

EUROPEAN LAW ACADEMY, TRIER

**EUROPEAN UNION LAW ON
EQUALITY BETWEEN MEN AND WOMEN**

**THE BURDEN OF PROOF
AND
ACCESS TO JUSTICE
IN DISCRIMINATION CASES**

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I. PRELIMINARY PRINCIPLES

I.1. The foundations of European social policy and how they frame the principle of non-discrimination

The **Treaty of Rome** contained few articles of specific relevance to social policy.

The essence of provisions in this field was to enshrine the free mobility of labour¹ and freedom of establishment² with a view to the future common market. The Treaty of Rome prohibited discrimination on grounds of nationality within its scope of application, and also discrimination between men and women with regard to pay for equal work.

*The **Single European Act (SEA)**, signed at Luxembourg on 17 February 1986 by nine Member States and on 28 February 1986 by Denmark, Italy and Greece, brought the first major amendments to the Treaty establishing the European Economic Community. It entered into force on 1 July 1987. This injected fresh momentum into social policy, in particular in the fields of occupational health and safety, dialogue between management and labour, and economic and social cohesion.*

There had already been some provisions on social policy in the EEC Treaty, but the new Act introduced two additional articles in this area. Article 118A of the EC Treaty gives the Council powers, by a qualified majority and through a cooperation procedure, to adopt minimum rules encouraging “improvements, especially in the working environment, as regards the health and safety of workers”. Article 118B of the EC Treaty makes it the Commission’s task to drive dialogue between management and labour at European level.

The new Article 13 of the EC Treaty, introduced by the Treaty of Amsterdam of 1996³, refers to rules designed to prevent discrimination against citizens of the Community⁴, and the Council is authorised, if acting unanimously, “to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

The **Treaty of Amsterdam** restored the unity and coherence of European social policy.

Article 136 of the **Treaty of Amsterdam** reaffirms that social policy is a responsibility shared by the European Community and the Member States.

This is reflected in complementary levels of competence for combating discrimination.

¹ Articles 39 to 42 of the EC Treaty, formerly Articles 48 to 51

² Articles 43 to 48

³ The Treaty of Amsterdam was the outcome of an Intergovernmental Conference that began on 29 March 1996 during the European Council in Turin. It was adopted at the European Council in Amsterdam (16 and 17 June 1997), then signed on 2 October 1997 by the foreign ministers of the 15 Member States. It entered into force on 1 May 1999.

⁴ P.RODIERE, *Droit social de l’Union européenne*, L.G.D.J., Lextension éditions, 2008, p. 166: it excludes discrimination on the ground of nationality, but this does not mean that other types of discriminations (race, ethnic origin, religion...) experienced by foreigners from within or outside the Community do not fall within the scope of Directives 2000/43 and 2000/78 (cf. Articles 2(1)).

*The objectives of social policy are then spelt out, in line with the **European Social Charter** signed in Turin on 18 October 1961 and the **Community Charter on the Fundamental Rights of Workers** of 1989. They include promoting employment, improving living and working conditions, providing adequate social protection, pursuing dialogue between management and labour, developing human resources to permit a sustained high level of employment and combating forms of social exclusion.*

Article 137⁵ provides that, in the fields listed below, Community shall support and complement the activities of the Member States by passing directives, to be adopted by a qualified majority and in a codecision procedure with the European Parliament, after consulting the Economic and Social Committee and the Committee of the Regions:

- *workers' health and safety;*
- *working conditions;*
- *integration of persons excluded from the labour market;*
- *information and consultation of workers;*
- *equality of men and women with regard to their labour market opportunities and treatment at work.*

In Community law, there is a link between the principle of equal treatment and the principle of non-discrimination, both direct and indirect.

*Discriminatory actions are prohibited, first of all in line with the case-law from the European Court of Justice, and secondly as enshrined in various directives. **Directives 2000/43 and 2000/78** define the concepts of direct and indirect discrimination⁶.*

*Article 2(3) of these **Directives 2000/43 and 2000/78** assimilates harassment as a form of discrimination, triggering a similar protection regime.*

I.2. The evolution and purpose of fundamental social rights: protective mechanisms to combat discrimination

Community law prohibits discrimination⁷ in relation to conditions of occupation and employment⁸, in both the private and the public sector^{9 10}.

⁵ Formerly Article 118

⁶ Article 2 (2a and 2b) of each directive

Application under Belgian law: B.RENAULD, Sources et notions du droit de la lutte contre les discriminations in Le droit de la lutte contre la discrimination dans tous ses états, ed. P.WAUTELET, Commission Université Palais, Université de Liège, 2009, pp. 22 ff.

⁷ Notwithstanding three exceptions:

- positive action in favour of disadvantaged groups to ensure that they enjoy full equality in their occupations (Article 5 of Directive 2000/43 and Article 7 of Directive 2000/78)
- genuine and determining occupational requirements (Article 4 of the Directives)
- justifications of indirect discrimination for legitimate reasons by appropriate and necessary means (Article 2(2) of both directives)

⁸ Viz.:

- conditions of occupation and employment, including dismissal and pay
- access to employment (selection, recruitment, promotion), guidance, vocational training and retraining, education
- membership of professional organisations and the resulting benefits

⁹ Article 3(1a ff.) of the Directives

¹⁰ Application in Belgian law: B.RENAULD, op. cit., pp. 51 ff.

In the case of racial and ethnic discrimination, this prohibition of discrimination is applied more broadly, as it includes the fields of social protection, social advantages, education etc.

There are provisions specific to each type of discrimination, but all these forms are covered by the protective mechanisms, the purpose of which is to ensure¹¹:

- **access to procedures** that guarantee the efficacy of Community law; recourse to courts and other tribunals, with a view to ensuring respect for Community law, is to be organised by each Member State, where this competence is retained;
- **organisation of the defence of wronged parties** by ad hoc structures with a legitimate interest in taking action against discriminatory acts and pursuing court or administrative procedures;
- **participation of management and labour** in promoting equal treatment, which is an extension to the issues addressed by social dialogue;
- **creation of public or private bodies** responsible for promoting equal treatment.

Finally, the efficacy of measures to combat discrimination has been strengthened by modifying the rules of evidence.

*Drawing on case-law from the Court of Justice, the first mechanism to be established was described in **Directive 97/80** of 15 December 1997 on the burden of proof in cases of discrimination based on sex. This was then extended to other types of discrimination, and national parliaments have the discretion to adopt more favourable rules¹².*

This mechanism will be examined later¹³: it applies to civil, but not criminal procedures.

I.3. Equal treatment for men and women

The topic of this paper is the principle of gender equality.

*Because gender equality is one of the fundamental aspects¹⁴ which the European Community seeks to promote, the **Treaty of Rome** already enshrined equality between men and women as a principle¹⁵.*

This is a fundamental thread that the various European Treaties have continued to develop.

*Article 119 of the **Treaty of Rome**, which became Article 141 of the Treaty establishing the European Community (EC Treaty), enshrines the principle of equal pay, which it sums up simply as “equal pay for equal work”.*

This simple expression of equal pay has evolved on the basis of the more general principle of equal treatment for men and women.

¹¹ P.RODIERE, op. cit., pp.170-171

¹² Article 10 of Directive 2000/78 and Article 8 of Directive 2000/43

¹³ See Chapter V below.

¹⁴ ECJ, ruling Defrene v. Sabena, C-43/75, 8 April 1976

¹⁵ Article 2 of the Treaty establishing the European Community (EC Treaty)

This principle has been proclaimed by all international organisations with competence in social matters, and in the constitutional rules of some Member States. These influences have set their stamp on the evolution of Community law.

This evolution is driven by three sources: case-law from the European Court of Justice, amendments to the Treaty, and derived law in the form of directives.

*The **Treaty on European Union (TEU)**, signed in Maastricht on 7 February 1992, which entered into force on 1 November 1993, declares in Article 2 on the common values of the Union, for example, that equality between men and women is a feature of European society¹⁶.*

According to Article 3, the Union promotes this equality.

*By highlighting fundamental rights, the authors of the **Amsterdam Treaty** sought to underscore respect for human rights in formal terms. This new Treaty specifically provides for:*

- *an amendment to Article 6 (formerly Article F) of the Treaty on European Union to consolidate the principle of respect for human rights and fundamental freedoms;*
- *introduction of a procedure to follow if a Member State is in breach of the principles on which the Union is founded;*
- *more effective measures to combat discrimination, which henceforth does not only mean national discrimination, but also discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation¹⁷;*
- *the inclusion of new provisions on the equality of men and women in the Treaty establishing the European Community;*
- *stronger protection for individuals in relation to the processing and free movement of personal data;*
- *inclusion in the Final Act of declarations on the abolition of the death penalty, respect for the status of religious, philosophical and non-denominational organisations, and the needs of people with disabilities.*

¹⁶ The Maastricht Treaty did not amend Article 119. However, the Social Policy Agreement annexed to the Treaty added a new paragraph on specific action designed to facilitate female employment or to compensate for the disadvantages women suffer. In a declaration likewise annexed to the Maastricht Treaty, the Member States furthermore made it clear that the principle of equality should not prevent them from taking measures intended to promote employment for women.

These additions were incorporated into the main body of the Treaty when the Treaty of Amsterdam entered into force. Article 119 became Article 141 EC when the Community's basic text was renumbered.

¹⁷ Under the Treaty establishing the European Community, Article 12 (formerly Article 6) provides that any discrimination on grounds of nationality is prohibited. Similarly, Article 141 (formerly Article 119) emphasises the principle of non-discrimination between men and women, but only with regard to equal pay.

The Treaty of Amsterdam is at pains to strengthen the principle of non-discrimination by adding two further provisions to the Treaty establishing the European Community. A new Article 13 complements Article 12, which already refers to discrimination on grounds of nationality. The new article provides that the Council can take measures required to combat any discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The new Article 13 mentions combating discrimination on grounds of disability. The Intergovernmental Conference that drew up the Treaty of Amsterdam wished to reinforce that guarantee by means of a declaration in the Final Act. This declaration provided that when the Community adopted measures approximating the legislation of Member States, its institutions must take into account the needs of people with disabilities.

*The **Treaty of Amsterdam**¹⁸, which entered into force on 1 May 1999, affirms the general principle of combating all forms of discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation¹⁹.*

*The **Treaty of Amsterdam** made equality between men and women a Community objective²⁰, explicitly providing that it should seek in all its actions to eliminate inequality and promote equality between men and women²¹.*

*According to Article 2 of this **Treaty of Amsterdam**, “the Community shall have as its task, (...) by implementing common policies or activities (...), to promote throughout the Community (...) equality between men and women, economic and social cohesion (...)”.*

Article 3 specifically states that the Community shall aim to eliminate inequalities, and to promote equality, between men and women.

The aim of Article 12 is – within the scope of the Treaty’s application, and without prejudice to any of its special provisions – to prohibit any discrimination on grounds of nationality.

*According to Article 13, without prejudice to the other provisions of the **Treaty of Amsterdam** and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, was empowered to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*

The new Article 141 of the EC Treaty signified a reinforcement of equal treatment for men and women and of equal opportunities. The old Article 119, by comparison, had been confined to ensuring that the two sexes received equal pay for equal work²².

*The **Treaty of Nice**, which was signed on 26 February 2001 and entered into force on 1 February 2003, extended the equal pay principle. It no longer applied merely to “equal work”, but also to “work of equal value”²³, and there was also recognition for “specific advantages”²⁴ to make it easier for the “underrepresented sex” to pursue a vocational activity and to prevent gender gaps in professional careers²⁵.*

*The **Treaty of Lisbon**, signed on 13 December 2007 and entering into force on 1 December 2009, consolidated that framework²⁶. The Treaty on the Functioning of the European Union (TFEU) provided in its Article 8: “In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.”*

¹⁸ Politically agreed on 17 June and signed on 2 October 1997

¹⁹ Article 13 of the EC Treaty

²⁰ Article 2 of the EC Treaty

²¹ Article 3(2) of the EC Treaty

²² The new provision allows the Council, by means of the codecision procedure and after consulting the Economic and Social Committee, to adopt measures to ensure that this principle is applied. In addition, Member States are granted the discretion to maintain or adopt measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

²³ Article 141 of the EC Treaty

²⁴ i.e. positive discrimination

²⁵ Article 141(4) of the EC Treaty

²⁶ The Treaty of Lisbon did not alter the provisions of Article 141 EC, which simply became Article 157 of the Treaty on the Functioning of the European Union (TFEU).

