

## Concepts of direct and indirect discrimination \*

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### I. Introduction

#### 1. Issues

Community law aims to significantly decrease discrimination of all kinds, with the ultimate goal of eradicating it from Europe, particularly in relation to employment. The European Union is playing an active role in offering a new model of economic, social and cultural development, characterized by the rule of law<sup>1</sup>. However, discrimination has long been a feature of European history and still remains so to this day.

This ambition is the expression of humanist culture, which recognizes the rights of individuals and, above all, the right to dignity as the source of human rights. It also reflects a concern to make use of all available human resources, in order to avoid wastage of skills that are necessary for companies and the community. Each individual needs to be able to participate in the common work of society, both in his own interests and also in order to ensure social cohesion<sup>2</sup>.

To achieve this objective, it must be possible to invoke the law as a credible threat against discrimination. The accepted concept of discrimination reflects these issues.

#### 2. A definition

In common usage, to discriminate means to distinguish. However, in a legal sense, discrimination refers to disadvantageous treatment of an individual for a prohibited reason.

In this sense, discrimination is not merely a matter of distinction. Not all distinctions are prohibited, and not all of them amount to discrimination. Individuals can be treated differently in a manner that is permissible.

Discrimination is not merely a matter of unequal treatment, as differential treatment may be unjustified, and yet still not amount to discrimination. Even if sanctions are applicable, discrimination laws do not necessarily apply.

For discrimination to be deemed to have been practised, several conditions must be met. A distinction or difference in treatment does not amount to discrimination unless it is unlawful<sup>3</sup>. Discrimination occurs when disadvantageous differential treatment is unjustified and when it is based on a criterion which the law prohibits from use in the making of legal distinctions.

#### 3. Ambitious legal developments

In attempting to define discrimination, the evolution of Community law is of relevance.

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<sup>1</sup>S. Stromholm, *Europe and the Law*, PUF, Paris, 2002.

<sup>2</sup>Treaty of Amsterdam, Art. 2, 3 k and 2, 13, 136.

<sup>3</sup>D. Lochak, "Reflections on the Concept of Discrimination", A. Lester, "British Anti-discrimination Legislation", *Droit social*, Paris, 1987, p.778 and p.791.

Early Community laws mentioned the terms of direct and indirect discrimination, but they did not define them<sup>4</sup>.

Subsequently, Community courts took on and met this need for a definition by setting precedents relating to the free movement of labour and, even more relevantly, gender equality in the field of employment. This right to equality in employment, which is confirmed both in the explicit provisions of the law and, in particular, by legal precedent, is a very generous right. The conceptual progress made as a result has influenced other areas of discrimination law, to the benefit of individuals affected by other types of discrimination.

Finally, the Treaty of Amsterdam significantly broadened the range of prohibited types of discrimination, but did not undertake a definition<sup>5</sup>. On the basis of this new measure and in continuation of case law relating to “occupational equality”, new Directives on discrimination have made use of this theoretical contribution, as in the case of the two Directives of 2000, the Directive against racial discrimination<sup>6</sup> and the Directive establishing a general framework for equal treatment<sup>7</sup>, and also the 2002 Directive on the amendment of the Directive on occupational equality<sup>8</sup>. These Directives define the concepts of direct and indirect discrimination.

Community laws on discrimination refer to these two concepts of discrimination (I) in relation to different types of discrimination, i.e. to direct discrimination (II), a concept that has been adopted from existing legislation, and to indirect discrimination (III), which is an innovative concept.

## II. Joint perspectives

### 1. An elaborate structure

Discrimination law can be compared to a tree:

- the roots, representing the values embodied in and defended by the law (human dignity, and everything that it implies);
- the trunk, representing applicable rules and issues common to all types of discrimination (the concepts of discrimination and assessment systems in particular);
- the branches, each one representing a particular area of discrimination (sexual, racial, etc.), each with specific legal, historical and sociological features, with the possibility of transferring legal solutions between branches.

### 2. Connected concepts

Discrimination is a violation of the principle of equality for a forbidden motive. Therefore, the concept of discrimination is closely dependent on the concept of equality<sup>9</sup>. In employment law, there are two concepts of equality:

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<sup>4</sup>In particular, European Council Regulation No. 1612/68 of 15 October 1968 on the free movement of labour within the Community and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of gender equality in relation to access to employment, training, promotion and work conditions.

