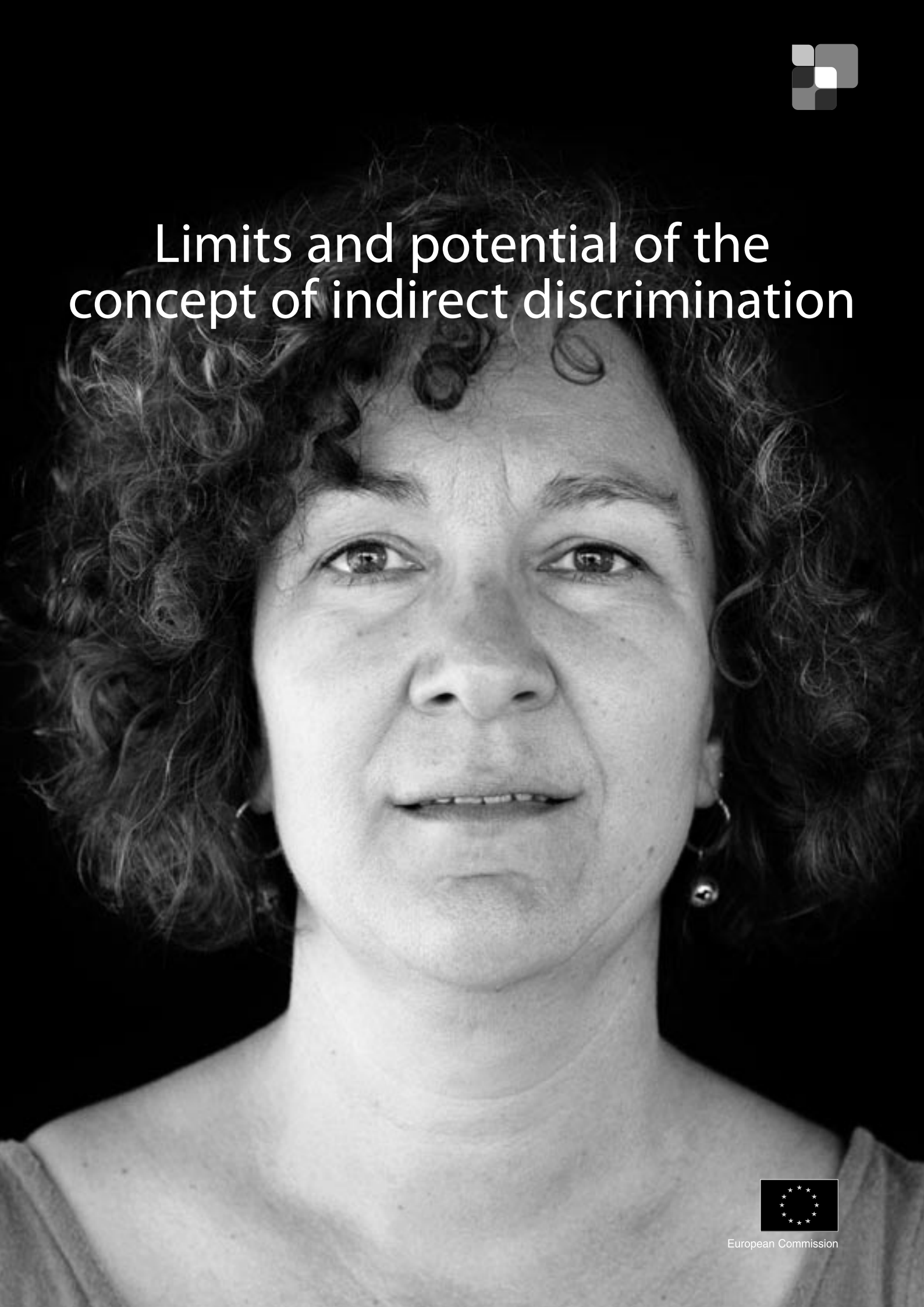
Limits and potential of the concept of indirect discrimination



European Commission

Limits and potential of the concept of indirect discrimination

Christa Tobler
European network of legal experts
in the non-discrimination field

European Commission
Directorate-General for Employment, Social Affairs and Equal Opportunities
Unit G.2

Manuscript completed in September 2008

This report was financed by and prepared for the use of the European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities. It does not necessarily represent the Commission's official position.

The text of this report was drafted by Christa Tobler, on the authority of the **European Network of Legal Experts in the non-discrimination field** (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), managed by:

human european consultancy
Hooghiemstraplein 155
3514 AZ Utrecht
Netherlands
Tel +31 30 634 14 22
Fax +31 30 635 21 39
office@humanconsultancy.com
www.humanconsultancy.com

The Migration Policy Group
Rue Belliard 205, Box 1
1040 Brussels
Belgium
Tel +32 2 230 5930
Fax +32 2 280 0925
info@migpolgroup.com
www.migpolgroup.com

This publication is supported for under the European Community Programme for Employment and Social Solidarity – PROGRESS (2007-2013). This programme is managed by the Directorate-General for Employment, Social Affairs and Equal Opportunities of the European Commission. It was established to financially support the implementation of the objectives of the European Union in the employment and social affairs area, as set out in the Social Agenda, and thereby contribute to the achievement of the Lisbon Strategy goals in these fields.

For more information see: http://ec.europa.eu/progress

For more information on publications from the European Network of Legal Experts in the non-discrimination field see:
http://ec.europa.eu/employment_social/fundamental_rights/legis/legln_en.htm

Europe Direct is a service to help you find answers to your questions about the European Union

Freephone number (*):

00 800 6 7 8 9 10 11

(*) Certain mobile telephone operators do not allow access to 00 800 numbers or these calls may be billed.

A great deal of additional information on the European Union is available on the Internet. It can be accessed through the Europa server (http://europa.eu).

Cataloguing data can be found at the end of this publication.

Luxembourg: Office for Official Publications of the European Communities, 2008

ISBN: 978-92-79-10150-2
DOI: 10.2767/56607

Printed in Luxembourg

PRINTED ON WHITE CHLORINE-FREE PAPER

Table of Contents

Iwan | *1973*

Executive summary

The prohibition of discrimination is a cornerstone of European Community law. It is therefore not surprising that the distinction between different forms of discrimination is of great relevance in its practical application. The most important distinction is that between direct and indirect discrimination. However, important as it is, this distinction does not appear in the wording of the EC Treaty, the basic text of EC law. Rather, it has been developed by the Court of Justice through its case law since the 1960s, in order to enhance the effectiveness of EC non-discrimination law.

Today, the concept of indirect discrimination has a firm place in both international human rights law and in EC law. In international human rights law, legal texts such as the Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of Persons with Disabilities explicitly define discrimination as an effects-based concept. Under these Conventions, the prohibition of discrimination therefore includes measures that are not discriminatory at face value but are discriminatory in fact and effect, i.e. indirect discrimination. Similarly, the relevance of the concept of indirect discrimination has been recognised by the European Court of Human Rights in relation to the European Convention on Human Rights. Under this case law, a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group.

In EC law, the prohibition of indirect discrimination plays a role wherever the law prohibits discrimination on a particular ground, and thus also in the context of the Racial Equality Directive (Directive 2000/43/EC),[1] which concerns discrimination on grounds of race or ethnic origin, and in the context of the Employment Equality Directive (Directive 2000/78/EC),[2] which concerns discrimination on grounds of religion or belief, disability, age and sexual orientation. Obviously, the prohibition of these types of discrimination can apply only within the field of application of the two Directives, which is strikingly different in terms of extent, the Racial Equality Directive having a much larger scope than the Employment Equality Directive. In contrast to the latter, the former covers not only employment-related matters but also social protection (including social security and healthcare), social advantages, education and the access to and supply of goods and services that are available to the public (including housing). In addition, the Employment Equality Directive does not apply to payments of any kind made under state schemes or similar, including state social security or social protection schemes. Moreover, Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces. Accordingly, the field within which the term 'indirect discrimination' is relevant as a matter of EC law is rather different for either Directive. In July 2007, the Commission proposed a new directive that would enlarge the field within which the prohibition of discrimination on grounds of religion or belief, disability, age and sexual orientation, including the prohibition of indirect discrimination, would apply. If adopted, the new directive will remedy the differences in scope between the Racial and Employment Equality Directives to some extent (though not the differences between these Directives on the one hand and sex equality directives on the other).

Being part of a new generation of EC non-discrimination law, the Racial and Employment Equality Directives not only explicitly mention different forms of discrimination, they also contain legal definitions. These include legal definitions of indirect discrimination. Under these definitions, 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of [a particular characteristic] at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by

[1] Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

[2] Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

a legitimate aim and the means of achieving that aim are appropriate and necessary'. So far there have been no decisions by the Court of Justice on cases allegedly involving indirect discrimination under the Racial and the Employment Equality Directives. Therefore, when trying to understand the meaning of these definitions, the Court's case law from other areas needs to be considered, including in particular case law on indirect sex discrimination. (However, it should not be forgotten that most of this case law relates to sex equality law from before the 2002 revision when a slightly different definition applied, notably in relation to the proof of disparate impact.)

The main characteristics of the legal concept of indirect discrimination are its effects-based nature and the element of objective justification. Regarding the former, the definitions in the Racial and Employment Equality Directives refer to 'a particular disadvantage' that a measure has on a particular group as compared to another group, and which must be shown to exist by the victim of the alleged discrimination. The Directives do not define what 'a particular disadvantage' precisely means, and neither does case law from the area of sex equality. Case law does, however, distinguish between two different situations, one where 'a considerably smaller percentage of women than men' is able to satisfy the condition in question, and one where there is 'a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement'. The case law further appears to indicate that the degree of disparity must be quite high. Importantly, the Directives do not necessarily require statistical proof of the required disparate impact. (This is an important difference to sex equality law from before the 2002 revision, where statistical proof played a very important role.) Still, the preambles of the two Directives stipulate that the Member States may provide for indirect discrimination to be established by any means including on the basis of statistical evidence.

Regarding objective justification, the case law of the Court of Justice shows that there is a very broad range of potentially acceptable grounds of justification. However, purely budgetary considerations can never serve as objective justification. Further, the aim relied on must be unrelated to discrimination, and mere generalisations are not sufficient in this context. As for proportionality, the requirements are very strict indeed. Proportionality requires that the concrete measure taken in the interest of the legitimate aim be both appropriate (i.e. suitable for achieving the aim in question) and necessary (i.e. another measure with a lesser effect, or even no disparate effect, would not be effective). It is therefore not sufficient that a measure is merely convenient or desirable. The legitimacy of the aim as well as the appropriateness and necessity of the measure must be shown by the person who has allegedly engaged in indirect discrimination. Indeed, the Court's recent case law on proportionality appears to be very strict.

When applying the prohibition of indirect discrimination, national authorities and courts will have to engage in a three-step analysis relating to the scope of the law, the nature of the measure as amounting to apparent indirect discrimination, and objective justification. In the framework of this analysis, the following questions must be asked and answered:

i) Does the case fall within the field of application of the non-discrimination law that is to be applied in the relevant EC Member State?
ii) If so, can the victim of the alleged discrimination prove that there is apparent indirect discrimination on a particular ground?
iii) If so, can the perpetrator prove that there is objective justification (i.e. a legitimate aim and proportionate means employed to reach this aim) that will prevent a finding of indirect discrimination?

In practice, challenges may arise in the context of all of these questions, for example in view of the different fields of application of EC law concerning different types of discrimination, which poses a particular problem in the context of multiple discrimination. However, national case law of the Member States shows how the prohibition of indirect discrimination can be made more effective by broadening the scope of the national law to include more situations than are required by EC law and by including more discrimination grounds. Further, in cases where it is either required or possible, difficulties may arise in gathering statistical evidence for indirect discrimination.

Under the Racial and Employment Equality Directives, a comparison must be made between the effect of the contested measure on two groups, namely the group to whom the victim of the alleged discrimination belongs on the one hand, and on a comparator group on the other. In practice, in some contexts it may be difficult to find comparators or relevant and significant statistical material. For these reasons statistical proof should not be made compulsory under national law, though it must be possible to rely on it where this is useful for victims of alleged indirect discrimination. Further, where relevant and significant statistical material is available, it may be difficult to determine which figures must be taken into account in order to establish the required disparity of effect. In the latter context, the case law of the Court of Justice on sex discrimination cases indicates that a flexible and pragmatic approach is required. As regards objective justification, the authorities and courts of the Member States should be very careful not to accept such justification too easily, and they should be particularly attentive with regard to the requirement of proportionality.

National authorities and courts that examine discrimination cases will have to be careful to distinguish indirect discrimination from other important concepts of EC non-discrimination law. Of particular importance is the distinction from direct discrimination, because of differences between the two concepts both on the level of proof and of justification. Under the Court of Justice's recent case law, certain cases that would have previously been examined in the framework of indirect discrimination are now treated as direct discrimination cases. The case law indicates that the Court has moved away from an approach where only measures that are explicitly based on the prohibited criterion or that are by nature indissociably linked to it amount to direct discrimination. Instead, direct discrimination now includes cases where reliance on a formally neutral criterion in fact affects one group only, be it by nature or on the basis of a rule that has the force of law.

Indirect discrimination is sometimes linked to concepts such as discrimination by association, positive action, and reasonable accommodation. However, this is either not necessary or not appropriate. As regards positive action, it is possible in theory to distinguish between direct and indirect positive action. However, the Court in its case law does not use such terminology. Furthermore, discrimination by association concerns a different element of the analysis of discrimination than do direct and indirect discrimination, namely the person affected by discrimination rather than the discrimination ground. Finally, reasonable accommodation concerns a specific right of a worker with a disability, rather than an unspecified right to comparatively equal treatment. The breach of the obligation to provide reasonable accommodation is best conceived of as a type of discrimination sui generis, which does not require a distinction between direct and indirect discrimination.

Finally, international human rights treaties often go further than merely prohibiting discrimination by obliging the Signatory States to actively engage in promoting equality and in changing their societies. This obligation is particularly important in the context of indirect discrimination which is often the result of structural problems in a given society and which, at the same time, often exposes and challenges these underlying structural causes. When applying prohibitions of indirect discrimination under EC law, the EU Member States should keep their international legal obligations in mind. Accordingly, they must do whatever they can to tackle not only indirectly discriminatory aspects of their national laws and to fight individual cases of indirect discrimination, but also to consider the broader background and act accordingly.

The author and the European network of legal experts in the non-discrimination field hope that this report will be able to contribute to the work of authorities, organisations and legal practioners working to fight discrimination throughout the European Union.

Introduction

What is indirect discrimination? Put simply, it relates to measures that appear to be unproblematic on their face but that, due to the circumstances in which they apply, nevertheless have a discriminatory effect on a particular group of people. In other words, such measures appear acceptable on an abstract level but are problematic on a concrete level. In contrast to direct discrimination, indirect discrimination is not readily obvious but rather implicit. An example: a job advertisement states that the future holder of the post in question must possess a driving licence. This does not appear problematic at first sight. However, blind people cannot obtain a driving licence, which means that this requirement excludes them from the post. Such a requirement may therefore amount to indirect discrimination on grounds of disability. Another example: under the law of a particular country there is a general obligation to perform military service. This will pose a problem for Jehovah's Witnesses who, for religious reasons, refuse to perform military service. Yet another example: in order to be allowed to immigrate to a particular country, applicants have to pass a so-called integration test. Practice shows that people with the nationality of certain countries (and hence with certain ethnic backgrounds) are far less likely to pass the test than others. In situations such as these, there will be indirect discrimination (in the above examples, on grounds of disability, religion, nationality or racial or ethnic origin) unless there is an objective justification for the measure in question, for example if the employer requiring a driving licence can show that the job can actually not be done without it.

As these examples show, the indirect nature of the discrimination relates to how a given measure is linked to a particular discrimination ground. Indirect discrimination is worse treatment of a person or a group of persons that in substance (though not in form) is based on a prohibited discrimination ground. In contrast to direct discrimination, indirect discrimination is only indirectly based on the prohibited ground. However, it is important to note that the indirect nature of the discrimination does not mean that its victims are in any way less affected. Indeed, an individual victim of indirect discrimination suffers just as much as a victim of direct discrimination. In both cases, rights and opportunities are prejudiced, and in both cases discrimination can have a significant negative impact on social and economic status, well-being and health (European handbook on equality data 2007:19). In spite of this, experience has shown that the concept of indirect discrimination is often not understood and sometimes not even accepted or acknowledged. Moreover, its application in practice presents a number of challenges.

Against this background, the present report aims to better explain the concept of indirect discrimination, in particular in the context of the Racial Equality Directive (Directive 2000/43/EC)[3] and the Employment Equality Directive (Directive 2000/78/EC).[4] Together with the sex equality Directives 2002/73/EC,[5] 2006/54/EC[6] (Recast Directive) and 2004/113/EC (Goods and Services Directive),[7] the Racial and Employment Equality Directives make up the most recent generation of EC social non-discrimination law, which distinguishes between four basic forms of discrimination, namely direct discrimination, indirect discrimination, harassment and the instruction to discriminate (see **Chart 4** in the annex to this report). Among these, the concepts of direct and indirect discrimination are closely

3 Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

4 Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

5 Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 2002 L 269/1.

6 Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23. This Directive is to be implemented into national law by 15 August 2008. It will replace, among others, Directive 2002/73/EC.

7 Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37.

related. Since both of them are relevant not only in EC social law but also in EC economic law, they are particularly important in the overall system of Community law. Today, legal definitions can be found in the new generation of EC social law directives previously mentioned. These definitions and their implications will be discussed in the present report.

However, at the time of submitting the present report (July 2008), there have not yet been any decisions by the Court of Justice on these definitions. So far, all cases about the interpretation of the Racial and Employment Equality Directives have concerned either direct discrimination (namely direct age discrimination in Mangold,[8] Palacios de la Villa[9] and the pending cases Kücükdeveci,[10] Age Concern England[11] and Wolf;[12] direct discrimination on grounds of disability in Chacón Navas[13] and Coleman;[14] direct discrimination on grounds of sexual orientation in Maruko[15] - though in this case indirect discrimination had been argued[16] - and, arguably, also in the pending case Römer;[17] and direct racial discrimination in Feryn)[18] or other issues (namely the effects of the general principle of equal treatment on grounds of age in Bartsch[19] and the reference date for a salary increment in the pending case Hütter[20]).

Given the lack of relevant case law under the Racial and Employment Equality Directives, the present report has had to rely strongly on case law from other areas, notably economic law on discrimination on grounds of nationality and sex equality law. Different types of discrimination have different backgrounds and, therefore, pose different problems (McCrudden 2005:17). Nevertheless, certain fundamental legal concepts of EC law are of a general nature and can be transposed from one area to another, at least as far as their basic aspects are concerned. This is also true for the concept of indirect discrimination. For that reason, case law from other areas of EC law is certainly relevant in the present context.

The report begins by briefly describing the place of the prohibition of indirect discrimination under international human rights law (below I.). The report then turns to the place of the context in the system of EC law (below II.). Thereafter, the definitions of indirect discrimination under the Racial and Employment Equality Directives are discussed (below III.), followed by the most important challenges that they present in practice (below IV.) and the relationship of the legal concept of indirect discrimination with other concepts of EC non-discrimination law (below V.). After this, a number of national case studies highlight selected issues concerning the definition as well as the application of the concept of indirect discrimination in the context of the national law of the Member States (below VI.).

8 Case C-144/04 Werner Mangold v Rüdiger Helm [2005] ECR 9981.

9 Case C-411/05 Félix Palacios de la Villa v Cortefiel Servicios SA, judgment of 16 October 2007 (n.y.r.).

10 Case C-555/07 Seda Kücükdeveci v Swedex GmbH & Co. KG, pending.

11 Case C-388/07 The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform, pending (opinion of AG Mazák of 23 September 2008).

12 Case C-229/08 Colin Wolf v Stadt Frankfurt am Main, pending.

13 Case C-13/05 Sonia Chacón Navas v Eurest Colectividades SA [2006] ECR I-6467.

14 Case C-303/06 S. Coleman v Attridge Law and Steve Law, judgment of 17 July 2008 (n.y.r.).

15 Case C-267/06 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen, judgment of 1 April 2008 (n.y.r.).

16 See further below V.1.

17 Case C-147/08 Jürgen Römer v Freie und Hansestadt Hamburg, pending.

18 Case C-54/07 Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV, judgment of 10 July 2008 (n.y.r.).

19 Case C-427/06 Brigit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH, judgment of 23 September 2008 (n.y.r.).

20 Case C-88/08 David Hütter v Technische Universität Graz, pending.

Marijke | *1953*

Part I

The broader context: indirect discrimination under international human rights law

The concept of indirect discrimination is not an invention of EC law but had precursors, among others, in early public international law (Tobler 2005a:89). This section of the report sets out briefly the meaning of indirect discrimination under a number of current international human rights legal instruments. It should not be forgotten that EC law is regional and it should be seen in context with, and against the background of, both global law and other, broader regional laws. The instruments discussed below include three specific Human Rights Conventions of the United Nations (namely the Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities; below 1.), as well the European Convention of Human Rights of the Council of Europe (below 2.). A final section addresses the obligation of social engineering and its meaning in the context of indirect discrimination (below 3.).

1. Indirect discrimination under specific UN Conventions

1.1 The Convention on the Elimination of Racial Discrimination (CERD)

The oldest of the three UN Conventions to be mentioned in the present context is the Convention on the Elimination of Racial Discrimination (CERD)[21] of 1965. It defines racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life' (Art. 1, emphasis added). Given that indirect discrimination is an effects-based concept, it must be concluded that the above definition includes a prohibition not only of direct but also of indirect discrimination. This is indeed confirmed by the Committee supervising the CERD, which describes indirect discrimination as relating to 'measures which are not discriminatory at face value but are discriminatory in fact and effect'[22] (Schiek 2007:340).

1.2 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

A similar picture emerges in the context of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[23] of 1979 (Schiek 2007:340). This Convention defines discrimination against women as 'any distinction, exclusion, restriction or preference made on the basis of sex, which has the *effect* or purpose of impairing of nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field' (Art. 1, emphasis added). Again, the reference to the effect of a given measure shows that indirect discrimination is included in this definition. According to the Committee supervising the CEDAW,[24] indirect discrimination against women 'may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women'. In its further explanations, the Committee points to the often structural causes of indirect discrimination: 'Gender-neutral laws, policies and programmes unintentionally may perpetuate the consequences of past discrimination. They may be inadvertently modelled on male lifestyles and thus fail to take into account aspects of women's life experiences which may differ

[21] See *http://www.unhcr.ch/html/menu3/b/d_icerd.htm*

[22] L.R. et al. v. Slowakia; Communication No. 31/2003, para. 10.4, U.N. Doc. CERD/C/66/D/31/2003 (2005).

[23] See *http://www.un.org/womenwatch/daw/*

[24] General recommendation No. 25, on Article 4 paragraph 1, temporary special measures, p. 9, note 1. The text of the CEDAW Committee's general recommendations is available on the internet, at *http://www.un.org/womenwatch/daw/cedaw/recommendations/*

from those of men. These differences may exist because of stereotypical expectations, attitudes and behaviour directed towards women, which are based on the biological differences between women and men. They may also exist because of the generally existing subordination of women by men.'

1.3 The Convention on the Rights of Persons with Disabilities (CRPD)

The Convention on the Rights of Persons with Disabilities (CRPD)[25] of 2006 is the most recent United Nations Convention specifically on human rights. It entered into force on 3 May 2008. So far (July 2008), there are only a small number of European states that have ratified the Convention,[26] but this number is expected to increase with time. The Convention defines discrimination against persons with disabilities as 'any distinction, exclusion or restriction on the basis of disability which has the purpose *or effect* of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field' and specifies that this 'includes all forms of discrimination, including denial of reasonable accommodation' (Art. 2, emphasis added). This resembles strongly the definition given in General Comment No. 5 on the International Covenant on Economic, Social and Cultural Rights.[27] In that document, express reference is made to both 'de jure and de facto discrimination against persons with disabilities'. Again, it must be concluded from the reference to the effect of a measure that indirect discrimination is included in the prohibition.

