PROVING DISCRIMINATION

THE DYNAMIC IMPLEMENTATION OF EU ANTI-DISCRIMINATION LAW: THE ROLE OF SPECIALISED BODIES

REPORT OF THE FIRST EXPERTS' MEETING, 14-15 JANUARY 2003
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INTRODUCTION

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The Belgian Centre for Equal Opportunities and Opposition to Racism was trusted with the task of organising the first international experts' meeting in the framework of the European project *Towards a uniform and dynamic implementation of EU anti-discrimination legislation: The role of specialised bodies,* which is supported by the European Community Action Programme to Combat Discrimination 2001-2006. The project was initiated by a number of independent bodies from EU Member States whose task it is to combat discrimination in their countries. The aim of the project is closer collaboration between the independent bodies on subjects we each in our national framework are confronted with.

The seminar was entitled 'Proving Discrimination', and took place in Brussels in January 2003, which was very timely for the Centre. The Belgian parliament had on 12 December 2002 passed a general anti-discrimination law transposing *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* (Racial Equality Directive) and *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* (Framework Directive). This new anti-discrimination law has entrusted the Belgian Centre with a broad spectrum of "new" discrimination grounds. Until now our Centre's competencies were essentially limited to fighting discrimination on ethnic and racial grounds.

That the new legislation, based on both EC Directives, gives us entirely new grounds of discrimination to tackle is the first reason why this European project is so important to us as a means to learn from other bodies who have experience in dealing with some of or even all of the new fields we are confronted with: sex, (so-called) race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, a disability or physical characteristic.

Secondly, the topic of the January 2003 seminar, proving discrimination, is very important to us. Since 1981, Belgium has had a penal code prohibiting all forms of discrimination based on (so-called) race, national and ethnic origin. Ten years later Belgium found that this law was hardly ever being applied and that there were serious tensions in some inner cities. The tensions could be explained partly by the total absence of policies aiming to promote the integration of newcomers in our society, but also by the fact that racism was not being taken seriously. This led to the creation of our Centre in 1993.

Since then, the numbers of court cases and convictions have gone up significantly. But a large number of cases of discrimination were left unanswered because of the burden of proof and of the difficulty of proving intent. It is significant that even though a 1997 study shows that there is a statistically significant phenomenon of ethnic discrimination in the labour market, such a case has never found its way to court on the basis of our legislation.

Thus it was necessary, and not only because Europe "told us to", that measures were taken to strengthen the position of the victims of discrimination by providing for the shift of the burden of proof. This was done in the framework of the general anti-discrimination legislation that embeds a new approach to discrimination, including ethnic and racial discrimination, which focuses on the factual discrimination (intended or not) and allows for a shift in the burden of proof and the bringing of cases before civil courts.

At the seminar we received interesting input from our national experts on topics relative to this subject. But for us, it was particularly interesting to learn from the input of our guests about the different views held and experience gained in the different countries (and in the field of gender discrimination especially) in relation to the difficulty of proving discrimination. We trust that this seminar is as interesting for the readership as it was for us.

PROVING SEX DISCRIMINATION: MISSION IMPOSSIBLE?

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Council Directive 76/207[1] on equal treatment between men and women is more than 25 years old. In the national legislation of the Member States, equal treatment of men and women employees by an employer has thus been guaranteed for more than a quarter of a century. Why then in 2003 it is always the women who serve the coffee in offices and that the great majority of managers are men? Why is it that while men and women are guaranteed equal pay for equal work, studies are being published as regularly as clockwork describing the gap that separates the remuneration of women from that of men? Why are we unable to erase inequality of treatment between men and women, in spite of the existence of an apparently perfect legal apparatus? Numerous answers can be given to these questions. In this study, we will however tackle one single issue - one that is often forgotten about – that separates men and women, that of the little enviable legal position of the person who complains of sexual discrimination – de facto most often a woman.

The law of evidence is an extremely complex discipline. Since we are limited in the number of pages for our presentation and we would like the reader who is not an expert in procedural law to be able to follow our reasoning, we will take an approach that is not too technical and keep the number of footnotes to a strict minimum.[2] We mainly base our analysis on Belgian law and jurisprudence, but we are certain that other countries will nevertheless recognise the points we raise.

1. THE DISCRIMINATION IS NOT CONTESTED

1.1 The discrimination is direct and unjustifiable

For some employers, discrimination against women is a sexist reflex response. For instance in 1989[3], the Antwerp Employment Court heard the case of a woman who had been dismissed because she was pregnant.

In Belgium, women enjoy protection against dismissal when they bring a child into the world, but this period of protection ends one month after the end of the maternity leave. In this case the employer had waited until the end of this period of protection to dismiss the woman. In the letter of dismissal, the employer explained that when he had hired the employee he had concluded a 'gentleman's agreement' (sic) with her, under which she committed herself to resigning in the event that she became a mother. As she had not given her notice, she would have to leave.

In this case the discrimination is so obvious that proving it does not pose any problem.

1.2 The discrimination is direct and attempts are made to justify it

Since the decision of the Court of Justice in 'Dekker',[4] we know that direct discrimination cannot be justified. Nevertheless, some people try to justify their behaviour.

In Belgium, a distinction can be made between men and women at the moment the person is hired, on the condition that the profession in question is listed in the Act of 8 February 1979.[5] These are most frequently in the artistic sector, e.g. model, or actor. Until the mid-1980s, positions for teachers and sports teachers were contra legem reserved to candidates of the same sex as the children in their charge. In other words, a woman

[1] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ L39 14/02/76, p. 40.

[2] For a more advanced approach see P. HUMBLET, "Bewijs(last) en geslachtsdiscriminatie", R.W. 1991- 92, pp. 485-488, and H.C.H. SCHOORDIJK, "Discriminatie en bewijslastverdeling", NJB 1989, pp. 1245-1246; G. THOMAS, "La charge de la preuve", Rev. trav. 1990, pp. 705-730; R.A.A. DUK, "Gelijke behandeling in het geding: problemen van bewijslastverdeling en van "fact finding"", in J.E. GOLDSCHMIDT, A.W. HERINGA et F. VAN VLIET (eds.), De zijkant van het gelijk, Zwolle, Tjeenk Willink, 1991, pp. 129-138; M.A.J. LEENDERS, Bewijsrecht en discriminatie bij de arbeid, Deventer, Tjeenk Willink, 1997.

[3] Antwerp Employment Court, 26 January 1989 and 14 December 1989, Chr. D.S., 1990, p. 157.

[4] OJ 8 November 1990 (Dekker v. Stichting Vormingscentrum voor Jong Volwassenen), 177/88, ECJ, p. 3941.

[5] Act laying down the cases in which a person's sex can be mentioned in the conditions of access to employment or professional activity, M.B., 16 February 1979.

could only teach girls. The arguments on which this was based related to tradition and 'emotional considerations'.

In such a case, proving the discrimination does not constitute a problem. The judge finds there has been unequal treatment, concludes that there is discrimination, and prohibits the behaviour complained of. In 1987 the Council of State consequently condemned the practices described above.[6]

1.3 The discrimination is indirect

Indirect discrimination can be justified in some circumstances. Using the criteria established by the Court of Justice, the judge tries to determine the extent to which unequal treatment by the employer is discriminatory. He thus verifies whether the pursued objective is legitimate. He also checks whether by this treatment, the employer is pursuing an aim that is sufficiently important and if the measure is necessary to achieve this aim.[7] This is a purely intellectual exercise. The facts that constitute the basis of the complaint are not contested, which means there is no problem of burden of proof.

2. THE DISCRIMINATION IS HIDDEN

In the preceding chapter there was no real problem of proof to contend with. In effect, no one is contesting the existence of the discrimination as such. The discrimination is however sometimes hidden. In this case, two hypotheses arise.

2.1 The person discriminated against realises they have been discriminated against

The employer sometimes discriminates consciously, but hides it so as to avoid prosecution. A classic example is discrimination at the time of promotion. Men have priority in attaining a higher position on the basis of stereotypical arguments.[8]

In Belgium, a woman who is refused a promotion and who wants to contest this act can invoke Article 19 of the Act of 7 May 1999 before an employment judge.[9] When she puts forward facts that establish a presumption of discrimination, the burden of proving that there is no violation of the principle of equal treatment falls upon the defendant. This is sometimes referred to as the 'reversal' of the burden of proof.

The reversal of the burden of proof is a very complicated chapter of (procedural) law[10] and is often associated with proving a negative fact, which is generally impossible.[11] In our opinion, another name must be given to the obligation laid down in Article 19. It is probably a question of a shifting of the proof and/or the burden of the allegation.[12] The employer who is presumed to have discriminated does not have to bring evidence of the fact that he does not discriminate (which would imply proving a negative fact), but he must be able to prove that the established acts are not based on the sex of the member of the staff concerned.

When a woman maintains she was dismissed on the grounds of her pregnancy (= direct discrimination), it is sufficient that the employer states that he terminated the contract of this worker because the section in which

[6] C.E., 24 November 1987, R.W. 1987-88, p. 228; see commentary by P. HUMBLET, "Discriminatie bij aanwerving van overheidspersoneel", R.W. 1987-88, p. 209-216.

[7] On the criteria see inter alia Commentaire J. Mégret, 7, Politique sociale, éducation et jeunesse, Brussels, Editions de l'Université de Bruxelles, 1998, pp. 131.

[8] See inter alia P. FRANCK, A. VAN PUT and L. VERMEULEN, Personeelsbeleid en bedrijfscultuur. Carrièremogelijkheid voor vrouwen in ondernemingen, Brussels, Inbel, 1990, pp. 41.

[9] Act on Equal Treatment of men and women as regards working conditions, access to employment and possibilities of promotion, access to an independent profession and supplementary social security systems, M.B., 19 June 1999. This article expresses the principle defined in Article 4 EC Directive No. 97/80 of 15 December 1997 concerning the burden of proof in sex discrimination cases OJ No 14 of 20/01/98.

[10] See M. STORME, De bewijslast in het Belgisch privaatrecht, Ghent, Faculty of Law of the University of Ghent, 1962, pp. 108.

[11] See L. LARGUIER, "La preuve d'un fait négatif", Rev. trim. dr. civ., 1953, pp. 1-48.

[12] The burden of the allegation implies that in a procedure it is the person making the allegation who must prove the facts which permits the use of the invoked norm. See M. STORME, o.c., pp. 38.

she was employed was closed down. An aeroplane manufacturer who only employs male aeronautic engineers (= direct discrimination) can defend himself by saying that – by hypothesis – there are no women who possess this degree.[13] In the first case, it is not a question of real proof. It is enough to prove that the section really had been closed down. In the second case it will be harder for the employer who should for example produce letters from universities in support of his statements.

Despite the fact that the above-mentioned Article 19 makes the position of the presumed victim easier at the tribunal, it is always difficult to bring evidence of discrimination. On the basis of experience with other articles – much older articles – of employment law that provide for the same facility,[14] we know very well that an employer who discriminates subtly will not be caught easily. For example, a promotion can be linked to plausible but unverifiable parameters. When an employer states that a worker is not taken into consideration because, in his opinion, she is more negligent, impolite or even less intelligent than her male colleague who got the promotion, it is almost impossible to verify the truthfulness of what he says. The employer is taken at his word. In Belgium the judge is not allowed to substitute himself for the employer. It is only in a case of manifest lies or gross blunder[15] that the judge can admonish the head of a company.

2.2 The person does not realise that she/he is discriminated against

In a good number of cases, women are discriminated against without realising it. Here are some examples to illustrate this assertion.[16] A woman works as a manager in an administrative post; she is responsible for personnel. She believes she is not considered as an equal of her male colleagues. Unlike her, they use the company's luxury cars; she is not invited to the dinners with the management in luxury restaurants etc. The last straw is that on the grounds of her large quantity of work, she is told she can engage a deputy and when she asks how much she can offer to the happy candidate, the head of the company suggests a higher amount than that she is paid herself. Friction with the management results, and the matter ends up before the employment courts where the judge concludes that she has been discriminated against on the grounds of sex.

In this example, the lady knows the salary of the person she hires (and therefore knows that there is discrimination). With the exception of the public sector, pay is however still one of the best-guarded secrets in the employment world. No one knows how much a colleague earns. How could an employee collect sufficient information to be able to prove that she is being discriminated against? It is only possible if the amount of remuneration is published, for example when the employees only earn the salary laid down in the CCTs (*Conventions Collectives du Travail*, Collective Work Conventions). However, in a number of sectors, the salaries in the pay scale are intentionally kept quite low in order to maintain some liberty in the setting of the salaries. Often, therefore, this information tells us nothing.

The more one climbs in the hierarchy, the greater the secrecy surrounding pay. For example, the managerial duties are practically never taken into account in the pay scales. For the directors, the setting of the salaries is always done by agreement. So because of the secrecy that surrounds pay, an employee may very well be discriminated against throughout her carrier without even knowing it. What can be done to remedy such a situation?

The problem would be resolved if the legislator were to force complete transparency of remuneration. At any given moment employees could compare their pay with that of their colleagues. However, how much you are paid is considered by a great number of employees to be private information. Moreover, the political will to impose

[13] Example borrowed from J. BOWERS and E. MORAN, "Justification in Direct Sex Dicrimination Law: Breaking the Taboo", Industrial Law Journal, 2002, pp. 312-313.

[14] For example Article 63 of the Employment Contracts Act.

[15] For example, sexist remarks in the evaluation notes. For such a case see the sensational ruling of the US Supreme Court in Price Waterhouse v. Hopkins, 109 s. Ct. 1775 (1989). We do not know of any such decisions in Belgian case law.

[16] Antwerp Employment Court, 2 May 1991, R.W. 1991-92, p. 510. Our comments on this can be found in: P. HUMBLET, "(Bewijs)last en geslachtsdiscriminatie", R.W., 1991-92, pp. 485-488 and P. HUMBLET, "Hoe sociaal kan Europa zijn naar vrouwen toe", in De vrouw in de Europese Unie. La femme dans l'Union européenne, Louvain, Acco, 1994, pp. 139-147.

such a measure is lacking. The publication of salaries could well trigger a *bellum omnium contra omnes* in companies, which would mean that neither the companies nor the trade unions would be tempted to request an amendment of the law.

3. THE DISCRIMINATION IS NOT RECOGNISED

3.1 By the victim

In Belgium, as in other Member States of the European Union, the work of women is systematically underestimated.[17] This is sometimes apparent in the classifications of duties and pay. But even for the specialists is it difficult to detect the lack of sexual neutrality, for example in the classifications of duties. It is thus obvious that an employee will not realise that she is the victim of discrimination.

3.2 By the practitioners

In 1992 the Catholic University of Louvain (UCL) organised a conference for European specialists dedicated to the problem of access to equality.[18] It appeared that one of the problems was the lack of knowledge among the majority of lawyers and judges of the law on equal treatment between men and women.[19] Ten years later, it seems that this situation – certainly in Belgium – has barely evolved. A woman who believes that she is the victim of discrimination will often be confronted with the difficulty that her lawyer is unable to defend her because he does not recognise the discrimination as such.

