insurance schemes) and vertical segregation (e.g. collective insurance paid only to managing staff).

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<sup>66</sup> A Paragraph 3 was inserted into Article 12 of the Gender Act to implement the exclusions from the material scope, as a consequence of the CJEU's decision in Case C-236/09 *Test-Achats*.

<sup>67</sup> CJEU, Case C-173/91 *Commission v. Belgium* [1991-I-2205].

<sup>68</sup> Court of Cassation, Judgment of 16 September 2013, (2014) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 282.

<sup>69</sup> *L'écart salarial entre femmes et hommes en Belgique /De loonkloof tussen vrouwen en mannen in België*, latest edition 2017, p.21, available in French and Dutch at: [https://igvm-iefh.belgium.be/fr/publications/lecart\\_salarial\\_entre\\_les\\_femmes\\_et\\_les\\_hommes\\_en\\_belgique\\_rapport\\_2017](https://igvm-iefh.belgium.be/fr/publications/lecart_salarial_entre_les_femmes_et_les_hommes_en_belgique_rapport_2017).

## 6.9 Evaluation of implementation

There is formally no implementation problem in Belgium. Important improvements have been registered in previous years, but some difficulties and issues are troublesome in terms of progress towards gender equality. As an illustration one can mention the effects of the pension system reform which will not be positive<sup>70</sup> in reducing the poverty risk of single women as it will in fact increase and then stagnate at 10 % until 2040 while single men will see their poverty risk decreasing from 2024.

## 6.10 Remaining issues

The main issue is the fact that gender-segregated actuarial factors are used as these reinforce the effects of gender inequalities in benefits: the amount of paid benefits is based on the remuneration, which is lower for women (gender pay gap) and the amount of complementary benefit is lower because of gender-segregated actuarial factors (i.e. mortality tables).

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<sup>70</sup> Study Committee on Ageing (*Comité d'étude sur le vieillissement/ Studiecommissie voor de vergrijzing*), *Annual report, 2018*, available in French and Dutch at <https://www.plan.be/publications/publication-1808-fr-conseil+superieur+des+finances+comite+d+etude+sur+le+vieillissement+rapport+annuel>.

## **7 Statutory schemes of social security (Directive 79/7)**

### **7.1 General (legal) context**

#### **7.1.1 Surveys and reports on the practical difficulties linked to statutory schemes of social security (Directive 79/7)**

Nothing to report.

#### **7.1.2 Other relevant issues**

Nothing to report.

#### **7.1.3 Overview of national acts**

Act of 10 May 2007 aimed at combating discrimination between women and men, usually known as the Gender Act.

#### **7.1.4 Political and societal debate and pending legislative proposals**

Under the current legislative term (2014-2019), the pursuit of a budgetary balance and a rise in the participation rate of older workers has led to a series of reforms in statutory pensions.

Despite the supposed implementation of the Gender Mainstreaming Act of 10 January 2007, the Government has not acknowledged the potential negative impact of the reforms on women. For example, the diploma-related bonus for civil servants is not free anymore as, since 2018, a lump sum by study-year has to be paid by new civil servants - in the majority of cases, this concerns women as they are overrepresented in teaching.<sup>71</sup> For higher positions in the public administration, a higher diploma or a secondary degree were a condition of access. Considering that the number of years necessary to get the appropriate degree means that a worker will never reach the full career rights by the pension age, such study periods were assimilated in working service time before the reform.

### **7.2 Implementation of the principle of equal treatment for men and women in matters of social security**

The principle of equality is implemented in Belgian legislation. Again, the horizontal prohibition of discrimination is laid down in Article 19 of the Gender Act of 10 May 2007. Article 5(14) provides the definition of 'statutory social security schemes.' Article 18(3) empowers the sovereign (i.e. the federal Government) to amend any social security statutes in order to comply with the principle of gender equality. So far, this power has not been used for the following reason. Since Directive 79/7/EEC came into force, i.e. 23 years before the Gender Act, a number of statutes and regulations had to be amended in order to comply with its provisions (for example, to implement the CJEU's decision in Case C-373/89 *Integrity*, quoted above); this was done simply by tabling a bill of law in Parliament or by promulgating a royal decree to correct another one. Thus, Article 18(3) is probably more symbolic than useful.

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<sup>71</sup> Opinion No. 152 of the Council for Equal Opportunities between men and women, 10 March 2017, accessible in Dutch [http://www.raadvandegelijkekansen.be/nl/adviezen/adviezen-van-de-raad?p=1#a\\_container](http://www.raadvandegelijkekansen.be/nl/adviezen/adviezen-van-de-raad?p=1#a_container) and French at <http://www.conseildelegalite.be/fr/avis>.

### 7.3 Personal scope

The personal scope of Belgian legislation is neither broader nor more restricted than specified in Directive 79/7, as the Gender Act of 10 May 2007 has no proper personal scope, but applies to any person concerned by any object included in the material scope.

### 7.4 Material scope

The material scope of Belgian legislation is certainly broader than that of the directive as the definition provided in Article 5(14) of the Gender Act of 10 May 2007 includes not only the content of Article 3(1) of the directive, but also survivors' and family benefits. Moreover, in the past, various statutory social security provisions that entailed direct gender discrimination were found to be in breach of the principle of equality before the law (Article 10 of the Constitution) and had to be amended as a consequence. For instance, the Constitutional Court decided that provisions within the optional statutory social security scheme for Belgian expatriates (Act of 17 July 1963), were incompatible with Article 10 of the Constitution, given that, although the rate of contributions was uniform, only widows were entitled to survivors' benefits.<sup>72</sup>

Of note is a judgment of the Labour Court of Veurne<sup>73</sup> concerning a man's entitlement to reimbursement for medication to treat breast cancer. The labour court relied not only on Article 10 of the Constitution, but also on Article 4 of Directive 79/7/EEC to set aside the provisions of the social security regulations that reserved reimbursement to women. This is an important development as in previous litigation concerning the treatment of osteoporosis, in which the male claimant had only relied on Article 10 of the Constitution, the Court of Cassation<sup>74</sup> refused to recognise the discrimination against men.

### 7.5 Exclusions

Historically, Belgium availed itself of Article 7(1)(a) of the directive to maintain different legal ages of retirement for men and women in the statutory pension schemes for paid and self-employed workers; consequently, entitlement to benefits under the unemployment and sickness insurance schemes would cease at the same difference in ages for men and women. Under an Act of 26 July 1996, the difference was progressively reduced and, as from 1 January 2009, the legal age of retirement became uniform (65 years) for men and women. Under the Act of 10 August 2015, the age will rise to 66 from 1 February 2025 and 67 from 1 February 2030, again uniformly for men and women.

