Private enforcement of Belgian non-discrimination law: perspectives on evidence and remedies

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Introduction

The swaying pendulum. A house owner refuses to rent to people who receive welfare payments, an employer refuses a job to a female candidate or a fitness manager refuses entrance to immigrants. Non-discrimination cases are numerous in practice, but rare in case law. Nonetheless, non-discrimination law is firmly established in today's multi-layer legal order. The principle of equality is enshrined in international, European, national and regional legal sources and molds not only vertical but also horizontal legal relations.[1] Although the tenant, job applicant and fitness customer can thus invoke this legal protection directly against the house owner, employer and fitness manager before national courts, they appear to do so very little in practice. Various recent research reports show that private enforcement of non-discrimination law at horizontal level is problematic.[2]

One reason appears to be an unbalanced legal framework for evidence and remedies. After all, it turns out to be quite difficult for the tenant, job applicant and fitness customer to establish facts from which it may be presumed that there has been discrimination. At what point can the court rule that a *prima facie* case of discrimination has been established? Which legal remedy is available to provide these victims with an effective and individual remedy, which is sufficiently dissuasive for the alleged discriminator as well? And how do the house owner, employer and fitness manager provide proof that their decision was not based on discriminatory grounds? The proverbial pendulum, which should be in the middle, still sways too often in terms of enforcement.

Overview of paper. In this paper, we delve deeper into two aspects regarding evidence and remedies. In a first part, we look at the impact of two recent developments in Belgian private law of evidence and how these developments fit within the wider system of evidence in the private enforcement of discrimination cases. In a second part, we look at the framework for remedies, specifically how that framework deals with cases of multiple discrimination.

Part I: Evidentiary problems

A. Analysis of the different causes

General. To the present day, there is no such thing as an EU private law of evidence regarding anti-discrimination. The EU anti-discrimination directives do not pay much attention to issues as to how and to which extent discriminatees have to prove the alleged discrimination or how and to which extent alleged discriminators have to prove that there has been no breach of the principle of equal treatment. This is self-evident, as EU competence with respect to private law (including the law of evidence) is very limited.[3] Between the boundaries of the EU anti-discrimination directives, issues on the burden of proof, the standard of proof and the means of evidence in discrimination cases are settled separately in each Member State and in accordance with the national laws on procedure and evidence. This fragmented legal framework leads to diverging judicial practices across the Member States, as well as within each

1 E. MUIR, "The transformative function of EU equality law" (2013) 21 European Review of Private Law 1231, 1245.
2 S. BENEDI LAHUERTA, "Taking EU equality law to the next level: in search of coherence" (2016) issue 7 ELLJ 348, 348-367; E. BRIBOSIA and I. RORIVE, Country report Non-discrimination. Belgium (173 p., Luxemburg, Publications Office of the European Union 2018); M. MERCAT-BRUNS, D.B. OPPENHEIMER and C. SARTORIUS, "Enforcement and effectiveness of Antidiscrimination Law: Global Commonalities and Practices" in M. MERCAT-BRUNS and others (eds.), *Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law* (Cham, Springer International Publishing AG 2018) 3, 5.
3 J. STUYCK, "Enforcement and Compliance: An EU Law Perspective" in R. BRONSWORD, H. W MICKLITZ, L. NIGLIA and S. WEATHERILL (eds.), *The Foundations of European Private Law* (Hart 2011) 515.

Member State.[4] Reports on the implementation of EU anti-discrimination directives reveal that private enforcement of anti-discrimination law remains problematic, inter alia as regards evidence.[5] Two key causes of the evidentiary problems revealed by these reports are discussed below: 1) standard of proof and burden of proof and 2) means of evidence.

1) Cause 1: Standard of proof and burden of proof

Legal framework. The EU anti-discrimination directives provide for the following requirement on the standard of proof and the burden of proof: *'[…] when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish […] 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*' (see Art 8(1) Dir 2000/43; Art 10(1) Dir 2000/78; and Art 19(1) Dir 2006/54).

Hence, the discriminatee has to trigger the evidence machinery by establishing facts which give rise to the presumption that there has been discrimination. From that moment, the burden of proof shifts onto the alleged discriminator. As clarified by the CJEU, the appreciation of the facts from which it may be presumed that there has been discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice.[6] Indeed, the directives contain no other rules on the burden of proof, the standard of proof or on the means of evidence. An important complementary role therefore remains for national law governing evidence and procedure. It has been concluded that the national courts are left with a large margin of appreciation and are often uncertain about what amounts to a *prima facie* case of discrimination.[7] Consequently, the application of this evidence rule varies widely, which does not serve legal certainty for both the discriminatee and the alleged discriminator.[8]

(Too) strict interpretation. Moreover, several national courts face difficulties when applying the evidence rule imposed by EU law. They seem to adhere to a strict interpretation of this rule, since they feel uncomfortable with rules deviating from ordinary private law rules on evidence they are used to.[9] Some national courts even apply interpretations that reduce the meaning of this rule to an empty shell,

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[4] In general, see B. De Witte "From a "Common Principle of Equality" to "European Antidiscrimination Law" (2010) 53 American Behavioral Scientist 1715, 1715-1720. For Belgium see, E. Bribosia and I. Rorive, "Belgium" in M. Mercat-Bruns and others (eds.), *Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law* (Cham, Springer International Publishing AG 2018) 43, 46.

[5] P. Foubert, *The enforcement of the principle of equal pay for equal work or work of equal value. A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway*, European Network of Legal Experts in Gender Equality and Non-discrimination, European Commission (Publications Office of the EU 2017) 50-51; L. Farkas and O. O'Farell, *Reversing the burden of proof: Practical Dilemmas at the European and national level*, European Network of Legal Experts in the Non-discrimination field, European Commission, 2014; EU Fundamental Rights Agency (FRA), *Access to justice in cases of discrimination in the EU. Steps to further equality* (Publications Office of the European Union); MILIEU LTD, *Comparative Study on Access to Justice in Gender Equality and Anti-discrimination Law. Synthesis Report* (European Commission Contract No VC/2009/0288 2011).

[6] C-104/10 *Patrick Kelly v National University of Ireland* [2011] ECR I-06813, para 31.

[7] K. Henrard, "The Effective Protection against Discrimination and the Burden of Proof: Evaluating the CJEU's Guidance Trough the Lens of Race" in U. Belavusau and K. Henrard (eds.), *EU Anti-Discrimination Law Beyond Gender* (Hart 2019) 95, 101.

[8] MILIEU LTD, *Comparative Study on Access to Justice in Gender Equality and Anti-discrimination Law. Synthesis Report* (European Commission Contract No VC/2009/0288 2011) 23-26.

[9] For Belgium, see e.g. Report of the Federal Evaluation Commission, February 2017, para 297.

thereby confronting the discriminatee with a high(er) burden of proof than provided for by the directives.[10] As a consequence, proving discrimination in court remains a major hurdle for claimants.[11]

Negative evidence. On the other side, alleged discriminators also face difficulties in the application of this evidence rule. As soon as the burden of proof shifts, the discriminator is required to prove that there has been no discrimination. Allegedly, in most cases, it does imply proof of an endless negative fact. Indeed, for the defendant, it is not sufficient to provide other reasons for his decision that exist in addition to the discriminatory reason. That would amount to a justification of the existing discrimination, but not to a rebuttal of the presumption of discrimination. The proof that there has been no discrimination implies that the defendant has to prove that *any* discriminatory ground or effect is definitely absent. Turning this requirement to judicial practice, it is, however, not always easy to produce these elements. This results in a heavy standard of proof to show that, although the alleged victim is in possession of a protected criterion, the measure taken is nevertheless independent of that criterion.

2) Cause 2: Means of evidence

In the hands of the discriminator. The effectiveness of private enforcement of anti-discrimination law is not only subject to the shift of the burden of proof, but also to the means of evidence available for both parties within legal procedures. Often there is no written document or material evidence that unambiguously establishes discrimination. Moreover, where available, it is often exclusively in the hands of the alleged discriminator.[12] Possibly because of differences between adversarial and inquisitorial approaches to be found in the various Member States,[13] EU anti-discrimination law holds no clear provision on this matter.