<sup>5</sup>Article 13 of the Treaty of Amsterdam refers to “all discrimination” based on various criteria.

<sup>6</sup>Council Directive 2000/43/EC of 29 June 2000 on the implementation of the principle of equality without reference to racial or ethnic origin, Article 2: Concept of Discrimination.

<sup>7</sup>Council Directive 2000/78/EC of 27 November 2000 on the creation of a general framework for equal treatment in employment and occupation, Article 2, Concept of Discrimination.

<sup>8</sup>Council Directive 2002/73/EC of 23 September 2002 amending Directive 76/207/EEC on the implementation of the principle of gender equality in relation to access to employment, training, promotion and work conditions, Article 2, Concept of Discrimination.

<sup>9</sup>C. MacCrudden, *The New Concept of Equality*.

- abstract equality, which implies that a rule should be applied in the same manner to all the persons to whom it relates, as in the case of equality before the law. This concept of equality is one of the underlying principles of the rule of law<sup>10</sup>. In view of this concept, discrimination that involves applying a different standard or applying the same standard in a different fashion to persons in the same situation is prohibited. This concept still remains valid, but it has proven insufficient in dealing with the full range of discrimination;
- specific equality, which implies that, when a standard is applied to the relevant persons, the specific circumstances of each one should be taken into consideration. It so happens that in many situations it is possible to discriminate by applying a standard in the same manner to individuals in different situations. Not taking differences into account can also amount to a form of discrimination.

The concept of discrimination is derived from the theoretical concept of equality, with practical implications for the appropriate response to issues arising from litigation or in the course of collective negotiation.

For example, in two similar cases, considering maternity leave on the same basis as other types of leave in keeping with the concept of abstract equality, or as a specific type of leave applying only to women in keeping with the concept of specific equality, would lead us to conclude either that there is no discrimination, or that there is direct sexual discrimination in the case of women excluded from benefits connected with maternity leave<sup>11</sup>.

There is no general principle of equality in employment law, as it would be difficult to maintain such a principle in the face of the actual and legal rights of the employer.

Discrimination can be either direct or indirect. For Community courts, discrimination can arise both from the application of different rules to comparable situations and from the application of the same rule to different situations<sup>12</sup>. In applying such an approach to discrimination, Community law is contributing to the implementation of equality both in law and in actual fact.

### 3. Wide range of applications

**a.** The concepts of discrimination apply both to the public and private sectors, including government institutions (State institutions may not ignore the laws that apply to their employees).

**b.** There is no general principle of non-discrimination, either at Community or international level<sup>13</sup>. The law stipulates non-discrimination rules for the protection of individuals considered by society to be particularly vulnerable in labour markets. The list of prohibited motives for differential treatment is restrictive and evolves in a way that reflects social values.

Thus, Community law explicitly prohibits discrimination against an individual or a group of individuals, that is, basing a decision disadvantageous for them on a criterion that refers to their person<sup>14</sup> and their actions<sup>15</sup>.

<sup>10</sup>Universal Declaration of the United Nations in 1948, Declarations of the Rights of Man in 1789 (France), etc.

<sup>11</sup>ECJ 30 April 1998 CNAVTS (National Employees' Pensions Insurance Fund) v. Ms Thibault, Case C-136/95.

<sup>12</sup>ECJ 17 June 1998, Kathleen Hill, Case C-243/95, Case Book 1998 p. I-3739.

<sup>13</sup>At international level, elimination of discrimination in the fields of employment and occupational activities is one of the "Four Gospels" of employment law (Declaration of the International Labour Organization on the Principles and Enforcement of the Fundamental Rights of Employment, 19 June 1998, Global Report, 91<sup>st</sup> Session 2003, ILO Convention No. 111, 1958).

<sup>14</sup>Gender, nationality, race, ethnic origin, disability, or age.

<sup>15</sup>Religion or beliefs, or sexual orientation.

Community law does not refer to all the criteria found in international law, and its list is more restricted than those from other sources<sup>16</sup>. However, Community law does envisage multiple discrimination against women, due to their gender and in particular their origins<sup>17</sup>. It prohibits incitement to discrimination in relation to persons to whom one of the criteria applies, and also in relation to persons to whom the criteria do not apply but who nevertheless have been subjected to disadvantageous treatment<sup>18</sup>.

