Indirect Discrimination and the European Court of Justice. A comparative analysis of European Court of Justice case-law relating to discrimination on the grounds of, respectively, sex and nationality

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A comparative analysis of European Court of Justice case-law referring to discrimination on the grounds of, respectively, sex and nationality.

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Abstract

When this study began there existed in European law only two prohibited forms of discrimination - discrimination on the grounds of sex and discrimination on the grounds of nationality. In it I examine in a comparative perspective the evidential requirements which the European Court of Justice (ECJ) has placed upon plaintiffs in cases concerned with indirect discrimination on the grounds of sex and the grounds of nationality. While indirect discrimination on the grounds of sex has been prohibited since the early stages of the European Communities, the prohibition of indirect discrimination on the grounds of nationality has only been introduced in recent years. The purpose of this study is to compare how the ECJ has interpreted these two different prohibitions of discrimination. The ECJ has placed different evidential requirements on indirect sex discrimination and indirect nationality discrimination. In the case of indirect nationality discrimination, as long as it is shown that a measure constitutes a risk that disadvantages may arise for migrant workers, it is sufficient to prove at the individual level that there is indirect discrimination. In contrast, if the law in question is based on the grounds of sex, the ECJ has set a higher evidential standard and requires evidence of “substantial” discrimination at the collective level. This means that statistical evidence is generally required to prove indirect sex discrimination. However, if the measure in question is not based on the grounds of sex, evidence of “substantial” discrimination at the collective level is not required.
1  Introductory points of departure

In Aristotle’s definition, equality means that like are to be treated alike and unlike are to be treated differently. The liberal legal tradition has taken this definition of equality as its starting-point and focused on the concepts of formal equality of treatment and direct discrimination. However, to achieve substantive equality of treatment it is not sufficient to pursue it solely in either law or practice without taking into account the outcome of this formal equality of treatment. Substantive equality, therefore, requires that direct discrimination is comprehended in indirect discrimination.

It is a term first introduced by the Supreme Court in the USA in the race discrimination case *Griggs v. Duke Power Co* in 1971. The Supreme Court determined that formally race-neutral provisions can have discriminatory effect, and can do so irrespective of whether or not it was the respondent’s intention to discriminate. The Supreme Court’s concept of indirect discrimination has subsequently been incorporated into EC law.

When I began this study there existed in EC law only two prohibited forms of discrimination—the prohibition of discrimination on grounds of sex, and the prohibition of discrimination on grounds of nationality. The objectives are thus different, but the means—the prohibition of discrimination—are the same. The ECJ has in practice determined that both these prohibitions of discrimination comprehend both direct and indirect discrimination.

In its reasoning the ECJ has created a strict dividing line between direct and indirect discrimination. Determining that these prohibitions of discrimination encompassed in the prohibition of discrimination is the same. The ECJ has in practice determined that the prohibition of discrimination on grounds of sex, and the prohibition of discrimination on grounds of nationality.

In the endeavour to achieve substantive equality of treatment, the term indirect discrimination has acquired ever greater importance. In consequence it is probable that the cases reaching the Court...

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Indirect Discrimination and the European Court of Justice

CFE Working paper series no. 15

Indirect discrimination

Chapter 1

Method and material

In Chapter 2 I give an account of the legal provisions in the EC which

Further presentation

The purpose of this study is to examine in a comparative perspective the evidential requirements the ECJ has placed upon plaintiffs in cases about indirect discrimination on the ground of sex, and to discuss the consequences for the individual of any differences.

The material for my own study consists of all cases concerned with indirect discrimination on the grounds of nationality in the context of free movement of labour which gave hits in a CELEX search using the search combination "equal treatment" and "nationality". The material has, however, been restricted to include only those cases which were published in the European Court Reports from 1 January 1990 to 31 December 1999, and on that basis comprises 27 cases.

The material thus comprises Judgments by the ECJ and the method is a textual analysis of the Court's reasoning. Since the Advocate-General's Opinions are of importance for an understanding of the Court's ultimate Judgments, they too are included in my study, just as they are in Lundström's.

The Court's procedure can in both types of case be divided into two stages. First it is established whether the disputed provision, criterion or case-law can be regarded as discriminatory. It is up to the plaintiff to show that it is discriminatory, whereas the respondent has the burden of showing that it is not. If the Court decides in the plaintiff's favour, it then proceeds to examine whether the respondent can objectively justify the provision in question. If the respondent succeeds, then there is no unlawful discrimination.

My study deals only with the first stage, that is to say the evidential requirements made of the plaintiff in cases about indirect discrimination.

Further presentation

In Chapter 2 I give an account of the legal provisions in the EC which have influenced, or which are relevant to, the Court's reasoning in the cases included in this study. In Chapter 3 there follows a summary of Lundström's conclusions regarding the evidential requirements placed upon plaintiffs in cases about indirect discrimination on grounds of sex. Next comes, in Chapter 4, an examination of the Court's reasoning in all cases about sex discrimination in the European Court Reports from 1 January 1990 to 31 December 1999, with a focus on the principles of evidence. Finally, in Chapter 5, a comparison is made of the evidence requirements of the Court in cases about direct and indirect discrimination.

For a person who considers himself or herself to be subject to discrimination, the requirements that the Court makes of the plaintiff in proving the existence of discrimination are of decisive importance. It is true that, formally speaking, the Court has no competence to express opinions about questions of evidence, or to decide what evidential requirements shall be applied by national Courts. Its task, as laid down in Article 234 of the Treaty of Rome, is to give rulings on the interpretation of EC law. In practice, however, the Court has built substantial evidential requirements into its definition of direct and indirect discrimination. Since I completed this study two new EC Directives containing prohibitions of discrimination have come into force in EC law. Today there are also prohibitions, in certain situations, of discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation. In its proposal on one of these new Directives the Commission took up the question of proof of indirect discrimination. It proposed that the previous case-law of the ECJ as regards indirect discrimination on the grounds of nationality should be applied in relation to the new Directive, and not the evidential requirements for indirect sex discrimination since the latter can be difficult for a plaintiff to meet. The ECJ has manifestly applied different evidential requirements in relation to these two prohibitions of discrimination.

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2 Legal Instruments

2.1 Instruments of the European Union

Art 141 of the Treaty of Rome provides that the Member States shall ensure that the principle of “equal pay for male and female workers for equal work or work of equal value is applied”.

Council Directive 75/117 converts the “principle of equal pay” into a prohibition of wage-discrimination on grounds of sex. Article 1 of the Directive lays down that the principle of equal pay means “... for the same work or work to which equal value is attributed, the elimination of all discrimination on the grounds of sex with regard to all aspects and conditions of remuneration”. Anyone regarding himself/herself as having been subject to wage discrimination on grounds of sex must be able to have his/her case tried before a national court.

European Court of Justice, Judgment of 21 September 1987, Case 485/84 E.g. "...(the) principle of equal pay means "...", 1987/2939, "...(the) principle of equal pay means "...", 1987/2939, "...(the) principle of equal pay means "...", 1987/2939.