However, the CJEU has provided guidance on how to assess this bottleneck. In *Kelly*[14] and *Meister*,[15] the CJEU ruled that the discriminator's refusal to grant access to information which he possesses, is one of the factors which national courts must take into account when assessing the *prima facie* case of discrimination.[16] However, that assessment must always be carried out in accordance with personal data protection norms.[17] This is a roundabout way of enabling plaintiffs to obtain *prima facie* evidence that does not exist at first sight.[18] Despite this guidance provided by the CJEU, the national courts are still left with a large margin of appreciation and struggle with the lack of a more precise legal framework.

Statistics. Given the difficulties that arise with the information in possession of the alleged discriminator, other means of evidence are conceivable to facilitate proof of discrimination. For

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[10] P. FOUBERT, *The enforcement of the principle of equal pay for equal work or work of equal value. A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway*, European Network of Legal Experts in Gender Equality and Non-discrimination, European Commission (Publications Office of the EU 2017) 51.

[11] J. RINGELHEIM, "The burden of proof in anti-discrimination proceedings. A focus on Belgium, France and Ireland" [2019] European Equality Law Review 51.

[12] K. HENRARD, "The Effective Protection against Discrimination and the Burden of Proof: Evaluating the CJEU's Guidance Trough the Lens of Race" in U. BELAVUSAU and K. HENRARD (eds.), *EU Anti-Discrimination Law Beyond Gender* (Hart 2019) 95, 96.

[13] E. ELLIS and P. WATSON, *EU Anti-Discrimination Law* (OUP 2nd edn, 2012) 158.

[14] C-104/10 *Patrick Kelly v National University of Ireland* [2011] ECR I-06813, paras 38 and 48.

[15] C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012], para 46.

[16] C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012], paras 44 and 45; C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2015]; F. BENOÎT-ROHMER, "Lessons from the Recent Case Law of the EU Court of Justice on the Principle of Non-discrimination" in L. SERENA ROSSI and F. CASOLARI (eds.), *The Principle of Equality in EU Law* (Springer 2017) 151, 163.

[17] C-81/12 *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării* [2013], para 59; J. RINGELHEIM, "The burden of proof in anti-discrimination proceedings. A focus on Belgium, France and Ireland" [2019] European Equality Law Review 62.

[18] C-104/10 *Patrick Kelly v National University of Ireland* [2011] ECR I-06813, paras 39 and 54; C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012], para 40.

instance, in some Member States national law provides that statistics[19] can be used as means of evidence.[20] The successful use of statistical data in discrimination cases is illustrated in litigation before supranational courts, like the CJEU[21] and also the ECtHR[22]. On national level however, statistical data appear to be rarely used to support discrimination claims.[23] That is not entirely surprising because of a double problem. On the one hand, *discriminatees* experience practical difficulties in collecting and processing necessary data to produce relevant statistics. In *Minoo Schuch-Ghannadan*[24]*,* the CJEU ruled that general statistical data should be allowed in case of no or little access to specific statistical data. On the other hand *judges* face difficulties in assessing and interpreting submitted statistics.[25] Yet, according to the CJEU in *Enderby,* 'it is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear significant'.[26] Again national judges are left with a large margin of appreciation and need more guidance for the legal assessment of a non-legal instrument.

Other means of evidence. Besides statistical data, other means of evidence, such as results of situation testing[27] and telephone taps are conceivable. Nevertheless these alternatives remain controversial in many legal systems. Another example is provided by the case law of the CJEU. From Feryn[28], for instance, it follows that, to support a claim for discrimination, a discriminatee can rely on public statements of the alleged discriminator, even though these statements are not addressed to the discriminatee.[29] However, a clear legal framework and guidance for the national courts on the assessment of these means (for example with regard to the legality) are lacking.[30]

B. The Belgian response

(Re)connection with private law. As follows from the above, national courts lack substantial guidance regarding the assessment of the *prima facie* case of discrimination, the rebuttal of the presumption of discrimination and the unconventional means of evidence. This results in complex and diverging approaches regarding evidence in discrimination cases across the EU Member States.[31]

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[19] For Belgium, see art. 28(3) General Anti-Discrimination Federal Act, art. 30(3) Racial Equality Federal Act and art. 33(3) Federal Gender Act.

[20] See Recital 15 of Directives 2000/43/EC and 2000/78/EC.

[21] 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 01607; C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-00623; C-300/06 *Ursula Voß v Land Berlin* [2007] ECR I-10573.

[22] For example, see *DH and others v Czech Republic* App no 57325/00 (ECtHR, 13 November 2007); *Zarb Adami v Malta* App no 17209/02 (ECtHR, 20 June 2006); *Di Trizio v Switzerland* App no 7186/09 (ECtHR, 2 February 2016).

[23] For Belgium, see Report of the Federal Evaluation Commission, February 2017, paras 303 and 311.

[24] C-274/18 *Minoo Schuch-Ghannadan v Medizinische Universität Wien* [2016], paras 55-57.

[25] For Belgium, see I. Rorive and V. Van Der Plancke, "Quels dispositifs pour prouver la discrimination?" in C. Bayart, S. Sottiaux and S. Van Drooghenbroeck (eds.), *Les nouvelles lois luttant contre la discrimination* (die Keure 2008) 415, 448-486.

[26] C-127/92 *Dr Pamela Mary Enderby v Frenchay Health Authority et Secretary of State for Health* [1993] ECR I-05535, para 17.

[27] J. Ringelheim, "The burden of proof in anti-discrimination proceedings. A focus on Belgium, France and Ireland" [2019] European Equality Law Review 70; I. Rorive, *Proving Discrimination Cases. The Role of Situation Testing* (Center for Equal Rights and Migration Policy Group, Brussels, 2009).

[28] C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-05187, para 34; C-81/12 *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării* [2013], para 58.

[29] K. Henrard, "The Effective Protection against Discrimination and the Burden of Proof: Evaluating the CJEU's Guidance Trough the Lens of Race" in U. Belavusau and K. Henrard (eds.), *EU Anti-Discrimination Law Beyond Gender* (Hart 2019) 95, 99.

[30] I. Rorive and V. Van Der Plancke, "Quels dispositifs pour prouver la discrimination?" in C. Bayart, S. Sottiaux and S. Van Drooghenbroeck (eds.), *Les nouvelles lois luttant contre la discrimination* (die Keure 2008) 415, 431.

[31] Muir stresses, however, that '[a]lthough located in different parts […] and not always strictly identical, the procedural provisions of the current EU equality legislation are very similar. This means that they can be presented together and largely understood as a common procedural law of EU anti-discrimination policy.' (E. Muir, *EU Equality Law. The First Fundamental Rights Policy of the EU* (OUP 2018) 150).

Furthermore, specific rules on evidence in discrimination cases rarely look beyond the specific (EU and national) rules on anti-discrimination (*leges speciales*) and fail to take into account the general rules on private procedural law (*lex generalis*). Anti-discrimination law has become a public law niche, which has no connection (anymore) with private law. However, more attention to the general rules on procedural law can provide interesting insights that are able to boost the enforcement of anti-discrimination law. This is presented through a case study of the Belgian legal framework. Indeed, in Belgium there are two quite recent developments, on statutory as well as on case law level, that might be of particular interest to make the connection with private law (again). Both developments are discussed below.

1) Statutory development

Book 8 of the Belgian Civil Code. On November 1st, 2020 the (new) Belgian private law of evidence (Book 8 of the Civil Code) entered into force. Book 8 of the Civil Code contains interesting evidentiary techniques, which could provide practical solutions for some of the problems listed above. Yet, these techniques appear to be underused in discrimination cases. For example, article 8.6, paragraph 1 of the Civil Code provides for a lowering of the standard of proof for the party that bears the burden of proof of a negative fact.[32] Rather than establishing proof with a reasonable degree of certainty, the party bearing the burden of proof could then be satisfied with the proof by probability. As mentioned previously, the alleged discriminator has to prove a negative fact when he wants to rebut the presumption that discrimination took place. Hence, in applying this provision, the defendant could be allowed to proof the absence of discrimination by plausibility, rather than proving with a reasonable degree of certainty. This solution would put the defendant somewhat more on an equal footing with the alleged victim of discrimination.[33]

Moreover, the fifth paragraph of article 8.4 Civil Code enables the court to, subject to strict conditions, reverse the burden of proof in some exceptional circumstances. In exceptional circumstances, the reversal of the burden of proof is only possible if the court finds the application of the basic evidence rules manifestly unreasonable. Moreover, it is required that the court has ordered all useful measures of inquiry and ensured that the parties participate in producing evidence, without obtaining sufficient proof.[34] The reversal of the burden of proof could provide the ultimate solution for the party in a discrimination case who finds himself in a situation of lack of evidence.

