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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, respectively, sex and nationality. To assert 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 bring within its scope discrimination which does not relate precisely to nationality. The means has been adapted to serve the end, and the Court has progressed from rhetoric about discrimination to rhetoric about obstacles. It 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 disadvantage.

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 focuses on results and content rather than on form. In the endeavour to achieve substantive equality the term indirect discrimination has acquired ever greater importance.

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 in practice 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 *inter alia* 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 objective of the former is “equality between women and men in the Communities”, while the latter aims to bring about “free movement of workers within the Communities”. The *objectives* are thus different, but the *means*—the prohibition of discrimination—is the same. The ECJ has in practice determined that both these prohibitions of discrimination comprehend indirect as well as direct discrimination.

In its reasoning the ECJ has created a strict dividing line between direct and indirect discrimination, determining 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 Communities it is becoming socially more and more 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

in future will gradually come to relate exclusively to *indirect* discrimination, and therefore that is the concept on which my study will focus.

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.

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 or, respectively, cases about indirect discrimination on the grounds of nationality, and to discuss the consequences for the individual of any differences.

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 accord-

ing 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 this, and if he/she succeeds there is a case of potential indirect discrimination, or a *presumption* of the existence of indirect discrimination. 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 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 furnished the actual basis for the Court’s interpretations 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 Chap-

ter 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.

2 Legal instruments

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 about equal pay* 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 for 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 must be able to have his/her case tried before a national court.

In *Council Directive 76/207 on the conditions for employment and work* the principle of equality of treatment is extended to apply also to access to employment and working conditions other than pay. In accordance with

Article 2 of the Directive "there shall be no discrimination whatsoever on grounds of sex either directly or indirectly". The Directive thus explicitly mentions both direct and indirect discrimination, but does not define what is meant by these concepts.

Directive 97/80 on the burden of proof in cases about sex discrimination was adopted with the original intention of codifying in law the case-law in this field which the Court had thus far developed. The Directive is applicable specifically in the question of the two legal instruments mentioned immediately above, about wages and other conditions of work and employment. *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 presumed that there has been direct or indirect discrimination". It is on this particular question, what is meant by "it can be presumed" that indirect discrimination exists, on which the rest of this study focuses.

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 only to such social assistance intended to supplement or replace any schemes of this kind.

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)* 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 and employment.

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. In accordance with *Article 7(1)* 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 Court’s previous case-law the concept of “social benefits” has developed to embrace all benefits accruing to any national employee chiefly on the grounds 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 prohibit both direct and indirect discrimination.

Summary

To achieve the objectives of equality and free movement of persons, EC law contains prohibitions of both direct and indirect discrimination on the grounds, respectively, of sex and nationality. Both these prohibitions of discrimination are applicable as regards pay and other conditions of employment and work. They are both 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 relating to equality between women and men which corresponds with *Article 7(2)* of Regulation 1612/68.

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.

3 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

The object of the Court's interpretations has thus been 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 the Court established that to pay 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 demonstrating objective reasons for it. The codification of the Court's previous case-law which was incorporated in Directive 97/80 accords in the main with the formulation

in *Bilka-Kaufhaus*. Even if the burden of proof Directive is formally applicable only in employment situations the Court has in practice also applied the same evidential requirements in cases concerned with Directive 79/7 on social security.

Comparison

Because of the way in which the evidential requirements are formulated, a comparison between two groups is necessary. For there to be discrimination on the grounds of sex, one group must consist of men and the other of women. 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.

How many persons must the comparative groups comprise? If the alleged discrimination originates in an employer's decisions or practice, the Court has been of the view 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, respectively, 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 strict. Thus in the *Enderby* case, for example, it declared that the statistical material must comprise a sufficient number of people so as not simply to reflect random or short-term phenomena. It must also be of general significance. In the *Royal Copenhagen* case the requirements were made more specific still. All persons in the two groups, women and men, who are in comparable situations must be taken into account. To guarantee that the wage differentials (which is what this case was about) were not the result of chance or of the employee's productivity, the groups must comprise a relatively large number of employees. With such requirements, the question is how can indirect sex discrimination possibly be established at places of work with few employees. It is probably difficult at such workplaces to produce substantial statistical evidence to prove that significantly more women than men are placed at a disadvantage by an apparently sex-neutral provision.

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 women are placed at a disadvantage, than of men. Exactly how high a proportion constitutes "substantially higher" has never been stated by the Court. In those cases where a plaintiff has succeeded in creating a presumption of indirect sex discrimination, the statistical material has so far shown that 80% or more of the group placed at a disadvantage has consisted of women.

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 material that a provision disadvantages not only her but also other women, and that it disadvantages a *substantially higher proportion* of women than of men. The statistics must be significant and the comparative groups must comprise a large number of the employees at the place of work concerned. If the alleged discrimination derives from legislation the whole population of the country must be included in the statistical material. 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".

4 The previous case-law of the European Court of Justice in cases about indirect discrimination on grounds of nationality

Outline

The basis for the Court's interpretations in the matter of 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 which I consider the Court has engineered in regard to 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 both Lenz and the Court found that, even if 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 smaller indeed. If the proportion of them in the disadvantaged group (64%) is measured against the "proportion they form of the total" i.e. of the number of people 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%. As regards the division between women and men in the "total group" (however that is defined), the rela-

tionship ought quite often to be close to 50/50. A statistical result which shows that the disadvantaged group is as to 64% comprised of nationals of other Member States can therefore—looked at proportionately—be an even stronger indication than a result which puts the proportion of women in a disadvantaged group at 80%.