The Directive thus extended the principle of equality of treatment to apply also to access to employment and working conditions other than pay. In accordance with the principle of equality of treatment, the Directive applies to all aspects and conditions of remuneration on which equal pay is guaranteed. The principle of equal pay is applied in accordance with the Council Directive 75/117 on the conditions for employment and working conditions other than pay. In accordance with the principle of equality of treatment, the Directive applies to all aspects and conditions of remuneration.

2.2 Instruments of the European Council

Article 2(1) of Council Directive 77/298 on the conditions for employment and working conditions other than pay. In accordance with the principle of equality of treatment, the Directive applies to all aspects and conditions of remuneration.

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2.5 Instruments of the European Court of Justice

Article 2(1) of the Council Directive 77/298 on the conditions for employment and working conditions other than pay. In accordance with the principle of equality of treatment, the Directive applies to all aspects and conditions of remuneration.
Article 12 of the Treaty of Rome prohibits "any" discrimination on grounds of nationality "within the scope of application of this Treaty". However, in accordance with the previous case-law of the Court, this general prohibition of nationality discrimination can only be used independently in situations which are governed by Community law but in which the Treaty affords no specific legal provision for the situation in question.

The prohibition of discrimination is spelt out in Article 39 of the Treaty. Article 39(1) provides that "Freedom of Movement for workers shall be secured within the Community." According to Article 39(2), free movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work.

In Council Regulation 1612/68 on the free movement of labour within the Communities, the principle of equal treatment as regards conditions of employment is given a still clearer form. Article 7(1) of the Regulation states that "no employee who is a citizen of one Member State but residing in another may on grounds of his/her nationality be treated differently from workers of that Member State as regards conditions of employment and work."

Article 7(2) of the Regulation provides that an employee who is a citizen of one Member State but resident in another shall moreover "enjoy the same social and tax advantages as citizens of that State". By virtue of the same social and tax advantages reference is made to the "same social and tax advantages as citizens of that State". By article 7(2) of the Regulation, the concept of "social benefits" has developed to embrace all benefits accruing to any national employee chiefly on the ground of his/her objective status as an employee, or simply on the basis that he/she is resident within the territory of the state concerned.

The Court has further extended the principle of equal treatment to apply also to members of the migrant worker’s family. A further expression of the principle of equal treatment is to be found in Article 3(1) of Regulation 1408/71 on the application of social security systems when employees, self-employed workers or members of their families move within the Communities. Persons who are resident within the territory of one of the Member States and to whom the Regulation applies shall be "subject to the same obligations and enjoy the same benefits" under the legislation of any Member State as the nationals of that State. In principle all persons who are insured in accordance with any Member State’s social security system are embraced as regards at least one of the benefits which are covered by the Regulation. However, family members and surviving dependants are not accorded any independent right to the benefits to which the Regulation refers. They are provided only with the advantages referred to in Article 7(2) of the Regulation. According to Article 7(2), family members and surviving dependants are provided with the same social and tax advantages as citizens of the State concerned unless they are explicitly excluded from the scope of application of the Regulation.

Even if the term indirect discrimination is not explicitly mentioned in any of these statutes, the ECJ has made it clear that the principle of equal treatment laid down in both Article 39 of the Treaty of Rome and in Regulations 1612/68 and 1408/71 prohibits both direct and indirect discrimination.

Summary

Indirect Discrimination and the grounds of nationality

The prohibition of discrimination on the grounds of nationality under the Regulation of the European Communities prohibits all forms of discrimination on grounds of sex and nationality. The prohibition is applicable to all citizens of the Member States, including members of their families. The prohibition is not limited to discrimination in employment, but extends to all aspects of life within the Community. The prohibition applies to all forms of discrimination, including indirect discrimination.

Indirect discrimination on grounds of sex in the matter of conditions of employment and work has been defined in the Directive on the burden of proof, which also prescribes what evidence is required to establish the existence of such discrimination. In other cases, the legislative instruments provide no guide to the meaning of the concept of indirect discrimination.

The operative principle of equal treatment is the principle of equal treatment in the matter of conditions of work. The principle of equal treatment is applicable to all citizens of the Community, including members of their families. The principle of equal treatment is not limited to discrimination in employment, but extends to all aspects of life within the Community. The principle of equal treatment applies to all forms of discrimination, including indirect discrimination.

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The previous case-law of the European Court of Justice in cases concerned with indirect discrimination on the grounds of sex.

The formula for establishing indirect discrimination on the grounds of sex

Comparison

Because of the way in which the evidential requirements are formulated, a comparison between two groups is necessary. For there to be discrimination, comparison between two groups is necessary. The Court's traditional attitude has been that it is the proportions of men or, respectively, women in the disadvantaged group which must be compared with one another.

**Sexual orientation**

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**Grounds of sex**

The formula for establishing indirect discrimination on the grounds of sex

**Court of Justice in cases concerned with the European case-law**

Indirect discrimination and the European case-law.
Indirect Discrimination and the European Court of Justice

Alleged indirect sex discrimination can also stem from national legislation. That is always so in cases concerned with Directive 97/7 on statutory schemes.

The whole population of the country must then be included in the statistical material. If the plaintiff is from a Member State with well-developed and publicly accessible statistics this can be a simpler task than obtaining statistics relating to major private employers. On the other hand it can in practice be a totally impossible task for a plaintiff to prove indirect sex discrimination in cases where the necessary statistics have not been produced by a public body.

That is illustrated by the Kirshammer-Hack case which related to the German legislation on security of employment. The legislation was alleged to disadvantage part-time employees in small firms and hence women. However, neither the Advocate-General nor the Court considered that statistics showing that 90% of part-time employees on the German labour market were women could serve as prima facie proof that there was a substantially higher proportion of women than men working part-time in small enterprises. There were no publicly available statistics relating to the proportion of women or, respectively, men among part-time workers in enterprises with less than 5 employees. That meant, as a result of the Court’s evidential requirements, that Petra Kirshammer-Hack was in practice denied the opportunity to create a presumption of indirect discrimination.

Result of the comparison

According to the Bilka-Kaufhaus formula, the statistical material must show that “a substantially higher proportion” of the relevant group of the population placed at a disadvantage consists of women. The percentages must be significantly higher proportion of women than men. The figures must be 80% or more of the people in the disadvantaged group.

In the case of Seymour-Smith and Perez the plaintiff contended that if there are significant statistics which relate to the whole labour force of a Member State and which show that there are long-term non-random sex differences, every difference in the effect of a provision, however small, is a breach of the principle of equal treatment. The statistics showed that 77.4% of the male employees met the condition, while the figure for female employees was 68.9%. The Court did not consider that it was thereby shown that a significantly smaller proportion of women met the condition. Since the Court here departed from its traditional method and instead compared the proportions of, respectively, women and men in the advantaged group it is unclear what conclusion can be drawn from this case. Such an examination does not really tell us anything about the situation in the disadvantaged group, and hence nor does it tell us whether discrimination exists or not.