2. The European Convention on Human Rights (ECHR)

The European Convention on Human Rights (ECHR)[28] of 1950 is of particular importance for the European Union because of Art. 6(2) of the Treaty on European Union (EU). Through this article, the provisions of the ECHR become directly relevant in the framework of EU and EC law.[29] As in EC law,[30] discrimination under the ECHR can consist in the different treatment of persons in comparable situations as well as in the same treatment of persons in non-comparable situations (Thilemmenos).[31] However, in contrast to the specific UN Human Rights Conventions mentioned above, the ECHR does not include a definition of the concept of discrimination but just a prohibition of discrimination. Art. 14 of the Convention states: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' However, this provision does not provide for a general and free-standing right to equality outside the context of the Convention. Only Protocol No. 12 to the ECHR, for those states that have ratified it, granted this.[32]

25 See *http://www.un.org/disabilities/default.asp?navid=12&pid=150*

26 For the state of ratification, see *http://www.un.org/disabilities/default.asp?id=257*

27 CESCR General comment 5, Persons with Disabilities, text available at *http://www.unhchr.ch/tbs/doc.nsf/0/4b0c449a9ab4ff72c12563ed0054f17d*. On indirect discrimination under the International Covenant on Economic, Social and Cultural Rights as well as under the International Covenant on Civil and Political Rights, see Schiek (2007:336 et seq.). More generally on international and regional human rights law and equality, see De Schutter (2005) and McCrudden/Kountouros (2007:78). Generally on equality and human rights see e.g. Morawa (2003).

28 See *http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG*

29 See further below II.1.

30 See below II.2.

31 Thlimmenos v Greece, 6 April 2000, Rep. 2000-IV. - The present writers agrees with Bell (2007:189), according to whom Thlimmenos is not a case about indirect discrimination but rather about the failure to treat differently persons in different situations; see also Henrard (2008:245). Bell reacted to De Schutter (2005:16, 45 and 52) who puts Thlimmenos in the context of indirect discrimination.

32 See *http://www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm*

According to Art. 1 of the Protocol, '[t]he enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1'.

In contrast to the specific UN Human Rights Conventions mentioned above, and also in contrast to EC law, both Art. 14 ECHR and Art. 1 of Protocol No. 12 provide an open-ended list of relevant discrimination criteria. The concept of indirect discrimination would hence not appear necessary in order to bring cases within the field of application of the prohibition. However, it is relevant because under the ECHR - in contrast to EC law - different levels of scrutiny apply in relation to different discrimination grounds. According to the case law of the Court of Human Rights, 'very weighty reasons' must be present to justify different treatment on grounds of sex, birth, nationality and sexual orientation, but not in other cases (Gerards 2007:33, Gerards 2005:199, Gerards 2004, also Martin 2006:270). Against this background, it may be vital to be able to bring a case under a prohibition to which a high level of scrutiny applies, and the concept of indirect discrimination may be instrumental in this context.

For a long time, the attitude of the European Court of Human Rights to indirect discrimination was rather hesitant, even though the references to an effects-based approach to discrimination could be found early on in its case law (e.g. Marckx,[33] Hugh Jordan[34]). However, it is only in much more recent case law that the Court explicitly referred to indirect discrimination. In Hoogendijk v. The Netherlands[35] the Court stated that 'where an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult to prove indirect discrimination.' The case concerned a disability allowance under Dutch law that was granted only if the earnings of the applicant or of a family member who were obliged to contribute to the applicant's maintenance remained below a certain level. The Court found indirect sex discrimination, based on the fact that the second condition (income of a family member) resulted in more women than men losing the benefit.[36]

Indirect discrimination was also at the centre of D.H. and others v. Czech Republic (also called the 'Ostrava case'), in which racial discrimination to the prejudice of Roma children was argued. Following a Chamber judgment of December 2006,[37] the case was referred to the Grand Chamber of the Court, which gave its ruling in November 2007.[38] In this judgment, the Grand Chamber reiterated that 'a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group' (para. 175 of the judgment). The Grand Chamber made express references to General policy recommendation no. 7 of the European Commission Against Racism and Intolerance (ECRI) of 13 December 2002 as well as to EC law. It explained that 'a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group […]. In accordance with, for instance, Council Directives 97/80/EC[39] and 2000/43/EC […] and the definition provided by ECRI

33 Marckx v. Belgium, 13 June 1979, Publ. ECHR Series A Volume 31.

34 Hugh Jordan v. UK, 4 May 2001, application number 24746/94.

35 Hoogendijk v. The Netherlands, 6 January 2005, 40 EHRR SE 22. The national legislation at issue in this case had an EC law background.

36 In academic writing, Hoogendijk is sometimes seen as the first real indirect discrimination judgment of the ECHR; Hendriks 2005.

37 D.H. and others v. Czech Republic, 7 December 2006, application number 57325/00, see also below IV.2.2.6.

38 D.H. and others v. Czech Republic, 13 November 2007, application number 57325/00.

39 Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ L 14/6, of 20/1/1998.

[…] such a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent' (para. 184). The ECRI recommendation[40] contains definitions of both direct and indirect racial discrimination, which are modelled on EC law. According to the Recommendation, the term 'indirect racial discrimination' refers to 'cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised'. In D.H. and others v. Czech Republic, the Grand Chamber of the Court found indirect racial discrimination based on the fact that the percentage of Roma children placed in special schools in the Czech Republic was much higher than that of other children.

3. The obligation of social engineering under international Human Rights Law

International human rights law recognises that the causes of discrimination are often of a structural nature. Thus, some Conventions explicitly oblige the States Parties to engage in what is called 'social engineering'. Under Art. 8(1) CRPD the States Parties to the Convention undertake 'to adopt immediate, effective and appropriate measures: a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities; b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life; c) To promote awareness of the capabilities and contributions of persons with disabilities.' Similarly, under Art. 5(a) CEDAW the States Parties are obliged to take all appropriate measures 'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women' (see Holtmaat 2004). Finally, Art. 7 CERD provides: 'States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups […].'

Such provisions are nothing more than the logical consequence of the prohibition of all forms of discrimination including, in particular, indirect discrimination. If the latter exposes structural problems in a particular society,[41] it is not enough to prohibit such discrimination and to make amends in individual cases. Rather, it is imperative that the underlying causes are tackled, and that this is done in a comprehensive manner.

[40] ECRI General recommendation N°7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002; text available at *http://www.coe.int/t/e/human_rights/ecri/1-ECRI/3-General_themes/1-Policy_Recommendations/Recommendation_N7/3-Recommendation_7.asp*

[41] See below II.5.

Nikki | *2001*

Part II

Indirect discrimination in the system of EC law

EC non-discrimination law is a complex area with various different layers. In order to describe the place of indirect discrimination in this system, the subsequent section of the report begins by giving an overview of EC legal provisions in whose context indirect discrimination may be relevant (below 1.). It then explains what the term 'discrimination' generally means under EC law (below 2.) and how indirect discrimination fits in this system (below 3.). Thereafter, the origins of the legal concept of indirect discrimination in EC law are briefly described (below 4.) and its functions are explained (below 5.). Finally, there are some brief remarks about indirect discrimination under EU law following the Lisbon Treaty (below 6.).

1. Equality and non-discrimination provisions in EC law

The fact that indirect discrimination concerns the connection between a given measure and a prohibited discrimination ground means that the concept of indirect discrimination is relevant only in the context of non-discrimination provisions that focus on discrimination grounds, i.e. provisions that prohibit discrimination in relation to a specific issue, such as age, sexual orientation or disability.[42] Both the EC Treaty and the secondary law derived from it contain numerous provisions of this kind. Accordingly, the range of provisions and subject matters where indirect discrimination may be relevant is extraordinarily wide, as the following overview will show.

Only one type of discrimination is prohibited in all areas of EC law, namely discrimination on grounds of nationality of an EU Member State. This prohibition can be found both on the level of the Treaty (in particular in Art. 12 EC, which applies in all areas of EC law where there is no specific provision on discrimination on grounds of nationality, such as Art. 39 EC on the free movement for workers) as well as in numerous regulations and directives fleshing out the Treaty provisions (including for example Regulation 1612/68/EEC[43] and Regulation 1408/71/EEC,[44] both of which also relate to the free movement of persons). Directive 2003/109/EC[45] on long-term resident third country nationals extends the prohibition of discrimination on grounds of nationality to certain nationals from non-EU Member States in particular fields.

In addition to discrimination on grounds of nationality, EC law prohibits several other types of discrimination, though only in specific and limited contexts.[46] In EC social law, the most important types are discrimination on grounds of sex (prohibited under Art. 141(1) and (2) EC and various directives), racial or ethnic origin (prohibited under the Racial Equality Directive), religion or belief, disability, age and sexual orientation (prohibited under the Employment Equality Directive),[47] part-time work (prohibited under the Part-Time Work Directive),[48] and fixed-

42 Not all non-discrimination provisions of EC law do. For example, Art. 34 EC simply provides that common market organisations in EC agricultural law 'shall exclude any discrimination between producers and consumers within the Community', without specifying any ground for such discrimination.

43 Regulation 1612/68/EEC on freedom of movement for workers within the Community, OJ English Special Edition 1968 L 257/2, p. 475 (as amended).

44 Regulation 1408/71/EEC on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ English Special Edition 1971(II) L 149/2, p. 416 (as amended). This Regulation is to be replaced by Regulation 883/2004 on the coordination of social security systems, OJ 2004 L 166/1.

45 Art. 11 of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44.

46 See further below IV.1.

47 Regarding disability, there is also Regulation 1107/2006/EC concerning the rights of disabled persons and persons with reduced mobility when travelling by air, OJ 2006 L 204/1. The Regulation in particular contains provisions about the prevention of refusal of carriage (Arts. 3 and 4) and on the right to assistance at airports (Art. 7 et seq.). According to Art. 1(1), the Regulation aims to protect disabled persons and persons with reduced mobility against discrimination.

48 Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ 1998 L 14/9 (as amended).

term work (prohibited under the Fixed-Term Work Directive).[49] Besides such specific non-discrimination legislation, there are also directives and regulations that relate to other issues but contain non-discrimination clauses (e.g. Art. 3e(1)(c)(ii) of the Audiovisual without Frontiers Directive,[50] Art. 1d of the EU Staff Regulations[51] and Art. 16 of the general Regulation on the Structural Funds).[52] Further, non-discrimination plays a role in the EC's external relations law where there is a Regulation about the promotion of gender equality[53] and where discrimination on grounds of nationality is prohibited in various agreements concluded by the EC with third countries (for instance the multilateral European Economic Area Agreement and bilateral Agreements with specific countries such as Turkey, Morocco, Algeria, Tunesia, Switzerland and Russia). Non-discrimination is also mentioned in the preambles of some recent directives, where it is stated that the provisions of the directives have to be applied without discrimination on various grounds (e.g. the Directive on movement and residence of EU citizens,[54] and the Directive on long-term residents from third countries).[55]

Equality and non-discrimination provisions can also be found on the overarching level of European Union human rights law. According to Art. 6(2) EU, the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms – which includes the prohibition of discrimination in Art. 14, as already mentioned[56] - must be respected by the European Union (and hence also by the European Community as the EU's most important sub-part) as general principles of EC law. Respect for the general principles is a condition for the legality of any EC act, and the Member States are obliged to respect the general principles whenever they act within scope of EC law (Tridimas 2006:29, Schiek/Waddington/Bell 2005:2). Further, in 2000 the European Union adopted its own Charter of Fundamental Rights[57] which contains a specific provision on equality between men and women (Art. 23), a general provision about equality before the law (Art. 20) and a general provision which refers to discrimination on grounds of nationality as well as to 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation' (Art. 21). However, at present the Charter of Fundamental Rights is not binding on the Member States (this would change with the entry into force of the Lisbon Treaty).[58]

49 Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ 1999 L 175/43 (as corrected).

50 Directive 89/552/EEC on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ 1989 L 298/23, as amended on several occasions, in particular in 2007 in order to include audivisual media services.

51 Regulation 259/68/EEC, Euratom, ECSC laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, OJ 1968 L 56/1, Special Edition 1968, 1 December 1972 (as amended; consolidated version: *http://www.europa.eu.int/comm/dgs/personnel_administration/statut/tocen100.pdf)*

52 Art. 16 of Regulation 1083/2006/EC laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, OJ 2006 L 210/25.

53 Regulation 806/2004/EC on promoting gender equality in development cooperation, OJ 2004 L 143/40. Note also that some agreements between the European Community and certain third countries (like Turkey, Morocco or Tunisia) include non-discrimination clauses in social law, including on the rights of migrant workers and their families who are nationals of those third countries.

54 Recital 31 in the preamble to Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158/77.

55 Recital 5 in the preamble to the Directive.

56 See above I.2.

57 Charter of fundamental rights of the European Union, OJ 2000 C 364/01, re-enacted in 2007, OJ 2007 C 303/1.

58 See below II.6.

According to the Court's case law, all specific equality and non-discrimination provisions of EC law are merely particular expressions of general principles that underlie EC law (e.g. the general principles of equal treatment on grounds of sex, as recognised in Defrenne III,[59] and on grounds of age, as recognised in Mangold). Specific provisions are necessary for individuals to be able to rely on their rights vis-à-vis a Member State or vis-à-vis other individuals. The existence of a general principle alone is not sufficient for these purposes (Defrenne III). However, it should be added that after the Court's judgment in the much-debated Mangold case, there is some uncertainty as to the precise effect of the general legal principles of EC law[60] (e.g. McCrudden/Kountouros 2007:89; Tobler 2007a; Polloczek 2007:119). More recently, the Court's decision in the Bartsch case confirmed that the Member States when applying EC law are bound by its general principles (e.g. when they implement a directive).[61]

2. What does 'discrimination' generally mean in EC law?

Before the adoption of the Racial Equality and Employment Equality Directives, there were no encompassing legislative definitions of what the term 'discrimination' means in EC law.[62] However, certain indications could be found in case law of the Court of Justice early on, and can still be found. Under this case law, 'discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations' (e.g. Rieser,[63] para. 39). This broad definition mirrors the general principle of non-discrimination or equal treatment (which, according to the Court, 'are simply two labels for a single general principle of Community law, which prohibits both treating similar situations differently and treating different situations in the same way unless there are objective reasons for such treatment'; Europe Chemi-Con,[64] para. 33). This general principle, which is sometimes also called the 'general principle of equality', underpins the whole of EC law. Put in positive terms, it requires that which is like (comparable) be treated alike whereas that which is different be treated differently according to the degree of difference, unless there is objective justification (e.g. Nuova Agricast,[65] para. 66).

3. How does indirect discrimination fit into this system?

The case law of the Court of Justice shows that in EC economic law discrimination may indeed take both forms mentioned in the previous section, i.e. unequal treatment of comparable situations and equal treatment of different situations. The case law further indicates that discrimination through same treatment may be either direct

59 Case 149/77 Gabrielle Defrenne v SABENA [1978]ECR 1365 (Defrenne III).

60 See also Case C-164/07 James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions, judgment of 5 June 2008 (n.y.r.). In this case, the Court appears to base its answer on the general principle of non-discrimination in relation to nationality, rather than on Art. 12 EC, to which the national court's question related.

61 See also the opinion of AG Sharpston of 22 May 2008. – Bartsch concerned a a company regulation under which there is no entitlement to an occupational survivor's pension if the survivor is more than 15 years younger than his or her deceased spouse. The Cort held that Art. 13 EC (which does not specifically mention pensions) is not capable of creating a link of such treatment with Community law, and neither is the Employment Equality Directive during the period for its implementation.

62 In the field of sex equality law, the Burden of Proof Directive (Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ 1998 L 14/6) first introduced a legal definition of indirect discrimination, but not of direct discrimination and neither of harassment which concept was introduced in EC sex equality law only through Directive 2002/73/EC.

63 Case C-157/02 Rieser Internationale Transporte GmbH v Autobahnen- und Schnellstraßen-Finanzierungs- AG (Asfinag) [2004] ECR I-1477.

64 Case C-422/02 P Europe Chemi-Con (Deutschland) GmbH v Council and Commission [2005] ECR I-791.

65 Case C-390/06 Nuova Agricast Srl v Ministero delle Attività Produttive, judgment of 15 April 2008 (n.y.r.).

or indirect (though actual findings are rare),[66] as can discrimination through different treatment (of which there are numerous examples). Conversely, in the case law on EC social law the concepts of direct and indirect discrimination have, at least so far, invariably been linked to unequal treatment of comparable situations. This can be explained by the fact that the stated aim of EC social non-discrimination law has traditionally been to achieve equal treatment understood as the same treatment of persons in comparable situations. Accordingly, discrimination has traditionally been understood as the different treatment of such persons. Only exceptionally is different treatment allowed (e.g. on the basis of occupational requirements under Art. 4 of the Racial and Employment Equality Directives; see also **Chart 6** in the annex to this report).

Against this background, it may be concluded that for the purposes of EC social law the concept of indirect discrimination relates first and foremost to different treatment of comparable situations. It should perhaps be added that under the Court's case law different treatment may result from what at first sight might appear to be same treatment, such as through the application of a single requirement that is imposed indiscriminately to different groups of people. For example, in the early landmark case on indirect discrimination on grounds of nationality, Sotgiu,[67] workers employed away from their place of residence were entitled to a higher allowance if they had lived in Germany at the time of their initial employment. Thus, residence in Germany at the initial time of employment was a single requirement or criterion, which, however, at the same time distinguished between those who had indeed resided in Germany at the material time and those who had not. The Court in Sotgiu explicitly referred to 'criteria of differentiation' and found that the residence requirement resulted in a differentiation according to nationality. In Schönheit and Becker[68] (para. 67), the Court generally described indirect sex discrimination as 'the application of provisions which maintain *different* treatment between men and women at work as a result of the application of criteria not based on sex' (emphasis added).

As far as economic law is concerned, it should be added that Art. 39 EC (free movement for workers), Art. 49 and 50 EC (free movement of services) and Art. 56(1) EC (free movement of capital) prohibit not only discrimination on grounds of nationality but also non-discriminatory restrictions, i.e. any measure that, 'even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty' (Kraus, para. 32).[69] In this specific context and because of certain similarities of the two concepts, the prohibitions of indirect discrimination and of restrictions compete with each other (Tobler 2005a:371). However, this is not the subject of the present report.[70]

Finally, in order to differentiate between different types of provisions in EC social law, it may be useful to distinguish between provisions that prohibit discrimination within the traditional sense just mentioned (i.e. discrimination understood as comparatively unequal treatment without defining the level of treatment to be accorded) and

66 For a recent example of direct discrimination, see Case C-442/04 Spain v Commission, judgment of 15 May 2008 (n.y.r.), concerning agricultural law; for a case that according to Advocate General Stix-Hackl involves indirect discrimination, see Case C-400/02 Gerard Merida v Germany [2004] ECR I-8471, concerning the free movement for-workers; Tobler 2005a:220.

67 Case 152/73 Giovanni Maria Sotgiu v Deutsche Bundespost [1974] ECR 153.

68 Joined Cases C-4/02 and 5/02 Hilde Schönheit v Stadt Frankfurt am Main and Silvia Becker v Land Hessen [2003] ECR I-12575.

69 Case C-19/92 Dieter Kraus v Land Baden-Württemberg [1993] ECR I-1663.

70 Although a certain parallel may be found in the specific context of part-time work where the relevant directive prohibits not only discrimination on grounds of part-time work (Clause 4 of the annex to the Part-Time Work Directive) but also obliges the Member States to 'identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them' (Clause 5(1)(a) of the annex); see Joined Cases C-55/07 and 56/07 Othmar Michaeler, Subito GmbH and Ruth Volgger v Amt für sozialen Arbeitsschutz, Autonome Provinz Bozen, judgment of 24 April 2008 (n.y.r.).

Heinrich | *1969*

provisions that prescribe a certain, specific result independent of the comparability of situations (see also **Charts 1** and **6** in the annex to this report). Examples of the latter are the right of pregnant women and recent mothers to at least 14 weeks of maternity leave (Art. 8 of the Maternity Directive)[71] and the right of persons with a disability to reasonable accommodation in the workplace (Art. 5 of the Employment Equality Directive).[72] Strictly speaking, the terms 'direct' and 'indirect discrimination' are neither necessary nor useful in this context. A breach of the obligations imposed by such provisions is simply that: a breach of a positive obligation, which does not need any further and specific label. At the same time, it is undisputable that such obligations play an important part in the system of non-discrimination law and that their breach has discriminatory effects. It may therefore be best to term such breaches discrimination sui generis, and to avoid calling them 'direct' or 'indirect'. Similarly, the distinction between direct and indirect discrimination would appear to be irrelevant in the context of the other two forms of discrimination expressly labelled as such in Art. 2 of the Racial and Employment Equality Directives, namely harassment and the instruction to discriminate. Both of them are not based on the comparability of situations (see again **Chart 1** in the annex to this report). Neither does the distinction seem relevant in the context of victimisation, defined in the Racial Equality and Employment Equality Directives as 'adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment' (Arts. 9 and 11, respectively).

4. Origins of the concept of indirect discrimination under EC law

How did the concept of indirect discrimination enter the legal order of the European Community? In spite of their obvious importance, the terms 'direct discrimination' and 'indirect discrimination' do not appear in the text of the EC Treaty (which is the basic text of the European Community), and neither do they appear in the EU Treaty (which is the basic text of the European Union, of which the EC is the most important subpart). Rather, the distinction between these concepts was developed by the Court of Justice through its interpretation of EC legal provisions, among them in particular the prohibition of discrimination on grounds of nationality under what is today (i.e. after the renumbering of the Treaty provisions following the Treaty revision of Amsterdam) Art. 39 EC, on free movement for workers (Ugliola,[73] Sotgiu), and the prohibition of discrimination on grounds of sex under the Communities' Staff Law (Sabbatini)[74] and under what is today Art. 141(1) EC, on equal pay for men and women (Jenkins,[75] Bilka).[76] Today, the Court's case law-based definitions of direct and indirect discrimination remain essential in areas where there are no legal definitions, i.e. most notably in EC economic law.

The concept of indirect discrimination is not an original invention of the European Community. There were precursors both in early public international law and in certain national legal orders (USA, UK, Ireland). The latter in particular appear to have influenced EC law (Tobler 2005a:94, 96, 144). This caused Schiek (2008:360) to call the concept of indirect discrimination a transplant from common law systems into the civil law systems of the European continent. Of these precursors, a landmark case of US American law is particularly illustrative. Griggs v. Duke Power Co.,[77] decided by the US Supreme Court in 1971, concerned racial discrimination. The plaintiffs challenged the requirement of a high school diploma or the passing of intelligence tests as a condition for employment in, or

71 Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ 1992 L 348/1.

72 On reasonable accommodation, see further below V.5.

73 Case 15/69 Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola [1969] ECR 363.

74 Case 20/71 Luisa Sabbatini, née Bertoni, v European Parliament [1972] ECR 345.

75 Case 96/80 J.P. Jenkins v Kinsgate (Clothing Productions) Ltd [1981] ECR 911.

76 Case 170/84 Bilka-Kaufhaus GmbH v Karin Weber von Hartz [1986] ECR 1607.

77 Griggs v. Duke Power Co., 401 U.S. 424 (1971).

transfer to, jobs at the Duke Power Company plant. Since these requirements were not directed at measuring the ability to learn to perform a job, they were found to be unlawful under the Civil Rights Act 1964 by the Supreme Court, even though the contested rule was formally neutral in terms of race. Writing for the Court, Chief Justice Burger explained that the legislator did not intend 'to provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox', but rather that 'the vessel in which the milk is proffered by one all seekers can use. The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation.' In this passage, the reference to the stork and the fox refers to a fable by Aesop (who lived in the sixth century BC) about a fox that invites a crane to dinner and serves soup in a shallow dish, making it impossible for the guest to eat. When the crane invites the fox for dinner in return, the fox finds the food served in a tall jar with a narrow neck. The crane became a stork - and thus an animal with an even longer beak - in later versions of the fable. The fable captures well the meaning of indirect discrimination.

5. Functions of the concept of indirect discrimination under EC law

The function of the concept of indirect discrimination under EC law can be said to be twofold. First, the Court of Justice developed this concept with the aim of enhancing the effectiveness of the prohibition of discrimination. As the Court explained in an early landmark case on indirect discrimination on grounds of nationality, the inclusion of indirect (or covert) discrimination 'is necessary to ensure the effective working of one of the fundamental principles of the Community', meaning in the specific context of this case the free movement of workers and the prohibition of discrimination on grounds of nationality laid down in what is today Art. 39(2) EC (Sotgiu, para. 11). In this context, the maxim that 'substance prevails over form' expresses the essence of the concept of indirect discrimination (Tobler 2005a:114). As far as effectiveness of non-discrimination law goes, the concept of indirect discrimination is of particular importance in legal systems such as EC law which are based on a exhaustive list of the types of discrimination that are prohibited. In such a system, where the list of relevant types of discrimination is limited, the concept of indirect discrimination is an important tool for bringing a case involving a ground for differentiation that is not explicitly prohibited within the application field of EC law (Gerards 2005:13, Tobler 2005a:50). The concept is somewhat less important in legal contexts with open-ended non-discrimination provisions, such as international Human Rights Conventions. Nevertheless and as already noted,[78] even here the concept has a role to play, in particular where a legal system provides for different levels of scrutiny in the context of different types of discrimination.

