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Indirect Discrimination and the European Court of Justice

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

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Abstract

When this study began there existed in European law only two prohibited forms of discrimination - discrimination on the grounds of sex and discrimination on the grounds of nationality. In it I examine in a comparative perspective the evidential requirements which the European Court of Justice (ECJ) has placed upon plaintiffs in cases concerned with indirect discrimination on the grounds of sex and the grounds of nationality. While indirect discrimination on the grounds of sex is prohibited in the Treaty of Rome in Article 119, and in Article 153 as a result of the EC Treaty, the grounds of nationality were only subsequently included in the EC Treaty in Article 155. However, the ECJ has interpreted Article 155, and Article 157, in a way that indirectly discriminates on the grounds of nationality.

Indirect discrimination on the grounds of sex can be shown at the individual level. In cases where the evidence points to a practice of sex discrimination, it must be possible to show that the practice has the effect of placing women at a disadvantage. The ECJ has required statistical evidence to support the claim that a practice has the effect of placing women at a disadvantage. The ECJ has held that a practice has the effect of placing women at a disadvantage if it has the effect of placing a substantially higher proportion of women at a disadvantage than men.

In the matter of indirect discrimination on the grounds of nationality it is sufficient to establish that a measure constitutes a risk that disadvantages may arise for migrant workers. The ECJ has held that a measure constitutes a risk that disadvantages may arise for migrant workers if it is likely to have the effect of placing migrant workers at a disadvantage.

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 held that the evidence must be sufficient to establish that the measure has the effect of placing migrant workers at a disadvantage.

The means have been adapted to serve the end, and the cases cited above show how the Court has interpreted the provisions of the EC Treaty so as to bring within its scope discrimination which does not clearly proceed from those of migration. The means have been constitutional, by means of the Court's power to interpret the provisions of the EC Treaty in accordance with the constitutional order of the European Community. The prohibition of discrimination on the grounds of sex and nationality is therefore based on "sex" and "nation" respectively, and not on "mobility" or "mobility mobility". The Court has held that the evidence must be sufficient to establish that the measure has the effect of placing migrant workers at a disadvantage.

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In the European law the concept of 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 there was intentional discrimination. The term has subsequently been incorporated into EC law.

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

In its reasoning the ECJ has created a strict dividing line between direct and indirect discrimination. It has determined that those prohibitions of discrimination comprehended in the prohibition of discrimination are the same. The ECJ has in practice determined that direct discrimination can be said to exist only when the disputed provision, criterion or practice explicitly refers to sex or nationality as the ground for discrimination. As the principle of equality of treatment progressively takes hold in the 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 will be indirect.
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Indirect discrimination on grounds of sex. Next comes, in Chapter 2, an account of the legal position in the EC 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. 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 according to the way in which the Court has used the pairs of words or phrases direct discrimination and indirect discrimination, formal equality and substantive equality, 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.

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 Chapter 4, an account of the Court’s reasoning in all cases about indirect discrimination on the grounds of nationality. Finally, in Chapter 5, I give a summary of the conclusions which I have come to in this study.
2 Legal Instruments

Permission of discrimination on grounds of sex

Prohibition of discrimination on grounds of sex

1. 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.

2. Council Directive 75/117 converts the "principle of equal pay" into a prohibition of wage-discrimination on grounds of sex. Article 1 of the Directive lays down that the principle of equal pay means "... for the same work or 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 on grounds of sex must be able to have his/her case tried before a national court.

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

4. 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 reasons relating to sex".

5. 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 "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, through an equal means, "facts from which it may be presumed that there has been an equal treatment", the burden of proof is shifted to the respondent to prove that there has been no breach of the principle of equal treatment on the grounds of sex. The proportion of the burden of proof is the proportion of the burden of proof on the grounds of sex.

6. This is the particular point of the Treaty of Rome provides that the Member States shall ensure that no discrimination or disadvantage is suffered by employees on the grounds of sex.

7. The possible consequences for an individual who has suffered discrimination, on the difference occasioned in the Court's reasoning in these two areas and the evidential requirements in the case of indirect discrimination on grounds of sex, shall be the subject of a separate examination.
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1 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.

2 The prohibition of discrimination is spelt out in Article 39 of the Treaty.

3 Article 39(1) provides that "Freedom of Movement for workers shall be secured within the Community". According to Article 39(2) freedom 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.