**c.** The scope of discrimination concepts is very broad, and they apply to differential treatment, which is prohibited for all aspects of occupational activities, such as:

- access to employment, an area of strategic importance in which discriminatory practices are frequent and tend to be particularly serious; here they provide protection from exclusion;
- the exercise of employment, particularly in relation to payment, work and employment conditions, promotion, professional training and qualifications; here they provide protection from exploitation.

On the basis of this general list, which includes several items that are in themselves standards, various prohibited discriminatory acts can be derived, such as segregation, which amounts to a disadvantageous condition of work in terms of posting.

Harassment is also a form of discrimination<sup>19</sup>. Harassment can arise in connection with various types of discrimination (gender, racial origin, disability, etc.), and is understood in a broad sense to include not only deliberately offensive behaviour but also behaviour that has the same effect, even if the underlying intention was not the same. Such harassment can be hierarchical (vertical), between colleagues (horizontal), or environmental.

Incitement to discrimination applies to all persons, and particularly, although not exclusively, to persons in a hierarchical situation.

**d.** The legal relevance of these concepts is considerable, as all legal standards can be screened and analysed from the point of view of discrimination law, relating to direct and, above all, indirect discrimination. For example, the following may be declared as contrary to the law, and as a result may not be implemented:

- the production of legal norms between social partners, in particular collective labour agreements<sup>20</sup>;
- State production of legal norms (legislative, regulatory and administrative provisions<sup>21</sup>).

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<sup>16</sup>In particular, criteria relating to social origin, trade union activities, or political opinions are not mentioned (cf. European Convention on Human Rights- ECHR, Art. 14; Conventions of the International Labour Organization- ILO, Nos. 111 and 97). However, the draft European Constitution Convention includes a long list of criteria (Art. II-21).

<sup>17</sup>F. Gaspard, "A Joint Front Against Racism and Sexism", 45<sup>th</sup> Session of the Commission on Women's Status (United Nations), Prochoix, Paris, No. 18, summer 2001. A. Ardura and V. Simon, "Fighting Discrimination in Europe: Experiences of Combating Discrimination Against Female Immigrants", Codelfe Research Programme, Com. DG V, Final Report, January 2001, Iséres.

<sup>18</sup>Art. 2.4 of the aforementioned Directives.

<sup>19</sup>Art. 2.3.

<sup>20</sup>ECJ 30 April 1998 CNAVTS v. Ms. Thibault, Case C-136/95, as above.

<sup>21</sup>ECJ 9 February 1999, Regina v. Secretary of State for Employment, Case C-167/97.

### III. Concept adopted from existing legislation: direct discrimination

The concept of direct discrimination relates to discrimination in terms of effects produced (A) and in a wider sense for certain individuals (B). In particular cases, differential treatment can be based on a criterion (C).

#### 1. Principle

##### a. Objective

Direct discrimination uses a criterion as a basis for differential treatment. Discrimination arises if a person is treated less favourably for a prohibited motive.

Direct discrimination can therefore be intentional and explicit in relation to the prohibited motive. However, as explicit discrimination of this type, particularly in standards, is increasingly rare, the law tends to emphasize the effects produced by differential treatment, in accordance with an objective concept of discrimination<sup>22</sup>. In civil and administrative cases, it is no longer essential for the intentional nature of discrimination to be established<sup>23</sup>.

It is sufficient to prove disadvantageous treatment of a category, i.e. in relation to a prohibited criterion<sup>24</sup>, for discrimination to be established.

It is therefore helpful to consider whether the persons in question would have received the same treatment if such a criterion had not applied to them<sup>25</sup>.

##### b. Method

The approach to discrimination in terms of effects produced involves a comparison. This comparison involves:

- an analysis of situations.

This does not mean that comparisons should be limited to identical situations, which rarely occur. Instead, reference should be made to situations that are “comparable”. Situations should be evaluated through an in-depth examination of the material circumstances, conducted in an objective manner, and without being influenced by stereotypes.

- an analysis over time.

This can involve an *in concreto* comparison, as comparisons in terms of time are broad in scope.

The situations being compared may be ongoing; this is the least complex situation to study. A certain number of aspects<sup>26</sup> must be excluded to make synchronic comparisons over the same period of time.

<sup>22</sup>International standards applying to discrimination in terms of its effects: Convention No. 111 of the ILO, United Nations Conventions on the elimination of all forms of discrimination against women, 1971, and of racial discrimination, 1965.