Second, the concept of indirect discrimination can be seen as a tool to make visible and challenge the underlying causes of discrimination, which are often of a structural nature (i.e. caused by for instance prejudices, practices based on the idea of the inferiority or the superiority of particular groups of people and stereotyped roles; Loenen 1999:199). For example, in Jenkins, (para. 13), which concerned part-time workers, the Court expressly acknowledged the difficulties of (some) female workers to engage in full-time work. Accordingly, where worse treatment of part-time workers disparately impacts on women, the concept of indirect sex discrimination exposes the unequal division within the family between men and women of house and care work. In this manner, it helps to dismantle underlying power structures (Gijzen 2006:82) as well as to identify areas where further action is needed in order to achieve true equality, e.g. social engineering (Schiek 2007:327).[79]

[78] See above I.2.

[79] See above I.3.

6. Indirect discrimination under the Lisbon Treaty

When talking about the place of the concept of indirect discrimination within the EC legal system, a word should be said about EU law following the Lisbon Treaty.[80] On 13 December 2007, the EU Member States signed in Lisbon a Treaty intended to revise the present EU and Community Treaties (the 'Lisbon Treaty').[81] This Treaty can only enter into force once all 27 Member States of the EU have ratified it. At the time of writing, ratification is ongoing,[82] though it remains to be seen how far the negative popular vote in Ireland on 12 June 2008 will be a stumbling block.

If ratified by all Member States, the Lisbon Treaty will fundamentally change the structure of the EU. Perhaps most importantly for present purposes, the European Community will no longer exist. It will be incorporated in, and succeeded by, the European Union. For that reason, it will no longer be possible to speak about 'EC non-discrimination law', but only about 'EU non-discrimination law'. What is at present called the 'EC Treaty' will become – after amendments – the 'Treaty on the Functioning of the European Union' (TFEU). This Treaty will continue to contain all non-discrimination provisions mentioned earlier, though differently numbered. In addition, the TFEU will contain a provision that obliges the Union, when defining and implementing its policies and activities, to aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Art. 10 TFEU). Further, what is at present a (for the Member States) non-binding Charter of Fundamental Rights of European Union will, in a re-enacted form[83] and accompanied by a Protocol on its application,[84] have the same legal effect as the EU Treaty (TEU) and the TFEU (Art. 6(1) TEU). In this way, the equality and non-discrimination provisions of the Charter will become binding on the Member States, though 'only when they are implementing Union law', i.e. only within the limited scope of EU law (Art. 51(1) of the Charter). One major consequence of this will be the existence of EU non-discrimination law that is not based on a closed list of discrimination grounds, but rather is openly worded ('any discrimination based on any ground such as …', Art. 21 of the Charter), similar to Art. 14 ECHR. Further, the revised EU Treaty provides that the European Union will access to the ECHR and provides the legal basis for such accession (Art. 6(2) TEU).[85] As for the concept of indirect discrimination, it will continue to be absent from the text of the revised Treaties. As now, it will, depending on the area of law, continue to be based on explicit secondary legal provisions or on the Court of Justice's case law.

80 Generally on this revision, see e.g. Craig 2008 and Dougan 2008.

81 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ 2007 C 306 (consolidated versions of the Treaties as resulting from the revision: OJ 2008 C 115).

82 For the state of ratification, see *http://europa.eu/lisbon_treaty/countries/index_en.htm*

83 OJ 2007 C 303/1.

84 OJ 2007 C 306/156.

85 Regarding the effect of accession to the ECHR to the EC equality acquis, see McCrudden/Kountouros 2007:107.

Maaike | *1979*

Part III

The definition of indirect discrimination under the racial equality and employment equality directives

The present report now turns to the specific meaning of the concept of indirect discrimination under the Racial and Employment Equality Directives. In this section, the elements making up the definition of indirect discrimination are listed and explained. Particular challenges imposed by the practical application of the concept of indirect discrimination will be discussed in the next part.

1. Wording and main elements of the definitions

As a starting point, the legal definitions of indirect discrimination under the two Directives should be recalled. These definitions were largely modelled on the case law-based definition of indirect discrimination that was developed by the Court of Justice in the context of the EC law on free movement. In the landmark case O'Flynn[86] (para. 20), which concerned national legislation falling within the field of application of the EC rules on free movement for workers, the Court stated that:

> 'unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage'.

The legal definitions of indirect discrimination in the Racial and Employment Equality Directives take up the elements of this case law-based definition. According to Art. 2(2)(b) of the Racial Equality Directive,

> 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

The wording of the corresponding definition in the Employment Equality Directive is somewhat more complex, due, first, to the relevance of several different discrimination criteria, and, second, to an additional part concerning reasonable accommodation.[87] Art. 2(2)(b) provides that:

> 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
> (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
> (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.'

[86] Case C-237/94 John O'Flynn v Adjudication Officer [1996] ECR I-2617.

[87] Concerning reasonable accommodation, see below V.5.

The use of the words 'provision, criterion or practice' in the above definitions means that the legal concept of indirect discrimination relates to measures in the broadest meaning of the word (Fredman 2002:108, Connolly 2006:134, Makkonen 2007:33). Within this framework, the concept is characterised by two basic elements, one relating to the nature of the prohibited measure (i.e. the effects-based nature of the concept) and one to the legitimacy of any justification (i.e. objective justification or what in EC law is sometimes called the 'rule of reason'). Their meaning can be summarised as follows (Tobler 2005a:211; see also **Chart 5** in the annex to this report):

i) Indirect nature of the discrimination:
a) The existence of a formally neutral measure, that is, a measure or practice that does not directly and obviously rely on a forbidden discriminatory ground;
b) A disparate impact resulting from the measure in the sense of an expressly prohibited ground, that is, the measure is only apparently neutral since, in practice, it causes a disadvantage for a group that is protected by a particular non-discrimination provision;

ii) Absence of objective justification:
a) Reliance on a legitimate aim which is independent of the prohibited criterion, that is, the measure must have a legitimate, non-discriminatory aim;
b) Proportionality of the measure in that context, that is:
aa) The measure is appropriate (suitable) in the context of the legitimate aim;
bb) The measure is necessary (requisite) in that context.

2. An effects-based concept: detrimental effect

The most characteristic element of the concept of indirect discrimination is that it focuses on the detrimental effect of a measure, rather than on its outward appearance. The concept as defined in the Racial and Employment Equality Directives requires that an apparently neutral measure would put persons belonging to a protected group at a particular disadvantage as compared with other persons. In a concrete case, the burden of proof for such an effect lies with the applicant (Art. 8(1) of the Racial Equality Directive, Art. 10(1) of the Employment Equality Directive).

2.1 A formally neutral provision, criterion or practice

The starting point for a finding of indirect discrimination is a measure – i.e. a 'provision, criterion or practice' - the basis of which is different from a prohibited discrimination criterion. For example[88]:

- In a context where discrimination on grounds of nationality is prohibited, a requirement relating to residence is applied, e.g. the requirement that a person is habitually resident in the Member State in question in order to qualify for job seeker's allowance (as in the case of Collins);[89]
- In a context where discrimination on grounds of sex is prohibited, a requirement relating to working time is applied, e.g. the requirement that the employees of a company must have worked fulltime for a certain number of years in order to qualify for a salary benefit (as in the landmark Bilka case);
- In a context where discrimination on grounds of race is prohibited, a requirement relating to shaving is applied; e.g. the employees of a company must be clean-shaven;
- In a context where discrimination on grounds of religion is prohibited, a requirement relating to clothing is applied, e.g. the requirement that the employees of a company must not wear any headgear;

[88] In the following, concrete examples from the Court of Justice's case law are mentioned where such examples exist. To this date (July 2008), this is only the case in relation to discrimination on grounds of nationality and on grounds of sex.

[89] Case C-138/02 Brian Francis Collins v Secretary of State for Work and Pensions [2004] ECR I-2703.

- In a context where discrimination on grounds of disability is prohibited, a requirement relating to the donating of blood is applied, e.g. the requirement that all employees of a company must regularly donate blood;
- In a context where discrimination on grounds of age is prohibited, a requirement relating to seniority is applied, e.g. the requirement that the applicant for a particular job has at least 20 years of experience in the relevant field;
- In a context where discrimination on grounds of sexual orientation is prohibited, a requirement relating to the place where a seminar is held is applied; e.g. the requirement that certain employees of a company attend a seminar that is held in a particular country.

In all of these cases, the ground relied on is formally different from the ground mentioned in the law. However, depending on the circumstances, such measures as listed above may lead to apparent indirect discrimination. That is the case if the measure has, actually or potentially, a detrimental effect on people belonging to a protected group (also called 'disparate effect'). In such a case, the measure in question is only apparently neutral.

2.2 Only apparent neutrality: detrimental effect or disparate impact

Whether or not a measure is only apparently neutral depends on the context – both legal and factual - in which it is applied. Only if in spite of its neutral appearance it has a detrimental effect on one group as compared to the effect that it has on another group, can a measure amount to indirect discrimination. This may be illustrated by using, again, the examples listed in the previous section, though here in the reverse order:

- The requirement that certain employees attend a seminar that is held in a particular country is problematic if this is a country where homosexuality is illegal. In such a context, the requirement disadvantages the homosexual members of the staff, since they are at risk in such a country. The requirement therefore raises the presumption of indirect discrimination on grounds of sexual orientation;
- The requirement that the applicant for a particular job has at least 20 years of experience in the relevant field disadvantages (among others)[90] young people, since they have not yet had the time to accumulate experience of that length of time. The requirement therefore raises the presumption of indirect discrimination on grounds of age;
- The requirement that all employees must regularly donate blood disadvantages people with disabilities resulting from illnesses[91] such as chronic hepatitis C or AIDS. The requirement therefore raises the presumption of indirect discrimination on grounds of disability[92]**;**
- The requirement that employees do not wear any headgear disadvantages persons who belong to certain religions and interpret these religions as requiring particular clothing, such as (certain) Muslim women and (certain) Jewish men.[93] The requirement therefore raises the presumption of indirect discrimination on grounds of religion;
- The requirement that employees must be clean-shaven disadvantages Sikhs as an ethnic group, since male Sikhs do not shave. The requirement therefore raises a presumption of indirect discrimination on grounds of ethnic origin;[94]

[90] This requirement may at the same time disadvantage women, since they may have interrupted their work e.g. to have children or to care for elderly family members.

[91] Under EC law, illness is not the same as a disability, though an illness may lead to a disability; see Chacón Navas, para. 39 et seq.

[92] This requirement also disadvantages Jehovah's Witnesses because they are opposed to blood transfusions for religious reasons.

[93] In these cases, this requirement also disadvantages women (in the case of the headscarf or veil) and men (in the case of the yarmulke or kippah), respectively.

[94] Sikhs are seen both as an ethnic and a religious group. Male Sikhs refuse to shave for religious reasons. Therefore, the requirement to be clean-shaven can also be seen as discriminating on grounds of religion; Pitt 2007:229.

- The requirement that a worker must have worked fulltime for a certain number of years disadvantages women where, due to the traditional division of roles in the family according to which family and care work is (predominantly or entirely) the task of women, it is predominantly women who perform part-time work. The requirement therefore raises the presumption of indirect discrimination on grounds of sex;
- The requirement that a person is habitually resident in a Member State in order to qualify for job seeker's allowance disadvantages migrant workers holding the nationality of an EU Member State other than the state in question, since they are more likely than this country's own nationals to reside in another country when embarking on the search for a job. The requirement therefore raises the presumption of indirect discrimination on grounds of nationality.

In all of these cases, the apparently neutral criterion upon closer investigation proves in fact not to be neutral but rather to have a detrimental effect on a particular group of people. In order to qualify as apparent indirect discrimination, the detrimental effect must reach a certain level. The definitions in the Racial Equality and Employment Equality Directives require 'a particular disadvantage'. What this means is not explained further in the Directives, and neither can a precise limit be identified on the basis of the case law from other areas of Community law. In Seymour-Smith[95] (para. 58 and 60), which concerned alleged indirect sex discrimination in employment, the Court spoke of the requirement for 'a more unfavourable impact on women than on men' and about 'a considerably smaller percentage of women than men' able to benefit. The Court indicated two distinct situations where this will be the case. The first is where 'a considerably smaller percentage of women than men' is able to satisfy the condition in question. In other words, in this case the disparity must be considerable. Alternatively, there may be 'a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement'. However, for neither situation did the Court quantify the required disparate effect. Examples from case law appear to indicate that the degree of disparity must be quite high. For example, in Seymour-Smith (para. 63) the Court indicated that a situation in which the requirement in question was fulfilled for one year by 77.4% of men and by 68.9% of women did not entail a sufficiently disparate impact.

However, in practice identification of a precise level of disparate impact will not be necessary where no statistical proof of such an effect is required. Under the most recent generation of EC non-discrimination law, which includes the Racial Equality and Employment Equality Directives, such proof is not necessary since it is sufficient under the definitions of indirect discrimination in the Directives that the measure in question '*would* put persons […] at a particular disadvantage' (emphasis added). In other words, it is sufficient that the measure is liable to have such an effect. Nevertheless, the Racial and Employment Equality Directives leave a certain amount of discretion to the Member States,by stating that the they may provide 'for indirect discrimination to be established by any means including on the basis of statistical evidence' (recital 15 in the preambles to the Directives). The practical problems that arise from the use of statistics will be discussed later in this report.[96]

2.3 Irrelevance of discriminatory intent

A particularly important aspect of the effects-based nature of the concept of indirect discrimination lies in the fact that it is irrelevant whether or not the person deciding on the measure that causes the discrimination in any way intended such an effect. As AG Miguel Poiares Maduro explained in his opinion on the Coleman case (para. 19): '[I]n indirect discrimination cases the intentions of the employer and the reasons he has to act or not to act are

[95] Case C-167/97 The Queen v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez [1999] ECR I-623.

[96] See below IV.2.2.2.

irrelevant. In fact, this is the whole point of the prohibition of indirect discrimination: even neutral, innocent or good faith measures and policies adopted with no discriminatory intent whatsoever will be caught if their impact on persons who have a particular characteristic is greater than their impact on other persons. It is this 'disparate impact' of such measures on certain people that is the target of indirect discrimination legislation.' However, this does not mean that in practice there are no cases where indirect discrimination is brought about in an intentional manner (Quinn 2007:260, Fitzpatrick 2007:326), but it does mean that intention on the side of the discriminator is not a precondition for a finding of indirect discrimination. What is decisive is only the effect of the measure in question (Tobler 2005a:235, Loenen 1999:201).

3. A concept based on the 'rule of reason': objective justification

An apparently neutral measure with a disparate effect amounts to indirect discrimination only if it is not objectively justified. Under the definition of indirect discrimination in the Racial Equality and Employment Equality Directives, objective justification means that a measure leading to apparent indirect discrimination has a legitimate aim and that the means chosen to achieve that aim are appropriate and necessary (i.e. proportionate). In a concrete case, the burden of proof for the existence of objective justification lies with the defendant (Art. 8(1) of the Racial Equality Directive, Art. 10(1) of the Employment Equality Directive).

3.1 A legitimate aim

Objective justification requires first of all a legitimate aim, which is a concept that is open in nature and not limited to a closed list of grounds. In the specific context of EC law, objective justification has long been a traditional element of the concept of indirect discrimination.[97] As a rule, such justification is not available in the case of direct discrimination, except in those few cases where a directive explicitly states the contrary (see **Chart 6** in the annex to this report). These exceptions include in particular discrimination on grounds of age (Art. 6 of the Employment Equality Directive, as exemplified in the case Mangold, which concerned direct age discrimination), part-time work (Clause 4(1) of the Part-Time Work Directive) and fixed-term work (Clause 4(1) of the Fixed-Term Work Directive). They also include discrimination on grounds of sex, though only in relation to goods and services (Art. 4(5) of the Goods and Services Directive). In all other cases, the possibility to justify direct discrimination is limited to the specific grounds of justification listed in the law, and objective justification is an issue to be examined in the context of indirect discrimination only.

What then is a legitimate aim for the purposes of objective justification? Some general indications can be found in the case law of the Court of Justice on indirect sex discrimination. Thus, the Court held that in the case of actions by employers leading to apparent indirect sex discrimination, in order to be objectively justified a measure must correspond to a real need on the part of the undertaking and the difference of treatment must be based on factors unrelated to any discrimination on grounds of sex (Bilka, para. 30; Nikoloudi,[98] para. 47). Conversely, in the case of Member State legislation in the social field, the contested rule must reflect a legitimate aim of the Member State's social policy which is unrelated to any discrimination on grounds of sex (Seymour-Smith, para. 71).[99] It is important to note that this type of legitimate aim is reserved to the Member States in relation to their social law; employers cannot rely on aims of social or employment policy (Krüger,[100] para. 29).

[97] Originally, it was not part of the concept; see Tobler 2005a:184 et seq.

[98] Case C-196/02 Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE [2005] ECR I-1789.

[99] Earlier case law had been stricter, speaking about a 'necessary aim of its social policy'; Case 171/88 Ingrid Rinner-Kühn v FWW Spezial Gebäudereinigung GmbH & Co. KG [1989] ECR 2743, para. 14.

[100] Case C-281/97 Andrea Krüger v Kreiskrankenhaus Ebersberg [1999] ECR I-5127.

The fact that objective justification is an open-ended concept means that there is a very broad range of potentially acceptable grounds of justification. Indeed, under the Court's case law on EC sex equality law, this may even include economic considerations (Jenkins, para. 12; Enderby,[101] para. 25; Kachelmann,[102] para. 35). However, there are important limits, which were summarised in the Court's judgment in the Nikoloudi case (para. 49 et seq.). First, purely budgetary considerations can never serve as an objective justification. Although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination. Second, the aim in question must be unrelated to discrimination. In Nikoloudi, which concerned indirect sex discrimination, the Court explained that where a much higher percentage of women than men is denied the possibility of becoming a permanent member of staff, the argument that part-time work in itself constitutes a sufficient reason, unrelated to sex, to explain the difference in treatment cannot be upheld. In other words, it is not possible to rely on the very fact that causes the disparate impact. Rather, the objective justification must relate to a different factor or aim. Also, the Court will not accept an allegedly objective reason if it is no more than a mere generalisation insufficient to show that the aim of the measures at issue is indeed unrelated to any discrimination. As the Court explained in Seymour-Smith (para. 72), it must always 'be ascertained, in the light of all the relevant factors and taking into account the possibility of achieving the social policy aim in question by other means, whether such an aim [i.e. an aim that, in principle, can be considered legitimate] appears to be unrelated to any discrimination based on sex'. It should perhaps be added that in the legal definitions of indirect discrimination in the Racial and Employment Equality Directives, the requirement that an objective justification must be unrelated to discrimination is not explicitly stated. However, it would seem a matter of logic that the Court of Justice, in explaining the meaning of these definitions, will include it by reading it into these definitions (Schiek 2007:444 and 475).

Examples of legitimate aims can be found in Court of Justice case law, in particular in the context of cases dealing with indirect sex discrimination. It would be helpful if this case law were to allow for the identification of a well-defined list of acceptable aims. However, that is not the case. The main reason for this is the fact that the Court in preliminary rulings on EC social law often refrains from giving concrete guidance and leaves it up to the national court in question to determine the legitimacy of the justification relied upon.[103] Where the Court of Justice does rule on the matter, things are often complicated by the fact that the Court treats as justification issues related to the comparability of the situations at hand (Havelková 2008:339). In the framework of employment, this concerns in particular job-related elements such as working time (higher pay for inconvenient working hours; Jämställd hetsombudsmannen,[104] para. 61), the requirement for strength of a particular type of work (higher pay for more demanding work; Rummler,[105] para. 22), vocational training relevant for the quality of the work (higher pay in the case of more training; Danfoss,[106] para. 23; Wiener Gebietskrankenkasse,[107] para. 19) and seniority or length of service that enhance the performance of the work (higher pay in the case of more seniority; Cadman,[108] para. 35). In the

101 Case C-127/92 Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health [1993] ECR I-5535.

102 Case C-322/98 Bärbel Kachelmann v Bankhaus Hermann Lampe KG [2000] ECR I-7505.

103 For example in the landmark case Bilka (para. 35), and in numerous cases since.

104 Case C-236/98 Jämställdhetsombudsmannen v Örebro läns landsting [2000] ECR I-2189.

105 Case 237/85 Gisela Rummler v Dato-Druck GmbH [1986] ECR 2101.

106 Case 109/88 Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss) [1989] ECR 3199.

107 Case C-309/97 Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse [1999] ECR I-2865.

108 Case C-17/05 B. F. Cadman v Health & Safety Executive [2006] I-9583. - Cadman is a follow-up to a number of previous cases on seniority. As the Court explained in Nikoloudi, para. 55, the objectivity of such a criterion depends on all the circumstances in each individual case. In Cadman the Court found in favour of a presumption of objectivity, but this presumption can be rebutted.

context of access to training, the Court accepted as legitimate the aim of taking into account delays experienced in the progress of training through the duty to perform mandatory military service (preferential treatment in relation to the access to study places of people who had experienced such delays; Schnorbus,[109] para. 43 and 44). Strictly speaking, such issues do not concern the justification for different treatment of comparable situations, but rather comparability itself (different treatment of situations that are not comparable). However, it must be admitted that in practical cases it is not always easy to distinguish between issues of comparability and objective justification within the true sense of the word.

For these reasons, the case law of the Court of Justice provides only few clear cases of legitimate aims. The following examples from the area of sex equality law concern the legitimacy of actions by employers, of legislation by Member States and of secondary legislation adopted by the EC itself. The Court of Justice accepted as legitimate the following aims:

- The aim of the employer engaged in restructuring to protect workers facing dismissal whilst at the same time taking account of the undertaking's operational and economic needs (Kachelmann, para. 31 et seq.);
- The aim of the employer to find qualified labour in a male-dominated profession with a shortage of labour (Enderby, para. 26);
- The aim of the Member State to ensure sound management of public expenditure on specialised medical care and to guarantee peoples' access to such care (Jørgensen,[110] para. 40);
- The aim of the Member State to encourage employment and recruitment (Steinicke,[111] para. 62, with further references);
- The aim of the Member State to ensure independence of staff councils which have the task of promoting harmonious labour relations within undertakings (Freers and Speckman,[112] para. 23 et seq., with further references);
- The aim of the Member State to alleviate the constraints burdening small businesses (which are seen as playing an essential role in economic development and the creation of employment in the Community; Kirsammer-Hack,[113] para. 33);
- The aim of the Member State to guarantee a minimum replacement income (Commission v Belgium,[114] para. 19 et seq.; Molenbroek,[115] para. 17 et seq.);
- The aim of the Member State to achieve, in a social security system, equivalence between contributions and benefits (Megner,[116] para. 24 et seq.; Nolte,[117] para. 30 et seq.);
- The aim of the Member State to respond to the demand for minor employment and to fight unlawful employment (Megner, para. 27 et seq.; Nolte, para. 31 and 32);
- The aim of the EC legislator to legislate on specific training for general medical practitioners in order to prepare them better to fulfil their particular function (Rinke,[118] para. 37 et seq. – this somewhat special case concerned the compatibility of EC secondary legislation on the free movement of medical doctors with EC sex equality legislation. Under the free movement legislation, part-time training in general medical practice must include a certain number of periods of full-time training).

[109] Case C-79/99 Julia Schnorbus v Land Hessen [2000] ECR I-10997.

[110] Case C-226/98 Brigitte Jørgensen v Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg [2000] ECR I-2447.

[111] Case C-77/02 Erika Steinicke v Bundesanstalt für Arbeit [2003] ECR I-9027.

[112] Case C-278/93 Edith Freers and Hannelore Speckmann v Deutsche Bundespost [1996] ECR I-1165..

[113] Case C-189/91 Petra Kirsammer-Hack v Nurhan Sidal [1993] ECR I-6185.

[114] Case C-229/89 Commission v Belgium [1991] ECR I-2205.

[115] Case C-226/91 Jan Molenbroek v Bestuur van de Sociale Verzekeringsbank [1992] ECR I-5943.

[116] Case C-444/93 Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz [1995] ECR I-4741.

[117] Case C-317/93 Inge Nolte v Landesversicherungsanstalt Hannover [1995] ECR I-4625.

[118] Case C-25/02 Katharina Rinke v Ärztekammer Hamburg [2003] ECR I-8349.

Objective justification will necessarily limit protection from indirect discrimination. It is therefore unsurprising that the Court of Justice is criticised for accepting certain aims as legitimate. Enderby, mentioned above, is a prime example. It has been argued in academic writing that this decision allows employers to exploit the structurally weaker position of women on the labour market (e.g. Havelková 2008:343, with further references).

