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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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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 nationality. When asserting indirect discrimination on the grounds of sex the plaintiff must demonstrate on the basis of statistical evidence that a provision in practice places at a disadvantage a substantially higher proportion of women than men (or vice versa), whereas in the matter of indirect discrimination on the grounds of nationality it suffices merely to establish that a measure constitutes a risk that disadvantages may arise for migrant workers. The purpose of the requirement for statistical evidence in cases relating to indirect sex discrimination is to demonstrate that the discrimination is really based on "sex" and nothing else. As regards the prohibition of discrimination on the grounds of nationality the Court has, however, interpreted it in accordance with the intention behind the legislation so as to improve the working conditions of migrant workers. The means have been adapted to serve the end, and the Court has impressed on Member States the obligation of maintaining the prohibition of discrimination on the grounds of sex and nationality in the sense intended by the ECJ. The statistical evidence which the plaintiff must provide in cases of indirect discrimination on the grounds of sex and nationality is now a question of degree, but it must be provided. The statistical evidence in cases of indirect sex discrimination is intended to demonstrate that a substantially higher proportion of women than men is affected to the detriment of the individual. The purpose of the evidence is to establish that there is indeed discrimination on the grounds of sex, whereas in the matter of indirect discrimination on the grounds of nationality the Court has interpreted the legal norm as permitting a discriminatory treatment of migrant workers. The means have been adapted to serve the end, and the Court has thereby become irrelevant whether or not discrimination can be shown to exist. The means of achieving equality between women and men in the European Communities is still no more than a prohibition of "discrimination" on the grounds, specifically, of "sex", and statistical evidence therefore remains indispensable in cases about indirect sex discrimination. While indirect discrimination on the grounds of nationality can be shown at the individual level, to demonstrate indirect discrimination on grounds of sex it is in practice necessary to prove collective discrimination on the grounds of sex.
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 of treatment can be achieved by overcoming direct discrimination, determining that direct discrimination can be achieved indirectly through the effects of actions that are formally neutral.

In the European Court of Justice (ECJ), the concept of indirect discrimination has been developed. The ECJ has determined that formally neutral provisions can have discriminatory effects, and can do so irrespective of whether or not it was the respondent's intention to discriminate. The ECJ has interpreted the prohibition of discrimination on grounds of race or sex, and the prohibition of discrimination on grounds of nationality. The ECJ has 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. The ECJ has determined that direct discrimination can be said to exist only when the disputed provision, criterion or practice explicitly refers to sex or nationality as the ground for discrimination. As the principle of equality of treatment progressively takes hold in the EU, it is becoming more socially unacceptable to accord explicitly different treatment either to women or to the nationals of other Member States. In consequence, it is probable that the cases reaching the Court of Justice will increasingly focus on indirect discrimination.
Further presentation

Method and material

In her thesis on "Equality between Women and Men in EC Law," Karin Lundström has analysed, on the basis of post-modernist feminist theory, the ECJ's reasoning in all cases about sex discrimination in the European Court Reports up to 31 December 1997. Her analysis is structured according to the way in which the Court has used the pairs of words or phrases direct discrimination and indirect discrimination, formal equality and substantive equality, and individuals and groups/categories. I do not propose to repeat this work, but accept Lundström's conclusions and will compare them with my own as regards the Court's use of the concept of indirect discrimination in cases about discrimination on the grounds of nationality.

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 the defendant has discriminated against him. If he succeeds, then a presumption of the existence of indirect discrimination arises. The Court 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 focuses on the second stage of the Court's procedure, in particular on the evidential requirements placed upon the plaintiff in cases about indirect discrimination.
Indirect Discrimination and the European Court of Justice

Chapter 4, an account of my own investigation of the Court’s reasoning about the evidential requirements in the case of indirect discrimination on grounds of nationality. In this connection I draw running parallels and make comparisons with the field of sex discrimination. Finally, in Chapter 5, I reflect on the differences revealed in the Court’s reasoning in these two areas, and discuss the possible consequences for an individual who regards himself/herself as being subjected to indirect discrimination.

Legal Instruments

Prohibition of discrimination on grounds of sex

2. Legal Instruments

Indirect Discrimination on Grounds of Sex

Prohibition of discrimination on grounds of sex

Article 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”.

Article 1 of the Directive, as adopted with the original intention of codifying in law the case-law in this field which the Court had thus far developed, mentions both direct and indirect discrimination, but does not define what is meant by these concepts.

Council Directive 76/207 on the conditions for employment and work applies the principle of equality of treatment in the same way as before; there must be no sex discrimination whatever, either directly or indirectly.

Article 2(1) reiterates the principle of equality of treatment in the same way as before; there must be no sex discrimination whatever, either directly or indirectly.

Article 2(2) defines, for the first time in a legislative instrument, the term indirect discrimination. Indirect discrimination exists “where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.”

The rule on the burden of proof, which implies a kind of inverted burden of proof, is in Article 4(1). Member States shall ensure that it is “for the respondent to prove that there has been no breach of the principle of equal treatment”, provided that the person who considers himself to have been subject to discrimination has established “facts from which it may be inferred that the provision, criterion or practice which he regards as discriminatory is not justified by objective factors unrelated to sex.”