*The **Charter of Fundamental Rights**²⁷ recalls in Article 23: “Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.”*

The matter is likewise addressed in Article 21 on non-discrimination, which includes sex among the grounds covered, and in Article 33 on family and professional life²⁸.

Generally speaking, the Charter mainstreams gender equality by addressing it through the fundamental rights guaranteed in each chapter, notably in pursuit of dignity, freedoms and equality. The provisions of the Charter enjoy the same legal status as those of the Treaties.

It is incumbent upon the institutions to respect them in defining and implementing their policies, and this is subject to judicial review.

In Article 6, moreover, the new Treaty provided that the European Union was to abide by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR): “Fundamental rights, as guaranteed by the European Convention (...) and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”

“Equal treatment for men and women is one of the fundamental human rights whose observance the Court has a duty to ensure,” declares the European Court of Justice²⁹.

The principle of equal treatment for men and women applies generally.

This covers all employment relationships, including in the public sector^{30 31}.

I.4. Derived law: European sex equality directives

Since the adoption of the Treaty of Rome, there have been thirteen European directives to protect equal rights and opportunities in relation to employment, vocational training and social protection.

Twelve concern employment and were designed to extend the protection of equality to occupational life as a whole. There is one other directive which applies outside the field of employment.

²⁷ Charter of Fundamental Rights of the European Union, signed and proclaimed by the Presidents of the European Parliament, Council and Commission at the European Council in Nice on 7 December 2000

For the first time in EU history, the Charter of Fundamental Rights of the European Union took all the civil, political, economic and social rights of European citizens and all those living on EU territory and packed them into a single text. These rights are structured under six major headlines: dignity, freedoms, equality, solidarity, citizens’ rights, justice.

²⁸ “1. The family shall enjoy legal, economic and social protection. 2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.”

²⁹ ECJ 30 April 1996, P. v. S., C-13/94, ECR I, p. 2143, 22 September 1998, Coote, C-185/97

³⁰ ECJ 2 October 1997, C-1/95, Gerster, ECR I, p. 5253

³¹ Practice in the police and armed forces is not immune to the principle on the grounds that public security at home and abroad falls outside the scope of Community law (ECJ 15 May 1986, C-22/84, Johnston, ECR p. 1651; ECJ 26 October 1999, C-273/97, A.M. Sirdar).

Those that relate to employment are:

- **Directive 75/117/EEC** of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women³²
- **Directive 76/207/EEC** of 9 February 1976, amended by **Directive 2002/73/EC** of 23 September 2002 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions³³
- **Directive 79/7/EEC** of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security³⁴
- **Directive 86/378/EEC** on the implementation of the principle of equal treatment for men and women in occupational social security schemes, amended by **Directive 96/97/EC**³⁵
- **Directive 86/613/EEC** on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood³⁶
- **Council Directive 92/85/EEC** of 19 October 1992, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding³⁷
- **Directive 97/80/EC** on the burden of proof in cases of discrimination based on sex³⁸
- **Council Directive 98/52/EC** of 13 July 1998 on the extension of **Directive 97/80/EC** on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland³⁹
- **Directive 96/34/EC** of 3 June 1996 on the Framework Agreement on Parental Leave concluded by UNICE, CEEP and the ETUC, amended by **Directive 97/75/EC** of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the Framework Agreement on Parental Leave concluded by UNICE, CEEP and the ETUC⁴⁰.

³² OJ L, 19 February 1975

³³ OJ L, 14 February 1976 and 5 October 2002

³⁴ OJ L, 10 January 1979

³⁵ OJ L, 12 August 1986

³⁶ OJ L, 19 December 1986

³⁷ OJ L, 28 November 1992

³⁸ OJ L, 20 January 1988

³⁹ OJ L 205 of 22 July 1998

⁴⁰ OJ L, 16 January 1998

Directive 2004/113/EC does not relate to employment, but is on implementing the principle of equal treatment between men and women in the access to and supply of goods and services⁴¹.

In order to “simplify and improve Community legislation in the area of equal treatment for men and women in employment and occupation”⁴², the European institutions have now adopted a single equality directive.

5 July 2006 saw promulgation of what is called the “Recast” Directive, numbered **2006/54/EC**⁴³.

This directive was designed to coordinate the rules, fusing into a single text the six different directives that focused on equal pay for men and women, equal treatment for the two sexes at work and in training, promotion and employment conditions, occupational social security systems, and the arrangement governing the burden of proof.

Apart from this objective of coordination and a desire to make things clearer for citizens, the European legislation sought to enhance the *acquis communautaire* by incorporating case-law from the European Court of Justice.

This “recasting” enabled the new directive to merge the provisions on:

- a) access to employment, including promotion, and to vocational training,
- b) employment conditions, including pay,
- c) occupational social security schemes⁴⁴.

It excludes those statutory schemes which are only indirectly linked to terms of employment.

The Recast Directive also has some final provisions:

Article 31 concerns the reporting procedures required. By 15 February 2011, the Member States shall communicate to the Commission all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of the Directive. (...)

Article 32 deals with the review which the Commission is to conduct of the operation of the Directive, granting it the power, if appropriate, to propose any amendments it deems necessary.

Article 33 addresses implementation: Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 15 August 2008 at the latest or shall ensure, by that date, that management and labour introduce the requisite provisions by way of agreement. The obligation to transpose the Directive into national law shall be confined to those provisions which represent a

⁴¹ Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L, 21 December 2004

⁴² Statement of objectives, Proposal for a directive of the European Parliament and Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) of 21 April 2004

⁴³ Official Journal of 26 July 2006

⁴⁴ Article 1 of the Directive

substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are substantially unchanged arises under the earlier Directives.

*Article 34 is devoted to the repeal, with effect from 15 August 2009, of **Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC**, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives set out in Annex I, Part B.*

*The Recast Directive thereby repeals **Directive 75/117** on equal pay, **Directive 76/207** on equality at work (including the changes introduced by **Directive 2002/73**) and **Directive 86/378** on occupational social security schemes.*

*By incorporating provisions to ensure effective implementation of the equal treatment principle, **Directive 2006/54** likewise repealed **Directive 97/80** on the burden of proof.*

I.5. How Belgian law protects diversity and non-discrimination, in particular between men and women

Discrimination can occur anywhere in society and in company life.

However, discrimination is prohibited. In Belgium, the legal basis for combating discrimination was laid by three laws adopted on 10 May 2007, which entered into force on 9 June 2007:

- *the General Act of 10 May 2007 on Combating Certain Forms of Discrimination, replacing the law of 25 February 2003;*
- *the Act of 10 May 2007 on Combating Discrimination between Men and Women, which now substitutes the law of 7 May 1999 on equal treatment between men and women; this is known as the “Gender Act”;*
- *a third law enacted on 10 May 2007, known as the “Racism Act”, amended the Act of 30 July 1981 on Eliminating Certain Actions Inspired by Racism and Xenophobia.*

The General Act on Combating Certain Forms of Discrimination prohibits discrimination on grounds of age, sexual orientation, marital status, birth, wealth, religious or philosophical beliefs, political views, language, present or future health, disability, physical or genetic characteristics or social origin.

The Act on Eliminating Certain Actions Inspired by Racism and Xenophobia, in turn, prohibits the grounds of nationality, assumed race, skin colour, descent, and national or ethnic origin.

Their statutory provisions apply specifically to the world of work in general and industrial relations in particular, including access to employment, working conditions and terms of dismissal in both the public and the private sectors⁴⁵.

⁴⁵ See the following Sections of the laws adopted on 10 May 2007:

Section 5 of the “General Act”

Section 6 of the “Gender Act”

Section 5 of the “Racism Act”

For comment: B.RENAULD, op. cit., pp. 52-60

II. USEFUL CONCEPTS IN ANTI-DISCRIMINATION LAW

II.1. Common concepts in Community law⁴⁶

Recast Directive 2006/54/EC achieves one of its objectives by using common terms for all the areas it covers.

*To this end, it applies right across the board the definitions of direct and indirect discrimination already contained in **Directive 2002/73**, incorporating the case-law from the European Court of Justice.*

Direct discrimination occurs when sex is the criterion on which the different treatment is founded. Direct discrimination is a literal breach of the law; it exists de jure.

Indirect discrimination, a concept used by the Court of Justice⁴⁷ and in the directives⁴⁸, applies another criterion to the different treatment⁴⁹ but generates a similar result. Indirect discrimination is identified by observing the effects of a rule or practice. It is de facto discrimination^{50 51}, and the discriminatory effects therefore have to be examined. There has not necessarily been an intention to discriminate. The fact of discrimination is deduced from a measurable outcome: the proof is statistical insofar as the great majority of one of the two groups receiving different treatment will consist of individuals of the same sex.

*As an important tool among measures to combat unequal treatment, this concept of indirect discrimination is not utilised as much as it ought to be by national agencies and courts. To facilitate wider use, the Council included it in **Directive 97/80** of 15 December 1997 on the burden of proof in cases of discrimination based on sex, providing a definition that draws together the elements analysed above.*

⁴⁶ On this matter see: P.RODIERE, op. cit., pp. 280 ff. The following argument and notes reflect some of the comments by this author in the cited volume.

⁴⁷ This case-law has been particularly boosted by the issue of part-time work: apart from the above-mentioned cases, see ECJ 13 July 1989, Rinner-Kühn, C-171/88, ECR p. 2743; 13 December 1989, Ruzius Wilbrink, C-102/88, ECR p. 4311; 27 June 1990, Kowalska, C-33/89, ECR I, p. 2591; 7 February 1991, Nimz, C-184/89, ECR I, p. 297, about an instance of discrimination arising from a clause in a collective agreement, which the Court asked to have deleted. See also ECJ 9 September 1999, André Krüger, C-281/97, about a collective agreement excluding part-time workers (= women) from receiving a year-end bonus.

If, de facto, women take time off from work to look after children more frequently than men do (and why is that?), discrimination occurs if this leave results in an annual bonus being withdrawn or reduced, ECJ 21 October 1999, Susanne Lewen, C-333/97, ECR I, p. 7243.

⁴⁸ Compare in particular Directive 76/207 on equal treatment at work, which stipulates in Article 2 that the principle of equal treatment “shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status”, and

- Article 3 of Directive 86/613 extending the principle of equal treatment to self-employment.

⁴⁹ For example: the number of hours worked.

⁵⁰ It may be difficult to determine whether discrimination is direct or indirect; ECJ 7 July 2001, Julia Schnorbus, C-79/99; see K.BERTHOUS, Dr. Soc. 2001, p. 879.

⁵¹ Indirect discrimination: where an apparently neutral provision, criterion or practice “would put persons of one sex at a particular disadvantage compared with persons of the other sex”, and not “disadvantages a substantially higher proportion of the members of one sex”.

Indirect discrimination, specifies the Directive, exists “where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex...”⁵², and – the same definition goes on to add – it must be penalised, unless the originator can justify it.

Even if indirect, any discrimination that violates the principle of equal treatment shall be penalised as severely as if it were direct⁵³. There are, nevertheless, various potential grounds for justifying instances of indirect discrimination⁵⁴.

There are other differences which go hand in hand with this major distinction: direct discrimination is evident, because it uses sex as its criterion; when it is indirect, it is concealed behind another criterion which acts as a smoke screen.

II.2. A case in point: Belgian law⁵⁵

Belgium’s federal Parliament has harmonised the concepts used in the legislation it has enacted to fight discrimination in its various forms^{56 57}.

This paper will focus on the Act of 10 May 2007 on Combating Discrimination between Men and Women, rather than on the Act on Combating Certain Forms of Discrimination⁵⁸ adopted on the same date.

⁵² Article 2(2) of the Directive. The wording in the Commission’s draft directive proposed on 24 May 1988 was slightly different; see document COM(88) 269.

⁵³ V.P.GARRONE, “La discrimination indirecte en droit communautaire: vers une théorie générale”, *R.T.D. Eur.* 1994, p. 425; M.DURAND-PRINBORGNE, La notion de discrimination indirecte, mémoire pour le DEA de Droit social, Université de Paris I, September 1995

⁵⁴ P.RODIERE, op. cit., pp. 282 and 283, nos. 266 and 267

⁵⁵ B.RENAULD, op. cit., pp. 22 ff.