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 compared with the proportion of host-State 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's having completed his/her basic higher 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. (Hereinafter 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 arranging his burial in a family grave in the Republic of Ireland. O'Flynn then applied for a grant towards 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 can 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 territorial condition was not directly discriminatory, since it applied to both British nationals and those 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 decide to have members of their families buried in another country than that a British national will choose that option. Since Lenz therefore considered it *easier* for British citizens to meet the condition than for citizens of other Member States, in his opinion there existed indirect discrimination.

Lenz stated that in the Court's previous case-law in the field of free movement of labour formulations could be found indicating that discrimination on grounds of nationality exists only when a rule *affects* substantially more nationals of other Member States than of the host-State. But Lenz was of the view that the previous Judgments in question differ from a large

number of others in which the establishment of indirect discrimination had not been dependent on any *de minimis* test. The conclusion was therefore that for indirect discrimination on grounds of nationality to exist it suffices that a benefit should be linked to a condition which *more easily or with greater probability* can be met by the host state's own nationals than by nationals of other Member States. "... the number of nationals of other Member States who are placed at a disadvantage by such a rule has no bearing. It is sufficient that the rule is such as to produce discriminatory effects for nationals, however few, or many, of other Member States".

Lenz then commented on the British Government's reference to the Court's previous case-law regarding indirect sex discrimination, as follows. When what is at issue is equal treatment of women and men it may be supposed that there are many cases where it is doubtful whether particular rules disadvantage either of the sexes. Therefore one can speak of sex discrimination only if the rules in question *affect substantially more persons* of the one sex than of the other, and statistical studies are often the only means of establishing whether that is so. This reasoning however, is not applicable in the present field.

To illustrate his viewpoint Lenz makes a little intellectual experiment. He takes as his starting-point the grant for funeral expenses in the case in question and then applies the two discrimination prohibitions to the disputed territorial condition. He first examines the condition from the point of view of the prohibition of sex discrimination and establishes that the answer to the question whether the condition breaches that prohibition is anything but clear. The condition for making the grant for funeral expenses is so formulated that the sex of the applicant is altogether irrelevant. Therefore there could at most be a question of sex discrimination only if the condition *in practice* led to substantially more men than women (or *vice versa*) receiving the funeral expenses grant. In the light of this illustration it should thus be apparent why statistical evidence of the proportion of disadvantaged women/men is so indispensable in cases about sex discrimination.

Lenz then notes that the situation is quite different as regards breach of the prohibition of discrimination on grounds of nationality. Since the territorial condition links the grant to an event which takes place on British territory, it is *not formulated neutrally* in relation to nationality. It disadvantages nationals of other Member States and leads to indirect discrimination. Lenz then makes clear that it suffices that *only some* nationals of other Member

States are placed at a disadvantage for discrimination on grounds of nationality to exist, and the circumstance that certain other migrant workers may even be *advantaged* by the same condition can neither undo nor outweigh the discrimination that has been established.

Since Lenz took the liberty of applying the two discrimination prohibitions to one and the same condition, I will now take the same liberty. The *Ruziuz-Wyllbrink* case related to a general Dutch benefit as regards injuries at work. It was paid on the basis of the statutory minimum wage to all except part-time employees, in whose case it was calculated in accordance with their most recent wages.

The answer to the question whether *this condition* is contrary to the prohibition of *nationality* discrimination can thus be said to be "anything but clear". The condition is indeed formulated in such a way that the nationality of the applicant seems irrelevant. It ought therefore "at most" to be a question of discrimination on grounds of nationality if the condition "in practice should lead to a substantially greater proportion of host-State nationals than of nationals of other Member States" coming within the scope of social security system.

But I should naturally like to say that, on the other hand, the situation is "quite different" as regards the question of breaching the prohibition of discrimination on grounds of sex. For of course the condition about full-time work is "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 repeatedly expressed its awareness of the existence of such documentation, and has time and again referred to the difficulties for women to work full-time, because of their family responsibilities. Against that background it does not seem out of place to adopt the language used by Lenz, and to contend that "experience shows" that many women bear the main responsibility for the care of the family and that it is therefore "substantially more likely" for women to work part-time than for men to do so. It ought thereby to be possible to establish indirect sex discrimination without comprehensive statistical evidence.

In accordance with Lenz's logic I would thereby have demonstrated that whereas statistical evidence is required to establish the existence of indirect discrimination on grounds of nationality, the existence of indirect discrimination on grounds of sex can readily be established without such

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* is however quite different from making *one and the same evidential requirement* 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 the documented differences between the actual social situations of women and men, which are now “generally known”. That is of course precisely the evidential requirement that Lenz applies when he says that experience shows that it is *substantially more likely* that nationals of other Member States will arrange for members of their families to be buried abroad than it is for host-State nationals to choose that option, and that the condition is consequently indirectly discriminatory because it is easier for the latter than for the former to meet it.

In the *O’Flynn* case the Court formulated its often cited test for proving the existence of indirect nationality discrimination. First it summarised its own previous case-law in this field, and then re-formulated these principles into one single test: “.. *unless objectively justified and proportionate to its aim, a 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 consequent risk that it will place the former at a particular disadvantage*”.

According to this test it is therefore unnecessary to establish that a provision *in practice* affects a significantly higher proportion of migrant workers. It suffices that the provision is of such a *nature* as to entail a risk that such an effect will arise. The territorial condition for the funeral expenses grant was therefore unlawful. The Court made no comparisons whatever with its own previous case-law in relation to indirect discrimination on grounds of sex.

As in the *O’Flynn* case, in *Ruzius-Wilbrink* the Court determined that the Dutch provision might be indirectly discriminatory. But the plaintiff had then presented statistical evidence that 88% of those who had received the benefit calculated on the basis of their most recent wage were women....

Since the Judgment in the case of the *Commission v. Belgium* was delivered after the Judgment in *O’Flynn* the Court had no difficulties in also dismissing the Belgian Government’s contention about the need for a *de minimis* test.

