

# Indirect and systemic discrimination: impact and responses

Marie Mercat-Bruns, SciencesPo Law School/CNAM LISE CNRS  
ERA- Applying EU Anti-Discrimination Law  
Milan 5 & 6 October 2023



Funded under the 'Citizens, Equality, Rights and Values programme 2021-2027' of the European Commission

1

## Outline

- 1) Drawing from historical EU construction of the concept of discrimination: the broader model of gender antidiscrimination (direct & indirect to systemic discrimination)
- 2) Impact of complex forms of discrimination (intersectional discrimination; discrimination by association; algorithmic discrimination ) despite favorable shift of burden of proof
- 3) Responses for an Inclusive Society: EU Commission's Strategy on Equality (2020-2025), Action Plan on Racism, and LGBTIQ Equality Strategy + new directives as part of EU Social Pillars of Rights, case law on multiple sources of disadvantage, on the delicate balance of fundamental rights and on effective remedies

2

## Historical EU construction of the concept of discrimination: broader model of gender antidiscrimination (direct & indirect to systemic discrimination)

- With the Treaty of Rome (1957) and equal pay, the **EU model of gender equality**, outside of the prominent economic goal of circulation of goods, persons, services for the common market, **did prevail over the model of racial equality** developed under the impetus of the directive 2000/43 after Treaty of Amsterdam
- **4 logics underpin antidiscrimination law** : management goals, human rights, transformative, libertarian/freedom of choice perspective

3

## Historical EU construction of the concept of discrimination: the broader model of gender antidiscrimination (from direct & indirect to systemic discrimination)

- **Wide scope of subject matter jurisdiction**: EU law covers employment, access to social protection and goods and services for both sex and race discrimination (Dir. 2006/54, 2000/43) but not other grounds.
- **Achievements in grasping structural gender discrimination**:
- Directive 79/7/EEC of 19 December 1978 : equal treatment for men and women **in matters of social security**;
- Directive 92/85/EEC of 19 October 1992 : safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding;
- Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment (goods and services)
- **Directive 2006/54/EC of 5 July 2006** on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). **This directive defines direct and indirect discrimination, harassment and sexual harassment.**
- Council Directive of 8 March 2010 (parental leave), *replaced by Work life Balance Directive June 2019*
- **Directive 2010/41/EC** of 7 July 2010 laying down objectives for the application of the principle of equal treatment between men and women engaged in a **self-employed capacity**

4

## Historical EU construction of the concept of discrimination: the broader model of gender antidiscrimination (from direct & indirect to systemic discrimination)

Uncovering individual to systemic discrimination: the development of gender case law progressively: **structural view**

A more **contextual** approach to collective inequalities:

Reminder :definitions

**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**: that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (**Art. 1, Directive 2000/78**)

**Systemic discrimination**: (not defined in European norms, **structural discrimination is mentioned by EU**)

Formal and informal policies, practices and decision-making processes can result in barriers for and exclusion of persons protected by antidiscrimination law. The use of informal or highly discretionary approaches are particularly problematic as there is more room for subjective considerations, differing standards and biases to come into play. **Systemic discrimination can result from the design of policies, practices, collective bargaining agreements and decision-making processes in a way that uses the dominant culture of the company or a public institution as the norm.** Systemic discrimination can result from a combination of direct and indirect discrimination (glass ceiling)

5

## Historical EU construction of the concept of discrimination: the broader model of gender discrimination (from direct & indirect to systemic discrimination)

- **In Europe, the backbone of the model of sex equality progressively anchored itself in the recognition of structural inequalities** inherent in the dynamics of domination between men and women to eventually try to compensate the gendered disadvantages in terms of wages, job segregation and career advancement. The systemic dimension of inequalities (their recurring nature, the subtle and overt forms of direct and indirect discrimination, the possible influence of gender in collective bargaining and social benefits.
- From equal pay to indirect discrimination: the evolution of case law
- The discourse on gender mainstreaming
- The extension of certain social rights through a more structural view of equality

6

## Historical EU construction of the concept of discrimination: the broader model of systemic gender antidiscrimination through a fundamental right

It was not until the 1970's, that, on the grounds of of sex equality, the ECJ case law (Defrenne I ECJ May 25 1971, Defrenne II April 8 1976, C-43/75, et ECJ Defrenne III June 15 1978, C-149/77) started to build standards for the concepts applied in the antidiscrimination legal framework of the member States.