Another useful instrument of the Belgian private law of evidence is the obligation for both parties to cooperate in producing evidence (art. 8.4, paragraph 3 Civil Code). This obligation has a broad and general scope.[35] In discrimination cases, alleged discriminators often prevent the discriminatee from

[32] B. ALLEMEERSCH and A.-S. HOUTMEYERS, "De onderzoeksmaatregelen en het nieuwe burgerlijk bewijsrecht" in P. TAELMAN and B. ALLEMEERSCH (eds.), *Het burgerlijk proces opnieuw hervormd* (Antwerp, Intersentia 2019) 97, 105; B. CATTOIR, "Nieuw burgerlijk bewijsrecht" in *Recht en praktijk* (no. 104 Mechelen, Kluwer 2020) 50-51; V. RONNEAU, "Objet, charge et degré de preuve: une nouvelle partie de Stratego s'annonce" in C. BIQUET-MATHIEU et al. (eds.), *La réforme du droit de la preuve* (Liege, Anthemis 2019) (15) 34-35 .

[33] Cass. 26 November 2010, A.R. C.09.0584.N.

[34] Memorie van Toelichting bij het Wetsontwerp van 31 oktober 2018 houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek, *Parl. St.* Kamer 2018-19, nr. 3349/001, 16; B. ALLEMEERSCH and A.-S. HOUTMEYERS, "De onderzoeksmaatregelen en het nieuwe burgerlijk bewijsrecht" in P. TAELMAN and B. ALLEMEERSCH (eds.), *Het burgerlijk proces opnieuw hervormd* (Antwerp, Intersentia 2019) 97, 103-104; B. CATTOIR, "Nieuw burgerlijk bewijsrecht" in *Recht en praktijk* (no. 104 Mechelen, Kluwer 2020) 52; V. RONNEAU, "Objet, charge et degré de preuve: une nouvelle partie de Stratego s'annonce" in C. BIQUET-MATHIEU et al. (eds.), *La réforme du droit de la preuve* (Liege, Anthemis 2019) (15) 26; W. VANDENBUSSCHE, *Bewijs en onrechtmatige daad* (Mortsel, Intersentia 2017) 665-666; W. VANDENBUSSCHE, "Commentaar bij art. 8.4 BW" (2021) 128 *OBO*, (85) 127-129.

[35] Cass. 25 September 2000, *Arr. Cass.* 2000, 1424; B. ALLEMEERSCH and A.-S. HOUTMEYERS, "De onderzoeksmaatregelen en het nieuwe burgerlijk bewijsrecht" in P. TAELMAN and B. ALLEMEERSCH (eds.), *Het burgerlijk proces opnieuw hervormd* (Antwerp, Intersentia 2019) 97, 102-103; V. RONNEAU, "Objet, charge et degré de preuve: une nouvelle partie de Stratego s'annonce" in

proving his or her case by destroying or withholding evidence. However, the general duty to cooperate in producing evidence prevents the discriminator from doing so. The alleged discriminator is not allowed to adopt a passive attitude while the discriminatee encounters difficulties in establishing a *prima facie* case of discrimination. If the alleged discriminator does so anyway, an appropriate sanction could be the reversal of the burden of proof from article 8.4, fifth paragraph of the Civil Code if the above-mentioned conditions are met.[36] The court can also derive a factual presumption from the alleged discriminator's refusal to cooperate in producing evidence. Together with other evidence, this presumption can bring the judge to the conclusion that the *prima facie* case of discrimination has been established, so that the burden of proof shifts on to the alleged discriminator.[37]

2) Case law development

Decision of the Belgian Supreme Court 14 June 2021. Also on case law level, there is a recent development in Belgian private law of evidence that could be of particular interest for parties in a discrimination case. Nevertheless, this possible solution does not sufficiently filter through into anti-discrimination law either. On June 14th, 2021 the Belgian Supreme Court rendered a historic judgment regarding the lawfulness of evidence in civil cases.[38] Although not obvious, this decision is an important development for discrimination cases in private relationships. As is showed above (*supra* no. 0-0), discriminatees and alleged discriminators often find themselves in a situation of lack of evidence. This narrowed evidentiary position forces parties in discrimination cases to resort to more exotic means of proof, which are more likely to be combined with an unlawfulness (such as situation testing, telephone taps or recordings). For a long period of time, the question of sanctioning of unlawful evidence in civil cases has remained unanswered in Belgium, or at least it was disputable.[39] The judgment of 14 June 2021 removed all doubt. Since then, unlawful or unlawfully obtained[40] evidence in civil cases can only be excluded from the debates if the gathering of evidence affects the reliability of the evidence or jeopardises the right to a fair trial.[41]

Consequently, although the situation test, telephone tap or recording is unlawful or unlawfully obtained (e.g. because it violates the right to privacy of the alleged discriminator), the discriminatee can still use it in court to establish a *prima facie* case of discrimination, unless the way in which these means of evidence are obtained do affect the reliability of the evidence or jeopardises the right to a fair trial. To assess whether these criteria are met, the court must take into account all the relevant circumstances of the case, such as: the way in which the evidence was obtained, the circumstances in which the unlawfulness was committed, the seriousness of the unlawfulness and the extent to which it infringed the other party's right, the existence of evidentiary deficiency of the party committing the unlawfulness

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C.Bbiquet-Mathieu et al. (eds.), *La réforme du droit de la preuve* (Liege, Anthemis 2019) (15) 21-23; B. Samyn, *Privaatrechtelijk Bewijs. Een diepgaand en praktisch overzicht* (Ghent, Story Publishers 2012) 135.

[36] MvT bij wetsontwerp van 31 oktober 2018 houdende invoeging van Boek 8 "Bewijs" in het Nieuw Burgerlijk Wetboek, *Parl.St.* 2018-19, nr. 3349/001, 14; W. Vandenbussche, *Bewijs en onrechtmatige daad* (Mortsel, Intersentia 2017) 355, para 410; W. Vandenbussche, "Commentaar bij art. 8.4 BW" (2021) 128 OBO 85, 121-122.

[37] Vred. Hamme 6 June 2019, *Huur* 2020, 57; M. STORME, *De bewijslast in het Belgisch privaatrecht* (Gent, Story-Scientia 1962) 298, para 319; W. Vandenbussche, "Commentaar bij art. 8.4 BW" (2021) 128 OBO 85, 121-122.

[38] Cass. 14 June 2021, AR. C.20.0418.N.

[39] B. Allemeersch, I. Samoy and W. Vandenbussche, "Overzicht van rechtspraak. Het burgerlijk bewijsrecht 2000 – 2013" (2015) 2 TPR 605, 689-691; M. Schouteden, "Antigoon in een nieuw, burgerrechtelijk jasje: klaar voor de catwalk?" (2022) 5 TBBR 251, 259ff.

[40] See more comprehensively: B. Allemeersch and P. Schollen, "Behoorlijk bewijs in burgerlijke zaken. Over de geoorloofdheidsvereiste in het burgerlijk bewijsrecht", (2002) 2 RW 41, 41ff; B. Allemeersch, I. Samoy and W. Vandenbussche, "Overzicht van rechtspraak. Het burgerlijk bewijsrecht 2000 – 2013" (2015) 2 TPR 605, 679; B. Cattoir, "Nieuw burgerlijk bewijsrecht" in *Recht en praktijk* (no. 104 Mechelen, Kluwer 2020) 67; M. Schouteden, "Antigoon in een nieuw, burgerrechtelijk jasje: klaar voor de catwalk?" (2022) 5 TBBR 251.

[41] M. Schouteden, "Antigoon in een nieuw, burgerrechtelijk jasje: klaar voor de catwalk?" (2022) 5 TBBR 251, 261ff.

and the attitude of the other party.[42] Depending on the circumstances, a correct application of this test can provide a welcome rescue for the party in a discrimination case that only has unlawful evidence at his or her disposal. For instance, the Labour Tribunal of Hasselt and Bruges already accepted unlawfully obtained telephone taps produced by the employee to establish a *prima facie* case of a discriminatory dismissal.[43] Since the conversation took place in an entirely professional context and did not contain any private content, the right to a fair trial of the employer was not infringed and the telephone taps could be used in court.