A final glimpse of statistics in cases about indirect nationality discrimination

The Court’s generously formulated “test” in *O’Flynn* has in subsequent cases justified findings of indirect discrimination without further comparisons or statistical enquiries. Apart from *Allué II*, the only case within the scope of my material in which statistics played any part whatever is *Pettie*, which was determined four years after *Allué II* and hence also after *O’Flynn*.

The plaintiffs in *Pettie* were British nationals who, like those in *Allué II*, taught foreign languages at an Italian university. Whereas their employment contracts were regarded as being of a private law character, those of other university employees were regarded as being of a public law character. The alleged discrimination therefore consisted in the fact that only established university teachers and approved researchers could be assigned paid additional teaching and that both these qualified categories of university employees were governed by public law provisions.

Since the disadvantaged group were defined in the same way as in *Allué II*, 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 *O’Flynn* and underlines that it is not necessary to establish that a provision *in practice* adversely affected a significantly higher proportion of migrant workers. It suffices that there is *a risk* that migrant workers would be adversely affected to a greater degree than would national workers. To determine whether that is so is, according to Fenelly, an objective and value-neutral process. He describes the process as a comparison between *the probability* that the provision in question affects national workers and the corresponding probability when it is a matter of migrant workers.

Despite the fact that Fenelly considers a hypothetical disadvantage sufficient, he nonetheless conducts experiments in part on the practical plane. He suggests possible comparative groups, to examine whether the disputed condition *disproportionately* disadvantaged university employees who are not Italian nationals.

He is of the view that a disproportionate such disadvantage can exist if the great majority of those persons who are qualified to apply to give extra hours of teaching are Italian nationals, while the great majority of those categories of teaching staff not so qualified are not Italian nationals.

Fenelly thus compares the *number* of host-State nationals in the *advantaged* group with the *number* of foreign nationals in the *disadvantaged* group. Such a comparison can, however, hardly show whether a disproportionate disadvantage exists.

His next suggestion is that indirect discrimination can exist if the proportion of Italian nationals in the qualified group is substantially greater than the proportion as a whole in the relevant faculties.

This rather cunning formulation ought to imply that the proportion of Italian nationals in the advantaged group in any faculty should be judged in relation to how large a proportion of the total staff of the faculty comprises Italian nationals. In that case the comparison should only illustrate the reality at each university (each place of work) individually, which would not have sufficed if, instead, it was indirect sex discrimination which was to be proved, since the alleged discrimination derives from legislation. Fenelly's suggestion thus implies that, if the *proportion* of advantaged host-State nationals is appreciably greater than their proportion of the total, there may be indirect discrimination. Such a comparison only shows, however, whether a disproportionate *advantage* exists, and does not answer the question whether there is a disproportionate *disadvantage* on grounds of nationality.

It can be questioned whether an effect is *disproportionate* as soon as the proportion of non-Italian nationals in the disadvantaged group of university staff exceeds the proportion they form of the total staff of the university. Applied in relation to indirect sex discrimination that would imply that in most cases the proportion of women in the disadvantaged group would not need to go above 51% for the presumption of indirect discrimination to be met.

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, nor can there be any 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 requirement for good administration at the universities. But, the Court continued, if other professional categories who, in principle, are also not comparable with school-teachers or qualified researchers are notwithstanding regarded as qualified

to apply for relief posts, whereas foreign lecturers with the same positions and equivalent tasks in their work are excluded, then there may be a question of indirect discrimination. 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.

Whereas Advocate-General Fenelly is bolder and, with reference to *O'Flynn*, hovers 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 *Allué II*.

Disproportionate disadvantage is established without the aid of statistics

The Court's reasoning in the *Badmann* 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 *Badmann*, Belgian legislation made the right to tax reliefs in respect of certain insurance premiums dependent on whether these premiums were paid in Belgium itself. It was therefore a matter of alleged indirect discrimination in relation to a tax benefit. *Badmann* was a German national who in Belgium was denied relief in respect of premiums previously paid in Germany. He contended that the Belgian condition resulted in indirect discrimination on grounds of nationality. The Belgian Government objected that the provisions were applied without discrimination as to nationality and that the Commission's contention that these provisions were particularly to the disadvantage of tax-payers who were nationals of other Member States was wholly without foundation. 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 disadvan-

tage by the condition. 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 Mischio 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 *Badmann*—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 *Badmann* 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 *Badmann*. 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 “1b”. By prescribing that these 8 years must be completed in that specific salary-grade, it left out of account periods of employment

completed abroad, with a private employer in Germany, or within the German public sector but in a position not covered by the specified collective agreement or by salary grade 1b. Kalliopé Schöning was a Greek national working as a medical specialist in Germany. Her several years of experience as a medical specialist in the Greek public sector was not taken into consideration when she was assigned to a salary-grade.

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 the former’s 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 move from a post outside the scope of the BAT to a post within it can suffer the same disadvantages as migrant workers. But Jacobs is of the view that these persons probably comprise only a small proportion of the public sector employees in Germany since the field of application of the BAT is so wide. On the other hand *all* migrant workers starting work in the German public sector are placed at a disadvantage. The fact that certain German public sector employees suffer the same loss as migrant workers cannot justify refusing all migrant workers the advantages that are enjoyed by the apparently largest category of German public sector employees.

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”.

Commonsense 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 situation, but resident across the frontier in Belgium, 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 will disadvantage for the most part nationals of other Member States and hence constitute indirect discrimination on grounds of nationality.

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 Meusen* to constitute potential indirect discrimination. Commonsense is enough to tell the Court that those not resident in a given country are also usually not nationals of that country. In Advocate-General Fenelly’s words, it suffices to establish that a residence condition has an intrinsic tendency to disadvantage migrant workers.