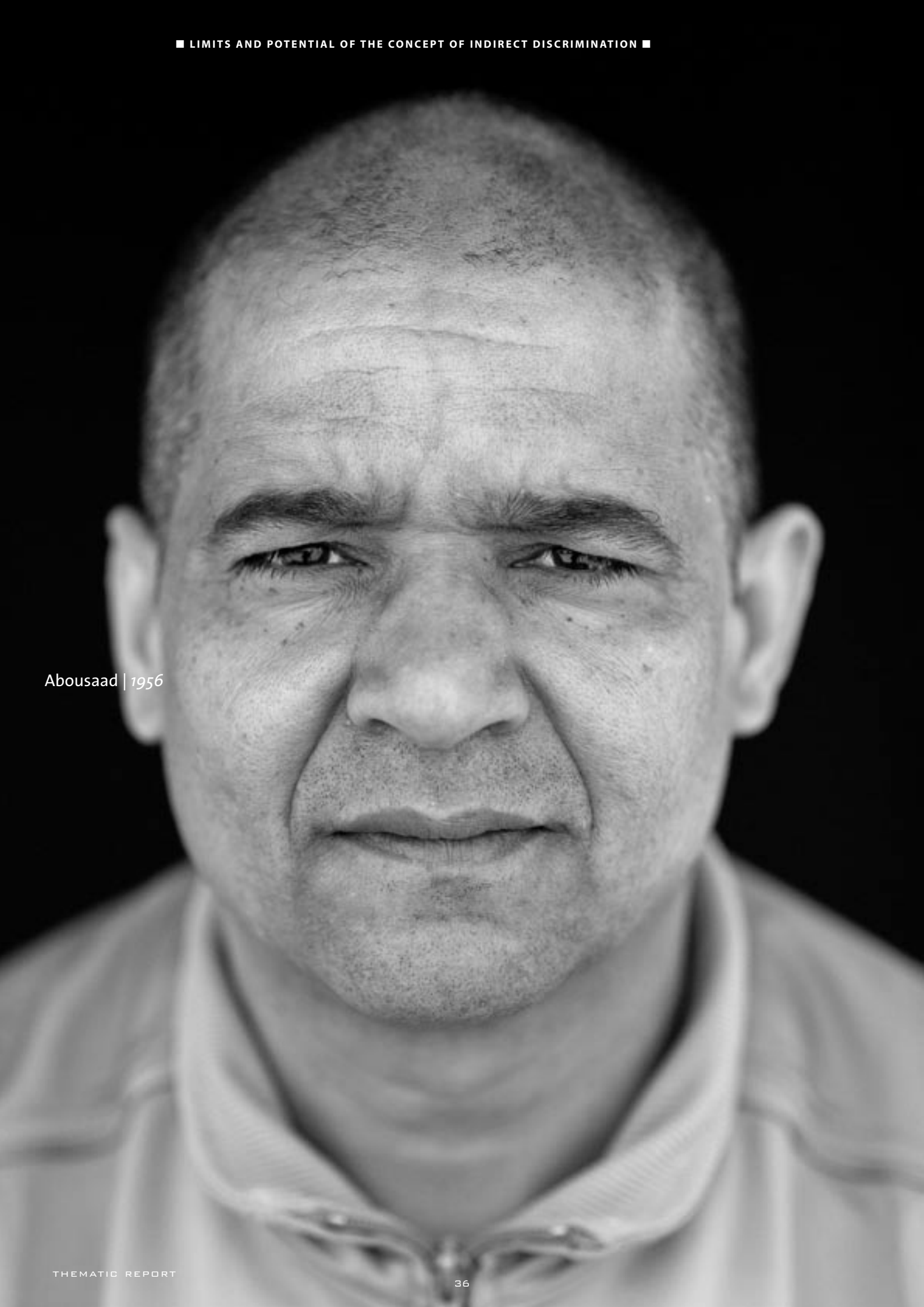
3.2 Proportionality

According to the definitions of indirect discrimination in the Racial Equality and Employment Equality Directives, measures taken in view of legitimate aims are objectively justified only if they are 'appropriate and necessary'. As the Court stated in Mangold (para. 65), '[o]bservance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued'. The wording of the Directives shows that the standard for proportionality required by EC law is high: it is not sufficient that a measure is merely convenient or desirable. Rather, it must be appropriate, that is, suitable for achieving the aim in question (again, mere generalisations are not sufficient for this purpose; Seymour-Smith, para. 76), and it must be necessary for that aim, that is, another measure with a lesser or no disparate effect would not do the job (Hervey 2002:121 et seq.).

Again, the case law in the field of social law shows that the Court of Justice often leaves it to the national courts to judge proportionality, especially when actions of employers are at issue (Tobler 2005a:243). Where the Court does give specific guidance and where the case concerns the social law of the Member States, the Court usually takes into account that, according to Art. 137 EC, the EC has only a complementing and supporting competence in the social field. Based on this starting point, the Court accepts that the Member States enjoy a broad margin of discretion when legislating in the social field, a statement that was repeated in the context of objective justification for age discrimination in Palacios de la Villa (para. 68) and in Mangold (para. 63). The acceptance of this broad margin is reflected in the Court's judgment in the case Palacios de la Villa. However, the Court emphasises that the use of this margin 'cannot have the effect of frustrating the implementation of a fundamental principle of Community law such as that of equal treatment' (Seymour-Smith, para. 75). Indeed, the general impression left by Court of Justice case law – also in areas other than EC social law – is that the Court has become increasingly strict on proportionality. The Court's decision in the case Mangold provides an illustrative example.

Mangold concerned German legislation that permitted employers to conclude without restriction fixed-term contracts of employment with workers over the age of 52. The declared aim of this legislation was to promote the vocational integration of unemployed older workers, in so far as they encounter considerable difficulties in finding work. When asked whether EC law allows for such legislation, the Court found that the rule involved direct discrimination on the grounds of age. Under Art. 6 of the Employment Equality Directive, such discrimination – even though it is direct rather than indirect - can be objectively justified.[119] This is the case where the measure in question is 'objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'. In Mangold (para. 65), the Court found that the aim relied on by Germany was legitimate but that the means chosen to achieve it were not proportionate. According to the Court, the German legislation too generally covered a certain age group, thereby risking the exclusion of workers from the benefit of stable employment, which constitutes a major element in the protection of workers. Such a general exclusion was not objectively necessary. Some commentators have criticised the Court for this approach (e.g. Hailbronner 2006:813, according to whom the Court in this case in fact left no room for discretion to the Member States). However, from the perspective of the effectiveness of the prohibition of discrimination, a strict approach to proportionality is very much to be welcomed.

[119] See above II.3.3.1.



Abousaad | *1956*

Part IV

Challenges in the practical application of the prohibition of indirect discrimination under EC law

Whenever the legal concept of indirect discrimination is applied in practice, the examination of the case at hand will have to involve a three-step analysis relating to the scope of the law, the nature of the measure as amounting to apparent indirect discrimination, and objective justification. In the framework of this analysis, the following questions must be asked and answered (see **Chart 2** in the annex to this report):

i) Does the case fall within the field of application of the non-discrimination law that is to be applied in the relevant EC Member State (i.e. national law as seen against the background of EC law)? (Below 1.)
ii) If so, can the victim of the alleged discrimination prove that there is apparent indirect discrimination on a particular ground? (Below 2.)
iii) If so, can the perpetrator prove that there is objective justification that will prevent a finding of indirect discrimination? (Below 3.)

In the following, a number of practical issues that may arise in the context of these questions are discussed.

1. Finding applicable law

In practical cases, the first challenge will always be to find applicable non-discrimination law.[120] Both the Racial and the Employment Equality Directives contain specific provisions on scope with positive and negative elements defining that scope. When called upon to judge on the applicability of non-discrimination law, national courts will have to take these elements into account. Under Court of Justice case law, elements that describe the scope in a positive way have to be interpreted in a broad manner, and elements that limit the scope of EC law have to be interpreted in a narrow manner (compare for instance the different interpretations of the term 'pay' in the Allonby case,[121] para. 66, and the Del Cerro Alonso case,[122] para. 39). Where a term is not defined in EC law, which is very often the case, and where it raises questions, the authoritative interpretation must be sought and found in the case law of the Court of Justice.[123]

The field of application of EC non-discrimination law varies considerably depending on the type of discrimination (Waddington/Bell 2001:589, also Bell/Waddington 2003; see **Chart 3** in the annex to this report). As was noted earlier,[124] there is only one type of discrimination that is prohibited in all areas of EC law, namely discrimination on grounds of nationality of an EU Member State (Art. 12 EC and other, related provisions). In all other cases, the provisions of EC law have a limited field of application. Within EC social law, anti-racism policy has been called 'the leader of the pack' (Bell 2007a:178). According to Art. 3(1) of the Racial Equality Directive, this Directive covers conditions for access to employment, to self-employment and to occupation, access to vocational guidance and training, employment and working conditions, membership of and involvement in an organisation of professional organisations, social protection, social advantages, and education, as well as access to and supply of goods and services which are available to the public. Art. 3(2) excludes differences of treatment based on nationality, provisions

120 A practical example that is much debated at the time of writing of this report are the measures adopted by the Italian government in May and July 2008 which foresee the taking of fingerprints for the identification of persons living in 'nomadic camps' in Italian cities if these persons cannot otherwise be identified. These measures clearly target Roma people as an ethnic group. However, whether or not they are falling within the material scope of the Racial Equality Directive may be open to discussion.

121 Case C-256/01 Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment [2004] ECR I-873.

122 Case C-307/05 Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud [2007] ECR I-7109.

123 See also below in the conclusions.

124 See above II.1.

and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States as well as treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

In comparison, the scope of the Employment Equality Directive is much more limited. According to Art. 1, this Directive aims to prohibit discrimination on the grounds of religion or belief, disability, age or sexual orientation solely as regards employment and occupation. Accordingly, the list in Art. 3(1) corresponds only partially to that in the Racial Equality Directive; it stops after the professional organisations. Art. 3(2) contains the same exclusions as the Racial Equality Directive. Further, Art. 3(3) excludes from the scope of the Employment Equality Directive payments made under state schemes or similar, including state social security or social protection schemes. Moreover, under Art. 3(4), Member States may provide that the Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces. Finally, EC sex equality law is positioned between the Racial Equality and the Employment Equality Directive. It covers employment and occupation, social security and goods and services.

In practical terms, these differences mean that it may depend on the type of discrimination whether a given case is or is not covered by EC law. For example, cases involving access to a service (such as insurance or a visit to a restaurant) will be covered if the alleged discrimination is on grounds of race or sex, but not if it is on grounds of disability or age. Another example: if the case concerns education, when only race discrimination is covered. Further, a particular problem is posed where a case involves a combination of grounds (multiple discrimination), and where EC law does not cover all of the issues to which the alleged discrimination relates. In such cases, only the type(s) of discrimination that is (are) in fact covered by the law can be taken into account.[125] All of this shows that cases involving alleged discrimination may easily fall outside the scope of EC non-discrimination law, either entirely or partially. However blatant the alleged discrimination may then be, if the national law does not have a broader scope than EC law, such cases will not involve discrimination from a legal point of view, and therefore the victims will be unable to find legal redress. At the most, such cases involve what may be termed 'factual discrimination', i.e. measures that, though not legally prohibited, appear discriminatory on the basis of different, extra-legal standards.

This situation would change in some respects if the Member States were to adopt the directive proposed by the Commission in July 2008, which is intended to enlarge the protection against discrimination on grounds of religion or belief, disability, age and sexual orientation.[126] This would bring the scope of the Racial and Employment Equality Directives closer together. However, it would leave sex equality law as the area with the smallest field of application, which is highly problematic given the function of sex as a key category our societies.

2. Proving apparent indirect discrimination

2.1 Comparability as a precondition

As was noted earlier,[127] where a discrimination complaint concerns unequal treatment, the claim of equal treatment will be upheld only where the situations of the persons in question are comparable. The case law from the field of

[125] See also below IV.4.

[126] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426; see *http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=197196*

[127] See above II.2. In the case law of the Court of Justice, this issue is often dealt with in the framework of objective justification. However, from a conceptual point of view it precedes the discrimination analysis.

sex equality shows that in indirect discrimination cases the requirement of comparability of situations may be a problematic hurdle (Tobler 2005a:265). For example, in Österreichischer Gewerkschaftsbund,[128] which concerned periods of absence from work being taken into account for the purposes of calculating redundancy payments, the Court of Justice compared absence from work due to voluntary parental leave (mostly taken by women) to absence from work due to military or civil service (mostly performed by men) and found them not to be comparable. According to the Court, the decisive element in this context was the voluntary nature of the parental leave, which – according to the Court - is taken in the individual interest, as opposed to the civic obligation of the national service, which is not governed by the individual interest of the worker. However, had the Court looked at the activities behind the two types of absence in the light of their usefulness to society as a whole, it might well have arrived at a different conclusion.

It is in view of such cases that reliance on comparability in the context of indirect discrimination (rather than only of direct discrimination) has been criticised as dogmatically unsound (Schiek 2007:468 et seq.). However, the fact remains that as EC law stands at present, the Court's case law does allow for comparability to be taken into account. In this situation and in order to avoid the danger of undermining the effectiveness of the prohibition of indirect discrimination, it is particularly important that national authorities and courts that are called upon to decide on cases of indirect discrimination are very careful about the issue of comparability. First, they should remember that the comparison should always be between the groups of people relevant in the context of the type of discrimination at issue. To revert to the example of the Österreichischer Gewerkschaftsbund case, which concerned sex equality, this means that the comparison should not be between two types of leave on an abstract level, but rather between female and male workers taking different types of leave, i.e. between women taking parental leave and men performing national service. In the context of this comparison, the overall purposes of the different types of leave should be taken into account. In other words, the courts should not forget the context of the cases before them. Second, national courts and authorities should be careful not to assume non-comparability too easily. As MacKinnon (2001:247) observed in the context of U.S. law, the status of not being in comparable situations 'can be created by Congress as well as God, biology, and the market' – in other words, all sorts of reasoning are possible in this context. National courts and authorities should therefore focus on those elements that are truly relevant for the case before them.

2.2 Showing a particular disadvantage, in particular through statistical proof

Where an alleged victim of indirect discrimination brings a case to a court, he or she must show to have suffered a particular disadvantage as compared to other persons. How difficult this will be in practical terms depends largely on the required level of proof. As was noted earlier,[129] the definitions of indirect discrimination under the Racial and Employment Equality Directives allow for a generous approach in this context. Under this approach, the disparate impact does not actually have to be proven. Rather, it is sufficient that the measure in question 'would' put certain persons at a particular disadvantage, i.e. if it is liable to have the required disparate effect (so-called 'liability approach'). Depending on the circumstances, this may be an easier test than a test based on statistics, since the Court will be able to make what has been called a common sense assessment (Doyle 2007:540, Makkonen 2007:34) by relying on common knowledge (e.g. Kachelmann, in the context of sex equality), on obvious facts (e.g. Schnorbus, also in the context of sex equality) or on its conviction (e.g. O'Flynn, concerning discrimination on grounds of nationality). However, this does not mean that statistical proof of a particular disadvantage is irrelevant. The preambles to the Racial Equality and Employment Equality Directives state explicitly that the rules of national law or practice 'may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence' (recital 15 in the preambles to the Directives).

[128] Case C-220/02 Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich [2004] ECR I-5907.

[129] See above II.2.2.1.

To obtain statistical proof may pose a number of challenges. At the centre of this issue is the comparison to be made. First, the definitions in the Racial Equality and Equality Directives show that the comparison is between the effect of the contested measure on two groups, namely on the group to whom the victim of the alleged discrimination belongs,on the one hand, and on a comparator group on the other. Accordingly, this comparator group has to be identified. However, in some cases, it may be difficult to find comparators, for example in the case of age discrimination (Fredman 2003:56 et seq.; Hepple 2003:83; O'Cinneide 2005:26). As Ellis (2005:95) rightly notes, defining the comparator is an issue over which the national courts possess an important element of discretion, and the extent to which they take a sensitive approach to it bears upon the capacity of the concept of indirect discrimination to be used to produce effective equality.

Second, the appropriate moment or time period for the comparison must be identified. As the Court explained in the sex equality law case Seymour-Smith (para. 42 et seq.), this may depend on the nature of the breach of EC law at issue. The Court mentions two examples relating to Member State legislation. First, the effect of the consistent application of a national law to individuals should be shown over a certain time. It would seem logical to apply the same approach where the alleged discrimination is based on a series of actions by private persons such as employers or service providers, rather than by the State. Second, where the legality of the adoption of a national law as such is at issue, the situation at the time of the adoption of the act will be relevant. Again, it would seem logical that the same will apply where a single act by a private person is at issue.

Third, statistical material concerning the relevant groups must be found, which in practice may be difficult. Thus, it has been pointed out that in the context of disability discrimination statistical data is unlikely to be available (Whittle 2002:309). The same is true for sexual orientation (Schiek 2007:398, Fitzpatrick 2007:33, Waaldijk/Bonini-Baraldi 2006:35). In such cases, statistics may therefore not be a helpful or even feasible means to prove apparent indirect discrimination.

Fourth, the statistical material relied on in a discrimination case must be relevant or significant. This means that it must cover enough individuals and, in cases that do not concern a single action, that it should not illustrate purely fortuitous or short-term phenomena. Again, these are factors that have to be assessed by the national courts (Seymour-Smith, para. 62).

Finally, once relevant statistical material is available, it must be determined precisely which figures have to be taken into account in order to establish the required disparity of effect. In the context of sex equality law, the Court explained in Seymour-Smith (para. 59) and Voss[130] (para. 41) that 'the best approach to the comparison of statistics is to consider, on the one hand, the respective proportions of men in the workforce able to satisfy the requirement […] and of those unable to do so, and, on the other, to compare those proportions as regards women in the workforce'. Under this relative approach the situation among those who can qualify (the 'qualifiers') has to be compared to the situation among those who cannot comply (the 'non-qualifiers'). However, it should be noted that in practice the Court itself quite often does not adopt this approach in sex equality cases. Indeed, in the very case of Seymour-Smith (para. 63) where it had formulated the above test, the Court considered only the pool of those able to benefit (i.e. the 'qualifiers'). It may therefore be concluded that in practice the test does not necessarily have to be a relative one, but can be flexible and pragmatic (Makkonen 2007:36). What is more, it can be argued that under the definitions of the Racial and Employment Equality Directives a limited comparison is sufficient in any case, due to the reference to 'a particular disadvantage', which would appear indicate a focus on the non-qualifiers only (Fredman 2002:111, Gijzen 2007:114, Senden 2008:374). The same reference to 'a particular disadvantage' can now also be found in the revised and recast sex equality legislation (Directive 76/207/EEC, as amended by Directive 2002/73/EC, and the Recast Directive). However, there is no case law from the Court of Justice yet that would explain the difference in approach as compared to the previous sex equality legislation.

[130] Case C-300/06 Ursula Voss v Land Berlin, judgment of 6 December 2007 (n.y.r.).


BEYOND BOUNDARIES!
WHAT NEW
THERE IS NO FINISH LINE.
BEYOND AIR!

Jesse | *1992*

As AG Léger noted in his opinion on the Nolte case (para. 53), the requirement of statistical proof can lead to a veritable battle with numbers. The national courts should, therefore, wherever possible under national law apply the liability test which is easier to meet, without, however, excluding the possibility of statistical proof where it may help the victims of alleged discrimination to show the existence of a disparate impact. It is recommended that Member State legislators do not make statistical proof compulsory. At the same time, where statistics are available they may be an easy means of showing disparate impact. Accordingly, the effectiveness of the prohibition of indirect discrimination under EC law demands that statistical proof is admissible.

3. Proving (objective) justification

On the level of justification, the Court's case law shows that finding an aim that is considered legitimate for the purposes of objective justification is much less difficult than showing that the means chosen to achieve this aim are appropriate and necessary. Nevertheless, national courts should always remember that the aim must be unrelated to discrimination and the defendant must actually show this, as was already noted.[131] Similarly, as regards proportionality, the Court has explained in the context of indirect discrimination under Art. 12 EC that 'the reasons which may be invoked by a Member State by way of derogation must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State and specific evidence substantiating its arguments' (Commission v Austria,[132] para. 63). The same is true in the present context. Accordingly, national courts do well to take these strict requirements very seriously and to refrain from accepting objective justifications too easily.

A particular challenge presents itself where the objective justification relied on by the alleged discriminator relates to a human right that conflicts with the human right that is at the basis of the discrimination complained of, for example where the discriminator relies on freedom of religion as the basis for an action that involves apparent indirect sex discrimination (Vickers 2006:37). The Employment Equality Directive contains certain provisions relating to this problem. First, Art. 2(5) states that the Directive is without prejudice to 'measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and *for the protection of the rights and freedoms of others*' (emphasis added). Further, Art. 4(2) concerns occupational requirements in relation to activities within churches and other public or private organisations the ethos of which is based on religion or belief. The Racial Equality Directive does not contain any comparable rules. In this context, a parallel may perhaps be drawn with Court of Justice case law in the field of free movement, according to which the protection of fundamental rights may justify restrictions of free movement (Schmidberger,[133] Omega,[134] Viking).[135] In keeping with this case law, the national court when examining a case where different human rights compete must engage in a particularly careful analysis of the proportionality of the restricting action.

Finally, it should be recalled that beyond objective justification as an element inherent in the definition of indirect discrimination, the Racial and Employment Equality Directives provide for a number of grounds of justification that are generally available, i.e. also in the cases of direct discrimination. These justifications include in particular

131 See above III.3.3.2.

132 Case C-147/03 Commission v Austria [2005] ECR I-5969.

133 Case C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge and Republik Österreich [2003] ECR I-5659, in the context of the free movement of goods.

134 Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609, in the context of the free movement of goods and of services.

135 Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, judgment of 11 December 2007 (n.y.r.), in the context of the free movement of services.

occupational requirements (Art. 4 of the Directives) and, in the case of the Employment Equality Directive the above-mentioned Art. 2(5) (see also **Chart 6** in the annex to this report). It remains to be seen how far these derogations will play a role in Court of Justice case law on indirect discrimination.

4. Dealing with particularly complex situations: multiple discrimination

The fact that people have multiple identities means that discrimination cases may involve several discrimination grounds at once. This is recognised in both the Racial Equality and the Employment Equality Directives, by referring to the fact that women are often the victims of multiple discrimination (recitals 14 and 3 of the preambles of the Racial Equality and Equality Directives, respectively). A report published by the European Commission concluded that minority women seem to be the most vulnerable to multiple discrimination.[136] Other particularly common combinations of discrimination grounds are age and sex and/or disability, but there are many more possibilities (Schiek 2002:311, Fredman 2003:29, Meenan 2007:287, Tobler 2007c:294).[137]

Multiple discrimination cases raise complex issues, not least because of the different rationales underlying the different discrimination grounds (Schiek 2005:443 et seq.). On the practical level, they often pose challenges in view of the differences in scope of the relevant laws and in the derogations that they permit (Gerards 2007:172 et seq., Fredman 2005b). On the level of scope, it is possible that a given case is covered by EC law (or by national law implementing it) only in relation to one discrimination ground but not in relation to another, for example when the alleged discrimination concerns access to services (e.g. a visit to a restaurant) and is based on combination of discrimination on grounds of sex and religion: the Goods and Services Directive (which concerns sex discrimination) covers access to services, but the Employment Equality Directive (which concerns, among others, discrimination on grounds of religion) does not . Other, concrete examples of multiple discrimination are provided by Court of Justice case law, mostly dating from the time before the Racial and Employment Equality Directives were effective. Thus, before there was EC legislation on age discrimination, multiple discrimination cases involving the combination of age and sex discrimination could be dealt with only in the framework of the legislation on sex discrimination (e.g. Beets-Proper,[138] Barber;[139] Tobler 2007c:285). Similarly, the Nikoloudi case, which involved the detrimental treatment of part-time workers, was dealt with as a case of sex discrimination only, because the implementation period of the Part-Time Work Directive had not yet expired at the material time. However, even if this Directive had been applicable, it would not have helped because Clause 4 in the annex to the Directive requires a comparison of the part-time worker with a comparable full-time worker. Such a comparator did not exist in the circumstances of the case of Ms Nikoloudi (Veldman 2005:192), and neither did it in Wippel[140] (para. 57 et seq.).

[136] European Commission, Tackling Multiple Discrimination. Practices, policies and laws, Luxembourg: Office for Official Publications of the European Communities 2007, p. 5. Similarly, the OECD in 2008 pointed to women and minorities in particular in the context of labour market discrimination; see 'Labour market discrimination still a big problem in OECD countries', see ***http://www.oecd.org/document/41/0,3343,en_2649_34487_40939753_1_1_1_1,00.html***.