Concluding remarks on evidence. The above-mentioned developments provide just a few potential elements, stemming from the general private law of evidence of one single Member State, that may contribute to a solution for some of the bottlenecks identified above. Nevertheless, in anti-discrimination cases, this (re)connection with private law of evidence is insufficiently made, in Belgium nor in other EU Member States. Therefore, to set up a balanced legal framework for the private enforcement of anti-discrimination, further fundamental research of the general private law of evidence that underpins these private relationships is required.

Part II: Remedies for multiple discrimination in the Belgian legal framework

Research question(s). In the second part of this paper, we delve into remedies for multiple discrimination.[44] We answer the questions what multiple discrimination is (A), which remedies currently exist for multiple discrimination in the Belgian non-discrimination framework (B) and how they hold up in light of the EU requirements for remedies (C). The hypothesis is that remedies for multiple discrimination at the Belgian level currently do not meet the standards the EU has set out for them and that some recommendations can be made to improve their legal framework (D).

A. What is multiple discrimination?

1) Definition

Multiple and intersectional discrimination. The term *multiple discrimination* is broad. Generally, we can distinguish two types of multiple discrimination: traditional multiple discrimination, also called additive or compound discrimination, where two or more distinguishable discrimination grounds are present at the same time in a discrimination case, and intersectional discrimination, where two or more discrimination grounds are present in a way that makes it impossible to distinguish them from each other.[45] Considerable inconsistency with the terminology remains. In this paper, we will use the term multiple discrimination, using the term intersectional discrimination only to describe the more specific situation.

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[42] D. MOUGENOT, "Utilisation des preuves irrégulières en justice : Antigone se met en tenue civile" (2021) 28 JT 537, 540; M. SCHOUTEDEN, "Antigoon in een nieuw, burgerrechtelijk jasje: klaar voor de catwalk?" (2022) 5 TBBR 251, 266ff; J. VAN DONINCK, "Het lot van onrechtmatig bewijs in civiele zaken: dat geeft te denken" (2021) 28 RW 1090, 1097.

[43] Labour Tribunal Hasselt 20 June 2017, *Limb. Rechtsl.* 2018, issue 4, 333; President of the Labour Tribunal of Bruges 10 December 2013, *Soc. Kron*. 2014, 339.

[44] As we focus on civil enforcement of non-discrimination law, we will use the term 'remedies' as a general term in this paper and explicitly use sanctions when we want to refer to a more punitive term or to specifically named provisions.

[45] D. SCHIEK and S. BURRI, *Multiple discrimination in EU law. Opportunities for legal responses to intersectional gender discrimination*, Network of Legal Experts in Gender Equality and Non-Discrimination, European Commission, July 2009, p. 3, with further references there; E. ELLIS ad P. WATSON, *EU Anti-Discrimination Law, 2nd edition,* Oxford, Oxford University Press, 2012, p. 156-157.

The term *intersectional discrimination* was first coined by Kimberly Crenshaw at the end of the 1980s. At the time, she used the term intersectionality to talk about the experience of black women. Her renowned 1989 article sketched the picture of an intersection of streets: "Discrimination, like traffic through an intersection, may flow into one direction and it may flow into another. If an accident happens at an intersection, it can be caused by cars travelling from any number of directions, and, sometimes, form all of them. Similarly, if a black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination."[46]

A classic example of intersectional discrimination would be a Muslim woman falling victim to a discrimination because she wears a headscarf – gender and religion come together indistinguishably in the headscarf.[47] An example of additive discrimination would be the refusal for a job of a deaf woman, who also happened to be pregnant.[48] In many instances, multiple discrimination will entail the simultaneous presence of *gender* and (an)other criterium/a.[49] While the presence of the gender criterium in a case is statistically likely, we do not take the stance that all multiple discrimination should at least contain the gender criterium. There are situations (usually additive) where gender does not play a role.

2) Policy on multiple discrimination

Supra-national legal instruments. The EU Council first mentioned multiple discrimination in recital 4 of the 2000 Council Decision establishing a Community action programme to combat discrimination.[50] The concept also found its way into the recitals of the discrimination directives, albeit not in the provisions of the directives themselves.[51] As a result, most EU member states' legislations do not explicitly mention multiple discrimination, nor do they explicitly exclude it.[52] Back in 2006, the European Commission commissioned a study on multiple discrimination.[53] Evaluations of the discrimination directives have long suggested the need for a proper legal framework.[54] In an attempt to close the remaining gaps in the EU non-discrimination framework, in particular the lack of a comprehensive prohibition on discrimination in the field of goods and services, the EU Council also took legislative action: a new discrimination directive (focused on goods and services) would provide an approach to multiple discrimination but has been stuck in legislative limbo for over a decade.[55] The pending proposal for the new pay transparency directive acknowledges the travails of multiple discrimination in its article 3,

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[46] K. CRENSHAW, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", *U.Chi.Legal F.* 1989, (139) 145.

[47] E. BRIBOSIA, R. MEDARD INGHILTERRA and I. RORIVE, "Discrimination intersectionnelle en droit: mode d'emploi", Rev.Trim.Dr.H. *2021*, nr. 126, (241) 257. By way of comparison: neither a Muslim woman who does not wish to express her religion, nor a Muslim man who expresses his religion by wearing a beard, for example, are equally affected by the ban.

[48] Employment Tribunal Antwerp 29/9/2020, *NJW* 2021, 222 and Employment Court of Appeal 28/6/2021, *unpublished*.

[49] Point in case: the supra-national legal instruments mentioned in the next title all consider multiple discrimination from a gender-centric standpoint.

[50] Council Decision of 27/11/2000 establishing a Community action programme to combat discrimination, *OJ* L303, 2/12/2000, p. 23–28. See also D. SCHIEK and S. BURRI, *Multiple discrimination in EU law. Opportunities for legal responses to intersectional gender discrimination*, Network of Legal Experts in Gender Equality and Non-Discrimination, European Commission, July 2009, p. 9.

[51] Directive 2000/43/EC, recital (14) and directive 2000/78/EC, recital (3). In execution of the European principle of equal treatment and in implementing these directives, member states should in particular "promote equality between men and women, especially since women are often the victims of multiple discrimination."

[52] D. SCHIEK and S. BURRI, *Multiple discrimination in EU law. Opportunities for legal responses to intersectional gender discrimination*, Network of Legal Experts in Gender Equality and Non-Discrimination, European Commission, July 2009, p. 11 ff.

[53] This led to the report *Tackling multiple discrimination. Practices, policies and laws,* Europan Commission, September 2007.

[54] Report of 19/3/2021 from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC and of Council Directive 2000/78/EC, COM (2021) 139 final, p. 5; Joint report of 17/1/2014 on the application of Council Directive 2000/43/EC and of Council Directive 2000/78/EC, COM (2014) 2 finaal, p. 10.

[55] Procedure 2008/0140/APP: Equal treatment: implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426.

stating that "gender-based pay discrimination may involve an intersection of various axes of discrimination", some of which are protected under the existing discrimination directives, and that "such combination should be taken into account".[56] Finally, the ILO recognizes "that an inclusive, integrated and gender-responsive approach, which tackles underlying causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations, is essential to ending violence and harassment in the world of work" in its Convention 190.[57]

Multiple discrimination in case law of the CJEU. While the Court of Justice of the EU (hereafter: CJEU) recognizes the existence of multiple discrimination, it has not recognized intersectionality. In *Parris*, the CJEU stated that "while there may be discrimination on the basis of several [...] grounds, there is no new category of discrimination resulting from the combination of several of those grounds [...] which may be established where discrimination on the basis of those grounds alone has not been established."[58] Advocate general Kokott however, had taken the view that the basic premise of the discrimination directives that "there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in [the directive]"[59], could not be interpreted narrowly and therefore also applies to a *combination* of discrimination criteria. If no discrimination on the basis of the criteria in isolation can be established, she suggests that the situation should be assessed from the point of view of *indirect discrimination*: it should then be considered whether the persons affected by the measure in question are *particularly disadvantaged* as a result of a specific interplay of two or more criteria.[60]

3) Multiple discrimination in a single axis framework[61]

Structural issues in a single axis framework. Kokott's reference to indirect discrimination points toward a larger problem in the realm of multiple discrimination: the single axis approach of the current legal framework.[62] In short, this is the tendency of the legal framework to assume that discrimination happens on the basis of a single discrimination ground. The traditional enforcement mechanisms are also based on that assumption, leading victims of multiple discrimination to adapt their claims, either by claiming only one discrimination, or several separate direct or indirect discriminations.[63] Often, as advocate-general Kokott wrote, *indirect discrimination* is better suited to the situation of a victim of multiple discrimination, as it naturally takes into account the circumstances and structures in which the discrimination took place.[64] These circumstances and structures are, in turn, closely linked to the

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[56] Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM (2021) 93 final.