**The case Defrenne II 8 April 1976 (Case 43/75):** the Court recognize the direct of the principle of equal pay between women and men, and decided that the principle did not only apply only to public authorities but also extends to collective bargaining agreements which regulates collectively the workplace.

*THE PRINCIPLE THAT MEN AND WOMEN SHOULD RECEIVE EQUAL PAY , WHICH IS LAID DOWN BY ARTICLE 119 , IS ONE OF THE FOUNDATIONS OF THE COMMUNITY . IT MAY BE RELIED ON BEFORE THE NATIONAL COURTS . THESE COURTS HAVE A DUTY TO ENSURE THE PROTECTION OF THE RIGHTS WHICH THAT PROVISION VESTS IN INDIVIDUALS , **IN PARTICULAR IN THE CASE OF THOSE FORMS OF DISCRIMINATION WHICH HAVE THEIR ORIGIN DIRECTLY IN LEGISLATIVE PROVISIONS OR COLLECTIVE LABOUR AGREEMENTS** , AS WELL AS WHERE MEN AND WOMEN RECEIVE UNEQUAL PAY FOR EQUAL WORK WHICH IS CARRIED OUT IN THE SAME ESTABLISHMENT OR SERVICE , WHETHER PRIVATE OR PUBLIC .*

Equality is considered as a **fundamental principle** recognized as such by the ECJ: «*equal treatment between men and women is a fundamental right, part of the general principles of EU law which the Court must ensure the respect*» (ECJ Defrenne III).

7

## Historical EU construction of the concept of discrimination: the broader model of systemic gender antidiscrimination through work of equal value

The work of equal value implies to appreciate a comparability of jobs that goes beyond the limits of equal treatment and the sex segregation of jobs (**Case 127/92, Enderby**)

- § 16 if the pay of speech therapists is significantly lower than that of **pharmacists and if the former are almost exclusively women while the latter are predominantly men**, there is a prima facie case of sex discrimination, at least **where the two jobs in question are of equal value** and the statistics describing that situation are valid.
- 19 In these circumstances, the answer to the first question is that, where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex. The second question 20 In its second question, **the Court of Appeal wishes to know whether the employer can rely as sufficient justification for the difference in pay upon the fact that the rates of pay of the jobs in question were decided by collective bargaining processes which, although carried out by the same parties, are distinct and which, considered separately, have no discriminatory effect.**
- 23 ...**the fact that the respective rates of pay of two jobs of equal value**, one carried out almost exclusively by women and the other predominantly by men, **were arrived at by collective bargaining processes** which, although carried out by the same parties, are distinct, and, taken separately, have in themselves no discriminatory effect, **is not sufficient objective justification** for the difference in pay between those two jobs.

8

## Historical EU construction of the concept of discrimination: the broader model of systemic gender discrimination through non-discriminatory job classification

Unequal treatment linked to institutional pay grade system where it is based on physical strength benefitting men more than women for career advancement: ECJ 1 July 1986, *Gisela Rummler* (printing industry)

- **13 IT FOLLOWS THAT THE PRINCIPLE OF EQUAL PAY REQUIRES ESSENTIALLY THAT THE NATURE OF THE WORK TO BE CARRIED OUT BE CONSIDERED OBJECTIVELY . CONSEQUENTLY , THE SAME WORK OR WORK TO WHICH EQUAL VALUE IS ATTRIBUTED MUST BE REMUNERATED IN THE SAME MANNER WHETHER IT IS CARRIED OUT BY A MAN OR BY A WOMAN .** WHERE A JOB CLASSIFICATION SYSTEM IS USED IN DETERMINING REMUNERATION , THAT SYSTEM MUST BE BASED ON CRITERIA WHICH DO NOT DIFFER ACCORDING TO WHETHER THE WORK IS CARRIED OUT BY A MAN OR BY A WOMAN AND MUST NOT BE ORGANIZED , AS A WHOLE , IN SUCH A MANNER THAT IT HAS THE PRACTICAL EFFECT OF DISCRIMINATING GENERALLY AGAINST WORKERS OF ONE SEX .
- **15 EVEN WHERE A PARTICULAR CRITERION , SUCH AS THAT OF DEMAND ON THE MUSCLES , MAY IN FACT TEND TO FAVOUR MALE WORKERS , SINCE IT MAY BE ASSUMED THAT IN GENERAL THEY ARE PHYSICALLY STRONGER THAN FEMALE WORKERS , IT MUST , IN ORDER TO DETERMINE WHETHER OR NOT IT IS DISCRIMINATORY , BE CONSIDERED IN THE CONTEXT OF THE WHOLE JOB CLASSIFICATION SYSTEM , HAVING REGARD TO OTHER CRITERIA INFLUENCING RATES OF PAY . A SYSTEM IS NOT NECESSARILY DISCRIMINATORY SIMPLY BECAUSE ONE OF ITS CRITERIA MAKES REFERENCE TO ATTRIBUTES MORE CHARACTERISTIC OF MEN . IN ORDER FOR A JOB CLASSIFICATION SYSTEM AS A WHOLE TO BE NON-DISCRIMINATORY AND THUS TO COMPLY WITH THE PRINCIPLES OF THE DIRECTIVE , IT MUST , HOWEVER , BE ESTABLISHED IN SUCH A MANNER THAT IT INCLUDES , IF THE NATURE OF THE TASKS IN QUESTION SO PERMITS , JOBS TO WHICH EQUAL VALUE IS ATTRIBUTED AND FOR WHICH REGARD IS HAD TO OTHER CRITERIA IN RELATION TO WHICH WOMEN WORKERS MAY HAVE A PARTICULAR APTITUDE .**