<sup>23</sup>In penal law, where the defendant must be presumed innocent until proven guilty, legal precedents are less rigorous in demanding proof of intention to perpetrate a crime (cf. in French law: M. Miné, “Racial Discrimination and Recruitment in Penal Courts”, *Le Droit Ouvrier*, Paris, July 2003).

<sup>24</sup>The English version of the text, “on grounds of” seems to be more appropriate than the French version, “pour des raisons de”.

<sup>25</sup>The “criterion of a single distinguishing feature”, the so-called “but for” test: ECJ 17 February 1998, Mme Grant, Case C-249/96. See M. Miné, “Legal Approach to Racial Discrimination at Work: a Comparison Between France and the United Kingdom”, *Travail et Emploi*, Paris, No. 80, Sept. 1999, pp. 91 and 96 in particular, for a discussion of the evolution of relevant case law in the United Kingdom.

<sup>26</sup>ECJ 31 May 1995, Case C-400/93 (situation ruled to be comparable); ECJ 11 May 1999, Case C-309/97 (situation ruled to be not comparable). According to these rulings, the nature of employment and responsibilities of the employee need to be considered as well as professional training.

However, the situations in question may have occurred successively. The same features can apply here, but in relation to diachronic situations<sup>27</sup>. These retrospective comparisons between situations occurring successively can be made without limitations in terms of time.

An *in abstracto* comparison is also possible involving hypothetical persons. This method is potentially a very effective approach, which enables interpretation of situations where specific comparisons are impossible, due to the segregation of labour markets<sup>28</sup>. When approaching individuals who appear to have been treated disadvantageously, it is useful to consider how other individuals, to whom the same criterion did not apply, would have been treated<sup>29</sup>. This type of hypothetical comparison has already been made for the purposes of examining the situation of women in relation to maternity leave<sup>30</sup>. In this approach, the person responsible for the treatment in question needs to explain the objective causes of the situation perceived as being disadvantageous.

## 2. Special provisions for the disabled

Employers are required to make such accommodation as can be reasonably expected to enable a disabled person to have access to a job and to work in a particular capacity<sup>31</sup>. Disabled persons are entitled to arrangements that take the specific nature of their disability into account (premises, materials, environment at work), as these arrangements are legally required to ensure equality, and should not be confused with positive aleatory actions intended to avoid or rectify discrimination.

Employers may only refrain from making such arrangements, and by doing so deprive a person of a job or a normal career, if the financial burden is disproportionately large. The disproportionate nature of such a burden should be established in relation to the company (financial resources) and government policy (support for the employment of disabled persons). Unjustified refusal to accommodate disabled employees amounts to direct discrimination.

## 3. Limited dispensations

Direct discrimination, which is in direct breach of the legal principle of equality, may not be justified<sup>32</sup>. There are therefore only exceptional, precisely defined dispensations from the prohibition against discrimination, and these apply only to certain types of work.

### a. Genuine and determining occupational requirements

Differential treatment can lawfully invoke a criterion, if the criterion in question constitutes a genuine and “determining” occupational requirement<sup>33</sup>. This exception to the rule, which involves considering whether differential treatment does not amount to discrimination, is applied in a restrictive manner, in view of the objectives of the Directives. Therefore, the request for exemption from application of the rule must be justified

<sup>27</sup>ECJ 27 March 1980, Case C-129/79, *MacArthy’s Ltd v. Wendy Smith*.

<sup>28</sup>M.-T. Lanquetin, “Gender equality: Directive 2002/73 EC of 23 Sept. 2002”, *Droit Social*, Paris, 2003, p.315.

<sup>29</sup>In a company where administrative secretarial jobs are performed by women, or where the cleaning staff consists of immigrants from former colonies, etc., how would they have been treated, in terms of salary, responsibilities, training, etc., if the same posts had been occupied by members of the dominant group in the company, i.e. white males, born in the country in question? For a discussion of the situation in Quebec, see M.-T. Chicha, “Equal Salaries: Implementation and Issues”, ed. Yvon Blais, Quebec, 1997, on the Act of 21 November 1996 relating to jobs with a preponderance of women.

<sup>30</sup>ECJ 4 Oct. 2001, *Tele Danmark*, Case C-109/00.

<sup>31</sup>Art. 5 of the Directive establishing a general framework for equal treatment. A. Hendriks, “Reasonable Accommodation”, Report, 1 April 2003, ERA (Trier).

<sup>32</sup>ECJ 8 November 1990, *Dekker*, Case C-177/88.

