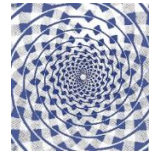


**The Use of Situation Testing as Evidence of Discrimination
and the Right to a Fair Trial.**
***Amicus Brief* Submitted to the European Court of Human Rights
in *SEJAC v. France*.**

Julie Ringelheim, Isabelle Rorive, and Véronique van der Plancke
On behalf of Unia and the Université Libre de Bruxelles Equality Law Clinic

June 2023

 **UCLouvain**



Institute for Interdisciplinary Research in Legal sciences (JUR-I)
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Third-Party Intervention submitted to the European Court of Human Rights
by the Belgian equality body Unia and the ULB Equality Law Clinic
in the case *Société d'exploitation des jeux automatiques champenois (SEJAC) c. la France*
June 2023

1. The case of *SEJAC v. France* (appl. no. 62583/17) is, to our knowledge, the first in which your Court is called upon to examine the validity of situation testing under Article 6 § 1 of the European Convention on Human Rights (hereinafter ECHR or the Convention). This case, therefore, will have particularly important implications for the implementation of the principle of non-discrimination enshrined in Article 14 of the Convention. Situation testing is one of the means used by equality bodies, NGOs, victims of discrimination and certain public authorities to overcome the considerable evidential hurdles that limit the effectiveness of the prohibition of discrimination. It is in the light of these implications that Unia, one of the equality bodies¹ designated for Belgium, and the Equality Law Clinic (ELC) of the *Université Libre de Bruxelles* (ULB), which is recognised for its expertise in the protection of fundamental rights,² have requested your Court's authorization to submit these observations.³

2. We begin by clarifying the origins of situation testing and its various uses (I). We then highlight that racial and ethnic discrimination remains widespread in Europe. The difficulty of proving discrimination in court is one of the major obstacles to the effective implementation of anti-discrimination law (II). Situation testing is one of the tools used in many European countries to overcome this problem. The legality of its use as a means of proof has been recognised by a number of national courts and, in some countries, by the legislature (III). Lastly, we will discuss the conditions that situation testing must meet in order to be allowed as evidence in court, in the light of your case-law on Article 6 §1 ECHR and of comparative law (IV).

I. History and Uses of Situation Testing

3. The situation testing method (also called ‘audit studies’ or, more rarely, ‘discrimination testing’) is considered by many researchers to be one of the most effective ways of highlighting and

¹ See Article 13 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

² The ELC is a University legal clinic, created in 2014 by Prof. Emmanuelle Bribosia, now judge ad the Constitutional Court of Belgium, and Isabelle Rorive, Professor at the ULB. The ELC is sponsored by Françoise Tulkens (former vice-president of the European Court of Human Rights) and David Oppenheimer (Professor at University of California, Berkeley School of Law and Director of the *Berkeley Center on Comparative Equality and Anti-Discrimination Law*).

³ These observations were drafted by Prof. J. Ringelheim, I. Rorive and V. van der Plancke on behalf of Unia and the ELC, with the contribution of P. Charlier (co-director of Unia) and Martin Fortez (Unia). They are based on their previous publications on this subject, mainly : J.-F. Neven, J. Ringelheim and V. van der Plancke, « Les tests de situation et la méthode du client-mystère comme outils de détection et de preuve des discriminations », in J. Ringelheim, S. Van Drooghenbroeck, J. Vrielink and P. Wautelet (eds), *Redynamiser la lutte contre la discrimination*, Anvers, Intersentia, 2023, pp. 105-143 ; J. Ringelheim and V. van der Plancke, « Prouver la discrimination en justice », in J. Ringelheim and P. Wautelet (eds), *Comprendre et pratiquer le droit de la lutte contre les discriminations*, Anthémis, coll. CUP, 2018, pp. 137-174 ; I. Rorive, « ‘Désolé, c’est déjà loué !’ La Cour d’appel de Bruxelles confirme que le test de situation est un mode de preuve recevable pour révéler une discrimination directe fondée sur l’origine d’un candidat locataire », *Justice en ligne*, 2021 ; I. Rorive, *Proving Discrimination Cases. The Role of Situation Testing*, Migration Policy Group and Swedish Centre for Equal Rights, 2009 ([online](#)) ; I. Rorive and V. van der Plancke, « Quels dispositifs pour prouver la discriminations », in S. Van Drooghenbroeck and S. Sottiaux, *Les nouvelles lois luttant contre les discriminations*, Bruxelles, La Charte, 2008, pp. 417-461 ; V. van der Plancke, « Les tribulations du testing en Belgique : quels enseignements ? », *Horizons stratégiques*, 2007/3, n° 5, pp. 40-59.

measuring discrimination.⁴ It consists in a field experiment designed to test the behaviour of private or public actors in real life. It thus enables discriminatory practices to be detected through direct observation of the behaviour of social actors. Couples (of prospective tenants, jobseekers, potential customers of a nightclub, etc.) are constructed so that the two members have a similar profile except for a characteristic likely to give rise to discrimination, i.e. ethnic origin, gender or another protected characteristic, depending on the variable being tested. If among these couples the persons presenting the protected characteristic are disproportionately treated less favourably than the others by the company or institution tested, this finding indicates the existence of a discriminatory practice.