[57] ILO Convention nr. 190 concerning the elimination of violence and harassment in the world of work, preamble, *in fine,* adopted in Geneva, 108th ILC session, 21st of June 2019, entry into force on 25th of June 2021, www.ilo.org. The ILO Convention nr. 111 concerning Discrimination in Respect of Employment and Occupation, adopted in Geneva, 42nd ILC session, 25th of June 1958, entry into force 15th of June 1960, is given its age unsurprinsingly devoid of references to multiple discrimination.

[58] CJEU 24/11/2016, *Parris*, C-443/15, §80.

[59] See for instance Directive 2000/78, Art. 2.1.

[60] CJEU 24/11/2016, *Parris*, C-443/15: opinion advocate general Kokott 30/6/2016, §153-154.

[61] Beyond the scope of this paper, it is worth mentioning that the single axis framework gives rise to questions regarding proof of multiple discrimination, especially intersectional discrimination, as well. In particular, the question arises what a good comparator is in the case of an intersectional discrimination.

[62] See S. HANNETT, "Equality at the Intersections: the legislative and Judicial Failure to Tackle Multiple Discrimination", *Oxford Journal of Legal Studies* 2003, 23/1, (65) 69; M. MERCAT-BRUNS, "La discrimination intersectionnelle et sa critique : quel intérêt?", *Rev.Dr.Trav.* 2022, (289) 299.

[63] S. Hannett calls this the over-broadness and under-inclusiveness of the current framework, see S. HANNETT, *ibid*, p. 72 ff.

[64] M. MERCAT-BRUNS, "La discrimination systémique: peut-on repenser les outils de la non-discrimination en Europe?", *Rev.Dr.Homme* 2018/14, (1) 5, nr. 17; I. TOURKOCHORITI, "Disparate Impact and Indirect Discrimination. Assessing responses to Systemic Discrimination in the US and the EU", *JEDH* 2015/3, (297) 314.

concept of systemic discrimination: the ways in which society, the world of work… are conceived and set up, causing structural disadvantages for certain groups, often at the intersection of multiple discrimination grounds.[65] While we won't go deeper into the debate here, suffice to say that if a structural dimension is to be detected within a case of multiple discrimination, the *remedies should reflect this*.

A larger truck (of damage). Taking into account the structural aspects of multiple discrimination will likely lead to a more *qualitative* way of remedying damage.[66] Kimberlé Crenshaw's metaphor of traffic through an intersection describes the *quantitative* impact of multiple discrimination well. Victims of multiple discrimination will either be hit by a larger truck at the intersection (in the case of inextricable intersectional discrimination, where two or more criteria merge into a large truck) or by multiple cars coming from different directions (in the case of additive multiple discrimination). The damage done by multiple discrimination therefore is likely to be more severe, a fact corroborated by Kokott, who writes about the "particular disadvantage […] on account of a combination of two or more grounds for a difference of treatment" which more easily leads to an infringement of the requirements of proportionality when weighing the conflicting interests of employer (perpetrator) and employee (victim). Because of the combination of two or more discrimination grounds, "the interests of the disadvantaged employees carry greater weight, which increases the likelihood of undue prejudice to the persons concerned".[67] Should this be reflected in higher individual financial compensation? To find out what a proper qualitative and quantitative framework for remedies would look like, we first turn to the general requirements on remedies for discrimination in general set forth by the EU legal framework.

B. Legal framework for remedies

1) Effective and equivalent judicial protection

Requirement to create procedures. To be able to access remedies for discrimination through court, the discrimination directives require member states to ensure that victims of discrimination have access to judicial and/or administrative procedures for the enforcement of their rights under the directives.[68] These provisions "[do] not prescribe a specific measure to be taken in the event of a breach of the prohibition of discrimination, but [leave] member states free to choose between the different solutions suitable for achieving the objective of the Directive, depending on the different situations which may arise".[69]

In the absence of (concrete) EU rules, it is for the each member states to designate the competent courts and tribunals and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. These rules should not be less favourable than those governing similar domestic actions (principle of equivalence) and should not render practically

[65] For definitions, see M. MERCAT-BRUNS, "La discrimination systémique: peut-on repenser les outils de la non-discrimination en Europe?", *Rev.Dr.Homme* 2018/14, (1) 2, nr. 5 ff.

[66] This is the result of a recognition of the qualitatively different experience of multiple discrimination, as opposed to a single discrimination. See M. MERCAT-BRUNS, "La discrimination intersectionnelle et sa critique : quel intérêt?", *Rev.Dr.Trav.* 2022, (289) 290, *in fine* and M. MERCAT-BRUNS, "La discrimination systémique: peut-on repenser les outils de la non-discrimination en Europe?", *Rev.Dr.Homme* 2018/14, (1) 2, nr. 6 and 4, nr. 13.

[67] CJEU 24/11/2016, *Parris*, C-443/15: opinion advocate general Kokott 30/6/2016, §154 and §157.

[68] Art. 9.1. Directive 2000/78; art. 7.1. Directive 2000/43; art. 17.1 Directive 2006/54. See before in Article 6.1 of RL 76/207 as amended by RL 2002/73 (eventually fully replaced by Directive 2006/54).

[69] CJEU 2.8.1993, *Marshall II*, para 23 on article 6 of the 76/207 gender directive, with reference to CJEU 10.4.1984, *Von Colson and Kamann,* C-14/83, para 18.

impossible or excessively difficult the enforcement of the rights in question (principle of effectiveness).[70] The *material* remedies should also adhere to the rules of equivalence and effectiveness. For that matter, effectiveness is explicitly one of the conditions that have been set out for remedies and sanctions explicitly in the text of the directives.

2) Effectiveness, proportionality and dissuasiveness

The discrimination directives confer responsibility upon the member states for determining the rules on remedies[71] applicable to infringements of national non-discrimination provisions and for taking "all measures necessary" to ensure that they are applied.[72] The directives do not call for the adoption of specific remedies[73], except for the nullity of provisions contrary to the principle of equal treatment.[74] However, the remedies introduced by the member states must be "effective, proportional and dissuasive".[75] But what does that mean?

Real and effective protection. The CJEU evades having to concretely define these terms, using phrases like 'real and effective protection' and 'adequate protection' to describe them or simply replacing them by a synonym like 'deterrent' (for dissuasive). The *Draehmpaehl* judgement offers a good example. In it the Court states that "if a Member State chooses to penalize a breach of the prohibition of discrimination by the award of compensation, that compensation must be such as to guarantee *real and effective judicial protection*, have a real *deterrent* effect on the employer and must in any event be *adequate* in relation to the damage sustained".[76]

Real and effective protection therefore at least implies that "*purely nominal compensation* would not satisfy the requirements of an effective transposition of the Directive".[77] A purely symbolical compensation is not enough.

Full compensation of damage. The adequateness of the remedy has to be "in relation to the damage sustained". The damage therefore has to be considered as a factor in deciding upon a remedy. This relationship between damage and compensation has also found its way into the recitals of Directive 2006/54.[78]

In fact, compensation of the damage is *enough* and proper remedies do not imply punitive damages in order to be dissuasive. In *Camacho*, the referring court wondered whether "the nature of the compensation to be awarded to a victim of discrimination […] be interpreted as meaning that it enables the national court to award the victim reasonable punitive damages that are truly additional." In other words, can a sanction only be considered *dissuasive* if, over and above damages by way of reparation,

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[70] CJEU 8.7.2010, *Bulicke*, C-246/09, §25, with reference to CJEU 13.3.2007, *Unibet*, C-432/05, §43; CJEU 13.7.2006, *Manfredi*, C-295/04 to C-298/04, §62; CJEU 21.12.2016, *TDC*, C-327/15, §90, with reference to *i.a.* CJEU 27.6.2013, *Agrokonsulting* ,C-93/12, §36.

