



QUALITY IN GENDER+ EQUALITY POLICIES
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Accommodating multiple discrimination
Equality bodies in Belgium and the Netherlands analyzed from an
intersectional gender perspective¹

- Work in progress, please do not quote without authors' permission -

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1. INTRODUCTION

Recently, the term 'intersectionality' has become a promising buzzword in the academic world (Davis 2008). The popular concept has brought about numerous *theoretical discussions* (see for example Davis 2008; Hancock 2007; McCall 2005). Shifting the attention to the *political practice*, the past decade witnessed a broadening of the European Union's equality policies and legislation from covering no longer only gender to also include age, race/ethnicity, belief/religion, sexual orientation and disability, where these grounds have generally been treated as separate, non-intersecting strands. This has given rise to debates about what this new focus on multiple inequalities will mean for gender. Gender equality advocates have expressed worries that gender might 'lose out' on the other inequality grounds resulting in a loss of visibility and resources, and leading to 'competitive' reflexes in debates on the future of equality policies

The EU-shift towards a multiple inequalities framework has also led to discussions about whether addressing multiple inequalities is best done by single or separate equality institutions (Walby, Armstrong and Strid 2009). One common policy practice in promoting gender equality is the establishment of so-called 'equality bodies'. Here, we particularly have in mind national institutions that are in charge of monitoring and promoting the equal treatment of all persons in line with national anti-discrimination legislation regarding the inequality strand(s) that fall under the body's jurisdiction (this can be a single strand but also multiple strands). Equality bodies are part of the larger equality machinery of a country, which usually also includes policy units in central government, consultation bodies, legislation and legal machinery (courts and tribunals) (Walby, Armstrong and Strid 2009). Equality bodies as a rule are easily accessible as one of their tasks is to assist victims of discrimination. Often, victims first bring their discrimination complaint before these bodies and might – if still needed – only later decide to start court procedures.

The European Commission currently stimulates the member states to merge equality bodies that focus on single inequality strands into one integrated institute that covers multiple inequality strands. This has again triggered critical reactions from feminists about the danger of gender losing out, since one can doubt whether such a body in fact is more advantageous seen from a *gender* perspective than a single gender equality body. For one thing, it is generally accepted among feminists that women cannot be regarded as a homogeneous group. Being a woman is just one aspect of one's life. The way in which women experience their lives and are confronted with discrimination differs according to a range of facets that make up their identity. This does not only include their gender, but also their race, class, sexual orientation, age, religious beliefs and so forth (Dasvarma and Loh 2002). Ideally, equality bodies (whether integrated or single strand) should thus be able to address the complexity of gender intersecting with multiple inequalities. An intersectional dimension should be integrated in the gender perspective. In this way a more encompassing notion of gender equality is followed. This would improve the protection against discrimination of different groups of women including the ones who find themselves on the crossroads of multiple inequalities. Yet, *how* this is best done is not a straightforward question to answer. While at first glance a single integrated

equality body² indeed would seem better apt to deal with the overlap between (gender and) multiple inequalities than separate bodies, the institutional design is not the only factor that decides whether *gender* will fare well or not. This depends on the interplay with other factors, a very important one being the kind of anti-discrimination legislation that the body has to monitor.

In this paper we want to make a contribution to the discussions about the advantages and disadvantages that integrated or single strand equality bodies bring from an *intersectional* gender perspective. Notwithstanding the fears about gender coming off worst, we depart from the idea that intersectionality is essential for achieving gender equality. The paper takes a closer look at the equality bodies of two countries that know contrasting institutional set-ups as well as divergent legal settings: Belgium and The Netherlands. The basic assumption from which we depart is that consistency between anti-discrimination legislation and equality body – both being integrated – is desirable for dealing with the interplay between gender and multiple inequalities. However, as neither of the two countries have both, they pose challenging cases; to what extent these factors are defining in these ‘mixed’ cases? Looking at other factors in addition to institutional set-up and legal arrangements – like the functions and powers of the bodies, their independence, their broader visions as regards multiple discrimination, their internal organization, and their practical working procedures – might prove particularly useful here.

In concrete terms, in this paper we answer the question which setting – the Belgian or the Dutch – resonates best with an intersectional way of dealing with multiple discrimination complaints, where gender is one of the strands involved, by the equality body/bodies? First, we will discuss the concept of intersectionality and its relevance for gender equality and equality bodies (section 2). Then, the institutional set-up of the Dutch and Belgian equality bodies (are they integrated or separate bodies, but also how independent are they, and what are their exact functions and powers) and the legal framework in which they have to operate (do the countries know unified or fragmented equality legislation, with equal or unequal legal protection across the strands) are discussed. These aspects form important preconditions that might encourage or discourage the application of an intersectional gender approach (section 3). In section 4 the paper analyzes whether an intersectional approach is visible in the daily practice of the equality bodies (what are the exact working procedures in case of discrimination complaints based on multiple inequality grounds?) and what is the vision that the bodies keep regarding multiple inequalities, intersectionality and how to incorporate this in their future practical work. Finally, section 5 concerns the conclusions and discussion.

² In the following the terms ‘single equality body’ and ‘integrated equality body’ are used interchangeably

2. GENDER, INTERSECTIONALITY AND EQUALITY BODIES

Intersectionality implies that gender – or any other inequality for that matters – cannot be seen as separate from other inequality structures, social order principles or social characteristics such as race/ethnicity and class. They rather intersect and mutually constitute each other. That idea was not new when Kimberlé Crenshaw labeled it ‘intersectionality’ (Crenshaw 1991; Walby 2007). Intersectionality reaches back to the ‘old’ feminist debate where black women did not feel represented by the feminist discourse, because their specific experiences as *black women* were not dealt with. As the recognition of differences among women contained the danger of either an (infinite) fragmentation into different groups of women, or – quite the opposite – even a complete aversion to organization based on social constructed categories (anti-essentialism), the mutual characteristic ‘woman’ risked to be pushed into the background making political organization based on that characteristic (identity or group politics) difficult. The question that arose was how to denote the differences among women in a manner that mediates between the idea of multiple identities on the one hand and the urge to organize as a group on the other. With intersectionality, Crenshaw tried to find a middle path as a way out of identity politics. From an intersectional perspective, every individual stands on a crossroads where various social order principles join and form a specific combination of positions. A woman is not only female, she is also heterosexual/homosexual, high-educated/low-educated, migrant or not, and so on. The crossroads differs for everyone, and – depending on the social context – some combinations are more highly valued than others (Lutz 2002; Wekker en Lutz 2001). Here, specific problems might arise. As women have historically and structurally been the more disadvantaged gender in our societies, this implies that men and women are affected differently by racism, heterosexism and so on (Crenshaw 2000).

If we assume that gender inequality and inequalities on other grounds indeed are not separate but interconnected phenomena, this implies that reaching gender equality becomes rather difficult if other inequalities are not simultaneously addressed. Isolated attention for gender is not enough. The (theoretical) promise of intersectionality for the feminist project (reaching gender equality at all levels and in all fields of society) might therefore lie in the fact that it can contribute to a better understanding of what gender equality is and how it can be reached. What’s more, intersectionality might as well be attractive from a strategic point of view, namely as an improvement over single-ground understandings of inequality and discrimination. The EU has moved from addressing gender inequality towards addressing multiple inequalities, but currently treats those inequalities as separate and non-intersecting strands in its equality Directives. In such a scenario – where inequalities other than gender are regarded *independently* from the latter – the worry of gender equality advocates that attention and means for gender will decrease may be well-founded indeed. The previous exclusive attention for equal treatment on the basis of gender might have to be shared with the newly recognized inequalities. Intersectionality, on the contrary, implies that gender is considered *in connection* with the other inequalities (and the other way around), and therefore this danger of losing out and competition would be less.