4 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 or her nationality be treated differently from workers of that Member State as regards conditions of employment and work.

5 Article 7(2) of the Regulation provides that an employee who is a citizen of one Member State but resident in another shall moreover "enjoy the same social and tax advantages as citizens of that State". By virtue of the same social and tax advantages a citizen of the State of which the employee is a citizen.

6 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".

7 By virtue of the same social and tax advantages a citizen of the State of which the employee is a citizen.

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

Summary

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The ECJ has made it clear that the principle of equal treatment laid down in both Article 39 of the Treaty of Rome and in Regulations 1612/68 and 1408/71 prohibits both direct and indirect discrimination.
The previous case-law of the European Court of Justice in cases concerned with indirect discrimination on the grounds of sex has been focused on the interpretation of the Treaty of Rome and Directives relating to equal pay, conditions of employment, social security, and employment discrimination.

1. **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 Directives 75/117, 76/207, 79/7, and 97/80 on equal pay, conditions of employment, social security, and employment discrimination, respectively.

2. **The Jenkins case (1981)**

   In the Jenkins case, the Court established that paying a lower hourly wage 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 male. Nonetheless, there could 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.

3. **The Bilka-Kaufhaus case (1986)**

   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 producing evidence to prove that the provision does not discriminate.

4. **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. The number of cases depends on the evidential requirements for statistical evidence. If the number of cases is low, the Court has considered other forms of evidence, such as expert opinion or comparable situations.

   How many persons must the comparative groups comprise? If the alleged discrimination originates in an employer's decisions or practices, 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 that the results are statistically significant.

   In the Royal Copenhagen case, the Court required that 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 the case was about) were not the result of statistical fluctuations, the Court insisted on a minimum number of observations to ensure reliability.
 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 ... 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 consists 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. The statistics themselves do not provide us with any information about the proportion of women and men among the disadvantaged group. However, under the approach so far taken by the Court, any comparison of statistics as regards sex and enterprise size would need to be preceded by the Kirshammer-Hack case which in fact was decided by a different body.

Summary

In order to establish indirect discrimination on grounds of sex the plaintiff must demonstrate by means of statistical material that a provision disadvantages not only her but also other women, and that it disadvantages a substantially higher proportion of women than men. The statistics must be significant and the comparative groups must comprise a large number of employees. The proportion of employees must be calculated on the basis of the number of employees in the relevant group. The proportion of employees must be the proportion of employees’ sex divided by the number of employees in the relevant group. Since the proportion of employees of a certain sex in the disadvantaged group is made up of a significantly smaller proportion of employees of that sex than in the advantaged group, the proportion of employees of the disadvantaged group who meet the condition can be expected to be lower than the proportion of employees of the same sex who meet the condition in the advantaged group. The Court did not consider that this was demonstrated in the statistics showed that 77% of the people in the disadvantaged group were of her/his sex. The Court has, however, not pronounced on exactly what constitutes a “substantially higher proportion.”
The previous case-law of the European Court of Justice in cases about indirect discrimination on grounds of nationality comprises Article 39 of the Treaty of Rome, Article 7 of Regulation 1612/68, and Article 3 of Regulation 1408/71. Within the framework of the material on which this study is based, nine cases deal with indirect discrimination on grounds of nationality related to pay or other conditions of employment and work, five cases concern tax advantages, six cases concern social advantages and seven social security.

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

Indirect discrimination is established with the aid of statistical material. I take first the Allué II case, which was decided in 1993, because statistical material figured in it and because the Court developed its arguments in a manner similar to that adopted in cases about indirect sex discrimination. At issue in the case was an Italian provision which governed employment contracts for foreign language assistants at universities. It was prescribed that such contracts could be entered into for only one academic year at a time.

Advocate-General Lenz began by examining how far the one-year condition discriminated against foreign language assistants as compared with other employees. When Lenz found that no other category of employees in the university sector could be considered comparable with that of foreign language assistants, he had to choose, for the comparative group, employees in general. Since according to the Italian legal system employment contracts are normally of indefinite duration, Lenz determined that the one-year condition discriminated against foreign language assistants.