4. The first large-scale scientific research based on situation testing was carried out in the United Kingdom at the request of public authorities at the end of the 1960s, after the adoption of the 1965 and 1968 Race Relations Acts. It focused on racial discrimination, particularly in the fields of employment and housing.⁵ In the United States, situation testing has been increasingly used from the 1970s onwards, especially in housing. Following the adoption of the Fair Housing Act in 1968, situation testing campaigns were organized in many large American cities by the U.S. Department of Housing and Urban Development in association with researchers and NGOs. In continental Europe, the major comparative study on discrimination against immigrant and ethnic minority workers conducted by the International Labour Office in the 1990s was pioneer in the development of the situation testing method in this region.⁶

5. Situation testing initially emerged as an empirical method used by social science researchers to measure and study discrimination. In several countries, it then started to also be used as a public policy monitoring tool to assess compliance with anti-discrimination law. Given the evidentiary hurdles encountered in legal actions on discrimination, situation testing has also made its way into the courts. In the United States, from the 1970s onwards, the Department of Housing and Urban Development and a number of NGOs lodged appeals on the basis of findings obtained from situation tests.⁷ With the development of anti-discrimination law in Europe, the use of situation testing for evidentiary purposes has spread to many European countries (see *infra* para. no. 10 and seq.).

II. The Magnitude of Racial Discrimination in Europe and the Importance of Situation Testing as Means of Proof

6. Your Court has repeatedly stressed that ‘racial discrimination is a particularly invidious kind of discrimination’ which, ‘in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction’.⁸

7. Research shows however that racial and ethnic discrimination is still widespread in Europe. In a report published in 2019, the European Union Agency for Fundamental Rights (FRA) noted that ‘widespread racism continues to plague Europe’.⁹ In its 2017 EU-MIDIS II survey, the FRA also observed that ‘seventeen years after adoption of EU laws that forbid discrimination, immigrants, descendants of immigrants and minority ethnic groups continue to face widespread discrimination

⁴ See S. M. Gaddis, « An Introduction to Audit Studies in the Social Sciences », in S. M. Gaddis (ed.), *Audit Studies: Behind the Scenes with Theory, Method, and Nuance*, Springer, 2017 and D. Prager, « The Use of Field Experiments for Studies of Employment Discrimination: Contributions, Critiques, and Directions for the Future », *ANNALS, The American Academy of Political & Social Science*, January 2007, n°609, pp. 104-133, p. 114.

⁵ W. W. Daniel, *Racial Discrimination in England*, Baltimore, MD, Penguin Books, 1968.

⁶ F. Bovenkerk, *A manual for international comparative research on discrimination on the ground of 'race' and ethnic origin*, Geneva, ILO, 1992.

⁷ R. V. O. Boggs, J. M. Sellers, and M. Bendick, « Use of Testing in Civil Rights Enforcement », in M. Fix and R. Struyk, *Clear and Convincing Evidence. Measurement of Discrimination in America*, The Urban Institute Press, Washington, D.C., 1993, pp. 344-375.

⁸ See i.a. Eur. Ct. HR (GC), *D.H. and others v. the Czech Republic*, 13 November 2007, Appl. No 57325/00, para. 176.

⁹ FRA, *Fundamental Rights report*, 2019 (available [online](#)).

across the EU and in all areas of life'.¹⁰ Of the discrimination reported, 17% concerned refusal of entry to a nightclub or bar.¹¹ In France, the government recently adopted a national plan to combat racism, anti-Semitism and discrimination based on origin (2023-2026). It thereby recognized that discrimination based on origin unfortunately remains a common occurrence in French society.¹²

8. However, it is still very difficult to prove discrimination in court. Problems of proof are a well-known obstacle to the effectiveness of the prohibition of discrimination. In many cases, indeed, discrimination leaves no material trace. A company that refuses to hire, rent accommodation or provide a service to an individual because of his or her origin or another protected ground can easily invoke some pretext to give its decision the appearance of legality ('we have found a better candidate', 'it's already rented', 'access is for members only', etc.). And when documents exist that could provide evidence of discrimination, they are most often in the hands of the perpetrator. As Lord Steyn observed in a judgment of the UK House of Lords (now the UK Supreme Court), 'because people rarely advertise their prejudice and may not even be aware of them, discrimination normally has to be proved by inference rather than direct evidence'.¹³