In the scholarly literature on intersectionality, a distinction is usually made

between *structural* and *political* intersectionality.³ Structural intersectionality refers to how inequalities and the way they interdepend impact upon the experiences of people or groups at the level of everyday society. Political intersectionality denotes how inequalities and intersections between them are relevant for political practices and strategies. It stresses the necessity to consider the interdependence between inequalities, because strategies that focus on one inequality are often not neutral regarding other inequalities (Lombardo and Verloo 2009, 70). Up until this moment, in academic research, political intersectionality has received less attention than structural intersectionality (Lombardo and Verloo 2009). This paper deals with intersectionality in the work and procedures of the Dutch and Belgian *equality bodies*. As such, the foremost focus is on political intersectionality. Still, of all the institutes that are part of the gender equality machinery in Belgium and the Netherlands, the equality bodies are most closely linked to discrimination as experienced by people in everyday society (structural intersectionality). Everyone who experiences discrimination can file a complaint with these easily accessible instances. In that sense, they operate on the crossing border between structural and political intersectionality.

Discrimination can take various forms. *Single-ground discrimination* takes place when an individual is put at a disadvantage on the basis of one inequality ground. Next, one can at least distinguish between two forms of *multiple discrimination* (Hannett 2003): discrimination grounds can either be additive (additive discrimination) or discrimination can be based on the indivisible combination of two or more social characteristics (intersectional discrimination). *Additive discrimination* concerns a situation in which an individual belongs to two (or more) different groups which are separately victim of discriminatory practices: on top of discrimination on one ground, they suffer an 'extra' disadvantage stemming from another inequality ground. *Intersectional discrimination* stems from the combination of various oppressions that create a situation which is not equal to the sum of discrimination on separate grounds. Here a completely different sort of discrimination is concerned.

It has important consequences whether or not an equality body recognizes and addresses the various abovementioned forms of discrimination. Hannett clearly illustrates this with an example: during a selection procedure, applicants are ranked from high to low. A black, female applicant states that she was discriminated based on gender and race. Evidence shows that white applicants were ranked higher than black applicants, even if their class position was lower. Moreover, women had less chance to be appointed and would earn less than men. According to the involved equality body the applicant is the victim of double (i.e. additive) discrimination, on the basis of not being white *and* on the basis of being a woman. But suppose that the context had been different and a comparable number of men and women as well as 'black' and 'white' persons had been appointed, but no *black women* were appointed. In that case, the complaint would have been unfounded if both of the grounds were regarded *separately*, even though a black woman could have been the victim of intersectional discrimination (Hannett 2003, 68-69).

This example shows that both the way in which equality bodies conceptualize

³ Crenshaw also describes a third form: *representational* intersectionality. With this form she denotes 'both the ways in which [these] images are produced through a confluence of prevalent narratives of race and gender, as well as a recognition of how contemporary critiques of racist and sexist representation marginalize women of colour' (Crenshaw 1991, 1283).

discrimination, as well as the way of handling complaint procedures can have significant implications. In the above example, whether discrimination has taken place was investigated for each of the grounds separately. Such a method allowed for recognizing *additive discrimination* in the first context. In the second context this method is, however, blind for the *intersectional discrimination* that possibly has taken place. The dynamics based on the convergence of various discrimination grounds thus disappear from the picture. From a feminist point of view it is important that equality bodies deploy an intersectional approach when dealing with complaints, because in that way the protection against discrimination of women, who are at a crossroads of multiple inequalities, will ameliorate.

At first glance an integrated equality body would seem better apt to deal with the overlap between gender inequality and other inequalities. However, not only the *institutional set-up* (integrated or separate equality bodies) is of importance in determining the possibility that an intersectional dimension will be added that brings with it a deepened attention for the specific needs of the gender strand, but also the *legal context* in which an equality body has to operate: is the anti-discrimination legislation unified or fragmented? An integrated equality body that has to monitor and promote legislation where legal differences across the strands exist, will very likely have to separate clearly between the strands. The other way around, when separate inequality bodies – each being responsible for (a) different inequality strand(s) – have to monitor legislation in which the strands are treated equally in a single act the institutional split might hinder cooperation between the bodies that is needed for dealing effectively with multiple discrimination complaints. In such case, it is again quite likely that the strands will be treated in isolation from each other. So, it seems that the combination of an integrated equality body *and* unified legislation will provide better circumstances for dealing with gender inequality overlapping with other inequalities. In table 1, four scenario's that differ according to the specific combination of the kind legislation and the kind of equality body/bodies are sketched.

	Separate equality bodies	Integrated/single equality body covering all strands
Anti-discrimination law is fragmented	<i>Suboptimal for cross-strand approach</i>	<i>Mixed</i>
Anti-discrimination law is unified	<i>Mixed</i>	<i>Optimal for cross-strand approach</i>

Table 1: different combinations of institutional set-up and legal context and their assumed suitability for cross-strand approach

In the emerging – but still scarce – literature that theorizes about which variables help to explain how equality bodies deal (or not deal) with multiple inequalities and multiple discrimination, the institutional form and legal arrangements are generally regarded significant factors. Yet, various scholars argue that looking at the institutional and legal arrangements alone does not tell us all about how things work out in practice. According to Bell – who writes about the EU's anti-discrimination law – integrated laws are able to create internal hierarchies, comparable to how integrated equality bodies can have internal priorities. Reversely, separate institutes and statutes do not *necessarily* stand in the way of an equal protection of various

discrimination grounds (2002, 212⁴).

Satterthwaite – writing on international human rights law – argues that for women migrant workers to be protected against the specific abuses they face, it is not a prerequisite that their ‘intersectional protection’ is explicitly covered by a single binding human rights law convention. A creative, flexible and intersectional interpretation of the existing fragmented human rights legal provisions by advocates, lawyers, human rights institutes and courts enables their stretching and reframing, making them applicable to the specific problem that migrant domestic women workers face (2004, 2005). Satterthwaite warns against the traditional, single-variable, compartmentalizing analysis of human rights treaties that is still prevalent among human rights practitioners. Currently, the 2003 Migrant Workers Convention is the only human rights tool that is (directly) applicable to women migrant workers. It is quite probable that vital states will never ratify this Convention. In absence of such ratification, careful analysis of the entire range of existing ratified human rights treaties *through intersectional glasses* will reveal that a number of robust standards that apply to some of the most widespread abuses faced by migrant women are in fact already available *here and now* (2004, 2005).

Somehow connected to Satterthwaite’s plea, Hannett – writing about the UK equal treatment legislation and bodies – argues that a conceptual change in thinking about multiple discrimination is needed (2003). Removal of institutional and procedural obstacles will not necessarily suffice for those who claim to be victims of *intersectional* discrimination. Including the various inequality grounds in one statute and establishing an integrated equality body would mainly entail an improvement for people who claim to be victims of *additive* discrimination. Additive discrimination namely requests the same, simplistic and separate treatment of grounds as single-ground discrimination, and often connects better to the deeper ideology of equal treatment legislation. Like Satterthwaite, she notices a tendency by law practitioners to resort too easily compartmentalized and discrete understandings of discrimination, ignoring the complex ways in which discrimination operates between and within groups (Hannett 2003, 76). Hannett therefore stresses the importance of revising the underlying ideology of such legislation. The prevailing ideology of ‘formal equality’ where the focus is on ‘equal treatment of equal cases’, leaves little room for redressing historically formed structural disadvantages faced by groups *within* one ground or by groups that find themselves in more than one historically disadvantaged position.