[137] In a strict sense, the term 'multiple discrimination' refers only to situations where the different grounds operate separately. The strict terminology distinguishes multiple discrimination from compound discrimination (which occurs where a person suffers discrimination on the basis of two or more grounds at the same time and where one ground adds to discrimination on another ground) and from intersectional discrimination (which occurs where several grounds operate and interact with each other at the same time in such a way that they are inseparable).

[138] Case 262/84 Vera Mia Beets-Proper v F. Van Lanschot Bankiers NV [1986] ECR 773.

[139] Case C-262/88 Douglas Harvey Barber v Guardian Royal Exchange Assurance Group [1990] ECR I-1889.

[140] Case C-313/02 Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG. [2004] ECR I-9483.

Further, a challenge of a particular kind may arise in the context of discrimination on grounds of nationality. As the European Parliament[141] has noted, discrimination on grounds of ethnic origin will often be related to discrimination on grounds of nationality. However, the Racial Equality Directive does not apply to differences of treatment based on nationality. Instead, EC law on free movement (Arts. 39 EC et seq.) may be relevant. Being part of the law on the internal market, these provisions will only apply in situations involving a cross-border element, which is not a requirement under EC social law. (Neither is it a requirement under Directive 2003/109/EC on third-country nationals holding the status of long-term resident.)

On the level of justification, different forms of justification may apply in relation to the different types of discrimination at issue in a case of multiple discrimination. For example, in a case combining direct discrimination on grounds of religion and indirect discrimination on grounds of sex, the broad possibility of objective justification is available in the context of the latter, but not in the context of the former. It is suggested that in cases where both types of discrimination are indissociably linked, national courts should focus on the higher level of protection from discrimination.

The above illustrates the fact that it may be difficult to address the nature of multiple discrimination in a given case. One possible solution is that the national law of the Member States provides for a broader scope and more discrimination grounds than are required by EC law. Overall, wherever possible in the applicable legal framework the national courts should appreciate the complexity of multiple discrimination cases. In particular, they should take into account the aggravating nature of multiple discrimination when they determine the sanctions for such discrimination.[142]

141 European Parliament Report on progress made in equal opportunities and non-discrimination in the EU of 17 April 2008, A6-0159/2008, para. 39.

142 As is provided for under Romanian law; European Commission, Tackling Multiple Discrimination. Practices, policies and laws, Luxembourg: Office for Official Publications of the European Communities 2007, p. 20. Generally on remedies and sanctions in non-discrimination law, see Tobler 2005b.

Henk | *1982*

Part V

The relationship of the legal concept of indirect discrimination with other concepts of EC social non-discrimination law

Indirect discrimination as discussed in the previous parts of this report should be distinguished from other legal concepts that are relevant in the context of the Racial and Employment Equality Directives. These include in particular direct discrimination (below 1.), discrimination by association (below 2.), positive action (below 3.), positive obligations (below 4.), and, in relation to discrimination on grounds of disability, reasonable accommodation (below 5).

1. The relationship with direct discrimination

As already indicated,[143] direct and indirect discrimination are logical counterparts. To distinguish between them is important for practical reasons: first, in most cases there are fewer grounds for justifying direct discrimination than indirect discrimination, since direct discrimination can only be justified on the basis of grounds of justification stated in the law.[144] Second, indirect discrimination may be less easy to prove, in particular where the law requires proof on the basis of statistics.[145]

Under the definitions in the Racial and Employment Equality Directives, direct discrimination is described as less favourable treatment of a person as compared to another on the grounds of a prohibited type of discrimination (Art. 2(2)(a) in the Directives). In this case, the link with the discrimination ground is strong both in form and in substance. Regarding the form, the link is straightforward inasmuch as the prohibited ground is explicitly and obviously relied on. For example, people of colour are refused access to a nightclub whilst other people are accepted. In such a case, the entire group of the disadvantaged consists of people of colour, whilst the entire group of the advantaged consists of other people. This is typical for direct discrimination. As far as the disadvantaged group is concerned, a comparable situation arises in the case of disadvantageous treatment on grounds of pregnancy. By nature, only women can become pregnant, which fact led the Court to find that disadvantageous treatment on grounds of pregnancy is direct sex discrimination (Dekker,[146] para. 12). This is now explicitly stated in Art. 2(2)(c) of the Recast Directive.

In contrast, indirect discrimination concerns cases where 'an apparently neutral provision, criterion or practice would put persons protected by the relevant provision at a particular disadvantage compared with other persons' (Art. 2(2)(b) of the Directives). Here, the link with the criterion for discrimination is weaker both in form and in substance. On the level of form, there is a reliance on an apparently neutral criterion. On the level of substance, it is characteristic for indirect discrimination that the division between the groups that are differently affected (i.e. those advantaged and those disadvantaged by the measure in question) is not quite the same as in the case of direct discrimination. Typically, the group of the disadvantaged does not exclusively, but only predominantly, consist of persons that are protected by the discrimination ground in question. Accordingly, they are 'merely' disproportionately represented in the disadvantaged group. This may be illustrated by using the classic example of part-time work in the context of sex discrimination. Where part-time workers are treated less favourably than full-time workers, this will normally disproportionately affect women. This is due to the fact that in many countries of the EU a traditional division of roles in the family applies, according to which it is predominantly women who perform domestic and care work, and which makes it difficult for women to engage in full-time work outside the home. At the same time, there is nothing to prevent men from working part-time, and some men (though considerably fewer than women) indeed do so. Accordingly, any worse treatment of part-time workers than full-time workers will affect not only women, but also these men.

143 See above II.4.

144 See above III.3.3.1.

145 See above III.2.2.2.

146 Case C-177/88 Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus [1990] I-3941.

Until quite recently the Court of Justice in its case law put the emphasis on the formal aspect. Thus, any measure that did not formally rely on the prohibited criterion would be assessed in the context of the framework of indirect discrimination, even if its effect was (practically) the same as in the case of direct discrimination. Schnorbus, a sex equality case decided in 2000, is an example. This case concerned admission to practical legal training in Germany. Since there were more applications than places, the law provided for the postponing of applications, with certain derogations in cases of hardship. Among others, the latter included persons who had done compulsory military or civil service. Under German law, this applied exclusively to men. As a result, only men could benefit from this particular hardship clause, and women could never benefit from it. Asked whether this amounted to direct or to indirect sex discrimination, the Court stated that 'only provisions which apply differently according to the sex of the persons concerned can be regarded as constituting discrimination directly based on sex' (Schnorbus, para. 33).[147] The Court therefore analysed the hardship clause in the light of the concept of indirect sex discrimination. This was criticised in academic writing where it was suggested that in view of their effects such cases should be analysed in the context of direct discrimination (Tobler 2005a:312 et seq., with further references; also Bell 2007b:218).

In fact, it would seem that the Court's findings in the more recent cases of Nikoloudi (decided in 2005) and Maruko (decided in 2008) indicates a change in approach. Nikoloudi was a rather complex case concerning rules under a collective agreement on the promotion of temporary staff to permanent staff (called 'established staff' in the case). Under those rules, only temporary staff who had worked full-time for at least two years were eligible to become permanent staff. The case concerned a female temporary staff member who, after having been employed part-time as a cleaner, worked full-time for a little less than two years and for that reason did not qualify for the promotion to permanent staff member. The national court seized with the matter asked the Court of Justice whether such a case involved indirect sex discrimination, even if the rules in question in fact excepted exclusively female cleaners. The reason for this was a provision in the General Staff Regulations, which had the force of law and which provided that only women could be taken on as part-time cleaners. Ms Nikoloudi, the Commission and Advocate General Stix-Hackl all argued that such a case involved indirect sex discrimination. Conversely, the Court found that 'the […] exclusion of a possibility of appointment as an established member of staff by reference, ostensibly neutral as to the worker's sex, to a category of workers which, under national rules having the force of law, is composed exclusively of women constitutes direct discrimination on grounds of sex' (Nikoloudi, para. 36). The Court added that where, in spite of the General Staff Regulations, the part-time work force did in fact include some men, the analysis would have to be one of indirect discrimination (Nikoloudi, para. 44 et seq.). It has been argued that through this ruling the Court of Justice introduced a subjective element into the analysis of discrimination (Veldman 2005:192). However, for the present purposes the decisive issue is that the Court focused on the effect of the measure in question, and thereby on substance rather than form.

Similarly, in Maruko the Court held that reserving the entitlement to a widower's pension to surviving married partners, in a situation where marriage is open only to heterosexual couples, may amount to direct discrimination on grounds of sexual orientation. The case concerned Germany, which is a country where same-sex couples cannot marry but may only register their partnership. Mr Maruko was refused a widower's pension based on the wording of the collective agreement that applied to his deceased male partner. Under the applicable rule '[t]he spouse of the insured woman or retired woman, if the marriage subsists on the day of the latter's death, shall be entitled to a widower's pension.' It is worth noting that in the original German language the word 'spouse' in this rule indicates a male person ('der Ehemann einer Versicherten oder Ruhegeldempfängerin'). Conversely, it indicates a female person in the parallel rule on widow's pensions ('die Ehefrau eines Versicherten oder Ruhegeldempfängers'). It is therefore clear from the very language of the rule that the person entitled to a widower's pension had to be a women who

[147] The Court had already stated in Dekker (para. 10), that whether there is direct or indirect discrimination 'depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex'.

was married to a man. This excluded male partners in two ways: first, quite simply because they were not women, and, second, because under German law they were not able to marry their same-sex partners. In the Maruko case, the applicant, the European Commission and Advocate General Ruiz-Jarabo Colomer all argued that the decisive criterion was the requirement of marriage, and that, given that homosexual couples cannot marry in Germany, the case involved indirect discrimination on grounds of sexual orientation. However, the Court took a different approach. Whilst agreeing that under the provisions in question surviving life partners are treated less favourably than surviving spouses, it drew from this the conclusion that, '[i]f the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation' (Maruko, para. 72, emphasis added).

Seen in the light of the Court's statements in Schnorbus, mentioned above, the finding of direct discrimination in these cases is surprising. It would seem that the Court has shifted its focus away from form to substance. It is a move away from an approach under which only measures that are explicitly based on the prohibited criterion or that are by nature indissociably linked to it (such as pregnancy in the case of sex as only women can be pregnant; Dekker, para. 12) amount to direct discrimination. Instead, direct discrimination now also includes measures that are formally neutral but have, due to legislative provisions of the Member State in question or due to rules of the employer that have the force of law, the same effect as would have had a direct reliance on the prohibited criterion. This means that direct discrimination now includes cases where reliance on a formally neutral criterion in fact affects one group only, be it by nature or on the basis of a rule that has the force of law (Waaldijk/Tobler 2008). In contrast, indirect discrimination relates to cases where an apparently neutral criterion has as an effect that is less far-reaching but still reaches a certain level[148] (see also **Chart 7** in the annex to this report).

2. The relationship with discrimination by association

Discrimination by association was at issue in the Coleman case, where the national court wished to learn from the Court of Justice whether the term 'discrimination on grounds of disability' means that the disability that is allegedly at the basis of the discrimination complained of must relate to the worker herself (Coleman is an employment case concerning a female worker), in other words, whether the worker herself must be disabled, or whether it is sufficient that the worker suffers a disadvantage as a consequence of the disability of her son for whom she cares, i.e. because she is associated to a person with a disability.[149] The Court (para. 51) found that, in view of the effectiveness of the Directive, the latter must be the case.

In the run-up to the decision, it was argued that a positive decision would lead to a significant rise in claims of indirect discrimination in the workplace.[150] This raises the question of the relationship of discrimination by association with indirect discrimination. It is submitted that the two concepts relate to two different elements of an analysis of discrimination and that discrimination by association is not linked to indirect discrimination within the meaning of the present report. Whilst indirect discrimination concerns the link of a particular action with a particular discrimination ground, discrimination by association concerns the link with the person who complains

148 See above III.2.2.2.

149 The only case already decided by the ECJ that raised a similar issue, though not on the level of the discrimination ground, but on the level of scope, is Case 150/85 Jacqueline Drake v Chief Adjudication Officer [1986] ECR 1995. In this case the Court of Justice found that a social security benefit paid to a person caring for a disabled person forms part of a statutory scheme providing protection against invalidity which is covered by Art. 3(1)(a) of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6/24. In Coleman, the Court did not refer to this decision.

150 'EU court gives boost to indirect disability rights', EUobserver of 1 February 2008, ***www.euobserver.com/9/25579***.

about discrimination. Discrimination provisions typically contain a number of elements, including, among others, the ground for equal treatment or non-discrimination, the persons protected by the provision and the persons obliged by the provision (Tobler 2005a:83). If used in a very broad sense (which does not correspond to the present common use in EC law), the term 'indirect' can be applied in various contexts. Thus, as regards the persons protected by a prohibition to discrimination, it is possible that the disadvantage occurs in an indirect manner.[151] That is the case with discrimination by association. However, it should be clear that discrimination by association to a person with a particular characteristic (e.g. sexual orientation, ethnic origin, disability) concerns an issue different from indirect discrimination as related to the discrimination ground. Indeed, as Advocate General Poiares Maduro points out in his opinion on the Coleman case (para. 20), the issue for the Court in this case 'is whether direct discrimination by association is prohibited by the Directive'. Similarly, the Court (para. 33) described the national court's question as asking 'in essence, whether Directive 2000/78 […] must be interpreted as prohibiting direct discrimination on grounds of disability only in respect of an employee who is himself disabled, or whether the principle of equal treatment and the prohibition of direct discrimination apply equally to an employee who is not himself disabled but who, as in the present case, is treated less favourably by reason of the disability of his child, for whom he is the primary provider of the care required by virtue of the child's condition'. This clearly indicates that the direct nature of the alleged discrimination is a feature different from the nature of the discrimination by association.[152]

3. The relationship with positive action

Both the Racial Equality and the Employment Equality Directives contain provisions on positive action. Arts. 5 and 7, respectively, provide that, with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to one of the discrimination grounds mentioned in the Directives.[153] The concepts of positive action and indirect discrimination share a focus on substance rather than form, though in different contexts. In the case of indirect discrimination, the substantive element lies in the focus on the effect of a measure, rather than on its outward appearance. Similarly, positive action is based on the recognition that equal treatment (i.e. applying the same rule for all) may lead to an unequal outcome, and that therefore preferential treatment is needed. There are also other links between the concepts. Thus, positive action measures may be based on requirements that are formulated in a neutral manner but in fact are not neutral. For example, the requirement that each sex is represented in a work force on a level of at least 40% works to the advantage of the sex that, at the time when the measure is taken, is in fact underrepresented, and it works to the disadvantage of the sex that is overrepresented. Thus, it could be said that such a requirement constitutes indirect positive action. However, this terminology is not used in EC law. Similarly, positive action measures may lay particular stress on qualifications that are more easily present in the disadvantaged group (e.g. capabilities and experience which have been acquired by carrying out family work; Badeck,[154] para. 32). Where such a measure does not meet the legal conditions for positive action (which include in particular proportionality), the measure intended as positive action in favour of one group will instead amount to

[151] A somewhat special example is provided by the early coal and steel case Geitling (Case 2/56 Mining undertakings of the Ruhr Basin being members of the Geitling selling agency for Ruhr coal, and the Geitling selling agency for Ruhr coal v High Authority of the European Coal and Steel Community [1957/1958] ECR 3), where different treatment of consumers led to different treatment of producers; Tobler 2005a:96 et seq.

[152] Similarly, it might be said that the instruction to discrimination means that the person obliged indirectly discriminates against another person. This is explicitly called labelled a form of discrimination under EC law, though rightly so without using the label 'indirect', which would only cause confusion.

[153] Generally on positive action under the Racial and Employment Equality Directives, De Vos 2007. See also European Commission, Putting Equality into Practice: What role for positive action?, Luxembourg: Office for Official Publications of the European Communities 2007.

[154] Case C-158/97 Georg Badeck and Others [2000] ECR I-1875.

indirect discrimination against the other (or: another) group (Colgan 2005:140). What is more, a measure intended as positive action may be construed in such a manner that it amounts to (direct or indirect) discrimination against the very group that is supposed to be promoted. Nikoloudi provides an example.

Finally, an important difference between positive action and indirect discrimination should be mentioned: EC law obliges the Member States to prohibit indirect discrimination and to deal with cases where such discrimination is alleged, but it does not oblige the Member States to adopt positive action. Rather, under the present EC law this is a mere possibility (Holtmaat/Tobler 2005:414; Tobler 2007b). As a consequence, the Member States are not obliged to adopt positive action in order to avoid the disproportionate impact of apparently neutral measures (De Vos 2007:14).

4. The relationship with positive obligations

The fact that Member States are not obliged to adopt positive action measures leads to the issue of positive obligations in a more general sense (Fredman 2005a). It has been argued that positive duties (such as for instance the obligation to create a flexible and motivated workforce as part of a company's personnel policy) are the most appropriate way to advance equality and to fight discrimination, including indirect discrimination (Fredman 2003:63). Since the Amsterdam Treaty, positive obligations to promote equality have acquired a certain importance in EC law, in particular in the context of sex equality (see consideration 2 in the preamble to the Recast Directive and Art. 23 of the Charter of Fundamental Rights). In the Racial and Employment Equality Directives, the preambles mention, 'the aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination' (recitals 14 and 3, respectively). In the Employment Equality Directive, the duty to provide reasonable accommodation for people with disabilities (Art. 5) is a specific positive obligation of employers. However, otherwise the Directives focus on the obligation to refrain from discrimination, rather than obliging the Member States to actively promote equality. Nevertheless, it should not be forgotten that the Member States are not only bound by EC law, but also by the international human rights Conventions of which they are signatories. As was mentioned earlier,[155] some of these conventions oblige the States Parties to actively take measures in order to change society (social engineering). It is in this context that the concept of indirect discrimination has a role to play: by exposing the causes underlying indirect discrimination, it may help the states to identify areas where social engineering is necessary.

5. The relationship with reasonable accommodation

In EC law in its present form, reasonable accommodation appears exclusively in the context of people with disabilities. Art. 5 of the Employment Equality Directive provides that, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, 'employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.' This can be seen as a specific expression of the general principle of equality, according to which persons in non-comparable situations must be treated differently (Gijzen 2007:396). Against this background, it is not surprising that the refusal of reasonable accommodation is often seen as a form of discrimination, and by some even as indirect discrimination (compare Schiek 2007:740 et seq.). Indeed, as was noted earlier,[156] the definition of discrimination under Art. 2 of the UN Convention on the Rights of Persons with Disabilities (CRPD)[157] specifically

[155] See above I.3.

[156] See above I.1.1.1.

[157] See *http://www.un.org/disabilities/default.asp?navid=12&pid=150*

includes 'denial of reasonable accommodation' (compare Quinn 2007:257 et seq.). In spite of this, the Employment Equality Directive does not explicitly call the denial of reasonable accommodation a form of discrimination. It rather treats it as a specific obligation of the employer, to which corresponds a specific right on the side of the employee with a disability. In this context and as already observed,[158] it seems neither necessary nor advisable to label the refusal to provide reasonable accommodation 'indirect discrimination', in particular because there is no indirect link to the discrimination criterion.[159]

In the Employment Equality Directive, indirect discrimination is expressly linked to reasonable accommodation in Art. 2(2)(b)(ii). According to this provision, a presumption of indirect discrimination can be rebutted not only by showing that there is an objective justification but also by pointing to the obligation under national law of 'the employer or any person or organisation to whom this Directive applies [...] to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice'. There is no case law on the meaning of this provision yet, and there are various interpretations in academic writing (Tobler 2005a:292 et seq., with further references). One possible reading is that Art. 2(2)(b)(ii) is intended to reinforce the duty to provide reasonable accommodation, in that the alleged discriminator can rebut a presumption of indirect discrimination by pointing to reasonable accommodation. The idea behind this is that many obstacles that arise through indirect discrimination on grounds of disability can be removed by reasonable accommodation (Quinn 2007:261). Seen in this way, the consequence of Art. 2(2)(b)(ii) is to help the victims of the alleged indirect discrimination to obtain reasonable accommodation, whilst giving the employer a certain degree of flexibility. For that reason, it has been said to create a win-win situation (Whittle 2002:311).

Finally, it has been argued that the prohibition of indirect discrimination 'ties in with the obligation of employers to accommodate those groups [meaning: the groups protected by a particular discrimination provision] by adopting measures and designing their policies in a way that does not impose a burden on them which is excessive compared with that imposed on other people. In this way, while the prohibition of direct discrimination and harassment operates as an exclusionary mechanism (by excluding from an employer's reasoning reliance on certain grounds) the prohibition of indirect discrimination operates as an inclusionary mechanism (by obliging employers to take into account and accommodate the needs of individuals with certain characteristics).' (Advocate Poiares Maduro in Coleman, para. 19). However, this is true only to a certain extent, for example where an indirect discrimination case concerns working hours or working circumstances for which there is no objective justification and which, therefore, have to be changed for the good of the employee. In other cases, there is no such effect. For example, where part-time workers earn less per hour than full-time workers who do the same work, the consequence of a finding of indirect sex discrimination is simply the right to the same pay. There is no issue of accommodation in such a case. Also, a finding of indirect discrimination does not help to tackle the cause that often underlies the phenomenon of part-time work of women, namely an unequal division of work within the family. In such cases, therefore, the prohibition of indirect discrimination does not oblige the employer to take into account and accommodate the needs of individuals with certain characteristics.

158 See above II.3.

159 However, it might be added that new directive proposed by the Commission in July 2008 (see above IV.1.), which is intended to enlarge the protection against discrimination on grounds of religion or belief, disability, age and sexual orientation, in Art. 2(5) explicitly states that denial of reasonable accommodation 'shall be deemed to be discrimination within the meaning of paragraph 1'. Art. 2(1) defines the principle of equal treatment as meaning 'that there shall be no direct or indirect discrimination on any of the grounds referred to in Article 1'.

Dilara | *2006*

Part VI

Case studies of national legislation and case law

In the EC legal system, directives have to be transposed into the national laws of the Member States (Art. 249 EC). As the Court explained in an early sex equality case and in relation to employment, this means that whilst the Member States are free to choose the form and method of implementation, on the substantive level they have the obligation to ensure, 'by appropriate legislative and administrative provisions, that all workers are afforded the full protection provided them by the directive' (Commission v Denmark,[160] para. 8). The following part of the report addresses the implementation by the Member States of the Racial and Employment Equality Directives with regard to indirect discrimination (below 1.), as well as national case law on indirect discrimination cases (below 2.).

1. Implementation of the Directives in national legislation

A comparative report on the implementation of the Racial and Employment Equality Directives in the EU Member States published in 2007[161] found that there are considerable differences in the texts of national legislation. One country, namely France, at that time had not included a detailed definition of either direct or indirect discrimination in its national legislation. In 2008, French law was changed in order to introduce such definitions. The definitions in national legislations may differ (in the Czech Republic there are apparently different definitions even within the national law), notably in relation to the requirements in relation to the disparate effect that characterises indirect discrimination, the comparison that has to be made in this context, and justification.

For the purpose of illustration, three examples of legal definitions of indirect discrimination under the national laws of the Member States shall be given. These examples are based on the information provided in the country reports written by independent legal experts in the framework of the European network of legal experts in the non-discrimination field. Particularly notable is the different wording in relation to the requirement of 'a particular disadvantage'.

The first example is provided by the Lithuanian law. Here, the legislator chose a wording that appears to be rather different from that of the Directives. In fact, it would seem that any reference to 'a particular disadvantage' is missing. The English translation given in the country report of Art. 2(4) of the Lithuanian Law on Equal Treatment is as follows:

> 'Indirect discrimination shall be taken to occur where an action or inaction, legal norm or value criterion, apparently neutral provision or practice are formally equal, but in implementing or adopting them an actual restriction of the enjoyment of rights or the provision of privileges, priority or advantage for persons of a certain age, sexual orientation, disability, racial or ethnic origin, religion or beliefs can, do or might emerge.'

The second example is Art. 2(3) of the Romanian Governmental Ordinance 137/2000. The national expert notes that though the term 'indirect discrimination' is not used, that is nevertheless what the provision addresses. According to the English translation given in the country report, Art. 2(3) prohibits

> 'any provisions, criteria or practices apparently neutral which disadvantage certain persons on grounds of one of the protected grounds from para. (1), unless these practices, criteria and provisions are objectively justified by a legitimate aim and the methods used to reach that purpose are appropriate and necessary.'

[160] Case 143/83 Commission v Denmark [1985] ECR 427.