The magistrate who has to give a ruling on a question of discrimination also often seems to lack experience. In cases of pay discrimination he can, under Article 6 of the CCT No 25, call upon the experience of a specialised commission. In over 25 years the judges have only made use of this possibility twice.[20]

4. A GENERAL LAW ON THE EQUAL TREATMENT: A BREAKTHROUGH?

The provisions of Directives 2000/43[21] and 2000/78[22] have been transposed into Belgian law by the Act pertaining to the combat of discrimination.[23] This Act does not add anything to the law on equality between men and women, apart from the fact that the procedural position of the applicants will noticeably improve. At the time of writing the Crown has yet to execute the decree on this subject, which means that the exact limits of the legal framework are not yet known.

4.1 Statistical Data as proof

Article 19(3) of the aforementioned Act lays down that the presumed victim of discrimination can invoke before the competent courts statistical data that permits the presumption of the existence of direct or indirect discrimination. This is certainly a positive evolution. Such a technique could or should certainly already have been used before the new law,[24] but we saw that in practice a great number of lawyers doubted the acceptance of this evidence by the judiciary.[25] Now the judiciary is obliged to take this evidence into consideration.

[17] See inter alia D. MEULDERS and R. PLASMAN, "La place des femmes dans le monde du travail", in Femmes et hommes en Belgique. Vers une société égalitaire, Brussels, Federal Ministry of Employment and Work, 2001, pp. 61.

[18] M. VERWILGHEN (ed.), Acces to equality between men and women in the European Community/L'accès à l'égalité entre femmes et hommes dans la communauté européenne, Louvain-la-Neuve, Louvain University Press, 1993, 294 p.

[19] C. Mc CRUDDEN, "Acces to equality between women and men in the European Community: the lessons of the Louvain-la-Neuve conference", in M. VERWILGHEN (ed.), Acces to equality between men and women in the European Community/L'accès à l'égalité entre femmes et hommes dans la communauté européenne, Louvain-la-Neuve, Louvain University Press, 1993, pp. 231.

[20] See J. JACQMAIN, "Egalité de rémunération", in Commentaire droit du travail. Guide Social Permanent, Bruxelles, Ed. Kluwer, Partie II, Livre I, Titre I, Chapitre II, n° 130.

[21] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19 July 2000.

[22] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2 December 2000.

[23] Act of 25 February 2003 pertaining to the combat of discrimination and to the amendment of the Act of 15 February 1993 pertaining to the foundation of a centre for equal opportunities and opposition to racism.

On the basis of the experience of the United States, where evidence of this kind has been used since the 1970s, it seems nevertheless that such a technique is open to criticism. Firstly, there are doubts as to whether or not the advantages of statistical methods outweigh the disadvantages. For instance, TRIBE thinks that the use of mathematics gives the evidence a scientific stamp but that this leads to the 'dehumanisation' of the procedure.[26] A process is not only a search for the truth, but also a ritual and this aspect will surely be lost when the development of the procedure depends on figures.[27]

Furthermore, certain lawyers have a simplistic conception of statistics. In the USA for example, complicated methods[28] are used which allow for some manipulation.[29] The judges should either be re-trained or call upon the aid of statisticians.

4.2 Tests[30]

Article 19(4) of the new law permits the delivery of proof of discrimination using situation testing, established by a bailiff's report, as a means of proving discrimination. This thus implies that the employer suspected of discrimination could be confronted with a number of test persons (provided by the Centre for Equal Opportunities), for example 20 women and one man. If the man is hired, there is a presumption of discrimination.

4.3 No miracle cure

The two techniques that have been described here do not offer a solution to specific situations. Situation testing can be useful for detecting sex discrimination at the time of hiring but not in the case of dismissal. Also, in the case of sexual harassment – which is also a form of sex discrimination – statistics and situation testing hardly provide a solution. Only witnesses can be useful in such cases. But often there are no witnesses because the more serious the intimidation, the more the aggressor will do to hide from the outside world.

5. ACCOMPANYING MEASURES

It is all very well to accord anti-discrimination rights, but if the obstacles to bringing evidence are so great that an action before the courts is doomed to failure - and we think we have shown that this has sometimes been the case – it is hardly worthwhile.[31] For this reason, complementary measures must be taken, inter alia:

5.1 The threshold of the procedure must be lowered

Persons who have been discriminated against and who think they have evidence of this discrimination often hesitate in initiating a judicial action because of the costs of the procedure. A lawyer is needed and the court expenses can be quite high etc. It is for this reason that many people support the lowering of the threshold of the procedure, as is the case in the Netherlands where you can go to the Equal Treatment Commission before referring to a judge.[32] This Commission examines the complaint and gives its opinion without any commitment.[33] Sometimes agreement is reached at this stage. Even if that is not the case, the person discriminated against already has an indication of whether or not the complaint has a chance of succeeding.

[24] This can be deduced from the jurisprudence of the Court of Justice, e.g. ECJ 17 October 1989 (Danfos), 109/88, ECJ p. 3199.
[25] A. VAN OEVELEN, "Enige aspecten van het recht op erkenning en beleving van een eigen culturele identiteit in (prae)contractuele rechtsverhoudingen", in Recht en verdraagzaamheid in de multiculturele samenleving, Antwerp, Maklu, 1993, p. 224.
[26] L.H. TRIBE, "Trial by mathematics: precision and ritual in the legal process", Harvard Law Review, 1971, n° 6, pp. 1375.
[27] Ibid. p. 1376.
[28] See inter alia S. FIENBERG (ed.), The Evolving Role of the Statistical assessments as Evidence in the Courts, New York, Springer Verlag, 1989 and M.A.J. LEENDERS, o.c., pp. 161.
[29] S. FIENBERG (ed.), The Evolving Role of the Statistical assessments as Evidence in the Courts, pp. 102.
[30] The extent to which situation testing can be used in the employer/employee relationship is not yet clear.
[31] H.C.F. SCHOORDIJK, l.c., p. 124.
[32] This Commission was set up by virtue of Article 11 (and subsequent articles) of the Act of 2 March 1994.
[33] The opinions can be consulted on http://www.cgb.nl.

The Equal Treatment Commission dealt with 70 complaints of sex discrimination in 2001.[34] In Belgium during the period 1971 to 2001, a judge was only referred to in around 15 cases on discrimination in pay and around 40 cases on the violation of the principle of equal treatment[35]. These figures speak for themselves.

5.2 Specialisation

Another advantage of a specialised body is that it develops great expertise. The individual magistrate (and/or lawyer) does not have sufficient training to study alone the complicated forms of discrimination. A commission could take care of this task.[36]

Despite the fact that it would be contrary to our law on the judiciary, we could declare one single court to be competent in a certain form of discrimination (sex), for example the employment court and tribunal in Brussels, given their central situation.

5.3 The compensation must be higher

Discrimination must be sanctioned effectively. In most Member States of the EU, when a person is able for example to prove discrimination in recruitment, it is not worth going to a judge because the compensation is granted in accordance with the rules of civil law and, contrary to their American colleagues, the European judges are rather restrained.

Equally, the compensation granted in a case of dismissal must be increased. In Belgium, when a person is dismissed because she has instituted an action against her employer for discrimination on the grounds of sex, the sanction consists of a lump sum of compensation equal to six months salary. This is a lot for a small company, but almost nothing for a large company. For this reason we could consider compensation expressed in fractions of sales turnover or benefits. If an employer risks being served with a sanction of a few million Euros, he will think twice before discriminating.

6. CONCLUSION

In *Les lois civiles*, Domat wrote: 'proof is what persuades the mind of the truth'.[37] Everyone knows that women are still discriminated against in employment relationships. For lawyers, it is a constant challenge is to seek ways of persuading the minds of the magistrates of this truth.

[34] *These figures are from the Jaarverslag 2001, Utrecht, CGB, 2001, p. 10.*
[35] *A summary of the Belgian jurisprudence on discrimination on the grounds of sex can be consulted on http://www.meta.fgov.be.*
[36] *This task could perhaps be undertaken by the Institute for Equality of Women and Men (recently created, see Act of 6 December 2002, M.B., 31 December 2002)*
[37] *DOMAT, Les lois civiles, as cited by J. LARGUIER, l.c., p. 2.*

REGISTRATION OF ALLOCHTHNOUS PERSONS, THE EXPERIENCE IN FLANDERS

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1. The necessity of a positive action policy
2. To what extent should the allochthonous population be registered and why?
3. The dangers of registering origin
   3.1. Public authorities as a real power: avoiding abuse
   3.2. The symbolic power of public authorities: social cohesion must not be weakened
4. The impossibility of registering foreign origin in a neutral and objective way
5. Self-identification as effective way to register origin: legitimate and reliable
   5.1. Optimising the legitimacy by registering origin on the basis of self-identification
   5.2. Optimising the legitimacy by linking registration to the experience of descendents of immigrants
   5.3. Optimising the reliability through good information
6. Conclusion: a Flemish model of self-identification

This article is a summary of a policy study undertaken in support of the positive action policy for the allochthonous population (that is, persons of immigrant origin) on request of the Emancipation Service of the Ministry of the Flemish Community. This study outlined three models which could be used for the registration of allochthonous persons. The first model is based on subjective criteria (self-identification), the second on 'objective' criteria[38] and the third is a combination of the first two. The advantages and disadvantages of these models have been analysed and the criteria used to define the target group of allochthonous persons have been tested on the target group. This study concludes that it is a self-identification model that best meets the requirements of the positive action policy of the Flemish Community.

1. THE NECESSITY OF A POSITIVE ACTION POLICY

An analysis of unemployment statistics on the basis of an 'objective' criterion, namely the surname and first name of unemployed persons, reveals that unemployment among the allochthonous population in Flanders, taking account of the level of schooling, is disproportionately high.[39] In order to attain proportional representation of the allochthonous population in the working population, a determined effort must be made to counter the lack of attention of which they are victims. A catch-up operation is also necessary in the Flemish Community's administration, because the proportion of allochthonous persons working there is also unrepresentative. The Flemish public authorities recognise that it is partly their responsibility to offer opportunities to the groups of the population that descend from immigrants. The proportion of descendents of immigrants who are working within the Flemish administration should correspond to their proportion of the working population in Flanders. The objective is to attain proportional employment participation and thus permit an improvement of the situation of the working allochthonous population in the employment market. These efforts towards proportionality at this level require a 'colouring' of the manpower.

[38] The degree to which the criteria of ethnicity, race, and origin constitute objective criteria for defining allochthonous is the subject of discussion, hence the use of inverted commas around the term 'objective'.

[39] Since 1995 the Flemish Employment Service has used a database of "Turk" and "Maghreb" names in order to recognise allochthonous job seekers. The first names and surnames of job seekers with Belgian nationality or other nationalities are checked against a file containing Turkish / Maghreb first names (11 000) as well as surnames (19 000). This file was created using the names of all persons of Turkish or Mahgreb nationality who had ever been inscribed at the Employment Service of the Flemish Community (VDAB). If a surname and a first name are identified as belonging to the 'Turk' or 'Mahgreb' list, these job seekers are considered to be of Maghreb or Turkish origin. Those job seekers who only either have a listed surname or a listed first name are not catalogued in this social group.

2. TO WHAT EXTENT SHOULD THE ALLOCHTHONOUS POPULATION BE REGISTERED AND WHY?

An important obstacle to the evaluation of the position of allochthonous persons on the employment market, as well as to a policy of positive action, is that the data we have on the target group is not complete. '*Allochtones*' are residents of Flanders of foreign origin but not necessarily with foreign nationality, as a large number of them have acquired Belgian nationality.[40] Registering nationality is common practice in personnel administration but this does not register *allochtones* with Belgian nationality.

Until the beginning of the 1990s the nationality criterion remained an adequate instrument in Belgium to take account of all population groups stemming from immigration for the purpose of studies and political initiatives. Although Belgium has always maintained the possibility of naturalisation for the first generation, and adhered to the *jus soli* principle for the second generation, it was only with the amendment of the nationality law in 1991 that access to Belgian nationality was radically liberalised. Persons of foreign origin born in Belgium to parents also born in Belgium (third generation) automatically became Belgian. Thus, from birth, the foreign origin of a large number of persons was statistically erased. At the same time, it became much easier for the second, but also for the first generation of immigrants to acquire Belgian nationality. Although in the course of the 1990s the portion of foreigners in the Belgian population fluctuated around 9%, the number of inhabitants with Belgian nationality who, at the time of their first registration in Belgium, either at birth or at the moment of their immigration into the country, had had a foreign nationality, was rising, exceeding 3% in 1990 and 4% in 1998. The third generation immigrants, but equally the children of foreigners who acquire Belgian nationality as first generation, are not detectable on the basis of this initial registration. They are actually Belgian at birth. The number of allochthonous persons in Belgium in 1998 was consequently markedly higher than 13% of the population. Access to Belgian nationality for immigrants and their children was profoundly liberalised by the nationality law of 1 March 2000. Sixty thousand foreigners - seven percent of the foreigners living in Belgium in January 2000 – acquired Belgian nationality during the first year the new law was in force, in other words more than double the number of foreigners that became Belgian each year during the 1990s (Caestecker et al. 2002).

Proportional participation in the employment market constitutes a political objective of the Flemish public authorities, and the registration of origin was introduced as an instrument to attain this goal. The Flemish public authorities experimented with registering origin for the first time in 1999 when, in the framework of applications submitted under a programme designed for young persons leaving school without a job ('takeoff runways') the public authorities asked the candidates two unusual questions (do you consider yourself to be an allochtone or an autochthon and where were your two parents born). The experience of this test did not turn out to be very positive (see below) and a study was commissioned with a view to developing a quality system of registering. The registration must actually be an effective instrument that is able to respond to the high demands of legitimacy and reliability. Registration of origin equally carries a number of risks, which must be taken seriously.

[40] *This linguistic definition of allochtones goes beyond the more selective political definition of allochtones, i.e. immigrants originating from countries that do not belong to the European Union and their descendents. In Flanders this refers in particular to persons originating from the Maghreb and Turkey.*

3. THE DANGERS OF REGISTERING ORIGIN

The influence the State has as a centre of power means that registration of origin by the public authorities is a delicate matter. The real strike power of the State and the highly symbolic influence that the public authority can exert on society means that such a form of registration cannot be treated lightly.

3.1. Public authorities as a real power: avoiding abuse

With regard to registration of origin, the fear, founded or not, of an abusive use of personal data, must be taken into account. The massive acquisition of Belgian nationality in the 1990s by groups of the population stemming from immigration resulted notably from their preoccupation with escaping differential treatment by the Belgian State and by society. There may be a fear that a competent authority, controlled by a majority, may, through registration of origin, find itself in the position to act in a discriminatory way towards minorities who have become identifiable. Such a fear cannot be ignored in Flanders, where the 1990s saw the electoral advancement of a political grouping which is not in favour of the presence of the population that stems from immigration.