Could this unfair treatment then be considered as synonymous with discrimination on grounds of nationality? The available statistics showed that 64% of all foreign language assistants at Italian universities were foreign nationals. On the basis of this information...
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 substantially lower than that of nationals. The discrimination stems from legislation and the basis for the comparison comprises all female language assistants employed at Italian universities, exactly as would have been required had the case been concerned with indirect sex discrimination. Statistical data are available and are used to establish that the one-year condition substantially discriminates against nationals of other Member States. It should, however, be emphasised that it was the Italian Government, that is to say the respondent, which made these data available, and that the relative element in the statistical examination makes it difficult to draw any conclusions as regards any evidential requirements.

Statistics pronounced unnecessary in seeking to establish potential indirect discrimination

In the two cases the Commission v. Belgium and O’Flynn the respondent Governments made interventions which brought to the fore the question of the necessity for statistical evidence in cases about indirect discrimination. The Commission v. Belgium was concerned with Belgian legislation providing financial support to young Belgians seeking a job for the first time. This support was conditional on the applicant having completed at least five years of higher education at a school subsidised or recognised by the Belgian Government. 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 in cases about indirect sex discrimination (the “de minimis” test). Before the Court pronounced on the Commission v. Belgium, however, a Judgment was delivered in the O’Flynn case, in which the British Government had made a similar intervention. John O’Flynn was an Irish citizen, a pensioner, resident in Great Britain where he had worked for 38 years. When his son died, O’Flynn assumed responsibility for the funeral costs. In accordance with British law, a person who has undertaken to be responsible for the funeral costs of another may apply for a grant from the Social Fund. 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 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 seek their burial in Great Britain. The Commission argued that this evidence showed that the condition was indirectly discriminatory, since it applied to both nationals and residents of all other Member States. Advocate-General Lenz began by asserting that it was clear that the condition was not directly discriminatory, although the proportion of nationals of other Member States who were able to meet the condition was substantially lower than that of British nationals. 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 other Member States. In a nutshell, Lenz argued that the condition was indirectly discriminatory, since it applied to both nationals and residents of all other Member States. After the Advocate-General had pronounced, the Commission’s “de minimis” argument, however, still carried weight.

The Commission v. Belgium and O’Flynn were decided with identical reasoning.

Statistics pronounced unnecessary in seeking to establish potential indirect discrimination
nationals of other Member States and leads to indirect discrimination. Lenz then makes clear that it suffices that the condition is not formulated neutrally in relation to sex. If the condition is not formulated neutrally in relation to sex, it is an indication that the condition 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 pointed out that there is considerable discrimination against women in the present field.

In accordance with Lenz’s logic I would thereby have demonstrated that the condition for making the grant for funeral expenses is so formulated that the sex of the applicant is altogether irrelevant. The condition for making the grant for funeral expenses is thus not a condition which affects substantially more men than women or vice versa. In accordance with Lenz’s logic I would thereby have demonstrated that the condition for making the grant for funeral expenses is so formulated that the sex of the applicant is altogether irrelevant. The condition for making the grant for funeral expenses is thus not a condition which affects substantially more men than women or vice versa.

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Lenz then notes that the situation is quite different as regards breach of the prohibition of discrimination on grounds of sex. Since the territorial condition links the grant to an event which takes place on British territory, it is not formulated neutrally in relation to sex. 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. The ECJ has repeatedly expressed its awareness of the existence of such evidence. It has also pointed out 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.

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The categories of teaching staff not so qualified are not Italian nationals. He is of the view that a disproportionate disadvantage can exist if the hours of teaching are not more than 10% of the working time of those persons who are qualified to apply to give extra teaching. He suggests possible compensatory efforts to overcome the disparity. The judgment in Petrie 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 condition. The judgment in Petrie 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 condition.

According to this test it is therefore unnecessary to establish that a provision affects a significantly higher proportion of migrant workers. It suffices that there is a risk that it will place the former at a particular disadvantage and hence also after O’Flynn. Petrie has in subsequent cases justified findings of indirect discrimination without further comparisons or statistical enquiries. Apart from Allué, the only case within the scope of my material in which statistics played any part whatever is Lenz. When implementing the two discrimination prohibitions, 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.

The Court stated that experience shows that indirect discrimination is not an abstract or theoretical concept but a practical phenomenon. Allué II has in subsequent cases justified findings of indirect discrimination without further comparisons or statistical enquiries. The existence of indirect discrimination is determined by the operational effects of public law provisions. Any surplus may be followed by public law provisions.