### 7.6 Actuarial factors

Sex is used as an actuarial factor in statutory social security schemes. Indeed, Belgian legislation concerning accidents at work is similar to the Finnish one, except that only one third of the total value of the lifelong compensation benefit may be paid as a lump-sum amount; gender-segregated mortality tables are used in order to calculate this value. The relevant provisions are Article 45 of the Accidents at Work Act of 10 April 1971 and Article 6 of the ancillary Royal Decree of 24 December 1987. These instruments are applicable in the private sector, but are referred to by the provisions which are applicable in the public services (Article 12(1) of the Act of 3 July 1967 and Article 21 of the Royal Decree of 24 January 1969). After the European Commission requested all Member States to screen their statutory security schemes in the light of Case C-318/13, a Royal Decree of 30 November 2015 amended Article 6 of the R.D. of 24 December 1987 in order to impose

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<sup>72</sup> Constitutional Court, Judgment no. 121/2000 of 29 November 2000, (2001) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 380 with J. Jacqmain's case note.

<sup>73</sup> Labour Court Veurne, Judgment of 14 March 2013, (2016), *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 176.

<sup>74</sup> Court of Cassation, Judgment of 14 June 2004, (2004) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 15 with J. Jacqmain's case note.



the use of gender-neutral actuarial factors as to lump sums to be paid as of 1 January 2016. In the same way, a Royal Decree of 15 March 2017 amended the R.D. of 15 September 1965 (ancillary to the Act of 17 July 1963 concerning the Overseas Social Security Scheme) so that gender-neutral actuarial factors must now be used in order to calculate the pension annuity provided by the scheme.

## 7.7 Difficulties

After the CJEU's decision in Case C-229/89, *Commission v. Belgium* of 7 May 1991, the category of 'co-habiting partner' remained in use for unemployment and sickness-invalidity benefits. Consequently, the entitlement to benefits does not depend only on the number of working years and paid contributions but also on the people with whom one cohabits. There is no doubt that women make up the majority of the latter category.

As illustrated by the cases relating to breast cancer<sup>75</sup> and osteoporosis,<sup>76</sup> it is very difficult to analyse access to health care from a gender perspective.

## 7.8 Evaluation of implementation

There is formally no implementation problem in Belgium. A recent case can be described as an illustration of the correct implementation by courts. Under the Royal Decree of 25 November 1991 concerning the unemployment insurance scheme, young persons under 25 (with a possible extension of the age limit) who have completed their education are entitled to 'integration allowances' after a 310-day waiting period. During this waiting period, they are expected to actively seek employment. Their willingness to seek employment is assessed by the Employment Agency, and is a condition of entitlement. However, pregnant women are excused from assessment during the compulsory part of maternity leave (i.e. 10 weeks) as provided by the Working Conditions Act of 16 March 1971. In a specific case, a woman was assessed negatively because she admitted that over a brief period (2 months) following the end of maternity leave, she had not taken any steps to seek employment (she claimed that she had suffered postpartum depression as a consequence of giving birth prematurely). She challenged the Employment Agency's decision concerning the negative assessment. The Labour Court of Appeal in Brussels<sup>77</sup> noted that under Article 37 (5) of the R.D. of 25 November 1991, personal circumstances must be taken into account to the purpose of assessment. The court referred to the CJEU's decision in Case 184/83 *Hofmann* [1984-3047] on the importance of letting mother and child develop their relationship during the first months of the child's life. The court also stated that, given that such circumstances cannot affect a man, Article 37(5) had to be applied in compliance with the prohibition of direct gender discrimination imposed by Directive 79/7/EEC. Consequently, the Labour Court of Appeal cancelled the Employment Agency's decision.

## 7.9 Remaining issues

The unfinished nature of Directive 79/7 allows some difficulties to remain unsolved. For example, the directive is applicable to the 'working population'. Member States are free to provide for dependants, which makes it difficult to challenge such schemes from a gender perspective. This raises several questions, including whether it is legitimate that general solidarity has to finance benefits for people who have never worked nor tried to do so,

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<sup>75</sup> Despite the previous judgment of the Labour Court of Veurne of 14 March 2013, the National Institute for Health and Benefits (INAMI/RIZIV) continues to apply the criteria, allowing refundable prescribed drugs in the case of breast cancer patients only in case of pre- or perimenopausal stages. Structural changes in criteria applied are not yet implemented.

<sup>76</sup> In a particularly disastrous judgment of 14 June 2004 relating to the reimbursement of medication for osteoporosis for a male claimant, the Court of Cassation found that the difference of treatment was not grounded on gender but on the menopause.

<sup>77</sup> *Rôle général* No. 2016/AB/191, unreported; summed up in *Journal du Droit des Jeunes*, No. 372, 2018, p.43.

whether it should finance higher pension rates for 'household heads with a dependant spouse' and whether the higher unemployment benefit for 'household heads with a dependant spouse' favours men.

## **8 Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)**

### **8.1 General (legal) context**

#### 8.1.1 Surveys and reports on the specific difficulties of self-employed workers

No specific studies to report.

#### 8.1.2 Other issues

Nothing to report.

#### 8.1.3 Overview of national acts

- Royal Decree No. 38 of 27 July 1967 organising the social protection scheme for self-employed individuals;
- Act of 10 May 2007 aimed at combating discrimination between women and men, referred in the report as the Gender Act.

#### 8.1.4 Political and societal debate and pending legislative proposals

The possibility of granting paternity leave of 10 days to self-employed workers (the same as for employees) and parental leave for the self-employed is currently being debated (see section 5.1.4 above).

### **8.2 Implementation of Directive 2010/41/EU**

Essentially, the substantial provisions that serve to transpose Directive 2010/41/EU (as they did for Directive 86/613/EEC) are to be found in Royal Decree No. 38 of 27 July 1967 organising the social protection scheme for self-employed persons (equivalent to an act of Parliament) and in a number of ancillary royal decrees.

As to effectiveness and remedies, the necessary provisions are those of the Gender Act of 10 May 2007, which was devised to implement all EU instruments on gender equality and the material scope of which is broad enough to cover all the aspects of equal treatment mentioned in the directive.

### **8.3 Personal scope**

#### 8.3.1 Scope

Under Articles 3 to *7bis* of Royal Decree No. 38, the social protection system is applicable to two categories of persons: 'self-employed workers' and 'assistants'.