The disputes in the *Biehl, Schumacker* and *Gschwind* cases, and in the *Commission v. Luxembourg* were also occasioned by a residence condition. Common to all these cases is that the allegedly discriminatory rules were concerned with taxes on wages or salaries. Since they apply to tax advantages, the residence conditions do not constitute such equally “simple” cases as otherwise. A distinction based on residence is in fact the normal,

internationally accepted, model in income-tax systems. Discrimination in the sense of EC law can therefore only arise if, notwithstanding, it can be deemed that residents and non-residents find themselves in comparable situations. It was therefore an extra important element in those four cases to establish such “objective comparability”.

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 permanent residence in that country, by which was meant residence during the whole of the tax-year in question. Since Mr Biehl moved back to Germany before the end of a tax-year, he was refused a refund on the tax he had paid during his final year in Luxembourg.

The Advocate-General, Darmon, first re-applies the standard formula-tion 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 the result that it is chiefly those persons who are refused tax-refunds. Darmon then satisfies himself that there is “objective comparability”. He emphasises that difference in treatment is 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

they who move to and from Luxembourg. The conclusion—that there was discrimination on grounds of nationality—could scarcely have been sufficient had Biehl instead been a Luxembourg national, and the Court has been criticised for its caution in this.

In the *Commission v. Luxembourg*, the Commission brought proceedings against Luxembourg for breach of the Treaty, in that the discrimination identified in *Biehl* had been only partially remedied. The case thus dealt with the same situation once again.

In the *Schumacker* case the court once more repeated that those not resident in a given State are in fact most frequently not nationals of that State, and that the residence condition therefore carries a risk that it will chiefly be to the detriment of nationals of other Member States. After having first taken extra care to satisfy itself that there really were two comparable situations the Court was able to find that there was potential indirect discrimination.

In the fourth case, *Gschwind*, the claim of discrimination was dismissed since 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 *Dafeki* and *Romero* cases did not, it is true, relate to residence conditions but the Court held as readily as in those above that there was potential indirect discrimination.

The *Dafeki* case was about the circumstance that identity documents issued by the responsible authorities in another Member State were according to German law of lower value in proving identity than identity documents issued by the German authorities. When Mrs Dafeki’s identity card was not accepted she was in practice deprived of the possibility of exercising her rights to social security benefits. The Court held that the German provisions in practice placed at a disadvantage workers who were nationals of other Member States.

The *Romero* case brought to the fore the problem about taking into account periods completed in another Member State. The plaintiff was in receipt of a children’s pension allowance from Germany since his father, who was a Spanish national, had been covered by German social security when he died as a result of an accident at work. According to German law the pension was payable until the recipient reached the age of 25. During any military service the pension allowance was suspended but could subsequently be prolonged by a corresponding period beyond the age of 25, in compensation. Romero did his military service in Spain and it was treated

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 members of 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 Dafeği 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 Dafeği 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 discrimination “on grounds of their nationality”.

The dispute in *Scholz* arose in connection with recruitment procedures for the appointment of dining-room staff at an Italian university. In assessing the qualifications of the applicants 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 get it, and invoked the Article 39(2) discrimination prohibition.

How did Advocate-General Lenz attempt to solve this logical conundrum? Since the selection criteria made no explicit distinction between Italian nationals and others, he found that Mrs Scholz was quite clearly not a victim of discrimination on grounds of nationality. Moreover, she at any rate 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 non-Italian nationals, 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-rate 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 nation-

ality in order to challenge an Italian rule which discriminates against non-Italian nationals. That, however, according to Jacobs is precisely what Ingertraut 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 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 originally 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 who suffers discrimination is a man in no way alters the fact that he is the victim of a procedure which results in discrimination against women?

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*. But perhaps he himself thought that he was going a little too far. At any rate he adds that "*it could be that the basis for that proposition lies not so much in Article 39(2) but rather in Article 39 (1)*".

As is well known, Article 39(1) provides quite simply that "freedom of movement for workers shall be secured within the Community." After first having made a quite extensive

interpretation of the prohibition of discrimination in Article 39(2), he thus inserts an alternative basis for his conclusion. Below, I question whether that provision, together with the general duty laid upon Member States by Article 10 to fulfil the obligations of the Treaty of Rome, can possibly explain why the potential inherent in the concept of indirect discrimination has been better exploited by the Court in cases about nationality discrimination than in cases about sex discrimination.

Jacobs continues: "[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".

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. Ingertraut 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

Article 39 is meant to prevent since it runs counter to the objective of freedom of movement for workers. Yet the fact remains—she is not disadvantaged "on grounds of her nationality".

So when the Court declares that "[t]he fact that the plaintiff...has acquired Italian nationality has no bearing on the application of the principle of non-discrimination" and concludes that there is "unjustified indirect discrimination", the questions arise, which non-discrimination principle, and indirect discrimination on what grounds?

The same question comes up in connection with the Court's argument four years later in the very similar case of the *Commission v. Greece*. The Commission initiated the proceedings after a complaint from a Greek national who had been denied in Greece recognition of years of service completed in another Member State. Advocate-General Colomer reiterated from Scholz that the fact that the person requesting recognition of years worked in Greece is a Greek national has no bearing on the application of the non-discrimination principle.

Since it was now a matter of proceedings brought in respect of a breach of the Treaty of Rome, the Court's conclusion does not necessary have to be tailor-made to suit the specific infringement which gave rise to it, i.e. in this case the unfair treatment of a Greek national in Greece. The Court was free to disregard that, as indeed it did by pointing out that a rule shall be deemed indirectly discriminatory if it is of a nature to imply a risk that migrant workers will be affected to a greater degree than national workers and consequently risks placing the former at a disadvantage.