Generally, the federal government shares this concern. The Act of 11 December 1998 assuring the protection of private life in relation to processing personal data provides, similar to European Directive 95/46/EC of 24.10.1995, that sufficiently appropriate and specific guarantees are foreseen to ensure the protection of private life. As far as data on ethnic or racial origin is concerned, regulation must be especially strict. The law lays down a number of possibilities for processing such personal data. If the person concerned authorises in writing the processing of the data, or if there is an important public interest reason based on law, the registration of racial or ethnic origin of a person can take place.

The fear of an abusive use of personal data can seriously endanger the reliability of registration of origin. Minorities may fear becoming victims of discrimination following their registration. This fear will be particularly felt among isolated minorities and by those who have little confidence in the public authorities. Thus it emerged from a Dutch study that the number who chose not to respond is significantly greater in the regions where the number of minority residents is lower than in the cities where many minorities live (Schriemer M.R. 1999). The fear of an abusive use of registration of origin leads to the refusal to make this personal data available to the public authorities. If we want to avert this danger and optimise the reliability of the registration, it is advisable to show understanding of views on privacy in relation to personal data on origin. There must be clear guarantees that render any abusive use of this material impossible.

3.2. The symbolic power of public authorities: social cohesion must not be weakened

The power of public authorities is not only real but also highly symbolic. Officially registering origin may reinforce ethnic dividing lines in the sense that they are thus officially legitimised. This official registration of origin signifies, in fact, the institutionalisation of a line of demarcation drawn in the heart of society. The method of registration must take into account the objections to it so as to avert the dangers of a policy of symbolic apartheid. The ethnic category to which a person belongs or is put into is a social construction. The public authorities must recognise that an ethnic group does not constitute a natural, objective unit. This recognition means the public authorities cannot unilaterally establish the categories. On this delicate ground, it is advisable to opt for a low profile public authority that will restrain itself from unilaterally determining the meaning linked to these social categories.

4. THE IMPOSSIBILITY OF REGISTERING FOREIGN ORIGIN IN A NEUTRAL AND OBJECTIVE WAY

The ambiguity of the category of origin (or ethnicity) places a heavy burden on the legitimacy of the instrument that registers origin. In relation to foreigner versus Belgian citizen, or to man versus woman, the criteria used are unambiguous. Proof of nationality or sex unequivocally refers to the category to which one belongs. Origin is not such a clear identity concept. The question of origin relates above all to identifying oneself with a certain group of the population. The reduction of the question 'what is your country of birth and that of your (grand) parents' to an enquiry into an objective criterion of origin denies the problems of this question.

Belonging to a certain population group involves a subjective choice of the individual that is embedded in a social context. Origin in the sense of the place of birth of a person themselves or that of his/her (grand) parents does not necessarily affect the way a person identifies him/herself or is perceived in society. Likewise, a person's surname does not necessarily assign him to a certain ethnic group. The fact that the question is not neutral but indeed very sensitive is reflected in the resistance that habitually meets questions about the county of birth of (grand) parents. The Dutch study notes that 22% of those questioned refused to answer the question on the country of birth of their grandparents. This refusal is the result of the belief that the question on the country of birth of parents and certainly that of grandparents is considered irrelevant for a job application (Verweij 1993, Schriemer 1999).

The question about origin also clashes with many practical reservations. The country of birth is not an unequivocal criterion; it does not necessarily imply foreign origin. The place of birth can be determined by fortuitous circumstances (nationals of the mother country in the colonies, military presence abroad etc.) and therefore does not constitute a pure indication of the origin of a person. Numerous other situations further complicate this method: does it take into account the distinction between legal and natural persons, what about mixed marriages etc.? Limiting the criteria to parents implies anew that we can no longer consider third generation immigrants as being of foreign origin. As far as the third generation is concerned, it could, if considered opportune, be based on the vague question about the native country of the parents and grandparents. The question 'what is the native country of…' must be asked six times and then it must be determined arbitrarily how many parents and grand parents have to have been born abroad for a person to be considered to be of foreign origin. Of course it is always possible to opt for a certain branch and/or a certain sex (for example the grandparent of the father's side) to define foreign origin, but this option is still arbitrary. Through posing a multiple-choice question about the native country in the case of a job application, foreign origin is likewise strongly emphasised.

Because of the vague and arbitrary character of a system based on registering the native country, we advocate self-identification on a voluntary basis, which maximises the autonomy of the individual, and which recognises the subjective character of association with a social group. Any categorisation based solely on so-called objective data must be rejected for fear of institutionalisation of the ethnic dividing lines in society.

5. SELF-IDENTIFICATION AS AN EFFECTIVE WAY TO REGISTER ORIGIN: LEGITIMATE AND RELIABLE

In order to have an effective instrument, high requirements must be set as regards legitimacy and reliability of the registration. If these two conditions are not fulfilled, it will not be possible to adequately evaluate the policy on the basis of this instrument. A measuring instrument with low effectiveness will also lead to an inferior registration of origin in terms of political organisation.

The instrument registering origin must above all be legitimate. The criteria used must lead to a valid identification and it must enable the target group of the policy to be identified as fully as possible. Not only must the measure be legitimate, but it must be reliable as well. The various links of the process of registration of origin must be meticulously chained together.

5.1. Optimising the legitimacy by registering origin on the basis of self-identification

The choice of self-identification for the model for registering origin offers the important advantage that also the third and fourth etc. generation of immigrants can be identified, in so far as the person finds it relevant. The choice of self-identification recognises the subjective character of the ascription or belonging to a social group. Under such a categorisation system the individual concerned is put in a central position and can decide him/herself whether or not s/he is part of the population groups that descend from immigrants.

It is not the organisation that places persons in a certain category but the person him/herself who determines the category to which he/she belongs. From the point of view of the political organisation, this may generate problems when the (according to the majority 'identifiable') minorities do not identify themselves in the target group to which the majority assigns them. The question of reliability of registration can thus arise. In order to minimise the fracture between the majority and the minority, it is essential to clearly explain the logic of the categorisation in the general directions given on the form, in which it is explained that the individual concerned is accorded a central role in defining their identity. The inherent ambiguity in the concept of identification of allochthonous persons - which is loaded with subjectivity - is resolved to the benefit of the individual concerned. The processed categories cannot be detached from the will of the individual and be 'objectified'. Descendents of immigrants are not necessarily *allochtones.*

5.2. Optimising the legitimacy by linking registration to the experience of descendents of immigrants

As for reasons of principle and pragmatism we have chosen self-identification, the legitimacy of the instrument very much depends on the extent to which the target group recognises themselves in the choices that are proposed to them. As far as is possible, it must be avoided that the method of identification fails to achieve the objective sought and that, for example, part of the target group is not covered by the structure.

In order to determine the categories for self-identification we based ourselves on a questionnaire sent to 107 young allochtones, defined as themselves being born abroad, or having (grand) parents born abroad. These youths made 202 choices in the framework of this enquiry (see table 1).

Table 1: the popularity of the answers in the identification survey[41]

N=107,with 202 choices; the respondents could cross several choices	Portion of the total number of respondents	Portion of respondents who only crossed only one choice (n=29)
1. I am a Belgian of *ac* background	29%	10%
2. I am *on* with Belgian nationality	28%	35%
3. I am a Belgian *allochtone*	25%	17%
4. I am Belgian	21%	10%
5. I am Belgian *ac*	18%	0%
6. I am Belgian originally from *co*	12%	3%
7. I am Flemish	8%	0%
8. I am a Belgian of *ac* origin	8%	0%
9. I am a *on* Belgian	7%	3%
10. Other: I am a…….	34%	21%

The most popular answer was the free choice category. It was under this choice that around half of the respondents indicated their nationality of origin. Only 18% of the total sum of respondents chose the reference to the nationality at birth. The reference to original nationality was the fifth most popular. The most popular form of self-identification suitable for the positive action policy was Belgian with background adjective of country of birth, with 29% of respondents finding themselves in this definition.

It appears from the study that the category *allochtone* put up resistance that is habitual of some of the sub-groups of the target group. The opinion question in the questionnaire indicated that those who accord great importance to political and social rights linked to citizenship reject the label Belgian *allochtone* (a substantial Pearson correlation, -300 and -257 respectively). The resistance to the category *allochtone* equally arises from the limited experience of self-identification of allochthonous persons in Flanders. As mentioned above, the 'take-off runway' programme had posed job applicants two non-classical questions. The pattern of answers to these two questions indicated clearly that *allochtone* does not constitute a category which conjures up a lot of recognition among the Flemish population stemming from immigrants. The population stemming from immigration finds it difficult to identify itself under the category *allochtone*, this label only being of value as an administrative category that covers the various groups of population stemming from immigration. *Allochtone* is an overarching concept under which the diversity of the population groups that descend from immigration is reduced to a binary contrast between majority and minority (us and them).

Table 2: Portion of candidates in the 'take-off runway' programme who are of foreign origin (at least one parent is born elsewhere) and who consider themselves to be allochtones

N 225	Maghreb	Turkish	EU	Other
First generation	36%	26%	33%	41%
Second generation	25%	23%	10%	13%

[41] *Adjective of country of birth=ac; original nationality=on, country of origin=co.*

5.3. Optimising the reliability through good information

If we want to maintain the reliability of the registration of origin at a high level we must strive for a high reliability of registration and a limitation of the number of disadvantages that it entails. Potential candidates must thus be clearly informed in advance of the registration of its aim. Generally, (organised) allochthonous persons seem on principle to have a negative view of registration of origin and it is only for practical reasons that this point of view may be modified. Clear information, on the basis of which allochthonous persons can weigh up whether the registration of origin serves their interests, may overcome their resistance to this form of registration. Allochthonous candidates must be clearly informed that it may well be in their interests to collaborate on the registration of origin. At the same time, from a social and political point of view, it would be a bad thing to see, for example, those who are economically and socially weak recognising themselves as *allochtones* and those who have acquired a better social situation identifying themselves as autochthones. Giving positive value to foreign origin can lift this tension.

6. CONCLUSION: A FLEMISH MODEL OF SELF-IDENTIFICATION

The registration of foreign origin is a delicate question, the meaning attached to this origin not being neutral. The registration of members of our society as *allochtones* may lead to a sclerosis in the collective education. The public authorities must not endow society with a border post that officially separates *allochtones* and autochthones. They must not, then, unilaterally fix these categories. Yet they need instruments to be able to measure discrimination, conscious or unconscious, or to be able to evaluate their policy to combat discrimination. To recognise this social dividing line without perpetuating it demands a perilous balancing exercise. This concern brings us to reject 'objective' criteria to define the target group of a positive action policy: only self-identification recognises the subjective character of attribution to a social group. If we want to create an instrument of registration or origin that is legitimate, we must link this to the experience of the population group that descends from immigration. The study indicated that this implies a referral to the country or nationality of origin. For economic reasons, this rule was nevertheless departed from when elaborating the model. In the final model a number of geographically defined groups were proposed but the respondent can always avoid these by resorting to the free choice.

The proposed model was as follows:

Your nationality?
If you have Belgian nationality, what is your ethnic origin?
(You may make more than one choice)

Turkish origin
Belgian origin
Italian origin
Asian origin
American origin
Moroccan origin
East-European origin
Sub-Saharan origin
Originally from another west-European country
……origin (origin to be completed freely)

Explanation:
- The order is determined on the basis of the length of the proposal, being careful not to allow it to be perceived as a value judgement on the part of the authorities.

- The possibility to cross more than one of the choices gives people the place to express several possibilities of identification (mixed marriages, different country of birth, country of residence and country of origin) and may inspire them to select, in addition to their country of origin in the free choice, a combined category.

- In the menu of proposals the three largest immigration nationalities in the Flemish region are selected. The reference to Italians is explicitly included because it is the biggest population group, and to avoid the stigmatisation that could result from only mentioning the two population groups stemming from immigration that are central to the Flemish concept of *allochtone.*

Self-identification in the form proposed here offers the advantage that it can be dynamically manipulated. Depending on the number of persons who do not associate themselves with any of the 9 possibilities and create a new category, the categories may be redefined. Besides, the individuals can consider themselves as belonging to different categories. This model optimises the legitimacy of the instrument without institutionalising the boundary between *allochtone* and autochthon.

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METHODS OF PROOF IN THE CONTEXT OF COMBATING DISCRIMINATION

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One characteristic of equal treatment law is the fact that, more than in any other sphere, the material guarantees (prohibition of direct and indirect discrimination, the right to a reasonable procedure and the possibility of introducing affirmative action) and the procedural mechanisms by which protection is ensured (protection of the complainant from retaliation, the role of groups in assisting and representing victims in particular) are inextricably linked. There is no clear boundary between these two types of provision. Because the extent of the guarantee (that the individual should not be subjected to discriminatory treatment) depends on the means available to him/her to secure the cessation of this treatment or to obtain compensation, the essence of this right is determined by the quality of these mechanisms. This is illustrated particularly clearly by the law governing proof.

Considerable difficulties are experienced by victims in providing proof of discrimination. This is particularly true when discrimination is defined as the intention to treat someone differently on the basis of a prohibited criterion or to exclude members of a category that is defined by the use of criteria, provisions or procedures which are apparently neutral but are calculated to bring about this effect. Bearing this in mind, the option to use particular methods of proof does not just augment the resources available to the victim to prove the discrimination s/he suffers; in fact the very concept of prohibited discrimination is actually extended by the fact that the victim can make use of these methods. This extension of the concept of illegal discrimination occurs, in particular, when the provision of statistics is admissible as proof. This means that discriminatory actions where the discrimination is concealed behind the use of measures which, while they do not result in any difference in treatment based on a prohibited distinguishing criterion, nevertheless produce identical or similar consequences (since they are based on a criterion calculated to produce the same effect), are not the only form of discriminatory conduct liable to be penalised. By using statistical evidence, it also becomes possible to punish the use of measures, the impact of which is disproportionate in relation to certain categories which are protected from discrimination, whether or not this impact was foreseeable and whether or not it was calculated.