When the spouse of a self-employed worker does not perform any gainful activity that entitles her /him to social protection, or is not a recipient of social security benefits, that spouse is regarded as an assisting spouse and therefore as an assistant.

The same provisions apply in the case of a registered partnership (*cohabitation légale/wettelijke samenwoning*), which, under Article 1475 ff. of the Civil Code simply requires a common statement of the partners at the registrar's office.

As to *de facto* (or 'common law') life partnerships, the assisting partner simply falls into the category of assistants, as will, for instance, an assisting sibling of a self-employed worker.

The provisions mentioned above are applicable regardless of the dimension of the business or of the nature of the activity, including in the agricultural sector.

The only restriction worth reporting concerns the spouse or registered partner of a person who is a member of the board of directors or a chief executive officer in a company that does not employ him/her under an employment contract, as defined in Article 32 of the Income Tax Code (1992). The latter person is a self-employed worker, but his/her spouse or registered partner is not regarded as an assistant.

In conclusion, Article 2 of the directive seems to have been transposed exhaustively.

### 8.3.2 Definitions

- 'self-employed workers': any person performing a gainful activity other than under an employment contract or regulations applicable to civil servants;
- 'assistants': any person who assists or substitutes for a self-employed worker in performing his/her activity without having been hired by the latter under an employment contract.

### 8.3.3 Categorisation and coverage

The Gender Act is applicable to self-employed workers and their assistant, whether spouse, partner or otherwise.

### 8.3.4 Recognition of life partners

The law recognises life partners if they are part of a registered partnership (*cohabitation légale/wettelijke samenwoning*) and regards them as an assisting spouse and therefore an assistant if he/she does not perform any gainful activity that entitles her/him to social protection, or is not a recipient of social security benefits.

It should be recalled that both marriage and a registered partnership are available to heterosexual and to homosexual couples.

## 8.4 Material scope

### 8.4.1 Implementation of Article 4 of Directive 2010/41/EU

No steps had been taken to transpose Article 4 of Directive 86/613/EEC, most probably because at the time there were no legal provisions which might have been used to hinder women in the establishment, equipment or extension of a business. There have never been any cases to reveal practices that have such an effect. Thus, no new steps were taken when Article 4 of the old directive became Article 4(1) of Directive 2010/41/EU and national law is in conformity.

In relation to the implementation of Article 4(2) and (3) of the new directive, harassment/sexual harassment and instruction to discriminate are prohibited as discrimination by Article 19 of the Gender Act of 10 May 2007, a horizontal provision.

### 8.4.2 Material scope

The material scope of the Gender Act of 10 May 2007 is broad enough to cover all the aspects of equal treatment mentioned in the directive as it implements all the Gender Equality Directives.

## 8.5 Positive action

Over the years, some indirect positive actions have been taken by way of modest subsidies granted to universities or private associations in order to stimulate research on and campaigning in favour of female entrepreneurship, although there is no way to assess what impact such efforts may have produced. Presently, any more decisive initiatives are impossible because, while Article 16(2) of the Gender Act of 10 May 2007 allows positive action, Article 16(3) requires that a royal decree defines in what situations and on what conditions such actions may be taken. In 2018, 11 years later, such a royal decree still does not exist, meaning that no positive action is possible.

## 8.6 Social protection

The social protection scheme for self-employed workers is entirely statutory. Its legal foundation is Royal Decree No. 38 of 27 July 1967, which provides that the scheme is financed by obligatory pay-as-you-go contributions by self-employed workers and assistants (see above) and by a state subsidy.

The following categories of benefits are available:

- healthcare: the social insurance scheme is now the same as for paid workers, organised by the Consolidated Act of 14 July 1994;
- sickness and maternity benefits: organised by the Royal Decree of 20 July 1971;
- family benefits: organised by the Act of 29 March 1976;<sup>78</sup>
- retirement and survivors' pensions: organised by Royal Decree No. 72 of 10 November 1967; and
- a premature end of activity benefit: organised by the Royal Decree of 18 November 1996, this is a stop-gap relief measure, available during a maximum of one year to meet situations such as bankruptcy or permanent disablement.

In order to implement Article 6 of Directive 86/613/EEC (now Article 7(1) of Directive 2010/41/EU), affiliation to the sickness and maternity benefits scheme was first made available to assisting spouses on a voluntary basis. It was then found that such a measure was insufficient and, after a two-year transition period, affiliation to the whole protection scheme was made compulsory for all assisting spouses and registered partners as from 1 January 2006. However, a spouse or registered partner may remain exempt from affiliation if she/he states in an affidavit that she/he does not provide any assistance to the self-employed worker, in which case she/he will be considered as the latter's dependant.

As explained above, a *de facto* ('common law') life partner who assists a self-employed worker is simply regarded as an assistant, subject to compulsory affiliation to the whole scheme.

## 8.7 Maternity benefits

The scheme aimed at protecting maternity for self-employed workers, assistants and assisting spouses was built up gradually, first in order to implement Directive 86/613/EEC, then under its own steam and, finally, but in a very marginal way, in order to implement Directive 2010/41/EU.

Protection of maternity is optional, i.e. a woman must apply to her sickness insurance fund to be granted benefits. This scheme can be described in the following way:

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<sup>78</sup> As a consequence of the Sixth Institutional Reform of the State, family benefits were transferred to the respective jurisdictions of the various federate authorities as from 1 January 2015.

- there is maternity leave of eight weeks (or nine in the case of a multiple pregnancy), of which three weeks (one immediately before and two immediately after the birth) are compulsory, i.e. using those three weeks is a condition of entitlement to any of the allowances. The remainder (i.e. five or six weeks) is optional and usable under the following possibilities: two extra weeks immediately after the compulsory postnatal leave; and/or in fractions, each of at least one week, during a maximum period of 21 weeks following the compulsory postnatal leave;
- for every week of leave, a gross maternity allowance of EUR 475.41 (as of 1 January 2018) is available;
- as from 1 January 2017 and for any maternity leave beginning by that date, the provisions mentioned above will be improved in the following way: the maximum duration of the leave will be 12 weeks (13 in case of multiple pregnancy), including the 'obligatory' three weeks; the optional part of the leave may be used over a period of 36 weeks; during the optional part of the leave, a worker will be allowed to resume her activities half-time. In that case, the optional part of the leave will amount to a maximum of 18 (or 20) weeks, and the weekly benefit will be halved to EUR 237.71 (as of 1 January 2018);
- in order to promote the reconciliation of work and family life, there is an additional scheme of 'maternity support', under which the beneficiary receives 105 'service vouchers', each worth EUR 9. Private persons normally buy and use service vouchers to remunerate menial household tasks, performed by workers in precarious situations (unemployed, beneficiaries of public assistance, etc.) who in this way are given access to regular employment. The workers are employed by specially created 'service voucher firms' which remunerate them. One voucher corresponds to one hour's work, and the difference is compensated for by a state subsidy paid to the firm.