The Court's further reasoning could nonetheless have been applied in relation to the specific infringement which gave rise to the Commission's proceedings. The Court was of the view that the disputed rule quite evidently placed at a disadvantage migrant workers who had completed part of their working lives in the public sector in another Member State and 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.

Has the Court in *Scholz* and the *Commission v. Greece* considered whether, in addition to the Article 39(2) prohibition of discrimination *on grounds of nationality*, there may also exist another prohibition of discrimination based either on Article 39(1) or perhaps some other ground? Or has the Court permitted itself an extensive interpretation of the prohibition of discrimination on grounds of nationality in Article 39(2), based on the intentions behind it, so that the grounds for the discrimination does not strictly need

to be specifically nationally? Discrimination “on grounds of enjoyment of free movement” might perhaps 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

In the *Maggio* 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 *Maggio* 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, through taking advantage of his right to free movement, 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 works 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 taken into account, however, there emerges the principle that *migrant workers* must not be placed

at a disadvantage. From there the Court goes on to *rhetoric about obstacles*. An interpretation based on the intention behind Article 39(2) turns it into a prohibition “of obstacles to freedom of movement”.

In the *Munster* case it was instead a question of a Belgian rule for calculating pensions. The Belgian legislation could not in itself be deemed discriminatory, but in a particular combination with Dutch legislation it resulted in a disadvantage for Mr Munster who had been employed in both these two Member States. Advocate-General Darmon points out that the Court had determined that Article 39 prohibits legislation in the field of social security which results in discrimination on grounds of nationality. But it had also determined that such legislation was in conflict with Article 39 if it deprives migrants of benefits enjoyed by non-migrant workers. That means that rules which impede freedom of movement for workers are incompatible with Article 39 “*even where not discriminatory*”. Darmon even inserts a little moral passage: “*If there is one area in which substance must prevail over form and reality over appearances, it is freedom of movement for workers, having regard in particular to the rights that have accrued them at the end of their working life*”.

The Court repeats from *Maggio* that the objective of Articles 39-42 would not be achieved if migrant workers were to lose advantages which they have acquired under the legislation of another Member State. That would deter them from making use of their right to freedom of movement and would therefore constitute *an obstacle* to that freedom.

In the *Maggio* and *Munster* cases the Court makes explicit an interpretation of Article 39(2) based on the intention behind it, when its wording in fact requires the ground of discrimination to be nationality, and also of Article 3 of Regulation 1408/71, the wording of which is concerned with equality of treatment between national workers and workers who are nationals of other Member States. At the decisive stage the Court goes beyond rhetoric about discrimination and, once it has embarked on rhetoric about obstacles, it is no longer in any way concerned to prove discrimination, whether direct or indirect.

Rhetoric about discrimination becomes rhetoric about obstacles

The *Bosman* case, which has attracted a great deal of attention, concerned football transfer fees. Football clubs have been able to charge a fee when one of their players, whose contract has expired, joins another club. The rules on this had given rise to disputes between the football-player Jean-Marc Bosman and several national football associations.

Advocate-General Lenz conducts a systematic analysis of Article 39, partly as a *prohibition of discrimination*, and partly as a *prohibition of limitations on the freedom of movement*. He begins with Article 39 as a *prohibition of discrimination* and recalls that Article 39(2) prohibits any discrimination against workers from Member States as regards conditions of work and employment. He is not in doubt that the application of the rules on the transfer of footballers can *in principle* result in some form of discrimination against nationals of other Member States, since the transfer of a footballer to another football association almost without exception implies moving abroad, and such transfers are subject to less advantageous rules than transfers within one and the same national association.

In his view this discriminatory treatment *can* lead to players being impeded in exercising their right to free movement. Lenz is also of the view that this can mean a breach of the prohibition 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 can in principle lead to discriminatory treatment, which can lead to an obstacle to free movement, 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 *Scholz* and the *Commission v. Greece*. Even if the logical chain is not entirely sound, the outcome is at any rate "discrimination".

But then Lenz comes to the exciting part. He observes that the Court would, however, have to examine those questions only if Article 39 did no more than establish a prohibition of discrimination on grounds of national-

ity. Lenz is of the view that that is not the case. "*In my opinion, all restrictions on freedom of movement are prohibited in principle by Article 39*".

The fact that Lenz puts this statement in the context of an analysis of Article 39(2) indicates that he considers *this* provision to contain more than a prohibition of discrimination on grounds of nationality, that is to say independently of Article 39(1).

When Lenz then switches to an analysis of Article 39 as a prohibition of limitations on free movement, he does not explicitly state to which provision in the Article (i.e. paragraph 1 or paragraph 2) he refers. After recapitulating the Court's case-law he states that a large number of previous judgments point beyond the traditional view that Article 39 consists only of a prohibition of discrimination on grounds of nationality. Lenz concedes that these cases could have been determined on the basis of a broadly defined prohibition of discrimination. "What is decisive is that the Court precisely did *not* choose that path".

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 *prohibition of discrimination* only if the view is taken that it suffices that citizens who exercise that right are placed at a disadvantage compared with those who do not. Such an interpretation, in the opinion of Lenz, corresponds to the spirit of Article 39(2), but he adds that "*it is admittedly evident that it is then no longer discrimination on grounds of nationality that is being focused on*".

That is exactly what happened in *Scholz* and the *Commission v. Greece*: the precise grounds of discrimination were no longer firm, and needed no longer to be strictly confined to "nationality". He is of the view that the Court's previous case-law has tended in the direction that it is now *irrelevant* whether in a given case it is a question of indirect discrimination, or not.

In the *Bosman* case the Court endorses Lenz's line and holds that the transfer rules constitute an obstacle to the free movement of workers prohibited in principle by Article 39 of the Treaty. The rules can prevent or deter players from leaving the clubs to which they belong, in order to join a new club in another Member State.