The first section of this paper focuses on the use of statistical evidence to provide proof of discrimination (I.). It highlights the extension provided by this type of proof of the very concept of prohibited discrimination (I.1.), to which allusion has already been made above. Next we address one by one the methodological problems (I.2.) followed by the legal difficulties involved in the use of statistics (I.3.). The second section is devoted to the use of "situational tests", which is the other special technique of proof in the field of equal treatment (II.). This second section is structured similarly to the first one: after demonstrating the added value of using this method of proof (II.1.), the associated methodological (II.2.) and legal difficulties (II.3.) are addressed.[42]

1. PROOF THROUGH STATISTICS

1.1. Added value of proof based on statistics

Where it is prohibited to practise a certain type of direct discrimination, that is to treat people differently on the basis of a distinguishing criterion, which is prohibited, the perpetrator of the discrimination will be inclined to conceal his/her discriminatory conduct behind the use of criteria, provisions or practices which do not overtly result in such a difference in treatment, but which are nevertheless calculated to produce the same effect. The prohibition of indirect discrimination aims to counter this. It is in this sense that the prohibition of indirect

[42] *The arguments put forward in this text were developed in part in O. De Schutter, Discriminations et marché du travail. Liberté et égalité dans les rapports d'emploi, Bern-Oxford-New York-Vienna, P.I.E. Peter Lang, 2001.*

discrimination constitutes the necessary complement to the prohibition of direct discrimination: it would be too easy to circumvent the latter prohibition if indirect discrimination was not itself also prohibited. At this level, statistics serve to highlight the fact that the use of measures which are apparently neutral do, nevertheless, lead to a specific disadvantage for particular categories of people. If the defendant cannot prove that, in using these measures, s/he was pursuing a legitimate aim by appropriate and necessary means, it will be found that s/he is guilty of discrimination. It is of little importance whether this discrimination, which it was possible to prove by the statistics, was intentional or not.

However, two separate definitions of indirect discrimination co-exist in equal treatment law which produce very different consequences. The first is based on the concept of disparate impact: if it appears that an apparently neutral measure (that is, one which does not overtly lead to any difference in the treatment of members of Group A compared with the members of Group B), in actual fact affects a considerably larger number of members of one group, the measure is considered to be suspect and may only be continued if an objective and reasonable justification can be provided. This approach to indirect discrimination is the one which is contained in Directive 97/80 of 15 December 1997 on the burden of proof in cases of discrimination based on sex. According to this Directive, "…*indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex* unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex" (author's italics).[43]

More generally, it is this concept of indirect discrimination which is employed in equal treatment law in relation to men and women. In one of the first judgements[44] where it is developing the concept of indirect discrimination, the Court of Justice of the European Communities, with regard to the staffing policy operated by a department store which consisted of excluding part-time employees from an occupational pension scheme, decided that, "If, therefore, it should be found that a much lower proportion of women than of men work full time, the exclusion of part-time workers from the occupational pension scheme would be contrary to Article 119 of the EC Treaty [equal pay for the same work] where, taking into account the difficulties encountered by women workers in working full-time, that measure could not be explained by factors which exclude any discrimination on grounds of sex."[45] In the same way, the Court of Justice considers that a collective agreement which allows employers to operate a distinction as regards overall pay between two categories of workers, who are the equal in terms of the number of hours worked per week or per month, "…does constitute discrimination against female workers vis-à-vis male workers, if in fact a much lower percentage of men work on a part-time basis than women", unless the difference in treatment between the two categories of workers could be shown to be based on "objectively justified factors unrelated to any discrimination on grounds of sex".[46]

The approach is based on a statistical analysis of the impact of such an apparently neutral measure on the two categories of people concerned. This analysis is the task of the court, which applies the rule of equal treatment to determine whether the statistical evidence provided may be taken into account, that is "whether [it] cover[s] enough individuals, whether [it] illustrate[s] purely fortuitous or short-term phenomena, and whether, in general, [it] appear[s] to be significant".[47]

The second approach to indirect discrimination is founded on the idea that certain measures, although they may not be based explicitly on a prohibited distinguishing criterion, are nevertheless *by their nature, or intrinsically,*

[43] *Official Journal (OJ), L 14, 20/01/1998, p. 6.*
[44] *See also Court of Justice of the European Communities (CJEC), 31 March 1981, Jenkins, 96/80, Rec., p. 911.*
[45] *CJEC 13 May 1986, Bilka-Kaufhaus GmbH, 170/84, Rec., p. 1607 (point 29). In this case, the ratio was one to ten women to men among the full-time employees who benefited from the occupational pension scheme. According to the data provided by the German National Court consulting the Court of Justice of the European Communities for a preliminary ruling, the situation was as follows: 72 % of the company's employees were men and 28 % were women; of the men, 90 % worked full time and 10 % worked part-time; of the women, 61 % worked full-time and 38.5 % worked part-time.*
[46] *CJEC, 7 February 1991, H. Nimz, C-184/89, Rec., p. I-297 (point 12). For more similar judgements, see also, for example, CJEC, 13 July 1989, Rinner-Kühn, 171/88, Rec., p. 2743 (point 12); CJEC, 27 June 1990, Kowalska, C-33/89, Rec., p. I-2591 (point 16); CJEC, 2 October 1997, Kording, C-100/95, Rec., p. I-5289 (point 18).*
[47] *CJEC, 27 October 1993, Enderby, C-127/92, Rec., p. I-5535 (point 17).*
[48] *See Directive 2000/43/EC, 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ, L 180, 19/07/2000, p. 22; and Council Directive 2000/78/EC, 27 November 2000, establishing a general framework for equal treatment in employment and occupation, OJ, L 303, 02/12/2000, p. 16.*
[49] *See Article 2 para. 2 of the two Directives cited above.*

liable to disadvantage individuals who belong to a category protected from discrimination, without it being necessary to determine, statistically, whether a disparate impact actually takes place to the detriment of this category. It is this approach which is favoured by the Directives based on Article 13 of the EC Treaty.[48] These Directives state that indirect discrimination "shall be taken to occur where an apparently neutral provision, criterion or practice would put […] at a particular disadvantage" persons defined by their race or ethnic origin, religion or belief, disability, age or sexual orientation.[49] This method of exposing indirect discrimination is illustrated particularly clearly by the judgement in the case of *O'Flynn* v *Adjudication Officer* given on 23 May 1996 on the basis of Regulation No. 1612/68 of the Council regarding freedom of movement for workers.[50] In the preparatory work for the Directives based on Article 13 of the EC Treaty, the influence of this judgement on the authors can clearly be seen.[51]

The Court of Justice of the European Communities considers in this judgement that Article 7 paragraph 2 of Regulation No. 1612/68 of 15 October 1968, which stipulates that workers from other Member States are to enjoy in the Member State where they work "the same social and tax advantages as national workers", precludes a national rule which makes the granting of a payment to cover funeral expenses incurred by a paid worker subject to the condition that burial take place within the territory of the Member State which grants this payment. According to the Court, "unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory *if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage*" (point 20 – author's italics). The Court continues: "It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. [...] It is above all the migrant worker who may, on the death of a member of the family, have to arrange for burial in another Member State, in view of the links which the members of such a family generally maintain with their State of origin." (points 21 and 22).

Article 2 paragraph 2 of Directives 2000/43/EC and 2000/78/EC stipulates that indirect discrimination is defined as the use of a criterion which is apparently neutral but which is in reality intrinsically suspect because it is liable to lead to a particular disadvantage for the members of certain protected categories. However, the use of the disparate impact method to establish a prima facie case of discrimination is nonetheless not ruled out within the framework of these Directives. In the preamble to the two Directives it is indicated that it is possible for, "indirect discrimination to be established by any means including on the basis of statistical evidence". The possibility[52] for a Member State's law or national practice to make provision for this type of evidence is due, however, to the fact that, while the only aim of the Directives is to guarantee a minimum level of protection from discrimination, they authorise the states to which they apply to make provision for rules of evidence which are more favourable to plaintiffs.[53]

The application of this possibility (allowing evidence of discrimination based on statistical data) actually changes the concept of indirect discrimination. The scope of the prohibition of indirect discrimination is in fact extended. If statistical evidence is allowed, it is not only the use of "suspect" measures which is prohibited (that is measures which seem, by their nature, to have been calculated to produce a discriminatory effect, allowing the burden of proof to be reversed and placed on the initiator of the measure, without the statistical impact of the measure concerned having to be measured), but also the use of measures which turn out to have a disproportionate impact on certain protected categories.

[50] From the Sotgiu judgement of 12 February 1974 there is established case-law regarding freedom of movement for workers to the effect that, "the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result." The Sotgiu judgement finds that, "it may therefore be that criteria such as place of origin or residence of a worker may, according to circumstances, be tantamount, as regards their practical effect, to discrimination on the grounds of nationality, such as is prohibited by the treaty." (CJEC, 12 February 1974, Sotgiu, 152/73, Rec., p. 153 (point 11)).

[51] The O'Flynn judgement is not the first to use the criterion of indirect discrimination which is developed here. See, for example, CJEC, 15 January 1986, Pinna, 41/84, Rec., p. 1 (points 23 and 24) ("…the principle of equal treatment prohibits not only overt discrimination based on nationality but all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result."); CJEC, 7 June 1988, Roviello, 20/85, Rec., p. 2805 (point 15); CJEC, 30 May 1989, Allué and Coonan, 33/88, Rec., p. 1591 (point 12); CJEC, 21 November 1991, Le Manoir, C-27/91, Rec., p. I-5531 (point 11); CJEC, 28 January 1992, Bachmann, C-204/90, Rec., p. I-249 (point 9); CJEC, 12 September 1996, Commission v Belgium, C-278/94, Rec., p. I-4307 (point 28) ("Thus, conditions applied without distinction which may be more easily fulfilled by national workers than migrant workers are prohibited.").

[52] Will there come a day when the Court of Justice of the European Communities makes compulsory what is currently just an option within the power of the Member States? Such a development is not impossible. In this respect, it is useful to recall, for example, in the Enderby case, that it is in view of the fact that

The difference between the two approaches to indirect discrimination can be explained as follows. The admissibility of statistical evidence shifts the approach from focusing on the identification of "doubtful" measures to focusing on the "disparate impact". In this way it extends the scope of prohibited practices. However, at the same time it a) requires an appropriate methodology (see below, I.2.) and b) makes the initiator of the measures in question inclined to monitor constantly the impact, on different categories of people protected from discrimination, of the measures s/he implements and even - when it is no longer possible for the initiator of such a measure to justify the criteria used - to aim for a balanced (proportionate) representation of these different categories through the procedures s/he establishes. The table below is intended to summarise the different consequences of each of the definitions of indirect discrimination.

	Method: impact evaluation method: disparate impact leads to indirect discrimination being suspected	**Method: identification of the "suspect measure":** the use of these measures leads to indirect discrimination being suspected
Scope	Wide: allows justification to be required for any measure where the examination of its statistical effects reveals a disparate impact	Narrow: only allows justification to be demanded for measures where a "concealed" intention to discriminate is suspected
Implementation	Assumes: - the classification of individuals into different categories - that statistics are collected based on a representative sample, and that these statistics are interpreted taking account of preferences and necessary qualifications	Assumes: - that the individuals who belong to a protected category have certain common characteristics - and that these characteristics, as well as the average situation of the members of the group in relation to them, are known
Result	Since s/he is uncertain of being able to justify each of the choices s/he makes, the initiator of the measure or the individual who applies it, will take account, once the permitted criteria have been exhausted, of the individuals' membership of the different categories available (choice made on the basis of a lexicographical method)	The individual alleged to have used a "suspect" criterion will either seek to conceal better the discrimination which they want to practise with impunity (including by making more use of informal procedures), or revise the criterion complained of so that it corresponds more closely to the requirements of the job

By contrasting these two methods in this way, it is possible to reveal that, behind what seems to relate to an ordinary issue of evidence, is the fundamental issue at stake – concealed by the choice between two definitions of indirect discrimination. The next two sections look at the methodology required by the "impact evaluation" method for establishing proof of indirect discrimination (that is, the establishment of this proof by using statistical evidence) and the legal issues with which this specific methodology confronts us.

the defendant provided statistical evidence allowing a prima facie case of discrimination to be established that the Court opined that "Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory." (CJEC, 27 October 1993, Enderby, C-127/92, Rec., p. I-5535, point 18). In spite of the fact that the definition of methods of proof before national courts comes, in principle, under the procedural autonomy of the Member States, which is recognised even in the application of Community law, the Court of Justice of the European Communities does not hesitate to lay down that the requirements of proof in national law shall not make it "virtually impossible or excessively difficult" to establish in legal proceedings the rights accorded by Community law (see CJEC, 9 November 1983, Administra-zione delle Finanze delle Stato v Societa San Giorgio, 199/82, Rec., p. 3595). Sometimes this restriction to the procedural autonomy of the Member States is justified by the obligation to respect the right to an effective remedy (Article 13 of the European Convention on Human Rights): CJEC, 15 May 1986, Johnston v Chief Constable of the Royal Ulster Constabulary, 222/84, Rec., p. 1651 (point 20). For specific references to this aspect of Community case-law relating to the equal treatment of men and women, see O. De Schutter, Fonction de juger et droits fondamentaux, cited above, p. 177, note 37.

[53] *Article 8 paragraph 2, of Directive 2000/43/EC; article 10 paragraph 2 of Directive 2000/78/EC.*

1.2. Methodology for the use of statistical evidence

The approach to indirect discrimination represented by disparate or disproportionate impact is based on a statistical comparison of the composition of two groups, a "reference" group (base group) and a "selected" group, comprising all the people who have experienced the measure whose impact is being measured. Within each of these groups the individuals must be divided into two categories, A and B, corresponding to the dominant or majority category and the traditionally disadvantaged or minority category. The distinction between the two categories will be based on criteria such as sex, race or ethnic origin, religion or belief, age, disability or sexual orientation. The ratio of category A to category B represents the proportion of the members of each category within the reference group, while the ratio of category A* to category B* will represent the proportions within the selected group. The measure which is being assessed to determine whether or not it constitutes indirect discrimination is said to be "suspect" (leading to a reversal of the burden of proof) if the members of the protected group (B) are clearly less well represented in the selected group (at the end of the selection) than in the reference group (at the beginning of the selection), that is, if A / B < A* / B*. In this case, the individual responsible for the measure will have to justify it, that is s/he will have to show that it has a legitimate aim and that the means by which s/he intends to achieve this aim are appropriate and necessary for its attainment

In terms of methodology, the use of statistical evidence assumes a) a sufficiently precise definition of the reference group; b) the allocation of each individual to a category (A or B in this example); and c) that there is a defined threshold on the basis of which the impact of this or that "neutral" measure with regard to prohibited distinguishing criterion must be considered as disproportionate, and therefore sufficient to allow a shift of the burden of proof. It is by identifying these conditions that the questions can be determined which, in legal terms, occasion the use of this method of establishing proof of discrimination, or rather of this technique whereby the victim is authorised to reverse the burden of proof, that is establishing a prima facie case of discrimination whereby it is the defendant who must demonstrate that it is unfounded.

1.3. Admissibility of statistics in the context of legal proceedings

The legal problems associated with the use of statistical evidence relate to the processing of "sensitive" personal data whereby a group of individuals is divided into different categories (1.3.1.) as well as to the prima facie mechanism itself which allows statistical evidence to be brought before the court, which then requires the defendant to establish the proof of a negative fact, that is the absence of the alleged discrimination (1.3.2.). In criminal cases specific restrictions apply which are linked to the principles of legality and the presumption of innocence: in the context of criminal proceedings, these problems are considered to be sufficiently significant that the use of statistical evidence is, in principle, ruled out (1.3.3.).