[161] Mark Bell/Isabelle Chopin/Fiona Palmer, Developing Anti-Discrimination Law in Europe. The 25 EU Member States compared, The European network of legal experts in the non-discrimination field, Luxembourg: Office for Official Publications of the European Communities 2007.

Whilst this definition uses the word 'disadvantage', it does so without any further qualification. As for the protected grounds referred to in this definition, they go beyond the limited list of grounds under the Racial and Employment Equality Directives. Art. 2(1) of the Romanian Governmental Ordinance 137/2000 mentions 'race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion'.

The third example is Section 6(2) of the Finnish Non-Discrimination Act, which refers to

> 'an apparently neutral provision, criterion or practice puts a person at a particularly disadvantageous position compared with other persons, unless said provision, criterion or practice has an acceptable aim and the means used are appropriate and necessary for achieving this aim (indirect discrimination)'.

According to the Finnish expert, this English translation, which is provided by the Ministry of Labour of Finland, is somewhat imprecise. A more accurate translation would read 'an apparently neutral provision, criterion or practice puts a person in a particularly disadvantageous position vis-à-vis comparators', or even more literally 'against those who are the subjects of comparison'. Though this seems different from the English language version of the definition of indirect discrimination under the Racial and Employment Equality Directives, the expert notes that it is in fact in line with the Finnish language version of these Directives.

Turning to another issue, national rules on evidence are of particular importance in practice. As was stated earlier,[162] EC law does not prescribe statistical proof but such proof must be admissible where helpful for the plaintiff. Two examples of good regulation on national level shall be mentioned in this context. First, the Italian decrees transposing the Racial and Employment Equality Directives into national law state explicitly that statistical evidence is admissible. Under this law, in order to show the existence of discriminatory conduct, a plaintiff can rely on elements of fact, 'also on the basis of statistical data' (Art. 4(3) of the decreto legislativo 9 luglio 2003, n. 215, and Art. 4(4) of the decreto legislativo 9 luglio 2003, n. 216). A second example is provided by Belgian federal legislation. Art. 19 § 3 of the Non-Discrimination Act states that the plaintiff can rely on facts, 'including in particular statistical facts and practice tests'. The latter term ('practice tests') concerns what is often termed 'situation testing', i.e. the setting up of test situations in order to show the existence of discrimination. A test situation would typically involve two persons in similar situations except for the discriminatory criterion who apply for the same e.g. service or employment (Makkonen 2007:30).

In 2006, Waaldijk/Bonini-Baraldi (2006:101) concluded that among the pre-2004 enlargement Member States and based on the text of the relevant legislation, France, the Netherlands, Belgium and the UK did not fully transpose the provisions of the Directives, whilst among the enlargement countries this was the case for the Czech Republic, Estonia, Hungary, Latvia, Poland and Romania. However, it should be noted that the mere wording of national legislation is not always decisive. According to Court of Justice case law, transposing a directive into national law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific express legal provision of national law, as long as the full effect of the directive is guaranteed (Commission v Spain,[163] para. 26). Nevertheless, where a directive seeks to create rights for individuals – as is the case with the Racial and Employment Equality Directives -, the Member States must ensure that 'the legal situation arising from those principles is sufficiently precise and clear and that the persons concerned are put in a position to know the full extent of their rights and obligations and, where appropriate, to be able to invoke them before the national courts' (Commission v France,[164] para. 55). It is against the background of these requirements that the Member States, including their national courts and other authorities that apply the national law, will have to examine carefully whether the national law lives up to this standard.

[162] See above III.2.2.2.

[163] Case C-58/02 Commission v Spain [2004] ECR I-621.

[164] Case C-296/01 Commission v France [2003] ECR I-13909.

2. National case law

In the following section, a number of national cases involving the issue of indirect discrimination will be discussed. Again, these cases were identified on the basis of reports made by independent legal country experts in the framework of the European network of legal experts in the non-discrimination field. The cases selected for the present purposes serve to highlight some of the issues mentioned in the present report.

2.1 The scope of national law: the Dutch restaurant case

As was mentioned earlier,[165] the Racial and Employment Equality Directives apply within the framework of a clearly delimited field of application, which is less limited in the case of the Racial Equality Directive and considerably more limited in the case of the Employment Equality Directive. For example, access to services is covered by the Racial Equality Directive but it is not covered by the Employment Equality Directive. In other words, EC law does not require the national law of the Member States to prohibit discrimination on grounds of religion or belief, disability, age and sexual orientation in relation to services. However, given the minimum character of the directive, this does not hinder the Member States from providing protection in a broader field than that defined by the directives. The legislation of the Netherlands provides an example in this regard. The Dutch Equal Treatment Act prohibits inter alia direct and indirect discrimination in relation to access to services where the allegedly discriminatory acts are committed in the course of the carrying out of business or professional activities. A case decided by the Dutch quasi-judicial equality body, the Equal Treatment Commission, may illustrate the practical importance of the broadening of the scope of national law as compared to EC law.

The Dutch restaurant case[166] concerned access to a restaurant that operated a specific dress policy in order to attract sophisticated, older and smartly dressed guests. The policy guidelines included the following passage: 'Correct clothing is mandatory. Sport shoes and headgear which in combination with the other clothing do not correspond to the restaurant's dress code are prohibited. The ultimate assessment of this rule remains the decision of the host.' Based on this policy, the restaurant asked four young women who, based on their interpretation of their Muslim faith, wore a headscarf, to remove the scarf. When they proved unwilling to comply, they were refused entry into the restaurant. The case was brought to the Dutch Equal Treatment Commission, which found that the dress policy amounted to indirect discrimination on grounds of religion because it disproportionately affected Muslim women. The Commission concluded that whilst the aim of the restaurant's policy was legitimate, the means to achieve this aim were neither appropriate nor necessary. According to the Commission, the policy was not appropriate because it also excluded persons who were neatly dressed, such as the applicants. Further, the policy was not necessary because alternative and less far-reaching means could have been used, for example a specification of the type of clothing that the restaurant considered inappropriate, such as baseball hats and sports wear.

Had this case been decided only on the basis of EC law alone, such a finding would not have been possible due to the fact that – as mentioned above - the Employment Equality Directive does not include access to services in its scope. The Dutch Equal Treatment Act is therefore a positive example of legislation that, on the level of scope, affords more protection against discrimination than is required by EC law.

[165] See above IV.1.

[166] Commissie Gelijke Behandeling**,** Case 2004-112, opinion of 8 September 2004**.**

2.2 Discrimination grounds covered: the French health discrimination case

Similar considerations apply in the second example of a national indirect discrimination case, though here not in relation to the scope of the national law but rather in relation to the discrimination grounds mentioned in that law. EC non-discrimination law as it stands is based on a closed list of discrimination grounds. In particular, the Racial Equality Directive covers exclusively discrimination on grounds of race or ethnic origin, and the Employment Equality Directive covers only discrimination on grounds of religion or belief, disability, age and sexual orientation. Further, the Court of Justice's decision in the Chacón Navas case made clear that under EC law disability is to be distinguished from sickness. It is therefore clear that under EC law, the discrimination that is prohibited is not simply discrimination on grounds of health. Conversely, the French labour code prohibits discrimination on grounds of health.

The French health discrimination case[167] concerned the calculation of a salary adjustment based on the employee's factual working time in a situation where the employment varied between 44 hours ('high working periods') and 21 hours ('low working periods') per week, for an annual average of 35 hours. The applicable collective agreement provided that health-related absence should be treated as working time for the purpose of the calculation of the annual working time, without, however, stating on what level (high level, low level, or average) the calculation should be done. In this case the employee had been on health-related leave of absence during 'high working periods' over a period of two years. When calculating the salary adjustment, the employer interpreted the collective agreement as requiring a inclusion of the time of absence on the basis of the average working time of 35 hours. The Cour de Cassation found that this method of calculation was apparently neutral but constituted a measure with an adverse indirect impact by reason of the employee's health.

Again, had this case been decided only on the basis of EC law, such a finding would not have been possible due to the fact that the Employment Equality Directive does not prohibit discrimination on grounds of health. As in the Dutch case discussed in the previous section, the French labour code is therefore a positive example of legislation that affords more protection against discrimination than is required by EC law.

2.3 Link with discrimination on grounds of nationality: the Cypriot language requirements case

As was mentioned earlier,[168] discrimination on grounds of nationality does not fall under either the Racial Equality Directive or the Employment Equality Directive, even though there may be factual links to discrimination covered by these Directives. The Cypriot language requirements case[169] provides an illustrative example. The case concerned a regulation of the quasi-governmental Cyprus Tourism Agency according to which the manager of any tourist office in Cyprus must be Greek-speaking. The Cypriot Equality Body received a complaint by a tourist office that was refused an operating licence because it did not employ a Greek-speaking manager. The Equality Body found that the requirement in question constitutes discrimination on grounds of language, whilst at the same time amounting to indirect discrimination on grounds of race or ethnic origin. In its considerations, the Equality Body referred not only to the Cypriot Law on Equal Treatment and Occupation, but also to Regulation 1612/68/EEC,[170] which prohibits discrimination on grounds of nationality and which is part of the EC law on the free movement of persons. In this

[167] Cour de Cassation, case 05-43962, Berthus et a. v Sté Sporfabric, judgment of 9 January 2007.

[168] See above IV.1.

[169] Equality Body, complaint against the Cyprus Tourism Organisation regarding the requirement of knowledge of Greek for tourist office managers, Ref. A.K.I. 12/06, report of 1 August 2006.

[170] Regulation 1612/68/EEC on freedom of movement for workers within the Community, OJ English Special Edition 1968 L 257/2, p. 475, as amended.

manner, the Equality Body recognised the link between race/ethnic origin and nationality. However, as was also noted earlier, EC free movement law can only be relevant where a given case involves a cross-border element, which is precisely what is not required in the context of EC social law. It is not known whether this requirement was fulfilled, i.e. whether the non Greek-speaking manager was in fact a non-Cypriot national of another EU Member State.

2.4 Discrimination 'on grounds of': the UK far-right political party case

Some cases raise the question of what precisely discrimination 'on grounds of' means. More specifically, the question is to whom the discrimination ground has to relate. One such case is Coleman, on discrimination by association.[171] In a different context, the UK far-right political party case[172] provides a particularly interesting example of the issues that arise in the present context. It is therefore dealt with in some more detail than the other national cases. The case concerned Mr Redfearn, a white driver employed by the bus company Serco who, after having been elected as local councillor for a far-right political party with a racist ideology (the BNP), was dismissed. The employer argued that the employee's political views could cause distress to the bus company's passengers, the majority of whom (70-80%) was of Asian ethnic origin, and cause tensions among its employees, of whom 35% were also of Asian origin. (Both the bus driver and the passengers were disabled, but this element appears not to have played a role in relation to the discrimination issues raised by the case.) Given that under UK law there is no prohibition of discrimination on grounds of political opinion, and given further that the national law on unfair dismissal did not apply in this specific case, Mr Redfearn brought an action for racially discriminatory dismissal. Originally, he claimed that there was direct discrimination on grounds of race against him in view of the race and ethnic origin of the bus company's passengers. Later, he also argued that there was indirect discrimination in view of the white ethnic origin of the members of his party, and even later he argued that this was was fact direct discrimination. For the present purposes, it should be noted that only the argument related to the race of the party members were directly linked to the employee himself. The other argument concerned the race of other persons (here, the bus passengers). In other words, Mr Redfearn argued that 'on grounds of race' included not only his own race, but also the race of others that somehow affected him.

Regarding the direct discrimination claim related to the ethnic origin of the bus passengers, the Court of Appeal recalled that under UK law discrimination 'on racial grounds' is not confined to less favourable treatment on the ground of the colour or race of the claimant himself or herself. Rather, 'it is accepted that A can be liable for discriminating against B on the ground of C's colour or race'[173]. However, the court felt that this could not go so far as to consider it 'an act of direct race discrimination for an employer, who was trying to improve race relations in the workplace, to dismiss an employee, whom he discovered had committed an act of race discrimination, such as racist abuse, against a fellow employee or against a customer of the employer. To accept otherwise would mean that any less favourable treatment brought about because of concern about the racist views or conduct of a person in a multi-ethnic workplace would constitute race discrimination.' Neither did the Court accept the argument related to direct discrimination on the grounds of the ethnic origin of the party members. This aspect of the case as well as the argument of indirect discrimination are discussed in the following section.

171 See above V.2.

172 Court of Appeal, Serco Ltd v Arthur Redfearn [2006] EWCA Civ 659, judgment of 25 May 2006.

173 This and the following quotes are from Lord Justice Mummery, writing for the Court of Appeal; see the text of the judgment as available at ***http://www.bailii.org/ew/cases/***.

2.5 Direct or indirect discrimination? The UK far-right political party case and the Polish police case

As regards discrimination on the basis of the race of the party members, the UK far-right political party case raised questions concerning the distinction between direct and indirect discrimination. As was noted in the previous section, Mr Redfearn first claimed that there was indirect discrimination on grounds of race. Later, he argued that the case amounted to direct discrimination given the fact that his party only accepted white members, which meant that persons dismissed because of their membership of this particular party were necessarily and only white. The Court of Appeal examined both arguments. In relation to direct discrimination, it found that Mr Redfearn was treated less favourably not on the ground that he was white, but on the ground of a particular non-racial characteristic shared by him with a tiny proportion of the white population, that is membership of and standing for election for a particular political party. According to the court, the employer would have applied the same approach to a member of a similar political party which confined its membership to black people. The court found that the dividing line of colour or race was not set by the employer but rather by the party which defined its own composition by colour or race. In other words, the court in this context looked at the overall policy of the employer as applied in a concrete case, rather than conceiving the dismissal as a single act directed against one particular party. The court explained, 'Mr Redfearn cannot credibly make a claim of direct race discrimination by Serco against him on the ground that he is white by relying on the decision of his own chosen political party to limit its membership to white people. The BNP cannot make a non-racial criterion (party membership) a racial one by the terms of its constitution limiting membership to white people. Properly analysed Mr Redfearn's complaint is of discrimination on political grounds, which falls outside the anti-discrimination laws.'

Regarding the indirect discrimination claim, the court of first instance accepted that there was apparent indirect discrimination but then held that there was an objective justification on the basis of the aim to ensure the health and safety of the bus passengers. Conversely, the Court of Appeal found that the particulars necessary for a claim of apparent indirect discrimination had not been established (e.g. a policy, criterion or practice relied upon, the relevant pool relied upon, a relevant disparity in effect). According to the Court of Appeal, it was not correct to view as the relevant criterion 'membership of the BNP', as this criterion could not be applied to a person who was not of the same colour as Mr Redfearn, due to the fact that only persons of the same colour as him (white) were eligible to be members of the BNP. In other words, according to the court this criterion was not apparently neutral. According to the court, a more general and meaningful provision would have been one applying to 'membership of a political organisation, which existed to promote views hostile to members of a different colour than those that belonged to the organisation'. However, such a provision would not put persons of the same race as Mr Redfearn at a particular disadvantage when compared with other persons, since all such political activists would be at the same disadvantage, whatever colour they were. In the final analysis, therefore, the Court of Appeal found that there was no issue even of apparent indirect discrimination.

A second example concerning the distinction between direct and indirect discrimination may illustrate that sometimes the borderline in the argumentation is razor-sharp. The Polish police case[174] concerned a computer operator with an officially recognised moderate level of disability who worked at County Police Headquarters and who took part in a recruitment process for the position of senior clerk in the same Headquarters. He was informed that his application did not make it to the second stage of the recruitment process because a disabled person could not be considered. The applicant went to court and asked for damages for discrimination on grounds of disability. However, in the course of the proceedings, the employer changed its reasoning. It now argued that according to the Act on the Disabled a person with a moderate level of disability was not able to work full-time and could not be asked to do night work and overtime work. Accordingly, such a person was not an 'available worker' within the meaning of the Act on the Disabled. The court agreed with the employer that at the material time the applicant

[174] District Court of Głogów, Zbigniev Maciejewski v Komenda Powiatowa Policji Głogów, judgment of 8 February 2006.

was not an available employee, since at that time he had not produced evidence that he was able to work full-time. (At a later stage, a doctor confirmed that the applicant could work full-time, but this certificate could no longer be attached to the job application.) Accordingly, the court found itself unable to find proof for either direct or indirect discrimination on grounds of disability. The judgment was reversed at second instance, where the court found indirect discrimination.[175]

The national expert notes that in this case the reasoning first relied on by the employer ('applications of disabled persons are not taken into account') concerned alleged direct discrimination on grounds of disability. However, the second reasoning ('availability for full-time work, night work and overtime work') made the case shift to alleged indirect discrimination on grounds of disability. In a general context, this raises questions as to the ease with which an alleged discriminator can avoid a finding of direct discrimination and thereby limit the protection against discrimination in concrete cases. It should be clear that such shifts based on the mere reasoning of the alleged discriminator should not be permitted. At the same time, it is possible that in the specific case at issue the second reasoning merely explained what had actually been meant with the first reasoning, namely that applications by disabled persons would not be taken into account because they were not considered to be available employees. Ironically, in this case the legal provision that is intended to serve as additional protection for disabled persons (namely the provision that limits the working time of persons with a moderate level of disability) was used against the applicant. The national expert remarks that this appears not to have been taken into account by the court. Instead, the court simply relied on the concept of the 'available worker', apparently without considering the issue of reasonable accommodation (see consideration 17 of the Employment Equality Directive). If so, this would be a weak point in the judgment.

Both cases illustrate the fact that arguments of direct and indirect discrimination must not be examined by national courts in a mechanical manner, but must always be seen in the context of the meaning and the purpose of the prohibition of discrimination.

2.6 Use of statistical evidence: the Czech Ostrava case

The Czech case D.H. and others v. Czech Republic (Ostrava), already mentioned earlier in the context of international human rights law,[176] illustrates not only how the use of statistics can be relevant in showing that there is apparent indirect discrimination, but also that the courts' attitude to such proof is important. In this case, 18 Roma school children from the Czech city of Ostrava complained about the fact that the percentage of Roma children placed in special schools for children with learning difficulties in the Czech Republic was much higher than that of other children. Children were placed in special schools based on the results of a test of intellectual ability administered by a psycho-pedagogic assessment and advisory centre. The plaintiffs in the Ostrava case argued that the authorities abused the school system to place disproportionately many Roma children in special schools where they would receive a lesser education. Indeed, the level of such special schools was considerably lower than that of regular schools.

The case raised a number of legal issues, of which the proof of apparent indirect discrimination based on statistics is of particular interest for our present purposes. The case is characterised by the vast use of statistical data comparing numbers of Roma and non-Roma children in special and regular schools in Ostrava in particular, and in the Czech Republic in general. The statistics relied on had been collected by the European Roma Rights Centre, Interights

[175] Regional Court of Legnica, Zbigniev Maciejewski v Komenda Powiatowa Policji Głogów, judgment of 20 June 2006.

[176] See above I.2.

and the Migration Policy Group based on lengthy and detailed research carried out by these organisations.[177] The data showed that in Ostrava Roma children were 27 times (!) more likely to be placed in special schools than other children. This led to the argument of a segregated school system involving indirect discrimination on grounds of racial origin. However, the action was unsuccessful before the Czech courts. In particular, the Constitutional Court held that it had no jurisdiction to consider statistical evidence. As was also noted earlier, the action was also unsuccessful before a Chamber of the Court of Human Rights in Strasbourg in 2006, but it was successful before the same Court's Grand Chamber in 2007. As for the Chamber, it held that 'if a policy or general measure has disproportionately prejudicial effects on a group of people, the possibility of its being considered discriminatory cannot be ruled out even if it is not specifically aimed or directed at that group. However, statistics are not by themselves sufficient to disclose a practice which could be classified as discriminatory' (para. 46). In academic writing, the Chamber judgment was severely criticised because of its flawed approach to indirect discrimination and to statistical proof in particular (e.g. Goodwin 2006:426). In contrast, the Grand Chamber, after having referred to the practice of other courts and human rights bodies, including in particular the European Court of Justice, found that 'when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce'. The Court added that '[t]his does not, however, mean that indirect discrimination cannot be proved without statistical evidence' (para. 188).

Overall, the Ostrava case illustrates the importance not only of admitting statistical evidence in the context of allegations of indirect discrimination, but also of assessing it in an adequate manner.

2.7 Objective justification: the Dutch mortgages and handshaking cases

Two Dutch cases may illustrate how national equality bodies and courts could deal with arguments relating to objective justification. The Dutch mortgages case[178] concerned a policy established by financial institutions in the Netherlands for granting of loans to purchase real estate, and more precisely the criteria used in order to select clients to be given such loans. In relation to the value of the property that would serve as a security for the loan, the institutions relied on the postal code of the property.[179] When it became aware of this policy, the Dutch Equal Treatment Commission decided to carry out an investigation on its own initiative. Having found that the subject matter of the case (access to a financial service) was covered by the Dutch Equal Treatment Act, it held that reliance on postal codes constituted indirect discrimination on grounds of race or ethnic origin. This finding is explained by the fact that parts of Dutch cities such as Amsterdam, Rotterdam, The Hague and Utrecht are mainly inhabited by non-Western immigrants and that Dutch postal codes rather precisely indicate the part of the city where a building is located. The aim of the financial institutions' policy was to restrict the financial risk of both the institutions themselves and of the applicants (in the Netherlands such loans are typically given for the duration of 30 years).

177 See European Roma Righs Centre (ERRC)/Interights/Migration Policy Group (MPG), Strategic Litigation of Race Discrimination in Europe: From Principles to Practice, Budapest: ERRC/London: Interights/Brussels: MPG 2004, p. 80.; see *http://www.migpolgroup.com/documents/2181.html*

178 Equal Treatment Commission, Risicoselectie op grond van postcode en verblijfsstatus. Een onderzoek uit eigen beweging naar onderscheid door hypothecair financiers, December 2006.

179 In relation to the solvency of the applicant, where the applicant was not a national of a Member State of the EU or of the European Economic Area or a national of Switzerland, the financial institutions relied on the potential client's residence status, i.e. on whether the person was in possession of a residence permit for an indefinite period of time. The Commission found that this amounted to indirect discrimination on grounds of nationality. As it is not related to the race discrimination caused by the postal code criterion, this issue is not discussed further in this report.

When examining this case, the Equal Treatment Commission explained that financial and economic justifications are not legitimate aims in the context of objective justification for indirect discrimination, except where in a concrete case equal treatment would lead to a disproportionate rise in the costs or where the costs for other reasons would appear disproportionate. The aim of this approach is to avoid objective justification merely being based on considerations of a company's profit. In this case, the Commission found the above-mentioned aim to be acceptable, not least because Dutch law explicitly obliges the providers of financial services to strive to protect them from financial risks. However, the Commission held that the broad formulation of the criteria went further than was necessary (i.e. it was disproportionate). In the course of its investigation, the Commission noted that some financial institutions used alternative criteria that did not result in discrimination. The Commission therefore concluded that there was no objective justification. It then made recommendations to the financial institutions for improving the situation (which were apparently well received by the industry). In this case, therefore, the Equal Treatment Commission took a strict approach towards objective justification for indirect discrimination, which is to be applauded.

This seems to be different in the Dutch handshaking case,[180] which was also decided by the Equal Treatment Commission, and which involved a conflict between different human rights. The case concerned the rejection of the application for the job of customer manager of a Muslim man who indicated that he would not be willing to shake hands with women. The potential employer explained its refusal to appoint the applicant by pointing out that the refusal to shake hands with women would obstruct the applicant's relationship with customers. The Equal Treatment Commission found that not wanting to shake hands with women could also be an expression of religious belief, and that requesting employees to shake hands with all customers mainly affects Muslims and therefore amounts to indirect discrimination on grounds of religion. On the level of objective justification, the Commission found that the aims of the respondent, namely customer-friendliness and prevention of discrimination on grounds of sex, were legitimate but that the means used in order to achieve these aims were neither necessary nor appropriate. The Commission based this on the fact that there was no proof that customers ever object to not being shaken hands with, that the employer did not operate a specific policy with regard to the treatment of customers and had not looked for alternative ways of greeting customers. Also, the employer could not answer the question of whether the applicant would have been accepted if he had refused to shake hands with both women and men. In an earlier case,[181] the Equal Treatment Commission had held that equality between men and women can be upheld by requiring that the applicant should not shake hands with both men and women. However, as the national expert notes, this disregards the fact that according to (a certain interpretation of) the Muslim religion, the shaking of hands is prohibited only between the sexes, and not as a general issue. It is therefore clearly related to sex. When the case came to the ordinary court, this court found that there was objective justification and, therefore, no indirect discrimination on grounds of religion.[182]

This and other non-discrimination cases concerning segregational elements in Muslim societies have caused fierce debates in the Netherlands. The main problem lies in the conflict between discrimination on grounds of religion and discrimination on grounds of sex. The Equal Treatment Commission tends to favour the former, even in highly disputed cases such as the right of Muslim women to wear the full veil. In this writer's view, the outcome of such cases has been rightly criticised (most recently by Loenen 2008).