9

## Historical EU construction of the concept of discrimination: the broader model of systemic gender discrimination through indirect discrimination

ECJ 31 March 1981 *Jenkins* CASE 86/80: Indirect discrimination, reveals a formal equality/neutrality that masks and perpetuates discriminatory effects without apparent reference to sex:

- **THE FACT THAT WORK PAID AT TIME RATES IS REMUNERATED AT AN HOURLY RATE WHICH VARIES ACCORDING TO THE NUMBER OF HOURS WORKED PER WEEK DOES NOT OFFEND AGAINST THE PRINCIPLE OF EQUAL PAY LAID DOWN IN ARTICLE 119 OF THE TREATY IN SO FAR AS THE DIFFERENCE IN PAY BETWEEN PART-TIME WORK AND FULL-TIME WORK IS ATTRIBUTABLE TO FACTORS WHICH ARE OBJECTIVELY JUSTIFIED AND ARE IN NO WAY RELATED TO ANY DISCRIMINATION BASED ON SEX .**
- **IT IS FOR THE NATIONAL COURTS TO DECIDE IN EACH INDIVIDUAL CASE WHETHER , REGARD BEING HAD TO THE FACTS OF THE CASE , ITS HISTORY AND THE EMPLOYER 'S INTENTION , A PAY POLICY REPRESENTED AS A DIFFERENCE BASED ON WEEKLY WORKING HOURS IS OR IS NOT IN REALITY DISCRIMINATION BASED ON THE SEX OF THE WORKER .**
- **THEREFORE A DIFFERENCE IN PAY BETWEEN FULL-TIME WORKERS AND PART-TIME WORKERS DOES NOT AMOUNT TO DISCRIMINATION PROHIBITED BY ARTICLE 119 OF THE TREATY UNLESS IT IS IN REALITY MERELY AN INDIRECT WAY OF REDUCING THE LEVEL OF PAY OF PART-TIME WORKERS ON THE GROUND THAT THAT GROUP OF WORKERS IS COMPOSED EXCLUSIVELY OR PREDOMINANTLY OF WOMEN**
- CJEU 18 oct. 2017 C-409/16 *Kalliri* : another example of indirect discrimination based on sex- Italian Police imposing to all candidates for admission to the competition a minimum height standard
- CJUE 17 July 2014 *Leone* C-173/13 : Symetric ground of sex creating reverse indirect discrimination when women benefit from extra semesters to retire early linked to parental or maternity leave: Court decides the difference of treatment might be justified to take into account women's chaotic careers with recurring leaves but the benefit of pension of contributions is not the necessary means to promote women's career since it only excludes them early from the workforce (proportionality test) and does not help them DURING their career . See also *Case C-486/18 Praxair* 8 May 2019 on indirect discrimination

10

## Historical EU construction of the concept of discrimination: the broader model of systemic gender antidiscrimination through indirect discrimination