[71] We use the term 'remedies' as a general term in this paper. Without going into it deeper at this time, it is worth mentioning that the directives themselves use a variety of terms to indicate remedies: remedies, sanctions, compensation, reparation, penalty… There is no indication in the directives or elsewhere, however, that these terms indicate large discrepancies in meaning.

[72] CJEU 22.4.1997, *Draehmpaehl*, C-180/95, §24 about art. 6 of the 76/207 directive, with reference to CJEU 10.4.1984, *Von Colson and Kamann,* C-14/83, §18.

[73] See C-54/07, *Feryn,* §37 about directive 2000/43.

[74] Art. 16(b) Directive 2000/78; art. 14(b) Directive 2000/43 and art. 23(b) Directive 2006/54.

[75] Directive 2000/78, recital (35) and art. 17 (sanctions); Directive 2006/54, recital (35) and artt. 18 (compensation or reparation) and 25 (penalties); Directive 2000/43, recital (26) and art. 15 (sanctions).

[76] CJEU 22.4.1997, *Draehmpaehl*, C-180/95, §25; CJEU 2.8.1993, *Marshall II*, §24, with reference to CJEU 10.4.1984, *Von Colson and Kamann,* C-14/83, §23.

[77] CJEU 22.4.1997, *Draehmpaehl*, C-180/95, §25, with reference to CJEU 10.4.1984, *Von Colson and Kamann,* C-14/83, §23-24.

[78] Directive 2006/54, recital (33), *in fine.* Was already to be found in article 6.2 of RL 76/207 as amended by RL 2002/73 before.

a victim is awarded punitive damages?[79] The answer is no: there is "genuine and effective compensation or reparation" in a way which is "dissuasive and proportionate" when a member state which chooses the financial form of compensation, provides for payment which *covers in full the loss and damage sustained*.[80] This is in line with the CJEU's general view on punitive damages, which generally fall within the procedural autonomy of the member states.[81]

No prior upper limits allowed. With adequate compensation for sustained damage in mind, the fixing of an upper limit cannot constitute proper implementation of the discrimination directives, since it limits the amount of compensation *a priori* to a level which does not necessarily ensure adequate reparation for the damage sustained.[82] The CJEU does not allow the fixing of any prior upper limit for compensation, except where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of the directive (on gender in that case) was the refusal to take their job application into consideration. An employer's failure to take an application into consideration does not cause damage to the same extent as a refusal to engage. A statutory limit of three months for a victim of the former category of applicants was not found unreasonable by the court, while three months would not suffice in the latter case.[83] Moreover, these prior limits were not in line with the principle of equivalence, since the same types of limits were not provided for in other provisions of civil and labour law.[84]

No aggregate ceilings allowed. Apart from a prior ceiling, the *Draehmpaehl* case stipulates that an aggregate ceiling for financial compensation in the case of multiple applicants in the same discrimination case also is not allowed. Putting a ceiling on the aggregate amount of compensation may lead to the award of reduced compensation and may have the effect of dissuading applicants so harmed from asserting their rights. Such a consequence would not represent real and effective judicial protection and would have no real dissuasive effect on the employer, as required by the directive. Moreover, once again, there were no similar provisions on aggregate ceilings in other domains of (in that particular case: German) national law.[85]

Guidelines for non-pecuniary compensation. As said above, the directives do not prescribe specific remedies and from the CJEU's case law it i clear that neither does the court. While the above-mentioned case law focuses on financial compensation, the Court confirms in *Feryn* the possible non-pecuniary remedies, such as simply establishing the existence of a discrimination or an injunction to stop the discriminatory behaviour.[86] The court hints in *Marshall* that "in the event of a dismissal a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained", considering reinstatement as an option, also.[87] In anticipation of the conclusions of this paper, the principle of non-monetary relief derived from civil law offers a lot of options in this regard.

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[79] CJEU 17.12.2015, *Camacho,* C-407/14, §24-25.
[80] CJEU 17.12.2015, *Camacho,* C-407/14, §33 and §37, with reference to CJEU 2.8.1993, *Marshall II*, §26.
[81] CJEU 5.3.1996, *Brasserie du pêcheur* and *Factortame,* C-46/93 and C-48/93, §89-90.
[82] CJEU 2.8.1993, *Marshall II*, §30 (about art. 6 of the directive 76/207.
[83] CJEU 22.4.1997, *Draehmpaehl*, C-180/95, §33-36, meanwhile also to be found in Directive 2006/54, recital (33), *in fine.* Was already to be found in article 6.2 of RL 76/207 as amended by RL 2002/73 before. See same message in art. 18 Directive 2006/54.
[84] CJEU 22.4.1997, *Draehmpaehl*, C-180/95, §28.
[85] CJEU 22.4.1997, *Draehmpaehl*, C-180/95, §40-43.
[86] CJEU 10.7.2008, *Feryn*, C-54/07*,* §39.
[87] CJEU 17.12.2015, *Camacho,* C-407/14, §42, with reference to CJEU 2.8.1993, *Marshall II*, §25.

3) Conclusions on the framework for remedies created by the directives and the CJEU

The European legislator leaves the specific remedies to the margin of appreciation of the member states. What is certain, is that

- no particular type of remedy or sanction is prescribed by the directives (apart from nullity). The national legislators have a large margin of appreciation in transposing them;

- the amount of damage plays an important role what constitutes proper compensation, and that damage has to be compensated in full;

- no prior limits on (financial) damages are allowed, but the CJEU has spoken out about acceptable limits to damages, namely 3 or 6 months' wages in the case of a discriminatory recruitment process;

- the directives and the CJEU leave room for non-pecuniary measures, such as injunctions, establishing a discrimination or reinstatements;

- damages can be compensated in line with the dissuasiveness required by the directives without having to resort to punitive damages;

- in the case of multiple victims launching a claim for the same discriminatory behaviour, no aggregate ceilings on (financial) compensation are allowed.

In what follows, we will look at what the Belgian legislation and judicial practice is on multiple discrimination and its remedies. We will then try to evaluate it against the EU legal framework.[88]

C. Belgian legislation and case law on multiple discrimination

1) Belgian legislation

Mostly civil remedies. The Belgian non-discrimination acts provide for several, in employment cases mainly civil, remedies for discrimination. Of those, financial compensation is the main remedy for discrimination in Belgium, although the nullity of a provision or the injunction to halt discrimination are also frequently granted by the judge.

No specific remedy for multiple discrimination. There are no specific provisions on remedies for multiple or intersectional discrimination. The remedy on which multiple discrimination has the greatest impact, seems to be *financial compensation*. A victim may, under civil law, prove the precise damage and claim compensation but the law also provides for the possibility of lump sum compensation.[89] In line with the principle of equivalence, the lump sum compensation foreseen by law amounts to six months' worth of gross wages, an often-used remedy in the field of Belgian employment law. Victims in multiple discrimination cases tend to claim *multiple* lump sum compensations in court. This cumulation of these compensations is neither explicitly allowed nor excluded by the discrimination acts.[90] It therefore usually comes down to the question of if and how the judge can combine multiple pecuniary compensations. In our view, this does not diminish the potential importance of non-pecuniary remedies for this type of discrimination – even though they do not feature in the studied cases below.

[88] For this evaluation, we start from the hypothesis that the EU criteria for remedies apply to multiple discrimination in the same way as to single discrimination. This case study from Belgiam can help shed light on the way in which their concrete interpretation changes for cases of multiple discrimination.

[89] Art. 15 Brusselse ordinance; art. 18 general discrimination act; art. 23 gender act.

[90] See L. MARKEY, "Discriminations multiples -- commentaire de Cour Trav. Bruxelles 13.11.2012", *Chr.Dr.S.* 2014, (279) 282.