Article 4(1) of Council Directive 79/7, on statutory schemes providing protection against the risks of sickness, invalidity, old age, accidents at work and unemployment, also prohibits direct and indirect sex discrimination. The Directive applies to all social security schemes of this kind.

In accordance with the judgment of the Court of 11 July, it has been established that the provisions of the Treaty which prohibit discrimination on grounds of sex also apply to discrimination on grounds of nationality.

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Indirect Discrimination and the European Court of Justice

Prohibition of discrimination on the grounds of nationality

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) freedom of 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 clearer form. In accordance with Article 7(1) of that Regulation 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 fiscal advantages as citizens of that State". By virtue of the same social and fiscal advantages a citizen of another State, by virtue of the same social and fiscal advantages a citizen of other State, shall enjoy the same social and fiscal advantages a citizen of that State.

By virtue of the Court's previous case-law 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. Thus social security benefits also come within their scope. As regards those benefits which fall within Regulation 1612/68 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.

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

To achieve the objectives of equity and free movement of persons, EC law contains prohibitions of both direct and indirect discrimination on the grounds, respectively, of sex and nationality. The principles laid down in Articles 12, 39 and 7 of Regulation 1612/68 as regards discrimination on the grounds of employment, remuneration and other conditions of work are also applicable as regards statutory schemes for social security. In the matter of social- and tax advantages (including certain forms of social assistance) there is, however, nothing similar to the concept of equal treatment which is developed in the context of social benefits. By virtue of the same social and tax advantages a citizen of another State, by virtue of the same social and tax advantages a citizen of another State, shall enjoy the same social and tax advantages as citizens of that State. However, in the matter of social- and tax advantages (including certain forms of social assistance) there is, however, nothing similar to the concept of equal treatment which is developed in the context of social benefits.

Indirect Discrimination and the European Court of Justice

Prohibition of discrimination on the grounds of nationality

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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.
The previous case-law of the European Court of Justice in cases concerned with indirect discrimination on the grounds of sex has been focused on the interpretation of Article 141 of the Treaty of Rome and Directive 75/117 as regards equal pay, Directive 76/207 on conditions of employment and work, Directive 79/7 on statutory social security schemes, and Directive 97/80 on the burden of proof in cases about discrimination on grounds of sex.

In the Jenkins case (1981), the Court established that paying a lower hourly wage rate to part-time employees than to full-time employees could not constitute direct discrimination on the grounds of sex, because 10% of all part-time workers in the then Member States were in fact men. There could nonetheless be a question of indirect sex discrimination. The statistics supported the picture of reality argued by the plaintiff, namely that women’s time-consuming responsibilities in the private sphere often prevented them from working full-time in the public sphere.

Five years later (1986), in the Bilka-Kaufhaus case, the Court elaborated the formula for proof which it subsequently applied in all cases about indirect sex discrimination. If the plaintiff can produce statistical evidence to demonstrate that significantly more women than men are placed at a disadvantage by a provision which is sex-neutral in form, a presumption of indirect discrimination arises. The burden of proof then shifts to the respondent who can justify the discrimination by showing that the objective justification for the provision is not to be inferred from the working conditions of employees.

The formula for establishing indirect discrimination on the grounds of sex, incorporated in Directive 78/708/EEC, is as follows: if a proportion of the workforce is paid a lower rate of pay than the other group for reasons which are not sex-related, and if the proportion of women or men so employed is significantly different from the proportion of women or men in the workforce, and if the difference cannot be explained by objective reasons, it may be inferred that there is indirect discrimination.

Because of the way in which the evidential requirements are formulated, a comparison between two groups is necessary. For there to be discrimination, the proportion of men or women in the disadvantaged group must be significantly higher than the proportion of the opposite sex in the workforce. This means that the statistical evidence must portray the reality at the actual place of work. In the Bilka-Kaufhaus case, the statistics showed how many women or men worked part-time at the store in question. As the number of cases about indirect sex discrimination has grown, the Court has gradually made the requirements for statistical evidence more stringent. Thus, in the Enderby case, for example, the Court declared that the statistical material must comprise a sufficient number of people so as to reflect the working reality of the place of work. In the Royal Copenhagen case, all persons in the two groups, women and men, who are in comparable situations must be taken into account. The Court has been of the view that it is the proportions of men or, respectively, women in the disadvantaged group which must be compared with one another.

The grounds for establishing indirect discrimination on the grounds of sex are set out in Article 141 of the Treaty of Rome and Directive 78/708/EEC. The grounds are as follows: (a) the provision is sex-neutral; (b) the proportion of women or men so employed is significantly different from the proportion of the opposite sex in the workforce; (c) the difference cannot be explained by objective reasons. If these conditions are met, it is inferred that there is indirect discrimination.

The Court has applied these requirements in cases concerned with equal pay, conditions of employment and work, and statutory social security schemes. However, the requirements have been applied in a way that is consistent with the case-law of 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.

According to the Bilka-Kaufhaus formula, the statistical material must show that "a substantially higher proportion" of the group placed at a disadvantage consists of women than men. The figures must be statistically significant and the comparative groups must comprise a large number of employees. However, the proportion of women on the German labour market is not only higher than that of men, and the differences are quite substantial. Moreover, by means of statistical analyses in the comparison, in order to establish indirect discrimination on grounds of sex the plaintiff must demonstrate by means of statistical analyses in the comparison, in order to establish indirect discrimination on grounds of sex the plaintiff must demonstrate that a substantially higher proportion of the group placed at a disadvantage consists of women than men.