The judgment in Petrie 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 condition.

A final glimpse of statistics in cases about indirect discrimination is granted. The judgment in Petrie 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 condition.

The judgment in Petrie 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 condition.
Disproportionate disadvantage is established without the aid of statistics. The Court's reasoning in the Bachmann and Schöning cases also follows the logic of cases about sex discrimination, in so far as it is founded on "disproportionate disadvantage". This disproportionate disadvantage is, however, established entirely on the hypothetical plane, without any practical comparisons.

In Bachmann, Belgian legislation made the right to tax relief in respect of certain insurance premiums dependent on whether these premiums were paid in Belgium itself or in another State. It was therefore a matter of the application of indirect sex discrimination, where the proportion of certain insurance premiums paid in Belgium was direct in respect of sex discrimination. Faced with the problem of establishing a disproportionate advantage to women, the Court's reasoning could be followed. In Schöning, the German law imposed a tax on the importation of cars. It was therefore a matter of the application of indirect sex discrimination, where the proportion of cars imported from the UK was direct in respect of sex discrimination. Faced with the problem of establishing a disproportionate advantage to men, the Court's reasoning could be followed.

The Court's reasoning in the Bachmann and Schöning cases, and in all cases of indirect discrimination, is the same. It is based on the idea that there is a disproportionate advantage to one group compared to another group. This is established by comparing the proportion of the group in question to the proportion of the other group.

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 essential idea of equal treatment. The Court therefore determined that the proportion of Italian nationals in the qualified group is substantial in comparison to the proportion of the total staff of the relevant faculties. Fenelly's suggestion thus implies 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 would 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 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 need to go above 51% for the presumption of indirect discrimination to be met. Thus, 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 essential idea of equal treatment. The Court therefore determined that the proportion of Italian nationals in the qualified group is substantial in comparison to the proportion of the total staff of the relevant faculties. Fenelly's suggestion thus implies 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 would 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 whether a disproportionate advantage exists, and does not answer the question whether there is a disproportionate disadvantage on grounds of nationality.

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

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

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

Since the Court in its reasoning says both that the condition particularly disadvantages nationals of other Member States, and that that results in an obstacle to free movement, it is difficult to say whether in the *Bachmann* case it employs discrimination rhetoric or whether it embarks on what I call the "rhetoric about obstacles" which I shall illustrate below. It is possible that Article 39, as a "prohibition of obstacles to free movement", lay behind the position adopted by the Court, rather than Article 39 as a "prohibition of discrimination". Perhaps the Court wobbled just a little in its rhetoric since it nonetheless considered that discrimination could be justified taking into account that, at the stage then reached in Community law, the coherence of the tax system could not be guaranteed with less restrictive provisions.

In the *Schöning* case, which was decided in 1998, Advocate-General Jacobs gives further examples of the proportionality thinking which was illustrated by *Allué II*, *Petrie*, and *Bachmann*. The plaintiff considered himself to have been discriminated against in consequence of a clause in a German public sector collective agreement ("BAT"). In accordance with it, employees were promoted after completing 8 years of service in a certain salary-grade. By prescribing that these 8 years must be completed in a certain public sector, the condition in question is not applicable to employees of other Member States who had worked in Germany. Kalliope 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 account 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 provisions, i.e. "ordinary" German workers. Public sector employees who had moved 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.
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In his reasoning Jacobs likewise follows the logic of cases about indirect sex discrimination. Whereas 100% of migrant workers taking employment in the public sector are placed at a disadvantage, the proportion of other public sector employees in the disadvantaged group is extremely small. Since the former group comprises only a small proportion of the total number of public sector employees, there is a disproportionate disadvantage for migrant workers. This disproportionate disadvantage can however be determined without statistical data.

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

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

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

Common sense suffices to establish potential indirect discrimination.