[180] Equal Treatment Commission, Case 2006-202, opinion of 5 October 2006.

[181] Equal Treatment Commission, Case 2006-51, opinion of 27 March 2006.

[182] Court of Rotterdam, judgment of 6 augustus 2008, LJN: BD9643.

2.8 Reasonable accommodation: the Italian workplace case

A final example from national case law takes up the issue of the relationship between indirect discrimination and reasonable accommodation that was already touched upon in the Polish police case.[183] The Italian workplace case[184] concerned an employee of the Ministry of Justice who had been recognised to be disabled and for that reason needed to work as closely as possible to her place of residence. The case arose because after having been transferred to a workplace close to her residence and after having worked there for a certain period of time, the employee was transferred back to an earlier place of employment that was further away. The labour court seized with the case found that this decision involved indirect discrimination on grounds of disability. In doing so, the court referred not only to the definition of indirect discrimination contained in the Italian law implementing the Employment Equality Directive, but also to recitals 6, 9 and 20 in the preamble to the Employment Equality Directive as well as to Art. 5 on reasonable accommodation. The national expert explains that the implementing Italian law does not mention the requirement of reasonable accommodation and that in order to qualify the decision of the Ministry as discriminatory within the meaning of the Directive, the court had to include considerations in relation to reasonable accommodation. It may perhaps be concluded that to let the employee continue her work at the place close to her residence would have met the requirement of reasonable accommodation. Interestingly, however, the court did not focus on the refusal of such accommodation as such. Instead, it focused on the requirement to work in particular place, which it considered as apparently neutral but particularly disadvantageous in effect to people having the condition of the applicant.

As the Ministry of Justice did not appear before the court, there were no arguments of defence, and in particular no argument in relation to Art. 2(2)(ii) of the Directive, where reasonable accommodation is expressly linked to indirect discrimination. Accordingly, the court found that the employer had not proven the existence of an objective justification.

[183] See above IV.2.2.5.

[184] Court of Pistoia, Laura Neri v Ministry of Justice, judgment of 30 September 2005.

Stella | *1955*

Conclusion

Realising the potential of the concept of indirect discrimination

The particular potential of the legal concept of indirect discrimination lies in the fact that it looks beyond mere appearances and focuses on substance. However, whether this potential can be realised depends largely on the manner in which the concept is put in practice, and thus on legislation and practice in the various EU Member States. In her important contribution on indirect discrimination, Schiek (2007:472) noted that the law on indirect discrimination is a complex area that is far from being consolidated, and that it is difficult to know whether indirect discrimination law will truly take hold in all the national legal orders within the European Union. However, it will have to be remembered that as an important element of EC law, the prohibition of indirect discrimination is part and parcel of the famous acquis communautaire, which the Member States have to respect as a matter of the primacy of EC law (Costa).[185] The Member States are, therefore, obliged to make the various prohibitions of indirect discrimination under EC law effective within their national legal orders.

In this context, the national courts play a particularly important role. In holding national law to the standards of EC law, these courts may find guidance in Court of Justice case law, as discussed in this report. Where a court has doubts about the meaning of EC law and cannot find an answer in Court of Justice case law, it should consider a request for a preliminary ruling to the Court of Justice under Art. 234 EC.[186] As Senden (2008:384) has recently shown in relation to sex equality law, the potential of this unifying mechanism is used rather unevenly in the different EU Member States and could be improved.

Further, it is important to remember that the Racial and Employment Equality Directives provide only a minimum framework of protection from discrimination. Member States 'may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment' than those laid down in the Directives (Arts. 6 of the Racial Equality Directive, Art. 8 of the Employment Equality Directive). In this framework, the Member States enjoy discretion which should be used in order to further realise the potential of the concept of indirect discrimination, for example, by giving the national law a broader scope than the Directives and by providing for fewer exceptions than EC law. Also, the proportionality test can be made stricter under national law by adding a third requirement that is often seen as part of the proportionality principle, namely that of proportionality between the seriousness of intervention and the gravity of the reasons for justifying it, i.e. a requirement that the disadvantages caused must not be disproportionate to the aims pursued (Tobler 2005a:242).

Finally, the prohibition of indirect discrimination can and should be backed up in the Member States with further legislative and non-legislative action. This may include measures aiming to raise awareness in relation to the problem of indirect discrimination as well as measures aiming to tackle the structural problems that are exposed through findings of indirect discrimination. Again, the Member States' obligations under public international law of engaging in social engineering in order to fight discrimination acquire a particular meaning in this context.

[185] Case 6/64 Flaminio Costa v ENEL [1964] ECR 585.

[186] Guidance from the Court of Justice on how to make such a reference can be found in the Court's Information note on references by national courts for preliminary rulings, available at ***http://curia.europa.eu/en/instit/txtdocfr/index.htm***

List of cases

European Court of Justice

- Case 2/56 Mining undertakings of the Ruhr Basin being members of the Geitling selling agency for Ruhr coal, and the Geitling selling agency for Ruhr coal v High Authority of the European Coal and Steel Community [1957/1958] ECR 3.
- Case 6/64 Flaminio Costa v ENEL [1964] ECR 585.
- Case 15/69 Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola [1969] ECR 363.
- Case 20/71 Luisa Sabbatini, née Bertoni, v European Parliament [1972] ECR 345.
- Case 152/73 Giovanni Maria Sotgiu v Deutsche Bundespost [1974] ECR 153.
- Case 149/77 Gabrielle Defrenne v SABENA [1978] ECR 1365 (Defrenne III).
- Case 96/80 J.P. Jenkins v Kinsgate (Clothing Productions) Ltd [1981] ECR 911.
- Case 143/83 Commission v Denmark [1985] ECR 427.
- Case 170/84 Bilka-Kaufhaus GmbH v Karin Weber von Hartz [1986] ECR 1607.
- Case 262/84 Vera Mia Beets-Proper v F. Van Lanschot Bankiers NV [1986] ECR 773.
- Case 150/85 Jacqueline Drake v Chief Adjudication Officer [1986] ECR 1995.
- Case 237/85 Gisela Rummler v Dato-Druck GmbH [1986] ECR 2101.
- Case 109/88 Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss) [1989] ECR 3199.
- Case 171/88 Ingrid Rinner-Kühn v FWW Spezial Gebäudereinigung GmbH & Co. KG [1989] ECR 2743.
- Case C-177/88 Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus [1990] I-3941.
- Case C-262/88 Douglas Harvey Barber v Guardian Royal Exchange Assurance Group [1990] ECR I-1889.
- Case C-229/89 Commission v Belgium [1991] ECR I-2205.
- Case C-189/91 Petra Kirsammer-Hack v Nurhan Sidal [1993] ECR I-6185.
- Case C-226/91 Jan Molenbroek v Bestuur van de Sociale Verzekeringsbank [1992] ECR I-5943.
- Case C-19/92 Dieter Kraus v Land Baden-Württemberg [1993] ECR I-1663.
- Case C-127/92 Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health [1993] ECR I-5535.
- Case C-278/93 Edith Freers and Hannelore Speckmann v Deutsche Bundespost [1996] ECR I-1165.
- Case C-317/93 Inge Nolte v Landesversicherungsanstalt Hannover [1995] ECR I-4625.
- Case C-444/93 Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz [1995] ECR I-4741.
- Case C-237/94 John O'Flynn v Adjudication Officer [1996] ECR I-2617.
- Case C-158/97 Georg Badeck and Others [2000] ECR I-1875.
- Case C-167/97 The Queen v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez [1999] ECR I-623.
- Case C-281/97 Andrea Krüger v Kreiskrankenhaus Ebersberg [1999] ECR I-5127.
- Case C-309/97 Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse [1999] ECR I-2865.
- Case C-226/98 Brigitte Jørgensen v Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg [2000] ECR I-2447.
- Case C-236/98 Jämställdhetsombudsmannen v Örebro läns landsting [2000] ECR I-2189.
- Case C-322/98 Bärbel Kachelmann v Bankhaus Hermann Lampe KG [2000] ECR I-7505.
- Case C-79/99 Julia Schnorbus v Land Hessen [2000] ECR I-10997.
- Case C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge and Republik Österreich [2003] ECR I-5659.
- Case C-256/01 Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment [2004] ECR I-873.
- Case C-296/01 Commission v France [2003] ECR I-13909.

- Joined Cases C-4/02 and 5/02 Hilde Schönheit v Stadt Frankfurt am Main and Silvia Becker v Land Hessen [2003] ECR I-12575.
- Case C-25/02 Katharina Rinke v Ärztekammer Hamburg [2003] ECR I-8349.
- Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609.
- Case C-58/02 Commission v Spain [2004] ECR I-621.
- Case C-77/02 Erika Steinicke v Bundesanstalt für Arbeit [2003] ECR I-9027.
- Case C-138/02 Brian Francis Collins v Secretary of State for Work and Pensions [2004] ECR I-2703.
- Case C-157/02 Rieser Internationale Transporte GmbH v Autobahnen- und Schnellstraßen-Finanzierungs- AG (Asfinag) [2004] ECR I-1477.
- Case C-196/02 Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE [2005] ECR I-1789.
- Case C-220/02 Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich [2004] ECR I-5907.
- Case C-313/02 Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG. [2004] ECR I-9483.
- Case C-422/02 P Europe Chemi-Con (Deutschland) GmbH v Council and Commission [2005] ECR I-791.
- Case C-147/03 Commission v Austria [2005] ECR I-5969.
- Case C-144/04 Werner Mangold v Rüdiger Helm [2005] ECR 9981.
- Case C-17/05 B. F. Cadman v Health & Safety Executive [2006] I-9583.
- Case C-13/05 Sonia Chacón Navas v Eurest Colectividades SA [2006] ECR I-6467.
- Case C-307/05 Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud [2007] ECR I-7109.
- Case C-411/05 Félix Palacios de la Villa v Cortefiel Servicios SA, judgment of 16 October 2007 (n.y.r.).
- Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, judgment of 11 December 2007 (n.y.r.).
- Case C-267/06 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen, judgment of 1 April 2008 (n.y.r.).
- Case C-300/06 Ursula Voss v Land Berlin, judgment of 6 December 2007 (n.y.r.).
- Case C-303/06 S. Coleman v Attridge Law and Steve Law, judgment of 17 July 2008 (n.y.r.).
- Case C-390/06 Nuova Agricast Srl v Ministero delle Attività Produttive, judgment of 15 April 2008 (n.y.r.).
- Case C-427/06 Brigit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH, judgment of 23 September 2008 (n.y.r.)..
- Case C-54/07 Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV, judgment of 10 July 2008 (n.y.r.).
- Joined Cases C-55/07 and 56/07 Othmar Michaeler, Subito GmbH and Ruth Volgger v Amt für sozialen Arbeitsschutz, Autonome Provinz Bozen, judgment of 24 April 2008 (n.y.r.).
- Case C-164/07 James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions, judgment of 5 June 2008 (n.y.r.).
- Case C-555/07 Seda Kücükdeveci v Swedex GmbH & Co. KG, pending.
- Case C-88/08 David Hütter v Technische Universität Graz, pending.

European Court of Human Rights

- Marckx v. Belgium, 13 June 1979, Publ. ECHR Series A Volume 31.
- Thlimmenos v Greece, 6 April 2000, Rep. 2000-IV.
- Hugh Jordan v. UK, 4 May 2001, application number 24746/94.
- Hoogendijk v. The Netherlands, 6 January 2005, 40 EHRR SE 22.
- D.H. and others v. Czech Republic, 13 November 2007, application number 57325/00.

USA Supreme Court

Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Dylan | *1999*

Bibliography

Mark Bell/Lisa Waddington, 'Reflecting on inequalities in European equality law', European Law Review 2003, 349-369.

Mark Bell, 'EU anti-racism policy: the leader of the pack?' in: Helen Meenan (ed), Equality Law in an Enlarged European Union. Understanding the Article 13 Directives, Cambridge: Cambridge University Press 2007, 178-201 (quoted as Bell 2007a).

Mark Bell, 'Direct Discrimination', in: Dagmar Schiek/Lisa Waddington/Mark Bell (eds), Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, Oxford and Portland, Oregon: Hart Publishing 2007, 185-322 (quoted as Bell 2007b).

Mark Bell/Isabelle Chopin/Fiona Palmer, Developing Anti-Discrimination Law in Europe. The 25 EU Member States compared, (The European network of legal experts in the non-discrimination field), Luxembourg: Office for Official Publications of the European Communities 2007.

Aileen Colgan, Discrimination Law, 2nd edition, Oxford: Hart Publishing 2005.

Michael Connolly, Discrimination Law, London: Sweet & Maxwell 2006.

Paul Craig, 'The Treaty of Lisbon: Process, architecture and substance', European Law Review 2008, 137-166.

Olivier De Schutter, The Prohibition of Discrimination under European Human Rights Law. Relevance for EU Racial and Employment Equality Directives, (The European network of legal experts in the non-discrimination field), Luxembourg: Office for Official Publications of the European Communities 2005.

Marc De Vos, 'Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78/EC', (The European network of legal experts in the non-discrimination field), Luxembourg: Office for Official Publications of the European Communities 2007.

Michael Dougan, 'The Treaty of Lisbon 2007: Winning minds, not hearts', Common Market Law Review 2008, 617-703.

Oran Doyle, 'Direct Discrimination, Indirect Discrimination and Autonomy', Oxford Journal of Legal Studies 2007, 537-553.

European Commission, Putting Equality into Practice: What role for positive action?, Luxembourg: Office for Official Publications of the European Communities 2007.

European Commission, European handbook on equality data, Luxembourg: Office for Official Publications of the European Communities 2007.

Lilla Farkas, Segregation of Roma Children in Education. Addressing Structural Discrimination through the Race Equality Directive, (The European network of legal experts in the non-discrimination field), Luxembourg: Office for Official Publications of the European Communities 2007.

Barry Fitzpatrick, 'The 'mainstreaming' of sexual orientation into European equality law', in: Helen Meenan (ed), Equality law in an Enlarged European Union. Understanding the Article 13 Directives, Cambridge: Cambridge University Press 2007, 313-341.

Sandra Fredman, Discrimination Law, Oxford: Oxford University Press 2002.

Sandra Fredman, 'The Age of Equality', in: Sandra Fredman/Sarah Spencer (eds), Age as an Equality Issue, Oxford and Portland, Oregon: Hart Publishing 2003, 21-69.

Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation', Maastricht Journal of European and Comparative Law 2005, Special issue: Thirty Years of EU Sex Equality Law (compiled and guest-edited by Tamara Hervey), 369- 398 (quoted as Fredman 2005a).

Sandra Fredman, Double Trouble: multiple discrimination and EU law', European Anti-Discrimination Law Review 2/2005, 13-19 (quoted as Fredman 2005b).
Janneke H. Gerards, Judicial review in equal treatment cases, Leiden/Boston: Martinus Nijhoff 2005.

Janneke Gerards, 'Discrimination grounds', in: Dagmar Schiek/Lisa Waddington/Mark Bell (eds), Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, Oxford and Portland, Oregon: Hart Publishing 2007, 33-184.

Janneke H. Gerards, 'Intensity of judicial review in equal treatment cases', Netherlands International Law Review 2004, 135-183.

M.H.S. Gijzen, Selected Issues in Equal Treatment Law: A multi-layered comparison of European, English and Dutch law, Antwerp/Oxford: Intersentia 2006.

Morag Goodwin, 'D.H. and Others v. Czech Republic: a major set-back for the development of non-discrimination norms in Europe', German Law Journal 2006, 421-432.

Kay Hailbronner, 'Hat der EuGH eine Normverwerfungskompetenz?', Neue Zeitschrift für Arbeitsrecht 2006, 811-816.

Barbara Havelková, 'Die Anwendung des Verhältnismäßigkeitsprinzips durch den EuGH bei der Feststellung von Diskriminierungen aufgrund des Geschlechts', Zeitschrift für Europarechtliche Studien 2008, 305-357 (forthcoming).

Aart Hendriks, 'EHRM neemt discriminatiejurisprudentie HvJ EG indirect over', NJCM Bulletin 2005, 444-454.

Kristin Henrad, 'Een zoektocht naar een beter begrip van een adequaat toetsingsmodel voor indirecte discriminatie', NJCM-Bulletin 2008, 234-250.

Bob Hepple, 'Age Discrimination in Employment: Implementing the Employment Equality Directive 2000/78/EC', in: Sandra Fredman/Sarah Spencer (eds), Age as an Equality Issue, Oxford and Portland, Oregon: Hart Publishing 2003, 71-96.

Tamara K. Hervey, 'EC Law on Justifications for Sex Discrimination in Working Life', conference paper of 2002, 103-147, text available via *http://unjobs.org/authors/tamara-k.-hervey.*

Rikki Holtmaat, Towards Different Law and Policy. The significance of Article 5a CEDAW for the elimination of structural gender discrimination, research undertaken for the Ministry of Social Affairs and Employment in the Netherlands; text available at *http://www.rikkiholtmaat.nl/e_index1.html* (under 'English publications').

Rikki Holtmaat/Christa Tobler, 'CEDAW and the European Union's Policy in the Field of Combating Gender Discrimination', Maastricht Journal of European and Comparative Law 2005, Special issue: Thirty Years of EU Sex Equality Law (compiled and guest-edited by Tamara Hervey), 399-425.

Titia Loenen, 'Indirect Discrimination: Oscillating Between Containment and Revolution', in: Titia Loenen & Peter R. Rodrigues (eds), Non-Discrimination Law: Comparative Perspectives, The Hague/London/Boston: Kluwer Law International 1999, 195-211.

Titia Loenen, 'Kopftuch ja, Burka nein? Gedanken zur Beschränkung der Glaubensfreihiet in Bezug auf gesichtsbedeckende Schleier', in: Kathrin Arioli/Michelle Cottier/Patricia Farahmand/Zita Küng (eds), Wandel der Geschlechterverhältnisse durch Recht?', Zurich/St. Gallen: Dike and Baden-Baden: Nomos 2008, 321-322.

Catharine A. MacKinnon, Sex Equality, University Casebook Series, New York, Foundation Press 2001.

Timo Makkonen, Measuring Discrimination. Data Collection and EU Equality Law, (The European network of legal experts in the non-discrimination field), Luxembourg: Office for Official Publications of the European Communities 2007.

Christopher McCrudden, 'Thinking about the discrimination directives', European Anti-Discrimination Law Review 2005, 17-21.

Christopher McCrudden/Haris Kountrouros, 'Human rights and European equality law', in: Helen Meenan (ed), Equality law in an Enlarged European Union. Understanding the Article 13 Directives, Cambridge: Cambridge University Press 2007, 73-116.

Denis Martin, Egalité et non-discrimination dans la jurisprudence communautaire. Etude critique à la lumière d'une approche comparatiste, Brussels: Bruylant 2006.

Helen Meenan, 'Age discrimination - of Cinderella and the golden bough', in: Helen Meenan (ed), Equality law in an Enlarged European Union. Understanding the Article 13 Directives, Cambridge: Cambridge University Press 2007, 278-312.

Alexander H.E. Morawa, 'The Evolving Human Right to Equality', in: European Centre for Minority Issues/The European Academy Bozen/Bolzano (ed), European Yearbook of Minority Issues 2001/2, volume 1, Den Haag/London/New York: Kluwer Law International 2003, 157-205.

Colm O'Cinneide, 'Age discrimination and European Law', (The European network of legal experts in the non-discrimination field), Luxembourg: Office for Official Publications of the European Communities 2005.

Gwyneth Pitt, 'Religion or belief: aiming at the right target?', in: Helen Meenan (ed), Equality Law in an Enlarged European Union. Understanding the Article 13 Directives, Cambridge: Cambridge University Press 2007, 202-230.

Tobias Polloczek, Altersdiskriminierung im Licht des Europarechts, Baden-Baden: Nomos 2007.

Gerard Quinn, 'Disability discrimination in the European Union', in: Helen Meenan (ed), Equality Law in an Enlarged European Union. Understanding the Article 13 Directives, Cambridge: Cambridge University Press 2007, 231-277.

Dagmar Schiek, 'A New Framework on Equal Treatment of Persons in EC Law? Directives 2000/43/EC, 2000/78/EC and 2002/???/EC changing Directive 76/207/EEC in context', European Law Journal 2002, 290-314.

Dagmar Schiek, 'Broadening the scope oand the norms of EU gender equality law: towards a multidimensional conception of equality law', in: Maastricht Journal of European and Comparative Law 2005, Special issue: Thirty Years of EU Sex Equality Law (compiled and guest-edited by Tamara Hervey), 427-466.

Dagmar Schiek, 'Indirect Discrimination', in: Dagmar Schiek/Lisa Waddington/Mark Bell (eds), Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, Oxford and Portland, Oregon: Hart Publishing 2007, 323-475.

Dagmar Schiek/Lisa Waddington/Mark Bell, 'A comparative perspective on non-discrimination law', in: Dagmar Schiek/Lisa Waddington/Mark Bell (eds), Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, Oxford and Portland, Oregon: Hart Publishing 2007, 1-32.

Linda Senden, 'Conceptual Convergence and Judicial Cooperation in Sex Equality Law', in: Sacha Prechal/Bert van Roermond, The Coherence of EU Law. The Search for Unity in Divergent Concepts, Oxford: Oxford University Press 2008, 363-396.

Christa Tobler, Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law, Antwerp/Oxford: Intersentia 2005 (quoted as Tobler 2005a).

Christa Tobler, Remedies and Sanctions in EC non-discrimination law, (The European network of legal experts in the non-discrimination field), Luxembourg: Office for Official Publications of the European Communities 2005 (quoted as Tobler 2005b).

Christa Tobler, Putting Mangold in perspective: in response to Editorial comments, Horizontal direct effect – A law of diminishing coherence?', Common Market Law Review 2007, 1177-1183 (quoted as Tobler 2007a).

Christa Tobler, 'Substantive Equality and Positive Action in EC Sex Equality Law: Can the EC oblige the Member States to Provide for Positive Action Measures?, IISL e-paper in: Judy Fudge (ed), Equality as a social Right: Towards a Concept of Substantive Equality in Comparative and International Law, available at: *http://www.iisj.net/antBuspre.asp?cod=3640&nombre=3640&prt=1&sesion=1347,* posted March 2007 (quoted as Tobler 2007b).

Christa Tobler, Altersdiskriminierung im EG-Recht', in: Astrid Epiney/Markus Wyssling (eds), Schweizerisches Jahrbuch für Europarecht 2006/2007 / Annuaire suisse de droit européen 2006/2007, Bern: Stämpfli/Zürich: Schulthess 2007, 283-303 (quoted as Tobler 2007c).

Takis Tridimas, The General Principles of EU Law, second edition, Oxford: Oxford University Press 2006.

A.G. Veldman, 'Neutraal onderscheid in arbeidsvoorwaarden kan direct discriminatie zijn', Sociaal recht 2005, 190-193.

Kees Waaldijk/Matteo Bonini-Baraldi, Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive, The Hague: T.M.C. Asser Press 2006.

Lucy Vickers, 'Religion and Belief Discrimination in Employment – the EU Law', (The European network of legal experts in the non-discrimination field), Luxembourg: Office for Official Publications of the European Communities 2006.

Kees Waaldijk/Christa Tobler, (Case note on Maruko), Common Market Law Review 2008 (forthcoming).

Lisa Waddington/Mark Bell, 'More equal than others: distinguishing European Union Equality Directives', Common Market Law Review 2001, 587-611.

Lisa Waddington, 'Reasonable Accommodation', in: Dagmar Schiek/Lisa Waddington/Mark Bell (eds), Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, Oxford and Portland, Oregon: Hart Publishing 2007, 629-756.

Richard Whittle, 'The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective', European Law Review 2002, 303-326.

Bert | *1952*

Annex

Charts on indirect discrimination

This annex provides a number of so-called charts, i.e. graphic representations of selected aspects discussed in this report. The first chart provides a decision tree, i.e. a chart that guides the reader down the appropriate path for a dealing with discrimination cases falling within the field of EC social law as discussed in the present report. The remaining charts are so-called topic charts, i.e. they deal with specific issues:

Chart 1: Decision tree: discrimination cases

Chart 2: Legal analysis of discrimination cases
When analysing whether there is discrimination in a given case, the authority, court, person or entity dealing with the matter will have to follow a three-step approach which involves the issues of scope, discrimination and derogations.

Chart 3: Scope of non-discrimination legislation
The different pieces of EC non-discrimination law that are relevant for the area of social law have very different fields of application.