2) Cumulation of financial remedies in Belgian case law

Different legal cause, distinguishable damages. When studying Belgian court cases on multiple discrimination, it is important to point out a theory the Court of Cassation has developed around a decade ago.[91] Prodded by lower courts trying to apply the existing legal framework to situations of multiple discrimination and multiple damages in general, in 2012, the Court of Cassation created a theory on the cumulation of financial compensation in discrimination cases: compensation in the context of discrimination can be cumulative *if the claims have a different legal cause and compensate distinguishable damage*. By different legal causes, the Court of Cassation means that the legal basis of the compensation arises from different legal provisions.[92]

As cumulation of financial damages is neither explicitly allowed nor excluded by law, an employment court had allowed the cumulation of two lump sum compensations for pregnancy discrimination in 2009.[93] Following the cassation rulings, the 2009 ruling was reformed on appeal: indeed both claims for compensation had the same legal cause – i.e. the gender discrimination act.[94]

In a 2012 case, in line with the Court of Cassation's theory, the Brussels employment court ruled that compensation for breach of retaliation protection following a discrimination complaint could not be cumulated with compensation for discriminatory harassment, as they compensated for the damage caused by the same discriminatory act and both compensations were based on the same legislative act.[95] The case was based on the 2003 discrimination act, which listed harassment as a prohibited act.[96] Since 2007, the discrimination act refers to the welfare act with regard to harassment. Hypothetically, today, this would mean that for the exact same set of facts, the Court of Cassation's requirement that two *different legal causes* are required for the cumulation of damages would be fulfilled. Of course, this leaves the question of *distinguishable damages* but, were a judge to find a distinct non-pecuniary loss from the discriminatory harassment on the one hand and the breach of retaliation protection on the other, would this mean that for the same set of facts, a cumulation of damages would be allowed? In a 2017 Brussels employment court case, the judge effectively allowed cumulation between compensation under the discrimination act and the welfare act.[97] Similarly, cumulation of compensation for discrimination and compensation for violation of the royal decree on employee health surveillance does not pose a problem.[98]

Different discrimination grounds, different legal act (coincidentally). The cumulation between a protected discrimination criterium from the general discrimination act and a protected criterium related to gender (which has an act of its own) also seems to satisfy the Court of Cassation's requirement for a different legal cause. In a 2017 case involving age and gender discrimination, the employment court added three months to the regular six months' lump sum compensation to account for the fact that the discrimination had taken place not only on the basis of age (six months) but also on the basis of gender (three months). It stated that "le dommage est à tout le moins partiellement distinct sous l'angle moral puisque le comportement dénoncé porte atteinte à deux caractéristiques".[99]

[91] The Court of Cassation is the civil supreme court, judging not on the merits of a case but on the proper application and interpretation of the law.
[92] Cass. 3/12/2012, S.11.0014.F and Cass. 20/2/2012, S.10.0048.F, www.cass.be.
[93] Employment Court Luik 14/10/2009, AR 379.247, *unpublished*.
[94] Employment Court of Appeal Bergen 15/3/2015, AR 2011/AM/367, *Chr.D.S.* 2014, 417.
[95] Employment Court of Appeal Brussels 15/5/2012, *JTT* 2012, 300-302.
[96] Act of 25/2/2003 combating discrimination […], *BS* 17/3/2003, p. 12844.
[97] Employment Tribunal Brussels 2/10/2017, www.unia.be.
[98] Employment Court of Appeal Brussels 23/10/2017, www.unia.be. In first instance, the cumul was granted as well: Employment Tribunal Brussels 6/5/2015, www.unia.be.
[99] Translation: "the damage is at least partially distinct from a moral point of view since the behavior denounced infringes two discrimination characteristics".

According to the prevailing theory of the Court of Cassation (to which the judgement refers), the cumulation was also possible because the provisions on age and gender discrimination both stem from a separate legal act and therefore have a different legal cause. The employment court stated that while both legal acts are formally similar, their cause is clearly to protect *different* types of discrimination.[100]

However, when drafting the current three discrimination acts (the Gender Act, the Anti-Racism Act and the General Discrimination Act), the legislator seriously debated whether a single act collecting all provisions was not preferable after all. The existence of three separate acts was motivated by the desire for clarity, not because the intention of the legislator (the legal cause) or text of the law, for that matter, differed greatly for each type of protected criterium.[101]

In a case involving two protected criteria from the general discrimination act, a cumulation of compensation would not be available under the current case law of the Court of Cassation, since it involves the same legal basis. The Court of Cassation seems to assume that compensation from different acts compensate a distinct damage, where compensation from the same act does not. However, the general discrimination act contains the bulk of the protected criteria and a person can perfectly well be the victim of discrimination on the intersection of, for example, age and health status (same legislative act). Would this situation legally be so different from an intersectional discrimination on the basis of gender and religion (different legislative act)?

Compensation per violation of the law: a move away from Cassation? Two recent judgements apply another method of compensating discrimination damage: by awarding a financial compensation *per violation of the law*. In a case where a Muslim woman wearing a hijab applied for a position twice over the course of more than a year, the judge awarded the victim lump sum compensation twice – once for each of the rejected job applications. The fact that the victim was in both instances of applying for the job rejected on the basis of *two protected criteria* (gender and religious belief) did not lead to additional compensation. Thus, an intersectional discrimination here resulted in exactly the same amount of financial compensation as a single discrimination (namely a situation where someone would have applied for a job at the same company twice with an interval of time, but only possessing one protected discrimination ground at the time of application). Moreover, the tribunal granted an injunction for the employer to halt its neutrality policy.[102]

In another recent case, in which a victim was not recruited on the grounds of disability and pregnancy, the employment tribunal originally awarded three lump sum damages (of six months) because it had found three *separate infringements* of the law.[103] On appeal, the judgement was reformed because two of the violations involved the criterium of disability -- therefore there was no separate damage in that respect according to the employment court of appeal. The question of additional moral suffering caused by an accumulation of violations of the law remained unanswered, as did the matter that both disability claims were based on the same legal act (even though, in this case, the discriminations were quite distinguishable: one was about the conditions during the recruitment process, the other pertained to the actual decision not to hire).[104]

In an even more recent case, the Antwerp employment tribunal granted two six-month lump sums to a woman who had been discriminated against due to pregnancy. While the two instances of

[100] Employment Tribunal Liège 11/8/2017, *Chr.Dr.Soc.* 2018, 242-245.
[101] Legislative proposal on combating certain forms of discrimination, *Parl.St.* Kamer 2006-07, 51-2722/001, p. 11.
[102] Employment Tribunal Brussels 3/5/2021, www.unia.be and *NJW* 2022, nr. 455, p. 92. See also commentary: D. De Meyst, "Geen vaststelling van of gepaste remedie voor intersectionele discriminatie", *NJW* 2022, nr. 455, p. 98 ff.
[103] Employment Tribunal Antwerp 29/9/2020, *NJW* 2021, 222, met noot D. De Meyst en A. Hendrickx, "Schadevergoeding bij meervoudige discriminatie", *NJW* 2021, 229-230.
[104] Employment Court of Appeal Antwerp 28/6/2021, 2020/AA/417, *unpublished.*

discrimination were *easily distinguishable* (the lack of a well-being policy for pregnant workers on the one hand and a decision not to give the woman a fixed contract on the other), both claims were based on the same legal act. As for the damage, the judge stated that it the two counts of discrimination caused *distinguishable damage*. The court reiterated that "it is up to the national judge to establish a discrimination in a given case and apply the law to it" and that "the judge decides in a given case what constitutes a reasonable and sufficiently dissuasive compensation".[105] It is unclear how these more recent judgements, looking at *separate infringements* and at the *damage*, relate to the theory of the Court of Cassation set out above, which also requires courts to take the *legal cause* of the applied legislation into account.

3) Evaluation of the Belgian framework

European criteria. As a reminder, equivalence, effectiveness, proportionality and dissuasiveness are the EU criteria against which to judge the Belgian framework, materialized primarily by the requirement of full compensation of the sustained damage. With regard to equivalence, we needn't say much at this time – we mentioned above that six months' wages is a relatively common remedy in Belgian employment law. Concerning the other criteria, Belgian judges tend to be as opaque and self-referencing as the CJEU. In one judgement, the employment tribunal invoked the very choice between claiming compensation for actual damages and claiming a lump sum compensation to conclude that the Belgian framework met the EU criteria.[106] The effectiveness of the legislation has been referred to specifically in a 2017 case and led the court (amongst other reasons) to award more financial compensation for a multiple discrimination.[107] While we cannot shake the impression that the abstract EU criteria are of relatively little use here, EU law and the CJEU leave a large margin of appreciation to the judges to apply the law to each case.