9. In this context, situation testing is a particularly useful tool for revealing discriminatory treatment hidden behind pretexts such as 'it's already rented' or 'entry is for members only'. It may counter-balance the inequality between the parties in relation to evidence that often characterizes discrimination cases. For what regards access to a nightclub, when it shows that, among the participants in the test, only people of foreign origin, or a disproportionate number of them, are refused entry, while the others are allowed to enter, it provides a strong indication that discrimination is taking place. This, however, presupposes that the test is carried out according to certain conditions: the profiles of the participants must be similar for what regards the characteristics that could legitimately be taken into account (i.e. style of dress and non-provocative, sober, attitude for entry to a nightclub). Where this is the case and people with a foreign background are treated less favourably than the other, origin alone can *a priori* explain the difference in treatment.

III. Situation Testing in Comparative Law

10. In many countries, the courts, and sometimes the legislature, have recognized that situation testing can constitute valid proof of discrimination in legal proceedings. (III.1). The evidentiary role played by situation testing varies depending on whether civil or criminal proceedings are involved (III.2).

III.1. Recognition of situation testing as valid evidence in court

11. Situation tests can be used as evidence in court in two main ways. In the first case, following a situation test organized by a public authority or an NGO, a legal action is brought against the discrimination suffered by the people who took part in the test (the 'testers'). (1). In a second scenario, an applicant for housing, a job or another good or service who is refused under conditions that seem suspicious to her organizes a simplified test by asking someone she knows to apply for the same housing, job, good or service and, finding that there is a difference in treatment, takes legal action. (2). Both methods have been accepted as valid forms of evidence. It should be noted that when the results of situation testing are cited in court, they take the form of testimonies, sometimes supported by audio or video recordings or bailiff's or police officer's reports.

¹⁰ The legislation at stake is Directive 2000/43 (*supra* note 1). FRA, *Second European Union Minorities and Discrimination Survey - Main results* (EU-MIDIS II), 2017.

¹¹ FRA, *op. cit.*, *supra* note 10, p. 22.

¹² See the [dedicated page](#) on the French government website.

¹³ *Regina v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others*, 9 December 2004 [2004] UKHL 55, § 73.

III.1.1. Situation testing giving rise to legal action against discrimination suffered by a tester

12. In this first scenario, following complaints or on the basis of other indications of discriminatory practice on the part of a private or public actor, a situation testing is organized by the public prosecutor, an equality body or an NGO. If the test proves positive - in the sense that it reveals a difference in treatment between the testers depending on whether or not they have the protected characteristic - legal action is taken to challenge the discrimination suffered by the testers. The testing operation at the origin of the *SEJAC v. France* case corresponds to this scenario.

13. Numerous courts in different countries have recognized – in the context of both civil and criminal proceedings – that situation tests carried out in similar circumstances constitute admissible evidence.

14. The admissibility of situation testing as a means of proof was recognized in 1982 by the United States Supreme Court in *Havens Realty Corp. v. Coleman*. A civil action for discrimination had been brought against a real estate agency by testers and an NGO. The agency contested the *locus standi* of the testers on the grounds that they were not truly looking for accommodation. The Supreme Court however rejected this argument and ruled that the action was admissible. It held that unfavourable treatment based on race constitutes discrimination regardless of the reasons for which the person applied for housing, employment or any other good or service.¹⁴ The validity of situation testing as a means of proof has been confirmed by US courts in other cases relating to discrimination in housing as well as in employment.¹⁵

15. In France, a number of criminal proceedings have been brought following situation testing organized by anti-racism NGOs, the equality body or the public prosecutor's office, particularly in nightclubs. The criminal division of the French *Cour de cassation* has ruled that a situation test is valid evidence in court.¹⁶ Confirming this case-law, article 225-3-1, inserted into the Criminal Code in 2006, lays down that the offence of discrimination ‘is constituted once the proof of this behaviour has been established, even if it is committed against one or more persons who have requested one of the goods, acts, services or contracts mentioned in article 225-2 with the aim of demonstrating the existence of discriminatory behaviour’.¹⁷ The anti-discrimination legislation was amended in 2017 to specify that a person who has been discriminated against in the course of a situation test is also entitled to bring an action before the civil and administrative courts.¹⁸

16. The Supreme Court of Sweden¹⁹ and the Supreme Court of Hungary,²⁰ in cases brought before

¹⁴ U.S. Supreme Court, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). See also U.S. Supreme Court, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) (also holding that a tester has *locus standi* in discrimination cases).