The amount of the maternity allowance seems to meet the requirements of Article 8(3) of Directive 2014/41/EU. The criteria that were used to fix this amount appear to fall under subsection (a), but it is definitely higher than the sickness benefit, most probably as an incentive to use maternity leave.

As for Article 8(4) of the directive, the 'maternity support' scheme can hardly be regarded as an implementation measure, as it is aimed at relieving the self-employed worker of part of her domestic tasks and not at providing her with temporary replacement in her gainful activities.

## **8.8 Occupational social security**

### **8.8.1 Implementation of provisions regarding occupational social security**

Originally, Article 12 of the Gender Act of 10 May 2007, which deals with occupational social security schemes, only applied to schemes for paid workers. However, when the Gender Act had to be amended as a consequence of Case C-236/09 *Test-Achats*, it was realised that self-employed workers used to subscribe to various individual or collective insurance schemes in order to complement statutory social security benefits (most of them within legal frameworks provided by diverse statutes); gender-based actuarial factors were routinely used to calculate premiums and benefits. Thus, the same Act of 19 December 2012 that amended Article 10 of the Gender Act of 10 May 2007 as to goods and services also amended Article 12 to provide a non-exhaustive list of such schemes and to state that the use of gender-based actuarial factors was no longer permitted in schemes set up or contracts concluded after 20 December 2012.

#### 8.8.2 Application of exceptions for self-employed persons regarding matters of occupational social security (Article 11 of Recast Directive 2006/54)

None of the items mentioned in Article 11 of the Recast Directive can possibly fall within the notion of an 'occupational scheme' as it is understood in Belgium (such as private insurance, falling under the scope of Directive 2004/113), so there is no necessity for such exclusions (see section 6, above).

#### **8.9 Prohibition of discrimination**

In describing the material scope of the Gender Act of 10 May 2007, Article 6(1)(7) includes membership of a workers' or employers' organisation, or any other organisation of persons performing a professional activity.

#### **8.10 Evaluation of implementation**

The Gender Act of 10 May 2007 can be considered to implement the directive correctly.

#### **8.11 Remaining issues**

Nothing specific to report.

## **9 Goods and services (Directive 2004/113)<sup>79</sup>**

### **9.1 General (legal) context**

9.1.1 Surveys and reports about the difficulties linked to equal access to and supply of goods and services

Nothing to report.

9.1.2 Specific problems of discrimination in the online environment/digital market/collaborative economy

There is absolutely no relevant literature to mention, nor case law or complaints relating to gender discrimination in the collaborative economy.

The only measures adopted until now to regulate the collaborative economy are of a fiscal nature. However, access to and provision of goods and services fall within the material scope of the Gender Act of 10 May 2007, and any person involved in such activities is liable under the act. So, hypothetically, if for instance, provider A makes himself known to platform B as a car driver, but only for women, and if B takes heed of such restriction, potential user C, a man, might complain of gender discrimination against A as well as B - in so far as he ever knew he had been a victim.

9.1.3 Political and societal debate

Bianca Debaets, the Secretary of State for Equal Opportunities of the Brussels Region, and Wheel of Care - a group of nurses and midwives offering home care - launched a campaign on breastfeeding in public in 2018. About 20 bars and restaurants now display a sticker on their windows indicating that young mothers are welcome to breastfeed their children on their premises. In addition to these stickers, the business will also offer a cushion to facilitate breastfeeding and a changing table. All Brussels socio-cultural centres are also 'breast feeding friendly'.

### **9.2 Prohibition of direct and indirect discrimination**

National law prohibits direct and indirect discrimination on the ground of sex in access to, and the supply of, goods and services. The horizontal prohibition of discrimination is laid down in Article 19 of the Gender Act of 10 May 2007. Under Article 8, the prohibition is applicable to access to goods and services, a notion defined in Article 6(1)(1).

### **9.3 Material scope**

The material scope of national law relating to access to goods and services is broader than specified in Directive 2004/113, as Article 6(1)(1) does not exclude the content of media, advertising and education from the material scope of the Gender Act of 10 May 2007.

### **9.4 Exceptions**

National law has not applied the exceptions from the material scope, regarding the content of media, advertising and education, given the lack of the adoption of an ancillary royal decree required by Article 4(5) of the Gender Act (see section 9.5. below).

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<sup>79</sup> See e.g. Caracciolo di Torella, E. and McLellan, B. (2018), *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.



## 9.5 Justification of differences in treatment

Article 9(1) of the Gender Act of 10 May 2007 was reproduced from Article 4(5) of the directive to allow that certain goods and services might be reserved exclusively or mainly to persons belonging to one sex if justified and proportionate. However, under Article 9(2) these goods and services must be listed exhaustively in an ancillary royal decree, which has not yet been promulgated 11 years after the Gender Act came into force. Under Article 9(3), in the absence of such a royal decree, it was for the courts to assess whether a difference in treatment could be justified in individual cases, but only until 21 December 2007; consequently, no exception is presently admissible under the Gender Act. Currently, certain aspects of the concept of 'goods and services' fall within the respective jurisdictions of the federate authorities; their various legislative anti-discrimination instruments (see above) contain identical provisions to Article 9 of the Gender Act, including the need for ancillary decrees to list possible exclusions, none of which has been promulgated so far. Again, in the absence of such decrees, the courts have the power to assess justifications for differences in treatment, but there is no time limit to this power. The discrepancy between federal and federate provisions led to the following bizarre case.

When a man complained of gender discrimination because access to a fitness facility was reserved for women, the Court of Appeal in Liège found that the material object of the dispute fell within the notion of 'sport', i.e. within the jurisdiction of the French Community. Under the *decree* of 12 December 2008, the court was competent to assess the proposed justifications for the difference in treatment, being the morphological differences between men and women and the protection of privacy. The court found that these justifications were valid.<sup>80</sup> In contrast, under the Gender Act the court would have been bound to conclude that the difference in treatment was direct discrimination, as it would have had no power of assessment.