O’Cinneide’s compares how single equality bodies operate in countries other than UK. One of her starting assumptions seems to be that integrated equality bodies have the *potential* to advance the equality agenda by making possible an effective cross-strand approach. If such a body functions well the separate inequality strands will mutually reinforce rather than detract from each other. There is fairness across the strands and tensions between them are avoided, while the specific needs of each strand are also addressed. However, if established ‘badly’ an integrated body could just as well mean a step backwards for gender (or any other ground⁵), leading to ‘diluting levels of expertise, creating a hierarchy of grounds and serving as an excuse for watered down resources’ (O’Cinneide 2002, 9). Thus, establishing a single

⁴ Italics added by the authors.

⁵ O’Cinneide does not write about one inequality strand in specific.

equality body in itself is not yet a guarantee for its success. Its success is *conditional* on numerous other factors. Most notably there is the question whether the equality legislation is unified or fragmented. According to O’Cinneide unified legislation is invaluable in minimizing hierarchical differences between inequality strands. In absence of it, individual discrimination complaints will be treated differently depending on the strand(s) involved (2002, 9). Still, she makes sure to underline that unified legislation is not an absolute precondition either. Experiences in cases such as Northern Ireland and the US show that a single equality body can function without unified legislation. What’s more, legislation can be unified in a single act, while different approaches to the strands persist. In the end, she nevertheless concludes that unified legislation is necessary if a single equality body is to fully fulfill its potential, because its absence will in any case hinder the bodies’ work. Other factors that according to O’Cinneide might as well hinder a single equality body from implementing an effective cross-strand approach, such as whether the body is given effective legal functions and powers, the sort of values that underpin the equality bodies’ activities, its approach towards external stakeholders, its structure and composition (is the commission internally organized around function or around strands), its funding and resources, and its independence (O’Cinneide 2002).

While above scholars⁶ all somehow agree that a single equality body combined with unified anti-discrimination legislation is *favourable* for an effective cross-strand approach, they nonetheless feel that the presence of one or both of these factors is neither absolutely necessary nor sufficient. According to Satterthwaite, fragmentation of legislation is surmountable. Victims of intersectional discrimination can be protected as long as the actors that monitor compliance with the legislation are able and willing to interpret the fragmented statutes in a creative and flexible way. Hannett argues that reforms towards creating a single body and the inclusion of all inequality grounds in a single statute would at most mean improvement for victims of additive discrimination. But as long as the now dominant conceptualization of multiple discrimination – which fits closely to the prevailing ideology underlying most equal treatment law – stays unchallenged, and as long as the actors that monitor this law let themselves be guided by this same ideology, a better protection against intersectional discrimination will not be very likely. So in a sense, both Hannett and Satterthwaite put rather high hopes on the *agency* by actors that monitor or apply the anti-discrimination legislation, such as national equality bodies. As legislation itself is not capable of acting, the solutions envisioned by Hannett and Satterthwaite greatly hinge on the agency by these actors. For O’Cinneide, whether a single equality body is to apply an effective cross-strand approach, ultimately depends on a favourable coming together of multiple aspects.

The general research question set out in the introduction was: which setting – the Belgian or the Dutch – resonates best with an intersectional way of dealing with multiple discrimination complaints by the equality body/bodies where gender is one of the strands involved? The scholars discussed above lead us to question to what extent it matters which particular mix of legislation and institutions exists? The equality bodies’ agency and the way in which multiple other factors blend with the sort of anti-discrimination legislation and institutional set-up are underlined.

⁶ However, Satterthwaite speaks about protecting victims of intersectional discrimination under *international legislation* and therefore her focus is not on *national* equality bodies.

3. ANTI-DISCRIMINATION LAW AND EQUALITY BODIES IN BELGIUM AND THE NETHERLANDS

Anti-discrimination legislation

Belgian anti-discrimination legislation and Dutch equal treatment legislation⁷ are both fragmented, but the degree to which varies. In the Netherlands the various possible discrimination grounds are scattered even more over several statutes than in Belgium, where the 2007 anti-discrimination legislation categorizes the grounds in three laws which can be interpreted as one body of anti-discrimination legislation since the same provisions are covering the wide range of inequalities. More importantly, in the Netherlands the legal protection depends on the inequality ground at stake, whereas it is equal for all the grounds in Belgium. The countries correspond in that the inequality grounds are treated separately from each other in the laws, even when more than one ground is covered in the same statute. This means that no explicit protection against multiple discrimination is legislated.

Belgian anti-discrimination legislation came about at the beginning of the eighties. The battle against racism played a considerable role: the 1981 law that punished certain acts motivated by racism or xenophobia⁸ was the first step. In 1999, a gender law that regulated the equal treatment of men and women regarding employment and social security⁹ was added. Four years later, in 2003, an anti-discrimination law was adopted that defined various inequality grounds¹⁰. Here the influence of EU anti-discrimination legislation and the lobbying LGBT-organizations played an important role. In 2007, the – until now – last step was taken in the federal, Belgian anti-discrimination legislation. Since that moment 18 possible discrimination grounds are covered by equal treatment legislation, dispersed over three laws. The *racism law*¹¹ modifies the 1981 law and concerns 5 inequality grounds: nationality, so-called race, skin colour, descent, and national or ethnic descent. In the *gender law*¹², gender is the central criterium, including transsexuality. The last is the *general anti-discrimination law*¹³ that concerns 12 of the 18 covered inequality grounds: age,

⁷ In The Netherlands the term *equal treatment legislation* is used instead of the Belgian terminology *anti-discrimination legislation*. In these equal treatment laws the term '*distinction*' is used instead of *discrimination*. However, for reasons of clarity we will use the term 'discrimination' throughout this paper.

⁸ Wet van 30 juli 1981 tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden, published in *Belgisch Staatsblad*, (BS) 8 August 1981, modified on 15 Februari 1993 (BS, 19 February 1993), 12 April 1994 (BS, 14 May 1994), 7 May 1999 (BS, 25 June 99), 20 January 2003 (BS, 12 February 2003), 23 Januari 2003 (BS, 13 March 2003) en 10 May 2007 (BS, 30 May 2007).

⁹ Wet van 7 mei 1999 betreffende gelijke behandeling van mannen en vrouwen inzake arbeidsvoorwaarden, toegang tot het beroep en de promotiekansen, toegang tot een zelfstandig beroep en aanvullende sociale zekerheidsstelsel, published in *Belgisch Staatsblad*, 19 June 1999. Annulled on 9 June 2007.

¹⁰ Wet van 25 februari 2003 ter bestrijding van discriminatie en tot wijziging van de wet van 15 februari 1993 tot oprichting van een Centrum voor gelijkheid van kansen en voor racismebestrijding, published in *Belgisch Staatsblad* on 17 March 2003, modified on 9 July 2004 (BS, 15 July 2004), and partly annulled on 6 October 2004 (BS, 18 October 2004). Annulled on 9 June 2007.

¹¹ Wet van 10 mei 2007 tot aanpassing van het Gerechtelijk Wetboek aan de wetgeving ter bestrijding van discriminatie en tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden, published in *Belgisch Staatsblad* on 30 May 2007.

¹² Wet van 10 mei 2007 ter bestrijding van discriminatie tussen vrouwen en mannen, published in *Belgisch Staatsblad* on 30 May 2007.

¹³ Wet van 10 mei 2007 ter bestrijding van bepaalde vormen van discriminatie, published in *Belgisch*

sexual orientation, civil status, birth, wealth, belief/religion, political preferences, language, current or future health, disability, physical or genetic characteristic or social descent. The list of grounds across the three laws is longer than the European Directives require (Centre 2008, 12-13).¹⁴

The 2007 anti-discrimination laws apply to the area of employment (access to employment, terminating employment contracts, and membership of trade unions), offering and granting access to goods and services, social security and protection, statements in official administration or records, and the access to and participation in economic, social, cultural or political activities. Prohibited are: direct discrimination, indirect discrimination, commissioning discrimination, intimidation and refusing reasonable adjustments (Centre 2008, 13-14). The legal protection is thus equal for every inequality ground in Belgian anti-discrimination legislation (Fredman 2009, 86). These laws are federal and partly transpose the European directives.¹⁵ It is important to know that these directives are also transposed on the level of the Belgian regions and communities. This paper however only concerns legislation (and equality bodies) on the federal level.