If Article 39 prohibits any national measure which can constitute an obstacle to free movement for workers, it becomes irrelevant whether discrimination can be proved or not. If no discrimination, whether direct or indirect, needs to be proved, it of course disposes of the whole complex of problems concerning the grounds of discrimination. We have then left the

arena of the concept of indirect discrimination since the means—“prohibition of discrimination”—has been replaced by something else.

No potential indirect discrimination could be proved

Of the 27 cases which I include in my material, the cases of *Leguay-Neelsen* and *McLachlan* are the only two, apart from *Gschwind* and *Badmann*, in which the Court held that there was no potential indirect discrimination.

In *Leguay-Neelsen* the reason was the same as in *Gschwind*, there being no discrimination because there were not two comparable situations and different rules had therefore not been applied in situations that were the same.

In *McLachlan* it was claimed that French legislation was discriminatory because only periods covered by French social security insurance were counted in calculating the size of pensions. The Court held that it is part of the Regulation 1408/71 system that each Member State pays the benefits that corresponds to the periods completed under that State's legislation. The objective of Article 42 is merely co-ordination and not the establishment of a common social security system.

General conclusions

In the cases analysed, the Court's reasoning in regard both to the requirements 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.

Commonsense and a feeling for social realities was sufficient to prove, for example, the discriminatory character of residence conditions.

Even if the Court in most cases keeps to the rhetoric of discrimination and to “nationality” as the grounds of discrimination, the Advocates-General are bolder and argue in favour of a broader interpretation to bring into account discrimination which does not specifically refer to “nationality”. However, in the cases of *Scholz*, and the *Commission v. Greece*, the grounds for discrimination begin to shift, and in *Masgio* and *Minister* the Court gives interpretations explicitly based on the intention behind the legislation. Taking into account the objective behind Articles 39-42 of the Treaty the Court succeeds in progressing via the rhetoric about discrimination to rhetoric about obstacles. With that, it becomes irrelevant whether any discrimination exists in reality or not.

In case rhetoric about discrimination should nonetheless be employed in future, the Judgment in *O'Flynn* dispelled any potential doubt about the need to show that a provision *in practice* disadvantages disproportionately more nationals of other Member States for it to be deemed discriminatory. A condition is indirectly discriminatory if it constitutes a risk that disadvantages will arise for migrant workers, or if it can *more easily* be met by national workers.

Statistical evidence has thereby become quite unnecessary in cases about indirect discrimination on grounds of nationality, but remains indispensable in cases about indirect sex discrimination.

5 Concluding reflections

Evidential requirements

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.

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. However, the EU lacks a constitution 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, but that they can serve as an inspiration “*in determining the content of the general principles of Community law with regard to fundamental rights and freedoms*”.

Since the right to non-discriminatory treatment which has been discussed in this study is a “fundamental right in Community law”, and not a “human right”, the Court had no need to treat it as a human right.

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 thus 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. It lacks a moral dimension and therefore does not resemble a “human right”. But since the prohibition has developed into a principle extending beyond actual and disproportionately unfair treatment of nationals of other Member States, the prohibition is not an expression of an aspiration to bring about fair distribution. Therefore, nor does it resemble a “social right”. Despite that, the prohibition also strikes at indirect discrimination. 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 as an expression of an aspiration towards fair distribution.

The right not to be discriminated against on grounds of sex ought thereby, in that terminology, to be a social right and as such distributable. A disproportionate, to say the least, disadvantage to the group “women” (or men) must be proved for the prohibition to be applicable. That in turn explains the more demanding evidential requirements and the stricter rhetoric in relation to the grounds of discrimination in these cases, as compared with cases about discrimination on grounds of nationality. The right to sexual equality thereby becomes more a *group right* than an individual right. As Lundström notes, through its evidential requirements the Court has trans-

formed the sexual category “women” from individuals into a collective in a section of the law in which the load-bearing beam is the rights of individuals.

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 and the evidential requirements, and has even 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 free 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 a development *has* in fact occurred. The reference to evolution in the area of the law on free movement of goods also points in that direction, since Article 28 was from the outset regarded as a prohibition of discrimination and not as a prohibition of barriers to trade.

Just as Bergström wonders whether the prohibition of discrimination on grounds of nationality is a sufficient means to achieve the objective of “free movement”, one can wonder whether the “prohibition of discrimination on grounds of sex” does not need to be developed if it is really to serve as an effective means to achieve the ends “equality” and the equal worth of all human beings irrespective of sex.

But while the prohibition of discrimination “on grounds of nationality” has become a prohibition of discrimination “on grounds of exploitation of the right to free movement”, subsequently to become something other than a prohibition of, precisely, “discrimination”, the prohibition of discrimination on grounds of sex still remains no more than 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 free male 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

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 work-place 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 present employees there are 10 who are currently, 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 Ingegraut Scholz could according to Advocate-General Lenz contend 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 place of work 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 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. But since for the time being it is only discrimination on grounds of sex that is prohibited, the statistical evidence remains “necessary” in order to assure the Court that “sex” really is the actual grounds of discrimination.

Conclusion

It is inspiring to follow the flexible interpretations given by the Advocates-Generals 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 end—free movement for workers. Instead of focusing on the evidential requirements, the purpose behind the discrimination prohibition has been taken into account. Indirect discrimination can be shown at the level of the individual, and it is not decisive that the grounds of discrimination should not be specifically “nationality”. Strictly speaking it is now no longer necessary to show that there is any “discrimination”, and it suffices that a measure is an obstacle to the objective for it to be unlawful. The hope is now of course that in cases about indirect sex discrimination the Court will be inspired by its own flexibility, so that individual women and men will also be able to exercise the right to non-discriminatory treatment, and it will be possible to achieve the objective—equality between women and men.