Chart 4: Forms of discrimination
Originally, the term 'discrimination' had only one meaning. Conversely, the most recent generation of social non-discrimination law distinguishes between four different forms of discrimination, three of which are defined in the legislation.

Chart 5: Indirect discrimination: an overview
Indirect discrimination is an effects-based concept and a concept based on the rule of reason.

Chart 6: Same and different treatment
Equality and non-discrimination in EC social law may mean either the same treatment or different treatment, depending on the situation.

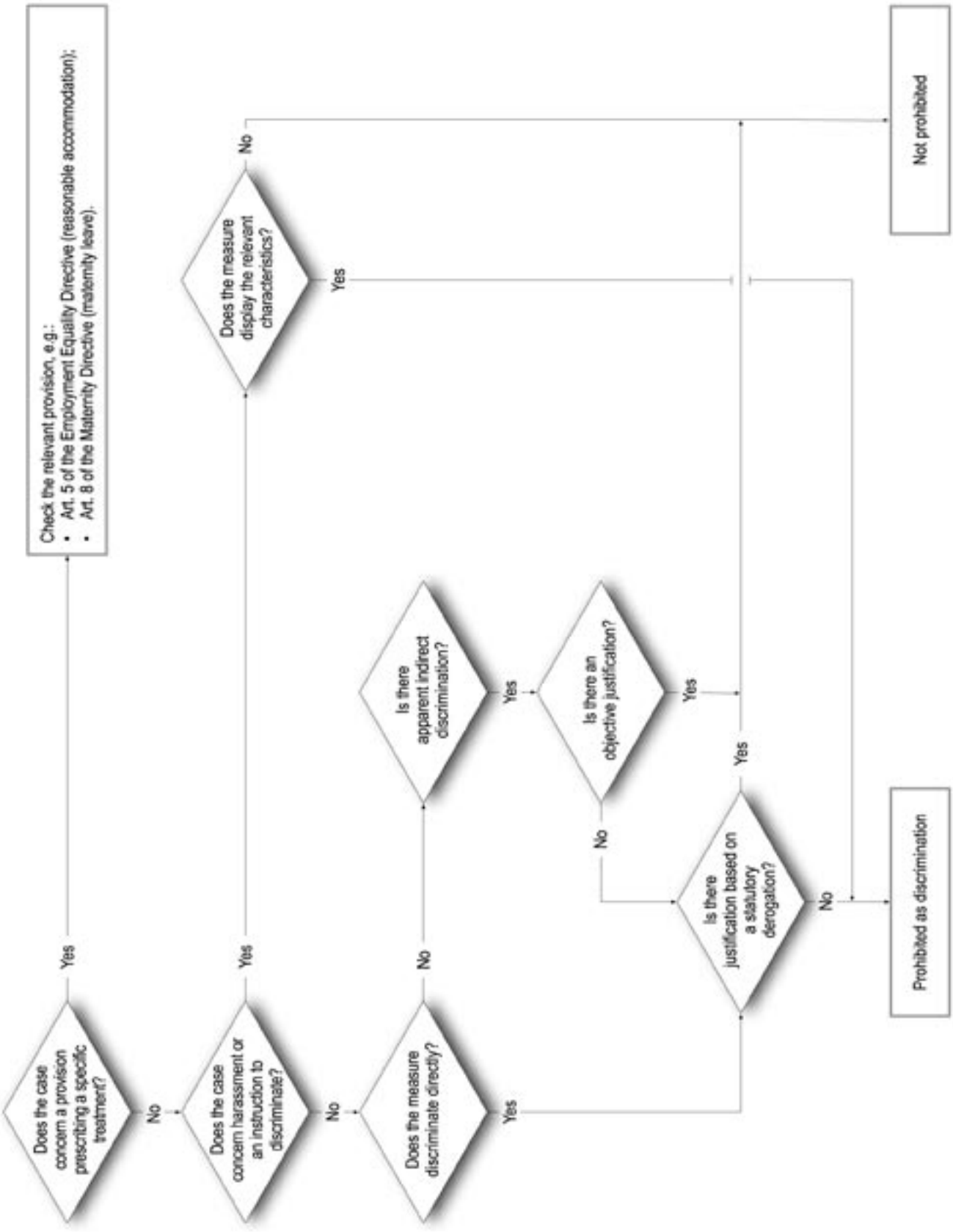
Chart 7: Distinguishing direct and indirect discrimination
Indirect discrimination must be distinguished from direct discrimination. This can be done both on the level of the nature of the allegedly discriminatory measure and on the level of justification.

The charts contained in this annex are based on the models that can be found in:

Christa Tobler/Jacques Beglinger, Essential EC Law in Charts, Budapest: HVG-Orac 2007.

'Essential EC Law in Charts' is an output of the 'EC Law in Charts Project'. More information about the project and about the book can be found at *http://www.eur-charts.eu*.

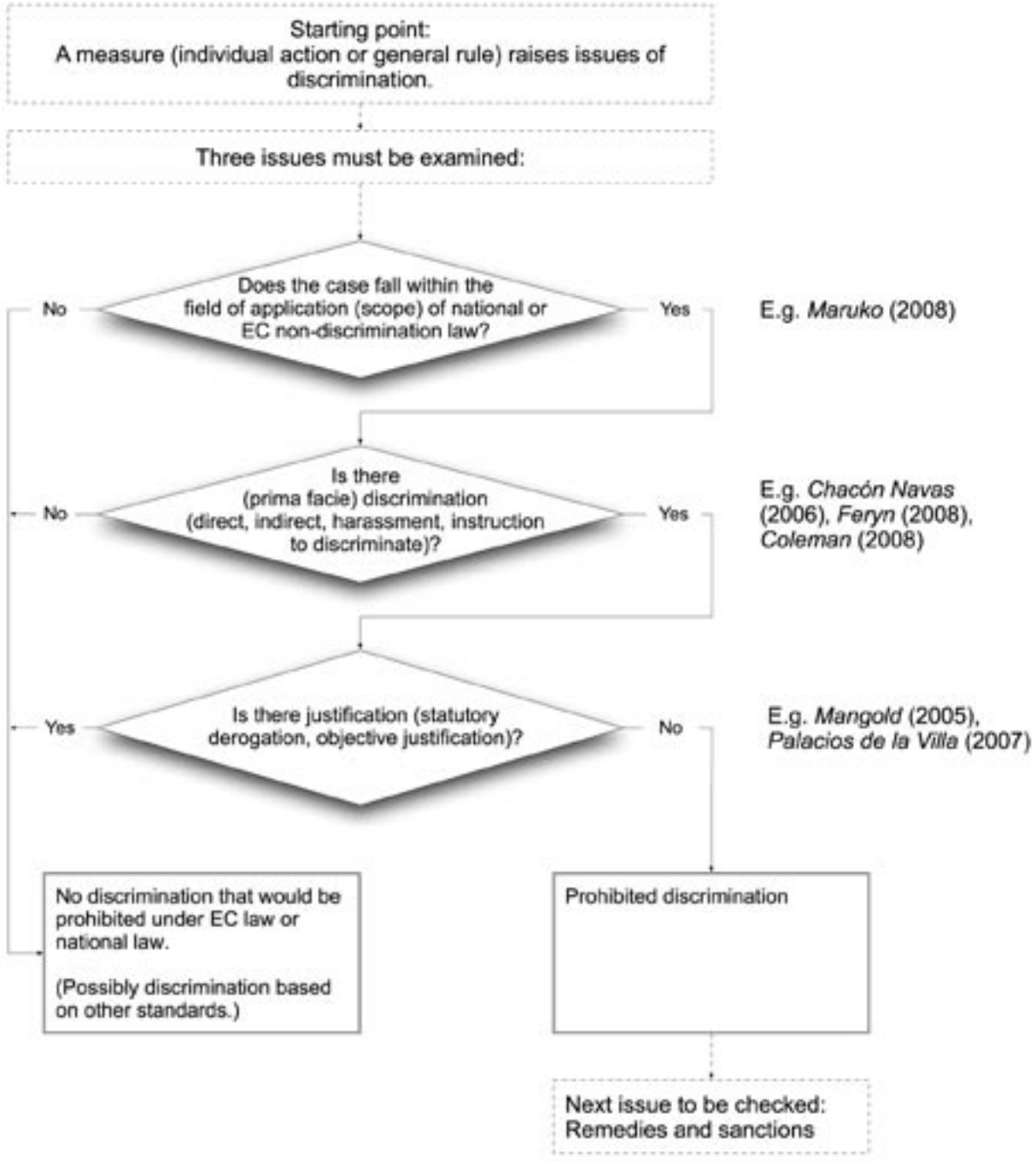
Decision tree: discrimination cases **Chart 1**



Legal analysis of discrimination cases **Chart 2**

Topic:
When analysing whether there is discrimination in a given case, the authority, court, person or entity dealing with the matter will have to follow a three-step approach which involves the issues of scope, discrimination and derogations.

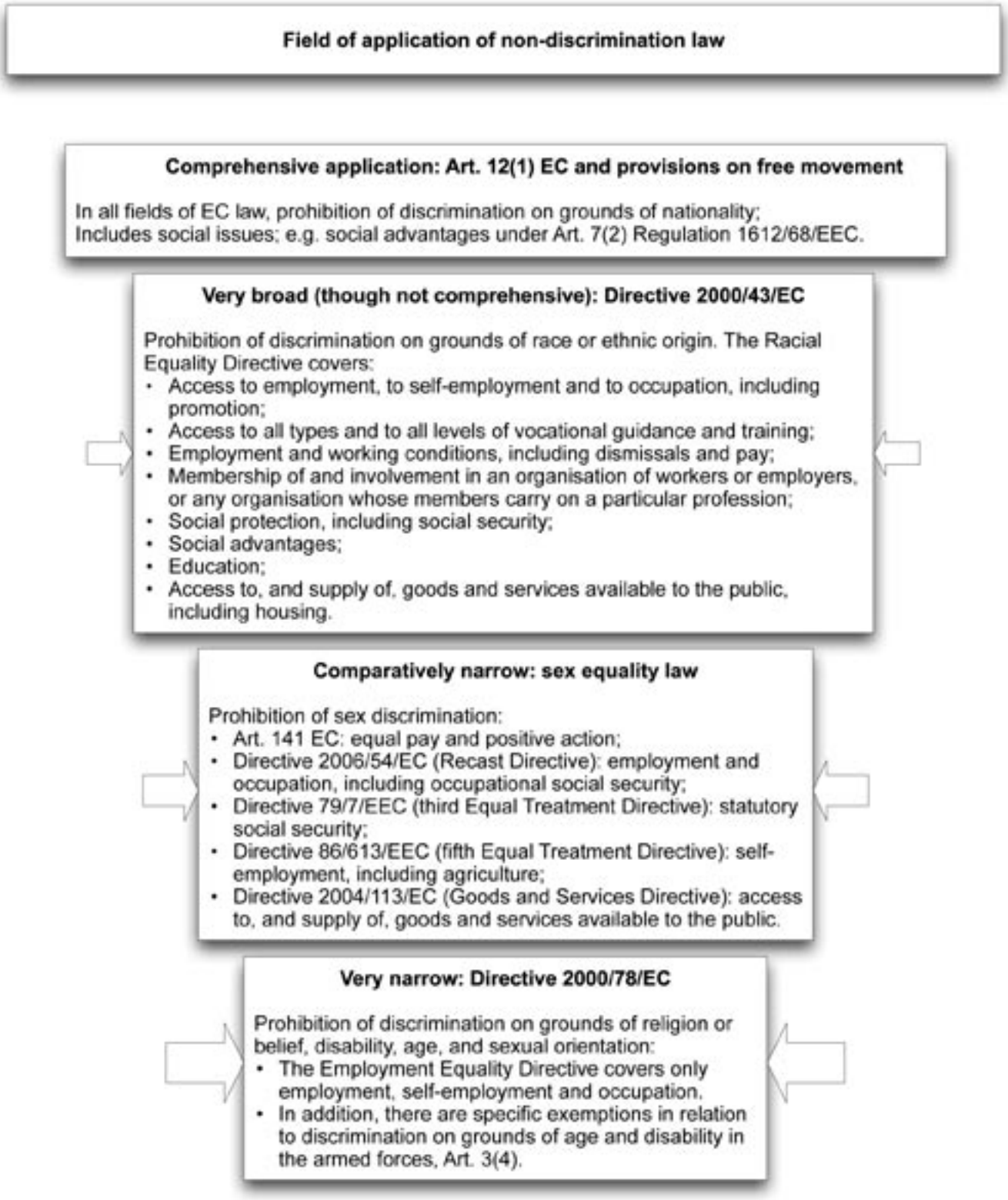
Three-step analysis in discrimination cases



Scope of non-discrimination legislation — **Chart 3**

Topic:

The different pieces of EC non-discrimination law that are relevant for the area of social law have very different fields of application.



Forms of discrimination — **Chart 4**

Topic:

Originally, the term 'discrimination' had only one meaning. Conversely, the most recent generation of social non-discrimination law distinguishes between four different forms of discrimination, three of which are defined in the legislation.

Different forms of discrimination

Originally: only one form of discrimination

Originally, discrimination was unequal treatment of comparable situations explicitly based on the prohibited criterion.

Based on ECJ case law: direct and indirect discrimination

Subsequently, the ECJ developed the distinction between direct and indirect discrimination; e.g. *Ugliola* (1969), *Sabbatini* (1972), *Sotgiu* (1974), *Bilka* (1986), *O'Flynn* (1996)

The most recent generation of directives: four forms of discrimination

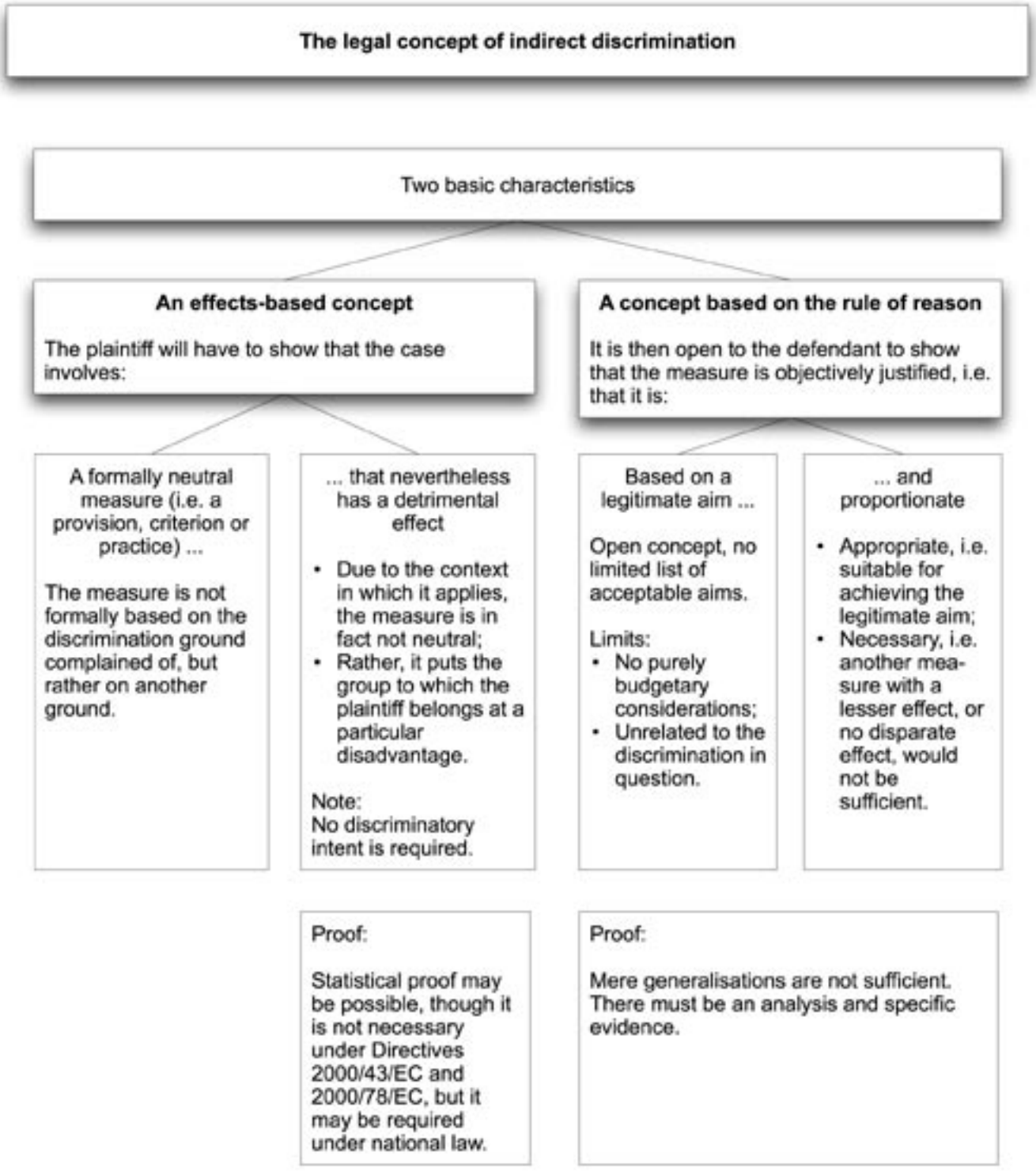
- Directives 2000/43/EC (Racial Equality Directive);
- Directive 2000/78/EC (Employment Equality Directive);
- Directive 2002/73/EC (amendment to Sex Equality Directive 76/207/EEC);
- Directive 2004/113/EC (Sex Equality Goods and Services Directive);
- Directive 2006/54/EC (Sex Equality Recast Directive).

Direct discrimination	Indirect discrimination	Harassment	Instruction to discriminate
E.g. Art. 2(2)(a) of Directives 2000/43/EC: 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'.	E.g. Art. 2(2)(b) of Directive 2000/43/EC: 'where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.	E.g. Art. 2(3) of Directive 2000/43/EC: 'when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment'. Note: sex equality law distinguishes between • harassment; • sexual harassment.	Mentioned e.g. in Art. 2(4) of Directive 2000/43/EC, but not defined. Concerns the situation where a person instructs another person to engage in direct or indirect discrimination or in harassment against a third person.
Legally defined			Not legally defined

Indirect discrimination: an overview — **Chart 5**

Topic:

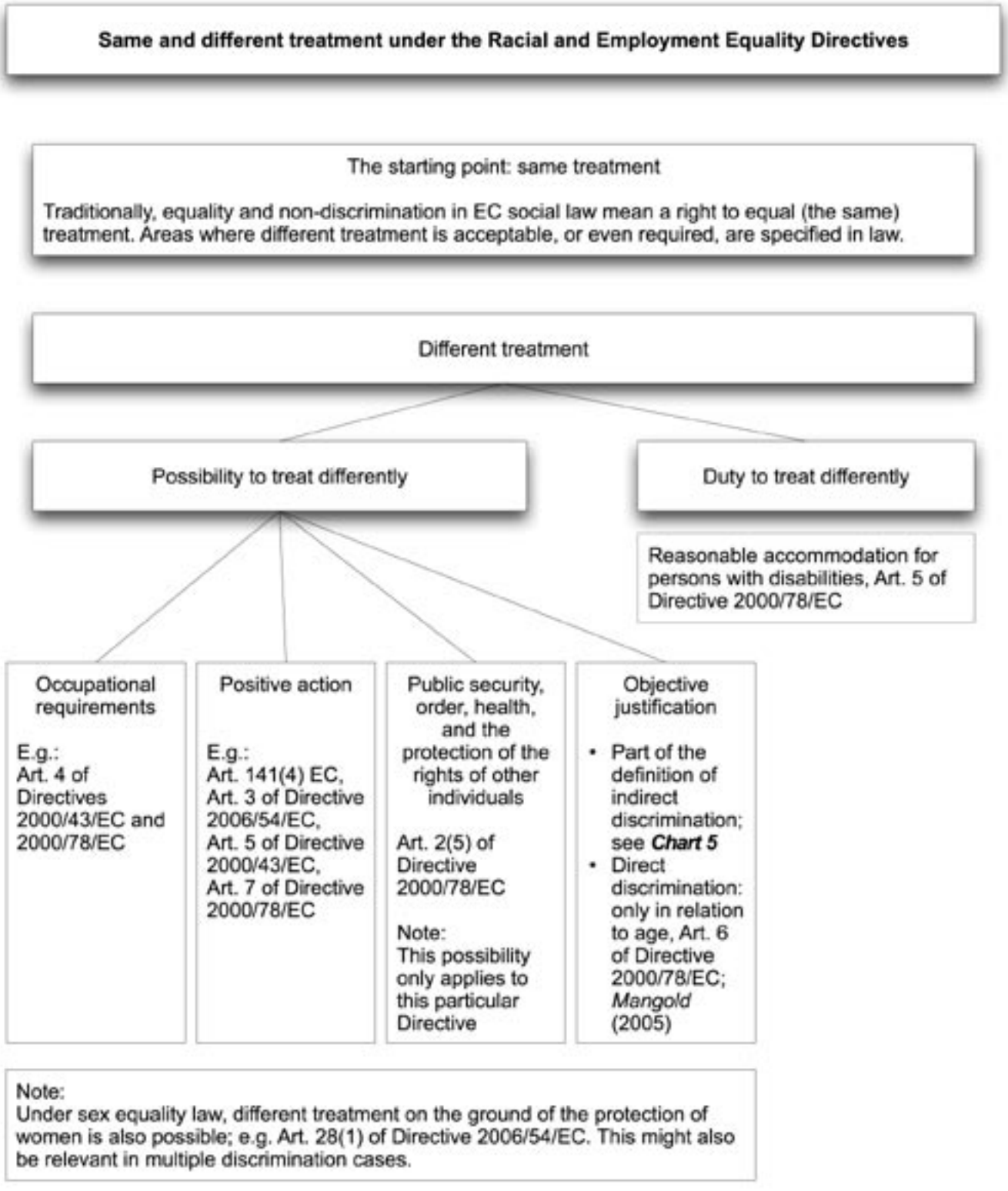
Indirect discrimination is an effects-based concept and a concept based on the rule of reason.



Same and different treatment **Chart 6**

Topic:

Equality and non-discrimination in EC social law may mean either the same treatment or different treatment, depending on the situation.



Distinguishing direct and indirect discrimination — Chart 7

Topic:

Indirect discrimination must be distinguished from direct discrimination. This can be done both on the level of the nature of the allegedly discriminatory measure and on the level of justification.

Need for distinction

Though closely related, direct and indirect discrimination are different legal concepts, which has consequences for their application in practice (proof, justification).

Distinction on the level of the nature of the discriminatory measure

Direct and indirect discrimination can be distinguished both on the level of the form and of the substance of the measure in question.

Form

Concerns the outward appearence of the measure, which can be:
- either explicitly discriminatory
- or apparently neutral.

Substance

Concerns the effect of the measure which can:
- either disadvantage only members of one group, including cases where this is so by nature or as the result of a rule having the force of law;
- or disadvantage persons from both groups, but puts persons from one group at a particular disadvantage.

System:

	Explicitly discriminatory measure	***Apparently neutral measure***
Disadvantages only one group	Direct discrimination E.g. *Palacios de la Villa* (2007)	Direct discrimination E.g. *Nikoloudi* (2005), *Maruko* (2008)
Disadvantages persons from both groups, but puts persons of one group at a particular disadvantage	(not applicable)	Indirect discrimination E.g. *Bilka* (1986), *O'Flynn* (1996)

Distinction on the level of justification

Objective justification is normally not available for direct discrimination; see ***Chart 6***.

European Commission

Limits and potential of the concept of indirect discrimination

Luxembourg: Office for Official Publications of the European Communities

2008 — 87 pp. — 21 × 29.7 cm

ISBN 978-92-79-10150-2
DOI: 10.2767/56607

How to obtain EU publications

Our priced publications are available from EU Bookshop (http://bookshop.europa.eu), where you can place an order with the sales agent of your choice.

The Publications Office has a worldwide network of sales agents. You can obtain their contact details by sending a fax to (352) 29 29-42758.

KE-81-08-420-EN-C

Are you **interested** in the publications of the Directorate-General for Employment, Social Affairs and Equal Opportunities?

If so, you can download them at
http://ec.europa.eu/social/main.jsp?catId=316&langId=en

or take out a free online subscription at
http://ec.europa.eu/employment_social/publications/register/index_en.htm

ESmail is the electronic newsletter from the Directorate-General for Employment, Social Affairs and Equal Opportunities.

You can subscribe to it online at
http://ec.europa.eu/employment_social/emplweb/news/esmail_en.cfm

http://ec.europa.eu/social

Publications Office
Publications.eu.int

ISBN 978-92-79-10150-2