Even though all the discrimination grounds were joined in the former anti-discrimination law of 2003, they are divided in the 2007 version. In this way, the legislation has become more consistent with the division in equal opportunity structures: the Institute for the Equality of Women and Men is responsible for monitoring the compliance and application of the gender law, whereas the Centre for Equal Opportunities and Opposition to Racism is qualified for every other discrimination ground, monitoring the compliance with and application of the racism and anti-discrimination laws.¹⁶

The origins of *Dutch equal treatment legislation* date back to 1975 when a law on equal pay for men and women was adopted. That law was later subsumed under the 1980 Equal Treatment in Employment (Men and Women) Act¹⁷ that is still in force today. At first, Dutch equal treatment legislation thus solely focused on discrimination based on gender. Only in a later stage other grounds were included. Currently, equal treatment legislation is broken up in various laws that prohibit unequal treatment on multiple grounds. The 1980 Act covers gender (pregnancy, child-birth and motherhood are included). The 1994 General Equal Treatment Act¹⁸ concerns gender as well as race, nationality, religion/belief, sexual orientation, civil status and

Staatsblad on 30 May 2007.

¹⁴ The grounds that are covered by the European Directives are: gender, age, race/ethnicity, belief/religion, sexual orientation and disability.

¹⁵ The racism directive 2000/43 is transposed in the racism law; directives 75/117 EEC, 76/207 EEC, 79/7EEC, 86/613EEC, 96/97EC, 97/80EC, 2002/73/EC and 2004/113 are transposed in the gender law; and directive 2000/78 is transposed in the general anti-discrimination law.

¹⁶ The Centre is not responsible for language – which constitutes an important dividing line in Belgium. In the future, another instance responsible for language will be created. (Centre 2008, 18)

¹⁷ Wet van 1 maart 1980, houdende aanpassing van de Nederlandse wetgeving aan de richtlijn van de Raad van de Europese Gemeenschappen van 9 februari 1976 inzake de gelijke behandeling van mannen en vrouwen, published in *Staatsblad* [Bulletin of Acts and Decrees] 1980, No. 86. Amended in 1981, 1989, 1992, 1994, 1995, 1996, 1997, 1998, 2000, 2001, 2005, 2006, and 2007. For this paper we use the most up to date text of this Law, including all its amendments.

¹⁸ Wet van 2 maart 1994, houdende algemene regels ter bescherming tegen discriminatie op grond van godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht, nationaliteit, hetero- of homoseksuele gerichtheid of burgerlijke staat, published in *Staatsblad* [Bulletin of Acts and Decrees] 1994, No. 230. Amended in 1994, 1995, 1996, 1997, 1999, 2000, 2001, 2004, 2005, 2007, 2008, and 2009. For this paper we use the most up to date text of this Law, including all its amendments.

political preference. Other laws are the 1996 Equal Treatment (working hours) Act¹⁹, the 2002 Equal Treatment Temporary and Permanent Employees Act²⁰, the 2003 Equal Treatment (Disability or Chronic Illness) Act²¹, and the 2003 Equal Treatment in Employment (Age Discrimination) Act²². Comparably to the Belgian case, the Dutch list of covered grounds is longer than required by the European Union.²³ The elaborate list of Dutch equal treatment statutes highlights that this legislation is fragmented.

The General Equal Treatment Act is the only one to cover more than one discrimination ground. However, the grounds are treated *separately* here: the approach is 'or/or' instead of 'and/or'. Moreover, no references to multiple discrimination can be found.²⁴ The General Equal Treatment Act consequently does not offer any explicit protection against multiple or intersectional discrimination.

The fields of application where discrimination is prohibited differ per ground. For example, discrimination based on race is prohibited in employment, in offering and granting access to goods and services, in providing information on career and education and in social protection. But in the case of gender, nationality, belief/religion and political preference 'social protection' is not included. Concerning age and disability, vocational training is included whereas certain other fields of application, such as the offering and granting access to goods and services, are momentarily not included in equal treatment legislation. Regarding disability, non-discrimination in the field of housing has recently been added. The prohibition of discrimination entails direct and indirect discrimination, as well as the commissioning to discriminate, sexual intimidation and victimization. Direct discrimination in principle is always prohibited, but the law makes some exceptions to the non-discrimination norm. The exceptions are fixed for most of the grounds (closed system). Only regarding age, working hours and permanent/temporary appointment the system is not totally closed. For these grounds direct discrimination is not prohibited if it can be justified objectively. Consequently, Dutch equal treatment legislation is not only dispersed over different statutes, the legal protection is not equal for every ground either.

Currently, the Dutch government is working on a so-called 'Integration Law' that will integrate several equal treatment laws (excluding the one on working time

¹⁹ Wet van 3 juli 1996, houdende wijziging van het Burgerlijk Wetboek en de Ambtenarenwet in verband met het verbod tot het maken van onderscheid tussen werknemers naar arbeidsduur, published in *Staatsblad* [Bulletin of Acts and Decrees] 1996, No. 391.

²⁰ Wet van 7 november 2002 tot uitvoering van de richtlijn 1999/70/EG van de Raad van de Europese Unie van 28 juni 1999 betreffende de door het EVV, de UNICE en het CEEP gesloten raamovereenkomst inzake arbeidsovereenkomsten voor bepaalde tijd, published in *Staatsblad* [Bulletin of Acts and Decrees] 2002, No. 560. In 2004 a similar Act for civil servants has come into force.

²¹ Wet van 3 april 2003 tot vaststelling van de Wet gelijke behandeling op grond van handicap of chronische ziekte, published in *Staatsblad* [Bulletin of Acts and Decrees] 2003, No. 206. Amended in 2004, 2005, and 2009. For this paper we use the most up to date text of this Law, including all its amendments.

²² Wet van 17 december 2003, houdende gelijke behandeling op grond van leeftijd bij arbeid, beroep en beroepsonderwijs (Wet gelijke behandeling op grond van leeftijd bij de arbeid), published in *Staatsblad* [Bulletin of Acts and Decrees] 2004, No. 30.

²³ See footnote 14.

²⁴ There are countries, like Germany, where multiple discrimination is referred to in the anti-discrimination legislation. See: Urbanek, Doris. 2009 (forthcoming). Intersectionality in Recent German Gender Equality and Diversity Policies. In: Gleichstellungs- und Familienpolitik in Zeiten der Großen Koalition: Neuer Feminismus? Modernisierung? Re-Traditionalisierung?, ed. Diana Auth, Eva Buchholz and Stefanie Janczyk. Opladen and Farmington Hills: Verlag Barbara Budrich.

and the one on permanent/temporary appointment) into the General Equal Treatment Act. The aim is to make the legislation more accessible. In 2005, a Bill was presented and several civil organizations – among which the Equal Treatment Commission – were asked for advice. From then on little progress was made, because the Bill has not been presented to the Second Chamber of Parliament yet.

Mandate, functions and organization of the equality bodies

The institutional set-up of the Belgian and Dutch equality bodies also differs. Whereas the Netherlands has a rather long list of equal treatment laws, only one integrated equality body handles the complaints that have to be tested against that legislation; the Equal Treatment Commission (from now on: Commission). Since the 2007 anti-discrimination laws, Belgium has reached more conformity between legislation and equality bodies, but actually has two bodies: the Institute for the Equality of Women and Men (from now on: Institute) is linked to the gender law, and the Centre for Equal Opportunities and Opposition to Racism (from now on: Centre) to the racism law and the general anti-discrimination law.