1.3.1. The issue of processing "sensitive" personal data

In terms of the law with regard to respect for the private life of the individual as it applies to the processing of personal data, the use of some categories of data (relating to racial origin, political opinions, religious and other beliefs, health and sex life) is subject to particularly rigorous conditions. This is because of the risk of discrimination involved in the use of such data. Article 6 of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, opened for signature at the Council of Europe on 28 January 1981,[54] is echoed in Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[55]

[54] *ETS 108.*
[55] *OJ, L 281, 23/11/1995, p. 31.*

The Directive stipulates that, "Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership and the processing of data concerning health or sex life." (Article 8 paragraph 1).

Thus we are confronted by a paradox: processing "sensitive" data is subject to specific restrictions because these data are based on characteristics which, in principle, have no relevance in decisions made about an individual and, consequently, processing the data may run the risk of discriminatory practices. But on the other hand, if a victim of discrimination wishes to support his/her legal action with statistical evidence which will establish a prima facie case of discrimination (thereby obliging the defendant to demonstrate that s/he did not commit the alleged discriminatory act), this sort of sensitive data will have to be processed. Before it can be suggested that a particular measure, provision or criterion produces a disparate impact on people defined by their membership of a "racial" or ethnic group or of a particular religion, belief, age, disability or sexual orientation, it must be possible to categorise both the "reference" group" people and the "selected" group people in accordance with these criteria.

So, is such a categorisation possible, in spite of the sensitive nature of the data which have to be processed for it? Article 6 of Convention 108 of the Council of Europe restricts itself to stating that sensitive data "…may not be processed automatically unless domestic law provides appropriate safeguards". Directive 95/46/EC allows processing of sensitive data in five situations which it sets out to a limited extent. In Article 8 paragraph 2 the Directive states that the prohibition of processing such data,"shall not apply where:

a) the data subject has given his explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his consent; or
b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorised by national law providing for adequate safeguards; or
c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent; or
d) processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects; or
e) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims."

We shall not consider the specific case of ideologically oriented enterprises (churches, trade unions, political parties and organisations with ideological aims) which may take into consideration the beliefs or convictions of their members or employees,[56] and for which Article 8 paragraph 2 d) consequently makes provision to the effect that they may process these data in spite of their sensitive nature. Other than this, the system set out by Directive 95/46/EC, the transposition of which has now been guaranteed by the majority of the Member States of the European Union[57] with the exception of France, implies that two different spheres must be distinguished.

[56] *Article 4 paragraph 2 of Directive 2000/78/EC. On the concept of ideologically oriented enterprises see Fr. Rigaux, La protection de la vie privée et des autres biens de la personnalité, Brussels-Paris, Bruylant-L.G.D.J., 1990, no. 423-430; G. Giugni, "Political, religious and private-life discrimination", in F. Schmidt (ed.), Discrimination in employment, The Comparative Labour Law Group, Stockholm, Almqvist & Wiksell International, 1978, pp. 191-238, esp. pp. 197-199; G. Lyon-Caen, Les libertés publiques et l'emploi, Paris, La Documentation française, 1992, no. 70; G. Dole, La liberté d'opinion et de conscience en droit comparé du travail. Union européenne, Vol.I Droit européen et droit français, Paris, LGDJ, 1997, pp. 127-142; O. De Schutter, Discriminations et marché du travail. Liberté et égalité dans les rapports d'emploi, Brussels-Berne-Oxford-New York-Vienna, P.I.E. Peter Lang, 2001, pp. 71-77.*

[57] *In its original version, Article 6 of the Belgian law of 8 December 1992 on the Protection of Private Life with Regard to Processing of Personal Data implements this particular system for sensitive data, stipulating that the processing of these sensitive data is only authorised "for purposes determined by or in pursuance of the law" (Moniteur belge, 18/03/1993). However, the law of 11 December 1998 transposing Directive 95/46/EC of 24 October 1995 amended this provision, by forbidding the processing of "sensitive" data, except for some exceptions which are set out to a limited extent in Article 6 paragraph 2 of the law of 8 December 1992. These exceptions include processing "necessary for the purposes of carrying out the obligations and specific rights of the [data] controller in the field of employment law", as well as processing "necessary for the establishment, exercise or defence of legal claims".*

In the sphere of employment, the processing of sensitive data by employers may be permissible in order to comply with the requirements imposed on them by employment legislation, if this legislation provides adequate safeguards (Article 8 paragraph 2b of Directive 95/46/EC). Employers are concerned to protect themselves from the risk of legal proceedings alleging discrimination on the basis of statistical evidence relating to the composition of the company's workforce or the disparate impact of a provision they have introduced. In order to do this, they will be inclined to monitor constantly the consequences of the decisions they make with regard to the effects these decisions have on the different categories of workers or job applicants. For this it is necessary to process "sensitive" data, such as membership of a "racial" or ethnic group, religion or health (disability). In theory, this is not prohibited. However, Article 8 paragraph 2 of Directive 95/46/EC states that national law must make provision for specific safeguards. This means that there must be strict guidelines governing the employers' methods and the use they make of these data. This applies especially to the manner in which the data are collected (it is only acceptable for workers to be categorised in a certain way if they identify themselves as belonging to the category in question), data security (the people who have access to the data and the conditions of access) and the exercising by the individual concerned of rights of access and correction.

In other spheres, in particular education and the provision of goods and services, Directive 95/46/EC makes provision for the processing of sensitive data, either subject to the consent of the individual concerned or where it is "necessary for the establishment, exercise or defence of legal claims". The other exceptions provided for in Article 8 paragraph 2 do not appear to apply here. However, the framework for consent by the individual concerned is very fragile. In Directive 95/46/EC the concept of consent is to be understood as the "freely given specific and informed indication" of the data subject's wishes by means of which "…[he] signifies his agreement to personal data relating to him being processed".[58] One is inclined to agree with the scepticism expressed by the Article 29 Data Protection Working Party concerning the possibility of legitimating data processing in the employment context through the worker's consent, since in a situation of constraint, consent is never actually given "freely". On the contrary, it may be given under threat to the worker of the loss of a job opportunity.[59] The consent given by prospective tenants who need accommodation for themselves and their families, or parents who want to provide education for their children is no less invalid than that of a job applicant: it is dangerous for the lawfulness of sensitive data processing to be based solely on consent.[60]

There is one question which remains unanswered by the last exception listed in Article 8 paragraph 2 of Directive 95/46/EC, which allows sensitive data to be processed where "it is necessary for the establishment, exercise or defence of legal claims". Does this exception allow the employer or someone renting out accommodation, for example, to protect themselves preventatively from legal action which alleges that they are guilty of discrimination on the basis of the provision of statistical evidence, by taking into account job applicants' or prospective tenants' membership of certain categories defined by a suspect category?[61] This issue does not appear to have been resolved. Directive 95/46/EC is at the very least ambiguous and its requirements should be clarified in this respect. It might be useful to seek an opinion from the Article 29 Data Protection Working Party[62] on this point.

In opinion no. 8/2002 relating to the processing of personal data by private temporary employment agencies, issued on 11 February 2002, the Belgian Commission for the Protection of Private Life *(Commission belge pour la protection de la vie privée)* considered that, concerning the processing of personal data relating to the data subject's religious opinions or racial/ethnic origin, "the danger of these data being used for purposes of discrimination is very

[58] *Article 2 h) of Directive 95/46/EC.*
[59] *Opinion no. 8/2001 of 13 September 2001.*
[60] *With regard to non-visible characteristics (sexual orientation, non-visible disability, genetic characteristics, religion or beliefs), consent is in any case necessary. Without it, processing such data would not be possible and could only occur in violation of respect for the private life of the individual and the right to respect for confidentiality in relation to certain personal information. However, the fact that this condition is necessary does not mean that it is sufficient.*
[61] *The admissibility of statistical evidence is an incentive for the individual who risks being accused of alleged discriminatory conduct to consider the membership of certain "suspect" categories of the individuals concerned –employers, for example, who know that a significant imbalance in the composition of their workforce may mean that, in the context of legal proceedings, they will have to justify the selection criteria they use, will come to the conclusion that they must constantly monitor the impact of their decisions on the composition of the workforce. The reality of this link is sometimes disputed: see I. Ayres and P. Siegelman, "The Q-word as red herring: why disparate impact liability does not induce hiring quotas", in Texas law review, vol. 74 (1996), p. 1487.*
[62] *Established on the basis of Article 29 of Directive 95/46/EC.*

real and has already occurred in the temporary employment agency sector". Furthermore, "…the processing of such data lacks relevance and therefore also constitutes a criminal offence punishable by the law on the protection of private life. Where no selection can be made on the basis of these data, it is inappropriate and irrelevant to process such data". However, this opinion does not take account of the fact that the employer's legal obligations may justify the processing of "sensitive" data. For instance, for the employer it might be about protecting themselves against legal proceedings alleging that they are guilty of discrimination, where a prima facie case of such discrimination may be established on the basis of statistical evidence, or alternatively it may be about implementing a positive action programme. Nevertheless, this can be taken as representative of the difficulty of moving from one concept of industrial relations, which rules out any consideration of "sensitive" characteristics of employees, to a concept which, in contrast, is actually based on the existence of these characteristics, in order that decisions relating to work and employment are not made which prejudice any defined category.

1.3.2. The "reversal" of the burden of proof and proving the absence of discrimination

Article 19 paragraph 3 of the Belgian law of 25 February 2003 on combating discrimination and amending the Law of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism states that: "If the victim of discrimination or [one of the groups authorised to bring legal proceedings in disputes to which the law may be applied] brings before the competent court facts, such as statistical evidence or situational tests, which allow the existence of direct or indirect discrimination to be presumed, the burden of proving the absence of discrimination falls on the defendant".

Recital 21 of Directive 2000/43/EC states, "The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought". This "reversal" of the burden of proof has sometimes been described as obliging the defender to provide evidence of a negative fact. This means s/he must prove s/he has not treated people differently on the basis of a prohibited distinguishing criterion (by seeking to conceal this direct discrimination behind an apparently neutral measure, that is one which does not result in any overt difference in treatment). Alternatively it means s/he must prove s/he has not implemented an apparently neutral provision, criterion or practice which is liable to lead to a particular disadvantage for people to whom one of the prohibited grounds of discrimination apply (absence of indirect discrimination). Asked for an opinion by the President of the Belgian Chamber of Representatives on the Bill which was to become the Law of 25 February 2003, the Belgian Council of State actually felt bound to emphasise the fact that, since "proving the absence of discrimination is likely to be very difficult", it is essential that "the evidence which authorises it is (...) at the very least sufficiently relevant and substantial".[63]

However, this caution must be understood correctly.[64] On the one hand, the shift of the burden of proof effected by the provisions enshrined in Article 8 of Directive 2000/43/EC and Article 10 of Directive 2000/78/EC mean the plaintiff can oblige the defendant to prove that s/he is not guilty of the discrimination alleged, on the basis of specific facts. The proof of the "negative fact" is only required precisely because these specific facts have themselves already been proved. It is this which is obscured in a potentially damaging manner by the expression "reversal of the burden of proof". On the other hand, as recognised by the European Court of Human Rights (in a passage which is especially striking, since it appears in the context of a criminal charge), the prosecution's obligation to prove the facts which they allege constitutes a right of the accused[65] which "is not, however, absolute, since

[63] *Opinion no. 32.967/2 issued on 4 February 2002 in response to the request by the President of the Chamber of Representatives. The Council of State seems to wish to subordinate compatibility with the fundamental rights requirements of a reversal of the burden of proof in civil cases to the adoption of a strict methodology, brushing aside any doubts regarding the authorisation to establish a prima facie case of direct or indirect discrimination.*

[64] *During the parliamentary debate on the Bill which was to become the Law of 25 February 2003 on combating discrimination, this caution was shared by a member of the Justice Committee of the Senate who considered that, "The plaintiff will always be able to find statistical evidence in their favour and will automatically obtain the reversal of the burden of proof without a direct link having been established between the general statistical evidence and the alleged discriminatory conduct. The proposed solution goes too far, because it jeopardises the rights of the defendant who will be obliged to prove their innocence." (Report made on behalf of the Justice Committee by Ms Kaçar, Doc. parl., Sénat, sess. 2001-2002, 18 December 2001, doc. 2-12/15, p. 189).*

[65] *A right which is clearly represented by the right to the presumption of innocence in Article 6 paragraph 2 of the European Convention on Human Rights but which, according to the Court, "forms part of the general notion of a fair hearing under Article 6 paragraph 1" (European Court of Human Rights (ECHR) (4th section), Phillips v United Kingdom judgement, 5 July 2001, paragraph 40).*

presumptions of fact or of law operate in every criminal law system and are not prohibited in principle by the Convention, as long as States remain within certain limits, taking into account the importance of what is at stake and maintaining due process."[66]

1.3.3. The ruling out of the reversal of the burden of proof in criminal cases

Directives 2000/43/EC and 2000/78/EC stipulate that Member States must take the necessary measures so that persons who consider themselves to be victims of discrimination are authorised to establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination and so oblige the defendant to prove that there has been no breach of the principle of equal treatment. However, the Directives rule out this process in the context of criminal proceedings.[67]

There are two reasons for this. The first is linked to the requirements of the rule of law in criminal cases (*nullum crimen sine lege*). According to the European Court of Human Rights, it follows from this principle that the individual has to know "from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable".[68] However, a broad interpretation of this principle also means that it rejects the fact that an action may be complained of and the perpetrator charged, even though s/he cannot know, at the point when the action concerned is committed, that this action may involve his/her criminal liability, including if the law is completely clear, because of the perpetrator's uncertainty about the context in which s/he is acting. Interpreted in this way, the rule of law means strict liability offences are ruled out, that is offences which do not include a mental element among their constituent parts – the state of mind of the perpetrator at the point when the offence is committed. The perpetrator must have committed the offence consciously and voluntarily. If this is not the case, the substance of the offence will not be sufficient to justify the criminal liability. In particular, the insurmountable error of the offender (their ignorance of the indictable nature of the action if, in the same circumstances, any reasonable person would have been similarly ignorant) may constitute a ground for justification of the action.