⁵⁶ See the directives:

Directive 2000/43/EC: Racial or ethnic origin

Directive 2000/78/EC: Age, sexual orientation, disability, belief or religion

Framework decision 2008/913/JHA: Race, colour, religion, descent, national or ethnic origin

⁵⁷ In chronological order:

First, since 1981 Belgium has had a statutory instrument for combating racism, i.e. the Act of 30 July 1981 on Eliminating Certain Actions Inspired by Racism or Xenophobia, known in short as the Racism Act. This statute has been amended several times in the past. In 1994, a definition of discrimination was added, along with provisions aimed specifically at racism in the workplace. On 20 January 2003, the law was changed and the word “race” was replaced by “assumed race”. In adopting this legislation, Belgium met its obligation to transpose European Directives 2000/43 and 2000/78. Directive 2000/43 is referred to as the “Race Directive”. Its purpose is to guarantee equal treatment for everyone, regardless of race or ethnic origin.

Second, European Directive 2000/78/EU serves the aim of guaranteeing equal treatment at work, in employment conditions and in vocational training. This Directive was transposed into Belgium’s federal legislation by the Act of 10 May 2007 on Combating Certain Forms of Discrimination. The Act of 10 May 2007 prohibits discrimination on grounds of age, sexual orientation, marital status, birth, wealth, religious or philosophical beliefs, political views, trade union views, language, present or future health, disability, physical or genetic characteristics or social origin. Since entering into force on 9 June 2007, this Anti-Discrimination Act of 10 May 2007 has replaced the old Anti-Discrimination Act of 25 February 2003. The Act of 10 May 2007 amended Sections 107 to 119 of the Act of 30 December 2009, with a number of different provisions (cf. *Moniteur belge* of 31 December 2009).

⁵⁸ Sections 7 and 8 of this Act address justifications for direct distinctions, Section 9 concerns justifications for indirect distinctions, Sections 10 and 11 consider general justifications, Sections 12 and 13 contain specific types of justification, and Section 14 refers to prohibitions. The latter is worded as follows:

“In areas within the scope of the present Act, all forms of discrimination are prohibited. In the meaning of the present Title, discrimination is understood to mean:

- direct discrimination;
- indirect discrimination;

Discrimination is taken to mean any difference in treatment on grounds of age, sexual orientation, marital status, birth, wealth, beliefs or ideology, political views, language present or future health, disability, physical or genetic characteristics or social origin⁵⁹, sex⁶⁰, nationality, assumed race, skin colour, descent, or national or ethnic origin⁶¹.

Discrimination may be direct or indirect.

Direct discrimination is taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the protected grounds, without any of the objective justifications provided by the law⁶².

Indirect discrimination is taken to occur where an apparently neutral provision, criterion or practice would put a person to whom a protected criterion applies at a particular disadvantage compared with other persons, without any of the objective justifications provided by the law⁶³.

An instruction to discriminate is likewise held to constitute discrimination. In certain cases relating to employment, the employer may be able to justify different treatment, in particular if there is a determining occupational requirement that has been objectively and reasonably substantiated.

Apart from the term “discrimination” as it occurs in European law, Belgian law makes use of the term “distinction”. Belgian law differentiates between situations where there have been a “distinction” in treatment, which may be direct or indirect, and facts constituting “discrimination”, which may similarly be direct or indirect.

Like the concept of discrimination, this concept of distinction breaks down into direct⁶⁴ and indirect⁶⁵ versions. These distinctions may be subject to justifications⁶⁶.

A direct distinction is defined as: the situation which results when, on grounds of sex, one person is treated less favourably than another is, has been or would be in a comparable situation.

-
- an instruction to discriminate;
 - harassment;
 - a refusal to make reasonable accommodation for a person with a disability.”

⁵⁹ General Act of 10 May 2007

⁶⁰ Act of 10 May 2007 on Combating Discrimination Between Men and Women

⁶¹ Act of 30 July 1981 on Combating Discrimination Between Men and Women

⁶² Section 4 of the General Act, Section 5 of the Gender Act and Section 4 of the Racism Act

⁶³ The concept had been borrowed directly from Article 2(2) of Directive 2000/78/EC.

⁶⁴ Section 8 of the Gender Act of 10 May 2007:

“In the field described in Section 6 (1,i), any direct distinction on grounds of sex constitutes direct discrimination, except in the circumstances described in Sections 9, 10, 16, 17 and 18.”

⁶⁵ Section 15 of the Gender Act of 10 May 2007:

“Any indirect distinction on grounds of sex constitutes indirect discrimination, unless the apparently neutral provision, criterion or practice underlying this indirect distinction is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

⁶⁶ Sections 16 to 18 of the Gender Act of 10 May 1997 sets out the terms for justifications (on this question, see B.RENAULD, op.cit, pp. 36 ff.)

Likewise, Section 18(1) stipulates: “a direct or indirect distinction on grounds of sex is not deemed in any way to constitute discrimination prohibited by the present Act where this direct or indirect distinction has been imposed by or by virtue of a law.”

As for indirect distinction, this is the situation created where an apparently neutral provision, criterion or practice would put a member of one sex at a particular disadvantage.

European gender equality legislation does not permit any direct or indirect discrimination between men and women; if such discrimination is observed, it is automatically penalised⁶⁷, except in the case of indirect discrimination for which a justification can be made⁶⁸.

Under Belgian law, on the other hand, “discrimination” is always open to justification for objective reasons, as long as these stand up to the criteria by being appropriate, legitimate, necessary and proportionate.

Hence the legislation differentiates between discrimination on the ground of sex, in matters falling within the scope of European law, and distinction on the ground of sex in the few areas⁶⁹ not covered by the Directives.

In Belgian law, the term “discrimination” designates something which cannot be condoned, whereas the term “distinction” is neither licit nor illicit, but neutral in its connotations.

The federal laws of 10 May 2007 are broader in scope than the European texts.

This decision to introduce a new concept has created considerable confusion, making the law difficult for practitioners to grasp.

⁶⁷ In this respect, see the judgment in Dekker, C-177/88 of 8 November 1990, ECR I, p. 1941; J.T.T. 1991, 122, obs. D. DE VOS; Chr. D.S., 1991, 43 obs. J. JACQMAIN. However, it has provoked profound debate. Cf. D. MARTIN, *Egalité et non discrimination dans la jurisprudence communautaire*, Bruylant, 2006.

⁶⁸ Indirect discrimination can only be accepted under strict conditions: it must pursue a legitimate aim and the means for achieving it must be appropriate and necessary.

⁶⁹ The “General” Anti-Discrimination Act includes many more grounds for discrimination than Directive 2000/78. Introducing the term “distinction” meant that the legislative was not obliged to reject national case-law on discrimination where the grounds fall outside those listed in Directive 2000/78.

III. THE JUDICIAL MECHANISM IN COMMUNITY LAW

We can observe that the Directives and the case-law from the European Court of Justice have given rise to a judicial arrangement that centres around two rules.

On the issue of discrimination, the Court of Justice has passed down judgments which have indisputably advanced the cause of equal opportunities for men and women.

In pursuit of equal opportunities, it has resorted to the notion of indirect discrimination. This term does not appear in Article 119 of the Treaty, but a prohibition of this kind of discrimination has been included in most of the directives designed to implement the principle of gender equality.

The first rule has been to assimilate indirect discrimination within direct discrimination: both are penalised, notwithstanding options for derogation or justification.

The second has been to open up particular rights for women, although Community law only permits these under stringent conditions.

As far as the first rule is concerned, before establishing and possibly condemning a case of discrimination, a comparison must be performed of identical or similar situations⁷⁰.

However, although in principle any different treatment for men and women is rejected, be it direct or indirect, the Court does leave room for indirect discrimination to be deemed legitimate under certain conditions^{71 72}.

*This case-law was subsequently enshrined in **Directive 97/80**.*

Different treatment resulting from the application of an apparently neutral rule or practice is to be condemned “unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex”.

With regard to proof, it is the party committing the discriminatory act who must put forth “objectively justified economic grounds”⁷³.

Indirect discrimination can be justified if it is incurred in pursuit of an “essential aim of social policy”⁷⁴, and Member States can choose whatever measures they think fit to

⁷⁰ ECJ 14 September 1999, Gabriele Gruber, C-249/97

⁷¹ For example: if part-time jobs in a company, most of which by far are held by women, are proportionately less well paid than full-time jobs, it is established that this is discrimination counter to the principle of equal treatment, and it does not matter whether this discrimination has been targeted against women – which is unlikely – or whether it responds to a desire, for commercial reasons, to encourage full-time work – which is likely. (ECJ, 31 March 1981, Jenkins, C-96/80, ECR p. 911; cf. also ECJ, 13 May 1986, Bilka-Kaufhaus, C-170/84, ECR p. 1607 and the study by M.-Th. LANQUETIN, Dr. soc. 1988, p. 806).

⁷² If it appears that, as the result of a rule or practice, the members of one sex suffer a disadvantage compared with the members of the other, the person responsible for this rule or practice may be able to escape the accusation of discrimination in violation of Community law if he can justify it on serious, objective grounds and if the disadvantage observed is not excessive.

⁷³ The wording used in the Jenkins judgment and echoed in the Bilka judgment, quoted above, no. 264.

⁷⁴ ECJ 13 July 1989, Rinner-Kühn, C-171/88, ECR p. 2743

achieve their social policy objectives – as long, however, as these measures do not have the effect of “frustrating the implementation of a fundamental principle of Community law such as that of equal pay for men and women”⁷⁵.

The Court has regularly repeated that justifying indirect discrimination requires “objective grounds unrelated to sex discrimination”.

In a number of judgments, the Court has taken the view that, in a matter of indirect discrimination, it may be necessary to shift the burden of proof to the employer “when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle” of equality.

It is now established case-law that in the case of indirect or apparent discrimination, it is up to the employer to show that there are objective grounds totally unrelated to the sex of the persons concerned.

This by way of a prelude to the mechanisms which follow, designed to protect wronged parties, and hence ensuring procedural access and the specific arrangements for evidence⁷⁶.

⁷⁵ ECJ 9 February 1999, Seymour-Smith, C-167/97, ECR I, p. 623; cf. more recently ECJ 20 March 2003, Kutz-Bauer, C-187/00; ECJ 11 September 2003, Steinicke, C-77/02

⁷⁶ See Chapter I, section 2, above.

IV. PROTECTING WRONGED PARTIES

IV.1. The scope

Both Directive 2006/54/EC and the Belgian Act of 10 May 2007 are designed to combat all sex discrimination, including psychological harassment and sexual harassment.

The extensive scope of derived law and Belgian federal law has already been outlined:

- *equal pay*
- *equality in employment*
- *equality in the field of social security*

IV.2. Community law

IV.2.A. The horizontal provisions in Directive 2006/54/EC

The implementation of Community law is guaranteed by the general measures set out to ensure that this law is effective in fighting discrimination in the ways described above in the second section of Chapter I.

There are, however, two particular aspects to implementing Community law on gender equality.

These concern the rules of evidence⁷⁷ and the penalties applied.

In both cases, the requirements of Community derived law are met by means of national legislation, which must ensure effective implementation.

Title III of the Recast Directive contains what are known as horizontal provisions.

They are of a general nature and address:

- *compliance with the principle of equal treatment;*
- *victimisation after a complaint has been made;*
- *penalties;*
- *preventing discrimination;*
- *minimum requirements;*
- *the relationship with Community or national provisions;*
- *mainstreaming gender equality;*
- *disseminating information.*

Questions relating to recourse to other authorities, the application of law and the burden of proof are addressed in the following articles:

⁷⁷ See Chapter V below.

Article 17 is about recourse to other procedures and the defence of rights. “Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.”

The article then requires Member States to “ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his/her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.”

Article 18 is about compensation or reparation: “Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.”

Article 19⁷⁸ does not apply to criminal procedures – unless Member States provide otherwise – and is devoted to the burden of proof: “Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”

However, Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 23(b) of this Recast Directive 2006/54 states that it is for Member States to take all necessary measures to ensure that:

- any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- provisions contrary to the principle of equal treatment in individual or collective contracts or agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations or any other arrangements shall be, or may be, declared null and void or are amended;
- occupational social security schemes containing such provisions may not be approved or extended by administrative measures.

⁷⁸ Paragraphs 1, 2 and 3 also apply to:

a) the situations covered by Article 141 of the Treaty and, insofar as discrimination based on sex is concerned, by Directives 92/85/EEC and 96/34/EC;

b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law.