<sup>33</sup>Art. 4 of the Directive against racial discrimination, Article 4.1 of the Directive establishing a general framework for equal treatment, and Article 2.6 of the Directive on gender equality.

in each individual case and implemented in an appropriate manner. This exception excludes persons who do not meet the criterion in question and, if applied too broadly, it would counteract the objectives of the Directives, and permit all kinds of stereotypes.

The occupations in question are precisely identified, and can be designated by government standards in the form of lists according to criteria, or on the basis of case law, by reference to similar cases<sup>34</sup>.

### **b. Occupations of a religious nature**

In the professional activities of churches and organizations founded on the basis of religions or beliefs, the criterion of religion or belief may serve as the basis for differential treatment if such a criterion is considered to be a “genuine, legitimate, and justified occupational requirement”<sup>35</sup>. The evaluation of this requirement depends on the nature of the job in question.

Member States can maintain legislation that already allows for such dispensation, or they can pass legislation to reflect existing practices, but they may not allow for new provisions in this area. The exceptions to the rule of non-discrimination are limited to those that have already been considered essential.

Such differential treatment based on the criterion of religion cannot justify discrimination based on any other criteria (such as gender, racial origin, disability, etc.).

## **IV. Innovative concept: indirect discrimination**

The concept of indirect discrimination can be applied to the full range of discrimination (A), and in particular to discrimination inherent in a system (B). However, in some situations indirect discrimination can be justified (C).

### **1. In search of a potential discriminatory effect**

#### **a. What the concept involves**

The concept of indirect discrimination<sup>36</sup> is one of the most important contributions made by Community law, both in terms of texts and precedents. The method, which is linked to this concept, permits concealed discrimination to be exposed.

According to the Directives, indirect discrimination occurs under the following circumstances:

- 1) there is a provision, a criterion, or a custom (a rule or a practice employed in a company or in a country);
- 2) one that appears neutral (it does not refer to a criterion);
- 3) but which has the potential to be particularly disadvantageous<sup>37</sup> for individuals meeting one or more criteria, or;
- 3 (continued) could be particularly disadvantageous to persons of one gender in relation to those of the other<sup>38</sup>;
- 4) unless such a provision, criterion, or practice is objectively justified by a legitimate objective and the means used to achieve it are appropriate and necessary.

<sup>34</sup>For example, occupations exposed to violent situations can be barred to women, ECJ 26 October 1999, *Angela Maria Sirdar v. The Army Board, Secretary of State for Defence*, Case C-273/97. No doubt, the same could apply to persons in frail health due to a disability or old age. A contrary instance would be the role of Othello in Shakespeare’s play, which could be assigned to a black actor by preference.

<sup>35</sup>Art. 4.2. of the Directive establishing a general framework for equal treatment.

<sup>36</sup>This legal concept originates from the USA: Supreme Court *Griggs v. Duke Power Co.*, 1971 401 US 424.

<sup>37</sup>Directives 2000/43 and 2000/78, as above.

<sup>38</sup>Directive 2002/73, as above.

So, the three Directives lead to a new and unique definition of indirect discrimination, which emphasizes the unique nature of their concept of discrimination.

If the first three conditions are met, there is reason to presume that indirect discrimination may have occurred. By definition, intentions are irrelevant as far as indirect discrimination is concerned. Only the results are relevant, insofar as a discriminatory effect has already occurred<sup>39</sup>, or has the potential to occur<sup>40</sup>.

As in the case of direct discrimination, this method is comparative. However, the concept of indirect discrimination has evolved, as it no longer involves quantitative measurement of the disadvantageous effects in question<sup>41</sup> but is more concerned with a qualitative examination of the potential disadvantageous effects of a measure to relevant persons meeting a particular criterion in relation to other persons. The potential discriminatory effect is viewed in relation to a characteristic of persons who are inseparably associated with a particular criterion.

This concept is innovative. Firstly, it allows the possibility to take action during the initial stages of a discriminatory effect and to remedy suspected practices or standards in an anticipatory and preventive manner. Secondly, this new definition also makes it possible to deal with indirect discrimination connected to criteria for which quantitative data is lacking (e.g. disability or sexual orientation).

For example, in a private company or a public institution whose employees are native to the country, recruitment policies that tend to favour children of existing employees have a potential indirect discriminatory effect for persons of foreign origin who are looking for jobs.