¹⁵ U.S. District Court for the District of Columbia, *Fair Employment Council v. BMC Marketing*, 829 F. Supp. 402 (D.D.C. 1993) June 18 1993. On this case-law, see R. L. Brooks, G. P. Carrasco and M. Selmi, *The Law of Discrimination: Cases and Perspectives*, LexisNexis, 2011, pp. 316-317; M. J. Yelnosky, « Employment Testers Revisited », *Roger Williams University School of Law Legal Studies Research Paper Series*, n°74, 2011, pp. 1-27 ; M. Bendick, « Situation Testing for Employment Discrimination in the United States of America », *Horizons Stratégiques*, 2007/3, No. 5, pp. 17-39.

¹⁶ Cass. crim., 11 June 2002, No. 01-85.559, *Bull. crim.*, No. 131, p. 482; Cass. crim., 4 February 2015, No. 14-90.048, *Bull. crim.*, 2015, No. 26 and Cass. crim., 28 February 2017, No. 15-87.378. On situation testing as means of proof in French law, see inter alia R. Medard Inghilterra, *La réalisation du droit de la non-discrimination*, Paris, LGDJ, 2022, pp. 477-484, Nos. 857-867.

¹⁷ Our translation. Provision inserted in accordance with *Loi n° 2006-396 du 31 mars 2006 pour l'égalité des chances*.

¹⁸ Art. 4 of *Loi n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*, *JORF* No. 0123 of 28 May 2008, modified by *Loi n°2017-86 du 27 janvier 2017*.

¹⁹ Högsta Domstolens (Supreme Court of Sweden), *Escape Bar c. Ombudsmannen*, 1st October 2008 (*mål nr T 2224-07*), available in Swedish [online](#). See also District Tribunal of Malmö, 4 May 2006 (*mål nr T 3562-05*); District Tribunal of Gothenburg, 14 December 2006 (*mål nr T 4658-05*) and District Tribunal of Huddinge, 2 March 2007 (*mål nr T2688-05*). These cases concern discrimination in access to nightclubs. See I. Rorive, *Proving Discriminations Cases*, *op. cit. supra* note 3, pp. 81-83.

²⁰ Legfelsőbb Bíróság (Supreme Court of Hungary), 2002, Legf. Bír. Pfv. IV.21.269/2001. Sz, EBH 2002.635, Complex CD Corpus Juris (discrimination against Roma by a nightclub). See I. Rorive, *Proving Discrimination Cases*, *op. cit. supra* note 3, pp. 67-68.

the civil courts, have also expressly accepted that a situation test may constitute valid evidence of discrimination in court and that testers who have been discriminated against in the course of a test have *locus standi*. In 2018, a civil court in Northern Macedonia found discrimination against Roma at the entrance to a swimming pool on the basis of a situation test organized by the NGO European Roma Rights Centre (ERRC).²¹ In the Netherlands, in both civil²² and criminal²³ proceedings, situation testing carried out by the ERRC have been accepted as valid proof in Roma discrimination cases. Similarly, the Equal Treatment Commission (*Commissie gelijke behandeling*, now *College voor de Rechten van de Mens*), an independent authority empowered to settle discrimination disputes by means of non-binding opinions, has accepted that situation testing could serve as evidence.²⁴ In a 6 September 2017 decision, the Romania's equality body, the National Council for Combating Discrimination, which is empowered to rule on disputes by means of binding decisions, also admitted that a situation test can be used as means of proof.²⁵

17. In several countries, the admissibility of situation testing as a means of proof in legal proceedings has been expressly recognized by the legislature. The case of France has already been mentioned (*supra* no. 15). In Northern Macedonia, since 2020, the Law on Prevention and Protection against Discrimination has expressly authorized the use of situation testing as a means of proof.²⁶ In Belgium, since 2018, federal social inspectors have been expressly authorized, subject to certain conditions, to carry out situation testing to check compliance with anti-discrimination legislation in the field of employment.²⁷ This authorization testifies of the importance recognized by the Belgian legislature to situation testing as a tool for detecting discrimination. The Brussels Region has also authorized its social inspectorate,²⁸ as well as its regional housing inspectorate,²⁹ to organize 'discrimination tests', according to the terminology used, to detect discrimination. The Brussels regional legislation also expressly recognizes that a discrimination test carried out by a regional employment inspector, by the victim, or by an equality body or an NGO in support of a victim, if it is conducted in accordance with the conditions laid down by this legislation (*infra* no. 29) and if it proves positive, constitutes a fact likely to establish a presumption of discrimination in the context of civil proceedings (on this concept, see *infra* no. 22).³⁰

III.1.2. Simplified situation test organized by an individual whose application for a job, good or service has been rejected

18. In this second scenario, the situation test is organized at the initiative of an individual who was

²¹ Tribunal of first instance, decision of 13 November 2018. This decision was confirmed on appeal: Appeal Court of Bitola, CЖ-42/19 J.K., R.E., A.E., D.A., O.A., R.A. and ERRC v Megagrup DOOEL and JP Strezhevo, 18 July 2019. See B. Kotevska, *Country report. Non-Discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. North Macedonia*, available [online](#), p. 40.