We note, then, that with regard to the defence of rights the horizontal provisions of **Directive 2006/54** echo the measures introduced in **Directive 2002/73/EC**, reflecting the case-law from the Court of Justice and extending these to all fields addressed by the Directive:

- stronger protection of those who have been wronged by discrimination, even after employment has ceased ;
- protection from any unfavourable treatment;
- incorporation of ECJ case-law on fixing upper limits for damages, which may exceptionally be authorised in cases of compensation or reparation.

IV.2.B. On compensation and reparation

With regard to compensation and reparation, the Directive provides that Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex.

The Directive does not establish an upper limit to this reparation or compensation.

Decisions on damages shall be entirely guided by the principle of proportionality.

The injured party can, once the complaint, judicial proceedings or action for an injunction has been upheld, claim damages for contractual and extra-contractual loss.

The injured party can choose whether to request these damages in the form of a lump sum or seek recovery of the loss actually suffered.

IV.2.C. On the burden of proof⁷⁹

As to the burden of proof, the Directive effectively ensures respect for the principle of equal treatment by extending the rules on burden of proof to occupational social security schemes.

This means that the provisions on burden of proof apply to all fields within the material scope of the Directive.

IV.2.D. On penalties

*Article 3(2) of **Directive 76/207** provides that any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall or may be declared null and void.*

⁷⁹ See Chapter V below.

The Recast Directive stipulates in the section on compliance that provisions contrary to the principle of equal pay or equal treatment must be deleted or declared null and void.

Member States are called upon to lay down rules for effective, proportionate and dissuasive penalties that can be applied to violations of the rights set out in the Directive.

No precise penalties are prescribed here, because the autonomy of Member States must be respected, and national parliaments will make their own choices about civil or criminal procedures for prosecuting these violations. The essential point is that they must be effective, dissuasive and proportionate to the injury suffered⁸⁰.

IV.2.E. On protecting workers

Article 7 of Directive 76/207 obliges Member States to protect workers against dismissal – or other adverse measures⁸¹ – taken by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Moreover, in the absence of appropriate measures for applying Community law, the group that is placed at a disadvantage by a discriminatory act must be subject to the same rules as those applied to other workers, which is the only valid benchmark. This substitution effect is a specific type of sanction⁸².

The Recast Directive provides for protection to be granted to workers, including those who represent them, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Finally, Member States have a duty to actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in the Directive. In addition to this, the Directive makes it incumbent on Member States to ensure that measures taken pursuant to the Directive, together with the provisions already in force, are brought to the attention of all the persons concerned.

IV.3. A case in point: Belgian law

A distinction should be drawn between active measures to promote diversity on the one hand and protective mechanisms on the other.

⁸⁰ ECJ, Von Colson and Kamann, C-14/83, 10 April 1984, ECR, p. 1891 (on this judgment see P.RODIERE, op. cit., p. 293, nos. 277-1)

⁸¹ ECJ, Coote v. Granada Hospitality Ltd, C-185/97, 22 September 1998

⁸² P.RODIERE, op. cit., p. 294, no. 278. The author quotes judgments from the European Court of Justice:

- ECJ, Netherlands v. FNV, C-71/85, 4 December 1986 (in a case of direct discrimination)

- ECJ, Nimz, C-184/89, 7 February 1991 (in a case of indirect discrimination)

- ECJ, Ruzius-Wilbrink, C-102/88, 13 December 1989

With regard to the former, if equal rights are the objective pursued by anti-discrimination laws, then diversity is a policy or tool for achieving them.

Discrimination is harmful to the proper functioning of companies. It is often born of prejudice and stereotypes.

To combat these and hence prevent discriminatory acts, companies and employers in both the public and private sectors increasingly formulate human resources policies that seek to reflect the diversity in society as well as possible.

These diversity policies embrace various aspects and adopt different formats:

- *selection and recruitment drives,*
- *codes of good practice,*
- *charters,*
- *information desks,*
- *customer campaigns.*

Among the protective mechanisms, we encounter the following:

IV.3.A. Provisions declared null and void⁸³

Section 18(1) of the Gender Act of 10 May 2007 stipulates that “a direct or indirect distinction on grounds of sex is not deemed in any way to constitute discrimination prohibited by the present Act where this direct or indirect distinction has been imposed by or by virtue of a law”.

The second paragraph of this Section, however, adds that the principle stated in the first does not debar verification that the law in question complies with the Constitution, current EU legislation and current international law.

It follows that if the prohibited discrimination is contained in a decree or regulation, the Act of 10 May 2007 will prevail.

A judge hearing a case will be obliged to apply Article 159 of the Constitution and annul any regulation or decree that is in breach of the legislation.

If the discrimination is contained in a legal statute, Article 142 of the Constitution grants the court a Constitutional power to review legislative compliance with regard to the fundamental principle of equality in general and gender equality in particular.

This issue has established a place all of its own in case-law from the Constitutional Court.

Until the Act of 9 March 2003, these judicial powers of review were confined to Articles 10, 11 and 24 of the Constitution.

Hence, the Constitutional Court exploited the options presented by these principles by combining them with the rights and freedoms granted to all citizens.

⁸³ Section 20 of the Act of 10 May 1997

Consequently, although the Constitutional Court does not actually have the powers to review international law, it can perform this review indirectly:

- *either by combining Articles 10 and 11 of the Belgian Constitution with international law and ruling that if this law has been violated, so have Articles 11 and 12 ipso facto,*
- *or, if the international rule has been ratified under Belgian law and is identical in scope to a domestic law, the Court will argue that the international rule and the national provision constitute a totality.*

Furthermore, let us recall that under the terms of Article 234 of the EC Treaty, any national court can refer a question about Community law to the European Court of Justice; Section 18 of the Act of 10 May 2007 cannot, therefore, be interpreted as meaning that no further recourse is available domestically until this reference has been exhausted.

Finally, the wording of Section 18 of the Act of 10 May 2007 implies that the Belgian parliament may enact a derogation from the principle of non-discrimination.

In this event, the federal government of Belgium would be forgetting its essential obligation, under the Recast Directive, to implement the principle of gender mainstreaming.

This is about promoting the integration of the gender dimension into every kind of policy and action. As the European Commission points out in a Communication on the subject, that means “not restricting efforts to promote equality to the implementation of specific measures to help women, but mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account at the planning stage their possible effects on the respective situations of men and women”⁸⁴.

Contractual clauses contrary to the provisions of the Acts of 10 May 2007 are null and void⁸⁵. This must be confirmed by judicial procedure, and there is a ten-year statutory bar on the right to lodge such a request with a court⁸⁶.

IV.3.B. Defence of rights, penalties and civil remedies

Wronged parties have a number of options for recourse.

Apart from criminal penalties⁸⁷ imposed on transgressions of the law, the Act of 10 May 2007 above all provides for civil remedies.

⁸⁴ COM96 (67) final

⁸⁵ Section 15 of the Anti-Discrimination Act; Section 20 of the Gender Act and Section 13 of the Racism Act

⁸⁶ F.CRABEELS, D.DESAIVE, P.MALDEREZ, *Du neuf en matière de lutte contre les discriminations: les lois du 10 mai 2007*, in *Le droit du travail dans tous ses secteurs*, edited by M.DUMONT, Commission Université Palais-Université de Liège, Anthémis, 2008, p 69. The authors analyse the powers of courts repealing clauses of this kind, arguing that the Cour de cassation seems to have debarred them from replacing these clauses once they have been declared null and void (Cass. 23 March 2006, R.C.J.B., 2007, p. 442).

⁸⁷ Section 38(1) empowers the King to appoint public servants whose task is to monitor compliance with the Act. This task rests with the inspectors at the Belgian Federal Public Service Employment, Labour and Social Dialogue, who monitor compliance with social legislation.

Under Section 23 of the Act of 10 May 2007, any party experiencing an act of discrimination, and also the “competent bodies” described in Section 35⁸⁸, may report a reasoned complaint or file for court action. This provision implements Article 17 of the Recast Directive, which also requires conciliation procedures and effective judicial procedures to be in place, ensuring compliance with the obligations deriving from the Directive.

Wronged parties may avail themselves of a complaint mechanism⁸⁹; there is provision for compensation⁹⁰.

Damages may be granted by the court which holds jurisdiction for applying liability law, or else by the court which has granted the injunction.

Awarding lump sums in compensation helps to avoid complex debates, but the wronged party may actually prefer to be compensated on the basis of statutory liability law, which means demonstrating the magnitude of the losses incurred. In this instance, only a regular court has jurisdiction, not the court that granted the injunction.

The lump sum will vary, depending whether the discrimination occurred in relation to employment or elsewhere.

The injured party may:

- ***firstly,***

apply for an agency injunction procedure:

The Act of 10 May 2007 has substantially pruned back the criminal offences in favour of civil procedures. Whereas the Acts of 4 August 1978 and 7 May 1999 made an offence of most behaviour in breach of the principle of equal treatment, the Act of 10 May 2007 only contains the following charges:

Section 27: incitement to discrimination against a group, an individual or a community, or to hatred or violence towards a person on the ground of sex, if the act was committed “either in meetings or public places, or in the presence of several persons in a place that is not public but open to a certain number of people who have the right to assemble in or frequent this place; or in any place in the presence of the injured person and before witnesses; or by means of written form, printed or otherwise, images or emblems that are displayed, distributed or sold, offered for sale or exhibited for public view; or in written form that is not made public but addressed or conveyed to several persons;

Section 28: discriminatory acts by public servants;

Section: non-compliance with an order issued following an application for an injunction

⁸⁸ “Competent bodies” means the Gender Equality Institute, employers’ associations and trade unions, organisations representing the self-employed and any association that has enjoyed legal status for at least three years and whose bylaws include defending human rights or fighting discrimination.

⁸⁹ Section 21 of the Gender Act of 10 May 2007

⁹⁰ On this question see C.DELANGHE, Nouveaux outils dans la lutte contre les discriminations raciales, in *Revue du droit des étrangers*, no. 144, 2007, p. 306

As far as lump sums are concerned, the system established by Section 23 of the Act of 10 May 2007 is complex. The wronged party can request:

Material and non-material damages where the wrong was committed in relation to work: the sum is six months’ pay unless the employer can show that the unfavourable or disadvantageous treatment at issue would also have occurred without any discrimination taking place. In this event, the sum is only three months’ pay. Moreover, in cases related to employment and complementary social security schemes, Section 20 (Nullity of a contrary provision) applies.

If the wrong was not work-related, only non-material damages (€650) are awarded for a breach of the principle of non-discrimination. This sum can be doubled if the person who committed the contentious act is unable to show that the unfavourable or disadvantageous treatment would equally have occurred without any discrimination taking place, or for other reasons, such as the severity of the non-material injury suffered.

Joël HUBIN
ERA TRIER

A worker may apply directly to the agency which inspects compliance with social legislation.

The inspectors hold powers to initiate a conciliation procedure with a view to ending the discrimination.

If the employer refuses to end the practice, the inspectors may, in serious and obvious cases, draw up a formal charge.

They are equally empowered to generate a report describing the facts. A labour court can require this document.

The Gender Equality Institute (for sex discrimination matters) and the Centre for Equal Opportunities and Combating Racism (where other grounds for illicit discrimination are concerned) are available to assist anyone who has suffered a wrong or witnessed an act of discrimination. A team of experts will provide information, analyse circumstances, channel people to existing services, record a complaint, propose mediation and – if necessary – contemplate legal proceedings.

○ ***secondly.***

seek a judicial action for injunction^{91 92}:

For the first time in the history of personal social law, the Act of 10 May 2007 establishes an authentic action for injunction combined with lump-sum compensation. The wronged party, the Gender Equality Institute, the prosecutor-general or prosecutor at a labour court, or an interest group⁹³ may file an action for injunction with a court of first instance or a labour or commercial tribunal, depending on the nature of the act, in the form of a contentious petition in an expedited procedure.⁹⁴

Through this procedure, the injured party may claim damages equal to those that would be defined during a regular procedure.

In this instance, following the action for injunction, the injured party may not recommence proceedings by writ in order to sue for damages.

⁹¹ Section 25 of the Gender Act of 10 May 2007:

“1. At the request of the person who has suffered the discrimination, the Institute, an interest group, the prosecutor-general or, depending on the nature of the act, the prosecutor at the labour court, the presiding judge of a court of first instance or, depending on the nature of the act, the presiding judge of the labour or commercial tribunal will establish the fact of the act and require its cessation, and may institute criminal proceedings if it constitutes a failure to comply with the provisions of the present Act.