Where a perpetrator (someone who makes *individual* decisions, consisting for example of granting a housing lease, recruiting staff or being responsible for a promotion decision) is alleged not to have anticipated the consequences which would result from the accumulation of their individual decisions – statistically speaking, following a series of individual decisions – it may be that insurmountable error can be argued. For practical reasons, it is not always possible to anticipate the consequences, in terms of statistics, of the accumulation of individual decisions, for example where decision-making within an organisation or company is decentralised. It is quite possible that none of the people responsible for making these individual decisions was or could have been aware of the indictable nature of the action they have taken, because they lack all the information. It follows that they also would or could not have been aware of the impact which such a decision would have statistically overall. As recalled by the legislative section of the Belgian Council of State in its second opinion on the text which became the Law of 25 February 2003 on combating discrimination, "From the point when the concept of discrimination enters the definition of offences (...) it will only be possible to take the discriminatory effect of an action into consideration only if the perpetrator was aware of its inevitable (*"dol indirect"*) or probable occurrence (*"dol éventuel"*), but was resigned to it and accepted it being carried out rather than renouncing the conduct in question".[69]

[66] *Ibid., paragraph 40. The Court refers to a previous decision: ECHR, Salabiaku v France judgement, 7 October 1988, Series A no. 141-A, paragraph 28.*
[67] *See Articles 8 paragraph 3 and 10 paragraph 3 respectively of the two Directives.*
[68] *ECHR Kokkinakis v Greece judgement, 25 May 1993, Series A no. 260-A, paragraph 52; ECHR, S.W. v United Kingdom judgement, 22 November 1995, Series A no. 335-B, paragraph 35; ECHR, Streletz, Kessler and Krenz v Germany and K.-H. W. v Germany judgements, 22 March 2001, paragraph 50 and paragraph 45 respectively.*
[69] *Opinion no. 32.967/2, 18 February 2002, and reference to C. Hennau and J. Verhaegen, Droit pénal général, 2nd edition, Brussels, Bruylant, 1995, no.352-353.*

The second argument for ruling out a shift of the burden of proof is derived from the principle of the presumption of innocence. Although Article 6 paragraph 2 of the European Convention on Human Rights does not rule out the use of certain supporting evidence, the use of the mechanism of presumptions in order to establish the guilt of the accused may, according to the European Court of Human Rights, lead to a violation of the presumption of innocence if it results in a reversal of the burden of proof, that is if the prosecution is exempted from having to provide proof of the offence.[70]

Certainly, it might be considered that the use of statistical evidence is not so much about making it easier for the victim to provide proof of an offence (the discriminatory conduct of the defendant) as about imposing a specific conduct on the perpetrators on pain of criminal sanction (causing the perpetrators to ensure that the statistics cannot give rise to the idea that they operate discriminatory practices). The use of statistics would thus serve not so much to prove an offence committed independently as to demonstrate the existence of a constituent element of the offence. However, this would not comply either with the letter or the spirit of Directives 2000/43/EC and 2000/78/EC. In addition, should such a use of statistics be retained, it would in any case require a more precise definition of the offence consisting of the perpetrator not respecting certain objectives defined statistically, for example, identifying the ethnic composition of the workforce of a company situated in a particular region or the allocation of social housing among ethnic categories.

2. SITUATIONAL TESTS

2.1. Added value of proving discrimination through situational tests

As has been demonstrated above, the use of statistical evidence to establish a prima facie case of discrimination is closely linked to the extension of the prohibition of certain forms of indirect discrimination. The adoption of what is at the outset only a method of proof leads to a shift in the definition of prohibited indirect discrimination: from the adoption of a measure liable to create a particular disadvantage for certain protected categories of people, to an extended definition which encompasses any apparently neutral measure which results in a disproportionate impact on certain categories of people. The use of situational tests is connected not to the concept of indirect discrimination, but to direct discrimination which is "concealed", that is, not acknowledged by the person who turns out to be guilty of it. The aim of such tests is to expose behaviour whereby an individual is treated less favourably because of a particular characteristic, where another individual placed in a comparable situation who did not have this particular characteristic would not be treated in this way, although the perpetrator of this difference in treatment tries to prevent his/her conduct from being detected.

The situational test is in the same category as techniques which are employed to facilitate the exposure of other offences, particularly those linked to organised crime. The most obvious analogy is so-called "pseudo purchasing" employed in combating drug trafficking. In both cases it is about surprising the perpetrator when s/he is in a situation of trust and does not suspect that his/her actions are being observed, so that they may be used if necessary in legal proceedings.

[70] *ECHR, Telfner v Austria judgement, 20 March 2001, paragraphs 15-16.*

2.2. The methodology for situational tests

The use of "situational tests" assumes the greatest possible comparability between the "experimental" group, which has a characteristic liable to give rise to discrimination, and the "control" group, which is identical from the point of view of all the relevant characteristics (professional qualifications, age, clothing etc.). In order for this method to be used to provide proof of discrimination, it is important to confirm this comparability on the basis of as comprehensive a list as possible of the elements likely to influence the decision made by someone responsible for recruitment or housing lets, or the manager of a restaurant, depending on the case in question.

This method was basically developed in the United Kingdom by the Commission for Racial Equality as a tool for combating discrimination based on race or national origin. In the area of recruitment it consists of presenting a potential employer with two candidates who are identical in every respect except for their ethnic or national origin (revealed by the sound of their name or their physical appearance) and then comparing the outcome of the two candidacies.[71] This technique for exposing discrimination was used for a major international comparative study on ethnic discrimination in the hiring of employees conducted by the International Labour Office (Bureau international du travail - BIT) on the basis of Fr. Bovenkerk's methodological guidelines.[72] The study was described as follows by B. Smeesters, in the context of the Belgian research carried out on behalf of the BIT:

> Two researchers have identical characteristics in terms of the selection criteria which would be likely to appeal to an employer recruiting staff. They are the same age, have a similar "background" with respect to their qualifications, but are of different ethnic origins. If just one of them is appointed, in principle, the difference cannot be attributed to any other characteristic apart from their ethnic origin.
>
> This rationale assumes that ethnic origin should never be a relevant criteria for the selection of staff. If there is discrimination in the labour market, it will be proved through a sufficiently high number of similar situational tests.[73]

In comparison with the method of identifying discrimination solely through quantitative data based on the socio-economic status of the members of a particular ethnic group, in comparison with the average population, the "situational test" method has a distinct advantage. The advantage is that this method exposes which of the factors explaining this less favourable status is attributable to discrimination, as opposed to those which may relate to other factors. These include, in particular, factors such as the generally lower standard of education received by the members of a particular ethnic group or the fact that they speak the language less well. This advantage can be derived when candidacies are submitted *which are identical in every respect except for the ethnic origin of the candidates* competing for the post.[74] If this condition is respected, that is if the experiment is conducted correctly, preference expressed for the candidate of the same national origin as the recruiter would not be attributable to anything but the discrimination of which the person doing the recruiting, in most cases the employer, is guilty.

The situational test conducted in this way facilitates the exposure of "concealed" discrimination (whether unacknowledged or concealed behind neutral arguments which are merely pretexts), which is assumed to be a conscious action on the part of the perpetrator. By the very way they are constructed, situational tests may serve to identify the existence of indirect discrimination associated with the use of certain criteria or procedures which, applied to people who belong to different groups, lead to members of certain groups being particularly

[71] *For more on this technique see in particular J. Wrench and D. Owen, Preventing racism at the workplace, The UK National Report, Centre for Research in Ethnic Relations, University of Warwick, Coventry, 1996. For a comparison with the restrictions in combating discrimination encountered until recently in French law due to the problems of proof, see M. Miné, "Approche juridique de la discrimination raciale au travail: une comparaison France–Royaume-Uni", in Travail et emploi, no. 80, September 1999, p. 91.*

[72] *Fr. Bovenkerk, A manual for international comparative research on discrimination on the grounds of 'race' and ethnic origin, Geneva, International Labour Organisation, 1992.*

[73] *La discrimination à l'embauche en raison de l'origine étrangère. Contribution belge à la recherche comparative internationale du Bureau international du travail, Centre for Equal Opportunities and Opposition to Racism, SSTC, 1997, p. 16.*

[74] *For more on this advantage of situational tests, please refer to the research cited above, pp. 16, 20 and 239 (n. 250).*

disadvantaged. The situational test works on the basis of a comparison between two candidacies which are *identical in every respect,* which generally *prohibits the person responsible for the selection from deciding between rival candidates on any grounds other than on the basis of the only characteristic which distinguishes them from one another* (for example, in the most common application of this technique, on the basis of their different national or ethnic origin). The identical nature of the two candidacies, ensured through the methodological framework of the test, means in principle that the suspect criteria or procedures, which are suspected of giving rise to indirect discrimination, should not influence the decision. Since there is nothing to distinguish the two candidates from one another except for a distinction made on the basis of a suspect characteristic, these criteria or procedures could not, in the usual course of events, influence the choice between the two candidates.

A possibly more troublesome weakness of the situational test method is found in the avoidance strategies to which it will give rise, as long as the tests are generalist. These strategies will exist in the mind of the perpetrator and involve, quite simply, the accumulation of sufficient information about the different competing candidates, in order to prove that the selection was made for reasons other than the inadmissible suspect characteristic. These strategies undermine the situational test method by calling into question the theory of interchangeable candidacies, the theory which is simultaneously the methodological asset of these tests and their weak point. To understand this, two highly refined situations in the sphere of employment may be used to serve as an example.

> In the first situation (A) two CVs are sent to the same employer in response to a job advert. These CVs are completely identical except for purely anecdotal aspects (the two candidates were born in the same year but on different days). The two candidates fulfil the requirements set out in the job advert. However, it is only the candidate with the European-sounding name who is called for an initial interview; there is no response to the application submitted by the person with an Arab-sounding name.[75] The direct discrimination in such a case can easily be exposed. It would be difficult for the person responsible for the selection to disprove the prima facie case of discrimination established against him/her.
>
> In the second situation (B), although the initial conditions are the same as those in situation A, both candidates are called for a first interview with the person responsible for making the selection. In the course of the interview, the selector enquires about the marks attained by the two candidates during their studies. During the conversation s/he sometimes shifts to English or to German, languages which in their CVs the candidates claimed to speak fluently. At the end of the interview, the selector introduces each of the candidates s/he has interviewed to the members of the small team with which they would be asked to work. After the two interviews, only the candidate who has a European-sounding name is chosen for a more in-depth discussion. But how can it be proved that this was due to discrimination against the other candidate who has an Arab-sounding name? Is it not the case that all the information gathered about the two candidates will provide the selector with more arguments than s/he needs to explain his/her choice if, by chance, s/he should be asked for his/her reasons?

As situational tests become more widespread as a method for exposing concealed direct discrimination, recruiters, who know that their impunity is no longer guaranteed in situation A, may come to adopt situation B, while maintaining their intention to discriminate on the basis of the suspect characteristic. For the recruiter, this amounts to undermining the methodological foundation of the situational tests which is essential to their value. This is achieved by compensating for the artificial construction of completely identical candidacies through the

[75] *For more on foreign-sounding candidate names being taken into account in the recruitment process, see Ph. Bataille, Le racisme au travail, Paris, La Découverte, 1997, pp. 50-57; N. Negrouche, "Discrimination raciale à la française", in Le monde diplomatique, March 2000, p. 7.*

reality of a practically boundless amount of information which the recruiter is likely to gather about each of the candidates and which will be easy to use in order to find reasons to justify his/her choice.[76] The difficulty of monitoring the decisions s/he can thus make is linked to the fact that these decisions are based largely on intuition or on a combination of different criteria which, rather than simply stacking up, enable an individual assessment to be made of the person's competence.

2.3. The admissibility of situational tests in the context of legal proceedings

The Belgian law of 25 February 2003 on combating discrimination, cited above, stipulates that the methodology for situational tests – which the law allows to be conducted to impose on the defendant the burden of proving the absence of discrimination – shall be determined by a Royal Decree deliberated by the Council of Ministers.[77] In its second opinion on the Bill on combating discrimination, the legislative section of the Council of State considered that an intervention by the legislature was required on this point, given that it is better placed than the Executive to "establish a fair balance between the promotion of equality and non-discrimination (...) and the other rights and fundamental freedoms [the Council of State cites respect for the home, private and family life, confidentiality of correspondence and professional confidentiality], and therefore to ensure that 'situational tests' cannot be accused of constituting provocation or unfair procedures".

The issue of the admissibility conditions for this method of proof is rather delicate, considering the risk of abuse involved. At the very least, this admissibility must be subject to strictly defined procedural conditions. Preferably, an individual able to provide certain guarantees of independence and credibility, such as a bailiff, could safeguard the conditions in which the evidence is gathered. The task of this person responsible for authenticating the situational test may be summarised in two points. First, s/he must ensure that nothing in the situational test process may give rise to a suspicion that the wrongful or negligent behaviour was provoked by those conducting the test. The test must simply be able to confirm or record an action which would have taken place even without this construction of an artificial situation. Secondly s/he must guarantee the methodological integrity of the situational test, in particular the comparability of the people in the "experimental" group who have a suspect characteristic (for example, because they are of a particular ethnic origin or visibly wear a particular religious symbol) with the people of the "control" group.

2.3.1. Private life and risk of provocation

In the opinion cited above the legislative section of the Belgian Council of State expressed in particular its concern about the risks, which would be involved in the use of situational tests, of violation of the right to respect for private life.[78] While the prohibition of discrimination must take account of the requirements of private life (which explains the fact that this prohibition will only be applied in the public or semi-public domain – employment, provision of goods and services, etc. – and not in a purely private context), on the other hand, these requirements do not appear to represent an obstacle, in principle, to the lawfulness of using the situational test as the method of proof. In fact, in situations where the issue has arisen of using undercover agents in certain criminal milieux, especially in the area of drug trafficking, the European Court of Human Rights has considered that using an individual with a fictional identity for the sole purpose of exposing the illegal action does not constitute interference in the "private life" of an individual.

Thus, in the *Lüdi* v *Switzerland* judgement of 15 June 1992[79], the European Court of Human Rights considered

[76] *The state which, within its jurisdiction, allows discrimination to be proved through the use of situational tests imposes administrative restrictions on the economic actors in its territory. These restrictions are associated with the need to provide a sufficiently detailed explanation for each decision not to employ someone and to ensure that these explanations are traceable. The cost of these restrictions is certainly not to be underestimated.*

[77] *Article 19 paragraph 4 of the Law.*

[78] *It will be noted that, where the assistance of a bailiff is required for this test, s/he is obliged to refuse to contribute to a violation of the right to respect for private life or, for example, a violation of the home: see M. Storme, "De bewijswaarde van het proces-verbaal van vaststelling van materiele feiten door een gerechtswaarder op verzoek van particulieren (art. 516 Ger. W.) en aanverwante vragen", in Rechtskundig weekblad, 1994-1995, p. 345.*

[79] *For more on this judgement see Ch. De Valkeneer, "L'infiltration et la Convention européenne des droits de l'homme", in Revue trimestrielle des droits de l'homme, 1993, p. 313.*

that the use of undercover agents did not, in principle, constitute an interference in the right to the respect for the private life of individuals whose criminal activities are revealed by this particular method of investigation. In the case in point, the plaintiff, a drug trafficker, had been trapped by a sworn police officer who passed himself off as the potential purchaser of a large quantity of cocaine. As Mr Lüdi's telephone was intercepted, it was possible for the ensuing criminal conviction to be based not only on the reports made by the undercover agent, who had introduced himself as "Toni" and whose true identity Mr Lüdi was unaware of until the end, but also on the recordings of his conversations with the undercover agent.