- **B) Promoting equality within the welfare state outside of the directives on pension and occupational invalidity rights and over the whole career:**
  - Extension of pension rights through **indirect** discrimination based on lower level of pension of women:
  - **EUCJ 20 oct 2011 Brachner C-123/10**: Directive 79/7 must be interpreted as precluding a national provision which leads to the exclusion, from an exceptional pension increase, of a specific group of holders of minimum pensions and which provides, with regard to those persons, for a lower increase than the increase applicable to other pension holders, which works to the disadvantage of many more women than men.
  - **EUCJ 6 March 2014 (Napoli C-595/12) §20**: The prejudicial effects of required training on admission to the police force which delays integration in the police force and ulterior promotion. This apparently neutral rule on training creates a **disproportionate disadvantage** in the career of women who take maternity leave after a successful entry exam: apparently neutral maternity leave postponed the mandatory training
  - **EUCJ 30 June 2022 KM c Instituto Nacional de la Seguridad Social C-625/20**: Statistical approach to indirect sex discrimination in occupational invalidity pension:
  - **Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as precluding national legislation which prevents workers affiliated to social security from receiving a combination of two total occupational invalidity pensions where those pensions come under the same social security scheme, while permitting such a combination where those pensions come under different social security schemes,**
    - where that legislation places female workers at a particular disadvantage as compared with male workers, in particular in so far as that legislation permits a significantly higher proportion of male workers, determined on the basis of all male workers subject to that legislation, as compared with the corresponding proportion of female workers, to benefit from that combination
    - and where that legislation is not justified by objective factors unrelated to any discrimination on ground of sex.

11

## Historical EU construction of the concept of discrimination: the broader model of systemic gender antidiscrimination through work life balance and positive action

- Extension of equality to include **parental rights/family responsibility** discrimination (work life balance)
  - Directive 92/85 (safety and health at work of pregnant workers, recently given birth or breastfeeding)
  - Directive Work life balance in 2019
- From equality to making the difference: **limits and perspectives on positive action**
  - Art. 157 TFUE: refers to under-represented sex and compensation of disadvantage during the professional career

**Dynamic dimension of structural equality in directives and case law linked to the risk of discrimination to workers stemming from relations of informal care to elders, people with disabilities or children (but positive action seen as an exception to discrimination rather than a broader notion)**

12

## Historical EU construction of the concept of discrimination: the broader model of systemic gender antidiscrimination and the extension to other grounds?

- Personal jurisdiction of EU: what people were covered?
- The Treaty of Amsterdam of 1997, in its article 13 (now art. 19), gave further impetus to this framework by expanding coverage of antidiscrimination law to other grounds prohibiting discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.
- Indeed, article 13 of the Amsterdam Treaty invited « the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, » to « take appropriate action to combat discrimination... After the main directives covering the scope of employment were adopted:
- Racial Equality Directive 2000/43 which covers race and ethnic origin (June 29 2000)
- Employment Equality Directive 2000/78 then covered the other grounds religion, disability, age and sexual orientation (Nov. 27 2000) (more narrow scope: not discrimination in access to goods and services)
- Recast Directive 2006/54 covers sex discrimination in employment (consolidating, among others, Directive 2002/73 and relevant EU case law)

13

## Impact of complex forms of discrimination (intersectional, by association, algorithmic discrimination) despite favorable burden of proof

**a) Despite favorable shift of the burden of proof:** Article 8 (Directive 2000/43; (see also Directive 2000/78; 2006/54)

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, **it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.**

**b) Initial ignorance of Intersectional Discrimination :** multiple discrimination in directives (§14 Directive 2000/43: In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should... aim to eliminate inequalities, and to promote equality between men and women, **especially since women are often the victims of multiple discrimination)**

**c) Discrimination by association:** Coleman case, 17 July 2008 C-303/06 : **purpose of the directive 2000/78:** Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the **less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee**, such treatment is contrary to the prohibition of direct discrimination

**d) Algorithmic discrimination:** direct discrimination based on correlations (not causation) : social benefit fraud (fishing linked to family situation, residence) or cherry picking files of people who were born outside of Europe to detect violations (Data mining )

14

### 3) Responses for more inclusive Society: EU Commission Strategies and Action Plans: directives, case law on multiple sources of disadvantage, on balance of fundamental rights and on effective remedies

- **EU Commission: institutional role against intersectional/structural discrimination**
- **a) A Union of Equality: Gender Equality Strategy 2020-2025**
- The implementation of this strategy is based on the dual approach of targeted measures **to achieve gender equality, combined with strengthened gender mainstreaming**. The Commission will enhance gender mainstreaming by systematically including a **gender perspective in all stages of policy design in all EU policy areas, internal and external**. **The strategy implemented using intersectionality** – the combination of gender with other personal characteristics or identities, and how these intersections contribute to unique experiences of discrimination – as a cross-cutting principle. Examples : emphasis on gender based violence (directive) and elimination of stereotypes for gender wage gap (directive)
- **b) A Union of equality : EU anti-racism action plan 2020-2025 : 8 guiding principles**
- **c) LGBTIQ Equality Strategy 2020-2025: 4 pillars**
- This strategy follows calls for action by Member States, the European Parliament, with the strong support from the Intergroup for LGBTI Rights, and civil society. It sets out a series of targeted actions across four pillars