²² President of district tribunal of Zutphen, 26 June 1980, NJ, 1981, no 29. See T. Loenen, *Country report. Non-Discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. The Netherlands*, European network of legal experts in gender equality and non-discrimination, 2019, p. 22, available [online](#).

²³ Local Tribunal of Amsterdam, 4 January 1982, RR No 36; Criminal Tribunal of the Amsterdam District, 20 March 1992, RR No. 287. See I. Rorive, *Proving Discrimination Cases*, *op. cit. supra* note 3, p. 73.

²⁴ See i.a. Opinions 1997-62; 1997-64, 65 et 66; 1997-133, 1998-39, 2009-15 and 2012-50 (available [online](#)). See T. Loenen, *Country report, op. cit., supra* note 22, p. 22 and I. Rorive, *Proving Discriminations Cases*, *op. cit., supra* note 3, pp. 71-72.

²⁵ Decision 486 of 6 September 2017, European Equality Law Network, *News Report*, 21.09.2017, available [online](#).

²⁶ Law on the prevention and protection against discrimination (Закон за спречување и заштита од дискриминација), para. 38, Official Journal of the Republic of North Macedonia, n°258/2020. Voy. B. Kotevska, *Country report., op. cit., supra* note 21, p. 40.

²⁷ Article 42/1 of the Social Criminal Code, inserted pursuant to the *loi du 15 janvier 2018 portant des dispositions diverses en matière d'emploi*.

²⁸ Art. 4/2 of the *Ordonnance du 30 avril 2009 relative à la surveillance des réglementations en matière d'emploi qui relèvent de la compétence de la Région de Bruxelles-Capitale*, inserted pursuant to the *Ordonnance du 16 novembre 2017 visant à lutter contre les discriminations en matière d'emploi en Région de Bruxelles-Capitale*.

²⁹ Art. 214bis, para. 4, of the Brussels housing code, inserted pursuant to the *Ordonnance du 21 décembre 2018 modifiant le Code bruxellois du logement afin de renforcer la lutte contre la discrimination dans l'accès au logement*.

³⁰ Art. 22, para. 3, 1st al. of the *Ordonnance du 4 septembre 2008 relative à la lutte contre la discrimination et à l'égalité de traitement en matière d'emploi*, inserted pursuant to the aforementioned *Ordonnance* of 16 November 2017 and art. 4/3, para. 5, of the aforementioned *Ordonnance* of 30 April 2009.

genuinely seeking access to housing, employment or another good or service. Having had his application rejected under conditions that seemed suspicious to him, he asks one or more other people with the same profile, but who do not have the characteristic that generated the potential discrimination, to apply for the same housing, job, good or service. Finding that these people are treated more favourably than he or she is, the initial applicant lodges an action for discrimination, invoking this finding as evidence. This simplified testing, if carried out under appropriate conditions, can be very useful for victims who are often at a loss to demonstrate the discriminatory nature of being refused entry to a place of leisure or of having their application for a job or accommodation rejected.

19. Situation tests carried out in these circumstances have also been accepted as valid means of proof by the courts in various countries. In Belgium, the Antwerp Labour Court heard the case of a worker with a Moroccan-sounding name who had replied by telephone to a job offer as a furniture assembler. After giving his name, he was told that the position had already been filled. An acquaintance, who had a Flemish-sounding name and spoke with an Antwerp accent, contacted the same employer and was invited to an interview. The Court found that these facts gave rise to a presumption of discrimination and, given the employer's unconvincing defence, ultimately concluded that there had been discrimination.³¹ The Brussels Court of Appeal accepted similar evidence in a housing discrimination case: a man from an African country had visited a flat offered for rent and informed the estate agency that he wanted to rent it. He was told that another tenant had already been chosen. Noting that the property was still being offered for rent, the man asked another person, of European origin and speaking without a foreign accent, to enquire about the same flat. This person was told that the property was still available and invited to visit. Here too, the Court of Appeal found that these facts gave rise to a presumption of discrimination.³² In Germany, the Charlottenburg local court, in a 14 January 2020 decision, found discrimination in access to housing against a man of Turkish origin on the basis of comparable evidence.³³ In the Czech Republic, the Regional Court of Ostrava, the High Court of Prague and the Municipal Court of Prague, relied among others on the results of a test of this type to find discrimination against Roma at the entrance to a bar (first case) and in employment (second and third cases).³⁴ In France, the Angers Court of Appeal took into account, among other elements, a test carried out by private research agents, to conclude that the plaintiff, a nursery assistant, was discriminated against in the context of employment.³⁵ It can also be noted that the Riom Court of Appeal stated that as a general matter “it is accepted that situation testing can be used as a means of proof when discriminatory behaviour has been committed against a person”.³⁶