The tasks of the three equality bodies at first appear quite similar. The Commission as well as the Centre and Institute can work autonomously from government, are responsible for handling individual complaint procedures, for familiarizing the public with the laws, for guarding their compliance, conducting research, and formulating advice.

Yet, the bodies working methods clearly differ at other points. The statements that the bodies make when they test complaints about potential discrimination against the law – has anti-discrimination legislation been violated or not? – are not legally binding in both countries. However, the Dutch Commission's judgments/opinions (hereafter: opinions²⁵) appear to take in a more central role in its work and – possibly related to that – to have quite a weighty status as well. This seems less true for Belgium. In the case of the Netherlands, the statements are termed 'opinions' which all receive a case number, and are based on thorough fact-gathering in which both parties have been heard. They are all accessible to the public. As such, they really have a semi-judicial appearance. Moreover, most of the time they are acted upon by the defendant and if the case is taken to court, the judge motivates any deviation from the Commission's opinion in her/his own judgment. While in Belgium complaints are tested against legislation, they are not denoted as 'opinions'. Because most of them are not accessible to the public, it is much harder to trace how effective they really are. This also makes it harder to gain insight in the way legislation is interpreted and applied by the Centre and the Institute. Also, in Belgium there is no similar practice for judges to motivate deviation from an opinion by the Centre or the Institute. So, while the Belgian Centre and Institute also assist victims who have complaints, they do not make similar quasi-judicial opinions and as such the emphasis maybe is a bit more on promotion than on enforcement. However, both can bring litigation in their own name before Court.

²⁵ In Dutch language the semi-judicial statements made by the Equal Treatment Commission are called 'oordelen' which translated in English would be 'judgments'. However, to denote the fact that the judgments done by the Commission are not legally binding and to analytically separate them from judgments made by judges in Court,, in what follows we will use the term 'opinions' instead.

In *Belgium*, the Centre was established in February 1993. It is a semi-state organization and has a 'unique position' because it was installed by law as a public service, but has the opportunity to work in complete independence (Centre 2008, 3).

The Centre is responsible for the promotion of equal opportunities and battling discrimination based on 16 of the 18 discrimination grounds that are covered by law. It does not have any competences as regards gender and language. Victims of discrimination based on those 16 grounds are provided with information, support, advice and – if it is necessary – legal help. The Centre tests the complaint against the anti-discrimination legislation, and offers the opportunity of mediation, or sensibilization of the offender. If the situation does not improve, it can help in taking the case to court. Not all of the Centre's statements concerning testing complaints against the legislation are registered for the public. Only if similar complaints are recurring or are of high societal importance, the Centre's advice will be published on its website or in its year report.²⁶ The Centre opened 1754 files in 2008²⁷ (Centre 2009, 96). From the moment a file is opened, a written and signed document is asked of the applicant. The discrimination grounds falling within the Centre's competence are treated separately in its official documents.

Besides handling complaints, the Centre is competent for familiarizing the public with and monitoring the anti-discrimination laws, conducting research, formulating (policy) advice and promoting diversity. Maintaining partnerships with other instances – for instance the Institute for the Equality of Women and Men – is part of the Centre's work as well.

In December 2002, the Belgian Institute was established. It took over the competences and staff of the Direction of Equal Opportunities of the Federal Public Service Employment and Social Consultation. The Institute is responsible for the administration of the federal Minister of Equal Opportunities and as such is not completely independent from government. But when it comes to complaint procedures, its statute is comparable to that of the Centre; it works completely autonomously from government.

The Institute is responsible for surveilling the equality between women and men in Belgian society. It does so by profiling itself as a legal instance that helps in case of complaints about gender discrimination. In those cases, the Institute provides (non-binding) advice and information, it mediates and negotiates, is able to prove of default and can – if the desired effects fail to occur – go to court. Further, this equality body develops and promotes instruments for gender mainstreaming, it develops expertise, and is responsible for the preparation and execution of governmental decisions.

Complaints have to be in writing when filing them at the Institute. The discriminatory situation needs to be described in detail and the applicant should identify him- or herself. The Institute then registers the complaint and examines the susceptibility: only complaints on gender discrimination are considered. First, the Institute will advise the applicant and explain him/her how the Institute can help. Then, the complaint is tested against the Belgian legislation: the 2007 gender law

²⁶ Information provided during phone interviews with staff from the racial and non-racial department of the Centre for Equal Opportunities and Opposition to Racism, 14 July 2009.

²⁷ In 2008, the total number of dossiers the Centre received was 2207: for 453 (20,5%) of these the Centre had no competences, only 1754 dossiers (79,5%) were followed up.

and the law on the establishment of the Institute (Institute 2006, 5-6). In 2008, 176 files were opened at the Institute: 51 concerned requests for information, and 125 were complaint procedures (Institute 2009, 29). Three cases went to court and the Institute began a procedure in civil law concerning the honour killing of Saida Sheikh (Institute 2009, 7).

The Centre and Institute thus fulfill the task that is imposed by some of the European equal treatment Directives stating that an equality body is to be appointed that is responsible for independent assistance to victims in pursuing their complaints about discrimination based on gender and race, and for the promotion, analysis, monitoring and support of equal treatment of all persons on these two grounds.²⁸

In the *Netherlands*, the Commission that was previously responsible for the promotion and enforcement of the 1980 Equal Treatment in Employment (men and women) Act, was merged in the autonomous Equal Treatment Commission that was established by the General Equal Treatment Act in 1994. The competences of this new Commission have expanded with the adoption of every new equal treatment law. The Commission is an independent board of experts on equal treatment legislation that monitors the compliance with this legislation, promotes awareness on equal treatment norms, and contributes to developing these norms.

The Commission has several competences at its disposal that are established by law. It is competent to deal with complaints by (potential) victims of discrimination on grounds and fields of application that are covered by the equal treatment laws. It can pass (semi-legal) opinions in which a statement is made about whether or not the equal treatment law has been violated. Almost half of the complaints results in such an opinion, but sometimes a simple intervention (like providing information or referring to former opinions on similar cases) is enough. Since recently, the possibility of 'mediation' is provided, during which both parties are given the opportunity to solve their conflict by means of (external) mediation. When this succeeds, the Commission does not have to pass an opinion anymore (Commission's year reports 2006 and 2007).

The Commission is easily accessible, because a request for an opinion is free of any costs and the applicant does not need a lawyer. After the request is submitted the Commission decides whether it is admissible, it conducts research in which both parties are heard, and when the necessary information is gathered a hearing is held for which both parties are invited. Within eight weeks from the hearing the Commission passes its opinion. An opinion of the Commission is not legally binding; the defendant cannot be obliged to comply with it. However, in practice the opinions seem to have moral power since more than 75% of them are acted upon. When the opinion is not complied with by the defendant and the applicant decides to take the matter to court, it is considered appropriate that the judge includes the Commission's opinion in the clarification of his/her own judgement (Burri and Prechal 2009, 228). If the judge chooses to deviate from the Commission's opinion, he/she is expected to justify why. In almost 70% of the cases the judge follows the Commission's opinion

²⁸ Directive 2000/43/EC in the case of race and directives 2002/73/EC as well as 2004/113/EC in the case of gender. The Recast Directive on Gender Equality 2006/54/EC will replace Directive 2002/73/EC (as well as other gender equality related Directives) from August 2009. In this Directive the obligation to set up such a body is again demanded. At this moment, the EU does not oblige member states to set up such a body regarding the other grounds of discrimination that are covered by EU law.

(Commission's year report 2007, 48). The Commission itself also has the ability to take matters to court. Every year a compilation of the opinions by the Commission is (publicly) published and all opinions can be accessed via the website of the Commission.