15

### 3) Responses for more inclusive society: EU institutional commitment and new directives

- **Intersectional and structural dimension of inequalities:**
- **1) Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on combating violence against women and domestic violence COM/2022/105 final 8 March 2022.**
- **Change of paradigm: gender based violence is a form of discrimination and of intersectional discrimination (collecting data, prevention, support systems for focus groups, including women escaping war zones): article 35:**
- Member States shall ensure the provision of specific support to victims at an increased risk of violence against women or domestic violence, such as women with disabilities, women living in rural areas, women with dependant residence status or permit, undocumented migrant women, women applying for international protection, women fleeing from armed conflict, women affected by homelessness, women with a minority racial or ethnic background, women sex workers, women detainees, or older women.
- **2) DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (Parliament adopted 30 March 2023)**
- **Article 3 – Definitions:**
- **Gender-based pay discrimination may involve an intersection of various axes of discrimination: on the basis of sex on the one hand, and racial or ethnic origin, religion or belief, disability, age or sexual orientation (as protected under Directive 2000/43/EC or Directive 2000/78/EC) on the other hand. A new definition aims at clarifying that, in the context of gender pay discrimination, such combination should be taken into account, thus removing any doubt that may exist in this regard under the existing legal framework.**

16



### 3) Responses for more inclusive Society: using strategic case law on multiple sources of disadvantage

- EUCJ 24 février 2022 C-389/20,
- Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as precluding a national provision that excludes unemployment benefits from the social security benefits granted to domestic workers by a statutory social security scheme, where that provision places female workers at a particular disadvantage in relation to male workers and is not justified by objective factors unrelated to any discrimination on grounds of sex.

17

### 3) Responses for more inclusive Society: using strategic case law on balancing with other fundamental rights

- Polish case on LGBTQ discrimination linked to independent worker who does personal work is covered by directive 2000/78 and no disproportionate infringement on **liberty of contract** (balancing between rights)/ 8 September 2022 **Case C-356/21**.
- Other balancing approach on **religious freedom** /German Constitutional Court; See CJEU headscarf cases *IX v Wabe eV* and *MH Müller Handels GmbH v MJ* 15 June 2021 : Cases C-804/18 and C-341/19

18

### 3) Responses for more inclusive Society: using strategic case law to adjust remedies

---

- More recent cases for strategic litigation on diversity of remedies
- **14 September 2023 DX v. Instituto Nacional de la Seguridad Social (INSS) C-113/22**
- Where an application for the grant of a pension supplement submitted by a male scheme member has been rejected by the competent authority, under national legislation limiting the grant of that supplement to females scheme members only, whereas that legislation constitutes direct discrimination on grounds of sex, as interpreted by the Court of Justice in a preliminary ruling delivered prior to the decision rejecting such an application,
- the national court hearing an action against that decision must instruct that authority not only to grant the pension supplement claimed to the person concerned, **but also to pay him compensation enabling the loss and damage actually sustained by him as a result of the discrimination to be made good in full...**(including cost and lawyer's fees)
- **14 May 2020 Case C-30/19 Braathens :**
- Refusal by the defendant to acknowledge the existence of discrimination despite the express claim made by the applicant, Article 47 of the Charter of Fundamental Rights of the European Union — Right to effective judicial protection

19

### Conclusion: A way forward?

---

- **Impact and responses to indirect and systemic discrimination must go beyond arguments on discriminatory structural effects and possible justifications**
- Reflect on the hard cases of intersectional, algorithmic discrimination and discrimination by association
- Monitor Member states for effective implementation of EU Strategies and action plans (multi-layered action)
- Engage or promote strategic litigation to have leverage to negotiate systemic solutions to eliminate discrimination in light of CJEU case law

20

## Marie Mercat-Bruns- Bibliography

---

### Thank you!

- **Forthcoming: Antidiscrimination Law: from equality to inclusion (Société de législation comparée LGDJ October 2023)**
- Discrimination at work: comparing European, French and American Law (free e-book UC Berkeley Press),  
<https://www.luminosoa.org/site/books/m/10.1525/luminos.11/>