20. The Equal Treatment Commission in the Netherlands³⁷ and the Equal Treatment Authority in Hungary,³⁸ in cases of discrimination in hiring, have also accepted to take into account situation tests carried out after the complainant's application had been rejected. A 7 December 2022 decision issued by the Denmark's Equal Treatment Commission, a quasi-judicial body that examines complaints of discrimination, can also be mentioned here: a woman with a foreign-sounding name who had tried unsuccessfully to reserve accommodation with a housing company, sent several e-mails under different names, some foreign-sounding, others Danish-sounding. Only the

³¹ Antwerp Labour Court, 25 June 2008, A.R. 2060328, available in Dutch [online](#).

³² Brussels Appeal Court, 28 September 2020, available [online](#). See also Brussels tribunal of 1st instance, 18 October 2021 (available in French [online](#)) and Brussels tribunal of 1st instance, 3 June 2005 (available in French [online](#)).

³³ Amtsgericht Charlottenburg, 14 January 2020, 203 C 31/19, ECLI:DE:AGBECH:2020:0114.203C31.19.00, European Equality Law Network, *Flash Report*, 22.04.2020, available [online](#).

³⁴ Regional Court Ostrava, 24 March 2005; High Court of Prague, 22 March 2005; Municipal Tribunal of Prague, 31 March 2004. See I. Rorive, *Proving Discrimination Cases*, *op. cit.*, *supra* note 3, p. 60.

³⁵ CA Angers, ch. Soc. 30 June 2009, No. 09/00530.

³⁶ CA Riom, 4th ch. Civ., 7 June 2016, No. 14/00514 (our translation). In this case, the Court found the situation testing unconvincing (*infra* note 57).

³⁷ Opinion 2005-136, 1st January 2005, available in Dutch [online](#).

³⁸ Case 180/2006. See I. Rorive, *Proving Discrimination Cases*, *op. cit.* *supra* note 3, p. 69.

applications submitted under Danish-sounding names received a favourable response from the company. The Commission took these findings into account to establish a *prima facie* case of discrimination.³⁹

III.2. The evidential role of testing: distinguishing between civil and criminal proceedings

21. The review of comparative law provided in the previous section shows that situation testing is widely accepted as evidence in both civil and criminal proceedings. Given the differences between these two types of procedure in terms of evidentiary regime, the role of situation testing varies according to the type of proceedings in which it is invoked.

22. In civil or administrative proceedings for discrimination, the rule on sharing the burden of proof, established by European Union law, applies in all EU Member States. Originally developed by the Court of Justice of the European Union in its case-law on equal pay for men and women,⁴⁰ this rule was subsequently enshrined in European directives.⁴¹ This mechanism means that when the plaintiff establishes facts which, while not proving with certainty that discrimination has occurred, nevertheless allow the presumption that a conduct is discriminatory, the burden of proof shifts to the defendant, who must rebut this presumption. In civil (or administrative) proceedings, the positive result of a situation test may therefore constitute a fact on which the judge may rely to establish a presumption of discrimination.

23. In criminal proceedings for discrimination, on the other hand, the rule on the sharing the burden of proof does not apply. It is up to the prosecution to produce evidence capable of proving beyond all reasonable doubt the guilt of the accused. In Belgian law, as in French law, any piece of evidence is in principle admissible in criminal proceedings, provided that it has been subjected to the adversarial process. The judge then freely assesses its probative value.⁴² Findings made by means of situation testing may therefore, alone or in combination with other elements, contribute to constituting a ‘body of serious, precise and concordant evidence’ (*faisceau d’indices graves, précis et concordants*) establishing the guilt of an accused person.

IV. Conditions for Admissibility of Situation Testing as Means of Proof and Assessment of its Probative Value

24. Recognizing that situation testing may constitute admissible evidence in court does not, of course, mean that its practice is exempt from scrutiny or that it will necessarily convince a judge. The courts and the legislature in several countries have specified that the prohibition of incitement to discrimination is a central requirement. This concept echoes the case-law of your Court on police undercover agents and ‘agents provocateurs’ under Article 6 § 1 of the Convention. However, it should be borne in mind that a situation test carried out to detect discrimination differs substantially from the situations considered by your Court in your case-law on police incitement. (IV.1.). Moreover, by virtue of the rights of the defence, the defendant must have the opportunity to challenge the credibility of a situation test relied on as evidence. More generally, it is up to the judge to verify the probative value of a situation test according to the circumstances of each case. (IV.2.).