Endnotes

1 Lundström (1999) pp. 28 f.

2 Lundström (1999) pp. 30 f.

3 Both these cases can be read from Article 2 of the Treaty of Rome.

4 See Lundström (2000:1) p. 8.

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 materiel.

6 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

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.

8 Lundström (1999).

9 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.

10 See Lundström (1999) p. 214.

11 The phrase “or work of equal value” was added by the Amsterdam Treaty.

12 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women, OJ 45/75 p. 19.

13 Council Directive 75/117 articles 2–7, see further Lundström (1999) pp.107–112.

14 Council Directive 76/207/EEC of February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 39/76 p. 40.

15 See further Lundström (1999) pp. 112–122.

16 Council Directive 97/80 of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14/98 p.6.

17 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6/79 s 24.

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

19 Case C-10/90 Masgio, see Pennings (1998) p. 91, Nielsen / Szyssczak (1997) p.79, Westerhäll (1995) p. 79.

20 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.

21 Regulation (EEC) No1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257/68 p. 2.

22 See Nielsen / Szyssczak (1997) s 80.

23 Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149/71 pp. 2–50. 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.

24 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 Pennings (1998) pp. 53–68, and their references to case-law.

25 See further Westerhäll (1995) pp. 72 ff. As regards the definition of ‘members of the family’, see Article 1.(f-g) of the Regulation.

26 See Westerhäll (1995) p. 81, Nielsen / Szyssczak (1997) pp. 79 f, 130, Wong (1997) p. 44 ff.

27 Case 96/80 Jenkins. See Lundström (1999) p. 224 ff.

28 See Lundström (1999) pp. 231 f.

29 Case 170/84 Bilka-Kaufhaus, Lundström (1999) p. 326.

30 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.

31 Case 170/84 Bilka-Kaufhaus, Lundström p.365 ff.

32 Case C-127/92 Enderby, Lundström (1999) p.326.

33 Case C-400/93 Royal Copenhagen, Lundström (1999) p.326.

34 Lundström (2000:1) p.12.

35 Case C-189/91 Kirshammer-Hack, Lundström (1999) pp. 344 f, and 389 f.

36 Lundström (1999) p. 326.

37 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.

38 Case C-167/97 Seymour Smith and Perez, Lundström (2000:1) s 12 f.

39 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.

40 Joined cases C-259/91, 331/91 and 332/91 Allué and others. (Hereinafter Allué II),

Case C-375/92 Commission . / . Spain, C-419/92 Scholz, C-415/93 Bosman, C-15/96 Schöning, C-90/96 Petrie, C-187/96 Commission . / . Greece, C-350/96 Clean Car, and C-35/97 Commission . / . France.

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.

41 Cases 175/88 Biehl, C-279/93 Schumacker, C-151/94 Commission . / . Luxembourg, C-391/97 Gswind and C-204/90 Bachmann.

- 42 Cases C-300/90 Commission . / . Belgium, C-111/91 Commission . / . Luxembourg, C-237/94 O'Flynn,
- C-278/94 Commission . / . Belgium, C-57/96 Meins and C-337/97 Meusen.
- 43 Cases C-165/91 Munster, C-10/90 Masgio, C-266/95 Garcia, C-336/94 Dafeki, C-28/92 Leguay-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)
- 46 Allué II, A-G's Opinion, para. 12.
- 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.
- 49 Allué II, Judgment of the Court, para. 12, A-G's Opinion, para. 17.
- 50 Cases C-278/94 Commission . / . Belgium and C-237/94 O'Flynn.
- 51 Case C-237/94 O'Flynn.
- 52 See Peers (1997), p. 160.
- 53 Case C-237/94 O'Flynn, A-G's Opinion, para. 14.
- 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.
- 63 Case 102/88 Ruiziz-Wilbrink, see Lundström (1999) p. 397 and Sohrab (1996) pp. 125 f.
- 64 I follow the same logic as Lenz and examine the advantaged group.
- 65 Lundström (2000) p. 16.
- 66 c.f. the terminology in Lenz' Opinion in Case C-237/94 O'Flynn, para. 15.
- 67 *ibid.* Judgment of the Court, para. 20. For this see: Peers (1997) p 160 f.
- 68 Lundström (1999) p 397 f.
- 69 Case C-278/94 Commission . / . Belgium, Judgment of the Court, para. 20. See also Penning (1998) s 11.
- 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.
- 72 Case C-90/96 Petrie, A-G's Opinion, para. 20 and 21.
- 73 *ibid.*, para. 18:2 [NB the Opinion is wrongly numbered]
- 74 *ibid.*, para. 19:2.
- 75 *ibid.*
- 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 comparative groups may be assumed to be 50%
- 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 . / . Belgium, concerned the same legislation and Judgment was delivered on the same day as Bachmann. A-G Mischio'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 204/90 Bachmann, Judgment of the Court, para. 27. As regards the justification of discrimination see Bachmann, Penning (1998) p. 94 and Bergström (1998) pp. 51 f.

87 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.

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

89 *ibid.* para. 12 and 13.

90 *ibid.* para. 14.

91 *ibid.* Judgment of the Court, para. 23.

92 *ibid.* para. 24.

93 Case C-35/97 Commission . / . France.

94 Article 7(4) of Regulation 1612/68 prescribes that neither may the provisions of collective agreements imply discrimination against nationals of other Member States.

95 Case C-35/97 Commission . / . France, Judgment of the Court, para. 39.

96 Case C-350/96 Clean Car Autoservice.

97 This Case was particular in the respect that the plaintiff who invoked the equality of treatment principle was an employer. The Court determined that employers may also invoke the principle of equality of treatment in Article 39, for the purpose of engaging workers who are nationals of another Member State, Judgment of the Court, para. 25.

98 *ibid.* para. 29.

