



European network of legal experts in gender equality and non-discrimination

FLASH REPORT

Country:	Belgium
Title:	Constitutional Court decides that lack of difference between lump sum damages for direct and indirect discrimination is constitutional
Date:	10 July 2019
Expert:	Emmanuelle Bribosia, Isabelle Rorive & Nathalie Wuiame
<u>Context</u>	
Issue at stake:	Is the fact that the law provides that there is no difference in the lump sum damages for direct and indirect discrimination, constitutional?
Grounds of discrimination:	All grounds
Field of application:	All fields
Source:	National court decision
Applicable law:	Flemish Framework Decree on Equal Treatment (<i>Decreet houdende een kader voor het Vlaamse gelijkekansen- en gelijkebehandelingsbeleid</i>) of 10 July 2008 (Belgian OJ: 23 September 2008)

Content

Case: Two women were banned from two different public swimming pools for wearing a burkini. They sought an injunction imposing immediate cessation of the discriminatory practice, on the basis of religious belief as the Flemish Framework Decree on Equal Treatment of 10 July 2008 applies to access to goods and services for all discriminatory grounds covered by the *decreet* (article 20, 6°). On 5 July, the Civil Court in Ghent found that there was indirect discrimination and granted the injunction, as well as lump-sum damages for indirect discrimination. The respondents (the managers of the swimming pools) contested the constitutionality of Article 28 of the Flemish Framework Decree, as it does not make a distinction between direct and indirect discrimination for the rewarding of lump-sum damages. The Civil Court referred to the Constitutional Court for a preliminary ruling.

Decision of the court: The Constitutional Court considered, following the claimants and the Flemish legislator, that the distinction between direct and indirect discrimination only has relevance regarding the burden of proof, and the possible justification of the discrimination. The nature of the discrimination (direct or indirect), has no incidence whatsoever on the damage suffered by the victim of said discrimination. Furthermore, by providing for lump sum damages, the legislator aimed to make sure that victims of any kind of discrimination – for which the damage is often very difficultly calculated as all situations are very diverse and the damage suffered is often of non-pecuniary nature – are adequately compensated.

The Constitutional Court therefore considered that Article 28 was not unconstitutional.

Key points of analysis: The main question regards the rewarding of lump-sum damages in cases of direct and indirect discrimination.

The Constitutional Court rightly decided that there is no distinction to be made between the rewarding of lump-sum damages, depending on whether the discrimination is direct or indirect. The difference between those two notions resides only in the nature of the discrimination and the possible justification. There should be no difference in the rewarding of lump-sum damages; the Constitutional Court recalls the established case law of the Court of justice that the intent to discriminate is not a constituent element of discrimination. This implies that there is no difference neither between perpetrators nor between victims of direct and indirect discrimination, and therefore there should be no difference between the damages.

As all pieces of anti-discrimination legislations (federal and federate level) provide for the same lump-sum system, this decision is also confirming the constitutionality of all the relevant anti-discrimination legislations.

It is also interesting to stress that the Civil Court in Ghent found that there was indirect discrimination grounded on religious belief while under EU Law such an indirect discrimination could only be challenged as gender related (given that only women are wearing a burkini) under Directive 2004/113/EC. Indeed, Directive 2000/78/EC does not apply to access and provision of goods and services.

Internet link source: Constitutional Court, judgment 110/2019 of 10 July 2019. Full judgment available in French or Dutch on the website of the Court. Link to the French version: <https://www.const-court.be/public/f/2019/2019-110f.pdf>.