IV.1. The prohibition of incitement to discrimination

³⁹ Board of Equal Treatment, decision of 7 December 2022, no. 9026, available in Danish [online](#).

⁴⁰ See ECJ, 27 October 1993, *Enderby*, C-127/92, para. 14. See also ECJ, 17 October 1989, *Danfoss*, C-109/88, para. 13; ECJ, 31 May 1995, *Royal Copenhagen*, C-400/93.

⁴¹ See *inter alia* Directive 2000/43/CE (*supra* note 1), art. 8 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art. 10. Your Court also applied this device in cases relating to discrimination, among others in *D.H. and others v. the Czech Republic* [GC], 13 November 2007, appl. No. 57325/00, para. 177-180.

⁴² M.-A. Beernaert, H.-D. Bosly and D. Vandermeersch, *Droit de la procédure pénale*, Bruges, la Chartre, 2021, pp. 1365-1366 (concerning Belgium); Cass. crim., 11 June 2002, No. 01-85.559, *Bull. crim.*, No. 131, p. 482 (concerning France).

25. According to the case-law of your Court, the ‘admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Court, for its part, must ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (...)’.⁴³

26. Your Court has established that it is not contrary to the Convention to use, in the context of a criminal investigation, special methods involving undercover agents in order to gather evidence of an individual’s involvement in criminal activities, provided that those agents do not incite the commission of an offence. Where, on the other hand, evidence has been gathered as a result of police incitement, its use in court would be contrary to the right to a fair trial.⁴⁴ Your Court has defined police incitement as the situation in which members of the police or persons acting on their instructions ‘do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution’.⁴⁵ The Court has identified material criteria and a procedural criterion for determining whether an operation carried out by undercover agents constitutes incitement contrary to the Convention.

27. It is important to emphasize that this case-law only concerns operations carried out by or at the request of members of law enforcement agencies and in the context of criminal investigations. A situation test aimed at establishing discrimination generally differs from this pattern.

Firstly, as the examples drawn from comparative law illustrate, a situation test is most often carried out to establish a breach of civil provisions prohibiting discrimination and is used in the context of civil proceedings. It is therefore important that your Court, in the observations it makes on the use of situation testing as a means of proof, is mindful of the fact that situation tests are very often invoked in civil proceedings to which your case-law on police incitement is not intended to apply.

Secondly, the special investigative methods examined by your Court in its case-law on police incitement have the particularity of leading undercover agents to participate themselves in criminal activities, such as buying drugs. Such acts may only be carried out by or at the request of members of the police force in the context of a strict procedure. By contrast, there is nothing illegal about showing up at the entrance of a discotheque, applying for a job or expressing interest in rented accommodation. The tester is certainly concealing her ultimate objective, which is to check that the company is complying with anti-discrimination legislation, but by expressing her wish to enter a place of leisure, apply for a job or rent accommodation, she is acting in a perfectly legal manner. Accordingly, a situation test does not necessarily have to be carried out at the initiative of a public authority. It can also be organized by an NGO or an individual who believes they have been the victim of discrimination. However, as it was made clear in *Shannon v. the United Kingdom*, the rules on police incitement laid down by your Court relate only to operations organized by State agents. A complaint that a private individual, who was not acting on the instructions or under the control of the authorities, had incited the defendant to commit an offence must be examined in the light of the general rules of evidence.⁴⁶

Finally, practice shows that when situation tests are initiated by public officials, they are organized either by the public prosecutor (and not by police officers), as in *SEJAC v. France*, or by an equality body or social inspectors (in the case of Belgium). It is important to emphasize that the situation

⁴³ Eur. Court HR (GC), *Ramanauskas v. Lithuania*, 5 February 2008, Appl. No. 74420/01, para. 52.

⁴⁴ *Ramanauskas v. Lithuania* (*supra* note 43), para. 54. See also, among many others, Eur. Court HR, *Teixeira de Castro v. Portugal*, 9 June 1998, Appl. No. 25829/94, para. 36 et 39.

⁴⁵ *Ramanauskas v. Lithuania* (*supra* note 43), para. 55.

⁴⁶ Eur. Court HR, *Shannon v. United Kingdom* (dec.), 6 April 2004, Appl. No. 67537/01.

tests conducted in such circumstances and admitted as evidence by the courts were always carried out following complaints or on the basis of other indications of discrimination. This meets the first material criterion established by your Court to verify the absence of incitement. The procedure followed to carry out the situation test varies depending on the country concerned and the institution organizing the test. The prior authorization of the public prosecutor is not necessarily required for a test carried out by an equality body or the social inspectorate, but the court will always review the way in which the situation test has been conducted (see section IV.2, no. 30 and seq. below). This satisfies the procedural criterion established by your Court in your case-law on police incitement. And as already noted, it should also be borne in mind that, unlike the acts that may be carried out as part of special investigation methods involving undercover agents, an act such as turning up at the entrance of a nightclub, as in *SEJAC v. France*, does not in itself constitute an offence. In view of these differences, and of the importance of situation testing in ensuring the effectiveness of the prohibition of discrimination, it is important not to make it subject to overly restrictive conditions of validity which would make its use as evidence hardly possible.