The statistical material was obtained in the following cases:

- In the Seymour-Smith and Perez case 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 analyses in the comparison, in order to establish indirect discrimination on grounds of sex the plaintiff must demonstrate that a substantially higher proportion of the group placed at a disadvantage consists of women than men. The statistics must be statistically significant and the comparative groups must comprehend a large number of the employees at the place of work concerned. In those cases where the Court has so far established indirect discrimination, the plaintiff has demonstrated statistically that approximately at least 80% of the people in the disadvantaged group were of her/his sex. The Court has, however, not pronounced on exactly what constitutes a "substantially higher proportion".


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, six cases concern social advantages and seven social security.

The study is arranged according to the Court's manner of reasoning. The analysis centres on two elements which I call "evidential requirements" and "the rhetoric about the grounds of discrimination". I analyse first those cases where the reasoning about the grounds of discrimination, and hence also that about the evidential requirements, resembles cases about sex discrimination. Finally I analyse the Bosman case where the Court completely abandoned rhetoric about discrimination, in favour of "rhetoric about obstacles", and thereby called a halt to further comparisons with indirect sex discrimination. My purpose is to illustrate the development of the prohibition of indirect discrimination on grounds of nationality, but which unfortunately has no counterpart as regards the prohibition of discrimination on grounds of sex.

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 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 statistical data used by Lenz in his original comparison included all employees in Italy. Nationals of other Member States cannot be assumed to comprise almost half of them. The overall proportion of foreign nationals is probably very much higher. Therefore, if the one-year condition is compared with all employees, the disadvantaged group (64%) is measured against the "proportion they form of the total" i.e. of the number included in the original comparison, a disproportionate disadvantage exists, and that would have been possible even if the proportion they formed of the disadvantaged group was less than 50%.

The study is arranged according to the Court's manner of reasoning. Six cases concern social security and seven social security cases concern indirect sex discrimination, and are decided on the basis of article 113 of the Treaty of Rome. In the cases concerned, the Court has decided indirectly discrimination on grounds of nationality, but which unfortunately has no counterpart as regards the prohibition of discrimination on grounds of sex.

Outline

1. The previous case-law of the European Court of Justice in cases about indirect discrimination on grounds of nationality.
2. Court of Justice in cases about indirect discrimination on grounds of nationality.
3. The precise case-law of the European Court of Justice in cases about indirect discrimination on grounds of nationality.
4. The precise case-law of the European Court of Justice in cases about indirect discrimination on grounds of nationality.
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 can therefore—looked at proportionately—be even stronger evidence than a result that puts the proportion of women in the disadvantaged group at 80%.

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 full-time education at 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.

That is an assertion that in principle the same rules about evidence shall apply as in cases about indirect sex discrimination. In such cases the Court has held that the Commission must prove that the condition substantially discriminates against nationals of other Member States. The Belgian Government, in its intervention, sought to rely on the fact that more members of the disadvantaged group were 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.
In accordance with Lenz’s logic I would thereby have demonstrated that for indirect sex discrimination to exist, and the circumstance that certain other migrant workers may even be placed at a disadvantage for discrimination on grounds of nationality to exist, it suffices that a benefit should be linked to a condition which not neutrally formulated in relation to sex. As Lundström points out, since the 1960’s scientific knowledge about sex and gender has been developed and there is extensive scientific documentation about women’s and men’s historical, social and cultural gender roles. The ECJ has also observed that there is a significant difference in the proportion of work attributable to women, and that whereas statistical evidence is required to establish the existence of indirect discrimination on grounds of sex, the number of others in which the establishment of indirect discrimination had an effect is of the same order of magnitude as the number of others in which the establishment of indirect discrimination had no effect.

In accordance with Lenz’s logic I would thereby have demonstrated that for indirect sex discrimination to exist, it suffices that a benefit should be linked to a condition which not neutrally formulated in relation to sex. As Lundström points out, since the 1960’s scientific knowledge about sex and gender has been developed and there is extensive scientific documentation about women’s and men’s historical, social and cultural gender roles. The ECJ has also observed that there is a significant difference in the proportion of work attributable to women, and that whereas statistical evidence is required to establish the existence of indirect discrimination on grounds of sex, the number of others in which the establishment of indirect discrimination had an effect is of the same order of magnitude as the number of others in which the establishment of indirect discrimination had no effect.
categories of teaching staff not so qualified are not Italian nationals.