The Commission also deals with requests of employers, schools and other organizations to test their policy and/or everyday practice against the legislation; it is able to conduct research within areas where it suspects systematic discrimination; and it advises the government, public services and market actors. (Commission's year reports 2006 and 2007).

With this Commission the Netherlands fulfilled – even before the Directives were passed – the EU regulations that request an independent body for assisting and defending victims of discrimination on the grounds of race and gender.²⁹

Different institutional and legal frameworks: do they matter?

So far, we have learned that the Dutch and Belgian bodies not only differ according to their institutional but also to their legal setting. We can classify the Belgian and Dutch frameworks within our table of possible scenarios that was introduced earlier (see section 2). It seems that neither Belgium, nor the Netherlands can be classified as having a (sub-) optimal setting for the materialization of an effective cross-strand approach where multiple discrimination complaints are dealt with in an intersectional way if appropriate. In Belgium, the institutional set-up is characterized as being separate, whereas the legal setting is unified. This results in a mixed setting. The Netherlands is also characterized by a mixed setting, but is constituted in a completely different manner. Here the institutional set-up consists of an integrated equality body, but the legislation is fragmented (see table 2).

	Separate equality bodies	Integrated/single equality body covering all strands
Anti-discrimination law is fragmented	<i>Suboptimal for cross-strand approach</i>	<i>Mixed (-> The Netherlands)</i>
Anti-discrimination law is unified	<i>Mixed (-> Belgium)</i>	<i>Optimal for cross-strand approach</i>

Table 2: Classification of Belgian and Dutch setting along different combinations of institutional set-up and legal context and their assumed suitability for cross-strand approach

But how does this translate into everyday practice? The description of the writings of several scholars in section 2 showed that the above aspects which – in theory at least – are generally regarded as relevant 'predictors' do not *necessarily* work out in practice as expected, since the fragmentation of legislation and institutional separation are part of a more complex and broader set of aspects that work together in determining any practical outcomes. For mixed cases such as Belgium and the Netherlands, expectations on the basis of the legislative framework and institutional set-up point in opposite directions, one (potentially) encouraging and the other one (potentially) hampering an intersectional gender approach. Whether the one or the

²⁹ The EU equality directives demand that an independent institution should be responsible for the support and defense of victims of discrimination based on gender and race.

other will be more decisive, thus very likely depends on aspects other than institutional set-up and legislative framework, like agency.

An integrated equality body like the Dutch Equal Treatment Commission seems potentially more suitable for the inclusion of groups of women at the intersection with (an)other inequality ground(s) than the two separate bodies in Belgium. Because the Institute can only deal with complaints based on gender, and the Centre is responsible for the complaints on all the other grounds, interaction between gender and – for instance – race/ethnicity at the very least will be impeded by this institutional split. Conversely, the fact that legal protection differs per ground in the Dutch system, and that the grounds are treated independently in the law, might overshadow the possible intersectional advantage of the integrated Dutch equality body, because such legal obstacles might hinder an intersectional approach. So, in respect of the legal context, the Belgian legislation that offers equal protection for each ground seems to provide more leeway for the Belgian equality bodies to address intersectional discrimination. However, it would be hard to assume that the Belgian and Dutch equality bodies are merely puppets on a string without any room for maneuver. If agency and vision indeed matters a lot, like Hannett and Satterthwaite argue, the disadvantages mentioned above could be surmountable after all. But in which of the two country cases this is most likely to happen? Is it easier to ‘apply’ intersectionality even if this does not fit very well with the legislative framework (Satterthwaite) if there is one acting actor, as could be the case in the Netherlands? Or can the institutional split in a case like Belgium be overcome if close cooperation exists between the multiple equality bodies allowing them to develop and apply a shared intersectional vision regarding multiple discrimination complaints (Hannett)? In addition, is it possible that the more coherent Belgian legislation could enhance the equality bodies’ space to adopt such a broader shared vision on how equal treatment legislation should counter inequalities (Hannett)?

In the following section, we will zoom in on how intersectionality is (or is not) dealt with in practice by the three equality bodies. What are the exact working procedures in case of discrimination complaints based on multiple inequality grounds? And what is the vision that the bodies keep regarding multiple inequalities, intersectionality and how to incorporate this in their future practical work? Do they show any signs of (latent) aspects of an intersectional approach?

4. AN INTERSECTIONAL GENDER APPROACH IN PRACTICE? BELGIUM AND THE NETHERLANDS COMPARED

If *Belgian* citizens want to file a complaint concerning any alleged discrimination, they can contact the Centre and/or the Institute. In the first contacts, the staff of the equality bodies aims to gather as much information as possible on the situation. As such, discrimination on multiple inequality grounds *could* be detected and pinpointed. However, in practice, when gender is intersecting with other inequalities, the Institute is responsible for the gender-part, whereas the Centre is competent for the others. This separate treatment of inequalities is also visible within the work of the Centre.³⁰ Even though its staff will handle any alleged discrimination complaint as a unique case, and as such could have the opportunity to deal with the inequalities under its competences in an intersectional way, the statistics presented every year indicate that the equality body rather 'thinks' in separate inequality strands: 39,2% of the complaints concern national or ethnic descent, 13,3% concern disability, 8,3% belief/religion, 6,2% colour of skin, 6,% age, 5,2 sexual orientation, 4,5% nationality, 3,9% health, 3,8% so-called race and so on (Centre 2008, 96). No official statistics are kept on complaints that are based on multiple grounds.

Still, the staff members of both equality bodies are aware of the notion of intersectionality. Especially those dealing with discrimination of migrant women are aware of the interconnection between gender and migrant status; but also examples in which religion and ethnicity/migrant status/nationality intersect are given.³¹ The term 'double discrimination' is even literally used: the Centre mentions migrant women in its 2007 year report and explains that they 'are part of the group of women who are discriminated on gender (gender group) and of the group of men and women who are discriminated based on their ethnic descent or religious background' (Centre 2008, 153³²). Now the question rises on how Belgian equality bodies deal with this in practice; where can women who have experienced intersectional discrimination and want to file a complaint turn to?

That is exactly where the shoe pinches. As some of the staff members of the equality bodies indicate: there is no working method, tool or instrument to efficiently handle such intersectional gender complaints. If, for instance, migrant women have complaints, they can turn to the Centre with their complaints based on ethnicity and to the Institute with their complaints based on gender. The Institute mentions that in case of 'mixed complaints', it collaborates with other instances (Institute 2008a, 1). So far however, the Institute has not received many complaints in which the combination of gender and for instance race or ethnicity feature.³³ This could be explained by the fact that the possibility to file such a complaint is not clearly mentioned on the Institute's website (and other communication channels) and those

³⁰ Information provided during phone interviews with staff from the racial and non-racial department of the Centre for Equal Opportunities and Opposition to Racism, 17 November 2008 and 14 July 2009; and with a staff member of the legal department of the Institute for the Equality of Women and Men, 17 November 2008.

³¹ Information provided during phone interviews with staff from the racial and non-racial department of the Centre for Equal Opportunities and Opposition to Racism, 17 November 2008 and 14 July 2009; and with a staff member of the legal department of the Institute for the Equality of Women and Men, 17 November 2008.

³² Citation translated from Dutch to English by this paper's authors.

³³ Information provided during phone interviews with a staff member of the legal department of the Institute for the Equality of Women and Men, 17 November 2008.

women therefore make a choice of going to either the Centre or Institute before they file their complaint. These choices are often motivated by which discrimination ground is more likely to be interpreted as the strongest, the most capable of leading to actual help in fighting the discriminatory situation. The Centre and the Institute will help these women in deciding which equality body will be competent in dealing with their complaint.