Summary

In order to establish indirect discrimination on grounds of sex the plaintiff must demonstrate by means of statistical material that a provision disadvantages not only her but also other women, and that it disadvantages a substantially higher proportion of women than men. The statistics must be significant and the comparative groups must comprise a large number of employees.

15
Indirect discrimination is established with the aid of statistical material. I take first the Allué II case, which was decided in 1993, because statistical material figured in it and because the Court developed its arguments in a manner similar to that adopted in cases about indirect sex discrimination. At issue in the case was an Italian provision which governed employment contracts for foreign language assistants at universities. It was prescribed that such contracts could be entered into for only one academic year at a time. Advocate-General Lenz began by examining how far the one-year condition discriminated against foreign language assistants as compared with other employees. When Lenz found that no other category of employees in the university sector could be considered comparable with that of foreign language assistants, he had to choose, for the comparative group, employees in general. Since according to the Italian legal system employment contracts are normally of indefinite duration, Lenz determined that the one-year condition discriminated against foreign language assistants.

Could this unfair treatment then be considered as synonymous with discrimination on grounds of nationality? The available statistics showed that 64% of all foreign language assistants at Italian universities were foreign nationals. On the basis of this information, Lenz concluded that since the one-year condition was valid independently of the nationality of the employee, it essentially concerned employees who were foreign nationals. At first sight it may seem that 64% is a significantly lower figure than the 80% which was current in cases about indirect sex discrimination. It should, however, be observed that the statistics were used by Lenz in the opposite sense. A statistical difference of 2 can mean that 64% significantly hinders foreign language assistants.

The previous case-law of the European Court of Justice in cases about indirect discrimination on grounds of nationality comprises Article 39 of the Treaty of Rome, Article 7 of Regulation 1612/68, and Article 3 of Regulation 1408/71. Within the framework of the material on which this study is based, nine cases deal with indirect discrimination on grounds of nationality related to pay or other conditions of employment and work, five cases concern tax advantages, and six cases concern social advantages and social security.
The number of young people who were nationals of other Member
States who entered the condition was proportionally much larger
than the number of young people who were nationals of the host-
State. The Belgian Government contested the burden of proof on the
Commission, pointing to the fact that the condition was 

The Belgian Government contested that the burden of proof on the
Commission had to be clearly established. The Court, however, held
that the condition was sufficiently established. The Commission had
demonstrated that the condition substantially discriminated against
nationals of other Member States. The condition was therefore 

The reasoning in Allué II nonetheless shows great similarities with that in cases about indirect sex discrimination. The proportion of persons in the disadvantaged group who are nationals of other Member States is a consideration in assessing the proportion of nationals. The discrimination stems from legislation and the basis for the comparison comprises all foreign language assistants employed at Italian universities, exactly as would have been required had the case been concerned with indirect sex discrimination. Statistical data are available and are used to establish that the one-year condition substantially discriminates against nationals of other Member States.

It should, however, be emphasised that it was the Italian Government, that is to say the respondent, which made these data available, and that the relative element in the statistical examination makes it difficult to draw any conclusions as regards any evidential requirements.

Statistics pronounced unnecessary in seeking to establish potential indirect discrimination

In the two cases the Commission v. Belgium and O’Flynn the respondent Governments made interventions which brought to the fore the question of the necessity for statistical evidence in cases about indirect discrimination. The Commission v. Belgium was concerned with Belgian legislation providing financial support to young Belgians seeking a job for the first time. This support was conditional on the applicant having completed a school subsidised or recognised by Belgium. The Belgian Government contended that the burden of proof on the Commission entailed that it must prove, and not simply assert, that the number of Belgian youth who met the condition was proportionately much greater than the number of young people who were nationals of other Member States. This is an assertion that in principle the same rules about evidence shall apply in cases about indirect sex discrimination (tor. (m. n.) I will call this a "de minimis" test).

Before the Court pronounced on the Commission v. Belgium, however, a Judgment was delivered in the O’Flynn case, in which the British Government had made a similar intervention. John O’Flynn was an Irish citizen, a pensioner, resident in Great Britain where he had worked for 38 years. When his son died O’Flynn assumed responsibility for the funeral costs, which, in accordance with British law, may in certain circumstances be paid from the Social Fund to a person who has undertaken to be responsible for the funeral costs of another. However, one of the conditions was that the burial must take place in Great Britain. O’Flynn’s application was rejected on the basis of that condition.

In the British court O’Flynn invoked the principle of equal treatment as regards social security benefits. The national court in turn applied to the ECJ for a ruling on which criterion should be applied to determine whether there had been indirect discrimination on grounds of nationality. The British Government referred to the ECJ’s previous case-law in the field of sex discrimination and contended that an apparently neutral condition cannot be considered discriminatory only if it can be met by a considerably smaller proportion of the nationals of other Member States than of British nationals. Advocate-General Lenz began by establishing that it was clear that the condition was not directly discriminatory, since it applied to both British and nationals of other Member States. But experience showed that many migrant workers still feel that they have links with their country of origin and that it is therefore substantially more likely that migrant workers will adhere to those links with their country. Local municipal workers in Great Britain have higher status than those working for other Member States. But the evidence showed that a large proportion of the applicants who were nationals of other Member States were precisely local municipal workers. It could therefore not be considered that the condition substantially discriminates against nationals of other Member States.

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...
categories of teaching staff not so qualified are not Italian nationals.

Since the Judgment in the case of the Commission v. Belgium on 9 March 2000, the Council of Europe’s European Commission for Democracy through Law (The Venice Commission) has published various opinions and reports, such as the “Handbook on the Protection of Human Rights and Fundamental Freedoms in the Context of Indirect Discrimination” in 2003. The Venice Commission's work has been influential in shaping European Union law on indirect discrimination.

The case of the CFE Working paper series no. 15 on indirect discrimination is a seminal case for understanding the European Court of Justice’s approach to indirect discrimination. The case, O'Flynn v. Belgium, involved a Belgian university employee who claimed that the university's provision for additional teaching hours was indirectly discriminatory against migrant workers.

The Court determined that the provision in question affects national workers disproportionately, and hence also after Petrie v. Belgium, it should have been possible to use the same type of statistical data as had been presented in that case. Advocate-General Fenelly opens, however, with a reference to Allué II on the existence of indirect nationality discrimination. First it summarised its own previous case-law in this field, and then reformulated these principles into one single test:

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 consequential risk that it will place the former at a particular disadvantage and hence also after Petrie v. Belgium, it should have been possible to use the same type of statistical data as had been presented in that case.