The disadvantageous effect can be evaluated in terms of either individuals or of groups. In the latter case, the question of racial discrimination arises, and it is helpful to take an *a posteriori* approach, without identifying the relevant individuals<sup>42</sup>, by defining the features connected to a prohibited criterion which the employer made use of (e.g. skin colour, surname, accent, etc.).

The concept of indirect discrimination can be used to expose discrimination that is opaque or apparently of a trivial nature due to stereotyping<sup>43</sup>. It provides solid support in the examination of employers' decisions<sup>44</sup>, conventional standards adopted by social partners<sup>45</sup>, national legislation<sup>46</sup>, and generally of public and private policies, on the basis of equal treatment.

The assessment process<sup>47</sup> is closely linked to the very concept of indirect discrimination. Assessment procedures can add a sociological dimension to legal cases.

## **b. Concept that supports real equality**

Indirect discrimination uses a criterion that is not one of the criteria prohibited by Community law as a basis for differential treatment of individuals who fulfil such criteria. The outcome is equivalent to that of direct discrimination, but the process is different, as a

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<sup>39</sup>This concept originated from the rulings of the ECJ of 31 March 1981, Jenkins, Case 96/80, and ECJ 13 May 1986, Bilka, Case 170-84, in relation to equal opportunities at work.

<sup>40</sup>ECJ 23 May 1996, John O'Flynn, Case C-237/94, in relation to the free movement of labour.

<sup>41</sup>Directive 97/80 of 15 December 1997 confirming precedents in Community law concerning sexual discrimination in employment.

<sup>42</sup>Directive 95/46/CE of the European Parliament and the European Council of 24 October 1995 on the protection of individuals in relation to the use of personal data and free circulation of such data, Article 8.

<sup>43</sup>ECJ 28 March 2000, G. Badeck, Case C-158/97. This judgement refers to the "prejudices and stereotypes relating to the role and abilities of women in active life".

<sup>44</sup>ECJ 17 Oct. 1989, H.K. v. Danfoss, Case 109/88.

<sup>45</sup>ECJ 30 April 1998, CNAVTS, as above.

<sup>46</sup>ECJ 9 February 1999, Regina, as above.

<sup>47</sup>O. de Schutter, The Burden of Proof.

neutral criterion is used as a screen to obscure indirect discrimination<sup>48</sup>. Indirect discrimination is revealed by examination of the effects of a rule or practice. Indirect discrimination amounts to actual discrimination.

An approach that refers to the concept of indirect discrimination can be used to demonstrate that groups of persons fulfilling one or several criteria are victims of discrimination, and thus identifies groups of discriminated persons. The immediate objective of such action is to benefit such persons by establishing equal treatment and suppressing discriminatory practices. However, it can also have wider implications by encouraging policies that support equal opportunities and positive action<sup>49</sup> benefiting such persons and, more broadly, other persons meeting the same criterion, in the form of temporary adjustment measures, while leaving the door open for other individuals<sup>50</sup>.

## **2. Effective concept for dealing with discrimination inherent in a system**

### **a. Discrimination inherent in a system**

Discrimination inherent in a system is the result of practices in a company, area of employment, sector of activities, institutions, or society as a whole, arising from stereotypes or mechanisms that appear neutral and are used more or less explicitly. Within this context, discrimination is the product of a system.

One example of such a system could be the recruitment process used in a company, which involves both agents who are external to the company, such as public or private intermediaries in labour markets, clients/consumers and suppliers, as well as internal agents, such as personnel management, employees in various positions of responsibility in the departments or premises where new recruits are to be posted, and other employees currently working there.

Such a system can systematically exclude persons who fulfil one or more recruitment criteria, or only affect them in relation to certain jobs or services. Decisions on recruitment and posting are made on the basis of prohibited criteria instead of the professional competence of job applicants<sup>51</sup>.

This discriminatory system could be the result of intentional discrimination on the part of agents in the system, of macro-social and institutional mechanisms, or of both combined.

### **b. Concept relevant to new areas**

The concept of indirect discrimination has strong potential for dealing with discrimination inherent in systems.

Firstly, it reveals facts that would otherwise often be obscured (non-recruitment or specific posting of persons fulfilling certain criteria).

Secondly, it enables analysis of the system that produces discrimination by focusing on its effects, and questioning each stage of the process.

Such a procedure can take a broad approach by looking at agents external to a company, such as schools and colleges where the students recruited by the company are trained (initial school orientation procedures, school selection procedures, type of training, assistance in finding employment, etc.).