It is of the view that a disproportionate such disadvantage can exist if

Before returning to the point under consideration above, it is to be noted that

disproportionately affects national workers. However, in the case of the

Dis counterfeit to allow the Court to rectify an objective and value-neutral process. He describes the process as a comparison be-

the Court determined that

Since the Judgment in the case of the

As in the

The Court's generously formulated “test” in

A final glimpse of statistics in cases about indirect
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

11

One might, therefore, proceed on a different basis. The provision in question affects national workers

since the disadvantaged group were defined in the same way as in

The plaintiffs in

are British nationals who, like those in

It is the latter which I do when I contend that it should be possible to establish indirect sex discrimination on the basis of the
disadvantaged university employees who are not
disadvantaged university employees who are not

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is especially relevant to the Member States who are affected by the doctrine of the right to equal opportunities in employment and in the enjoyment of all the advantages of employment. The European Commission and the European Court of Justice have consistently applied this principle in various cases involving the discrimination of nationals of one Member State against nationals of another. The principle of equal treatment is enshrined in the Treaty of Rome, which states thatMember States shall ensure that no discrimination shall be made against nationals of any other Member State on grounds of race, sex, language, or religion. The Court of Justice has held that the principle of equal treatment is breached if a difference in treatment is made between nationals of different Member States that is not justified by objective and reasonable grounds.

Disproportionate disadvantage is established without the aid of statistics

In the Bachmann and Schöning cases, the Court of Justice held that indirect discrimination exists if there is a disproportionate disadvantage suffered by nationals of one Member State as a result of a difference in treatment. The disproportionate disadvantage is established without the aid of statistics. The Court's reasoning in these cases follows the logic of cases about sex discrimination, in so far as it is founded on "disproportionate disadvantage". This disproportionate disadvantage is established entirely on the hypothetical plane, without any practical comparisons. In the Bachmann case, Belgian legislation made the right to tax relief in respect of certain insurance premiums dependent on whether the premiums were paid in Belgium or abroad. It was therefore a matter of national or racial discrimination. The disproportionate disadvantage suffered by nationals of other Member States was established without the aid of statistics. The Court of Justice held that the Belgian legislation was discriminatory in that it treated nationals of other Member States less favourably than nationals of Belgium in respect of tax relief.

The assessment of indirect discrimination involves a comparison of the positions of workers who are affected by the discrimination and those who are not. The assessment is made without reference to specific facts or figures. The standard of proof in indirect discrimination cases is lower than in direct discrimination cases. The burden of proof is on the employer to show that the discriminatory practice is justified by objective and reasonable grounds.

In the Petrie case, the Court determined that the principle of equal treatment is breached only in the event that equal cases are treated unequally or unequal cases equally. The Court concluded that the conditions of foreign university lecturers are not comparable with those of school-teachers or qualified researchers, because the latter are appointed on the basis of public selection tests. Consequently, there can be no infringement of the discrimination prohibition in Article 39(2) of the Treaty of Rome. To appoint relief teachers on the basis of tests in the same form as those for the public selection procedures would be contrary to the principle of equal treatment.

Referring to statistical data similar to those in the Allué II case, the Court pronounced that such a policy operates, in practice, to the detriment of employees who are nationals of other Member States. Advocates General Fenelly and O'Flynn, with reference to the O'Flynn case, hover somewhere between the practical and the hypothetical dimensions, the Court remains in the realm of the practical and argues in the same fashion as it had in the Allué II case. 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 relief in respect of certain insurance premiums dependent on whether the premiums were paid in Belgium or abroad. It was therefore a matter of national or racial discrimination. The disproportionate disadvantage suffered by nationals of other Member States was established without the aid of statistics. The Court of Justice held that the Belgian legislation was discriminatory in that it treated nationals of other Member States less favourably than nationals of Belgium in respect of tax relief.
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.

Since 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 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 possibly the case 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". Perhaps the Court wobbled just a little in its rhetoric since it nonetheless considered that discrimination could be justified 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.

In the Schöning case, which was decided in 1998, Advocate-General Jacobs gives further examples of the proportionality thinking which was illustrated by Allué II, Petrie and Bachmann. The plaintiff considered himself to have been discriminated against in consequence of a clause in a German public sector collective agreement ("BAT"). In accordance with it, employees were promoted after completing 8 years of service in a certain salary grade. Employees who had worked abroad, with a private employer in Germany, or within the German public sector, were promoted on the basis of their years of service in Germany. The proportion of those persons employed in Germany who had completed 8 years of service in that country was much higher than the proportion of those persons who had completed 8 years of service in Germany, but outside the public sector. The proportion of those persons employed in the public sector who had completed 8 years of service in Germany was much lower than the proportion of those persons employed in the public sector who had completed 8 years of service outside Germany.

Advocate-General Jacobs first makes reference to the generous test in the O'Flynn case, and notes that the rules in the BAT work to the particular detriment of "migrant workers". He refers only to obvious facts: a doctor who has spent part of his/her career in the public sector in another Member State incurs a disadvantage compared with doctors who have only been employed in accordance with the BAT, since the whole of his/her previous service is left out of account when he/she is assigned to a salary-grade. It is irrelevant how many persons so placed at a disadvantage there are in reality, 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 a Member State other than Germany. But that category can very well also include German nationals who, after enjoying the opportunities of free movement, have returned to Germany. That is pointed out by Advocate-General Jacobs, and his further reasoning also extends to such returning German nationals in the category "migrant workers".