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

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

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

The Court expressed itself in even simpler terms in the Clean Car case which was about a residence condition applied in regard to the appointment of Managing Directors of Austrian companies. The Court held that persons who are not resident in a given Member State are as a matter of fact usually not nationals of that State. There is therefore a risk that a residence condition in dispute 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 Meeusen to constitute potential indirect discrimination. Common sense 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.
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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 residents finding themselves in a comparable situation to that of nationals of the host Member State. Since Mr Biehl moved back to Germany before the end of the tax-year in question, 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 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 a substantial exclusion of Luxembourg nationals. This has lead to the courts issuing rulings on their right to freedom of movement. 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 the provision which is a ground for the residence conditions of the host Member State, and provides an exception to residence during the whole of the tax-year in question. 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 case, the Commission brought proceedings against Luxembourg for breach of the Treaty, in that the discrimination identified in Biehl had only partially been 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 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 right 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 social security law, 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, who was a Spanish national, had been covered by German social security when he died as a result of an accident at work.

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

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

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

The prohibition of "discrimination on grounds of nationality" becomes a prohibition of "discrimination." All the cases that have been analysed so far had their origin in the fact that a person who was a national of a certain Member State considered himself/herself to be disadvantaged by a provision of another Member State and in that connection contended that he/she had been subject to indirect discrimination on grounds of his/her nationality. That situation fits in extremely well with the wording of the legal instruments. Article 39 provides for "the abolition of any discrimination based on nationality," and Article 7(1) of Regulation 1612/68 lays down that "a worker... may not be treated differently from national workers by reason of his nationality." The wording of Article 3 of Regulation 1408/71 also concerns the equality of treatment between national workers and workers who are nationals of other Member States.

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 the job. In an action for damages she claimed that Mrs Scholz was a victim of discrimination on grounds of nationality. Moreover, she argued that the selection system was not intended to comply with the law of Article 39.

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 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 on grounds of nationality in connection with a provision which discriminates against non-Italian nationals. Despite the fact that she is an Italian national, Mrs Scholz has in fact been disadvantaged, it is not clear whether this disadvantage constitutes indirect discrimination "on grounds of nationality." To take an analogy, it is quite clear that a woman working part-time, and receiving a lower hourly wage than her colleagues who work full-time, is placed at a disadvantage, but it requires more than that to show that the disadvantage constitutes indirect sex discrimination.

Jacobs is of the view that Ingetraut Scholz has been subject to indirect discrimination because the points system is "likely to affect nationals of other Member States more severely than it affects Italian nationals." The rules for engaging new staff are therefore in principle contrary to Article 39. Jacobs agrees that at first sight it may seem strange that an Italian national can invoke the prohibition of discrimination on grounds of nationality. However, the Court's decision in Scholz is not limited to the case of Mrs Scholz, who was treated according to the selection system. It is also applicable to the case of national workers who are nationals of other Member States.
because she exploited her right to free movement and worked in more than one Member State, which is exactly the kind of disadvantage that Ingetraut Scholz was disadvantaged in Italy. In Scholz's case, the Italian public authorities refused to accord her recognition of years of service acquired in Greece, where she had worked for four years. Intragrant, the Court stated that this was a deprivation of the right to free movement. 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 is not entitled 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 been an Italian national with experience of public sector employment abroad.

As is well known, Article 39(1) provides quite simply that "freedom of movement for workers shall be secured within the Community." After having made a quite extensive interpretation of the concept of direct discrimination than in cases about sex discrimination, the Court concludes that "it 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 with the general obligations of the Treaty of Rome, can possibly explain why the potential inherent in the concept of direct discrimination has been better explored by the Court in cases about nationality discrimination than in cases about sex discrimination."

Jacobs continues: "It is clear that practices adopted by the public bodies of a Member State may impede the free movement of workers can be challenged by all Community nationals, including nationals of the State concerned."

In addition, there may also exist another prohibition of discrimination on grounds of nationality. Since it was now a matter of proceedings brought in respect of a breach of Article 10 of the Treaty of Rome, the Court's conclusion does not necessarily have to be tailor-made to suit the specific infringement which gave rise to it, i.e. in this case the unfair treatment of a Greek national in Greece. The same question comes up in connection with the Court's argument: the non-discrimination principle. So when the Court declares that "the fact that the plaintiff...has acquired Italian nationality has no bearing on the application of the non-discrimination principle", and concludes that there is "indirect limited discrimination", it is not enough to say that it is a victims 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 is not entitled 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 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 a victim of the same discrimination against women? Jacobs reasoning adapts the prohibition of discrimination in Article 39(2) so that it could be invoked by workers who are not victims of discrimination on grounds of nationality. Mrs Scholz belongs to that category of persons for whom the provisions on free movement and Article 39 are designed, and is not entitled 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 been an Italian national with experience of public sector employment abroad.