The presiding judge may order that the cessation order be revoked once it has been proven that the violations have been terminated.

2. At the request of the party who has suffered the discrimination, the presiding judge may grant the former the lump-sum compensation defined in Section 23(2) (...)

⁹² F.CRABEELS, D.DESAIVE, P.MALDEREZ, op cit., pp. 97-98

⁹³ F.CRABEELS, D.DESAIVE, P.MALDEREZ, op cit., pp. 98-100

⁹⁴ The introduction of this procedure in no way undermines actions for suspension or cancellation before the Conseil d’Etat, the Supreme Administrative Court in Belgium, if the discrimination results from an administrative measure (Section 25(5) of the Act of 10 May 2007).

To secure a termination of the discriminatory practice, the judge may likewise combine the judgment with a fine, to be paid until the wrongful act has been remedied, and require formal notifications.

○ ***thirdly,***

request compensation for any victimisation⁹⁵:

Wronged parties and witnesses of discrimination should not refrain from exposing the facts for fear of victimisation in their job. Workers are protected from dismissal⁹⁶.

An employer may not terminate the employment or unilaterally alter the worker's terms if this worker has filed an official complaint or sought judicial action, unless the grounds for so doing are unrelated to the complaint or action⁹⁷.

⁹⁵ F.CRABEELS, D.DESAIVE, P.MALDEREZ, op.cit, pp. 91-95

⁹⁶ The Gender Act of 10 May 2007 establishes protection for the victims of discriminatory acts, but also extends this to witnesses. They are to be compensated in the event that they lose their employment contract following a complaint or judicial action, or if their terms of employment are altered or any other detrimental measures are taken by the employer after the contract has ended.

Paragraph 4 of Section 22 provides that the protective period begins when an official complaint or a judicial action is filed and lasts for 12 months. If there is a judicial action, this period is extended to three months following the date when the ruling becomes effective.

Consequently, any detrimental measure occurring during this period will be regarded as victimisation, unless the employer can prove that other factors were at play.

⁹⁷ Section 22 of the Gender Act of 10 May 2007:

1. When a complaint is filed by or on behalf of a person because of a breach of the present Act arising in the field of an employment relationship and complementary social security schemes, the employer shall not take any measure detrimental to that person unless it be on grounds unrelated to the said complaint.

2. For the purposes of this Section, a detrimental measure is understood in particular to mean termination of employment, unilateral changes to terms of employment or a detrimental measure occurring after the employment has been terminated.

3. For the purposes of this Section, a complaint shall be taken to mean:

- a reasoned complaint filed by the person concerned with the employing company or department in accordance with the applicable procedures;

- a reasoned complaint filed on behalf of the person concerned by the general management of the Social Legislation Inspectorate of the Federal Public Service Employment, Labour and Social Dialogue with the employing company or department;

- a reasoned complaint filed on behalf of the person concerned by an interest group or by the Institute with the employing company or department;

- a judicial action filed by the person concerned;

- a judicial action filed on behalf of the person concerned by the Institute or an interest group.

The reasoned complaint referred to in clause 1, indents one to three, shall be dated, signed and sent by registered post, and shall set out the grounds for the suit against the originator of the alleged discrimination.

4. If the employer adopts a measure detrimental to the person concerned within a period of twelve months from the filing of the complaint, it shall be incumbent on the person charged with the complaint to prove that the detrimental measure was adopted for reasons unrelated to the said complaint.

If a judicial action has been filed by or on behalf of the person concerned, the period referred to in paragraph 1 shall be extended until three months from the date on which the ruling becomes effective.

5. If the employer takes a measure detrimental to the person concerned in violation of paragraph 1, that person or the interest group to which he or she belongs shall request his or her reinstatement in the company or department or request that he or she be able to perform his or her tasks under the same conditions as before.

From this point on, a worker may challenge compliance with the principle of equal treatment in the terms of dismissal.

*The Act moreover provides – and this is an innovation which reflects **Directive 76/207** as amended by the Recast Directive – for a system of lump-sum compensation.*

The wronged party nevertheless retains the right to request compensation for damages actually incurred.

The request shall be made by registered letter within thirty days of the serving of notice, the termination without notice or the unilateral change to the terms of employment. The employer must respond to this request within thirty days of the serving of notice.

An employer who reinstates the person in the company or in his or her former department or who allows him or her to perform his or her tasks under the same terms as previously shall be obliged to reimburse the pay that has been lost due to the dismissal or change to terms of employment and to pay the employer's and worker's social contributions associated with the said pay.

The present paragraph does not apply when the detrimental measure occurs after the termination of employment.

6. An employer who fails to reinstate the worker or to allow him or her to perform his or her tasks under the same terms as previously, in accordance with the request described in paragraph 5, clause 1, must, if the detrimental measure has been ruled contrary to the provisions of paragraph 1, pay the person concerned damages, as the person concerned shall determine, either in a lump sum equal to six months' gross pay or in a sum equal to the loss actually incurred by the person concerned, who shall in this instance demonstrate the magnitude of the loss.

7. The employer shall pay the same compensation, without receiving the request described in paragraph 5 from the injured person or the interest group of which he or she is a member to be reinstated in the company or department or to be able to perform his or her tasks under the same terms as previously, in accordance with the conditions described above:

- i. if the court with jurisdiction rules that the facts that were the object of the complaint constituted discrimination;
- ii. if the person concerned terminates the employment because the employer's conduct is in breach of the provisions of paragraph 1, which provides grounds for the person concerned to terminate the contract without notice or to give notice to terminate prior to the expiry of the contract;
- iii. if the employer has terminated the employment for breach of contract, providing that the court with jurisdiction deems this termination to be unfounded and contrary to the provisions of paragraph 1.

8. If the detrimental measure occurs after the employment has ceased and is deemed to be contrary to paragraph 1, the employer shall pay the compensation described in paragraph 6.

9. The protection described in this Section also applies to persons who act as witness by, in the course of investigations into the complaint described in paragraph 3, bringing to the knowledge of the person with whom the complaint was filed, in a signed and dated document, the facts that they personally saw or heard in connection with the situation on which the complaint is founded, or by appearing as witnesses in judicial proceedings.

10. The provisions of this paragraph likewise apply to persons other than employers who use the services of persons within the framework of a working relationship or who assign them tasks.

Joël HUBIN
ERA TRIER

V. ACCESS TO JUSTICE: THE RULES OF EVIDENCE

The rules of evidence are crucial to ensuring that the various provisions established to combat discrimination are truly effective: wronged parties have the greatest difficulties in proving the discrimination they suffer, due to dissimulation and to strategies that are becoming increasingly elaborate in response to the campaigns designed to prevent such forms of conduct and the publicity devoted to them⁹⁸.

Four mechanisms can be observed.

The first two relate to the burden of proof and the kind of evidence that may be adduced in civil procedure. This civil option is itself indicative of the approach being adopted by lawmakers as they seek to move away from a framework of criminal procedures, while continuing to impose penalties.

The other two relate to privacy and guarantees of fair trial.

One specific feature of the evidence rules is that they originated with case-law from the European Court of Justice, which envisaged sharing the burden of proof between parties once a charge of discrimination had been raised.

V.1. Case-law from the European Court of Justice

V.1.A. In general

In the absence of specific provisions on fundamental rights in the founding Treaties, it is to the credit of the European Court of Justice that it progressively created an effective system for guaranteeing fundamental rights at the level of the European Union.

Two essential factors encouraged the Court in its actions:

- *Article 220 (formerly Article 164) of the Treaty establishing the European Community, which provided that the Court should ensure respect for the law in the interpretation and application of the Treaty;*
- *the political dimension to building the Community, which rests on a European social model implying guarantees for fundamental rights recognised by all Member States.*

⁹⁸ In particular the anti-discrimination campaigns led by the European Commission during implementation of the following directives:

Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, known as the “Race” Directive;

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, known as the “Employment” or “Framework” Directive.

It is in the field of gender equality, and specifically employment, that the European Court of Justice has passed down case-law that shifts the burden of proof, making things easier for a wronged party who turns to the Court.

A distinction has to be made in this ECJ case-law, depending whether the circumstances relate to direct or indirect discrimination.

In the case of direct discrimination, evidence will focus on the existence of a rule or practice founded on a sex-related criterion, i.e. an explicit point of reference. When dealing with rules, that reference makes it easier to prove the facts. Evidence is more complicated when it comes to practices. An intention to discriminate has to be proven.

As for indirect discrimination, the case-law⁹⁹ is well summed up in the DANFOSS judgment:

“it is for the employer to prove that his practice is not discriminatory” (or that it is not at odds with the principle of equality) “if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men”.

The rules governing the burden of proof, then, are as follows:

- *First, the wronged party seeking satisfaction must demonstrate facts from which it may be inferred that there is a difference in treatment which operates predominantly to the disadvantage of his or her sex. The evidence relates to facts expressed as statistics, not to the existence of an intention to differentiate between the genders. It is enough to furnish a serious indication or prima facie evidence¹⁰⁰, no more than that. There is no need to prove that there was any intention to discriminate.*
- *Second, if this evidence submitted by the plaintiff is sufficient, there will be a presumption that the principle of equal treatment has been violated, which the originator of the act or practice then has to disprove by demonstrating that the different treatment can be justified in terms of acceptable, objective reasons and that it goes no further than necessary (proportionality principle).*

According to this case-law, it is enough for the party claiming to have been wronged to demonstrate prima facie discrimination, and it is then up to the defendant to prove the opposite.

We find the following reasoning in the Enderby judgment (C-127/92) of 27 October 1993:

“13. It is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination as to pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to removing the discrimination.”

⁹⁹ Cf.:

ECJ 31 March 1981, *Jenkins v. Kingsgate*, C-96/80, ECR p. 911

ECJ 13 May 1986, *Bilka Kaufhaus v. Karin Weber*, C-170/84, ECR p. 1607

ECJ 17 October 1989, *Handels O. G. v. Danfoss*, C-109/88, ECR p. 3202

¹⁰⁰ ECJ 27 October 1993, *Enderby*, C-127/92, ECR p. 5548

“14. However, (...) where an undertaking applies a system of pay which is wholly lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men (Case 109/88 Danfoss [1989] ECR 3199, at paragraph 16).”

Thus there is a shift in the onus, inspired by rulings from the Supreme Court in the United States¹⁰¹.

The arrangement rests on a presumption of indirect discrimination, leading to a shift in the burden of proof. The issue of intent arises again once this shift has taken place, because the defendant may prove that the goals he is pursuing have nothing to do with the criterion of gender differentiation.

V.1.B. ECJ judgment in C-54/07 of 10 July 2008 (Feryn)

The Court’s ruling in C-54/07 helps to clarify the notion of facts from which direct discrimination may be presumed.

This judgment followed a reference for a preliminary ruling submitted by order of 6 February 2007 by the Labour Court in Brussels¹⁰².

The facts concerned an employer whose company installed garage doors and who had published advertisements to recruit fitters. This employer had stated publicly that he did not wish to hire workers of North African origin because clients had reservations about granting them access to their private homes during the working day.

It was the Centre for Equal Opportunities and Combating Racism, the body whose task is to promote equal treatment in Belgium, that had brought this matter before the court.

*The Labour Court in Brussels asked what was meant by the “facts from which it may be presumed that there has been direct discrimination”, as described in Article 8(1) of **Directive 2000/43/EC**. Evidently, this question reflects the rigour required of the national court:*

- *To what extent do earlier acts of discrimination constitute “facts from which it may be presumed that there has been direct or indirect discrimination”?*
- *To what extent do earlier acts of discrimination (public announcement of directly discriminatory selection criteria in April 2005) constitute “facts from which it may be presumed that there has been direct or indirect discrimination’ (...)”?*
- *Does an established act of discrimination in April 2005 (public announcement in April 2005) subsequently give rise to a presumption of the continuation of a directly discriminatory recruitment policy?*
- *In other words, having regard to the facts in the main proceedings, is it sufficient, in order to raise the presumption (that an employer operates and continues to pursue a discriminatory recruitment policy) that, in April 2005, in answer to the question*

¹⁰¹ Cf. *Griggs v. Duke Power Co.*, 401, US, 424 (1971), quoted by I.RORIVE and V.VAN DER PLANCKE, *Quels dispositifs pour prouver la discrimination*, in *Les nouvelles lois luttant contre la discrimination*, C.BAYART, S.SOTTIAUX, S.VAN DROOGHENBROECK, *Die Keure, la charte*, 2008, p. 419, fn 9.