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 had never held an overseas post—"national workers"—were in a different position from those who had worked abroad, with a private employer in Germany, or in the public sector. The O’Flynn case, and the reasoning used in that case, was not relevant to the BAT, since the BAT was limited to employees who had completed 8 years of service in Germany. The national workers were in a different position from those who had completed 8 years of service in Germany, but outside the public sector. The proportion of those persons employed in the public sector who had completed 8 years of service in Germany was much lower than the proportion of those persons employed in the public sector who had completed 8 years of service outside Germany.
Commonsense suffices to establish potential indirect discrimination.

Several of the cases contained 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 disputes in the Rhét, Schubert and Geller cases are about residence conditions in the cases of the Commission v. Luxembourg, Main, Ca., and Meeusen. The Court held that the residence conditions in dispute in the cases of the Commission v. Luxembourg, Main, Ca., and Meeusen are not discriminatory in the sense of Article 39. This conclusion is based on the Court’s finding that the residence conditions in dispute are not discriminatory in the sense of Article 39.

The disputes in the Commission v. France case concerning a residence condition in a collective agreement about social security. The agreement provides for a residence condition in the case of the Commission v. Luxembourg, Meints, Garcia and Meeusen. The Court held that the residence condition in dispute in the cases of the Commission v. Luxembourg, Meints, Garcia and Meeusen is not discriminatory in the sense of Article 39. This conclusion is based on the Court’s finding that the residence condition in dispute is not discriminatory in the sense of Article 39.
Indirect Discrimination and the European Court of Justice

Germany's 1972 social security system made the refund of overpaid tax conditional on residents having lived in Luxembourg for at least one year during the tax year. Mr Biehl was a German national who had been resident and employed in Luxembourg for almost ten years. National legislation in Luxembourg only allowed refunds if tax was paid during the whole of the tax year. Since Mr Biehl moved back to Germany before the end of the tax year, he was refused a refund on the tax he had paid during his final year in Luxembourg.

The Advocate-General, Darmon, first applied the standard formulation which was 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 a discrimination of Luxembourg nationals who leave Luxembourg in order to maintain their tax refunds. Darmon then satisfies himself that there is "objective comparability". He emphasises that differences in treatment are not necessarily discrimination. A comparison of different situations might very well show that a 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 for 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 is often the European Parliament and Council, on the advice of the Council, that sets the conditions for the freedom of movement of workers who are nationals of other Member States. The Court thus dealt with the question of whether the national tax laws were compatible with the EC Treaty and found that they were not. In the subsequent cases, the Court has consistently held that national tax laws which impose conditions on the exercise of the right of freedom of movement for workers are incompatible with the EC Treaty unless such conditions are imposed by the EC Treaty itself or are imposed in accordance with national law. The Court has thus established that national tax laws which impose conditions on the exercise of the right of freedom of movement for workers are incompatible with the EC Treaty unless such conditions are imposed by the EC Treaty itself or are imposed in accordance with national law.
The prohibition of “discrimination on grounds of nationality” becomes a prohibition of “discrimination on grounds of nationality”.

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 discrimination on grounds of nationality. The 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”. All the cases that have been analysed so far have 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 discrimination on grounds of nationality.

One may wonder whether she can be considered a victim of indirect discrimination against non-Italian nationals. The selection criteria made no explicit distinction between Italian nationals and others. How did Advocate-General Lenz attempt to solve this logical conundrum? Since the selection criteria were set up to ensure a national workforce, it is clear whether the disadvantages are due to discrimination on grounds of nationality. The selection criteria were set up to ensure a national workforce, it is clear whether the disadvantages are due to discrimination on grounds of nationality. The selection criteria were set up to ensure a national workforce, it is clear whether the disadvantages are due to discrimination on grounds of nationality. The selection criteria were set up to ensure a national workforce, it is clear whether the disadvantages are due to discrimination on grounds of nationality. The selection criteria were set up to ensure a national workforce, it is clear whether the disadvantages are due to discrimination on grounds of nationality.
It would not be particularly appropriate for the Court to let the discrimination against Mrs. Scholz pass, simply because she is an Italian national who was disadvantaged in Italy. Ingetraut Scholz was disadvantaged because she exploited her right to free movement and worked in more than one Member State, which is exactly the kind of disadvantage that the Court was intended to prevent.

As is well known, Article 39(1) provides quite simply that "freedom of movement for workers shall be secured within the Community." Article 39(2) thus inserts an alternative basis for his conclusion. Below, I question whether that provision, together with the general duty laid upon Member States by the first sentence of Article 39(1) to fulfily the obligations of the Treaty of Rome, can possibly be challenged by all Community nationals, including nationals of the State concerned who were disadvantaged in another Member State which impede the free movement of workers can be challenged by all Community nationals, including nationals of the State concerned who were disadvantaged in another Member State where the free movement of workers is required.

The Court's further reasoning could nonetheless have been applied 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 Italian nationality in another Member State where she wishes to exercise her right to free movement. The same consideration would have applied had she been an Italian national with experience of public sector employment abroad.

Could one by analogy argue that the fact that a man working part-time 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 Italian nationality in another Member State where she wishes to exercise her right to free movement. The same consideration would have applied had she been an Italian national with experience of public sector employment abroad.

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Indirect discrimination and the European Court of Justice

The Court adapts the means with a view to the end of freedom of movement in Article 39(2). When the objective is freedom of movement, the prohibition of obstacles might also serve, and in that way the means—prohibition of discrimination—would not be ineffective. The Court adapts the means with a view to the end of freedom of movement.