## 9.6 Actuarial factors

Under Article 10(1) of the Gender Act of 10 May 2007, the use of gender-segregated actuarial factors for the calculation of premiums and benefits in life insurance was permitted without any time limit. However, in compliance with the CJEU's decision in Case C-236/09, that provision was annulled by the Constitutional Court,<sup>81</sup> then reformulated by an Act of 19 December 2012. Under the new version, the previous permission is only applicable to contracts concluded before 21 December 2012.

## 9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113

Under Article 10(1) of the Gender Act of 10 May 2007, the use of gender-segregated actuarial factors for the calculation of premiums and benefits in life insurance was permitted without any time limit. However, in compliance with the CJEU's decision in Case C-236/09, that provision was annulled by the Constitutional Court,<sup>82</sup> then reformulated by an Act of 19 December 2012. Under the new version, the previous permission is only applicable to contracts concluded before 21 December 2012.

## 9.8 Positive action measures (Article 6 of Directive 2004/113)

No positive action measures in relation to this area have been adopted.

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<sup>80</sup> Court of Appeal Liège, Judgment of 4 November 2014, (2015) *Journal des tribunaux*, p. 42 with S. van Drooghenbroeck's case note.

<sup>81</sup> Constitutional Court, Judgment no. 116/2011 of 30 June 2011.

<sup>82</sup> Constitutional Court, Judgment no. 116/2011 of 30 June 2011.

## **9.9 Specific problems related to pregnancy, maternity or parenthood**

There is no information on discrimination relating to access to and provision of services relating to pregnancy, maternity or parenthood. The Institute for Equality of Women and Men notes in its annual report that 22 % of complaints and requests for information concern discrimination based on maternity and pregnancy. The majority relate to employment (85 %) and 2 % are filed under 'good and services' without further specification.

As mentioned above, an initiative has been taken by the minister in charge of gender equality in the Brussels-Capital Region regarding the possibility for women to breastfeed in public.

## **9.10 Evaluation of implementation**

The only problem to be reported is the absence of the adoption of a royal decree that would fix the exceptions to the principle of equal access to and provision of goods and services. Consequently, no exception is presently admissible under the Gender Act of 10 May 2007 for federal matters.

## **9.11 Remaining issues**

Nothing to report.

## 10 Violence against women and domestic violence in relation to the Istanbul Convention

### 10.1 General (legal) context

#### 10.1.1 Surveys and reports on issues of violence against women and domestic violence

The results of a 'National Survey on the impact of domestic violence on work, workers and workplace in Belgium' were published by the Institute for Equality of Women and Men in 2017.<sup>83</sup> The survey consisted of over 40 questions that focused on workers' experiences of domestic violence and the workplace, including questions regarding whether they were personally experiencing, or had ever experienced domestic violence, and if they were aware of co-workers who were experiencing or perpetrating domestic violence (DV).

A total of 1 989 people completed the survey (69.3 % of respondents were women and 30.5 % were men). Almost one-third (28 %) of respondents reported personal experience of domestic violence at some point in their lives, which is similar to the results of other studies on the impact of DV at the workplace.

Of those who reported DV experience, 72.9 % indicated it affected their ability to work, and a further 42 % indicated that DV affected their workplace 'most' of the time or 'all the' time, one reason being that the abuse can continue at the workplace through abusive phone calls or texts, or the abuser physically coming to the workplace. Around 41 % indicated that DV made them miss work, 12.6 % reported having experienced discrimination after discussing the DV at work, and sadly, 7.2 % lost their jobs as a result of the DV.

In terms of reporting to and accessing formal sources of support, almost two-thirds of all victims did not receive assistance, despite the majority of respondents (89 %) being aware of the services available for victims of DV. The majority (88 %) did not believe that employers were aware when DV was affecting their workers, and 22 % believed that employers did not respond positively to employed victims of DV. Around one-third of the respondents also indicated that they believed that union officials responded rarely or not at all in a positive way to help members when union officials became aware of the experience of DV.

An interim report on the implementation of the *National Action Plan for the Fight Against All Forms of Gender-Based Violence 2015-2019* provides information on the registration of complaints to different services, on the measures to prevent and protect with regard to gender-based violence adopted by federal and federate entities during the period 2015 and 2017 under different aspects, notably as required by the Istanbul Convention (e.g. phone helpline, shelter services, etc).<sup>84</sup>

#### 10.1.2 Overview of national acts on violence against women, domestic violence and issues related to the Istanbul Convention

- Act of 24 November 1997 combating domestic violence;<sup>85</sup>

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<sup>83</sup> Institute for Equality of Women and Men (2017), *National Survey results on the impact of domestic violence on work, workers and workplace in Belgium*, [https://igvm-iefh.belgium.be/fr/publications/enquete\\_nationale\\_sur\\_limpact\\_de\\_la\\_violence\\_entre\\_partenaires\\_sur\\_le\\_travail\\_les](https://igvm-iefh.belgium.be/fr/publications/enquete_nationale_sur_limpact_de_la_violence_entre_partenaires_sur_le_travail_les).

<sup>84</sup> Information on the national action plan and its implementation can be found in French and Dutch at <https://igvm-iefh.belgium.be/fr/activites/violence/pan>.

<sup>85</sup> M.B./B.S., 06.02.1998, p.3353 ; *Loi du 27 novembre 1987 visant à combattre la violence au sein du couple/Wet stekkende om het geweld tussen partners tegen te gaan*.

- Act of 28 January 2003 assigning the family home to the spouse or legal cohabitant who has been the victim of physical violence from the hands of the other spouse or partner, and supplementing article 410 of the Criminal Code;<sup>86</sup>
- Board of Prosecutors-General, Circular No. Col 4/2006 (amended on 12 October 2015) fixing guidelines for criminal policy regarding domestic violence and aiming at a uniform system of identification, registration and intervention of domestic violence by the police and judicial services;<sup>87</sup>
- Act of 15 May 2012 concerning temporary interdiction of residence in case of domestic violence.

### 10.1.3 National provisions on online violence and online harassment

The Penal Code contains provisions that can be used with regard to online violence and harassment. Article 442*bis* of the Penal Code introduced by the Federal Act of 30 October 1998 criminalised harassment in general: 'Anyone who has harassed another when he/she knew, or should have known, that he/she would seriously affect the peace of mind of the person concerned by this behaviour'. This provision has a general scope of application.

Other general penal offences such as 'right to one's image', libel and defamation can also be used by a victim.

### 10.1.4 Political and societal debate

Nothing to report.