¹⁰² *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn*, C-54/07, OJ C 82 of 14 April 2007, pp. 21-23

whether, as an employer, he did not treat people from foreign and indigenous backgrounds in the same manner (...), he publicly stated: 'I must comply with my customers' requirements. If you say "I want that particular product or I want it like this and like that", and I say "I'm not doing it, I'll send those people", then you say "I don't need that door". (...) I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year (...)

- Is one fact sufficient in order to raise a presumption of discrimination?
- Having regard to the facts in the main proceedings, can a presumption of discrimination on the part of the employer be inferred from the recruitment of exclusively indigenous fitters by an affiliated company of that employer?
- How strict must the national court be in assessing the evidence in rebuttal which must be produced when a presumption of discrimination has been raised?

*The European Court was therefore being asked about the interpretation of Council **Directive 2000/43/EC** of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.*

The Court had been asked to respond to the question whether the above-mentioned statements by an employer, made in the course of a recruitment drive, constitute discrimination, even if there is no plaintiff claiming to have suffered discrimination.

The Court argued that statements by an employer constitute direct discrimination.

*The Court referred to **Directive 2000/43** on equal treatment:*

"The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43." (paragraph 25)

"It is, thus, for that employer to adduce evidence that it has not breached the principle of equal treatment, which it can do, inter alia, by showing that the actual recruitment practice of the undertaking does not correspond to those statements. It is for the national court to verify that the facts alleged against that employer are established and to assess the sufficiency of the evidence which the employer adduces in support of its contentions that it has not breached the principle of equal treatment." (paragraphs 32, 33)

We note that efforts to combat discrimination have been strengthened and broadened, in that there is no defined, identifiable victim of this discrimination.

We thus find we have case-law that contributes towards prevention.

The reasoning adopted by the European Court of Justice indicates that it first of all sought to determine the existence of direct discrimination in the recruitment procedure¹⁰³.

*In this context, it points out that the fact that an employer publicly states that he will not recruit workers of a particular ethnic or racial origin "constitutes direct discrimination in respect of recruitment within the meaning of **Directive 2000/43**"¹⁰⁴.*

¹⁰³ The Conclusions of the Advocate General were submitted on 12 March 2008.

¹⁰⁴ Article 2(2a)

The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim (paragraph 25).

*The Court stresses the need to distinguish between establishing direct discrimination within the meaning of **Directive 2000/43** and establishing the legal channels provided in Article 7 of the latter to identify and penalise non-compliance with the principle of equal treatment.*

*After all, Article 7 of **Directive 2000/43** does not preclude a Member State from laying down in national legislation:*

“the right for associations with a legitimate interest in ensuring compliance with that directive, or for the body or bodies designated pursuant to Article 13 thereof, to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant.” (paragraph 27)

Having established the existence of discrimination, the European Court of Justice then considers the issue of reversing the burden of proof.

*It recalls that reversing the burden of proof as described in Article 8 of **Directive 2000/43** simply requires the plaintiff to raise a presumption of discrimination.*

The Court then rules:

*“Public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of **Directive 2000/43**. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking’s actual recruitment practice does not correspond to those statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer’s contentions that it has not breached the principle of equal treatment.”*

The Court concludes by requiring that appropriate rules on sanctions be applied to the discriminatory recruitment.

***Directive 2000/43** does not provide for specific penalties, but requires Member States to adopt effective, proportionate, dissuasive sanctions.*

The Court argues that these criteria apply even when there are no identifiable victims.

It then lists a series of examples of sanctions that might be adapted in this instance. These may:

“where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, to pay a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings.” (paragraph 39)

The line of argument pursued by the Court indicates three ideas at play:

- First, “it cannot be inferred from this that the lack of an identifiable complainant leads to the conclusion that there is no direct discrimination within the meaning of Directive 2000/43”. Certainly, “the objective of fostering conditions for a socially inclusive labour market would be hard to achieve if the scope of Directive 2000/43 were to be limited to only those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer.” Besides, statements of this kind are “clearly likely to strongly dissuade certain candidates from submitting their candidature”.
- Second, with regard to the burden of proof, as the discriminatory nature of the recruitment has been established, it is “for the employer to adduce evidence that it has not breached the principle of equal treatment”, using the procedure adopted nationally. It will then be for the national court to verify that the facts alleged against that employer are established.
- Third, the Court concludes by listing examples of sanctions appropriate to this kind of discrimination: “finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity”; “a prohibitory injunction ordering the employer to cease the discriminatory practice”; or indeed, “the award of damages to the body bringing the proceedings”.

V.2. The Directives

V.2.A. Directive 97/80¹⁰⁵

A Directive 97/80 on the burden of proof in cases of discrimination based on sex was adopted on 15 December 1997¹⁰⁶.

It derived from an initiative by the Commission, which sought to make the rules of evidence developed by the European Court of Justice mandatory in the Member States^{107 108}.

The aim of the Directive being to ensure that measures to implement the principle of equal treatment by judicial means be made more effective, it states that this aim can be served by “rules of evidence which are more favourable to plaintiffs”.

The Directive covers both indirect discrimination – which it defines – and direct discrimination, which can be countered by judicial means.

In line with the case-law cited above, the burden of proof is not reversed, but merely adapted, i.e. shifted towards the defendant, “when there is a prima facie case of discrimination”.

Article 4 of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex provides for adaptation of the burden of proof in favour of persons who consider themselves wronged by a failure to apply the principle of equal treatment, who simply need to establish facts from which discrimination may be presumed.

¹⁰⁵ This Directive is echoed in Directive 2006/54/EC.

¹⁰⁶ OJ L 14 of 20 January 1998

¹⁰⁷ The first draft directive on the burden of proof in the field of equal pay and equal treatment for men and women was presented on 24 May 1988.

¹⁰⁸ See D. HOUTZLAGER, Perspectives en mutation : le renversement de la charge de la preuve dans les procès pour discrimination raciale, ENAR, June 2006, pp. 8-10.

Two questions arise from this, and they touch the essence of this approach to evidence which, given the influence of Community law, is a real instrument for combating discrimination:

- *What kind of evidence can be used to establish a presumption that the victim has suffered discrimination?*
- *What role is played by the person who commits the act or practice when called upon to prove non-discrimination?*

The Directive does not normally apply to criminal procedures, given the specific nature of evidence in adversarial criminal proceedings¹⁰⁹.

Member States may introduce rules of evidence more favourable to plaintiffs¹¹⁰.

V.2.B. Directives 2000/43/EC (race), 2000/78/EC (employment) and 2004/113/EC

*Again, it was case-law from the European Court of Justice that inspired the directives designed to implement Article 13 of the **Treaty of Amsterdam**¹¹¹.*

There are three directives containing the provision that Member States should take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

They are:

- the **“Race Directive” 2000/43/EC**¹¹²
- the **“Employment Directive” 2000/78/EC**^{113 114}
- **Council Directive 2004/113** implementing the principle of equal treatment between men and women in the access to and supply of goods and services¹¹⁵.

The same rule applies¹¹⁶ under directives adopted in implementation of Article 141 of the Treaty¹¹⁷.

¹⁰⁹ Article 3(2) and Article 4(3)

¹¹⁰ Article 4(2)

¹¹¹ Article 13 (formerly Article 6a):

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

¹¹² Article 8

¹¹³ Article 10

¹¹⁴ ECJ, Coleman, C-303/06, 17 July 2008

¹¹⁵ Article 9

¹¹⁶ Directive 2006/54/EC

V.3. A case in point: Belgian law

Apart from the mechanism for sharing the burden of proof, an indispensable condition for the efficient implementation of equality, the Belgian Acts of 10 May 2007 contain some innovative arrangements for evidence taken on board from ECJ case-law.

V.3.A. The evidence mechanism

*The aim of the Act of 25 February 2003 on Combating Discrimination and amending the Act of 15 February 1993 on the Creation of a Centre for Equal Opportunities and Combating Racism¹¹⁸ was to transpose Council **Directive 2000/43/EC** of 29 June 2000 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin¹¹⁹ and Council **Directive 2000/78/EC** of 27 November 2000 establishing a general framework for equal treatment in employment and occupation¹²⁰.*

Under the provisions of this Act, if a party who feels wronged raises, before a civil or social jurisdiction, facts such as statistics or situation tests which allow a presumption that discrimination has occurred, it is for the defendant to prove that discrimination did not take place.

The law added that conditions for the performance of situation tests, including possible recourse to a formal attestation by a judicial officer, were to be governed by a royal decree¹²¹. This indicated that situation testing was seen as one way of providing evidence of discrimination¹²².

*This law of 25 February 2003 was replaced by the Act of 10 May 2007 on Combating Certain Forms of Discrimination, which essentially transposed **Directive 2000/78/EC**.*

The Act of 10 May 2007 was one of several laws adopted that same day, as there are two other Acts of 10 May 2007, as we have already seen:

- *a specific instrument devoted to non-discrimination on the grounds of assumed race and assimilated criteria. This statute amended the Act of 30 July 1981 on Eliminating Certain Actions Inspired by Racism and Xenophobia. It was designed to transpose **Directive 2000/43/EC** and to comply with Belgium's other international obligations in combating racial discrimination.*

¹¹⁷ Extract from Article 141 (formerly Article 119): Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

¹¹⁸ Moniteur belge of 17 March 2003

¹¹⁹ OJ L 180, 19/7/2000, p. 22

¹²⁰ OJ L 305, 2/12/2000, p. 16

¹²¹ No royal decree was ever adopted.

¹²² Without explicitly saying so, these examples nonetheless indicate that situation testing was conceived as an option. To recall, the Act of 25 February 2003, eventually replaced by the Act of 10 May 2007, provided in Section 19(4) for situation tests to be recorded in an attestation by a judicial officer (*huissier de justice*). This provision was not annulled by the Constitutional Court (Judgment no. 157/2004 6/10/2004) and had been awaiting implementation by royal decree.

- *a specific instrument devoted to non-discrimination on the grounds of gender (and related grounds such as pregnancy, childbirth and transsexuality), which transposed Community rules adopted on the basis of Article 141 TEC as well as **Directive 2004/113/EC**.*

In adopting these three laws, the federal Belgian parliament created a system for the burden of proof, applicable to both direct and indirect discrimination¹²³, with the explicit aim of assisting the wronged parties.

This is a uniform structure, to be applied first of all in civil litigation.

This does not mean that this arrangement for evidence cannot be admitted in a criminal court, but only that, because a defendant is presumed to be innocent and because of the laws governing proof in criminal matters, circumspect treatment will be given to this evidence in such a forum¹²⁴.

Title V of the Act of 10 May 2007 on Combating Discrimination between Men and Women addresses the burden of proof:

“Section 32. The provisions of the present Title apply to all judicial procedures with the exception of criminal procedures.

In the meaning of the present Title, discrimination means:

- *direct discrimination;*
- *indirect discrimination;*
- *an instruction to discriminate;*
- *harassment;*
- *sexual harassment.*”

“Section 33 (1) If a person who feels that he or she has suffered discrimination, or the Institute or an interest group raises before the court with jurisdiction for this matter facts from which it may be presumed that discrimination on grounds of sex has occurred, it is for the defendant to prove that there has been no discrimination.

(2) Facts from which it may be presumed that direct sex discrimination has occurred include, among others, but not exclusively:

(i) elements revealing a certain recurrence of unfavourable treatment towards persons of the same sex; among others, separate isolated reports made to the Institute or to an interest group;

or

(ii) elements revealing that the situation of the party who has suffered the more unfavourable treatment lends itself to comparison with the situation of a reference person.

(iii) facts from which it may be presumed that indirect sex discrimination has occurred include, among others, but not exclusively:

1. general statistics on the situation of the group to which the person suffering the discrimination belongs or common knowledge; or

2. the use of an intrinsically suspect criterion for distinction; or

3. elementary statistical material revealing unfavourable treatment.”

This has made it easier for the wronged party, the Centre for Equal Opportunities and Combating Racism, or one of the interest groups seen by the law as competent to construct the case for discrimination: he, she or they must submit facts from which a presumption of discriminatory treatment can be

¹²³ The federated regions of Belgium have adopted comparable mechanisms on proof (I.RORIVE and V.VAN DER PLANCKE, op.cit, p. 427, no. 23).