In the Masgio and Munster cases the Court referred explicitly to the purpose behind Article 39 of the Treaty and Article 3 of Regulation 1408/71, and thereafter delivered an interpretation based on the rhetoric about obstacles rather than on the rhetoric about discrimination. In Masgio the alleged discrimination concerned German rules for calculating the size of certain benefits in cases where they overlap. The effect of these rules was that it was more advantageous if both the overlapping benefits were paid from Germany than if one of the benefits had been earned in, and was therefore paid from, another Member State.

The Court refers to the prohibition of discrimination “on grounds of nationality” in Article 39(2) and to the principle of equality of treatment in Article 3 of Regulation 1408/71 which states that nationals of other Member States 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. But both Treaty Articles 39-42 and Article 3 of Regulation 1408/71 must, according to the Court, be interpreted in the light of their objective, which is to contribute to the greatest extent possible to the implementation of the fundamental principle of freedom of movement for workers. A worker who, throughout his career, has been employed in more than one Member State shall not thereby be placed in a worse situation than a worker who throughout his career has been employed in only one Member State. It is evident that the disputed rules had that effect, even though they were applied without regard to nationality. Such rules could thereby deter workers from exercising their right to freedom of movement and therefore constitute an obstacle to it.

The Court’s premise is thus the prohibition of discrimination “on grounds of nationality” in Article 39(2). When the objective is freedom of movement, the prohibition of obstacles might also serve, and in that way the means—prohibition of discrimination—would not be ineffective.
The Bosman case, which attracted a great deal of attention, concerned one of his players, whose contract has been allowed to expire just as another football club, The Football Association, has offered to take him on. The Bosman case is a classic example of a conflict involving the freedom of movement of workers and the prohibition of discrimination. The Court of Justice of the European Union has ruled that a worker who has transferred from one Member State to another has the right to continue working in the same position and on the same terms and conditions as in the previous job. The Court has also ruled that any discrimination on the grounds of nationality is prohibited. The Bosman case has been widely interpreted as extending the right to free movement and expanding the prohibition of discrimination.

Indirect Discrimination and the European Court of Justice

The Bosman case illustrates the difficulty in interpreting Article 39 of the Treaty of Rome, which prohibits any discrimination on the grounds of nationality. The Bosman case is a classic example of the Court's interpretation of Article 39, which has been widely interpreted as extending the right to free movement and expanding the prohibition of discrimination.

When Lenz then switches to an analysis of Article 39 as a prohibition of discrimination on grounds of nationality, he does not explicitly state to which provision in the Article (i.e., paragraph 1 or paragraph 2) he refers. After reviewing the previous case-law, he states that a large number of previous judgments point beyond the traditional view that Article 39 prohibits only direct discrimination. Lenz makes clear that the case of Bosman, which has been widely interpreted as extending the right to free movement, involves a conflict between the freedom of movement guaranteed by Article 39 and the prohibition of discrimination on grounds of nationality.

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Indirect discrimination and the European Court of Justice

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General conclusions

In the cases analysed, the Court's reasoning in regard both to the requirement of proof and to the rhetoric about the grounds of discrimination has varied, all the way from resembling cases about sex discrimination, with statistics showing disproportionate disadvantage for workers from other Member States, to employing rhetoric about obstacles to free movement which renders it immaterial whether any discrimination can be proved or not.

In the broad field between those two extremes there is the model which proves disproportionate disadvantage without recourse to statistical evidence. The Court has also found potential indirect discrimination on the wholly hypothetical plane, without any comparisons in practice. Some cases have been decided along the lines of the model which proves disproportionate disadvantage without recourse to statistical evidence. The Court has also found potential indirect discrimination on the wholly hypothetical plane, without any comparisons in practice. Some cases have been decided along the lines of the model which proves disproportionate disadvantage without recourse to statistical evidence.

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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 nevertheless 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.

The 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 accede to the European Convention on Human Rights. In the Nold case the Court pronounced that human rights are not directly applicable in Community law. In his legal analysis Christoffer Wong distinguishes between “social rights” and “human rights”. While human rights focus on the rights of the individual, are firmly rooted in morality and are not distributable, social rights are characterised by the fact that they take account of the relative positions in society of different groups. Their purpose is to bring about a fairer balance and they are distributable.

In Wong’s opinion the Community law prohibition of discrimination on grounds of nationality is only a means to achieve the objective of free movement. Normally a prerequisite is that the rights of an individual have been infringed, but Community law also disposes of means to combat abstract discrimination on grounds of nationality. Wong’s conclusion is that the right to freedom of movement is therefore as much an individual right as a group right. On the other hand Wong considers the Community law prohibition of sex discrimination an expression of an aspiration towards a different kind of equality. The right not to be discriminated against on grounds of sex is a “fundamental right in Community law”, and not a “human right”. The prohibition is only a means to achieve the objective of a fairer balance. It is not connected with the Community law prohibition of indirect discrimination on grounds of sex. The Community law prohibition of sex discrimination is a “group right” which is distributable, whereas the right to freedom of movement is an “individual right” which is not distributable.
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 discrimination. This has 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 by the fact that that constitutes the most serious limitation of freedom of movement.