## 10.2 Ratification of the Istanbul Convention

The Belgian ratification of the Istanbul Convention (IC) required that all federate authorities, each one having a jurisdiction over a number of issues covered by the IC, had granted their assent to the federal Parliament's ratification. This process started in 2013 and was completed in 2015.<sup>88</sup> The Act of Ratification was then promulgated on 1 March 2016.<sup>89</sup>

<sup>86</sup> M.B./B.S., 12 February 2003, p.7022 ; *Loi visant à l'attribution du logement familial au conjoint ou au cohabitant légal victime d'actes de violence physique de son partenaire, et complétant l'article 410 du Code pénal/ Wet tot toewijzing van de gezinswoning aan de echtgenoot of aan de wettelijk samenwonende die het slachtoffer is van fysieke gewelddaden vanwege zijn partner en tot aanvulling van artikel 410 van het Strafwetboek.*

<sup>87</sup> Col 4/2006, available in French at [https://igvm-iefh.belgium.be/sites/default/files/downloads/col42006\\_fr.doc.pdf](https://igvm-iefh.belgium.be/sites/default/files/downloads/col42006_fr.doc.pdf), accessed on 17 April 2019.

<sup>88</sup> *Décret* Flemish Community, 29 November 2013; *Décret* French Community, 27 February 2014; *Décret* Walloon Region, 13 March 2014; *Décret* French Community Commission, 7 April 2014; *Dekret* German-speaking Community, 6 May 2014; *Ordonnance/Ordonnantie* Brussels Capital Region, 19 March 2015.

<sup>89</sup> *Moniteur belge/Belgisch Staatsblad*, 9 June 2016.

## **11 Compliance and enforcement aspects (horizontal provisions of all directives)**

### **11.1 General (legal) context**

#### 11.1.1 Surveys and reports about the particular difficulties related to obtaining legal redress

First, it should be noted that the national courts do not classify gender discrimination cases as such and that there is no systematic publication of cases. Therefore, there is no readily accessible data.

Case law relating to gender discrimination deals mainly with discriminatory dismissals or non-recruitments.

The evaluation report<sup>90</sup> of the anti-discrimination laws points to some hindrances regarding access to courts, such as:

- costs including the possibility of paying a procedural indemnity in case of denial of the claim;
- the potential difficulties linked to the coexistence of different time-limits depending on the type of action (civil, criminal, labour);
- the formalistic approach of protection of witnesses (only to persons who report the facts in a signed and dated document);
- the potential benefits of the outcome of legal action (payment of a fixed compensation without reintegration in the job).

As far as gender equality law is concerned, one should also point to the limited resources of the Institute for Equality of Women and Men and its inadequate visibility to the public. This contributes to the low number of discrimination cases reported.

#### 11.1.2 Other issues related to the pursuit of a discrimination claim

The situation of discrimination might be improved by the adoption of provisions which enable the labour inspectorates to use anonymous calls in order to establish the existence of discriminatory practices (through the whole scope of EU anti-discrimination legislation as meant by Article 19(1) TFEU). The Parliament of the Brussels Capital Region<sup>91</sup> and the federal Parliament<sup>92</sup> took such steps recently, and other federate authorities might follow these examples. However, due to the complexity of the division of competence in the country, the effectiveness of such innovations might be hampered by hesitations as to respective jurisdictions (legal uncertainty may arise as to which of those instruments is applicable to a case which occurs in education (within a community's jurisdiction) or in local administration (within a region's jurisdiction)).<sup>93</sup>

Moreover, there are serious differences between the provisions already adopted (e.g. in Brussels Capital, the inspectorate may perform anonymous calls on its own initiative, while

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<sup>90</sup> Evaluation Commission of the federal law aiming at fighting discrimination (2017), *First evaluation report, February 2017 (Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations, Premier rapport d'évaluation)*, report available at: [www.unia.be/files/Documenten/Aanbevelingen-advies/Commission dévaluation de la législation fédérale relative à la lutte contre les discriminations.pdf](http://www.unia.be/files/Documenten/Aanbevelingen-advies/Commission_dévaluation_de_la_législation_fédérale_relative_à_la_lutte_contre_les_discriminations.pdf)).

<sup>91</sup> Ordonnance/Ordinantie of 16 November 2017; all legal texts quoted are available in French and Dutch at <http://www.juridat.be>.

<sup>92</sup> Act of 15 January 2018 amending the Social Penal Code.

<sup>93</sup> See Labour Court in Namur, judgment of 28 April 2003, *Chroniques de droit social*, 2004, p.100 with J.Jacqmain's case note; and Labour Court of Appeal in Liège, judgments of 12 March 2013 and 18 February 2014, *Rôle général* No. 2012/AN/41, unreported.

at federal level, it must obtain the advance permission of the *auditeur du travail/arbeidsauditeur*, the public prosecutor specialised in social law matters).

### 11.1.3 Political and societal debate and pending legislative proposals

The Institute for Equality of Women and Men (unlike UNIA, the equality body for other discriminatory grounds) remains to this day a federal institution. It has signed protocols of collaboration with five federated entities (French Community, Walloon Region, French Community Commission, Brussels-Capital Region and German-speaking Community), which enables it to act against discrimination on the basis of gender in matters falling within the competence of these entities. It does not have a protocol with the Flemish Community, which has a service in charge of diversity issues, and where complaints should be addressed to the *Vlaamse Ombudsman* (Flemish Ombudsperson). As a result, in order to know which organisation to turn to, the victim of gender discrimination must first be able to identify whether the facts fall within a field of competence of the Flemish Region or of another entity, which requires a thorough knowledge of the system of division of powers and may, in some cases, impair action from a victim.

## 11.2 Victimisation

Given that the Gender Act of 10 May 2007 is aimed at implementing all EU directives concerning gender equality, two provisions were necessary: Article 22 on victimisation in employment relations including occupational social security schemes, and Article 21 on victimisation in other matters. The pattern of both provisions is the same: after the alleged victim has either filed a reasoned complaint about gender discrimination or taken legal action, the alleged perpetrator may not impose any adverse measure on the alleged victim, unless on grounds entirely unrelated to the complaint or lawsuit, for which the alleged perpetrator bears the full burden of proof. This protection against victimisation is applicable during 12 months after the complaint was filed, or until the end of a period of three months following the delivery of a final judgment in the lawsuit. As to reparation, if the alleged perpetrator has subjected the victim to victimisation in breach of those rules: under Article 22, fixed damages equal to six months' gross remuneration are due, unless the victim is reinstated in her/his job or in unmodified employment conditions; and under Article 21, fixed damages equal to EUR 1 300 are due.