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<sup>48</sup>P. Rodière, *European Union Social Law*, L.G.D.J., Paris, 2002.

<sup>49</sup>In Community law: Recommendation 84/635/EEC of 13 Dec. 1984; Article 5 of the Directive against racial discrimination, Article 7 of the Directive establishing a general framework for equal treatment, and Article 8 of the Directive against sexual discrimination. O. de Schutter, "Positive action as a resource", report, 1 April 2003, ERA (Trier).

<sup>50</sup>ECJ 6 July 2000, K. Abrahamsson, Case No. 407/98 and ECJ 19 March 2002, Lommers, C-476/99.

<sup>51</sup>As far as racial discrimination is concerned, the result could be described as ethnicization of employment.

It can go on from there to focus on the company. Here, there is one question of central importance: how are employees evaluated by the company?<sup>52</sup> This evaluation of an individual's professional competence by an employer is at the heart of management authority. The power to perform such an evaluation may be perceived as discretionary, but it can no longer be arbitrary. In exercising such power, an employer must be able to demonstrate that he has not been guilty of discrimination, and that his selection was based on material and objective factors capable of explaining not only his recruitment and posting decisions in relation to a particular individual, but also general recruitment policy in view of its effects. Courts are able to question evaluation of competence in the recruitment process and are therefore able to supervise an employer's exercise of his powers<sup>53</sup>.

They are thus able to contribute to rationalizing the exercise of power. They can also call into question the alleged economic rationale of factors that employers and other agents involved in the recruitment process base their decisions on. The concept of indirect discrimination therefore supports a "just and equal evaluation of competence"<sup>54</sup>.

### 3. Possible justification

A *prima facie* charge of indirect discrimination may be refuted if an employer is able to justify his practices in relation to the objectives of the Directives. In particular areas, the Directives envisage possible justifications.

This question of justification is the main issue involved in the implementation of the concept of indirect discrimination<sup>55</sup>.

#### a. Unqualified justification of discrimination

If an employer is able to demonstrate convincingly that his objectives are justified, and that the means employed to achieve them are appropriate and implemented in a reasonable manner, the *prima facie* charge of indirect discrimination is refuted. Even if individuals have received disadvantageous treatment as a consequence of such a policy, the policy cannot be said to amount to discrimination. However, if an employer is unable to fully justify his policies, the charge of indirect discrimination is established.

To be acceptable, and therefore to effectively counter an accusation of indirect discrimination, an employer's justification must fulfil the conditions established by Community case law<sup>56</sup>.

#### b. Evaluation of justifications

To be upheld, justification must meet the following conditions:

- it must be objective;
- it must relate to a legitimate objective, which by definition excludes any form of discrimination.

The legitimacy of an employer's objective should be evaluated from the perspective of the extent to which it really exists and whether it is appropriate in view of considerations such as the size of a company, the sector it operates in, conditions on the labour market, etc. It is

<sup>52</sup>A.Lyon-Caen, Employment Law, Employment Law course, Paris University X - Nanterre; "Dealing with Discrimination: European Education in Support of Democratization of the Labour Market", ongoing research project, FORUM/CPDR/CEE/CREDOF, O. de Schutter and F. Eymard-Duvernay, French Employment Ministry (DARES).

<sup>53</sup>As far as equal pay for male and female employees for work of equal value is concerned, Convention No. 100 of the International Labour Organization enjoins "objective evaluation of work" (Art. 3)

<sup>54</sup>FORUM/CPDR/CEE/CREDOF, as above.

<sup>55</sup>M.-A. Moreau, "Reasons which can justify discrimination", European Congress, Stockholm, 3-6 Sept. 2002, www.labourlaw2002.org, Droit Social, Paris, Dec. 2002, p.1112.

<sup>56</sup>ECJ 13 May 1986 Bilka, as above, and points 30 and 36 in particular.

important to establish whether the employer's alleged motives "can be considered as economic reasons that are objectively justified", and to attempt to ascertain the employer's real motivation.

It is essential that there should be a causal link between the justification and the objective invoked by the employer.

- the methods used to achieve an objective should be necessary and appropriate.

It is necessary to check whether the measures taken were necessary and appropriate for the objective in question. The methods chosen by the employer must correspond to "a genuine need of the company", and they must "be suitable for achieving the objective in question", and "necessary for achieving it". This means that attempted justifications based on stereotypes expressed in the form of commercial considerations are not acceptable (e.g. exclusion based on age, disability, or origin in the name of alleged consumer demand).