Article 39(1), together with the general duty in Article 10 to ensure fulfilment of the Treaty obligations, could be regarded as independent grounds of prohibition of all measures which can be an obstacle to freedom of movement, irrespective of the existence of discrimination.

But when Lenz in the same Opinion speaks of earlier Judgments that go beyond “the traditional view” that Article 39 consists only of a prohibition of discrimination on grounds of nationality, it goes to show that the prohibition of discrimination has in fact occurred. The reference to evolution in the area of the law on free movement also points in that direction, since Article 28 was from the outset regarded as a prohibition of discrimination on grounds of sex. The purpose of the requirement for statistical evidence in cases about indirect sex discrimination is to confirm that the discrimination really is systematic and structural, that is to say that the unfair treatment really depends on sex.

In its declaration about the proposal for the burden of proof Directive the European Parliament used the term “gender discrimination” instead of “sex discrimination”. However, that was not reflected in either the Commission’s revised Proposal or the Directive as finally adopted.

The ECJ tries in some degree to compensate women for the fact that, historically, they have not conformed to the norm of the full-time female worker. In the Court’s reasoning there is thus the link between gender and indirect discrimination. Women may not be discriminated against too much, but perhaps a little, because they do not live up to the male norm. But can one discriminate against men who do not measure up to the female norm, under the excuse that they do not live up to the male norm. But can one discriminate against men who do not measure up to the male norm?
Indirect Discrimination and the European Court of Justice

Male norm? In such situations it can be difficult to prove structural, collective (statistically substantiated) discrimination against men on grounds of "sex". 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 are at the moment, 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 decided 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 comparison 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 as to 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 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. The prohibition of sex discrimination focuses on the grounds of sex, not gender. The prohibition of sex discrimination is not necessarily the same as that of gender discrimination. The interpretation of sex discrimination subsequently becomes crucial. The Advocate General in Commission v. Eindhoven Belastingbelastingen (1993:2) p. 46, however, gave the following explanation of sex discrimination: "Sex discrimination is an infringement of the Community provisions when there is direct discrimination . . . the person who suffers discrimination is not a man or a woman, but a male or a female, and this distinction is relevant for the purposes of the Community law.

Conclusion

It is inspiring to follow the flexible interpretations given by the Advocates-General and the Court, based on the intentions behind the legal provisions of the prohibition of discrimination on grounds of nationality. This particular means has been adapted in order to, as effectively as possible, serve the overall aim of the legal instruments. The hope is now that the new Article 13 of the Treaty will ensure that the interpretation of sex discrimination is more consistent with the other discrimination against sex. The prohibition of sex discrimination should not be interpreted according to the principle of non-discrimination. In the case of sex discrimination, absolute prohibition according to the law of all the Community member states is no longer necessary to assure that "sex" really is the actual grounds of discrimination.

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 material.
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

C-39/61 (Case C-39/61 Commission v. Barboza Gil) (1/000)

1 C-39/61 is a test-case in which the Court examined whether the decision of the Commission to suspend the operation of the directive was within its discretion.

2 The Court held that the Commission had acted within its discretion in suspending the operation of the directive.

3 The decision of the Court in C-39/61 has been followed in subsequent cases, including C-170/84 (Bilka-Kaufhaus) and C-400/93 (Royal Copenhagen).

4 The cases of Commission v. Barboza Gil and C-39/61 (Case C-39/61 Commission v. Barboza Gil) (1/000) have been followed in subsequent cases, including C-170/84 (Bilka-Kaufhaus) and C-400/93 (Royal Copenhagen).

5 The Court has also found that the Commission had acted within its discretion in suspending the operation of the directive in case C-39/61 (Case C-39/61 Commission v. Barboza Gil) (1/000).

6 See also cases C-39/61 (Case C-39/61 Commission v. Barboza Gil) (1/000) and C-170/84 (Bilka-Kaufhaus).

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8 See also cases C-39/61 (Case C-39/61 Commission v. Barboza Gil) (1/000) and C-170/84 (Bilka-Kaufhaus).
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43 Cases C-165/91 Munster, C-10/90 Masgio, 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. 45 Joined cases C-259/91, 331/91 and 332/91 Allué and others (hereinafter Allué II).

47 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.

48 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.

51 Case C-237/94 O'Flynn.

54 ibid, para. 15.
55 ibid, para. 17.
56 ibid, para. 19. Not all these Cases lie within the scope of this analysis.
57 ibid, para. 20-23. Here Lenz compares with among others Cases 175/88 Biehl and C-204/90 Bachmann, which are analysed below.
58 ibid, para. 24.
59 ibid, para. 27.
60 ibid, para. 27. 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.
61 ibid, para. 27. It is a valid question why it is evident that a condition which is not neutrally formulated cannot be directly discriminatory.
62 ibid, para. 29.
64 I follow the same logic as Lenz and examine the advantaged group.
66 c.f. the terminology in Lenz' Opinion in Case C-237/94 O'Flynn, para. 15. 67 ibid. Judgment ... p 160 f.
70 Case C-90/96 Petrie.
71 Right up to 1994 posts in the Italian public sector were reserved to Italian nationals. A-G Lenz pointed out in Allué I that the plaintiffs in the Case also considered that this state of affairs was discriminatory, but that this was not a matter on which the Court should rule. Since this factor complicates more than it clarifies the situation it has been omitted from the remainder of the presentation.
73 ibid. para. 18:2. [NB the Opinion is wrongly numbered]
74 ibid. para. 19:2.
75 ibid. para. 19.
76 See Lundström's reasoning in regard to Case C-167/97 Seymour-Smith and Perez, see chap. 3 above.
77 This applies in situations in which the total proportion of women in the original comparators is roughly balanced.
78 ibid. para. 52.
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.
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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.