The Court's generously formulated "test" in O'Flynn case was: if a woman had been in a position to receive the benefit calculated on the basis of her most recent wage, it would have been possible to use the data used to establish the sex-based disadvantage in the O'Flynn case. The Court then referred to the fact that nationals of other Member States will ar-

When implementing the two discrimination prohibitions, it is the latter which I do when I contend that it should be possible to establish indirect sex discrimination on the basis of evidence. Now, it is not particularly logical to apply the prohibition of sex discrimination to a condition which is relevant in relation to nationality, and the prohibition of nationality discrimination to a condition which is relevant in relation to sex. To apply the two discrimination prohibitions to one and the same situation would be to subject one group to a risk of discrimination that is related to its sex and to the other group to a risk of discrimination that is related to its nationality. To apply the two discrimination prohibitions to one and the same situation would therefore be to subject one group to a risk of discrimination on the ground of its sex and to the other group to a risk of discrimination on the ground of its nationality.
Disproportionate disadvantage is established without the aid of statistics. The Court's reasoning in the Bachmann and Schöning cases also follows the logic of cases about sex discrimination, in so far as it is founded on "disproportionate disadvantage". This disproportionate disadvantage is, however, established entirely on the hypothetical plane, without any practical comparisons.

In the Bachmann case, Belgian legislation made the right to tax reliefs in respect of certain insurance premiums dependent on whether these premiums were paid in Belgium or in another country. It was therefore a matter of indirect discrimination. Belgian workers who had previously been employed abroad or who had taken out insurance policies abroad were likewise caught by the provision regarding the country in which the premiums were paid.

Advocate-General Mischo expresses the opinion that in relative terms it is primarily nationals of other Member States who are placed at a disadvantage by the provisions relating to the right to tax reliefs in respect of insurance premiums paid in another country. He concludes that the Belgian legislation results in indirect discrimination on grounds of nationality. The Court, however, maintains that the provisions are not discriminatory, as they merely reflect the different positions of national and foreign insurance companies.

The Court's reasoning in the Bachmann and Schöning cases is thus based on the hypothetical plane, without any practical comparisons. It claims that the disproportionate disadvantage is established without the aid of statistics. The Court's reasoning in the Allué II case also follows the logic of cases about sex discrimination, in so far as it is founded on "disproportionate disadvantage". This disproportionate disadvantage is, however, established entirely on the hypothetical plane, without any practical comparisons.
Indirect Discrimination and the European Court of Justice

The proportion of such persons in the disadvantaged group must generally speaking be much higher than the proportion they form of the working population as a whole. The proportion of Belgian nationals among the persons placed at a disadvantage must correspondingly be much smaller than the proportion they form of the total working population.

Even if the reasoning follows the same logic as the evidential requirements in cases about indirect sex discrimination, it suffices for Mischo merely to indicate that in general, it must be considered to be so (which is indeed quite correct), and no statistical data are required to determine these social realities.

The Court so reasoned in Bachmann—it is normally nationals from other Member States who, after having been employed in Belgium, return home and there have to pay tax on the sums paid out to them by their insurers. That is therefore the category of persons who are prevented from obtaining income-tax relief on the insurance premiums without the corresponding compensation that the sums they receive from their insurers are free of tax.

The Court in its reasoning says both that the condition particularly disadvantages nationals of other Member States, and that that results in an obstacle to free movement. It is therefore difficult to say whether in the Bachmann case it employs discrimination rhetoric or whether it embarks on what I call the "rhetoric about obstacles" which I shall illustrate below. It is possible that Article 39, as a "prohibition of obstacles to free movement", lay behind the position adopted by the Court, rather than Article 39 as a "prohibition of discrimination".

In the Schöning case, which was decided in 1998, Advocate-General Jacobs gives further examples of the proportionality thinking which was illustrated by Allee II, Price and Balduin. The plaintiffs considered themselves to be justifiably taking into account that, at the stage then reached in Community law, the coherence of the tax system could not be guaranteed with less restrictive provisions.

The BAT also affected adversely certain other persons who had never taken advantage of the free movement of labour provisions, i.e. "ordinary" German workers. Public sector employees who have moved from a posts outside the scope of the BAT to a post within it can suffer the same disadvantages as returning German nationals. But Jacobs is of the view that these persons probably comprise only a small proportion of the public sector employees who are placed at a disadvantage. The Court, in the Schöning case, noted that the BAT works to the particular detriment of "migrant workers". He refers only to obvious facts: a doctor who has spent part of his career in another Member State has to pay tax in Germany on the benefits he receives from his insurers. It is irrelevant how many persons so placed are affected, and therefore no statistical comparisons are required.

It is pertinent to comment on the categories "nationals of other Member States" and "migrant workers". These two concepts are occasionally employed as if they were identical: the "migrant workers" in one member State are assumed to consist of nationals of other member States. But that is not necessarily true. The BAT rules were particularly disadvantageous for "migrant workers", i.e. persons who had acquired experience working in the public sector in another Member State. But the Court is of the view that these persons are placed at a disadvantage in the BAT. The more important question is whether these persons are placed at a disadvantage in the BAT. It is evident that the Court is of the view that they are placed at a disadvantage.
In his reasoning Jacobs likewise follows the logic of cases about indirect sex discrimination. Whereas 100% of migrant workers taking employment in the public sector are placed at a disadvantage, the proportion of other public sector employees in the disadvantaged group is extremely small. Since the former group comprises only a small proportion of the total number of public sector employees, there is a disproportionate disadvantage for migrant workers. This disproportionate disadvantage can however be determined without statistical data.

Since the plaintiff Kalliope Schöning was in fact not a German national, it was unnecessary for Jacobs to pass comment on the circumstance that German nationals can also be members of the disadvantaged group “migrant workers”. So even if in his reasoning he engages in a broader interpretation of the Article 39(2) prohibition of discrimination, in the end he keeps to the literal wording of the Article and concludes that the condition in the BAT is discriminatory towards employees who are “nationals of other Member States”.

In its Judgment the Court very quickly arrived at the finding that the BAT provision can result in a breach of the Article 39 principle of non-discrimination. Referring to Jacobs’ draft Judgment the Court considered that the BAT manifestly worked to the detriment of migrant workers. The fact that certain German employees can find themselves in the same situation makes no difference.

Since the Court’s arguments deal in substance with the “migrant workers” category, and only allude to “the principle of non-discrimination in Article 39”, it is impossible to be clear whether the Court had in mind “discrimination against migrant workers” or “discrimination on grounds of nationality”.

Common sense suffices to establish potential indirect discrimination.

Several of the cases included in my material are concerned with alleged indirect discrimination as a consequence of residence conditions. Generally speaking, in these cases the Court has had no difficulties in establishing the existence of potential indirect discrimination.

The Commission v. France case concerned a residence condition in a collective agreement about social security. The agreement had been negotiated in connection with notices of dismissal because of the crisis in the French steel industry in 1976. In accordance with this agreement, those taking early retirement who were resident in France were given extra entitlement to pensions covering the years from the age of 55 to the normal retirement age. Belgian employees in the same sector who were not resident in France were not granted this concession. The Commission now contended that this difference in treatment amounted to indirect discrimination on grounds of nationality.