The European Commission of Human Rights considered that, "…the involvement of an undercover agent changed the essentially passive nature of the operation by introducing to the telephone interception a new factor; the words intercepted resulted from the relationship which the undercover agent had established with the suspect", so that the undercover operation constituted "a separate interference with Mr Lüdi's private life, requiring separate justification from the point of view of paragraph 2 of Article 8".[80] According to the judgement handed down by the Court on 15 June 1992, on the contrary, "the use of an undercover agent did not, either alone or in combination with the telephone interception, affect private life within the meaning of Article 8".[81]

The view taken by this judgement has been confirmed on several occasions since then,[82] in spite of the dramatic developments which the concept of private life has undergone over the same period. However, the most recent case law has clarified that, where undercover agents contribute to bringing about the offence which would not have been perpetrated without their involvement, this goes beyond the concept of an undercover operation in the strict sense (which should consist of the purely passive observation of the indictable activity) and, through the provocation of which the agents are guilty, leads to a violation of the fairness of the process.[83] At the same time, a violation does not take place, where the undercover agents are only passive actors in the perpetration of the offence, for example if they take delivery of a volume of narcotics by simply responding to an offer and without playing the role of agents provocateurs in the offence.[84]

2.3.2. Fairness of the proof

The prohibition of provocation which follows from this decision by the European Court of Human Rights (a prohibition which is framed more strictly than that derived from the decisions by the Belgian Court of Cassation on the same question[85]) is merely the specific application of a wider requirement, that of fairness in establishing proof of an offence. This requirement led to a decision by the French Court of Cassation when it was confronted with the specific issue of situational tests. Its most recent decision[86] is a judgement of 11 June 2002: in response to an appeal by the organisation, SOS Racisme, the French Court of Cassation quashed a judgement handed down on 5 June 2001 by Montpellier Court of Appeal. This judgement had acquitted the accused of the charge of racial discrimination perpetrated in the provision of a service on the grounds of origin or ethnicity and dismissed the party claiming damages because, according to the appeal judge, the proof of the discrimination had not been established through a fair procedure. "The 'testing' conducted by groups of potential clients was carried out unilaterally by the organisation which only asked its members and sympathisers, who were duly informed that the aim of the operation was not to gain entry to La Nuit, Souleil or Toro Loko, but to demonstrate the segregation practised on the doors of these establishments".

[80] See the report produced by the European Commission of Human Rights in pursuance of the old Article 31 of the Convention, 6 December 1990, paragraph 56. This strong line taken by the Commission is particularly notable since it is quite different from that found in its previous case-law: cf. European Commission of Human Rights, application no.10747/84, B. v Germany, decision, 7 October 1985, unpublished.

[81] ECHR, Lüdi v Switzerland judgement, 15 June 1992, paragraphs 36 and 40.

[82] See European Commission of Human Rights, application no. 28994/95, S.E. v Switzerland, inadmissibility decision, 4 March 1998; and European Commission of Human Rights, application no. 22463/93, R. Müller v Austria, inadmissibility decision, 28 June 1995.

[83] See European Commission of Human Rights, report (old Art. 31), 11 October 1990 in the case of Radermacher and Pferrer v Germany, Annuaire de la Convention européenne des droits de l'homme, vol. 34, p. 274; ECHR, Teixeira de Castro v Portugal judgement, 9 June 1998, Rec. 1998-IV, p. 1463, in particular paragraphs 42-43 and paragraphs 31-39.

[84] In an inadmissibility decision handed down on 22 October 1997 (at a time when the case of Teixeira De Castro mentioned in the previous footnote was pending before the Court, but when the Commission had already formed the opinion that, in this case, the applicant had been the victim of a violation of Article 6 paragraph 1 of the Convention) the European Commission of Human Rights noted that the new case was fundamentally different in relation to the concept of undercover "agents provocateurs", because, "…the undercover agents did not take the initiative to contact the applicant with a view to importing heroin into the United Kingdom, but only reacted to an offer by the applicant. In this respect, the applicant's case is distinguishable from Teixeira De Castro v Portugal where the Commission found a violation of Article 6 paragraph 1 of the Convention because of the role played by 'agents provocateurs' in bringing about that

Scrutiny of the reasons for the judgement by the court of appeal suggests that the fairness of the "testing" process aroused doubts on the part of the court. The basis of these doubts was that, because of their intention to expose an instance of discrimination, which they suspected and wanted to prove, the organisers of these situational tests would have been able – especially through their behaviour or their clothing – to create conditions for their being refused entry to the establishments in question. Thus the appeal judge notes that, "While the test reveals a difference in attitude on the part of the door staff, there is nothing to confirm that this refusal was motivated by the racial characteristic of the tester. In addition, the evidence given before the criminal court and the statements filed during the proceedings by the accused establish that the clientele of La Nuit and Le Souleil is multiracial. The individuals accused denied having practised racial discrimination. There is nothing to confirm that the accused selected the clientele on the basis of racial criteria, except for the subjective opinion of the parties claiming damages. Moreover, if selection did take place, it is customary in this type of business and is based on commercial and niche market criteria, such as is practised by establishments reserved for 'gays', 'blacks', 'heterosexuals' or the 'jet set'".

It is the lack of comparability which is penalised here: the appeal court seems to have believed that there could have been reasons other than their ethnic origin for refusing entry to the members of SOS Racisme. According to Montpellier Court of Appeal, due to a lack of adequate guarantees regarding the conditions in which it was conducted, the situational test could not be considered as a sufficiently fair procedure by means of which to prove the existence of discrimination: "... the 'testing' method used by the organisation, SOS Racisme, which took place without the involvement of a court officer or bailiff, is a method of proof which provides no measure of transparency and does not display the level of fairness necessary for obtaining evidence in criminal procedures, and violates due process". The quashing of the judgement is based chiefly on the grounds that, by rejecting the admissibility of this "testing" as a method of proof of the alleged offence, the court of appeal failed to apply Article 427 of the Code of Criminal Procedure, which sets out the principle that any mode of evidence may be employed in criminal cases.

The cases cited here, in particular the last case which is closest to our theme, clearly concern the admissibility of the proof provided by the applicant in the context of a prosecution. In these cases any mode of proof may be used, in principle, but it is ruled out, either because it was obtained on the basis of an illegal procedure or because the conditions in which it was obtained or in which it is presented violate the general principles of the law and, in particular, due process. However, this, together with the wider concept of fair trial to which it is linked, applies to civil cases just as it applies to criminal cases. In general, the responses by the courts in the context of criminal procedures, involving methods of proof which may violate the fundamental rights of the individual, will be applicable to proceedings before civil courts. The analogy may be drawn, for example, of a party claiming damages who has used the services of a private detective to "provoke" the misconduct which will allow him/her subsequently to justify a dismissal[87] or to commence divorce proceedings on the grounds of his/her spouse's adultery.[88] A writer who tried to take stock of these situations where private detectives or bailiffs were induced to resort to stratagems or tricks, or to be party to a trick organised by the private litigant, was compelled to note the incoherence of the responses of the civil courts confronted with such situations. For example, the fact that the bailiff did not automatically reveal his/her identity gave rise to contradictory perceptions on the part of the judges[89]. A strict legal framework for the use of situational tests is thus particularly opportune.

applicant's conviction. As opposed to Teixeira De Castro v Portugal, in the present case, it has not been established that the undercover agents were the real initiators of the offences. The Commission also notes that, as opposed to the applicant in Teixeira De Castro, the applicant in the present case had a long-term involvement in the heroin trade and was ready and willing to commit the crime even without the involvement of the undercover agents") (European Commission of Human Rights, application no. 34225/96, Mohammed Halid Shahzad v United Kingdom decision, 22 October 1997). See also European Commission of Human Rights, G. Calabro v Italy and Germany decision, 21 March 2002 (application no. 59895/00) (the use of undercover agents does not constitute a violation of the right to a fair hearing, since these agents did not provoke the offence).

[85] See Court of Cassation of Belgium, 5 February 1985, Gaddam, Pas., 1985, I, 690; Court of Cassation of Belgium, 7 February 1979, Salermo, Pas., 1979, I, 665. See also F. Kuty, "Lorsque Strasbourg déclare que la provocation policière vicie ab initio et définitivement tout procès pénal", in Revue de jurisprudence de Liège, Mons et Bruxelles, 1998, p. 1155.

[86] See also Court of Cassation of France (crim.), 12 September 2000, Fardeau et autres (rejecting the appeals against a judgement by the Orléans Court of Appeal of 2 November 1999 which pronounced three convictions for racial discrimination and aiding and abetting, following the reports of four young people of Maghreb (former French North African) origin and a journalist, as well as the official report of a bailiff who accompanied them when the young people were refused entry to a night club).

[87] Mons Industrial Tribunal, 16 March 1995, unpublished, Justel no. 12433.

[88] Brussels Civil Court (31st chamber), 28 June 1988, unpublished, no. 331, R.G. no.25264.

[89] See Ch. De Valkeneer, La tromperie dans l'administration de la preuve pénale, Brussels, Larcier, 2000, pp. 281-284.

SUMMARY OF WORKSHOPS: THEMES AND ISSUES RAISED

The discussions that ensued among participants over the two days of the experts meeting reaffirmed the complexity of proving discrimination, which constitutes a major obstacle to making a finding of discrimination.

Criminal vs. civil law

The difficulty of proving discrimination applies to both criminal law and civil law. However, the clear distinctions between these were recalled, i.e. that whereas in criminal prosecutions the intention of the perpetrator to commit a racist act must be proven, under civil law intention is irrelevant and furthermore it is enough that there is a risk that discrimination will take place: it does not need to have actually taken place as under criminal law. For example, where a person is refused entry into a disco, and the disco claims that it is on the grounds of a dress code, then the disco must show proof of an actual dress code to prove that in fact that was the reason for the refusal, and not the person's racial or ethnic origin. Without a written dress code there is a risk of racial discrimination. In employment an analogous situation could arise in the absence of a written a job evaluation system.

The point was made that in some countries in which discrimination is only prohibited under criminal law, a rule that a finding of discrimination will be made only where that is the sole motive for the act makes prosecutions rare; often once another motive is found, the racial aspect of the crime is ignored by the judge.

It was emphasised that in relation to the EC Directives, civil law is more relevant than criminal law: Article 8 of the Racial Equality Directive, Article 10 of the Framework Directive and Directive 97/80/EC on the burden of proof in cases of discrimination based on sex provide for a shift in the burden of proof only in civil cases.

Methods to prove discrimination

Where an allegation of discrimination is brought to court – which is by no means a certainty as often the victim is unwilling to bring an official complaint - proving it can be difficult in many respects. Types of proof include:

- witnesses: while there may well be witnesses, they may be afraid to give testimony in court for fear of repercussions for their own life (which constitutes victimisation, also outlawed by the Racial Equality Directive). One suggested way to overcome this is to allow the witness to give a statement to the police to read out in court on the condition that the witness remains anonymous.
- audio/television recording: judges are generally quite cautious about accepting this type of proof, in view of the principle of equality of arms between the litigating parties (Article 6 ECHR).

Situation testing

Situation testing can, if admitted, be an effective tool to prove discrimination occurred. It provides evidence that is objective and close to the actual situation.

Testing is not accepted in every jurisdiction, as some view it as provocation. However, the UK has used this type of proof for many years, and its use is increasing in other European countries. In France the courts have accepted testing as a form of proving discrimination in employment and nightclub entry cases (see Olivier De Schutter's commentary above). In Belgium the use of testing is provided for in the recently adopted anti-discrimination legislation, though previously testing was admissible both in civil and criminal law cases and has been used to prove discrimination in employment, housing and nightclub entry.

Statistics and Monitoring

The preambles of the EC Racial Equality Directive and Framework Directive refer to statistical evidence in recital 15: *the appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.*

Some jurisdictions however have major concerns about collecting such statistics, since it implies registering the ethnicity of citizens. In France for example it is argued that ethnic monitoring, and thus labelling citizens under certain categories, would infringe the constitutional guarantee that citizens are 'one and indivisible'. Furthermore, the objectivity of statistical evidence is sometimes questioned.

In Denmark, the Netherlands, Sweden and the United Kingdom, statistics are collected on the basis of voluntary self-identification of minorities. In addition in the UK everyone is required to complete the Census form, including a question on ethnic monitoring, for which defined categories are provided for self-identification (including various 'other' categories). A question on religion is optional. All other forms of ethnic monitoring in the public and private sectors is voluntary. Various schemes exist according to what the organisation is trying to achieve (for example there have been circumstances when a 'management classification' system may be used). Experience in the UK suggests that where voluntary ethnic monitoring is clearly explained and well communicated, response rates tend to be fairly high, whereas they are consistently very low where respondents do not understand what it is for and how it will be used. Under the Race Relations Act it is obligatory for certain public sector employers to monitor employees and they must produce public reports on these figures.

In Denmark the last 4 digits of social security numbers can indicate which country a person has migrated to Denmark from (including refugees) or that s/he is a descendent of a migrant, but only where neither parents of the migrant or descendent are born in Denmark and neither have Danish citizenship. Only the Danish National Statistics Office can decode these digits. On request the Office may inform a company of the ethnic composition of its employees. The information is anonymous and will only be shared if the number of employees is high enough to ensure that employee(s) with a minority background cannot be easily identified. Similarly in Sweden companies can send a list of personnel to the national statistics office, which can infer which ethnic minorities the workforce represents. There is no legal obligation to do this, but it has become common practice.

In the 1990s the Netherlands introduced a law regulating ethnic background in the labour market. This was met with outcry, firstly because people compared it to monitoring under Nazi rule, and secondly it made non-participation in monitoring by companies a criminal act. After two years the law was reformed, and the criminal element was removed, and registration has since been administered by companies on a voluntary basis. Employees fill out forms annually and companies are then expected to consider the make-up of the workforce and how improvements can be made. There are no other examples of ethnic monitoring in the Netherlands. The police used to monitor crime by ethnic minority. The general census bureau does surveys and keeps statistics on how many ethnic minorities are living in the Netherlands but this is not registration. The figures are nevertheless quite accurate and this provides a very good alternative to registration.

Two conditions were cited for acceptable ethnic monitoring: clear procedures and well-defined objectives. The example given of police monitoring the ethnicity of criminals did not satisfy the well-defined objective criteria. The categories of ethnic groups can either be laid down in legislation or develop on a case-by-case basis by the judiciary. Even if particular groups are cited on a form, the person should always be able to choose one that is not on the list. The futility of basing the categories on nationality were noted, given that minorities increasingly have the nationality of the State they are living in.

The European Commission is keen to promote the discussion on ethnic monitoring on the basis of self-identification, and underlines that the EC Racial Equality Directive requires governments to think about this in the context of proving indirect discrimination. Gender statistics are already widely used, and parallels should be drawn. Member States have a reporting obligation under the Directive, and thus they will need to be able to assess the effectiveness of laws and measures undertaken. There is no reason to oblige someone to record their characteristics, but many people do recognise their minority characteristics and by acting upon this governments may be better able to take action to eradicate discrimination.

