

The concept of indirect discrimination

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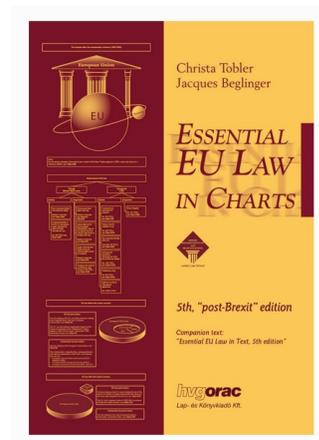
A note on material

References to Charts in this presentation

– Such references refer to materials from
(partially updated):

Christa Tobler & Jacques Beglinger,
Essential EU Law in Charts, 5th, post-Brexit
edition, Budapest: HVG-Orac 2020,
www.eur-charts.eu

– (There is also a short supplementary text volume:
Christa Tobler & Jacques Beglinger,
Essential EU Law in Text, 5th, post-Brexit edition,
Budapest: HVG-Orac 2020; www.eur-charts.eu).



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Introduction

Equal treatment and non-discrimination

- Core concepts of EU law from the beginning of European integration.
- In the original EEC Treaty (now, after many amendments, TFEU):
 - E.g. in the field of internal market law, Art. 48(2) EEC (now Art. 45 TFEU):
Freedom of movement for workers «shall entail the **abolition of discrimination based on nationality** between workers of the Member States as regards employment, remuneration and other conditions of work and employment.»
 - E.g. in the field of social law, first part of Art. 119 EEC (now Art. 157(1) TFEU):
«Each Member State shall [...] ensure and [...] maintain the application of the principle that **men and women should receive equal pay for equal work.**»
 - i.e. no discrimination on the basis of sex with respect to pay.
 - Note: no mention of different forms of discrimination!

Introduction

Different forms of discrimination?

- Examples from the first generation of secondary sex equality law:
 - Art. 1 of Directive 75/117 (equal pay):
«The principle of equal pay for men and women [...] means, for the same work or for work to which equal value is attributed, the **elimination of all discrimination on grounds of sex** with regard to all aspects and conditions of remuneration.»
 - Art. 2(1) of Art. 76/207 (employment):
«For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be **no discrimination whatsoever on grounds of sex either directly or indirectly** by reference in particular to marital or family status.»
- Distinction between two forms of discrimination in Directive 76/207 – what had happened?

The emergence of indirect discrimination

Development through case law

- Originally, the European Court of Justice interpreted the prohibitions of discrimination of the EEC Treaty in a uniform sense:
 - Prohibition of unequal treatment which is expressly based on the criterion mentioned therein (e.g. sex).
 - Corresponds (in part) to the current concept of direct discrimination.
- Subsequently, the Court **added the concept of indirect discrimination**: formally based on a different criterion (e.g. something other than sex).



- For the history of this case law, which began in 1969, see this book:

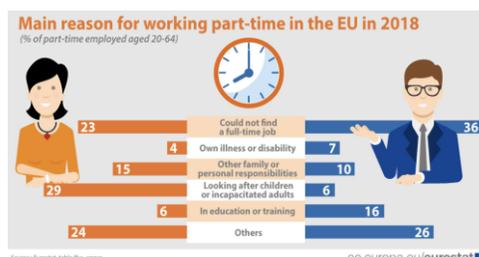
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The emergence of indirect discrimination

Rationale

- Reason for the new approach: **effectiveness** of the prohibition of discrimination, **prevention circumvention**; e.g. *Sotgiu* (1974).
- Best known example from the field of sex equality:
 - Different pay for men and women (i.e. clearly based on sex) is prohibited.
 - In order to save money, an employers could be tempted to change approach and pay differently e.g. **on the basis working time**: more for full-time workers, less for part-time workers.
- That may disadvantage women in particular.



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The emergence of indirect discrimination

From case law to legislation

- Interesting development notably in the field of social law.
- First legal definition in (the former) Directive 97/80 on the burden of proof, which largely reflected the Court's case law in the field of sex equality.
- As of 2000, a new generation of legislation with modern definitions; e.g. Art. 2(1)(b) of Directive 2006/54 (sex, employment and occupation):
«'indirect discrimination': where an **apparently neutral** provision, criterion or practice would put persons of one sex at **a particular disadvantage** compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary»
- See **Chart 10/10** for the larger picture in modern EU law.