Compensation of damages. Within this margin of appreciation, the courts seem to consider *additional or distinguishable damages* for multiple discrimination, usually conceding that the combination of discrimination grounds leads at least the moral damages to be higher – even though we find that judges often have a hard time *substantiating* the finding that there are more moral damages to support their decision for higher compensation. The only way to know for sure if and how much higher the damage is, is to conduct a study amongst victims of multiple discrimination.[108] For now, there are enough reasons to consider the damage is indeed higher,[109] even though this isn't always well reflected in the case law. Either way, the additional damage of multiple discrimination seems to be at the moral level,[110] unless in the cases where the court looked at the *number* of infringements of the law. Some courts rule explicitly along those lines and award higher damages based on the existing lump sum system.[111] Generally however, there is currently little legal certainty on the quantity of compensation for multiple discrimination.

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[105] Employment Tribunal Antwerp, div. Hasselt 2/12/2021, *unpublished.*

[106] *Ibid,* p. 25.

[107] Employment Tribunal Liège 11/8/2017, *Chr.Dr.Soc.* 2018, 242-245.

[108] We were not able to find specific psycho-legal studies on the matter.

[109] See also D. SCHIEK and S. BURRI, *Multiple discrimination in EU law. Opportunities for legal responses to intersectional gender discrimination*, Network of Legal Experts in Gender Equality and Non-Discrimination, European Commission, July 2009, p. 20.

[110] E. BRIBOSIA, R. MEDARD INGHILTERRA en I. RORIVE, "Discrimination intersectionnelle en droit: mode d'emploi", Rev.Trim.Dr.H. *2021*, nr. 126, (241) 268 e.v.; see also L. FASTREZ, P. LOECKX en L. MONNIER, "La discrimination multiple et la théorie de l'intersectionnalité dans la jurisprudence des Cours européennes de justice et des Droits de l'homme"*, Chr.Dr.S*. 2018, (174) 181.

[111] Employment Tribunal Liège 11/8/2017, *Chr.Dr.S.* 2018, 242; Employment Tribunal Antwerp 29/9/2020, *NJW* 2021, 222, with commentary D. DE MEYST en A. HENDRICKX, "Schadevergoeding bij meervoudige discriminatie", *NJW* 2021, 229-230.

Not only do the (admittedly sometimes aleatory) considerations on the damage fit in with the EU requirement of full compensation for the damage, they also align with the first component of the Court of Cassation's 2012 theory on cumulation of financial compensation.

Cassation theory. Besides distinct damage, this case law of the Court of Cassation emphasizes the need for a *separate legal basis* of the discrimination(s). As became clear from the lower case law above, this requirement can lead to strange situations, where certain combinations of discrimination criteria are eligible for cumulated compensation but others aren't. Not only could these situations be in breach of the principle of the principle of equality (similar situations with multiple criteria are treated differently), this requirement of different legal cause moreover creates a sort of hierarchy between discrimination grounds, with some (combinations of) grounds seemingly deserving higher compensation than others. We believe the Court of Cassation's requirement is unnecessary and overly formalistic and propose alternatives below.

Compensation per infringement of the law. Largely side-lining the Court of Cassation's theory on cumulation, a recent wave of judgements awards compensation per separate infringement of the law. While useful in some cases, this method inherently does not adequately take into account the additional impact of the presence of multiple protected criteria *per infringement* and therefore needs adapting.

Principle of equality. The principle of equality can be added to the evaluative framework in another way still. This constitutional principle prescribes that equal or highly similar situations be treated in the same way and different situations to be treated differently, unless a justification is present not to.[112] This principle applies to single and multiple discrimination, in the sense that these are two different types of discrimination and thus ought to be treated differently, which would not be the case of a victim received the exact same financial compensation in both situations. The principle of equality does not permit multiple discrimination to be remedied in the same way as single discrimination. Some judges have used this argument in their judgements on multiple discrimination to award higher compensation for multiple discrimination, in our view rightfully so.[113]

4) Recommendations on remedies for multiple discrimination

All of the above allows us to draw a few conclusions and make some recommendations regarding financial remedies for multiple discrimination within the Belgian framework.

Legislative recognition of multiple discrimination… Many of the problems with enforcing the prohibition on multiple discrimination arise from the fact that claimants function within a single axis framework. The Flemish decree on discrimination has changed its vocabulary in recent years, but has not yet made changes in the remedies.[114] Intersectional discrimination in particular deserves its own provision.

…and its additional financial compensation. Moreover, we shouldn't leave judgement on extra (moral) damage purely up to the judge. An intervention of the (EU) legislator may offer solace. For the same reasons that a lump sum financial compensation was introduced into the legislation in the first place (damages are hard to prove, judgements may vary too much), guiding judges with a provision on the additional (moral) damage of multiple discrimination and the appropriate additional financial compensation would guarantee "the arbitrariness of the legislature [to] supersede the arbitrariness of

[112] Art. 10 Belgian constitution.
[113] Employment Tribunal Liège 11/8/2017, *Chr.Dr.Soc.* 2018, 242-245.
[114] Art. 16, §1 of the Decree of 10/7/2008 containing a framework for the Flemish equal opportunities and equal treatment policy, *BS* 23/9/2008, speaks of "adverse treatment […] by virtue of *one or more* protected characteristics".

the judge".[115] Refuking the court of cassation's theory, this new provision would recognize additional damage and compensation for all types of multiple discrimination, regardless of their distinct legal basis.

Leeway for the judge. We do not believe, however, that the court's margin of appreciation should be reduced to zero. In particular, the court should retain the ability to temper the financial compensation where it establishes *no additional damage* as a result of the multiple discrimination. Not only would this allow a judge to come to a full and adequate compensation of the damage, it would moreover satisfy the requirements of the principle of equality, treating similar cases (same damage as a single discrimination even though multiple discrimination grounds are present) in the same way.

Diverse non-pecuniary remedies... Prompted by the approach of the Belgian case law which did not often look beyond financial compensation for multiple discrimination, this third part of the paper focused on evaluating and improving the rules on pecuniary compensation. This implies a *quantitative* outlook on the damages caused by multiple discrimination. Let's not lose sight, however, of the fact that both the European level and the Belgian level willingly allow other than pecuniary remedies[116] and that financial compensation might not always be the best way of remedying multiple discrimination.

...with attention for structural aspects of multiple discrimination. Non-pecuniary remedies imply a more *qualitative* look at the damages to be repaired. Higher up in this paper, we mentioned that the same combinations of discrimination grounds regularly come together to cause multiple discrimination, often indirectly, indicating in some instances a wider, structural problem. The Belgian legal framework does not currently allow a judge to order remedies specifically aimed at *tackling the structural issue* that is revealed by the individual case of multiple discrimination. Tackling these issues, almost by definition a qualitative issue, would require *positive injunctions,* made to measure to the problem at hand.[117] Going beyond the scope of this paper but food for further research, we believe the principles on reparation of damages in civil law offer a window of opportunity to flesh out further which shape these positive injunctions could take, like forced promotion or an order for reinstatement.[118]

Conclusion

In researching Belgian non-discrimination law, it is clear that both the framework for evidence and the framework for remedies give rise to a lot of academic debate. What is also clear, is that there is a role for the principles of civil law in improving the enforcement of non-discrimination. With regard to evidence, the brand new Book 8 of the Civil Code as well as recent case law of the Supreme Court offer a fresh perspective on proving discrimination, while older principles of civil law (such as the full reparation of damages and the principle of reparation in kind) can inspire more effective, proportional and dissuasive remedies – particularly within a framework that is mainly focused on financial compensation for now.

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[115] Legislative proposal on combating certain forms of discrimination, *Parl.St.* Kamer 2006-07, 51-2722/001, p. 26.

[116] For instance, the (negative) injunction to halt discrimination as it currently features in the Belgian discrimination acts, does not need adapting – even though a recognition of multiple discrimination as a separate kind of discrimination would probably increase its effectivity, as it would be aimed at a clear and well-defined situation.

[117] Spanish law, for instance, provides the judge with the option to "restore the position of the person prior to the damage and contribute to the *prevention* of damage": Article 183 of Law 36/2011 governing the social courts (Ley 36/2011, reguladora de la jurisdicción social), of 10 October 2011 (BOE No 245, of 11 October 2011, p. 106584), referenced in CJEU 17.12.2015, *Camacho,* C-407/14, §15.

[118] E. ELLIS ad P. WATSON, *EU Anti-Discrimination Law, 2nd edition,* Oxford, Oxford University Press, 2012, p. 506-507, who write that individual enforcement is often a burdensome way of enforcing the law and that the creative application of meaningful specific remedies is necessary.