The jurisprudence of the European Court of Justice in relation to the use of gender statistics has taken a long time to develop and the same is likely in relation to case law on statistics on ethnicity. It was noted that the decisions of the European Court of Justice on the use of statistics have been the simplest cases, and even these took a long time to reach.

Shift in the burden of proof in civil cases

Article 8 of the Racial Equality Directive and Art 10 of the Framework Directive provides that where a victim establishes, *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.* This provision does not apply to criminal procedures, in accordance with fair trial guarantees.

Experience in the principle of shifting the burden of proof - in sex discrimination cases in particular, but also in racial discrimination cases in some EU Member States such as the Netherlands and the UK - has shown it to be increasingly difficult to establish the 'facts from which it can be presumed…' (the prima facie case). It is not always clear what exactly is required to trigger the shift in the burden of proof. For example, in a case of racial harassment, should the burden be shifted after the existence of harassment has been established or not until the racial element in the harassment has been established?

In Austria establishing prima facie that discrimination has occured became much easier for women once the Ombud for Equal Employment Opportunities was set up and began to help victims with their cases. The Ombud recorded any complaints of discrimination that they received and patterns began to emerge, for example an employer systematically failing to promote women on the grounds of 'lack of management qualities'. Even if in a single case discrimination could not be proven, a series of complaints would be considered evidence of a discriminatory pattern sufficient to establish a presumption of discrimination to shift the burden of proof onto the employer. This led inter alia to a string of finding by the Supreme Court of discrimination in pay and sexual intimidation.

Similarly in Sweden there have been so many cases of minorities not being invited to interview after applying for a job, constituting clear cases of direct discrimination, that the burden of proof in such cases is easily shifted. A case recently won by the Ombudsman against Ethnic Discrimination involved a woman of Bosnian origin who was refused on a job on the basis of two factors: she had an accent when she spoke Swedish, and when the potential employer told her this she reacted angrily. It was difficult to prove which of the factors and thus who was to blame for her not getting the job, but the court found there had been racial discrimination.

As the Dutch Equal Treatment Commission has the competency to hear cases, it is able to be proactive in establishing the facts and requesting figures, in contrast to traditional civil court cases where the party must bring the facts. The Romanian National Council for Combating Discrimination raised the issue of the exception to the shift in the burden of proof rule in Article 8(5) of the EC Racial Equality Directive and Article 10(5) of the Framework Directive for proceedings in which it is for a court or a competent body to investigate the facts of the case. The boundaries of this exception are as yet unknown.

The British Commission for Racial Equality also has statutory powers to investigate organizations after receiving allegations of racially discriminatory practices. This enables the CRE to require organizations to provide information and where necessary to demand documents to be produced. In relation to individual complaints, complainants may, under the Race Relations Act as amended, send a questionnaire to the respondent, and if he/she does not reply, the complainant may use this to decide whether or not to bring or continue a case against them. This is one way of building a prima facie case.

In Belgium there are concerns among employers that the new Belgian law will mean they must record every application and interview so that they can disprove any allegation of discrimination in court, which will lead to a dramatic rise in administration. Fears were also heard from the National Proprietors Association that allegations of discrimination are difficult to disprove. The Association asserted that it is the free choice of the landlord to choose to whom he/she lets the property, taking into account considerations such as whether or not the person would fit into the community living there and their ability to pay the rent.

One of the greatest challenges is to ensure the judiciary knows how to deal with the shifting of the burden of proof. This was cited as a problem in Hungary. There is significant opposition to introducing the shift of the burden of proof in racial discrimination cases in some of the EU Member States. It was commented that this is surprising, given that all EU Member States have been under the obligation to introduce this principle in relation to gender discrimination, and even before that many jurisdictions made use of this tool in labour law.

Other ways to improve effectiveness of procedures

- It is extremely important for judges and tribunal members to understand differential treatment and be trained in this area.
- Ideally a magistrate / judge should be appointed for complaints of racism.
- Public prosecutors often do not understand the definitions of discrimination. Police / prosecutors should be given special training to be put in charge of these cases. Steps must be taken to overcome the mistrust of police often felt among victims.
- Professional bodies should educate other bodies including courts about what amounts to discrimination.

- Fighting discrimination must be prioritised by the government and the police alike.
- Sufficient means must be provided to support victims of discrimination.
- Alternatives to judicial remedies such as mediation should be provided.
- Where a question concerning the interpretation of the EC anti-discrimination directives is raised before any court or tribunal of an EU Member State, that court or tribunal should, if it considers that a decision on the question is necessary to enable it to give judgment, request the European Court of Justice to give a ruling thereon. The highest courts are obliged to bring such a matter before the Court of Justice (Article 234 of the EC Treaty).
- A specialised body should have the competency to be a party in court proceedings.

Further exchange between the specialised bodies on their positive and negative experience in relation to proving discrimination was called for. The problems come across should be made known, and the possibility of centralising information should be reflected upon. Methods implemented to encourage victims to bring complaints should also be exchanged, as could programmes, codes of conduct and tips on how to deal with the media.

PROGRAMME

TUESDAY 14 JANUARY 2003, WEDNESDAY 15 JANUARY 2003

TUESDAY, 14 JANUARY

START OF THE SEMINAR IN THE INTERNATIONAL PRESS CENTRE "RESIDENCE PALACE", RUE DE LA LOI 155, BRUSSELS

9.00 Reception of the participants and coffee

9.30 Plenary session in "Salle Maelbeek":
Welcoming speech by Johan Leman, Director of the Centre for Equal Opportunities and Opposition to Racism

9.40
- Representative of the judicial authority: experience of using the Belgian anti-racism law to bring cases before the courts, Anne-Marie Zwartenbroeckx, deputy public prosecutor of Brussels
- Centre for Equal Opportunities and Opposition to Racism: experience of proving discrimination and supporting victims in collecting witnesses, Ingrid Aendenboom, Legal Advisor
- Proving gender discrimination, Professor Patrick Humblet, Faculty of Law, University of Ghent

Question Time

11.05 Coffee break

11.20 Reactions from NGOs defending the rights of different groups:
- MRAX (Racism and Xenophobia), Pierre-Arnaud Perrouty, Legal Advisor
- Holebifederatie (Gays, Lesbians and Bisexuals), Anke Hintjens

12.15 – 13.45 Lunch

13.45 Workshop in Salle Maelbeek
Exchange of experience of and insight into the problem of proving discrimination in participating countries. Are all problems similar? What can be learnt form each other's situation/legislation/initiatives?
(Coffee Break at 15.30)

17.30 End of first day's activities

WEDNESDAY, 15 JANUARY

DAY 2 OF THE SEMINAR: METHODS OF PROVING DISCRIMINATION: SCOPE, POSSIBILITIES, PROBLEMS

9.00 Plenary Session in Salle Maelbeek

1. Statistical evidence and monitoring:
- Professor Frank Caestecker, SOMA: presentation of the research on the possibilities of ethnic registration for the purposes of positive action in the Flemish administration.
- Professor Olivier De Schutter, Faculty of Law, Catholic University of Louvain: preconditions and legal prerequisites for statistical evidence and situation testing.
- Stefan Verschuere, director of cabinet of Alain Hutchinson, Brussels State Secretary for Housing: Statistics and the housing sector: Can the principle of non-discrimination be reconciled with a policy of "social mix" in the public housing sector?

2. Situation Testing:
Situation testing as a means of proving discrimination: Michel Vanderkam of the Integration Policy department at the Centre for Equal Opportunities presents the Centre's experience of testing in the labour market, discotheques and housing (rent offers).
Questions on the introductions

10.30 Coffee break

11.00 Plenary Session in Salle Maelbeek

3. Statistical evidence and situation testing: pros and cons:
- Relevance of these methods for other grounds of discrimination: the view of a gay and lesbian organisation and of a people with disabilities organisation: Anke Hintjens, Holebifederatie; Philippe Laurent, Walloon Agency for the Integration of Disabled Persons (AWIPH).
- The view of an employer organisation: Steven Van Muylder, Flemish Employers Organisation (VEV), Research service.
- The housing sector: view of proprietors and tenants

Geert Inslegers, Vlaams Overleg Bewonersbelangen (Syndicate of tenants)
Katelijne D'Hauwers, Algemeen Eigenaarssyndicaat (General Proprietors' Syndicate)

Questions about the interventions

12.20 - 13.30 Lunch / Press Conference

13.30 Workshop in Salle Maelbeek

15.30 Coffee break

16.00 General conclusions of the workshops, Eliane Deproost, deputy director of the Centre for Equal Opportunities and Opposition to Racism

16.30 End of the Seminar

PARTICIPANTS OF THE MEETING:

Austria:
Ingrid Nikolay-Leitner, Ombud for Equal Employment Opportunities, Austria
Eva Fehringer, Ministry of Economic Affairs and Labour, Austria

Belgium:
Ingrid Aendenboom
Dirk De Meirleir
Eliane Deproost
Marissa Fella
Raymonde Foucart
Laurent Jadoul
Johan Leman
François Sant Angelo
Marco Van Haegenborgh
and Michel Vanderkam, Centre for Equal Opportunities and Opposition to Racism

Bruno Blanpain, DLA
Frank Caestecker, SOMA
Hans Clauwaertt and Jackie Van Damme, Research Service, Ministry of Employment and Work
Paulette De Coninck, Older Workers Unit, Ministry for Employment and Work
Katelijne D'Hauwers, General Proprietors' Syndicate
Olivier De Schutter, Faculty of Law, Catholic University of Louvain
Reza Gholamalizad and Amina Nadi, Multicultural Enterprise Unit, Ministry of Employment and Work
Anke Hintjens, Holebifederatie
Patrick Humblet, Faculty of Law, University of Ghent
Geert Inslegers, Flemish Syndicate of Tenants
Phillipe Laurent, Walloon Agency for the Integration of Disabled Persons (AWIPH)
Michel Pasteel, Cabinet of Minister Onkelinx, Vice Prime Minister and Minister of Employment and Work
Pierre-Arnaud Perrouty, Movement against Racism, Anti-Semitism and Xenophobia (MRAX)
Alan Squilbeck, Employment Tribunal of Brussels
Philippe Van de Casteele, Director Services of the Federal Ombudsman
Steven Van Muylder, Flemish Employers Association (VEV)
Michael Venturi, Ministry of Employment and Work, Unit for the promotion of employees over 45
Stefan Verschuere, Cabinet of Alain Hutchinson, Brussels State Secretary for Housing
Anne-Marie Zwartenbroeckx, Deputy Public Prosecutor of Brussels

Denmark:
Mandana Zarrehparvar, Danish Centre for Human Rights

France:
Sarah Pellet, National Consultative Commission on Human Rights

Germany:
Tarik Tabbara, Federal Government's Commissioner on Migration, Refugees and Integration

Hungary:
Eszter Regenyi, Office of Parliamentary Commissioner for the Rights of National and Ethnic Minorities

Italy:
Roberta Capponi & Mario Serio, Office of the Minister for Equal Opportunities

Lithuania:
Ausrine Burneikiene, Equal Opportunities Ombudsman

Netherlands:
Jenny Goldschmidt
Doete Jongsma
Ida Saabeel-Schoenmaker
and Marcel Zwamborn, Equal Treatment Commission

Poland:
Maria Anna Knothe and Dominika Walentynowicz, Secretariat of the Government Plenipotentiary for Equal Status for Woman and Men

Romania:
Christian Jura, National Council for Combating Discrimination

Slovenia:
Marusa Gortnar, Office for Equal Opportunities

Slovak Republic:
Jana Kviecinska, Section on Human Rights, Minorities and Regional Development, Slovak Governmental Office

Sweden:
Margareta Wadstein and Weini Kahsaim, Ombudsman against Ethnic Discrimination

United Kingdom:
Hazel Baird and Pam Smith, Commission for Racial Equality
Geraldine Scullion, Equality Commission for Northern Ireland

European Commission:
Adam Tyson, DG Employment and Social Affairs

Migration Policy Group:
Isabelle Chopin and Janet Cormack

TOWARDS THE UNIFORM AND DYNAMIC IMPLEMENTATION OF EU ANTI-DISCRIMINATION LEGISLATION: THE ROLE OF SPECIALISED BODIES

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive) and *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* (Framework Directive) enhance the potential to combat discrimination in the European Union. These compliment the existing legislative programme on gender discrimination, which was most recently added to by *Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.* All EU Member States require legislative change to ensure compliance with these Directives.

Under Article 13 of the Racial Equality Directive, a specialised body (or bodies) must be designated for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies that have a wider brief than racial and ethnic discrimination. Article 8a of Directive 76/207/EEC as amended by Directive 2002/73/EC requires the same in relation to discrimination on the grounds of sex. The bodies' tasks are to provide independent assistance to victims of discrimination, conduct independent surveys on discrimination, and publish independent reports and make recommendations on any issue relating to such discrimination. Many States are thus faced with the challenge either of establishing a completely new body for this purpose, or revising the mandate of an existing specialised body.

The project ***Towards the uniform and dynamic implementation of EU anti-discrimination leglislation: the role of specialised bodies*** is funded by the European Community Action Programme to Combat Discrimination (2001-2006). It creates a network of specialised bodies with the objective of promoting the uniform interpretation and application of the EC anti-discrimination directives, and of stimulating the dynamic development of equal treatment in EU Member States. It promotes the introduction or maintenance of provisions that are more favourable to the protection of the principle of equal treatment than those laid down in the Directives, as allowed under Article 6(1) of the Racial Equality Directive and Article 8(1) of the Framework Directive. The partners of the project are the Ombud for Equal Employment Opportunities (Austria), the Centre for Equal Opportunities and Opposition to Racism (Belgium), the Equality Authority (Ireland), the Equal Treatment Commission (Netherlands, leading the project), the Ombudsman against Ethnic Discrimination (Sweden), the Commission for Racial Equality (Great Britain), the Equality Commission for Northern Ireland, and the Migration Policy Group (Brussels).

The project provides a platform for promoting the exchange of information, experience and best practice. Specialised bodies from other existing and acceding EU Member States are also participating in the activities of the project.

This is the report of the first in a series of 7 experts' meetings conducted under the project, which was hosted by the Belgian Centre for Equal Opportunities and Opposition to Racism in Brussels on 14-15 January 2003. The theme of the meeting was proving discrimination, looking in particular at shifting the burden of proof, situation testing, statistical evidence and ethnic monitoring to establish such statistics.

CENTRUM VOOR GELIJKHEID VAN KANSEN EN VOOR RACISME BESTRIJDING
CENTRE POUR L'ÉGALITÉ DES CHANCES ET LA LUTTE CONTRE LE RACISME
MPG
OMBUDSMANNEN MOT ETNISK DISKRIMINERING DO
CGB Commissie Gelijke Behandeling
Equality Commission FOR NORTHERN IRELAND
THE EQUALITY AUTHORITY AN EQUALITY IN A DIVERSE IRELAND
COMMISSION FOR RACIAL EQUALITY
BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT UND GENERATIONEN Anwältin für Gleichbehandlungsfragen