At the Centre, experience shows that the current complaint procedure has shortcomings because of the fact that complaints are 'classified as manifestations of one or another form of discrimination', and not as a combination of them (Centre 2008, 153³⁴). In spite of this, the term 'intersectionality' is actually used, and is being brought up as a solution for the practical problem of migrant women in the 2007 year report. In June 2009, an advisory committee was set up comprising members from the Institute and the Centre, as well as civil society participants from various disciplines to reflect on the topic of multiple discrimination and intersectionality.³⁵ Also, a registration system to record such discriminations is considered, because of the lack of statistics on multiple discrimination.

Both the staff of the Institute and the Centre thus seem aware that one occurrence of discrimination can be based on the interaction of several discrimination grounds. Even though the examples are rare, there are cases for which the equality bodies met and cooperated. A clear example is the case in which a group of friends, women and men, went to a disco. The women were without any difficulty allowed to enter from the age of 18; the men were not immediately allowed to enter and had to be 21. Next to gender and age, sexual orientation played a role here, since a clear heterosexual norm was acted upon, entailing the idea that older male clients of the disco sexually prefer young female clients. This case was split: the Institute opened a file on gender discrimination and the Centre dealt with age and sexual orientation. Although the Centre and the Institute work together, the discrimination grounds are separated in their working method. The staff of the Institute and the Centre says they collaborate well, but there is no official protocol that records that collaboration.

Both the Institute and the Centre are thus aware of the concept of 'intersectional discrimination', as is particularly shown in the example provided above. The reference to intersectionality however has not been translated into the everyday practice of their complaint procedures yet. Intersectionality is not developed in the Belgian context yet, but is considered for the future. The staff that deals with the discrimination complaints are aware that a tool or protocol would help to deal more efficiently with these complaints. In the future, the recently established advisory committee has the task to reflect on these matters.

If *Dutch* citizens want to file a complaint concerning any alleged discrimination, they can contact the Commission. Complaints can be filed based on one or on multiple discrimination grounds. In 2006, 43 out of the 282 opinions (15%) concerned multiple grounds, in 2007 39 out of 247 (16%) and 14% (22 out of 155 opinions) in 2008 (Commission 2009, 2008a and 2007a).³⁶ The internal structure of the Commission's

³⁴ Citation translated from Dutch to English by this paper's authors

³⁵ Information provided during phone interviews with staff from the racial and non-racial department of the Centre for Equal Opportunities and Opposition to Racism, 14 July 2009.

³⁶ Only in the statistics on the *outflow of opinions* multiple grounds are covered in the year reports from 2006 on. Regarding the *inflow* of requests for an opinion, no statistics on multiple ground complaints are

staff is not organized around separate grounds, but around functions. In fact, the Commission used to be divided into three strand-specialist chambers, but has decided to adopt a functional structure on account of the number of multiple strand cases (O’Cinneide 2002, 31 and 88).

It is not necessarily the applicant who initially files a complaint as a multiple discrimination case; sometimes the Commission itself indicates that more grounds could be at stake.³⁷ In case of a complaint of discrimination on multiple grounds, the applicant needs to make a reasonable case for every ground separately to show that the law was violated. That procedure is thus comparable to the complaint procedure concerning discrimination on a single ground.³⁸ If, for example, a migrant woman feels discriminated based on ethnicity and gender, she needs to bring forward facts that lead one to suspect that an unlawful distinction was made, based on her ethnicity *and* on her being a woman. In that way, the combined position of ‘*migrant woman*’ in principal is not brought into vision. This procedure could hinder complaints based on *intersectional* discrimination. It leaves room for an opinion in which *additive* discrimination is found to have taken place, but not for discrimination that is the result of the *interaction* of multiple grounds. In the context of a discrimination complaint on multiple grounds the Commission can also conclude that on one ground indeed unlawful distinction took place whereas this was not the case for the other ground(s), or that on none of the grounds unlawful distinction took place. From the compilation of opinions that the Commission yearly publishes, it can indeed be read that complaints on multiple grounds nearly always result in separate opinions per ground (Commission 2007*b* and 2008*b*).

However, there are indications that the Commission is well aware of intersectional discrimination. Several official documents and advices indicate that the Commission considers it necessary to pay more attention to intersectional discrimination (in the future). More importantly, in exceptional cases the Commission deviates from the separate handling of discrimination grounds in treating complaints based on multiple inequality grounds.

In the abstract of opinion no. 2006-256 the Commission states the following: ‘first opinion of the Commission in which intersection plays a role’ (Commission 2007*b*, 57³⁹). What is certain, is that this is the first opinion in which the Commission *recognizes* that intersectionality is at stake. What we cannot be sure about is whether intersectionality did not already come across in earlier opinions.

In opinion 2006-256 the applicant claims to be discriminated based on disability *and* race. The applicant, a woman of Turkish descent who is blind, had to take a competence and interests test for her employer. Normally, that test is in

available.

³⁷ If the Commission has this idea, it is discussed with the applicant because he or she needs to endorse that viewpoint. This information was attained during two phone interviews (November 2008): the first with a former Commission member, the second with a legal staff member of the Commission.

³⁸ This information is based on a phone interview with a former Commission member, and an e-mail conversation with a legal staff member of the Commission, both in November 2008. In 2001, Kambel wrote an article in the Dutch journal *Nemesis* in which she states that the applicant who files a complaint on multiple grounds with the Commission 1) is obliged to show on which grounds he/she thinks to be discriminated, 2) must establish conclusive proof for every discrimination ground separately. Then, the Commission deals with these grounds in a strictly separated manner. Even though some things have changed since 2001 – the burden of proof has shifted from the applicant to the defendant for example – the information anno 2008 seems to confirm that points 1 and 2 still apply.

³⁹ Citation translated from Dutch to English by this paper’s authors

writing, but because the applicant is blind it was provided orally and not printed in braille. If the Commission had investigated the grounds separately, the complaint would have been valid based on disability: the woman was treated unequally because the test was not provided in braille. The question that rises however is whether the complaint based on race – regarded independently from her disability – would have been valid as well. After all, the Commission reasons that ‘there was no direct connection between providing an oral test and the descent of the applicant. If she had not been blind, she could have taken the test in writing’⁴⁰ (Commission 2006⁴¹). Still, the Commission concluded that the handicap of the woman should be taken into consideration to understand that her Turkish descent (Dutch not being her mother tongue) made an oral test extra difficult; rereading the answers and questions is not possible during an oral test. Something else than the addition of two separate discriminatory practices (*additive* discrimination) is thus at stake here. The Commission has looked into the *intersection* of two grounds and has concluded that the combination of those positions made the test more difficult.

This example suffices in showing that the Commission applies an intersectional approach in practice, but it does not show that the Commission applies an intersectional *gender* approach. Gender is not one of the involved discrimination grounds. Does the possibility exist that gender has been overlooked here? One could argue that Turkish women in the Netherlands more often have troubles with learning a second language due to their lower education levels than Turkish men. Having said this, the applicant herself evidently did not feel discriminated on the basis of gender, otherwise she would have included gender as a discrimination ground. The Commission can be of the opinion that another ground was involved as well, the applicant can never be forced to accordingly adapt his/her claim. In any case, with opinion 2006-256 possibly an important precedent has been established that might lead to future intersectional opinions where gender is one of the involved axis.

In its 2006 year report, the Commission remarks that there are cases in which a woman complains about discrimination at work, not because she is female or Muslim, but because she is a female Muslim. However, the Commission sees itself confronted with several practical problems that hinder the application of an intersectional vision. The fragmented equal treatment legislation that deals with the discrimination grounds separately, that provides unequal protection, and that allows various exceptions per ground, incites the Commission to deal with every ground individually in cases in which multiple grounds play a role. Chances are that the case is not seen as a whole (Commission 2007a, 6-7). Therefore, in its advice to the government on the future ‘Integration Law’ (see section 3), the Commission believes it to be desirable that the new law leaves more room for forms of discrimination that surpass separate grounds. It advises to address the grounds in one regulation. An intersectional vision would also be simplified if the law would be developed in a field-specific instead of ground-specific way, and if the protection level would be equal for all the possible grounds (Commission 2005a, 4).