28. Nevertheless, the basic principle laid down by your case-law in relation to police incitement is relevant in the case of situation testing: evidence gathered based on a situation test could not be admitted if the tester had incited the defendant to discriminate – in other words, if the tester had exerted an influence such as to incite him to commit discrimination which he would not otherwise have committed.⁴⁷ This principle has been recognised by the French *Cour de cassation*, which ruled that the authorization to perform situation testing under Article 225-3-1 of the Criminal Code does not allow to incite the commission of an offence.⁴⁸ The Court also stated that the organization of a situation test does not in itself constitute incitement or a breach of the principle of the fair presentation of evidence and the right to a fair trial.⁴⁹

29. The prohibition of incitement is one of the central rules laid down by the legislation on situation testing adopted in Belgium. It is one of the conditions that social inspectors, both at federal level⁵⁰ and in the Brussels-Capital Region,⁵¹ are required to respect. The Brussels regional legislation also specifies that a discrimination test carried out by a victim, an equality body or an NGO may not constitute a fact likely to establish a presumption of discrimination if it amounts to incitement.⁵² In addition, it should be noted that the federal and the Brussels legislations only authorize social inspectors to initiate a situation test if they have prior indication that the public or private organization being tested may be discriminating.⁵³

IV.2 Assessing the probative value of a situation test and guaranteeing the rights of the defence

30. Respect for the rights of the defence requires that if a situation test is used as evidence in court, the person accused of discrimination must be able to contest its evidential value and oppose its use.⁵⁴

31. In any event, it is up to the judge to assess the evidential value of a situation test invoked in court by examining the conditions in which it was carried out and its outcome.⁵⁵ For a situation

⁴⁷ See *mutatis mutandis Ramanauskas v. Lithuania* (*supra* note 43), para. 55.

⁴⁸ Cass. crim., 4 February 2015, No. 14-90.048, Bull. crim. n°26.

⁴⁹ Cass. crim., 28 February 2017, No. 15-87.378.

⁵⁰ Art. 42/1, para. 5, of the Criminal Social Code.

⁵¹ Art. 4/3, para. 4, first al. of the aforementioned *Ordonnance* of 30 April 2009.

⁵² *Ibid.* See also art. 214*bis*, para. 3, of the Brussels Housing Code.

⁵³ Art. 42/1, para. 1, of the Criminal Social Code and art. 4/3, para. 4, 2d alinea, of the aforementioned *Ordonnance* of 30 April 2009. In the case of the federal labour inspectorate, prior agreement of the public prosecutor is also required (art. 42/1, para. 4, of the Criminal Social Code).

⁵⁴ See among others Eur. Court HR (GC), *Bykov v. Russia*, 10 March 2009, Appl. 4378/02, para. 90.

⁵⁵ See Cass. crim., 11 June 2002, No. 01-85.559, Bull. crim., n°131, p. 482.

test to be conclusive, it is necessary, in addition to the absence of incitement, that the different persons taking part in the test present a comparable profile (cf. *supra* no. 9) and have approached the company or institution being tested in the same circumstances.⁵⁶ Moreover, testing can only contribute to establishing proof of discrimination if it reveals that testers have been treated differently depending on whether or not they have the protected characteristic. The case-law of various European countries provides examples of cases in which a court or a quasi-judicial body, while accepting the admissibility in principle of situation testing as a means of proof, found that in the case in question, the situation test invoked did not make it possible to establish discrimination.⁵⁷

⁵⁶ See the conditions listed by the Dutch Commission for Equal Treatment in its Opinions 1997-62, 1997-64, 1997-133 and 1998-39, available in Dutch [online](#).

⁵⁷ See among others the 6 September 2017 decision of the Romanian National Council for Combating Discrimination (*supra* note 25), which holds that a video meant to establish that in Transylvania, Romanian speaking persons were discriminated against by Hungarian speaking retailers, had no proving value. The Council observed that some passages indicating a lack of discrimination had been eliminated during editing and that the author of the video had, through his own behaviour, incited to discrimination. See also the judgment of the Riom Appeal Court in France which finds unconvincing the outcome of a situation test performed by the plaintiff, because the reaction of the company did not demonstrate any difference of treatment between the different applications (CA Riom, 4th ch. Civ., 7 June 2016, No. 14/00514).