99 *ibid.* para. 30.

100 Cases C-111/91 Commission . / . Luxembourg, C-57/96 Meins, C-266/95 Garcia and C-337/97 Meusen.

101 A-G Fencelly's Opinion in Case C-266/95 Garcia, para. 29.

102 Cases 175/88 Biehl, C-279/94 Schumacker, C-391/97 Gschwind, and C-278/94 Commission . / . Luxembourg. The latter concerned proceedings against Luxembourg for breach of the Treaty, in that the discrimination established by the Court in Biehl had been only partially remedied. The Case will therefore not be considered further.

103 Nielsen / Syszczak (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 his/her personal circumstances and granting tax-alloances 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.

104 Case 175/88 Biehl.

105 Case 175/88 Biehl, A-G's Opinion, para. 5.

106 *ibid.* para. 7.

107 *ibid.* para. 12 and 13.

108 *ibid.* para. 13.

109 Case C-415/93 Bosman is analysed below.

110 Case 175/88 Biehl, Judgment of the Court, para. 14.

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 . / . 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 Datéki and Case C-131/96 Romero

117 Case C-336/97 Datéki, Judgment of the Court, para. 13.

118 *ibid.* para. 33 and 36.

119 Cases C-419/92 Scholz and C-187/96 Commission . / . Greece.

120 Case C-419/92 Scholz, A-G's Opinion, para. 16.

121 *ibid.* para. 17.

122 *ibid.* para. 18.

123 *ibid.* para. 20.

124 *ibid.* para. 21.

125 *ibid.* para. 22.

126 Rhetoric about the grounds of discrimination will be discussed below in Chap. 5.

127 Case C-419/92 Scholz, A-G's Opinion, para. 22.

128 See below Chap 4.2.

129 Case C-419/92 Scholz, A-G's Opinion, para. 22.

130 *ibid.* Judgment of the Court, para. 8.

131 *ibid.* Judgment of the Court, para. 11.

132 Case C-187/96 Commission . / . Greece.

133 *ibid.* A-G's Opinion, para. 16.

134 Case C-187/96 Commission . / . Greece, Judgment of the Court, para. 19. Had the Court required to take into account the specific infringement, this would have been an

- illogical formula to apply. The person disadvantaged was in fact both a migrant and a national worker.
- 135 *ibid.* para. 21.
- 136 Cases C-10/90 Masgio and C-165/91 Munster.
- 137 *ibid.* Judgment of the Court, para. 14 - 16.
- 138 *ibid.* para. 17.
- 139 *ibid.* para. 19.
- 140 *ibid.* para. 18.
- 141 Case C-165/91 Munster.
- 142 *ibid.* A-G's Opinion, para. 17.
- 143 *ibid.* para. 18 and 19.
- 144 *ibid.* para. 60.
- 145 Case C-10/90 Masgio.
- 146 *ibid.* Judgment of the Court, para. 7. 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 the the intention behind 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).
- 147 Case C-415/93 Bosman.
- 148 The existence of what were known as "foreigners provisos" was also disputed in this Case. This part of it 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.
- 149 Case C-415/94 Bosman, A-G's Opinion, para. 154.
- 150 *ibid.* para. 162.
- 151 *ibid.* para. 164.
- 152 *ibid.* para. 166 and 185. There are a number of Cases concerning Article 43 and the right of establishment which therefore fall outside the scope of this essay.
- 153 *ibid.* para. 187.
- 154 *ibid.*
- 155 *ibid.* Judgment of the Court, para. 104.
- 156 *ibid.* para. 100.
- 157 *cf.* Fernandez Martin (1996) p. 313 and 321.

- 158 Cases C-28/92 Leguay-Neelsen and C-146/93 McLachlan. Cases C-391/97 Gschwind and Bachmann are analysed above.
- 159 Case C-28/92 Leguay-Neelsen, Judgment of the Court, para. 15 and 18.
- 160 *ibid.* Judgment of the Court, para. 37.
- 161 *ibid.* para. 38.
- 162 Lundström (1999) p. 213.
- 163 Lundström (1999) pp. 325 f.
- 164 Articles 39 and 141 of the Treaty of Rome have direct effect both horizontally and vertically. Regulations 1612/68 and 1408/71, like all Regulations, are directly applicable in the Member States. Directives can take direct effect vertically, but only in certain circumstances. See Craig and Búrca (1998) pp. 106, 163 ff, 176, 186, 666, and 807, and Lundström (1999) p. 218.
- 165 The European Convention on Human Rights and the fundamental freedoms (ECHR), Council of Europe 1950. Regarding the Ratification of the ECHR by the Communities see the Court's observations 2/94 in Craig and Búrca (1998) pp. 334-337.
- 166 Case 4/73 Nold, Judgment of the Court, para. 13.
- 167 Wong (1997) pp. 61 ff.
- 168 Wong (1997) p. 64.
- 169 *ibid.*
- 170 Lundström (2000:1) p. 10.
- 171 Case C-415/93 Bosman, A-G's Opinion, para. 203.
- 172 *ibid.* para. 194.
- 173 See Bergström (1998) p. 46 ff.
- 174 Case C-415/93 Bosman, A-G's Opinion, para. 185.
- 175 Bergström (1998) p. 54.
- 176 *ibid.* s 53.
- 177 Directive 97/80 on the burden of proof, in Cases about sex discrimination, see above.
- 178 Lundström (1999) p. 195.
- 179 Case C-419/92 Scholz, A-G's Opinion, para. 21, see above.
- 180 In Case 184/83 Hofman the Court stated, however, that Directive 76/207 on access to employment and working conditions was not intended "to settle questions concerned with the organisation of the family, or to alter the division of responsibility of parents", see Ackers (1996) p. 224 and Lundström (1999) p. 245.

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