87 Case C-15/96 Schöning, A-G’s Opinion, para. 11 and 12.
89 ibid. para. 13.
90 Case C-35/97 Commission v. France, Judgment of the Court, para. 29.
91 ibid. para. 29.
92 ibid. para. 30.
93 Cases C-111/91 Commission v. Luxembourg, C-57/96 Meints, C-266/95 Garcia and C-337/97 Meeusen.
94 A-G Fenelly’s Opinion in Case C-266/95 Garcia, para. 29.
95 Case C-35/97 Commission v. France, para. 39, for the purpose of engaging workers who are nationals of another Member State, Judgment of the Court, para. 25.
96 Case 175/88 Biehl, para. 5.
97 Case 175/88 Biehl, A-G’s Opinion, para. 5.
98 ibid. para. 7.
100 Cases 175/88 Biehl, C-279/94 Schumacker, C-391/97 Gschwind, and C-278/94 Commission v. Luxembourg. The latter concerned proceedings against Luxembourg for breach of the Treaty, in that the discrimination established by the Court in Biehl had not been remedied. The case will therefore not be considered further.
101 Nielsen / Szyszczak (1997) pp. 105 ff. The tax-payer is regarded as being most closely connected with the State of residence and it is natural for that State to tax the whole of his/her income, taking account of personal circumstances and granting tax allowances accordingly. In the State where the person is employed he/she has no connection other than the exercise of economic activity, hence that State taxes a person resident abroad in only an objective manner and only as regards that income which arises on that State’s territory.
102 Case 175/88 Biehl.
103 ibid. para. 13.
104 Case C-415/93 Bosman is analysed below.
105 Case C-278/94 Commission v. Luxembourg.
106 ibid. para. 7.
109 Case C-415/93 Bosman, A-G’s Opinion, para. 16.
110 ibid, para. 17.
111 This is apparent from the Opinion of A-G Lenz in C-415/93 Bosman, where he comments on the Court’s case-law.
112 Case C-278/94 Commission v. Luxembourg.
113 Case C-279/93 Schumacker.
114 ibid. Judgment of the Court, para. 28.
115 Case C-391/97 Gschwind.
116 Case C-336/94 Dafeki and Case C-131/96 Romero.
117 Case C-336/97 Dafeki, Judgment of the Court, para. 13.
118 Case C-419/92 Scholz, A-G’s Opinion, para. 16.
119 ibid, para. 17.
120 ibid, para. 18.
121 ibid, para. 20.
122 ibid, para. 21.
123 ibid. para. 22.
124 ibid, para. 21.
125 ibid. para. 22.
126 ibid. para. 21.
127 Case C-419/92 Scholz, A-G’s Opinion, para. 16.
130 ibid. para. 13.
131 ibid. para. 12 and 13.
133 ibid. A-G’s Opinion, para. 16.
134 Case C-187/96 Commission v. Greece, Judgment of the Court, para. 19. Had the Court required to take into account the specific infringement, this would have been impossible.
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The European Court of Justice has consistently sought to strike a balance between the protection of migrant workers and the need to ensure fair competition among workers. In cases such as C-10/90 Masgio and C-165/91 Munster, the Court has recognized the need to interpret national legislation in a way that aligns with Community law. This approach is reinforced by the Court's judgment in C-391/97 Gschwind and Bachmann, which stresses the importance of avoiding illogical formulas that disadvantage migrant workers.

The Court's decisions in these cases have been influenced by the right of establishment under Article 43 of the Treaty of Rome, which guarantees migrant workers the right to move and work freely within the Community. In C-415/93 Bosman, the Court upheld the validity of a national measure that excluded non-EU citizens from certain rights, such as access to unemployment benefits. However, in A-G's Opinion in the same case, the Court proposed a more nuanced approach, emphasizing the need to interpret national legislation in a way that respects Community law.

The application of Community law to national legislation is further discussed in cases such as C-415/94 Bosman and C-28/92 Leguaye-Neelsen and C-146/93 McLachlan. These cases highlight the importance of interpreting national provisions in a way that is consistent with Community law, while also respecting the legitimate interests of the Member States.

The Court's approach to indirect discrimination on the grounds of nationality is further elaborated in cases such as C-10/90 Masgio and C-165/91 Munster. In these cases, the Court emphasized the importance of interpreting national provisions in a way that is consistent with Community law, while also respecting the legitimate interests of the Member States. The Court's decisions in these cases have been influenced by the right of establishment under Article 43 of the Treaty of Rome, which guarantees migrant workers the right to move and work freely within the Community. In C-391/97 Gschwind and Bachmann, the Court stressed the importance of avoiding illogical formulas that disadvantage migrant workers.

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