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Indirect discrimination

Substantive elements of the concept

- See **Chart 10/11**.
- An **effects-based** concept:
 - Apparently neutral measure (provision, criterion, practice) ...
 - ... with a de facto disadvantageous effect.
- A concept based on the so-called «rule of reason», with the possibility of **objective justification**:
 - Measure pursues a legitimate aim ...
 - ... and is proportionate.
- Note further: «**would** put persons of one sex at a particular disadvantage» – important in view of proof.

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Finally: differences in the wording of EU sex equality legislation

With or without explicit distinction and legal definitions

- With explicit distinction and legal definitions:
 - Directive 2004/113 (services);
 - Directive 2006/54 (equal treatment in employment and occupation, recast);
 - Directive 2010/41 (self-employment).
- Without explicit distinction and legal definitions:
 - Directive 79/7 (statutory social security, gender);
 - Art. 157 TFEU (equal pay, gender);
 - Articles 21 and 23 of the Charter of Fundamental Rights.
- However, the Court seems to use the **same definitions everywhere**; e.g. *Praxair* re Art 157 TFEU; e.g. *TGSS* re Directive 79/7.

[See, by way of an annex to this presentation, sheets on the *TGSS* case that illustrate the steps to be taken in a classic indirect discrimination case with statistical evidence – as of sheet 19.]

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Direct and indirect discrimination

Delimitation

- Direct and indirect discrimination concern the **intensity of the link** of the rule or action in question **with the discrimination ground**.
- Qualification has important consequences, notably in view of justification: Direct discrimination can normally be justified only based on statutory justification grounds; see **Chart 10/13**.
- Therefore important questions:
 - **How strong must the link be** to amount to direct, rather than indirect discrimination?
 - How to **distinguish** between the two concepts?



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Direct and indirect discrimination

Delimitation

– See on this two of my publications:

- 2008 thematic report for the European Commission's European Equality Network;
- 2022 **new report, with updated information.**



– Interesting **development in CJEU case law**: shifting of the dividing line, in a number of steps – see the following sheets.

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Shifting the dividing line

The (on the paper) the easiest category: *Nikolova* (2015)

- Facts and legal issue:
 - Electricity meters are placed too high to be read in districts inhabited predominantly by members of the Roma population group.
 - The complainant is a non-Roma who runs a business in a Roma neighbourhood.
 - Direct or indirect discrimination based on ethnic origin?
- CJEU:
 - Direct discrimination **when the actual reason for the difference in treatment is ethnicity.**
 - Otherwise indirect discrimination, whereby objective justification must not stigmatise.
- So, new element: The form of the discrimination is immaterial where a discriminatory reason can be shown (proof may be difficult ...).

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Shifting the dividing line

A different line: the early case of *Nikoloudi* (2005)

- Facts and legal issue:
 - Part-time workers could only become scheduled staff (better position) if they had previously worked full-time for at least 2 years.
 - According to the General Staff Rules, employment as part-time cleaning personnel was reserved for women.
 - Direct or indirect sex discrimination?
- CJEU:
 - The exclusion of inclusion in the scheduled staff, by an apparently sex-neutral criterion, of **a group of workers consisting exclusively of women** constitutes direct discrimination on grounds of sex.
 - If men also belong to the group of men in question: indirect discrimination.
- My conclusion at that time: Where a criterion excludes only one group, there is direct discrimination. Subsequently same approach in *Maruko* and *Römer* (sexual orientation).

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Shifting the dividing line

Taking this a step further: the case of *Hay* (2013)

- Facts and legal issue:
 - An employer in France refuses a partner in a registered same-sex partnership (PACS) benefits on the occasion of marriage on the grounds that he is not married.
 - PACS is open to both same-sex and opposite-sex couples.
 - Same-sex couples could not marry at that time.
 - Direct or indirect discrimination on the basis of sexual orientation? Argument by some: cannot be direct if a form of partnership is open to both sexes.
- CJEU:
 - **Direct** discrimination, which therefore can therefore only be justified on the basis of a legal ground.