Another Commission’s recommendation concerns the relaxation of the requirement of selecting a so-called ‘comparator’. If someone requests an opinion of the Commission, he or she should be able to appoint a ‘measurement person’ as a

⁴⁰ Citation translated from Dutch to English by this paper’s authors

⁴¹ The integral opinion can be found on <http://www.cgb.nl/opinion-full.php?id=453056545>, consulted on 12 December 2008.

precondition for establishing discrimination (equal cases should be equally treated⁴²). That person needs to find him/herself in the same 'relevant circumstances', except with regard to the ground on which the applicant feels discriminated (for example in a gender discrimination case the comparator of a woman applicant should be a man). According to the Commission, fixing on someone's 'opposite' can affirm and generalize the differences between the two compared groups (like women and men, or heterosexuals and homosexuals), whereas other crosscutting differences or differences within such a group are off the picture. In this way the (possibly non-emancipated) status quo remains unchallenged (Commission 2005*b*, 40).

The Commission is thus aware of the existence of intersectional discrimination, it applies in exceptional cases an intersectional approach in its complaint procedure, it believes it is necessary to increase the possibilities for utilizing an intersectional vision, and is proactive in spreading this vision and in creating more opportunities for dealing with intersectional discrimination in the future.

⁴² A saying that is often used in this context is: "What's sauce for the goose is sauce for the gander".

5. CONCLUSION

Irrespective of the differences in institutional set-up and legal context between the Dutch and Belgian equality bodies (see table 2), these last years the necessity of an intersectional approach in dealing with discrimination complaints surfaces in both countries. The term 'intersectionality' is actually used by all three equality bodies: in the 2007 year report the Centre mentions that progress in the battle against discrimination is only possible when an intersectional approach is applied (Centre 2008, 153). Yet at the same time, the Centre keeps on speaking about the 'double discrimination' of migrant women. Here it seems that ethnicity and descent are piled on top of gender or vice versa, rather than that interaction between the discrimination grounds is at stake. Currently, the future of an intersectional approach is discussed in an advisory committee, comprising (among others) staff members of the Centre and the Institute. Conversely, intersectionality clearly plays a role in opinion no. 2006-256 of the Equal Treatment Commission. Whereas Belgium shows a first awareness on intersectionality, it is not applied in the practicalities of the complaint procedure yet. The Dutch Commission on the other hand puts its intersectional awareness in practice – even though this rather is an exception to the rule; the 'standard' complaint procedure provides little room for recognizing *intersectional* discrimination in the complaint procedure.

We wondered which setting – the Belgian or the Dutch – resonates best with an intersectional way of dealing with multiple discrimination complaints, where gender is one of the strands involved, by the equality body/bodies? A basic assumption from which we originally departed was that the combination of an integrated equality body and unified legislation provides favourable circumstances for dealing with gender inequality overlapping with other inequalities. Conversely, the combination of separate equality bodies and fragmented legislation is regarded sub-optimal for this end. In general, scholars like Bell, Hannett, Satterthwaite, and O'Conneide seem to agree that a single equality body combined with unified anti-discrimination legislation is encouraging for an effective cross-strand approach. Still, each in their own way, indicates that the presence of one or both of these factors is neither absolutely necessary nor sufficient, since they are part of a more complex and broader set of aspects that work together in determining any practical outcomes. So, we also need to look beyond these factors and this is especially so in the Belgian and Dutch (mixed) cases, where only one of these advantageous circumstances is present. Whether the disadvantageous circumstances – separate equality bodies in case of Belgium and fragmented legislation in case of the Netherlands – are surmountable will probably depend on other factors, such as agency. Agency by the equality bodies to creatively and flexibly interpret anti-discrimination legislation that is compartmentalized and does not offer explicit protection from intersectional discriminations, and to change the dominant conceptualization of multiple discrimination that fits closely with the prevailing ideology of formal equality that underlies most equal treatment law are underlined respectively by Satterthwaite and Hannett.

Section 4 showed that a compartmentalized way of thinking about multiple (in)equalities that is regarded to be prevailing according to Satterthwaite and Hannett, is clearly visible in how the equality bodies deal with complaints where several inequality strands are involved in both the Dutch and the Belgian case. But it

applies even stronger to the Belgian case. Moreover, this section reveals that the Belgian equality bodies are hindered by their institutional split. The division in an Institute for gender and a Centre for 'the other discrimination grounds', does not incentivize to treat complaints on gender and another inequality ground together – neither additively or intersectionally. An intersectional discrimination complaint can be filed with both equality bodies, but the case is subsequently being divided in separate parts. In the Dutch case, the fragmented equal treatment legislation which provides uneven legal protection between the grounds complicates an intersectional approach by the Commission.

But the case descriptions also tell that the Dutch Commission as well as the Belgian Centre and Institute, each in their own way, have begun to push for changes based on the vision that if they are to perform their jobs well intersectional dimensions of discrimination cannot be neglected. However, the Dutch case displays a stronger vision and intention towards adding an intersectional dimension than the Belgian case. The Dutch Commission changed its internal organization from strand specific to functional divisions in reaction to the high number of multiple stands complaints that they received, it is open to deviate from its 'standard' procedure of treating the strands separately in handling multiple discrimination complaints (although this is still highly exceptional), it has put pressure on the Dutch government to adapt the proposal for a future Integration Law in such a way as to enable a more effective intersectional vision, and in several of its official publications it expresses that it is aware of the existence of intersectional discrimination. The description of the Belgian case shows that the push for change towards a more intersectional approach – until now – has mainly been limited to the rhetorical level. The Belgian bodies communicate in their official publications that paying attention to intersectionality is needed and that a stronger cooperation between the bodies is important in this respect. But if they cooperate, this happens on a rather ad-hoc basis, because there are no established working methods, tools or instruments to efficiently and consistently deal with intersectional gender complaints. Until now, the most concrete thing that has been initiated is installing an advisory Commission on intersectionality. While this sounds promising, it is too early to tell whether this will give cause to any acting instead of mere talking.

Can we then conclude that it is easier to apply intersectionality – even though there are factors that clearly work against it – when there is only one actor acting, like in the Dutch case? Yes and no. The institutional split in the Belgium might have withheld the bodies from effectively combining their forces. This limits their agency in working towards change with regard to intersectional discrimination. But this is not the whole story. It also comes down to the (lack of) will to seek after change. The fact that even within the Centre keeping official statistics on complaints that are based on multiple grounds has not come off, is illustrative. Such a complaint would be filed within the statistics under the inequality – either disability or ethnicity – that is most prominent.

Although opinion 2006-256 is rather the exception that confirms the rule, it still shows that the Commission has taken some first practical steps in the direction of a conceptual change in thinking about multiple discrimination. Furthermore, the fact that the Commission thinks about relaxing the requirement to select a comparator, might indicate a (future) shift in attention from formal to substantive equality. In

Belgium, on the other hand, the theoretic notice that intersectionality is relevant in tackling discrimination has not yet been translated into the everyday practice of complaint procedures.

While some improvements towards the application of an intersectional approach by the equality bodies are visible in both countries – although to a more limited degree in Belgium – for the time being women with intersectional discrimination complaints still face difficulties in Belgium and the Netherlands to find protection. Everyday practice in the neighbouring countries' equality bodies shows that a new manner of looking at and handling discrimination is needed: discrimination in our society is complex and needs more flexible solutions than those that are currently being used. Widening the outlook from a gender perspective to an intersectional gender perspective is a step in the right direction.

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