The Court reiterated the O’Flynn test and recalled that a provision shall be regarded as indirectly discriminatory if it is of such a nature as to entail a risk that migrant workers will be adversely affected to a greater degree than national workers. The residence condition in question entailed such a risk, according to the Court, since the condition could more easily be met by French workers—for the most part resident in France—than by workers from the other Member States.

The Court expressed itself in even simpler terms in the Clean Car case which was about a residence condition applied in regard to the appointment of Managing Directors of Austrian companies. The Court held that persons who are not resident in a given Member State are as a matter of fact usually not nationals of that State. There is therefore a risk that a residence condition in connection with the appointment of Managing Directors will be disadvantageous to employees who are nationals of other Member States.

It was in much the same simple terms that the Court declared the residence conditions in dispute in the cases of the Commission v. Luxembourg, Meints, Garcia and Meeusen to constitute potential indirect discrimination.

Common sense is enough to establish potential indirect discrimination.

You argue that migrant workers or „discrimination on grounds of nationality“ 99.” It is impossible to be clear whether the Court held in mind „discrimination against migrant workers” or „discrimination on grounds of nationality”. Since the Court’s arguments deal in substance with „migrant workers”...
Indirect Discrimination and the European Court of Justice

Mr Biehl was a German national who had been resident and employed in Luxembourg for almost ten years. National legislation in Luxembourg made the refunding of overpaid tax conditional on the individual's residence during the whole of the tax year. Since Mr Biehl moved back to Germany before the end of his tax year, he was refused a refund on the tax he had paid during his final year in Luxembourg.

The Advocate-General, Darmon, first reapplies the standard formulation which will be recalled from, for example, the Commission v. France or the Clean Car case. Those who leave, or move to, Luxembourg in the course of a tax year will in the main not be Luxembourg nationals. The "permanent residence" criterion therefore leads to "treatment that is not the same for the tax payer" because it discriminates against Luxembourg nationals, who wish to make use of their right to freedom of movement. Darmon then satisfies himself that there is "objective comparability". He emphasises that a comparison of different situations might very well show that difference in treatment does not lead to a discriminatory result because the person in question does not end up in a less advantageous situation than the nationals of the host Member State. In Biehl's case, however, the conclusion is not that "things even out", but that the disputed provision gives rise to a sufficiently significant disadvantage for discrimination to be held to exist.

Darmon does not, however, content himself with finding potential indirect discrimination on grounds of nationality. He adds that the provision can in addition affect the situation of all Community nationals, including Luxembourg nationals, who wish to make use of their right to freedom of movement. The provision can therefore also be in conflict with the basic principle of freedom of movement for persons enshrined in Article 39(1). With that, Darmon opens up the rhetoric about obstacles that Advocate-General Lenz three years later persuaded the Court to accept in the Bosman case. In the Biehl case, however, the Court held to the classical line and found that the permanent residence condition risked affecting adversely primarily tax-payers who were nationals of other Member States, since it often applied retrospectively. In that case, the Court did not consider that the situation of a resident was comparable with that of a non-resident in relation to the disputed advantage. The Court did not consider the disadvantage the non-resident would suffer in that case since national treatment would be provided by the German authorities.

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similarly to German military service only as regards the suspension of his pension allowance, and not as regards the entitlement to its subsequent extension. The Court held that in such situations Member States have an obligation to give the same treatment to military service in other Member States as in their own, in order not to place at a disadvantage the nationals of Member States other than Germany.

What was of interest to the Court in these two cases was not how many persons were placed at a disadvantage, whether by number or by percentage. The decisive factor was that Dafeki and Romero found themselves in a situation in which they were placed at a disadvantage, and in which it could be presumed that they were disadvantaged on grounds of their nationality. Others might perhaps find themselves in the same situation, and they too would then be placed at a disadvantage, but it was not necessary to show that there were indeed others in the same situation as Dafeki and Romero at that very moment.

Common to all the cases mentioned under this heading is the simple fashion in which the Court reached a finding of potential indirect discrimination on grounds of nationality. Even if the Advocates-General in certain instances adumbrated a broader interpretation of Article 39 than as no more than a prohibition of discrimination on grounds of nationality, the Court did not explicitly follow up that line of reasoning in its conclusions. It is otherwise with the Court's reasoning in the cases which will now be analysed.

The prohibition of "discrimination on grounds of nationality" becomes a prohibition of "discrimination" all the cases that have been analysed so far had their origin in the fact that a person who was a national of a certain Member State considered himself/herself to be disadvantaged by a provision of another Member State and in that connection contended that he/she had been subject to indirect discrimination on grounds of his/her nationality. That situation fits in extremely well with the wording of the legal instruments. Article 39 provides for "the abolition of any discrimination based on nationality", and Article 7(1) of Regulation 1612/68 lays down that "a worker... may not be treated differently from national workers by reason of his nationality". The wording of Article 3 of Regulation 1408/71 also concerns the equality of treatment between national workers and workers who are nationals of other Member States. On the other hand, in the two cases to be analysed now, Scholz and the Commission v. Greece, the plaintiffs found themselves in a situation in which only by an interpretation based on the intention behind the law could it be asserted that they had suffered indirect discrimination on grounds of their nationality. In the first case, in connection with recruitment procedures for the appointment of dining-room staff at an Italian university, a number of points were awarded for each year of previous public sector service. However, only experience in the Italian public sector was counted in. Ingetraut Scholz was born in Germany but had acquired Italian nationality through marriage. When she applied for a job she was informed that no points would be awarded for her seven years of previous service in the German public sector. As a result, she did not reach the required threshold for selection. Since then, the Italian educational system in the German public sector has been reformed. The reform has led to a change in the requirements for the employment of workers with a background in education. The reform has also led to changes in the working conditions for such workers. Despite this, the Court held that Mrs Scholz was not a victim of discrimination on grounds of nationality. Moreover, she could not be a victim of discrimination against non-Italian nationals since she had in fact had acquired Italian nationality.

One may wonder whether she can be considered a victim of indirect discrimination on grounds of nationality in connection with a provision which discriminates against nationals of other Member States, despite the fact that she is an Italian national? For while it is quite clear that Mrs Scholz has in fact been disadvantaged, it is less clear whether this disadvantage constitutes indirect discrimination "on grounds of nationality". To take an analogy, it is quite clear that a woman working part-time, and receiving a lower hourly wage than her colleagues who work full-time, is placed at a disadvantage, but it requires more than that to show that the disadvantage constitutes indirect sex discrimination.

Jacobs is of the view that Ingetraut Scholz has been subject to indirect discrimination because the points system is likely to affect nationals of other Member States more severely than it affects Italian nationals. The rules for engaging new staff are therefore in principle contrary to Article 39(2).