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Shifting the dividing line

Taking this a step further: the case of *Hay* (2013)

- CJEU:
 - «The fact that the PACS [...] is not reserved to homosexual couples is irrelevant and, in particular, does not alter the nature of the discrimination against those couples, for whom - unlike heterosexual couples - it was **not legally possible to contract marriage** at the time relevant to the main proceedings.»
 - «A difference in treatment based on the fact that workers are married, rather than explicitly on their sexual orientation, nevertheless constitutes direct discrimination, as **homosexual workers cannot meet the necessary condition** to obtain the benefit claimed because marriage is reserved for persons of different sexes.»
- The decisive factor is the **total exclusion** of homosexual persons, where they can never fulfil the criterion in question (marriage) by definition.

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Shifting the dividing line

Taking this a step further: the case of *Hay* (2013)

- What about the exclusion of other couples?
- The criterion of «marriage» excludes all persons who are not married, heterosexuals and homosexuals alike.
- But note: direct discrimination requires the **comparability** of the situations!
 - According to the CJEU, the PACS is comparable to marriage in the relevant points.
 - This implies that the same is not true for mere cohabitation.

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Shifting the dividing line

Szpital Kliniczny (2021)

- A case concerning disability, summarising the line including *Hay*.
- CJEU:
 - There is direct discrimination, where a provision or practice is based on a **criteria that is inextricably linked to a ground of discrimination**.
 - Para. 48: «[...] where an employer treats a worker less favourably than another of his or her workers is, has been or would be treated in a comparable situation and where it is established, having regard to all the relevant circumstances of the case, that that unfavourable treatment is based on the former worker's disability, inasmuch as it is based on a criterion which is inextricably linked to that disability, such treatment is contrary to the prohibition of direct discrimination set out in Article 2(2)(a) of Directive 2000/78.»
- CJEU gives examples from previous case law: *Maruko*, *Römer*, *Hay* (sexual orientation); *Andersen* (age); *Kleist* (sex).

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Shifting the dividing line

The overall picture at this point in time

- See **Chart 10/12** – updated version.
- Distinguish the following cases involving formally neutral criteria:
 - Criterion used is **inextricably linked to a discrimination ground**, it excludes
 - either only persons from one group
 - or comparable persons from different groups but one of these altogether because it can never fulfil the criterion.
 - Criterion is used **for reasons related to discrimination**.
 - Criterion **disadvantages persons from both groups**, but puts or is liable to put persons of one group at **a particular disadvantage**.

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Annex: the example of TGSS

Facts, issues, relevant law, potential indirect discrimination

- Facts and legal issues:
 - Spain has a general social security scheme and within that scheme a special scheme for domestic workers. The latter excludes protection against unemployment.
 - CJ is a domestic worker who wishes to pay contributions in view of such protection.
 - Does the exclusion breach EU law, namely Directive 79/7 and/or 2006/54?
- CJEU:
 - Directive 79/7 is relevant.
 - No direct discrimination, since the system applies without distinction to male and female workers.
 - In the context of Directive 79/7, the concept of **indirect discrimination** must be understood in the same way as in the context of Directive 2006/54 (with references to previous case law).

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Annex: the example of TGSS

A particular disadvantage, statistical evidence

- CJEU:
 - The existence of **a particular disadvantage** is for the national court to determine.
 - Where **statistical evidence** is available:
 - The national court must take into account all workers subject to the national law in which the difference in treatment has its origin.
 - It must assess to what extent the statistical evidence adduced before it is valid and whether it can be taken into account, that is to say, whether, for example, it illustrates purely fortuitous or short-term phenomena, and whether it is sufficiently significant.
 - The best approach is to compare the respective proportion of workers that are and are not affected by the alleged difference in treatment among the women in the workforce who come within the scope of that legislation with the same proportion of men in the workforce coming within its scope.

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Annex: the example of TGSS

Comparison of treatment in the case at hand

– CJEU (comparison continued):

– In the case at hand, it is appropriate to consider not only the persons enrolled in the Special Scheme for Domestic Workers, but also all the workers subject to the Spanish general social security scheme, within which those persons enrolled in the Special Scheme for Domestic Workers are included.

– Statistics:

– General scheme: women = 48.96% and men = 51.04% of all employees.

– Special Scheme for Domestic Workers: women = 95.53% of the workers enrolled in the special scheme, that is to say, 4.72% of all female employees; men = 4.47% of the workers enrolled in the special scheme, that is to say, 0.21% of all male employees.