The same question comes up in connection with the Court's argument: the non-discrimination principle. So when the Court declares that "the fact that the plaintiff...has acquired Italian nationality has no bearing on the application of the non-discrimination principle", and concludes that there is "indirect limited discrimination", it is not enough to say that it is a victims 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 is not entitled 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 been an Italian national with experience of public sector employment abroad.
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The Court adopts the means with a view to the end

The prohibition of discrimination—would not be ineffective.

The Court's premise is that prohibition of discrimination on grounds of nationality is effective in the context of freedom of movement. 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 the Masgio case 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, by reason of his work, 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 interpret Article 39-42 and Article 3 of Regulation 1408/71 with a view to the objective of freedom of movement for workers. The Court repeats from Masgio 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 therefore constitute an obstacle to it.
problems concerning the grounds of discrimination. We have therefore focussed our attention on the problems concerning the freedom of movement of workers from one Member State to another, and the restrictions that are put into place. These problems require us to examine the meaning of Article 39 of the Treaty. The two cases that were referred to in this regard are Commission v. Greece and Scholz vs. Germany.

In the Scholz case, the Court considered the prohibition of discrimination on grounds of nationality. The case concerned a football player who was refused the right to transfer to another club within the same national association. The Court held that this was a violation of the prohibition of discrimination on grounds of nationality, as stated in Article 39(2) of the Treaty.

In the Bosman case, the Court considered the freedom of movement of workers. The case concerned a football player who was refused the right to transfer to another club in another Member State. The Court held that this was a violation of the freedom of movement of workers, as stated in Article 39 of the Treaty.

The Court's reasoning in both cases is based on the principle that discrimination on grounds of nationality is prohibited under Article 39(2) of the Treaty. The Court held that the rules that were put in place by the national associations were discriminatory, as they prevented the football player from exercising his right to free movement.

In his view, the prohibition of discrimination on grounds of nationality is an obstacle to the free movement of workers. He is of the opinion that the Court's previous case-law has tended in the direction that it is now possible to determine the prohibition of discrimination in Article 39 as a prohibition of discrimination on grounds of nationality.

The causal chain in Lenz' reasoning seems to be that the provisions on the transfer of footballers can in principle lead to discriminatory treatment, which can lead to an obstacle 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.

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 question of whether discrimination can be or not. If it is admitted that there is no discrimination, then the Court endorses Lenz's line and holds that the prohibition of discrimination in Article 39 is violated.

Lenz makes clear that the case of Bosman is an example of indirect discrimination. He is of the opinion that the Court's previous case-law has tended in the direction that it is now possible to determine the prohibition of discrimination in Article 39 as a prohibition of discrimination on grounds of nationality.

The Court's previous case-law has tended in the direction that it is now possible to determine the prohibition of discrimination in Article 39 as a prohibition of discrimination on grounds of nationality. Lenz concedesthat these cases could have been determined on the basis of a broadly de-

In my opinion, all restrictions on freedom of movement are prohibited in principle by Article 39. This is my opinion on restrictions on freedom of movement. I think that Article 39 is a prohibition of discrimination on grounds of nationality.

If the Court then links the question in the context of freedom of movement we can hold in principle by Article 39.

The Bosman case, which may need a great deal of attention, concerns about discrimination becomes rhetoric about discrimination becomes rhetoric about discrimination. We have therefore focussed our attention on the problems concerning the freedom of movement of workers from one Member State to another, and the restrictions that are put into place. These problems require us to examine the meaning of Article 39 of the Treaty. The two cases that were referred to in this regard are Commission v. Greece and Scholz vs. Germany.
The concept of indirect discrimination has been developed in the case law of the European Court of Justice 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 Leguaye-Neelsen and McLachlan are the only two, apart from Gschwind and Bachmann, in which the Court held that there was no potential indirect discrimination.

In Leguaye-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 correspond 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.

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 question discriminates disproportionately in order that a claim in respect of that provision in question may be brought.