Finally, the methods used need to be questioned from the perspective of whether they were applied in an appropriate manner, with the least possible impairment to equality of treatment.

Justification needs to establish a causal link with differential treatment.

The abovementioned characteristics, which are required of justifications for them to be upheld, are reference standards. The theoretical work on categories of justification done by Community courts on the subject of indirect sexual discrimination is a benchmark for other discrimination criteria. For the purposes of illustration, it is worth pointing out that:

- the criterion of physical strength for occupational classification favours men and should be modified by other criteria favourable to women<sup>57</sup>;
- availability in terms of hours, which puts women at a disadvantage, needs to be relevant to the responsibilities involved in a job<sup>58</sup>;
- policies that are not transparent are liable to be considered as discriminatory<sup>59</sup>;
- the circumstances of collective negotiation with an employee cannot be used to justify unequal treatment<sup>60</sup>; the provisions of a collective agreement must not prejudice Community standards on equal treatment<sup>61</sup>;
- integration to a lesser extent of part-time workers in the company is not acceptable<sup>62</sup>, nor are arguments based on the need to maintain motivation of full-time employees by penalizing employees in job-sharing schemes<sup>63</sup>;
- budgetary considerations cannot be used to justify differential treatment<sup>64</sup>.

Courts will evaluate justifications, with the need to ensure respect for equal treatment constantly in mind. Their task is to analyse the explanations put forward by an employer in relation to this objective of Community law. In default of other considerations, systematic acceptance of general explanations of an economic nature based on the interests and competitiveness of a company would undermine the effectiveness and efficacy of the relevant laws.

At the heart of the concept of indirect discrimination is the need to find a balance between the power of the employer, necessary for the efficient functioning of a company

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<sup>57</sup>ECJ 1 July 1986, Rummler, Case C-237/85.

<sup>58</sup>ECJ 17 Oct. 1989 Danfoss, as above.

<sup>59</sup>ibid.

<sup>60</sup>ECJ 27 Oct. 1993 Enderby, as above.

<sup>61</sup>ECJ 7 February 1991 Nimz, Case C-184/89, and paragraph 20 in particular.

<sup>62</sup>ECJ 19 July 1989, Rinner-Kuhne, Case Book I-5535.

<sup>63</sup>ECJ Hill, as above.

<sup>64</sup>ECJ 20 March 2003, Case C-187/00, Mme Helga Kutz-Bauer, and paragraph 60 in particular.

(while perhaps accommodating objectives such as collective participation) and the rights of individuals, and in particular their right to equal treatment. Although the right to equal treatment can be reconciled with other rights, it cannot be ignored.

An analysis of justifications needs to take into account the decisions of each agent in relation to the values and principles of justice favoured by him<sup>65</sup>.

### **c. Justifications envisaged by the law**

Community law envisages that differential treatment based on age<sup>66</sup> does not constitute discrimination if it is reasonable and objectively justified by employment policies and occupational training, and as a guide it provides a list of possible justifications<sup>67</sup>. This acceptance of a very broad range of justifications by the law places serious restrictions on action by the courts. However, courts are able to examine whether the legitimate objectives of employment policies of Member States are capable of justifying differential treatment based on age.

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Concepts of discrimination, both direct and indirect, will be interpreted in courts at national level, and particularly in relation to acceptable justification. Internal judges of Member States will develop their own arguments on the basis of interpretation of the rulings of Community courts and the objectives of Community law concerning equal treatment and the need to ensure social cohesion<sup>68</sup>. The fundamental nature of this evolving process is likely to reflect the cultural dimensions of the laws used to counter discrimination.

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<sup>65</sup>L. Boltanski and L. Thévenot, *On Justification*, Gallimard, Paris, 1991.

<sup>66</sup>M. Reid, "The Prohibition of Age Discrimination in Employment: Issues Arising in Practice", March 2003, ERA (Trier).

<sup>67</sup>Directive establishing a general framework for equal treatment, Art. 6.1.

<sup>68</sup>cf. Preamble to the Directives, ECJ 10 April 1984, *S. Von Colson and E. Kaman*, Case C-14/83, and paragraph 26 in particular; ECJ 13 Nov. 1990, *Marleasing*, Case C-106/98, and paragraph 8 in particular; ECJ 10 February 2000, *Deutsche Post AG*, Case C-270/97.