Jacobs agrees that at first sight it may seem strange that an Italian national can invoke the prohibition of discrimination on grounds of nationality, and that the Court reached the conclusion that the Italian system was contrary to Article 39(2). However, the Court's reasoning is based on the fact that the selection criteria make no explicit distinction between Italian nationals and others, and that Mrs Scholz was therefore not clearly excluded from eligibility.

The dispute in Scholz arose in connection with recruitment procedures for the appointment of dining-room staff. In the case of Jacobs, the dispute concerned the application of Article 39(2) to a situation in which a worker from abroad was refused the same treatment as a national worker. In both cases, the Court's reasoning is based on the fact that the selection criteria make no explicit distinction between Italian nationals and others, and that the worker from abroad was therefore not clearly excluded from eligibility.

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because she exploited her right to free movement and worked in more than one Member State, which is exactly the kind of disadvantage that Ingetraut Scholz was disadvantaged in Italy. Ingetraut Scholz was disadvantaged 

It would not be particularly appropriate for the Court to let the dis...

"[i]t is clear that practices adopted by the public bodies of a Member State which impede the free movement of workers can be challenged by all Community nationals, including nationals of the State concerned."

Indeed, as is well known, Article 39(1) provides quite simply that "freedom of movement for workers shall be secured within the Community." After having inserted an alternative basis for his conclusion. Below, I question whether that provision, together with the general duty laid upon Member States by the Treaty of Rome, can possibly interpret of the prohibition of discrimination in Article 39(2), he could be that the basis for that proposition lies not so much in Article 39(2) but rather in Article 39 (1) itself. The Court's further reasoning could nonetheless have been applied in

In a flexible manner so that it could also be invoked by workers who are not victims of discrimination on grounds of nationality. Mrs Scholz belongs to that category of persons for whom the provisions on free movement and Article 39 are designed, and that is not altered merely because she has acquired nationality of that Member State in which she wishes to exercise her right to free movement. The same consideration would have applied had she come originally been an Italian national with experience of public sector employment abroad. It seems difficult to think that in Jacques Jacobs' reasoning adapts the prohibition of discrimination in Article 39(2) in a flexible manner so that it could also be invoked by workers who are not victims of discrimination on grounds of nationality. Italian nationals. That, however, according to Jacobs is precisely what Ingetraut Scholz can do. The fact that she has acquired Italian nationality in no way alters the fact that she is a victim of a procedure that results in discrimination against her nationality in order to challenge an Italian rule which discriminates against non-

So when the Court declares in a generic manner that the non-discrimination principle laid down in Article 39 of the Treaty and Article 7(1) of Regulation 1612/68 could therefore result in a breach of the non-discrimination principle laid down in Article 39 of the Treaty and Article 7(1) of Regulation 1612/68, one cannot help but wonder whether the Court in cases about sex discrimination in a flexible manner so that it could also be invoked by workers who are not victims of discrimination on grounds of nationality. However, the question of discrimination based on grounds of nationality has not been properly considered by the Court in cases about nationality discrimination. Furthermore, which non-discrimination principle, and indirect discrimination on what grounds?

"and consequently risks placing the former at a disadvantage."

The Court's conclusion does not necessarily have to be tailor-made to suit the specific infringement which gave rise to it, i.e. in

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The Court's premise is thus the prohibition of discrimination on grounds of national origin and the need to ensure freedom of movement within the Union, which is enhanced by the prohibition of discrimination on grounds of nationality. It is evident that the prohibition of discrimination on grounds of nationality is necessary to ensure freedom of movement.
Lenz makes clear that the case of national citizens who are placed at a disadvantage because they made use of their right to free movement can be resolved with the aid of the Commission's decision in the Article (i.e. paragraph 1 or paragraph 2) he refers. After reviewing the Council's case law, the Court observes that the prohibition of discrimination on grounds of nationality is covered by Article 39 and as a result no discrimination can be proved or not. If no discrimination can be proved or not, the Court would, however, have to examine those questions only if Article 39 did not more than establish a prohibition of discrimination on grounds of nationality.

In his view this discriminatory treatment in principle constitutes a form of discrimination in Article 39, and that it is not significant that the rules perhaps only in exceptional cases result in such problems. It is sufficient that it is possible, by this discriminatory treatment, to limit freedom of movement.

The causal chain in Lenz' reasoning seems thus to be that the provisions on freedom of movement are prohibited in principle. The outcome is at any rate "discrimination". This reasoning constitutes a variant on the extensive interpretation of the prohibition of discrimination on grounds of nationality of the kind that the Court exemplified in the two cases. However, the Court has held that the transfer rules constitute an obstacle to the free movement prohibited in principle by Article 39 of the Treaty. The rules can prevent or hinder the exercise of the right to free movement for workers, which in turn can mean a breach of the prohibition of discrimination in Article 39(2). This reasoning constitutes a variant on the extensive interpretation of the prohibition of discrimination on grounds of nationality of the kind that the Court exemplified in the two cases. The causal chain in Lenz' reasoning is therefore of the kind that the Court exemplified in the two cases.

In my opinion, all restrictions on freedom of movement are prohibited in principle. Whether or not there is in any particular case a form of "discrimination" is a question of interpretation of the Article 39(2) provision to contain more than an absolute prohibition of discrimination on grounds of nationality.

In the Bosman case the Court endorses Lenz' line and holds that the prohibition of discrimination on grounds of nationality that is being focused on in the previous case-law has tended in the direction that it is now

Obstacles

Rhetoric about discrimination becomes rhetoric about prohibition of limitations on freedom of movement.
Indirect Discrimination and the European Court of Justice

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41

40

Indirect discrimination has been a controversial issue in European law, particularly with the advent of the European Court of Justice (ECJ) and its influence on the interpretation and application of EU law. One of the key decisions in this area has been the ECJ's approach to indirect discrimination, which has been subject to varying interpretations and applications.

Indirect discrimination occurs when a provision or practice is applied to all, but the effect is to discriminate against a particular group. The ECJ has had to grapple with the challenge of balancing the need for legislative uniformity with the protection of individual rights against discrimination.

The ECJ has consistently emphasized the importance of proportional analysis in assessing indirect discrimination. This approach involves examining whether the provision or practice in question is necessary and proportionate to achieve the legitimate aim pursued by the legislator. The ECJ has also highlighted the role of statistical evidence in demonstrating disproportionate impact on certain groups.

In recent years, the ECJ has faced increasing scrutiny regarding its approach to indirect discrimination. Critics have argued that the ECJ's emphasis on statistical evidence and proportional analysis has led to a more lenient approach, potentially undermining the purpose of the law.

The General Court of the European Union has been critical of the ECJ's approach, questioning the precision of the analysis and the sufficiency of statistical evidence in some cases. The Court of Justice has been more inclined to accept the proportionality test, which has been interpreted as a more lenient standard.

The potential indirect discrimination cases that have reached the ECJ have varied in their outcomes. Some cases, such as the one involving the French pension system, have seen the Court uphold the legality of the provision, arguing that it was a necessary measure to maintain the financial sustainability of the pension scheme.