– Thus: proportion of women covered by the Spanish general social security scheme who are affected by the difference under the special scheme is significantly greater than the proportion of men.

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Annex: the example of TGSS

Prima facie indirect discrimination; lack of comparability as an objective factor?

– CJEU:

– It follows that such a national provision gives rise to indirect discrimination based on sex, contrary to Article 4(1) of Directive 79/7, unless it is justified by objective factors unrelated to any discrimination on grounds of sex.

– Is comparability of situations a relevant issue?

– The argument by the Spanish Government that the situation of domestic workers is not comparable to that of other employed workers enrolled in the Spanish general social security scheme is irrelevant in that regard.

– As Advocate General Szpunar stated, the national provision at issue in the main proceedings does not constitute direct discrimination on grounds of sex which could be disputed by alleging that the situation of domestic workers was not comparable to that of other employed workers.

– [Remember the difference in the legal definitions!]

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Annex: the example of TGSS

Objective justification: general framework

– CJEU:

- Objective justification requires that the provision in question:
 - Reflects a **legitimate social policy objective**;
 - is **appropriate** to achieve that objective, i.e. capable of attaining the objective and implemented in a consistent and systematic manner;
 - and is **necessary** in order to achieve the legitimate objective.

– Discretion and obligations of the Member States:

- In choosing the measures capable of achieving the aims of their social and employment policy, the Member States have a **broad margin of discretion**.
- However, the Member State concerned in a particular statutory social security case, as the alleged discriminator must show that the rule fulfils the above-mentioned conditions.

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Annex: the example of TGSS

Objective justification in the case at hand: legitimate aim?

– Argument by Spain and the TGSS:

- Specific characteristics of the business sector in question, notably working in private homes, risks in terms of reduction of levels of employment, social security fraud and illegal work (see paras. 53 et seq.).
- Therefore aim of safeguarding levels of employment and combatting illegal work and social security fraud in order to provide social protection for workers.

– CJEU:

- These aims are general objectives of the EU; Art. 3(3) TEU and Art. 9 TFEU.
- They have been recognised by the Court as both a **legitimate aim of social policy [social law]** and an overriding reason in the public interest capable of justifying a restriction on the exercise of the fundamental freedoms recognised in the Treaty [internal market law].
- CJEU has already held that those objectives could justify a difference in treatment affecting considerably more women than men as regards access to a statutory unemployment insurance scheme.

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Annex: the example of TGSS

Objective justification in the case at hand: appropriate means?

– CJEU:

- The fact of protecting workers through social security schemes entails by nature an increase in the costs that may, depending on the circumstances of the labour market, affect the level of employment in any sector of that market. Plus, the very existence of such schemes, irrespective of the sector concerned, involves the risk of the protection they offer being used fraudulently.
- Consequently, in order for the national provision at issue to be regarded as being implemented in a consistent and systematic manner, **it must be established that the category of workers it excludes from unemployment protection differs in a meaningful way from other categories of workers who are not excluded from it.**
- In fact, other categories of workers whose employment relationship is similar to that of domestic workers (e.g. gardeners, chauffeurs, agricultural workers and workers employed by cleaning companies) are all covered by Spanish unemployment protection.
- Hence: no consistent and and systematic implementation.

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Annex: the example of TGSS

Objective justification in the case at hand: necessary means?

– CJEU:

- Should the national court nevertheless find the measure appropriate, it must still determine whether the provision goes beyond what is **necessary** to achieve those objectives.
- In fact, the exclusion of unemployment protection makes it impossible for domestic workers to obtain certain other social security benefits to which they are entitled and the granting of which is dependent on entitlement to unemployment benefits having come to an end (e.g. permanent incapacity benefit or social assistance for the unemployed).
- Since that exclusion entails a greater loss of social protection for domestic workers leading to a situation of social distress, the national provision at issue does not appear necessary in order to attain those objectives.

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Annex: the example of TGSS

Finding

– CJEU:

«In the light of all the above considerations, the answer to the questions referred is that Article 4(1) of Directive 79/7 **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.»

– Thus: clear framework of **indirect sex discrimination**.

– In view of the division of tasks in the framework of the preliminary ruling system (Art. 267 TFEU), the **actual finding in the case at hand** is left to the national court, but the CJEU gave a lot of «guidance» to the national court in this respect ...

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Thank you
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