Statistical evidence has thereby become quite unnecessary in cases about indirect discrimination on grounds of nationality, but remains indispensable in cases about indirect discrimination on grounds of sex.
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 nevertheless to give to individual persons the right to equality.

A plaintiff who considers herself discriminated against on the grounds of her sex must nevertheless demonstrate the provision has placed at a disadvantage not only her but also other women, and moreover significantly more women than men. 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... of its own to protect human rights, and the Court has ruled that the Communities have no legal competence to accede to the... of “direct effect” can be invoked before a court. However, the EU... of “direct effect” is only relevant for such a condition may be thought to exist if a provision hence contains a risk that it will thereby discriminate against other Member States. Such a condition may be thought to exist if a provision hence contains a risk that it will thereby discriminate against nationals of other Member States.

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 been described as 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 considers the Community law prohibition of discrimination on grounds of nationality to be an expression of an aspiration towards fair distribution in the whole broad field between one individual woman and approximately 80% of all women (or men).

Indirect 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 been described as 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 considers the Community law prohibition of discrimination on grounds of nationality to be an expression of an aspiration towards fair distribution in the whole broad field between one individual woman and approximately 80% of all women (or men).
where she has contended that the concept of indirect sex discrimination is not the equal of the concept of sex discrimination in Article 39(1). In the Court’s reasoning in this case, the concept of indirect sex discrimination is not the equal of the concept of sex discrimination in Article 39(1) but is rather developed and adapted to the specific context of the case. The Court has developed the concept of indirect sex discrimination in a way that it is no longer a discrimination prohibition but rather a prohibition of obstacles to the free movement of workers. The Court has adapted and developed the prohibition of discrimination in Article 39(2) from the traditional view that Article 39 consists only of a prohibition of discrimination on grounds of nationality to a prohibition of discrimination on grounds of sex. The Court has departed from the strict wording of Article 39(2) and has been flexible in regard to the grounds of discrimination. It can be contended that the concept of indirect sex discrimination is not the equal of the concept of sex discrimination in Article 39(1) but is rather developed and adapted to the specific context of the case.
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Male norm? In such situations it can be difficult to prove structural, collective (statistically substantiated) discrimination against men on grounds of "sex". Suppose that at a workplace there are 100 employees, 50 men and 50 women. The employer is very hostile to parental benefits, and it is widely known that those who have taken maternity or paternity leave have worse chances of promotion than those who have not. Of these 100 persons, 10 have been, or are about to be, on parental leave. Only one of these 10 persons is a man. This man claims to have been discriminated against over the appointment of a head of department, precisely because of the employer's negative attitude to parental leave. Has the Community law prohibition of sex discrimination anything to offer in this situation? The man cannot use, as the comparative group, the men who do not take paternity leave. He would then be a man who tried to prove that he had been subject to discrimination on grounds of his sex, in comparison with other men! It is true that the Italian national court, in the case of a woman who claimed to have been discriminated against on grounds of nationality in comparison with other Italian nationals, may have showed a certain flexibility. But neither can the man prove discrimination by comparison with those women at the workplace who have taken maternity leave, since they are in the same unfavourable situation as himself. Nor can he prove sex discrimination in relation to those women who have never taken maternity leave, because that disadvantaged group consists only of 10% of men.

The role as carer has historically and culturally been linked with women, it is a woman's gender role. Since women still constitute the majority of society's carers, discrimination against a woman "carer" can today be said to constitute discrimination precisely on the grounds of sex. If Community law had prohibited "gender discrimination" the male carer might also have succeeded. He has been discriminated against, not on grounds of his sex, but because of his gender-role. The point is that the European Court of Justice may be able to discard the concept of sex discrimination and look at the concept of gender discrimination when considering the situation of women. If a woman's gender role is to be treated differently and similarly, then her sex will be relevant.

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 Community law in question is to achieve the objective. 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 "discrimination", but it is necessary to show that the reason for the disadvantage is "discrimination". Indirect discrimination is therefore not an obstacle to the objective, if it is not of a particularly serious nature, and if it can be justified. In order to show that the employment has been taken into account, indirect discrimination can be shown by showing that the individual worker’s situation is not decisive for the individual worker, and that the individual worker’s situation is therefore not decisive for the individual worker’s situation.