The provisions of the Gender Act of 10 May 2007 offer sufficient implementation of the content of Article 24 of Directive 2006/54/EC and Article 10 of Directive 2004/113/EC. For instance, the protection in Article 22 of the act is applicable within the employment relationship as well as after it has been terminated: this complies with the CJEU's decision in Case C-185/97 *Coote*. Article 22 applies both to victims and to any worker who is called as a witness, either during the examination of the complaint or during the lawsuit: this was regarded as an indispensable extension of the protection against victimisation, while there was no need for such an extension in favour of workers' representatives (mentioned in Article 24 of the Recast Directive), who already enjoyed better protection under other statutes or collective agreements.

However, the effectiveness of the protection against victimisation is disputable in the light of the purpose of the directives. Indeed, six months' gross remuneration is the standard amount in Belgian labour law for fixed damages aimed at compensating workers after an unlawful dismissal in various specific situations (e.g. maternity leave, parental leave but also vocational training leave, etc.); in fact, the amount was already the same in the first Gender Equality Act (of 4 August 1978). Over nearly 40 years, the case law concerning victimisation has not been very abundant, but this is mainly because, in many cases, gender discrimination consisted of the victim's dismissal (which would not have occurred if she had been a man), so that there was neither the time nor the space for victimisation. Still, the amount of fixed damages is too modest to deter an unlawful dismissal in any

specific situation, unless the employer is a very small business with very limited financial resources.

### 11.3 Access to courts

#### 11.3.1 Difficulties and barriers related to access to courts

Under Articles 23 to 25 of the Gender Act of 10 May 2007, any person who claims to be a victim of gender discrimination has access to the courts. Under Article 578(10) of the Judicial Code, claims based on the Gender Act of 10 May 2007 and concerning matters of employment fall within the jurisdiction of the labour courts; however, if the source of the alleged discrimination lies in a decision by an authority, its annulment may be sought from the *Conseil d'État / Raad van State*, and if it lies in a legislative instrument, from the Constitutional Court. Claims concerning goods and services fall within the general jurisdiction of the civil courts.

There are no legal barriers to access; the cost of legal proceedings and the conditions of entitlement to legal aid certainly result in a deterrent effect for workers who cannot rely on a trade union's assistance, but this is not specific to gender equality matters.

Two distinct elements might be pointed out as particular causes of the reluctance to take individual legal action. One concerns gender discrimination in remuneration: given that in the private sector, the whole structure of pay scales is governed by collective agreements, it is always bold to claim that such an agreement induces gender discrimination. The other results from the current concept of 'diversity', under which gender is only one criterion among many others, some of which may focus the attention of political decision makers and of the media for circumstantial reasons, such as religion or ethnic origin. For example, the issue of access to the labour market or training for women with a veil is only addressed in terms of religious belief. Today, it become weird to complain about gender discrimination. This is the same for sexual harassment, women prefer to complaint about harassment, using the same legal basis as men.

#### 11.3.2 Availability of legal aid

Under Article 4 (6) of the Act of 16 December 2002, the Institute for Equality of Women and Men is entitled to take legal action in respect of all federal legislation concerned with gender equality. Under Article 35 of the Gender Act of 10 May 2007, entitlement to take legal action in order to uphold the principle of gender equality was conferred on trade unions, on organisations of employers and of self-employed workers and on any association or charity possessing legal personality and a charter under which it is aimed at upholding human rights or fighting discrimination.

There is hardly any significant case law because when a trade union is involved in a discrimination case, it is usually in its traditional function of providing legal assistance to its members; however, the *Fédération générale du travail de Belgique/Algemeen Belgisch Vakverbond* broke new ground when it supported the considerable costs of an appeal to the Court of Cassation, which resulted in the favourable solution of a case of gender discrimination in pay related to maternity.<sup>94</sup> As for associations and charities, so far none of them has ever taken legal action within the scope of the Gender Act of 10 May 2007; when *Test-Achats/Test-Aankoop* applied to the Constitutional Court concerning the issue which led to the CJEU's decision in Case C-236/09 *Test-Achats*, it did so as a defender of consumers' rights. In contrast, the Institute for Equality of Women and Men frequently goes to court alongside the claimant, e.g. on the issue which led to the CJEU's decision in Case C-65/14 *Rosselle*.

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<sup>94</sup> Final judgment in the case: Labour Court of Appeal in Brussels, 2 September 2009, (2010) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 23.

There is no specific legal aid, apart from free advice which the Institute for Equality of Women and Men is bound to provide under Article 4(5) of the Act of 16 December 2002 (see below). Under the Judicial Code, legal aid (i.e. *pro bono* assistance by counsel and an exemption from legal costs) is available to any person whose net monthly income does not exceed a fixed ceiling (i.e. for a single person, approximately EUR 1 000; for a person with dependants, between EUR 1 200 and 2 800 according to their number).

#### **11.4 Horizontal effect of the applicable law**

##### 11.4.1 Horizontal effect of relevant gender equality law

There is no difficulty with regard to the direct horizontal effect of gender equality law.

##### 11.4.2 Impact of horizontal direct effects of the charter after *Bauer*

The enforcement of gender equality in Belgium is based mainly on national law. However, the direct horizontal effect of European provisions is not contested by judges and is part of a long tradition. Therefore, if necessary, judges will have no problem in applying the Charter directly or interpreting national law in view of its provisions. An impact of the *Bauer* ruling is not expected.

#### **11.5 Burden of proof**

Article 33(1) of the Gender Act of 10 May 2007 was closely copied from Article 19(1) of the Recast Directive. Article 33(2) provides some examples of the notion of 'facts from which direct or indirect discrimination may be presumed,' but in too general a wording to be really helpful (e.g. 'elements which reveal some recurrence of the adverse treatment').

Case law concerning discrimination in recruitment is very scarce. Indeed, when the European Commission's proposal for the future Directive 97/80/EC was still under discussion, the usefulness of such an instrument as to the burden of proof had been questioned in Belgium, given that under Articles 870 and 871 of the Judicial Code, each of the litigating parties is bound to contribute to proof, and the courts may order them to produce whatever elements of proof are in their possession. However, there is no known case similar to C-415/10 *Meister*, so that the effectiveness of Articles 870 and 871 has never been tested in relation to gender equality. There is no case similar to C-104/10 *Kelly* either, but concerning a statute applicable to the Flemish civil service, the Constitutional Court ruled<sup>95</sup> that the protection of privacy had to be set aside when the principle of equality before the law (Article 10 of the Constitution) demanded that one civil servant be informed of the elements of another's personal record, which justified why the latter had been selected for promotion in preference to the former (this case was not related to gender).