Other cases, such as those involving the Portuguese tax benefits for local residents, have resulted in the Court finding indirect discrimination, emphasizing the importance of legislative uniformity and the need to ensure that all citizens are treated equally.

The General Court's approach may provide a more rigorous examination of the impact of provisions on different groups, thereby ensuring a more balanced and equitable application of EU law.

General Conclusions

The case law on indirect discrimination illustrates the complexity and nuance of the concept in EU law. The ECJ's approach has evolved over time, influenced by various factors including legislative developments and judicial interpretations. The balance between individual rights and collective needs remains a critical aspect of the ECJ's role in ensuring the effective application of EU law.

No potential indirect discrimination could be proved, but a more rigorous analysis is warranted to ensure that the rights of all citizens are protected. The General Court's approach may offer a more effective means of analyzing the impact of provisions on different groups, thereby enhancing the protection against indirect discrimination in the European Union.
5  Concluding reflections

Evidential requirements

Indirect discrimination and the European Court of Justice

If all discriminatory treatment were accidental, and randomly affected either women and men, or national and foreign workers, roughly equally frequently, discrimination would not constitute a problem with which legislators have concerned themselves. A prior condition for the enactment of any anti-discrimination legislation is the awareness that there exists structural, that is to say systematic, discrimination against certain groups in society. While the existence of disadvantaged groups in that sense constitutes the prerequisite for anti-discrimination legislation, its objective is nonetheless to give to individual persons the right to equality.

A plaintiff who considers herself discriminated against on the grounds of her sex must nevertheless demonstrate the provision has placed at a disadvantage not only her but also other women, and moreover significantly more women than men (or vice versa). It cannot merely be assumed that that is the state of affairs, it must be demonstrated in practice. As Lundström points out, with such requirements for proof there is no prohibited discrimination in the whole broad field between one individual woman and approximately 80% of all women (or men).

Indirect discrimination on grounds of nationality, on the other hand, exists if a provision merely contains a risk that it will be disadvantageous to nationals of other Member States, or if a condition may be thought easier for national workers to meet. It can therefore suffice for just one individual to be wronged in practice, for prohibited discrimination to be shown to exist.

Legislative acts described in Chapter 2 above accord the individual a “right to non-discriminatory treatment”, a right which thanks to the system of “direct effect” can be invoked before a court of its own to protect human rights, and the Court has ruled that the Communities have no legal competence to accord to the rights a constitutional status that would place them on a par with national laws. However, the EU Court of Justice has recognized that the Community law prohibition of discrimination on grounds of nationality is “a right to non-discriminatory treatment”, a right which, when interpreted in the light of its case law, can be applied directly in Community law. Hence, the Human Rights Convention on Human Rights, in the novel case the Court pos-

European Court of Human Rights
Indirect Discrimination and the European Court of Justice

The rhetoric about the grounds of discrimination

I have contended that in cases about indirect nationality discrimination the Court has adapted and developed the prohibition of discrimination in such a way that this means really does serve the end “free movement for workers within the Union”. My purpose has of course not been to question what is positive in this development, but rather to show how ingenious the Court can be if it really wishes. I wanted to show how in such cases the Court has in fact interpreted the legal instruments in accordance with the intention behind them, how it has departed from the strict wording and been flexible in regard to the grounds of... gone so far as to develop the prohibition of discrimination to such an extent that it is no longer a discrimination prohibition.

I agree with Advocate-General Lenz when he justifies the rhetoric about obstacles which he advocates in Bosman: “[s]ince it is a fundamental right which is being infringed, I cannot see...how the non-discriminatory character of the measure could mean that it did not fall within the scope of Article 39.”

The individual ought not to be disadvantaged just because no “discrimination” can be proved. Where the rhetoric about obstacles begins, the discrimination concept becomes irrelevant. But in the case of alleged indirect sex discrimination the individual must not only show that the measure is discriminatory, but also that it is collectively discriminatory. If that is not successfully demonstrated, the infringement of the fundamental right is not unlawful.

It can be contended that the rhetoric about obstacles is not the result of any development of the prohibition of discrimination. In Bosman, for example, Advocate-General Lenz points out that there is nothing to prevent the discrimination prohibition in Article 39(2) from being understood as part of a comprehensive regulation of freedom of movement. The special mention of discrimination in Article 39(2) can quite simply be explained as part of a comprehensive regulation of freedom of movement. The special prohibition of discrimination in Article 39(2) from being understood as part of a comprehensive regulation of freedom of movement.

The ECJ tries in some degree to compensate women for their role within the Union. My purpose has once been referred to as favouring the protection of discrimination.

The rhetoric about the grounds of discrimination

The ECJ has in some degree to compensate women for their role within the Union. My purpose has once been referred to as favouring the protection of discrimination.
Indirect Discrimination and the European Court of Justice

Suppose that at a workplace there are 100 employees, 50 men and 50 women. The employer is very hostile to parental benefits, and it is widely known that those who have taken maternity or paternity leave have worse chances of promotion than those who have not. Of the 10 persons who have been, or have been, on parental leave, only one of these 10 persons is a man. This man claims to have been discriminated against over the appointment of a head of department, precisely because of the employer’s negative attitude to parental leave. Has the Community law prohibition of sex discrimination anything to offer in this situation? The man cannot use, as the comparative group, the men who do not take paternity leave. He would then be a man who tried to prove that he had been subject to discrimination on grounds of his sex, in comparison with other men! It is true that the Italian national court, in a separate case, had found that she had been discriminated against on “grounds of nationality” in comparison with other Italian nationals, but it is doubtful whether the Court would have shown the same flexibility in this case. But neither can the man prove discrimination by comparing with those women at the workplace who have taken maternity leave, since they are in the same unfavourable situation as himself. Nor can he prove sex discrimination in relation to those women who have never taken maternity leave, because that disadvantaged group consists only of 10% of men.

The role as carer has historically and culturally been linked with women; it is a woman’s gender role. Since women still constitute the majority of society’s carers, discrimination against a woman “carer” can today be said to constitute discrimination precisely on the grounds of sex. If Community law had prohibited “gender discrimination” the male carer might also have succeeded. He has been discriminated against, not on grounds of his sex, but because of his gender-role. Nevertheless, the burden of proof is on the discriminator to prove that “gender discrimination” is not the actual grounds of discrimination. In order to assure the Court that sex discrimination actually is the ground for discrimination, the individual claim must be supported by statistical evidence. If sex discrimination is shown to exist at the workplace in general, it is not decisive that the grounds for discrimination should not be specifically “nationality.” Strictly speaking it is now no longer necessary to show that there is a “discrimination” or that the employer acts in a discriminatory manner. All that is necessary is to show that a woman in the same position as the man, has been excluded from the relevant group.