Endnotes

3 Both these cases can be read from Article 2 of the Treaty of Rome.
5 It is true that cases about direct discrimination still arise, but most frequently the main question is then not whether or not there is prohibited discrimination but the scope of application of the legal instruments as regards persons and matters.
7 For the Commission's proposal, see Lundström (2000:2). The proposal was put forward on the basis of the new Article 13 of the Treaty which was incorporated by the Amsterdam Treaty.
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Lundström (1999).

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


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


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


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


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.

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.

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


Case 170/84 Bilka-Kaufhaus, Lundström (1999) p. 326. The prohibition of indirect discrimination in regard to social security seems weaker in relation to the prohibition of sex discrimination in work-situations, see e.g. Nielsen (1995) p.188.

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

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


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

Case C-415/93 Bosman.

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

A-G’s Opinion, para. 12.

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.

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.


Case C-237/94 O’Flynn.


ibid, para. 15.

ibid, para. 17.

ibid, para. 19. Not all these Cases lie within the scope of this analysis.

ibid, para. 20-23. Here Lenz compares with among others Cases 175/88 Biehl and C-204/90 Bachmann, which are analysed below.

ibid, para. 24.

ibid, para. 25.

ibid, para. 27.

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.

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

ibid, para. 29.


I follow the same logic as Lenz and examine the advantaged group.


c.f. the terminology in Lenz’ Opinion in Case C-237/94 O’Flynn, para. 15.

ibid. Judgment ... p 160 f.


Case C-90/96 Petrie.

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.

Case C-90/96 Petrie, A-G’s Opinion, para. 20 and 21.

ibid. para. 18:2 [NB the Opinion is wrongly numbered]

ibid. para. 19:2.

ibid. 7.

See Lundström's reasoning in regard to Case C-167/97 Seymour-Smith and Perez, see chap. 3 above.

This applies in situations in which the total proportion of women in the original (unadjusted) group is 50%.

ibid. para. 52.

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

ibid. para. 53.

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

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

ibid Judgment of the Court, para. 11.

ibid. para. 9 and 13 respectively.

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

The European Court of Justice has ruled that in addition to the equality of treatment principle in Article 7(1) of Regulation 1612/68, Article 7(4) provides that all provisions in a collective agreement that lay down discriminatory conditions in regard to workers who are nationals of other Member States shall be invalid. 

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


Case C-350/96 Clean Car Autoservice. 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 7(1) of Regulation 1612/68 for the purpose of engaging workers who are nationals of another Member State, Judgment of the Court, para. 25.

Case C-111/91 Commission v. Luxembourg, C-57/96 Meints, C-266/95 Garcia and C-337/97 Meeusen.

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

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

Nielsen / Szyszczak (1997) pp. 105 ff. The tax-payer is regarded as being most closely connected with the State of residence and it is natural for that State to tax the whole of his/her income, taking account of the circumstances and granting tax allowances accordingly. In the State where the person is employed he/she has no connection other than the exercise of economic activity, hence that State taxes a person resident abroad in only an objective manner and only as regards that income which arises on that State's territory.

Case 175/88 Biehl.9

The Court was particularly in the respect the plaintiffs who invoked the equality of treatment in Article 7(1) of Regulation 1612/68 had brought claims that the provisions of collective agreements in force in the States of residence of the workers who were nationals of other Member States violated the principle of equality of treatment. The Court referred to Articles 89 and 90 of the Treaty, as interpreted in Case 175/88 Biehl, where it was established that national regulations which are in conflict with Community law are to be annulled.

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

This is apparent from the Opinion of A-G Lenz in C-415/92 Bosman, where he comments on the Court's case-law.

Case C-278/94 Commission v. Luxembourg.9

9 Case C-391/97 Gschwind.

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Case C-278/94 Commission v. Luxembourg.11

11 This is apparent from the Opinion of A-G Lenz in C-415/92 Bosman, where he comments on the Court's case-law.
The person disadvantaged was in fact both a migrant and a national worker. 

135 ibid. para. 21.


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 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.


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. 


158 Cases C-28/92 Leguaye-Neelsen and C-146/93 McLachlan. Cases C-391/97 Gschwind and Bachmann are analysed above.

159 Case C-28/92 Leguaye-Neelsen, Judgment of the Court, para. 15 and 18. 


166 Case C-175/92 and C-176/92, Judgment of the Court, para. 19. 


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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