¹²⁴ On the admissibility of “presumptions of guilt” in criminal affairs, see the following judgments: ECHR, *Salabiaku v. France* of 7 October 1988; *Pham Hoang v. France* of 25 September 1992; *Phillips v. United Kingdom* of 5 July 2001 (quoted in V.VAN DER PLANCKE, op.cit, fn 33).

inferred, thereby establishing a suspicion which then triggers the need for investigations, with the burden of proof “shifting” towards the defendant.

The latter may then demonstrate that there was no difference in treatment or else put a case for its justification¹²⁵.

So essentially, if there are facts, such as statistical data or situation tests, from which it may be inferred that direct or indirect discrimination has occurred, the burden of proving that no discrimination did actually occur falls to the defending party.

We might summarise the arrangements for evidence as follows¹²⁶:

- **First¹²⁷**, *the presumption of a discrimination initiates a shift in the burden of proof towards the defendant.*
- **Second¹²⁸**, *a presumption of direct discrimination is indicated in two cases. The first is the existence of elements revealing a certain recurrence of unfavourable treatment affecting individuals who share the same protected criterion. The second is a situation which can be compared with that of a reference person (or “comparator”)¹²⁹.*
- **Third**, *there are three types of fact from which the presumption of indirect discrimination may be inferred. The first type¹³⁰ is general statistics about the situation of the group to which the wronged party belongs, or common knowledge. The second is a distinction that has been founded on an intrinsically suspect criterion¹³¹. The third is elementary statistical material revealing unfavourable treatment.*
- **Fourth**, *if the litigation concerns a dismissal thought to constitute victimisation, the burden of proof rests entirely with the employer.*

When applying these arrangements, the court acts as guarantor that the evidence complies with the rules, that the proceedings are fair, and that fundamental rights are respected.

The arsenal of resources which can trigger a presumption is significant: given that the aim is to help victims, the court is encouraged to be flexible in choosing the most appropriate method, with a view to sharing the burden of proof justly, depending on the specific circumstances of each case¹³².

¹²⁵ Let us recall that the rebuttal of a presumption of indirect discrimination calls for a demonstration of the objective and reasonable nature of the indirect distinction.

¹²⁶ R. DE BAERDEMAEKER and M. KOKOT, Relations de travail et discrimination, Orientations, 2010, p.11

¹²⁷ See V.3.B below.

¹²⁸ See V.3.C and V.3.D below.

¹²⁹ The reference person is someone to whom the protected criterion does not apply.

¹³⁰ See V.3.E below.

¹³¹ See V.3.F below.

¹³² See the Parliamentary Report on all three bills, E.LIBERT, Rapport de la Commission de la Justice de la Chambre (rapport pour les trois projets de loi), Chambre des Représentants de Belgique, session 2006-2007, Doc ; 51-2720/0009, p. 85

V.3.B. Shifting the burden of proof and proving a negative fact¹³³

Sharing the burden of proof is not the same thing as having to prove a negative fact in a charge against the defendant.¹³⁴

The European Court of Justice does not require a negative proof, but the rebuttal of a presumption on the basis of precise facts.

This rebuttal may be founded on the evidence of contrary facts, or on a justification unrelated to any policy of discrimination¹³⁵.

Clearly, then, the plaintiff must produce evidence that is sufficiently precise¹³⁶.

V.3.C. Testing comparability and recurrence

The law thus provides for a comparability test¹³⁷ ¹³⁸ and a recurrence test.

The purpose of the comparability test is to show that better treatment was received by a person of reference who is comparable in every respect to the wronged party except in not sharing the protected criterion.

The recurrence test sets out to establish whether the facts are repeated, in that two or more persons sharing the same protected criterion suffer the same discrimination. The purpose of the recurrence test is to demonstrate repetition of a fact in relation to the same category of individuals with the characteristic in question¹³⁹.

¹³³ On this issue, see: I.RORIVE and V.VAN DER PLANCK, op. cit., pp. 427-430.

¹³⁴ On this issue, see: Conseil d'Etat de Belgique, Legislation section, Avis (Advisory opinion) no. 32.967/2, 4 February 2002, and Avis no. 42.399/1, 13 March 2007, Doc. 51-2720/004, Chambre des Représentants, session 2006-2007, Doc. 51-2720/008.

¹³⁵ Reflected in: ECJ, judgment in BRUNNHOFER, 26 June 2001, C-381/99; Opinion given on 14 July 1993 in the ENDERBY case, 27 October 2003, C-127/92, ECR 1993, p. I-5558 at paragraphs 23 and 24.

¹³⁶ Reflected in: Cour d'Arbitrage, judgment 157/2004, 6 October 2004, at paragraph B.84; Conseil d'Etat de Belgique, Legislation section, Avis (Advisory opinion) no. 32.967/2, 4 February 2002, and Avis no. 42.399/1, 13 March 2007, Doc. 51-2720/004, Chambre des Représentants, session 2006-2007, Doc. 51-2720/008.

¹³⁷ Also known as the elimination method: comparability must be established between the person who appears to have suffered a wrong and a comparator who is not characterised by the criterion protected by law.

¹³⁸ See the judgment in BRUNNHOFER C-381/99.

¹³⁹ Cf.: in ECJ case-law: judgments in C-109/88 DANFOSS, C-127/92 ENDERBY and C-400/93 ROYAL COPENHAGEN; the Parliamentary Report on all three bills presented by E.LIBERT, Rapport de la Commission de la Justice de la Chambre (rapport pour les trois projets de loi), Chambre des Représentants de Belgique, session 2006-2007, Doc. 51-2720/0009, p. 75.

V.3.D. Situation testing¹⁴⁰

This is an investigative method borrowed from the social sciences, but which can be applied in the judicial field, having been found useful in some EU Member States in connection with ethnic discrimination during recruitment or access to goods and services, notably entrance to leisure venues¹⁴¹.

It seems to be a suitable method for detecting situations of direct discrimination.

This method combines the effects of a comparability test with those of a recurrence test, but it is different from these.

Certainly, this kind of testing does engage both comparability and recurrence, in the sense that there needs to be some repetition, whereas a comparability test can raise a presumption even if only one comparator has experienced favourable treatment.

Moreover, situation testing requires a degree of construction, or stage management¹⁴², whereas a recurrence test can draw on testimony by witnesses¹⁴³.

To raise a presumption, the situation test has to satisfy rigorous criteria: on the one hand, ensuring sufficient comparability between the group vulnerable to discrimination and the control group, which is similar in every respect except for the characteristic that is being tested, and on the other, replicating a situation characterised by discriminatory treatment.

Although the Belgian Act of 25 February 2003 envisaged a royal decree that would set out the methodological aspects of testing in detail, the draft prepared by the Belgian Equal Opportunities Ministry in the course of 2005 was never adopted. It prompted dissatisfaction and objections in various quarters¹⁴⁴.

¹⁴⁰ I.RORIVE and V.VAN DER PLANCKE, op. cit., p. 432-447; Véronique van der Plancke, Les tribulations du *testing* en Belgique: quels enseignements? <http://www.cairn.info/revue-horizons-strategiques-2007>

This author argues that there are two essential aspects of the methodology to extract:

First, performing a test always requires verification that there is *full comparability* between the alleged victim of discrimination and the other candidates (for a job, rented accommodation, etc.), drawing on as comprehensive a list as possible of the factors that might legitimately influence the decision of a recruitment manager, landlord or restaurant owner. For example, clothing might be an acceptable criterion for not being allowed into a restaurant, and so it is important that all “dark-skinned” witnesses taking part in a situation test designed to detect racial discrimination are wearing appropriate attire.

Second, a once-off situation that gives rise to the appearance of unequal treatment will not be sufficient to prove discrimination.

¹⁴¹ Reference is made here to the work by I.RORIVE and V.VAN DER PLANCKE, with citation and comment in particular in:

I. RORIVE, Le test de situation en Europe : mythes et réalités, *Revue du droit européen relatif à la non discrimination*, 2006, no. 3;

F.KUTY, La sanction de l’illégalité et de l’irrégularité de la preuve pénale, in *La preuve – questions spéciales*, eds. F.KUTY and D.MOUGENOT, Liège, Anthémis, 2007, pp.7-62;

F.BURNIER and B.PESQUE, Test de discrimination et preuve pénale, *Horizons stratégiques*, 2007, no. 5, p. 62;

ECHR (Grand Chamber), D.H. et al. v. Czech Republic, 13 November 2007;

Cour de cassation, France, judgments of 12 September 2000, 11 June 2002, 27 June 2005 on the légifrance website

¹⁴² The problem resides in guaranteeing that the method meets the standards of law and avoids any interference in private life or provocation: the testers must confine themselves to setting up the conditions for the discriminatory act and then observing it.

¹⁴³ C.DELANGHE, op.cit, p. 312

¹⁴⁴ Véronique van der Plancke, op.cit.

The three Acts of 10 May 2007 did not ignore testing, but gave priority to overcoming the difficulties posed by the evidence and examining the elements that might constitute a presumption of discrimination.

In Belgium, testing is recognised as one legitimate method among others, and will be authorised subject to meeting a number of conditions to be reviewed by the court hearing the case, which must make sure that any pitfalls are avoided and guarantee a fair trial¹⁴⁵ and respect for fundamental rights¹⁴⁶.

It was recognised that legislating ex ante for detailed testing procedures would have been counter-productive, and so it was left to the court alone to refrain from any testing that might irreparably undermine a fair procedure¹⁴⁷.

In a decision handed down on 16 November 2007 by the judge hearing summary procedures at the Civil Court in Brussels,¹⁴⁸ no use was made of situation testing when ruling on an application for an injunction. This tells us something about the inherent difficulties posed by evidence of this kind.

V.3.E. Statistics¹⁴⁹

*The European Court of Justice likewise acknowledges references to statistics¹⁵⁰, thereby broadening the reach of indirect discrimination, in that these are not necessarily the consequence of deliberate acts or policies, but may also result from measures which have a discriminatory impact, or, to use the ECJ's own wording, a disproportionate effect¹⁵¹. This idea is echoed in Article 2(2) of **Directive 97/80** of 15 December 1997 on the burden of proof in cases of discrimination based on sex, i.e. in cases relating to pay and equal treatment.*

¹⁴⁵ On this issue, reference is made to Section 225-3-1 of the French Criminal Code: The offences provided by the present Section are constituted even if they are committed against a person or persons having requested goods, procedures, services or contracts listed in Section 225-2 with the aim of demonstrating discriminatory behaviour.

¹⁴⁶ C.DELANGHE, op. cit., p.313

¹⁴⁷ V.VAN DER PLANCKE

In a judgment of 31 March 2004, the Criminal Court at Brussels excluded this procedure on the grounds that it guaranteed neither objectivity nor accurate information (judgment published on the website of the Centre for Equal Opportunities).

¹⁴⁸ Judgment no. 07/8699/A (unpublished), quoted by I.RORIVE and V.VAN DER PLANCKE, p. 447, no. 121

¹⁴⁹ On statistical methods: O. DE SCHUTTER, *Discriminations et marché du travail. Liberté et égalité dans les rapports d'emploi*, coll. Travail et Société, Bruxelles, Bern, Berlin, Frankfurt, New York, Oxford, Vienna, ed. P.I.E., Peter Lang, 2001, p.102 ff.

In ECJ case-law:

Judgment Voss v. Berlin, C-3000/06, 6 December 2007, see paragraph 41

Judgment Seymour-Smith, C-167/97, 9 February 1999, paragraphs 54 and 59 and 60

Judgment Royal Copenhagen, C-400/93, 31 May 1995, paragraph 24

Judgment Enderby, C-129/92, 27 October 1993, paragraphs 14 and 17

Judgment Jenkins, C-96/81, 31 March 1981, paragraph 13

Judgment Bilka-Kaufhaus, C-170/84, 13 May 1986, paragraphs 29-31

Judgment Rinner-Kühn, C-171/88, 13 July 1989, paragraphs 11 and 12

Judgment Nikoloudi, C-196/02, 10 March 2005, paragraph 69

Judgment Kowalska, C-33/89, 27 June 1990

Judgment Voss v. Berlin, C 3000/06, 6 December 2007, paragraphs 27 and 42

¹⁵⁰ In this connection:

- ECJ, 6 February 1996, Kuratorium für Dialyse und Nierentransplantation e V Johanna Lewark, C-457/93, paragraphs 20-30, quoted by I.RORIVE and V.VAN DER PLANCKE, p. 448, no. 122

¹⁵¹ ECJ, 31 March 1981, Jenkins, C-96/81; ECJ, 13 May 1986, Bilka-Kaufhaus, C-170/84

The problems associated with statistical evidence had the effect of translating scenarios of this kind into indirect discrimination, i.e. the situation that occurs where an apparently neutral provision, criterion or practice is likely to place a group of people at a particular disadvantage compared with other people¹⁵².