#### **11.6 Remedies and Sanctions**

##### 11.6.1 Types of remedies and sanctions

Obviously, the most radical remedy consists of the general power to annul an unlawful provision, which is vested in the Constitutional Court under the Special Act of 6 January 1989 (with regard to legislative provisions) and in the *Conseil d'État / Raad van State* under the Consolidated Act of 12 January 1973 (with regard to regulations).

As for specific remedies and sanctions, they are all provided by the Gender Act of 10 May 2007. Under Article 23, a victim of discrimination may claim compensation for the prejudice that she/he has suffered, the amount of which she/he must demonstrate according to tort

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<sup>95</sup> Constitutional Court, Judgment no. 17/97 of 25 March 1997, (1997) *Journal des tribunaux*, p. 476.



law. Alternatively, the victim may claim fixed damages equal to six months' gross pay (in employment matters) or EUR 1 300 (in other matters), but these amounts may be halved if the perpetrator succeeds in demonstrating that the adverse treatment would still have occurred in the absence of discrimination (this is an application of the CJEU's decision in Case C-180/95 *Draehmpaehl*). Under Article 25, the victim, the equality body (see below) or an interest group (see below) may apply for a court order to put an end to the act that caused discrimination, and under Article 24, a failure to comply may entail a penalty payment. Under Articles 26 to 31, various breaches of the act are also penal offences, the perpetrator of which is liable to imprisonment for one month up to one year and/or a fine of EUR 300 up to EUR 6 000. Under Articles 28/1 and 28/2, both inserted by an Act of 22 May 2014, discrimination in access to goods and services and discrimination in employment relations are such penal offences.

#### 11.6.2 Effectiveness, proportionality and dissuasiveness

Curiously, although the CJEU had to state (in Case C-271/91 *Marshall II*) that no *ceiling* could validly be imposed on compensation for the actual prejudice, until 2007 victims of discrimination in Belgium were hampered by the absence of a legal *floor* when the prejudice was not material; thus, the introduction of the possibility of claiming fixed damages under Article 23 of the Gender Act of 10 May 2007 was a definite improvement. Still, the doubts which were expressed above (concerning protection against victimisation) as to the effectiveness of such modest fixed damages as a deterrent also apply to compensation.

Another moot point concerns the scope of the courts' power to order perpetrators to put an end to discrimination consisting of the dismissal of the victim. So far, the Court of Cassation's inflexible case law has decreed that no court may order an employer to reinstate a worker under an employment contract; this doctrine was applied more than 25 years ago to a case of direct gender discrimination<sup>96</sup> and has produced a freezing effect ever since. In contrast, when the *Conseil d'État / Raad van State* annuls an administrative decision as being unlawful, it is deemed never to have existed so that, for instance, a dismissed civil servant must be reinstated;<sup>97</sup> however, no such case related to gender discrimination can be quoted.

### 11.7 Equality body

The gender equality body is the Institute for Equality of Women and Men, which was created by the Act of 16 December 2002. Its competence covers discrimination on the ground of gender (including gender reassignment), while other grounds fall within the respective competences of two other institutions, the Interfederal Centre for Equal Opportunities (now Unia) and the Federal Centre for Migration (now Myria). The institute has a hybrid purpose. On the one hand, it serves as an administrative body to implement federal policy on gender equality. On the other, it is in charge of promoting gender equality through all useful means, including research; in this capacity, the institute is bound to provide advice to victims of gender discrimination, and is also entitled to take legal action to uphold gender equality.

### 11.8 Social partners

The Gender Act of 10 May 2007 assigns two different roles to the social partners. On the one hand, before adopting the various royal decrees ancillary to the act, the federal Government is bound to request the opinions of diverse advisory organs in which the social partners are represented, such as the National Labour Council. On the other hand, under

<sup>96</sup> Court of Cassation, judgment of 20 June 1988, (1988) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 345.

<sup>97</sup> In that respect, see the pending Case C-96/17 *Vernaza Ayovi*, in which the CJEU has been invited to compare an employee with a fixed duration contract (Directive 1999/70/EC) and a tenured civil servant.

Article 35 trade unions, employers' organisations and self-employed workers' organisations are entitled to take legal action in order to uphold gender equality, although trade unions usually prefer to assist members in individual cases.

### **11.9 Other relevant bodies**

As already mentioned, the labour inspectorates can play a role in the fight against discrimination.

First, labour inspectors have a role in controlling information provided by companies in their annual reports on differences in pay and labour costs between women and men, but due to their limited human resources, it has barely been carried out so far (see section 4.2.1, above).

Secondly, the recent introduction of the use of anonymous calls in order to establish the existence of discriminatory practices is the responsibility of labour inspectors.

### **11.10 Evaluation of implementation**

Globally, the system in place is quite comprehensive (in terms of support to victims) and corresponds to EU requirements. However, access to justice remains costly in general, protection against victimisation for witnesses can be improved and remedies and sanctions could more dissuasive to better protect potential victims of discriminatory acts.

### **11.11 Remaining issues**

Nothing to report.

## 12 Overall assessment

Apart from the obvious gaps described above, in the view of the expert, the main weaknesses of the transposition are the following:

- the unnecessary complication of the concepts used in the trio of anti-discrimination legislation adopted on 10 May 2007;
- eleven years after the Gender Act came into force, the absence of several ancillary royal decrees hinders the effective application of the Act;
- the questionable effectiveness of the remedies available to victims;
- the uneasy coexistence of federal and federate legislation concerning matters covered by EU law.

In the view of the expert, the following can be considered examples of positive implementation that exceed the requirements of EU law:

- the provisions aimed at protecting pregnancy and maternity are regarded as a condition for gender equality in employment;
- gender equality in statutory social security schemes also applies to family benefits and survivor's benefits;
- the whole statutory social security scheme for self-employed workers is also applicable to assisting spouses or registered partners;
- education and media are not excluded from the material scope of legislation in the context of gender equality in access to goods and services; and
- the Belgian federal legislation exceeds the EU requirements in relation to the equality body: under its Institution Act of 16 December 2002, the Institute for Equality of Women and Men is authorised to initiate litigation in order to enforce the principle of gender equality;
- the generous system of leaves for family related reasons offers great flexibility to parents of children up to the age of 12.

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