Endnotes

3 Both these cases can be read from Article 2 of the Treaty of Rome.
5 It is true that cases about direct discrimination still arise, but most frequently the main question is then not whether or not there is prohibited discrimination, but the scope of application of the legal instruments as regards persons and matters.
7 For the Commission’s proposal, see Lundström (2000:2). The proposal was put forward on the basis of the new Article 13 of the Treaty which was incorporated by the Amsterdam Treaty.
Indirect Discrimination and the European Court of Justice

CFE Working paper series no. 15

Lundström (1999).

The search gave approx. 80 hits, of which a number related to direct discrimination and a further 46 were quite unrelated to freedom of movement for workers.


The phrase "or work of equal value" was added by the Amsterdam Treaty.


Article 2 defines the persons to whom the Directive applies, while Article 3 defines the real questions, see further Lundström (1999) pp. 124 ff.


In the meaning of Community law, a worker is characterised as one who for a certain period of time has performed services for reward under the direction and at the expense of another. Article 39(4) defines exceptions to the prohibition of discrimination.


As regards the boundaries between the scope of Regulations 1612/68 and 1408/71, and between social assistance and social security, see Westerhäll (1995) p. 45.

These are: benefits in regard to sickness and maternity; invalidity; old-age; survivors; accidents at work and occupational diseases; death grants; family benefits. The matters covered are defined in Article 4 of the Regulation. See further Westerhäll (1995) pp. 88-99 and their references to case-law.


The prohibition of indirect discrimination in regard to social security seems weaker in relation to the prohibition of indirect sex discrimination in work-situations, see e.g. Nielsen (1995) p.188.

However, that refers to the case-law developed by the Court in relation to the possibility for Member States to justify discrimination. See Lundström (1999) pp. 393 ff, and p. 410. However, the analysis does not extend to any comparison of the Court's reasoning on the justification of, respectively, sex and nationality discrimination.


Case C-167/97 Seymour Smith and Perez, falls outside the time-frame of Lundström's thesis, but is discussed by her in Lundström (2000:1) p. 12.

Case C-167/97 Seymour-Smit and Perez, Lundström (2000:1) s 12 ff.

Both women and men can invoke the prohibition of sex discrimination. For reasons of space I sometimes take as illustration only the case of a female plaintiff and do not reiterate the reasoning to cover also the case of a male plaintiff.


Case C-375/92 Commission . / . Spain, is difficult to place in relation to the others, since the Court's reasoning refers to "the principle regarding the comparison of qualifications". This Case is not further discussed.


The Member States have the power to determine the conditions of employment of workers employed in frontier areas on either side of the border. For details in this regard, see the Opinion of Advocate General Jacob at paragraph 47 of his Opinion. The Court of Justice has not been asked to rule on this issue, nor have the Member States made any submission on the point. However, the facts are not such as to enable the Court to express a view on the matter.
Indirect Discrimination and the European Court of Justice

CFE Working paper series no. 15


43 Cases C-165/91 Munster, C-10/90 Massieu, C-266/95 Garcia, C-336/94 Dafeki, C-28/92 Leguaye-Neelsen, C-146/93 McLachlan, and C-131/96 Romero.

44 Case C-415/93 Bosman. Joined cases C-259/91, 331/91 and 332/91 Allué and others. (hereinafter Allué II)

45 A-G’s Opinion, para. 12.

46 ibid, para. 13. It is questionable how “workers in general” can be regarded as a group comparable with foreign language assistants, when no category of staff at the university is regarded as comparable.

47 It should be emphasised that since the Community law prohibition of discrimination on grounds of nationality applies only in relation to nationals of other Member States, it is at root the proportion of such nationals (in distinction to “foreign nationals”) in the disadvantaged group that is relevant.


49 ibid, para. 13. Not all these Cases lie within the scope of this analysis.

50 ibid, para. 20-23. Here Lenz examines the breakdown between the sexes in the advantaged and disadvantaged group.


53 ibid, para. 15.

54 ibid, para. 17.

55 ibid, para. 19. Here Lenz examines the breakdown between the sexes in the advantaged group, whereas in the Court’s case-law it is the disadvantaged group that is examined.

56 ibid, para. 27.

57 ibid, para. 24.

58 ibid, para. 27.

59 ibid, para. 27. It is a valid question why it is evident that a condition which is not neutrally formulated cannot be directly discriminatory.

60 ibid, para. 29.

61 ibid, para. 27.

62 ibid, para. 29.

63 ibid, para. 29.

64 ibid, para. 29.

65 ibid, para. 29.

66 ibid, para. 29.

67 ibid, para. 29.

68 ibid, para. 29.

69 ibid, para. 29.

70 ibid, para. 29.

71 ibid, para. 29.

72 ibid, para. 29.

73 ibid, para. 29.

74 ibid, para. 29.

75 ibid, para. 29.

76 ibid, para. 29.

77 ibid, para. 29.

78 ibid, para. 29.

79 Case C-90/96 Petrie, Judgment of the Court, para. 51.

80 ibid, para. 53.

81 Cases C-204/90 Bachmann and C-15/96 Schöning. Case C-300/90 Commission v. Belgium, concerned the same legislation and Judgment was delivered on the same day as Bachmann. A-G Mischo’s Opinion applied to both these Cases, and the latter is therefore not further considered.

82 Case C-204/90 Bachmann, A-G’s Opinion, para. 4.

83 ibid Judgment of the Court, para. 11.

84 ibid para. 9 and 13 respectively.

85 That is the view of e.g. Bergström (1998), see p. 53.

86 Case C-204/90 Bachmann, Judgment of the Court, para. 27. As regards the justification of discrimination see Bachmann, Pennings (1998) p. 94 and Bergström (1998) pp. 51 f.
In addition to the equality of treatment principle in Article 7(1) of Regulation 1612/68, Article 7(4) provides that all provisions in a collective agreement that lay down discriminatory conditions in regard to workers who are nationals of other Member States shall be invalid.

Case C-15/96 Schöning, A-G’s Opinion, para. 11 and 12.

ibid. para. 12 and 13.


ibid. para. 15.

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Indirect discrimination and the European Court of Justice

indirect discrimination. The person disadvantaged was in fact both a migrant and a national worker. The judgment of the Court, para. 14-16. ibid. para. 17. ibid. para. 18. Case C-165/91 Munster. ibid. para. 19. ibid. para. 18 and 19. ibid. para. 60. Case C-10/90 Masgio. The Court nonetheless solves the problem in such a way that Belgium, in accordance with Article 5, is placed under an obligation to interpret its own legislation in the light of Community law, and in that way to pay heed to the substance rather than the form in order not to accord unfair treatment to migrant workers. (para. 32-33). Case C-415/93 Bosman. The existence of what were known as “foreigners provisos” was also disputed in this Case. This part will, however, not be further analysed since it brings to the fore only the “simple” form of indirect discrimination on grounds of nationality which has been illustrated above.

Indirect Discrimination and the European Court of Justice

CFE Working paper series no. 15

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Indirect Discrimination and the European Court of Justice

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