*The **Recast Directive** of 2006 preserves the use of statistics as evidence, but ceases to define indirect discrimination by referring to a disproportionate impact¹⁵³.*

The Belgian Acts of 10 May 2007 specifically mention statistical data as a means of identifying facts from which treatment that indirectly discriminates can be inferred¹⁵⁴, with the consequence that it is up to the defendant to prove an absence of discrimination or demonstrate legitimate grounds.

However, the Belgian legislation does not describe in precise terms what is meant by the terms “general statistics” and “elementary statistical material”, and so we have to consult the case-law¹⁵⁵, in particular that of the European Court of Justice¹⁵⁶.

C. DELANGHE observes a paradox in Belgium resulting from the Act of 8 December 1992 on the protection of privacy with regard to processing personal data and the free circulation of such data¹⁵⁷. The restrictions provided under this statute prohibit – with some exceptions¹⁵⁸ – access to certain protected useful data, i.e. data that are regarded as sensitive and that relate to¹⁵⁹:

- racial origin
- ethnic origin
- political opinions
- religious or philosophical beliefs
- trade union membership
- sexual behaviour.

Furthermore, the opinions submitted by the Commission on the Protection of Privacy make the use of certain statistics equally complex, stipulating that persons in a subordinate relationship cannot be considered to have consented to their use for the purposes of compiling data.

¹⁵² In this connection, see the case-law from the European Court of Justice: ECJ, 7 December 2000, Julia Schnorbus, C-79/99.

¹⁵³ I.RORIVE and V.VAN DER PLANCKE, p. 451

¹⁵⁴ Section 28 (3,i and iii) of the Act of 10 May 2007 on Anti-Discrimination

Section 29 (3,i and iii) of the Act of 10 May 2007 on Anti-Racism

Section 33 (3,i and iii) of the Act of 10 May 2007 on Gender Equality

¹⁵⁵ C.DELANGHE, op. cit., p. 514

¹⁵⁶ See the Parliamentary Report on all three bills, E.LIBERT, Rapport de la Commission de la Justice de la Chambre (rapport pour les trois projets de loi), Chambre des Représentants de Belgique, session 2006-2007, Doc. 51-2720/0009, p. 84.

¹⁵⁷ C.DELANGHE, op. cit., p. 315

¹⁵⁸ Section 6(2) of the Act of 8 December 1992

¹⁵⁹ Section 6(1) of the Act of 8 December 1992

V.3.F. Intrinsically suspect criteria

These are criteria applied in situations of indirect discrimination. They concern measures which, by their very nature, seem to have been designed to produce a discriminatory effect¹⁶⁰.

V.3.G. Common knowledge

Common knowledge means facts that are so well known as to be uncontested, or derived by sound common sense: they are sufficient to establish a presumption of indirect discrimination.

One might, for example, presume that there is discrimination against new immigrants in relation to vacancies for jobs requiring a perfect command of the national language¹⁶¹.

V.3.H. Classical forms of evidence

All ordinary forms of evidence are admissible and can be used to prove discrimination or establish a presumption¹⁶².

V.3.I. Criminal procedure¹⁶³

Under Belgian law, there is a procedure for criminal prosecution which in some respects can complement the civil law mechanism, providing the wronged party with an additional option.

Thus, an infringement of rules enacted to combat discrimination may be subject to criminal sanctions following proceedings in a criminal court, but these penalties are limited to violations of just one of the three Acts of 10 May 2007, the Racism Act¹⁶⁴, and only if an intent to discriminate, whether directly or indirectly, has been verified¹⁶⁵.

It should be noted that Section 18(4) of the Racism Act of 10 May 2007 stipulates that if the wronged party seeks an action for an injunction, it is the civil procedure that will determine the progress of any criminal proceedings. The mechanism for reversing the burden of proof in civil matters was explained above. A criminal

¹⁶⁰ Quoted in this connection by C.DELANGHE, op. cit., p.316:

ECJ, Judgment O'Flynn, C-237/94, 23 May 1996

ECJ, Judgment Schnorbus, C-79/99, 7 December 2000

On this issue, see O. DE SCHUTTER, Les techniques particulière de preuve dans le cadre de la lutte contre la discrimination, in Prouver la discrimination, La mise en œuvre de la législation de l'UE sur l'anti discrimination, le rôle des organismes spécialisés. Report of the first expert meeting, 14-15 January 2003, organised by the Centre for Equal Opportunities and Combating Racism, p.4

¹⁶¹ This example is quoted by C.DELANGHE, op. cit., p. 316

¹⁶² In this connection: Labour Court of Ghent, (summary proceedings), 26 March 2007, available on the Centre for Equal Opportunities website.

¹⁶³ F.CRABEELS, D.DESAIVE, P.MALDEREZ, op. cit., pp. 100-104

¹⁶⁴ On the choice offered by the legislation: Cour constitutionnelle, 6 October 2004, B 19

¹⁶⁵ Constitutional Court, 6 October 2004, B 55

court, on the other hand, is obliged to respect the rules of procedure to which it is subject, and also, of course, the presumption of innocence¹⁶⁶.

V.3.J. Summary of case-law¹⁶⁷

Discrimination may be presumed from facts of all kinds.

Because our theme here is the law of evidence, and as the evidence rules are similar in all three Belgian Acts of 10 May 2007 and constitute a statutory mechanism for combating discrimination, the case-law described relates to different kinds of discrimination¹⁶⁸.

Court of Appeal, Antwerp, 25 June 2008

Simple telephone conversations, the content of which has been confirmed (under oath), partly by a third party whose credibility is unchallenged and partly by the data from an extract of the telephone bill, are sufficiently serious and pertinent to be regarded as elements triggering a sharing of the burden of proof.

The fact that a company employs several people of foreign nationality or origin does not rule out candidates being turned down on other occasions on grounds of their nationality or origin, and hence it is insufficient proof of the absence of discrimination.

The Centre can request the termination of a discriminatory practice towards an undefined group of individuals who may encounter future discrimination. However, the application of this collective termination is limited to the (legal) person carrying out or responsible for this discrimination by virtue of the discriminatory nature of the practice and of the protected criterion which have led the court to establish discrimination.

Civil court, Brussels, (summary proceedings), 16 November 2007, unpublished, ref. 07/8699/A¹⁶⁹

The victim hoped to be able to establish a presumption of discrimination based on successive telephone calls with comparable individuals who were treated differently depending on the sound of their name. The court where the application for an injunction was made ruled that these facts were insufficient.

Court of Appeal, Ghent, 30 November 2005

The appeal court ruling clarified the position of the presiding judge with regard to the conditions for applying the principle of sharing the burden of proof and the status of a formal attestation by a judicial officer ("huissier de justice").

It was extremely clear on the matter of sharing the burden of proof. First, it ruled that the first judge had been wrong to argue that the rules on sharing the burden of proof did not yet apply because there had been no royal decree on the situation tests for which the Anti-Discrimination Act provides. Section 19(3) in no way debar the use of other means of evidence, apart from situation testing and statistics, such as a formal attestation by a judicial officer. It went on to add that sharing the burden of proof can only be required of a defendant if it is probable from the outset that he or she personally committed or ordered the behaviour

¹⁶⁶ Constitutional Court, 6 October 2004, B 84

¹⁶⁷ <http://www.diversite.be>

¹⁶⁸ The documentation relating to this case was consulted on the website of the Centre for Equal Opportunities at <http://www.diversite.be>

¹⁶⁹ Quoted by C.DELANGHE, op. cit., p. 319

which, prima facie, seems to have been discriminatory or, at the very least, if he or she tolerated this behaviour. The presumptions put forth must be robust and pertinent.

The judge also concluded that the formal attestation by a judicial officer that had been submitted by the applicants merely mentioned the agent as intermediary, but not the owners, and hence did not demonstrate that these had knowingly committed, instructed anyone to commit or tolerated a prohibited act of discrimination.

The plaintiffs' petition to consider the fact that the children had given a mandate or apparent mandate to their mother was not granted.

In the end, the judge ruled that the application for an injunction against the letting agency was baseless, as the latter had no power to accept or refuse a candidate for the flat or to conclude a lease. Moreover, the agency had subsequently proposed another flat to the plaintiff.

Court of Appeal, Antwerp, 17 February 2005

The court accepted that Section 2 had been breached in connection with certain facts relating to access to a leisure venue. Detailed investigations by the police had helped to undermine the classical arguments used by the doormen that the refusal had been prompted by the visitor's drunken state, aggressive behaviour or clothing.

In one instance, the offence had been proven by, among other things, pictures from a hidden camera. The court ruled that using a hidden camera for a television programme does not mean that the facts were provoked. "Even if they should not be regarded as legal evidence, that does not diminish the admissibility of the criminal action, nor the evidence of the facts."

Summary proceedings, Labour Court, Brussels, 30 November 2006

In late 2006, the Labour Court in Brussels ruled on an action for an injunction sought by an occupational therapist suffering from epilepsy whose application had been turned down by a home for the elderly. She had worked there for two years with a cover contract, and although she had suffered a mild episode on two occasions, the company physician had found her medically suitable for practising her profession. The employer accused her of a lack of transparency about her health and refused to consider her application for the full-time post when it became vacant.

The court found that the employee, on grounds of privacy, was under no obligation to inform her employer about her health status, unless it posed a risk to the worker's safety or that of anyone else in her workplace. Mention was also made of the role played by the company physician as a prevention consultant. By drawing on the option for shifting the burden of proof, the court concluded, in casu, that this was discrimination on the ground of the health of the person concerned, as defined in the (previous) anti-discrimination legislation of 25 February 2003.

Commercial court, Brussels, action for injunction, 8 July 2005

The plaintiff had little sight and was always accompanied by his guide dog. On 6 October 2003, along with 4 friends and his guide dog, he wished to dine in a restaurant belonging to a major food chain. The staff refused to serve them as dogs were not allowed in the restaurant.

The Centre and the injured party filed an action for injunction against the restaurant and its manager for indirect discrimination on the ground of disability.

The judge at the Commercial Court decided that he did not have the power to rule in this action against the manager. An action against the restaurant was ruled to be unfounded as there was allegedly no proof that entry or service had been refused. The judge felt that there was no case for applying the shift in the burden of proof, as the statements made by the

plaintiffs (the 4 persons who accompanied the injured party) could not be regarded as "facts" from which a discrimination might be inferred.

The Centre was unable to accept the judge's interpretation and remained convinced that there was a problem with this outlet, but it decided nevertheless not to appeal. The manager in question no longer works for the chain, and the company provides a satisfactory level of access.

Summary proceedings, District Court of Ghent, 31 December 2003

A gay couple wished to rent a flat. A few days after the initial contact, the estate agent informed them that the owners did not wish to let to two men or two women. One of the two men and the Centre filed an action for injunction against the three owners, the estate agent and, later, the mother of the owners, who was looking after the flat.

The judge argued that the two plaintiffs should not have filed the action together, but that there was indeed an interest in acting in the light of the risk that the situation might be repeated, even though the flat concerned had now been let. The three owners had never intervened and hence had not discriminated. The mother's intervention had not been covered by a mandate or apparent mandate. The rules on sharing the burden of proof could not be applied as there had been no implementing decree on situation testing. There was nothing to suggest that the estate agent had committed any discrimination, as he had suggested the couple to the "owner".

Action for injunction admissible but groundless.

This ruling was altered by the ruling from the court of appeal in Ghent on 30 November 2005.

Labour Court, Mechelen, under procedural rules, 16 March 2006

An applicant of Moroccan origin was told after stating his name that the job of furniture fitter had already been filled. His friend, who phoned and gave a Belgian name, was immediately offered an interview for the job. These phone calls were made in the presence of a job-seeking councillor. The employer subsequently confirmed to the latter that the vacancy was not yet filled. The Labour Court had seen extracts from the telephone bill indicating the exact times when these calls took place, accompanied by a witness statement from the councillor and confirmation from VDAB, the Flemish Public Employment Service, that on this date the vacancy had not been filled.

The court felt that simple telephone conversations confirmed by a third party whose sincerity was challenged by the other party were not sufficient to be regarded as facts which might trigger a sharing of the burden of proof.

